

Journal of Conflict Management & Sustainable Development



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Environmental Management in Kenya

Kariuki Muigua

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Natural Resources: Case Study from Kenya

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Democracy and The Common Good: Decentralization in Kenya

Caroline S. Maingi

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Editor's Note

It is with pleasure that we launch the latest volume of the *Journal of Conflict Management and Sustainable Development*, Volume 4 number 5.

The Journal has grown into a reputable platform for scholarly discourse and debate on pertinent topics related to conflict management and sustainable development in Kenya and across the globe.

Sustainable development is now a cardinal principle of governance enshrined under article 10 of the Constitution of Kenya, 2010. However, development is not attainable in an environment of unresolved conflicts. The Journal offers insight on these issues with the underlying theme being achievement of sustainable development through effective and efficient conflict management. The Journal adheres to the highest academic standards. It is peer reviewed and refereed. We appreciate the feedback from our readers across the world that has enabled us to continue improving the Journal.

This volume covers a wide spectrum of themes including: *The Role of Women in Peacemaking and Environmental Management in Kenya; Impact of Foreign Direct Investment in the Utilization of Natural Resources; Human Rights and Technology Transfer; Judicial Adjudication and Impeachments in Kenya; Community Based Approaches in Environmental and Natural Resources Management and Democracy and Decentralization in Kenya.*

Publication of this volume would not have been possible without the immense input from our dedicated team of reviewers, editors and contributors. We are greatly indebted to you.

The editorial team welcomes submission of articles, comments and book reviews based on the themes of conflict management and sustainable development and related fields of knowledge for publication in the Journal. Submissions can be channeled to editor@journalofcmsd.net and copied to admin@kmco.co.ke.

Dr. Kariuki Muigua, Ph.D, FCI Arb (Chartered Arbitrator), Accredited Mediator.

Managing Editor,

August, 2020

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<u>Content</u>	<u>Author</u>	<u>Page</u>
Mainstreaming the Role of Women in Peacemaking and Environmental Management in Kenya	Kariuki Muigua	1
Impact of Foreign Direct Investment in the Utilization of Natural Resources: Case Study from Kenya	W A Mutubwa Mirelle Ameso Caroline Kingori	32
A Human Rights Approach to Technology Transfer	Billy Kipkemboi Nkatha Kabira	45
Restoring The Limits of Judicial Adjudication: Focus on Impeachments	Wamuti Ndegwa	73
Promoting Community Based Approaches in Environmental and Natural Resources Management in Kenya: A Reality or Mere Formality?	Kariuki Muigua	92
Democracy and The Common Good: Decentralization in Kenya	Caroline Shisubili Maingi	117

Mainstreaming the Role of Women in Peacemaking and Environmental Management in Kenya

By: Kariuki Muigua*

Abstract

This paper examines and discusses ways in which women can meaningfully participate in peacemaking efforts and environmental management as far as addressing environmental related conflicts in Kenya is concerned. The paper is based on the hypothesis that societal gendered division of labour makes women interact more with the environment as the caretakers of families and this places them at a better position to be included in managing environmental resources. Any adverse effects of conflict also affect their lives as they are left in charge of their homes and children. The paper argues that there is a need to promote a more participatory role of women in not only preventing emergence of conflict but also in quelling the same where it arises and also to enhance their role in environmental management.

1. Introduction

Peace is considered to be an important part of any society as self-determination is not possible without peace. Where conflict arises, it is often grounded in social, structural, cultural, political and economic factors, and depreciation in one increases chances of conflict in a particular society.¹ This paper focuses

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¹ 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 28 June 2020; See also Maiese, M., 'Causes of Disputes and Conflicts,' in G. Burgess & H. Burgess (eds), *Beyond Intractability*, (Conflict Information Consortium, University of Colorado, Boulder, October, 2003),

on environmental and natural resource related conflicts and how these types of conflict affect efforts towards achieving peace in any given society. In discussing this, the author also offers suggestions on the role that women can play in peacemaking efforts and environmental management. Natural resources are an important source of livelihoods of many households in especially in rural areas.² In addition, it has been observed that conflicts over natural resources can be useful in making needs and rights clear and helping to solve injustices or inequities in resource distribution. However, some conflicts have the potential for becoming obstacles to livelihoods and sustainable resource management if they are not addressed.³ It has also been rightly pointed out that women play a critical role in managing natural resources on family and community levels and are most affected by environmental degradation.⁴ In addition, world's women are seen as the key to sustainable development, peace and security.⁵ It is for these reasons that this paper argues that women must and should be included in not only any peacemaking efforts where environmental related conflicts arise, but also in environmental management as a way of preventing any future conflicts from arising.

There are as many approaches to peace efforts as there are players. The three main approaches to peace include: peacekeeping, peacebuilding and peacemaking.⁶ The three approaches are applied to different scenarios and

available at <http://www.beyondintractability.org/essay/underlying-causes> Accessed on 28 June 2020.

² 'Negotiation and Mediation Techniques for Natural Resource Management' <<http://www.fao.org/3/a0032e/a0032e04.htm>> accessed 4 July 2020.

³ Ibid.

⁴ Bureau of International Information Programs and United States Department of State, 'Chapter 11: Women and the Environment', *Global Women's Issues: Women in the World Today, extended version* (Bureau of International Information Programs, United States Department of State 2012) <<https://opentextbc.ca/womenintheworld/chapter/chapter-11-women-and-the-environment/>> accessed 8 July 2020.

⁵ Ibid.

⁶ Johan, Galtung, *Three approaches to peace: Peacekeeping, peacemaking and peacebuilding*. 1976

<https://www.galtung-institut.de/wp-content/uploads/2016/06/galtung_1976_three_approaches_to_peace.pdf> Accessed on 28 June 2020.

stages in a conflict situation. This paper is mainly concerned with peacemaking approach to peace efforts. As already pointed out, there are different players in a conflict situation. This paper is concerned with women as key players in conflict situations. Women's roles are closely tied up to satisfying the basic needs of the extended family, among which are the global economic, and social needs and hence the need to include them in environmental management.⁷

The scope and context of the paper is limited to discussing the connection between the role of women and peacemaking approaches in environmental-related conflict situations. Arguably, both men and women are affected differently by environmental-related conflicts. It has rightly been pointed out that the role of women in the exploitation of natural resources during the war is rarely acknowledged.⁸ As such, this discourse calls for a more inclusive role of women in environmental management.

2. Peacemaking and Environmental Management: The Linkage

Conflicts are issues about values which are non-negotiable. These needs and values are shared by the parties. Needs or values are inherent in all human beings and go to the root of the conflict while interests and issues are superficial and do not go to the root of the conflict.⁹ They are infinite. Conflicts, therefore, arise out of the non-fulfillment of these non-negotiable needs or values of the conflicting parties in the society. Accordingly, if all needs are met, the result is non-zero-sum which produces integrative and creative solutions and not a zero-sum solution.¹⁰

⁷ Emmanuel Ngwa Nebasina, 'The Role of Women in Environmental Management: An Overview of the Rural Cameroonian Situation' (1995) 35 *GeoJournal* 516.

⁸ 'Understanding Gender, Conflict and the Environment' (*CEOBS*, 5 June 2017) <<https://ceobs.org/understanding-gender-conflict-and-the-environment/>> accessed 4 July 2020.

⁹ Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", *Journal of Peace Research*, Vol.32, No. 2 (May, 1995), pp.152-153.

¹⁰ Fetherston, A.B., "From Conflict Resolution to Transformative Peacebuilding: Reflections from Croatia", *Centre for Conflict Resolution-Department of Peace Studies: Working Paper 4* (April, 2000), pp. 2-4.

A conflict involves at least two parties disagreeing over the distribution of material or symbolic resources or perceives their underlying cultural values and beliefs to be different or incompatible. It has also been argued that conflicts could also originate from the social and political make-up and structure of society.¹¹ This supports the perspective that conflict has to be dealt with at the psychological level to get past 'blocks' to positive communication and at an ontological level to uncover the 'real' causes of the conflict.¹² Thus, peacemaking efforts work towards stopping active conflicts (whether armed or not).¹³ The term peace is related to the well-being of any person and is also linked to harmony, tranquility, cooperation, alliance, well-being, and agreement.¹⁴ Peace is considered to be more than just the absence of violence.¹⁵ As such, 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.¹⁶

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.¹⁷

¹¹ See Serge, L, et al, "Conflict Management Processes for Land-related conflict", *A Consultancy Report by the Pacific Islands Forum Secretariat*, available at www.forumsec.org, [Accessed on 4/7/2020].

¹² Fetherston, A.B., "From Conflict Resolution to Transformative Peacebuilding: Reflections from Croatia", op.cit.

¹³ International Alert, "What is Peace Building?" Available at <https://www.international-alert.org/what-we-do/what-is-peacebuilding> [27/6/2020].

¹⁴ 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.

¹⁵ Galtung, J., "Violence, peace, and peace research," *Journal of peace research*, Vol. 6, no. 3 (1969): 167-191.

¹⁶ 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 26/6/2020].

¹⁷ Herath, O., "A critical analysis of Positive and Negative Peace," (2016), p.106.

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.¹⁸

Peacemaking generally includes measures to address conflicts in progress and usually involves diplomatic action to bring hostile parties to a negotiated agreement.¹⁹ In most African setups, the traditional conflict resolution mechanisms have been employed, for example, in resolving environmental conflicts where the council of elders, provincial administration, peace committees, land adjudication committees and local environmental committees play a pivotal role in managing conflicts.²⁰

Peace and the environment are closely related as affirmed in the sustainable development discourse.²¹ The United Nations *2030 Agenda for Sustainable Development*²² (SDGs) provides a global blueprint for dignity, peace and prosperity for people and the planet, now and in the future. SDG Goal 16 focuses on promoting peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.²³

Some scholars have argued that environmental peacemaking fundamentally utilizes cooperative efforts to manage environmental resources as a way to transform insecurities and create more peaceful relations between parties in dispute.²⁴ In addition, environmental management may help overcome

¹⁸ Ibid., pp.106-107.

¹⁹ 'Terminology' (*United Nations Peacekeeping*)
<<https://peacekeeping.un.org/en/terminology>> accessed 4 July 2020.

²⁰ Muigua, K., *Resolving Conflicts through Mediation in Kenya*, 2nd Ed., Glenwood Publishers, Nairobi – 2017.

²¹ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1, Target 35.

²² UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

²³ Goal 16, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

²⁴ Ken Conca and Geoffrey D Dabelko, 'Environmental Peacemaking /' (*Olin College Library Catalog*) <<http://olin.tind.io/record/126690>> accessed 28 June 2020.

political tensions by promoting interaction, confidence building, and technical cooperation.²⁵

An environmental conflict has been described as a particular social conflict characterised by: the qualitative or quantitative reduction of available environmental resources (water, biodiversity, arable land, raw materials and other finite common goods) due to the imposition of profitable projects by multinational companies and/or inappropriate policies by Governments, International financial organisations; and the escalation of protests by local residents and/or larger opposition movements in civil society, in an effort to protect the environment, common goods and people's rights.²⁶

In Northern Kenya, the resource based conflicts have been worsened by diminishing pasture and water resources, the proliferation of small arms and light weapons, disputes over land and ethnic boundaries, the absence of adequate state security, and the commercialization of cattle rustling.²⁷

Environmental conflicts have been perceived as a symptomatic manifestation of global model of economic development based on the exploitation of natural resources, disregard for people's rights and lack of social justice.²⁸ Furthermore, it has been suggested that there are about four key factors that contribute in the creation of environmental conflict: poverty, vulnerable livelihoods, migration and weak state institutions – all problems that are present at the local level.²⁹

²⁵ Ken Conca and Geoffrey D Dabelko, 'Environmental Peacemaking /' (*Olin College Library Catalog*) <<http://olin.tind.io/record/126690>> accessed 28 June 2020.

²⁶ CDCA, 'Why environmental conflicts?' Available at <<http://cdca.it/en/perche-i-conflitti-ambientali>> accessed 5 July 2020.

²⁷ 'Peace by All Means: Women Crusaders in Northern Kenya Make the Search for Peace Personal | International Organization for Migration - Nairobi' </article/peace-all-means-women-crusaders-northern-kenya-make-search-peace-personal> accessed 5 July 2020.

²⁸ CDCA, 'Why environmental conflicts?' Available at <http://cdca.it/en/perche-i-conflitti-ambientali> accessed 5 July 2020.

²⁹ Barnett, J., & Adger, W. N., 'Climate change, human security and violent conflict,' *Political Geography*, Vol.26, 2007, pp. 639-655, at p.643 (As quoted in Akins, E., "Environmental Conflict: A Misnomer?" *Environment, Climate Change and*

It is also argued that environmental factors often interact with the visible drivers of ethnic tensions, political marginalisation and poor governance to create a causal framework that allows degradation to affect livelihoods, interests and capital – which, in turn, lead to conflict.³⁰

It is thus clear that if communities are guaranteed environmental security, where they are able to meet all their resource needs, peace becomes easier to achieve. Where there are threats to sources of livelihoods especially in communities that mainly rely on environmental resources it means increased chances of conflict.

3. Role of Women in Peacemaking: Challenges and Prospects

It has been observed that natural resource based conflicts can, arguably, involve three broad themes: actors (or stakeholders, groups of people, government structures and private entities), resource (land, forests, rights, access, use and ownership) and stakes (economic, political, environmental and socio-cultural).³¹ As a result, it is contended that conflicts can be addressed with the actor-oriented approach, resource-oriented approach, stake-oriented approach or a combination of the three.³² Despite this, there are key principles such as, inter alia, participatory approaches³³, equitable representation,

International Relations: 99, available at <http://www.e-ir.info/2016/05/12/environmental-conflict-a-misnomer/>.

³⁰ Akins, E., "Environmental Conflict: A Misnomer?" *Environment, Climate Change and International Relations*: 99, available at <http://www.e-ir.info/2016/05/12/environmental-conflict-a-misnomer/> [Accessed on 5/5/2020]; See also Sosa-Nunez, G. & Atkins, E., *Environment, Climate Change and International Relations*, (E-International Relations, 2016). Available at <http://www.e-ir.info/wp-content/uploads/2016/05/Environment-Climate-Change-and-International-Relations-E-IR.pdf> [Accessed on 5/7/2020].

³¹ Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' *Annex C - Summary of Discussion Papers*, (FAO), available at <http://www.fao.org/docrep/005/ac697e/ac697e13.htm#TopOfPage> [Accessed on 5/7/2020].

³² Ibid.

³³ Participatory approaches are defined as institutional settings where stakeholders of different types are brought together to participate more or less directly, and more or less formally, in some stage of the decision-making process. (Hove, SVD, 'Between

capacity building, context of the conflict and increased access and dissemination of information, that must always be considered.³⁴ Natural resource based conflicts are sensitive considering that they arise from the need for people to satisfy their basic needs.³⁵

It is for this reason that this paper advocates for inclusion of women in peacemaking efforts and environmental management as important actors and stakeholders in tackling environmental and natural resource related conflicts. While the inclusion of women in making processes has gained momentum in policy discussions over the last 15 years, the number of women in decision-making positions remains relatively small.³⁶ Peacemaking efforts have relatively remained a man's affair, the same group of people who largely participate in conflicts.³⁷

Some authors have rightly pointed out that 'peace processes increasingly go beyond outlining cease-fires and dividing territory to incorporate elements that lay the foundations for peace and shape the structures of society'.³⁸ It is for this reason that some authors have argued for the inclusion of all groups in society in peacemaking efforts. Some commentators have argued that the participation of women in peace talks is important as they are more likely to raise day-to-day issues such as human rights, citizen security, employment,

consensus and compromise: acknowledging the negotiation dimension in participatory approaches,' Land Use Policy, Vol. 23, Issue 1, January 2006, pp. 10–17.

³⁴ Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' op cit.

³⁵ FAO, 'Negotiation and mediation techniques for natural resource management,' available at <http://www.fao.org/3/a-a0032e/a0032e05.htm> [Accessed on 5/7/2020].

³⁶ 'Why Women Should Have a Greater Role in Peacebuilding' (*World Economic Forum*) <<https://www.weforum.org/agenda/2015/05/why-women-should-have-a-greater-role-in-peacebuilding/>> accessed 5 July 2020.

³⁷ 'African Approaches to Building Peace and Social Solidarity' (*ACCORD*) <<https://www.accord.org.za/ajcr-issues/african-approaches-to-building-peace-and-social-solidarity/>> accessed 5 July 2020.

³⁸ Marie O'Reilly and Thania Paffenholz, 'Reimagining Peacemaking: Women's Roles in Peace Processes' (International Peace Institute (IPI): The Graduate Institute of International ... 2015)

<https://cvekenya.org/media/library/Reilly_et_al_2015_Reimagining_Peacemaking_Womens_Roles_in_Peace_Processes.pdf> Accessed 28 June 2020.

and health care, which make peace and security plans more relevant and more durable.³⁹

Women are seen as ‘more peaceful’ compared to men and argument used to call for their greater participation in peace efforts. Indeed, some authors have gone as far as arguing that ‘men are more likely to engage in aggression and war; in contrast “a world run by women” would be “less aggressive, adventurous, competitive, and violent”, and “less prone to conflict and more conciliatory and cooperative than the one we inhabit now”’.⁴⁰ Others argue that conflict “accentuates existing differences of power and access to resources, weakening the position of those who are already without power, whether they are men, women or children”’.⁴¹

While the former suggestion that women may be more peaceful is highly contentious, the latter argument solidifies the argument that women also have much to lose where there is conflict and hence creates the need to include them in peace processes.

Some authors have authoritatively explored women's participation in five important areas of international peace and security namely: (1) conflict prevention, (2) peace negotiations, (3) post-conflict disarmament, demobilization, and reintegration, (4) governance, and (5) transitional justice.⁴² Arguably, active inclusion of women in environmental management as part of the peacemaking efforts would go a long way in achieving lasting peace in any society.

Some scholars have observed that a key challenge to greater inclusion of women's issues and concerns in peace agreements and in peacemaking [and

³⁹ ‘Women on the Frontlines of Peace and Security’

<<https://ndupress.ndu.edu/Publications/Books/Women-on-the-Frontlines-of-Peace-and-Security/>> accessed 5 July 2020.

⁴⁰ See Hilary Charlesworth, ‘Are Women Peaceful? Reflections on the Role of Women in Peace-Building’ (2008) 16 Feminist Legal Studies 347.

⁴¹ See Hilary Charlesworth, ‘Are Women Peaceful? Reflections on the Role of Women in Peace-Building’ (2008) 16 Feminist Legal Studies 347, at 358.

⁴² Donna Ramsey-Marshall, ‘Review of Women Building Peace: What They Do, Why It Matters’ (2008) 25 International Journal on World Peace 112.

statebuilding] efforts is that women are not seen as central to ‘making or breaking’ a peace agreement and other forms of identity, such as ethnicity, are considered to be a more fundamental fault line for conflict.⁴³

According to some commentators, the trauma of the conflict experience may provide an opportunity for women to come together with a common agenda. In some contexts, these changes have led women to become activists, advocating for peace and long-term transformation in their societies.⁴⁴

In some parts of Northern Kenya especially among the pastoralist communities, women have been as agents of both conflicts and peace. For instance, it has been observed that among the communities of Nawuiyapong in West Pokot County and Lorengippi in Turkana County, Northern Kenya, women have now taken an initiative to attend meetings between the community elders, so as to exert pressure on the elders towards making peaceful resolutions. Furthermore, in contrast to the practice among pastoralist communities where women have in the past motivated young men to participate in raids, the women crusaders are now acting as change agents and discouraging their young men from such activities.⁴⁵ In these two communities, there are a group of women popularly referred to as the women crusaders, and they have been instrumental in pushing men (elders and youth-warriors) into committing themselves to resolutions reached during peace dialogues.⁴⁶

The inclusion of women in peace efforts is not alien to Africa as women elders in traditional African societies often played a key role in resolving conflicts.⁴⁷

⁴³ ‘Gender-Sensitive Peacebuilding and Statebuilding’ (*GSDRC*)
<<https://gsdrc.org/topic-guides/gender-and-conflict/approaches-tools-and-interventions/gender-sensitive-peacebuilding-and-statebuilding/>> accessed 4 July 2020.

⁴⁴ Julie Arostegui, ‘Gender, Conflict, and Peace-Building: How Conflict Can Catalyse Positive Change for Women’ (2013) 21 *Gender & Development* 533.

⁴⁵ ‘Peace by All Means: Women Crusaders in Northern Kenya Make the Search for Peace Personal | International Organization for Migration - Nairobi’ </article/peace-all-means-women-crusaders-northern-kenya-make-search-peace-personal> accessed 5 July 2020.

⁴⁶ *Ibid.*

⁴⁷ See generally, Boege, V., Potential and limits of traditional approaches in

For instance, it is said that among the traditional Igbo society in Eastern Nigeria, women are the sustainers and healers of human relationships.⁴⁸ Chinua Achebe buttresses this point further in his renowned novel, *Things Fall Apart*, where he asserts as follows:

*“...when a father beats his child, it seeks sympathy in its mother’s hut. A man belongs to his father when things are good and life is sweet. But when there is sorrow and bitterness, he finds refuge in his motherland. Your mother is there to protect you”.*⁴⁹

This is true in virtually all the other African communities. The role of the Luo women, for instance, is also well documented in various stages of peace processes in their community. They could directly or indirectly intervene through elders and women networks within the warring factions to bring peace.⁵⁰

Despite this, a critical look at the cultures of most of the other African communities reveals that the role of women as compared to men in conflict management activities was and is still negligible.⁵¹ For instance, among the Pokot and the Marakwet, women traditionally act as reference resource people but cannot challenge or influence decisions adopted by the male-dominated council of elders, the *Kokwo*. Among the Samburu, women are supposed to

peacebuilding. *Berghof Handbook II: Advancing Conflict Transformation*, 2011, pp.431-457.

⁴⁸ Brock-Utne, B., "Indigenous conflict resolution in Africa," In *A draft presented to week-end seminar on Indigenous Solutions to Conflicts held at the University of Oslo, Institute of Educational Research*, 2001, p. 13.

⁴⁹ Achebe, C., *Things Fall Apart*, (William Heinemann Ltd, London, 1958) (As quoted in Brock-Utne, B., "Indigenous conflict resolution in Africa," op cit., p.13).

⁵⁰ Brock-Utne, B., *Indigenous Conflict Resolution in Africa*, op cit.

⁵¹ See Alaga, E., *Challenges for women in peacebuilding in West Africa*, (Africa Institute of South Africa (AISA), 2010); Cf. Ibewuiké, V. O., *African Women and Religious Change: A study of the Western Igbo of Nigeria with a special focus on Asaba town*, (Uppsala, 2006). Available at <https://uu.diva-portal.org/smash/get/diva2:167448/FULLTEXT01.pdf> [Accessed on 5/7/2020].

merely convey their suggestions through their male relatives. Such information may or may not be conveyed at all to the council of elders.⁵² Consequently, traditions, cultural norms and practices that may be considered repugnant and contrary to written laws and that hinder the participation of women in conflict management, should be discarded. Women empowerment is essential to enable them participate in the various conflict resolution fora as they are the majority of the victims of conflicts.

Their role as carriers of life and agents of peace has not changed in modern society. As such their participation in conflict resolution activities should not be curtailed by the adoption of formal dispute resolution mechanisms or adherence to traditions hindering their role on the same. Women have the capacity to negotiate and bring about peace, either directly or through creation of peace networks, among warring communities.⁵³ Their participation in conflict resolution should thus be enhanced.

As already pointed out, peace building generally goes beyond conflict management measures, as it involves developing institutional capacities that alter the situations that lead to violent conflicts.⁵⁴ In traditional African societies, people engaged in activities that promoted peace through the various activities they engaged in. Resort to courts searching for justice when peace is what is needed may thus destroy relationships rather than build and foster them in the Kenyan case. In such cases, reconciliation, negotiation, mediation and

⁵² See generally, Rabar, B. & Karimi, M. (Eds), *Indigenous Democracy: Traditional Conflict Resolution Mechanisms: The Case of Pokot, Turkana, Samburu and Marakwet communities*, (ITDG, Nairobi, 2004), p.96.

⁵³ See generally, De la Rey, C., & McKay, S., Peacebuilding as a gendered process. *Journal of Social Issues*, Vol.62, No.1, 2006, pp.141-153; See also Paffenholz, T., et al, "Making Women Count - Not Just Counting Women: Assessing Women's Inclusion and Influence on Peace Negotiations," (Geneva: Inclusive Peace and Transition Initiative (The Graduate Institute of International and Development Studies) and UN Women, April 2016). Available at <http://www.inclusivepeace.org/sites/default/files/IPTI-UN-Women-Report-Making-Women-Count-60-Pages.pdf> [Accessed on 5/7/2020].

⁵⁴ See Maiese, M., 'Peacebuilding,' September 2003. Available at <http://www.beyondintractability.org/essay/peacebuilding> [Accessed on 5/7/2020].

other traditional mechanisms would be the better option.⁵⁵ There is a need to ensure that these processes include women as active players. Thus, women are still subjugated when it comes to peacemaking efforts due to poverty, discriminatory cultural norms and traditions and lack of education. This is despite the ongoing national and international efforts geared towards empowering women.

4. Role of Women in Environmental Management

The role of most women at the household level is not unique to Kenya as in many other African countries, they are charged with fresh water collection and use, the tedious search and use of energy resources, land use and its security, the marketing of farm produce, domestic chores and other household undertakings which they carry out so as to sustain each individual in the household.⁵⁶ Despite this, these women have no rights over the land on which they perform, hence no access to credit facilities for desired farm inputs and other farm improvement facilities, receive inadequate education and training, due some times to culture and religious factors, and they are thus forced by such circumstances to negotiate for or rent and cultivate small isolated patches of land which in most cases are separated by considerable distances.⁵⁷ The indirect effect of this scenario on the environment is that these women become frustrated and have no incentive for long term investments to upkeep positively the rural environmental management.⁵⁸

In her acceptance speech, Nobel Laureate, the late Prof. Wangari Maathai, summarised the importance of environmental resources to livelihood sustenance and the central role that citizenry can play in solving environmental

⁵⁵ See generally, Huyse, L., "Tradition-based Justice and Reconciliation after Violent Conflict: Learning from African Experiences." (2008). Available at 174.129.218.71/resources/analysis/upload/paper_060208_bis.pdf [Accessed on 5/7/2020]; See also Bar-Tal, D., "From Intractable Conflict through Conflict Resolution to Reconciliation: Psychological Analysis." *Political Psychology*, Vol.21, No. 2 (2000); see also Bloomfield, D., et al, (eds.), *Reconciliation after violent conflict: A handbook*, (International Idea, 2003).

⁵⁶ Emmanuel Ngwa Nebasina, 'The Role of Women in Environmental Management: An Overview of the Rural Cameroonian Situation' (1995) 35 *GeoJournal* 515.

⁵⁷ *Ibid*, p. 515.

⁵⁸ *Ibid*, p.515.

problems, especially women, by stating that: “.....So, together, we have planted over 30 million trees that provide fuel, food, shelter, and income to support their children's education and household needs. The activity also creates employment and improves soils and watersheds. Through their involvement, women gain some degree of power over their lives, especially their social and economic position and relevance in the family....Initially, the work was difficult because historically our people have been persuaded to believe that because they are poor, they lack not only capital, but also knowledge and skills to address their challenges. Instead they are conditioned to believe that solutions to their problems must come from 'outside'. Further, women did not realize that meeting their needs depended on their environment being healthy and well managed. They were also unaware that a degraded environment leads to a scramble for scarce resources and may culminate in poverty and even conflict....In order to assist communities to understand these linkages, we developed a citizen education program, during which people identify their problems, the causes and possible solutions. They then make connections between their own personal actions and the problems they witness in the environment and in society.... (Emphasis added).”⁵⁹

This speech aptly captures the place of women in environmental management and the need to include them in achieving effective environmental management for elimination of environmental based conflicts to achieve lasting peace.

5. Mainstreaming the Role of Women in Peacemaking and Effective Environmental Management in Kenya

Kenya has on several occasions witnessed violence erupting in the Rift valley as a result of pastoralists and farmers competing over the same land use or for vastly different uses.⁶⁰ Increasingly, stakeholders and leaders world over have agreed that ‘women’s participation in peace negotiations contributes to the

⁵⁹ The Norwegian Nobel Institute, ‘Wangari Maathai: The Nobel Lecture (Oslo, December 10, 2004),’ available at http://nobelpeaceprize.org/en_GB/laureates/laureates-2004/maathai-lecture/ [Accessed on 26/06/2020].

⁶⁰ Ibid, p. 10.

quality and durability of peace after civil war'.⁶¹ This assertion holds true especially in relation to environmental and natural resource related conflicts. This is because of the important role that women play as far as nurturing and providing for their families is concerned.

The women, peace, and security agenda first gained a foothold in 1995 at the Fourth World Conference on Women in Beijing.⁶² In the year 2000, the United Nations Security Council adopted *Resolution 1325 on Women, peace and Security*⁶³ where they *inter alia* urged Member States to ensure increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict.⁶⁴ The Council also called on all actors involved, when negotiating and implementing peace agreements, to adopt a gender perspective, including, *inter alia*: (a) the special needs of women and girls during repatriation and resettlement and for rehabilitation, reintegration and post-conflict reconstruction; (b) Measures that support local women's peace initiatives and indigenous processes for conflict resolution, and that involve women in all of the implementation mechanisms of the peace agreements; (c) Measures that ensure the protection of and respect for human rights of women and girls, particularly as they relate to the constitution, the electoral system, the police and the judiciary.⁶⁵

It has however been observed that despite the adoption of UN Security Council Resolution 1325, which called for strengthening women and girls' protection from conflict-related sexual violence and women's equal participation in all stages of the prevention and resolution of conflict, women's participation in

⁶¹ Jana Krause, Werner Krause and Piia Bränfors, 'Women's Participation in Peace Negotiations and the Durability of Peace' (2018) 44 International Interactions 985.

⁶² Princeton Lyman, 'Women's Role in Bringing Peace to Sudan and South Sudan' [2013] unpublished article submitted to State Department.

⁶³ Adopted by the Security Council at its 4213th meeting, on 31 October 2000, S/RES/1325 (2000).

⁶⁴ *Ibid*, para. 1.

⁶⁵ *Ibid*, para. 8.

peace negotiations with voice and influence remains exceptional rather than the norm.⁶⁶

Women's traditional societal role as caretakers and mothers of family leaves them at a precarious position when natural resource related conflicts arise.⁶⁷ Peacemaking 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 making peace. Peacemaking is also a long-term process, as it involves changes in attitudes and behaviour, and institutional norms.⁶⁸ It has been observed that shared natural resources can provide the basis for dialogue between warring parties, as can common environmental threats that extend across human boundaries and borders.⁶⁹ Failure to promote such sharing of available natural resources for harmonious existence is a recipe for resource fueled environmental conflicts.⁷⁰ Indeed, it has been documented that the current of wealth from the world's abundant natural resources is too often diverted away from populations in need, instead feeding conflicts and corruption, and leading to human rights abuses and environmental damage.⁷¹

Some authors have observed that the pervasiveness of women's responsibility for environmental management hinges on a gendered division of labour, in

⁶⁶ Jana Krause, Werner Krause and Piia Bränfors, 'Women's Participation in Peace Negotiations and the Durability of Peace' (2018) 44 *International Interactions* 985.

⁶⁷ 'Roles Of Women, Families, And Communities In Preventing Illnesses And Providing Health Services In Developing Countries | The Epidemiological Transition: Policy and Planning Implications for Developing Countries | The National Academies Press' <<https://www.nap.edu/read/2225/chapter/14>> accessed 5 July 2020.

⁶⁸ International Alert, "What is Peace Building?" Available at <https://www.international-alert.org/what-we-do/what-is-peacebuilding> [27/6/2020].

⁶⁹ 'How Does War Damage the Environment?' (*CEOBS*, 4 June 2020) <<https://ceobs.org/how-does-war-damage-the-environment/>> accessed 2 July 2020.

⁷⁰ 'Natural Resource Wealth Fails to Translate into "Equivalent" Benefits for People, Fuelling Conflict, Instability, Deputy Secretary-General Tells Security Council | Meetings Coverage and Press Releases' <<https://www.un.org/press/en/2013/sc11037.doc.htm>> accessed 2 July 2020.

⁷¹ 'Natural Resource Wealth Fails to Translate into "Equivalent" Benefits for People, Fuelling Conflict, Instability, Deputy Secretary-General Tells Security Council | Meetings Coverage and Press Releases' <<https://www.un.org/press/en/2013/sc11037.doc.htm>> accessed 2 July 2020.

which women are often disproportionately responsible for providing 'subsistence' products such as food, water and fuel.⁷² For instance, women's roles mean that the well-being of whole households and communities frequently depends on their ability to access resources, including during conflict. In addition, even where daily life is disrupted by armed conflict, women's responsibilities tend to remain the same in spite of additional environmental pressures which may include degradation directly and indirectly connected to armed conflict.⁷³ The roles of women are said to alter and expand during conflict as they participate in the struggles and take on more economic responsibilities and duties as heads of households.⁷⁴

The place of women in peacemaking as far as environmental resources are concerned has been rightly summarized as follows:

“....Harnessing these positive environmental dividends requires policymakers to think about gender and the way social roles shape everyday interactions with the environment in conflict affected areas. Where women are identified as the primary managers of local resources, effective management and reform will remain incomplete and ineffective if a gendered lens is not considered....”⁷⁵

Some authors have argued that the linkages between women signatories and women civil society groups explain the observed positive impact of women's direct participation in peace negotiations. In addition, collaboration and knowledge building among diverse women groups contributes to better

⁷² 'Understanding Gender, Conflict and the Environment' (CEOBS, 5 June 2017) <<https://ceobs.org/understanding-gender-conflict-and-the-environment/>> accessed 2 July 2020.

⁷³ Ibid.

⁷⁴ Julie Arostegui, 'Gender, Conflict, and Peace-Building: How Conflict Can Catalyse Positive Change for Women' (2013) 21 Gender & Development 533.

⁷⁵ 'Understanding Gender, Conflict and the Environment' (CEOBS, 5 June 2017) <<https://ceobs.org/understanding-gender-conflict-and-the-environment/>> accessed 4 July 2020.

content of peace agreements and higher implementation rates of agreement provisions.⁷⁶

The participatory processes such as negotiation, mediation and conciliation should also include women as they may better understand the underlying issues in the conflict due to their close interactions with the natural resources. It has been noted that women have generally been under-represented in peace negotiations, both in numbers and status (where they often constitute ‘informal’ participants).⁷⁷ There is a need for the stakeholders involved in peacemaking to acknowledge the important role that women can and should play in not only management of environmental and natural resources but also ensuring that they actively participate in peacemaking efforts.

Women should also be included in dispute management committees, both formal and informal, as a way of not only ensuring that they actively participate but also as a way of encouraging attitude change among communities that women can and should indeed participate in brokering peace within their communities. The participation of women in peace processes improves their outcome, leading to more stable communities that are less likely to revert into conflict.⁷⁸

5.1 Empowerment of Women through Elimination of Poverty

One of the ways of addressing poverty is focusing on human development which empowers people, both men and women, to contribute positively towards eradication of poverty without solely relying on the Government to do so. It has been observed that the view that poverty is a shortage of income ought to be changed to one that perceives poverty as ‘unfreedoms’ of various

⁷⁶ Jana Krause, Werner Krause and Piia Bränfors, ‘Women’s Participation in Peace Negotiations and the Durability of Peace’ (2018) 44 International Interactions 985.

⁷⁷ ‘Gender-Sensitive Peacebuilding and Statebuilding’ (GSDRC) <<https://gsdrc.org/topic-guides/gender-and-conflict/approaches-tools-and-interventions/gender-sensitive-peacebuilding-and-statebuilding/>> accessed 4 July 2020.

⁷⁸ ‘United Nations Gender Equality Chief, Briefing Security Council, Points Out “Systemic Failure” to Integrate Women in Peacekeeping, Mediation | Meetings Coverage and Press Releases’ <<https://www.un.org/press/en/2018/sc13554.doc.htm>> accessed 5 July 2020.

sorts: the lack of freedom to achieve even minimally satisfactory living conditions. Low income can contribute to that, but other factors such as the lack of schooling facilities, absence of health facilities, unavailability of medicines, the suppression of women, hazardous environmental features and lack of jobs do also play a major role. He opines that poverty can be reduced through addressing all these issues.⁷⁹

It has been observed that poverty and the urgent desire to satisfy the basic needs of growing human populations are some of the root causes of the extensive exploitation and inherent depletion of natural resources especially within rural environment.⁸⁰ Thus, poverty exerts undue pressure on environmental resources leading to environmental degradation. When women, who are the main caregivers in the Kenyan society especially within the rural communities, cannot comfortably meet the needs of their families, they turn to the environment to exert pressure on the small parcels of agricultural land as well as engaging in economic activities such as charcoal burning and timber harvesting to meet their needs. The unsustainable means of agricultural production adversely affects the environment.⁸¹ Economic empowerment of women would enable them diversify their sources of livelihood thus easing the pressure on the environment. The United Nations observe that Women's economic empowerment includes women's ability to participate equally in existing markets; their access to and control over productive resources, access to decent work, control over their own time, lives and bodies; and increased voice, agency and meaningful participation in economic decision-making at all levels from the household to international institutions.⁸² As far as realisation of sustainable development goals is concerned, the United Nations

⁷⁹ Green, D., *From Poverty to Power: How active citizens and effective states can change the world*, (2nd ed., 2012), pg. IX (Foreword by Amartya Sen), Rugby, UK: Practical Action Publishing and Oxford: Oxfam International, Available at http://www.oxfamamerica.org/static/media/files/From_Poverty_to_Power_2nd_Edition.pdf [Accessed on 4/7/2020].

⁸⁰ Emmanuel Ngwa Nebasina, 'The Role of Women in Environmental Management: An Overview of the Rural Cameroonian Situation' (1995) 35 *GeoJournal* 520.

⁸¹ Elizabeth Rodriguez, Ryan Sultan and Amy Hilliker, 'Negative Effects of Agriculture on Our Environment' (2004) 3 *Ef. Agric. Trap*.

⁸² 'Facts and Figures: Economic Empowerment' (*UN Women*) <<https://www.unwomen.org/what-we-do/economic-empowerment/facts-and-figures>> accessed 5 July 2020.

observes that ‘empowering women in the economy and closing gender gaps in the world of work are key to achieving the 2030 Agenda for Sustainable Development and achieving the Sustainable Development Goals, particularly Goal 5, to achieve gender equality, and Goal 8, to promote full and productive employment and decent work for all; also Goal 1 on ending poverty, Goal 2 on food security, Goal 3 on ensuring health and Goal 10 on reducing inequalities’.⁸³

As already pointed out, most natural resource related conflicts emanate from competition for access and control of natural resources. Economically empowered women can objectively engage in negotiations geared towards achieving peace or avoiding conflicts without them being disadvantaged.⁸⁴ They can also contribute to the empowerment of households through ensuring that children go to school. For instance, it has been observed that youths from Northern Kenyan communities partake in cattle raids against neighboring communities, which vice has been attributed to various factors such as lack of education, unemployment and the cultural obligation for young men to partake in the cattle raids. Acquiring cattle during such raids has for long been considered a sure way of enhancing the young men’s status in society.⁸⁵ Women would not only be able to take their children to school but would also discourage these youths from engaging in cattle raids.⁸⁶

5.2 Formal and Non-Formal Education for Meaningful Participation of Women

It has been observed that promoting women’s capacities to participate in peace processes is crucial for their advancement and ability to contribute to peace,

⁸³ Ibid.

⁸⁴ ‘United Nations Gender Equality Chief, Briefing Security Council, Points Out “Systemic Failure” to Integrate Women in Peacekeeping, Mediation | Meetings Coverage and Press Releases’ <<https://www.un.org/press/en/2018/sc13554.doc.htm>> accessed 5 July 2020.

⁸⁵ ‘Peace by All Means: Women Crusaders in Northern Kenya Make the Search for Peace Personal | International Organization for Migration - Nairobi’ </article/peace-all-means-women-crusaders-northern-kenya-make-search-peace-personal> accessed 5 July 2020.

⁸⁶ Ibid.

development and security.⁸⁷ One way of building such capacity is through empowering women and girls through education.

Education is seen as a key enabler of economic growth and indeed a part of sustainable development discourse. As such, increasing women's and girls' educational attainment contributes to women's economic empowerment and more inclusive economic growth.⁸⁸ This is because education is critical for women's and girl's health and wellbeing, as well as their income-generation opportunities and participation in the formal labour market.⁸⁹

Education will not only enable them diversify their sources of income and ease pressure on the environment but will also give them the voice to meaningfully participate in negotiations geared towards management of conflicts. Empowering women and girls through education is important in ensuring that they actively and meaningfully participate in community peace efforts. It is noteworthy that adopting a community-based approach to empowerment of women does not automatically translate into greater participation and inclusion. This is because some of the traditional practices have negative impacts such as discrimination of women and disabled persons.⁹⁰ In fact, it is against this fact that the Constitution retains the test of non-repugnancy while

⁸⁷ 'Mediating Peace in Africa' (*ACCORD*)

<<https://www.accord.org.za/publication/mediating-peace-in-africa/>> accessed 5 July 2020.

⁸⁸ 'Facts and Figures: Economic Empowerment' (*UN Women*)

<<https://www.unwomen.org/what-we-do/economic-empowerment/facts-and-figures>> accessed 5 July 2020.

⁸⁹ 'Facts and Figures: Economic Empowerment' (*UN Women*)

<<https://www.unwomen.org/what-we-do/economic-empowerment/facts-and-figures>> accessed 5 July 2020.

⁹⁰ See generally, Muigua, K., —Securing the Realization of Environmental and Social Rights for Persons with Disabilities in Kenya. Available at

<http://www.kmco.co.ke/attachments/article/117/Securing%20the%20Realization%20of%20Environmental%20and%20Social%20Rights%20for%20Persons%20with%20Disabilities%20in%20Kenya.pdf>; See also generally Human Rights Watch, *World Report 2013*, available at

http://www.hrw.org/sites/default/files/wr2013_web.pdf < accessed 5 July 2020.

applying traditional justice systems.⁹¹ This is where the Courts come in as the legal guardians of the Bill of human rights as envisaged in the Constitution.⁹²

5.3 Encouraging Active Participation of Women in Peace Negotiation and Mediation Processes

Under Article 31 of the *RIO+20 Report*, state parties emphasized that sustainable development must be inclusive and people-centred, benefiting and involving all people, including youth and children. They also recognized that gender equality and women's empowerment are important for sustainable development and our common future. They therefore reaffirmed their commitments to ensure women's equal rights, access and opportunities for participation and leadership in the economy, society and political decision-making.

Although the need to engage women in peace processes is widely acknowledged, it has been observed that in many parts of the world especially where conflicts persist, most mediation teams do not include or encourage the voices and representation of women.⁹³ This is despite evidence that women have demonstrated that they can be adept at mobilising diverse groups for a common purpose, working across ethnic, religious, political and cultural divides to promote peace.⁹⁴

The role of women in negotiation and mediation of conflicts should be institutionalized. The place of women in our society puts them in the most proximate contact with the wellbeing of communities. Conflicts affect them

⁹¹ Constitution of Kenya 2010, Art. 159(3).

⁹² Constitution of Kenya 2010, Art.23. Article 23 of Constitution of Kenya deals with Authority of courts to uphold and enforce the Bill of Rights.

(1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

⁹³ 'Mediating Peace in Africa' (*ACCORD*)

<<https://www.accord.org.za/publication/mediating-peace-in-africa/>> accessed 5 July 2020.

⁹⁴ Ibid; see also Helen Kezie-Nwoha and Juliet Were, 'Women's Informal Peace Efforts: Grassroots Activism in South Sudan' (2018) 2018 CMI Brief; Esther Soma, 'Our Search for Peace: Women in South Sudan's National Peace Processes, 2005–2018'.

and they should therefore be involved in any efforts geared towards reaching lasting peace solutions. Women traditionally played a primary role in resolving conflicts as negotiators, albeit informally. Conflict negotiation and mediation systems should require specifically that gender issues are given adequate weight and should include some requirement for inclusion of female negotiators and mediators when appropriate, like when land rights are involved.⁹⁵ The constitution now requires gender parity in almost all commissions or organs of government.⁹⁶

Elimination of social injustices entails promoting gender equity as a way of ensuring that both men and women get fair opportunities for the realisation of their right to self-determination and contribution towards national development. The *UN Conference on Environment and Development, Agenda 21*⁹⁷ under chapter 23 calls for full public participation by all social groups, including women, youth, indigenous people and local communities in policy-making and decision-making.

6. Conclusion

It has been contended that a gendered approach can improve not only the lives of men and women in conflict and post-conflict situations, but it can also reap significant environmental dividends.⁹⁸ Specifically, women's participation in

⁹⁵ Fitzpatrick, D., "Dispute Resolution; Mediating Land Conflict in East Timor", in AusAID's *Making Land Work Vol 2; Case Studies on Customary Land and Development in the Pacific*, (2008), Case Study No. 9, p. 196. <<http://www.ausaid.gov.au/publications/pdf>> accessed 5 July 2020.

⁹⁶ See Articles 97 (1)(b); 98 (1)(b); 98(1)(c) of the Constitution.

The Constitution of Kenya readily recognizes women by way of creation of special seats for women that resulted in the election of forty-seven (47) women into the National Assembly, nomination of sixteen women by political parties and one woman representing the youth and persons with disabilities into the Senate and County Governments and appointment of women into other decision-making bodies. ('Actualization and Implementation of the "Two-Thirds Gender Principle" in Kenya | [www.Sidint.Net](http://www.sidint.net)' <<https://www.sidint.net/content/actualization-and-implementation-two-thirds-gender-principle-kenya>> accessed 5 July 2020.).

⁹⁷ United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992.

⁹⁸ 'Understanding Gender, Conflict and the Environment' (*CEOBS*, 5 June 2017) <<https://ceobs.org/understanding-gender-conflict-and-the-environment/>> accessed 4 July 2020.

peace negotiations is believed to increase the durability and the quality of peace.⁹⁹ There is a need to ensure that peacemaking efforts take into consideration the gender aspect and an acknowledgement that both men and women are affected differently by natural resource based conflicts and there is therefore a need to ensure that both are included if Kenya is to not only ensure peace across the country but also achieve effective environmental management.

The Sustainable Development Goals (SDGs) acknowledge the link between peace and development and thus provide that sustainable development cannot be realized without peace and security; and peace and security will be at risk without sustainable development.¹⁰⁰ The SDGs Agenda also 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 of women to participate in community affairs), on effective rule of law and good governance at all levels and on transparent, effective and accountable institutions. Factors which give rise to violence, insecurity and injustice, such as inequality, corruption, poor governance and illicit financial and arms flows, are addressed in the Agenda. The aim is to redouble the efforts to resolve or prevent conflict and to support post-conflict countries, including through ensuring that women have a role in peace building and state building.¹⁰¹ The significant daily interaction of women with environmental resources makes them critical players in peacemaking efforts especially where natural resource based conflicts arise. Mainstreaming the role of women in peacemaking and environmental management in Kenya is a necessary move in order to achieve sustainable development.

⁹⁹ Jana Krause, Werner Krause and Piia Bränfors, 'Women's Participation in Peace Negotiations and the Durability of Peace' (2018) 44 *International Interactions* 985.

¹⁰⁰ United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, para. 35.

¹⁰¹ *Ibid.*

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Impact of Foreign Direct Investment in the Utilization of Natural Resources: Case Study from Kenya

By: W A Mutubwa, Mirelle Ameso** & Caroline Kingori ****

1. Introduction

Globalisation has shifted the economic paradigms from state-led economic growth strategies to more open market international regimes¹. As a result, regional trade blocs have been lifted as well as laws harmonized to allow the proliferation of private investments flow into interested regions for the benefit of all. There is a surge on Foreign Direct Investment (FDI), especially in developing countries, unsurprisingly, foreign investment is higher in industrialized countries where the rate of return seems much higher and perceived risk to the investors is lower². More than 70% of FDI flows to 10 recipients, all of which are middle income countries with China alone receiving 40% of these flows thereby attracting investors, on the other hand, low income countries only receive 6.5%³.

2. Background to the study

Foreign Direct Investment (FDI) is the act of purchasing an asset and at the same time acquiring control of it. Control is understood as the acquisition of a significant degree of influence over the decision making of the direct investment entity⁴. The concept of control is further detailed as a determinant of FDI in the definitions found in the framework of the International Monetary

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¹ Nick Mabey and Richard McNally, 'Foreign Direct Investment and the Environment: From Pollution Havens to Sustainable Development' A WWF-UK Report, August 1999, pg 11

² Ibid

³ Ibid

⁴ Organisation for Economic Co-operation and Development (OECD) 1996, Detailed Benchmark Definition of Foreign Direct Investment, 3(1), 7.

Fund (IMF) and the Organisation of Economic Co-operation for Development (OECD).⁵ It has a long borne *modus operandi* on the reliance of the use and extraction of natural resources, particularly agriculture, minerals and fuel production by foreign investing companies in overseas subsidiaries or joint ventures. What therefore attracts FDI? Dunning (1993) emphasizes that the primal motive for FDI is resource or asset seeking, with reason that this type of FDI is born out of unavailability of resources such as raw materials or low cost labour. This triggers firms to be competitive in the existing and potential markets and it goes overseas if the case for investment is exportation, because the reduction of costs is an important factor and the firm's profits escalate and elevates their competitive level in the particular market of service. It is also important to state that this kind of FDI is attracted to natural resource rich countries as it is location-based and serves to exploit the region of interest.⁶ Asiedu (2006) has portrayed the many influences of natural resources in directing FDI inflows to the region and the study suggests that African countries endowed with natural resources will attract more FDI.⁷ Data shows that 95% of African FDI flows come from OECD countries which are usually resource seeking investment⁸. The impact expected from these investments are; technological spillover effects, facilitated access to global markets, knowledge and skills into domestic firms and stimulated economic growth by spurring competition, innovation and a country's export programmes.

China's FDI consists of many medium to short-term loans with a focus on extractive industries such as oil, mining, natural gas and natural resources.⁹ Some loans are repaid with future exports from natural resources, especially

⁵ Ibid pg 9

⁶ Dunning, J. 'Multinational Enterprises and the Global Economy,' [Addison-Wesley Publishers Ltd, 1993]

⁷ Asiedu, E. 'Foreign Direct Investment in Africa- The Role of Natural Resources, Market Size, Government Policy, Institutions and Political Instability,' *United Nations/World Institute of Development Economics Research Conference*. Helsinki, 8th September 2006

⁸ Nick Mabey and Richard McNally, 'Foreign Direct Investment and the Environment: From Pollution Havens to Sustainable Development' A WWF-UK Report, August 1999, pg 26

⁹ Wang J. Abdoulaye, B., "Africa's Burgeoning Ties with China", Finance and Development, 45 (2007)

in countries with poor credit ratings. Its recent investments in Africa have been driven by its state-driven strategy for providing infrastructure and in return acquiring natural resources from African nations. The link between infrastructure assistance and resources in resource rich countries is that often the most resource rich states are in dire need of infrastructure development and support.¹⁰ Kenya and China have had a long term bilateral trade agreement to gain from each other, economic development and access to natural resources respectively. In Kenyan case, China has invested in construction of major roads networks such as Thika Highway, as they receive exports from Kenya such as skins, sisal, fiber, coffee, tea, fishery products, horticultural products and scrap metals.¹¹ The Chinese firms are interested in coffee and manufacturing in Kenya because the returns are higher than in oil exploration. Kenya's national agenda is inclusive of liberalizing its trade by going global and embracing regional and international open trade, infrastructural investment deals will therefore gain first consideration to affect its economic scope. The World Bank provisioned from its data analysis on world development, that adequate supply of infrastructure is an essential ingredient for productivity and growth.¹² It also played a key role in helping reduce income inequality. The Chinese have established influence and control over the decision making process of investment processes in FDI. International observers have expressed their fear for how the Chinese run their investment business overseas by paying bribes and attaching no conditions, undermining local efforts to increase transparency and good governance. The Chinese also bring in migrated labour from their country to work in Africa and so there is no solution replacement for the unemployed. Finally, they have limited the competitive open market by the strategic corrupt ways they have used, such as lower costs in the construction firms they own and thereby outbidding their western competitors and winning contracts for projects.¹³

¹⁰ Corkin, Lucy, Christopher Burke and Martyn Davies, 'China's Role in the Development of Africa's Infrastructure,' *SAIS Working Papers in African Studies* No. 04, 2008, The Johns Hopkins University

¹¹ Onjala, J., 'A scoping study on China-Africa Economic Relations: The Case of Kenya,' *Revised Final Report submitted to African Economic Research Consortium (AERC)*, Nairobi 5th March, 2008

¹² World Bank, 1994. *World Development Report*: Washington DC, The World Bank.

¹³ Mugendi, F. K., 'Kenya –Sino Economic Relations: The Impact of Chinese

Kenya performs poorly in attracting foreign direct investment (FDI) given the size of its economy. Corruption, poor infrastructure, poor investment and climate have affected foreign direct investment flows compared to pre 1980's¹⁴. In 2007, Kenya received US \$729 million in FDI; unfortunately the flows were cut down to only US \$96 million, this was after the controversial presidential election in 2008 that triggered intra-tribal hatred and violence that spread across the country and caused political instability which had a significant impact on the country's investment climate¹⁵. Kenya's savings rate is much lower than the average in Sub Saharan Africa of 20.4%. One reason for the low savings is Kenya's large scale infrastructure projects; the Standard Gauge Railway, Lamu berths, and Northern Corridor Integration Projects.¹⁶

The bulk of Chinese work in infrastructure is not investment but contracting. The SGR and the berths at Lamu are not investments but projects financed by China's EXIM bank: the bank will finance 90 percent of the SGR, making SGR a Kenyan investment¹⁷. Kenya has taken debts for many major construction projects and Chinese companies typically have no equity stake in the particular building, road or port¹⁸. The EXIM bank is responsible for promoting exports and investments of Chinese firms abroad, offering international guarantees, export buyers' credit, and export sellers' credit.¹⁹ The EXIM bank only provides loans: Chinese firms worked on the Standard Gauge

Investment in Kenya's Transport Sector' *University of Nairobi Library*, November 2011.

¹⁴ Sanghi A. & D. Johnson, 'Deal or No Deal: Strictly Business for China in Kenya?' *World Bank Group, Macroeconomics and Fiscal Management Global Practice Group*, March 2016 pg 18

¹⁵ Ibid pg 18

¹⁶ Ibid

¹⁷ Sanghi A. & D. Johnson, 'Deal or No Deal: Strictly Business for China in Kenya?' *World Bank Group, Macroeconomics and Fiscal Management Global Practice Group*, March 2016 pg 23

¹⁸ Ibid pg 23

¹⁹ Moss, T and Rose S., "China Exim Bank and Africa: New Lending, New Challenges" *Center for Global Development*, 2006

Railway and the Thika Superhighway, but the government of Kenya must pay back the debt.²⁰

With the cold reality that the bulk of investment flowing into low income countries is mainly channeled into extractive sectors, it is safe to state that these sorts of investments do not provide the host country with similar benefits as the manufacturing spill over effectiveness is very little.²¹ Furthermore, the detrimental effects on the environment are left for the weak government to deal with which can be overwhelming to these countries.²² Rapid developments without adequate control can also cause irreversible social, cultural disruption, removing economic means of support to locals without providing substitutes. The proposal in this paper seeks to address the existence of natural resources and influx of FDI flowing in an economy which could potentially lead to economic growth and stability and inclusively proposes recommendations and solutions to some of the adverse effects of FDI in natural resources.

3. Problem analysis

Much as the Chinese are being portrayed as violators of domestic laws, corruption incidences are frequently being mentioned by the same Chinese companies as a hurdle to investing in Kenya.²³ Chinese firms are being seen as easy targets to rent seeking government officials for several reasons. First, there is a collective action problem for investors willing to “enforce” anti-corruption efforts.²⁴ Secondly, there are some Chinese companies that do not follow the rules and therefore, contribute to the reputation or perception of Chinese investors as violators of the law. Thirdly, many Chinese investors

²⁰ Sanghi A. & D. Johnson, ‘Deal or No Deal: Strictly Business for China in Kenya?’ *World Bank Group, Macroeconomics and Fiscal Management Global Practice Group*, March 2016

²¹ N. Mabey & R. McNally, ‘Foreign Direct Investment and the Environment: From Pollution Havens to Sustainable Development’ *A WWF-UK Report*, August 1999. P.27

²² Ibid P.22

²³ SinoAfrica Centre of Excellence Foundation. *Business Perception Index Kenya 2014: Chinese companies’ perception of doing business in Kenya 2014*. 2014

²⁴ Persson, A. et al, ‘Why Anticorruption Reforms Fail- Systemic Corruption as a Collective Action Problem’ 26(3) *Governance* 449(2013)

want to remain on good terms with the government consequently, paying bribes seems to be a better alternative to formal procedures.

In 2012, an important announcement that weighed heavy on Kenyans was made by the then Kenyan President, Mwai Kibaki. Oil had been discovered in the arid Turkana and which also meant a welcoming entrance into the petro-dollar billionaires' league²⁵. However, there is a cloud of mystery going about the oil extraction project which was and is still being led by Tullow Oil Plc. a UK- based multinational Oil and Gas Production Company which also discovered the oil.²⁶ The Turkana region has then been experiencing both economic and social changes, a most prominent one is many of the region's oil drilling sites are located in areas that affect the local communities directly raising concerns about the economic, social and environmental impacts of production and the company had to halt its operation due to the numerous protests by the villagers.²⁷ The project has so far consumed 200 billion Kenyan shillings as total expenditure to the government's bill yet there is no evidence showing any progress to the oil extraction and it expresses its wish to stay despite not allocating any single cent to appraisal and exploration in the country in the year 2020. A case study done by the Food and Agriculture Organisation of the United Nations found that the major challenge confronting Turkana pastoralists in the context of extraction of oil and gas in the county is loss of land and lack of information regarding the development of their area. Another contentious issue arising from the same is that pastoralists have lost ownership, access and control of the basis of their pastoral livelihood and economic production and if not enough exclusion, they have not been included in the decision- making process regarding further development of the area.²⁸ As

²⁵ Edwin Okombo, 'Kenya's fading oil cash dream' *Daily Nation* (Nairobi, March 17 2020) pg 32

²⁶ Ibid pg 33

²⁷ Horn International Institute for strategic studies, "The Negative Impacts of Oil Exploration and Discovery on the Turkana Community," *Horn Policy Brief* No.10, August 30 2018

²⁸ Food and Agricultural Organization of the United Nations, "Triggering the Voluntary Guidelines on the Responsible Governance of Tenure(VGGT) In the Context of Oil Extraction in Kenya's Turkana County: A Case study" *Eastern and Southern African Pastoralists Development Network of Kenya-Turkana Chapter*, April 2018

such even though the climate has deprived and dispossessed pastoralists in the region from their daily livelihood, human activities have not only failed to solve the problem but rather exacerbated the situation.

What is unfolding in Kenya is referred to as the ‘resource curse’. The resource curse states that natural resource exports harm growth prospects, even after controlling for the effects of initial income per capita, human capital, investments, trade openness and institutional quality on economic growth. Natural resources are often extracted by foreign multinationals that bring in capital and knowledge. However, resource FDI is very capital intensive and leads to fewer spill-over effects into the non-resource sectors of the host economy as it relies less on local subcontractors or suppliers.

Another separate case study is the large deposits of titanium discovered in the coastal strip which gave renewed impetus to campaigns supporting sustainable development in the mining sector.²⁹ The titanium deposits account for 40% of the world’s known unexploited titanium reserves and are claimed to be worth trillions of US dollars on the world market³⁰. The extraction of such a mineral had clear socio-economic benefits such as creation of jobs and urbanization through the multiplier effect of industrialization. The Kwale mining project located approximately 65km from Mombasa and 10km in land is located in an agricultural area with coconut and cashew nuts as the main crops³¹. When an Environmental Impact Assessment (EIA) for mining of titanium in Kwale district was carried out by Coastal and Environmental Services of South Africa on behalf of Tiomin Kenya Ltd, the local subsidiary of Tiomin Resources Inc., a Canadian multinational, failed to address adequately the impact of released toxic substances, including radioactive emissions from the mining operations on the coastal ecosystem, nor the need for continuous rehabilitation of the mining area.³² The people settling in the region are already experiencing

²⁹ Abuodha, J. O. Z. ‘Environmental impact assessment of the proposed titanium mining project in Kwale District, Kenya.’ [*Marine Geo-resources and Geo-technology*, 20, 2002] 199-207

³⁰ Ibid pg 202

³¹ Ibid 205

³² T.C. Davies & O. Osano ‘Sustainable mineral development: case study from Kenya’ *Geological society London Special Publications*, (2005)P.93

limited water, energy and land resources and the onset of this project will cause additional deprivation to the related resources, related infrastructure and new settlement. The project revealed conflict of national laws and need for effective implementation of up-to-date laws. This has to seek consideration of harmonization with the Kenya Environmental Management and Coordination Act (EMCA) and the World Bank Standards on trade.³³

Many adverse effects from specialization of natural resources are irreversible, causing permanent and harmful environment of the host country. Environmental degradation leads to an economy's inability to produce goods over a period of time which reduces the value of the land, due to depletion of resources like soil fertility.

4. Conclusion

The Mining Act of Kenya,³⁴ emphasizes matters of occupational health and safety, but lacks clear provisions on environmental management. This omission is countered for by the enactment of the National Environmental and Coordination Act,³⁵ for the following purposes;

- 1) To provide a framework for sound environmental management in Kenya;
- 2) To provide a framework for improved legal and administrative coordination of the diverse sectoral initiatives for the management of the environment.
- 3) To be the principal instrument of Government in implementation of all policies relating to the environment.

The Act embodies the principles of sustainable development and also stipulates that all EIA procedures should engender the management tools inherent in section 58 to 67 of this Act. The Environmental Management Coordination (Amendment) Act, 2015 was enacted to make provisions to align the Environmental Management and Coordination Act, with the Constitution

³³ Ibid

³⁴ The Mining Act of Kenya (Cap 306) ,1904

³⁵ National Environmental and Coordination Act, 2000.

of Kenya, 2010. It takes into account the devolved system of government, rationalizing of state resources, sound environmental practices, structures for dispute resolution and principles such as transparency, accountability and participatory environment management. The Act however, is not comprehensive enough to show how the public participation will be carried out. The implication being that the proposed public participation will be done through less meaningful ways.

Devolution can be used efficiently to facilitate effective natural resources management that is people-centered and one that benefits the people of Kenya. Its framework can prove its worth by overcoming the challenges associated with state-centric approaches to natural resources management such as inequitable benefit sharing, exclusion of the poor and marginalized in the decision making system, indiscriminate environmental degradation, effectively promoting efficiency, equality among citizens, economic growth and stability in the countries.³⁶ To ensure the success of the devolution of natural resources management, there is a need for management frameworks that encourage the engagement of multiple actors across the two levels of government and affected communities. The Central government can oversee the county government resource management in a system of counter-checks and balances amongst the 47 county governments and the national government. The involvement of independent organizations and Non-Governmental Organisations (NGO's) will also go a long way in ensuring that the appropriate standards in natural resource management are maintained, educating the locals on the benefits that accrue and from sustainable utilization of the resources around them.³⁷

Kenya can also learn from its neighbouring African countries and emulate their economic management frameworks. Rwanda for example, has been experiencing significant economic growth amidst increase in Foreign Direct

³⁶ Kariuki M. "Devolution and Natural Resource Management in Kenya" [2018]

³⁷ See generally, 'Final Report of the Taskforce on Devolved Government,' Office of the Deputy Prime Minister and Ministry of Local Government, Vol.1, (Government Printer, Nairobi, 2011).

Investment³⁸. It has been able to achieve this steady discourse through the following means:³⁹

- The Rwanda government has put up measures to promote FDI and to reduce poverty with limited empirical studies;
- Rwanda Development Board (RDB) has been created to bring together all government agencies in charge of investment under it to manage and oversee their activities. This structure assists foreign and local investors to obtain the certificate of incorporation, tax identification number and other documents necessary⁴⁰.

Other proposed recommendations are; first, countries endowed with natural resources should pursue policies targeted at full deregulation (privatization) of their natural resources sector to better utilize the abundance of their natural resources and henceforth attract additional FDI. Second, more investment in the agricultural and industrial sectors which will make the growth of the economy branch out and spread across other sectors.

³⁸ Ruranga C. "Foreign Direct Investment and economic Growth in Rwanda: A Time Series Analysis," *Journal of Business Management and Corporate Affairs*, 2013, Vol. 2, Issue 1, pp 11

³⁹ Ibid

⁴⁰ Ibid pg 11- 18

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A Human Rights Approach to Technology Transfer

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Abstract

This article examines whether a human rights-based approach (HRBA) to technology transfer (ToT) would ensure high quality transferred technology in developing countries in the face of health and environmental challenges such as the COVID-19 pandemic. It argues that although scholars and policymakers view ToT as a conduit to achieving social and economic development, it nevertheless has inadvertently infringed on certain rights such as the right to health and a healthy environment. This article uses the example of Kenya to demonstrate that upholding human rights would ensure that the uptake of technologies is responsive to socio-political and economic realities. A context-specific HRBA to technology transfer would move away from a market and profit-driven ToT approach. This approach would ensure that transferred products such as pharmaceuticals and climate-friendly technologies are accessible and available to developing countries.

Key words: Human Rights, Technology Transfer, Technology, Health, Environment, Pandemic.

1.0 Introduction

Technology transfer (ToT) has turned out to be a key in triggering the development of countries, especially in medicinal and agricultural fields. ToT is ultimately geared towards improving human livelihoods but at the same time, some of the transferred technologies may end up threatening their right to basic subsistence by adversely affecting food and water resources as well as their health. This article works towards highlighting these human rights implications on ToT. In order to set the context, let's begin by defining ToT, what it means and what it constitutes. There are plenty of definitions of ToT. Past literature has offered varying descriptions regarding this concept;

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considering that it has been widely discussed in various research projects.¹ The most common definition proposes that ToT involves a sustained relationship linking two enterprises thereafter enabling the recipient enterprise to achieve the desired cost efficiency and standard of quality of production of a certain product over some time.² From these definitions, we see that ToT is not only the transfer of machinery or equipment as it is casually misconstrued to mean, but also involves the transfer of knowledge (know-how) which increases the capacity of recipient enterprises to provide a specific product or service.³

2.0 Background and Context

ToT is currently at the forefront of socio-economic development. The central role of ToT concerning developing countries is recognized in several forums, such as the 1992 Rio Summit, the Bali and Paris Conferences; which yielded agreements geared towards dealing with climate change and subsequently, related conventions such as UNFCCC and Kyoto Protocol.⁴ The aforementioned Bali Conference, held in 2007, involved discussions of a 'roadmap' to replace the Kyoto Protocol that would soon expire in 2012.⁵ Under the roadmap, nations were to hold a series of negotiations over a new treaty every two years, which were realized in the form of the Paris Agreement.⁶ It was recognized that a pre-emptive role of public policy is

¹ Wahab Abdul, 'Defining the Concepts of Technology and Technology Transfer: A Literature Analysis' 5

(2016) https://www.researchgate.net/publication/318015152_Defining_the_Concepts_of_Technology_and_Technology_Transfer_A_Literature_Analysis accessed 13 November 2018.

² N Reddy and L Zhao, 'International Technology Transfer; A Review.' (1990) 19 Research Policy.

³ J Baronson, 'Technology Transfer through the International Firms' (1970).

⁴ Martin Khor, 'Climate Change, Technology and Intellectual Property Rights: Context and Recent Negotiations' (2011) <https://www.southcentre.int/wp-content/uploads/2013/05/RP45_Climate-Change-Technology-and-IP_EN.pdf> accessed 14 November 2018.

⁵ Markus Becker, 'Happy Ending on Bali Climate Change Deal Reached after US U-Turn' *Spiegel Online* (17 December 2007)

<<http://www.spiegel.de/international/world/happy-ending-on-bali-climate-change-deal-reached-after-us-u-turn-a-523570.html>> accessed 14 December 2018.

⁶ 'The Paris Agreement.' (*United Nations Climate Change*)

<<https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>> accessed 14 December 2018.

necessary to make it possible for developing countries to access technology.⁷ It is prudent that human rights considerations need to be spotlighted in ToT agreements, such that a well-planned approach is undertaken in addressing not only the pending technological needs but also to offer solutions to deal with the subsequent adverse effects that threaten human livelihood.⁸ However, in reality, most ToT agreements tend to prioritize the former, focusing on attaining the most affordable technologies without considering the consequences of the same on human livelihood.

Moreover, the international protection of IPRs has become a great hurdle in ensuring effective ToT, eventually impinging on human rights. For example, patent protection of pharmaceuticals has led to the rise in the cost of drugs due to monopolies granted on pharmaceutical products. Subsequently, the drugs become subject to unaffordable prices for developing countries and infringe on the right to health. This tilts the balance in favour of countries with lucrative markets over the unprofitable markets in the diseases prevalent developing countries; especially those in Africa.⁹ Ultimately, a ‘global drug gap’ is created, where most of the world’s populace has no access to novel drugs.¹⁰

Until now, scholars and policymakers have viewed ToT as a mere conduit to achieving social and economic development. It is only recently that various institutions have started to recognize that ToT transcends this perspective, and therefore necessitates a keener look into the human rights implications of ToT ventures. Various institutions have shown efforts in addressing such issues; with the enactment of TRIPs and UNFCCC to show for it. However, scholars argue that from a broader perspective, such initiatives have not done enough, and have only increased the power imbalances between developed and

⁷ Khor (n 6).

⁸ Stephen Humphreys, ‘Perspective: Technology Transfer and Human Rights: Joining Up the Dots’ (2010) 9

<<http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1120&context=sdlp>> accessed 13 November 2018.

⁹ Smita Narula, ‘The Rights-Based Approach to Intellectual Property and Access to Medicine: Parameters and Pitfalls’ [2011] New York University Public Law and Legal Theory Working Papers

<https://lsr.nellco.org/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1300&context=nyu_plltwp> accessed 5 December 2018.

¹⁰ Ibid.

developing countries that are captured by the strong IPRs regime, which have a major influence in leading to rights infringements in ToT. Despite the fact that some international conventions, as well as a wide range of scholars, have advocated for a human rights-based approach (HRBA) to ToT, the reality is most agreements prioritize the fulfillment of technological needs, rather than considering the impact the same technologies have on human rights, as they take up a needs-based approach (NBA).

The immediate environment that envelopes the need for a HRBA is the socio-political realities that are prevalent in the country that would make it necessary to adopt technologies. This is because such factors heavily influence human rights and the adoption of technologies to address such factors; for instance AI to keep track of patient records so as to curtail instances of lost or wrong patient data, or digitizing the land registry to ensure proper and accurate information is kept regarding respective land owners and avoid cases of land grabbing. Such cases have an impact on rights to health and property. As such, socio-political influences such as these greatly impact the adoption of technologies. The aim of this article is to interrogate how the HRBA would be ideal in addressing human rights issues in ToT. It further links human rights infringements as the consequence of strict IPRs protection regime, which heavily influences the prices of such technologies – hence making it difficult for developing countries to access. The main question this research focuses on is why the HRBA to ToT is likely the best approach for efficient ToT.

3.0 Scholarly interventions on HRBA AND ToT

The idea of an HRBA to ToT is not particularly new; having been the subject of unremitting analysis, as several scholars have emphasized on the need to incorporate an HRBA to ToT.¹¹ Humphreys; while speaking against the backdrop of the Bali Conference on climate change implications, highlights the relevancy of ToT advocates for affordable technologies that will not only cater to the technological needs of the recipient country but also address the consequences which new technologies offer on basic subsistence such as water, food, and health.¹² Their discussions go on to link the strict IP regime as the catalyst to the sluggish flow of medical technologies, hence placing

¹¹ Humphreys (n 10).

¹² Ibid.

developing countries at a disadvantage. Developed and developing countries have responded differently to the strict IP regime. Developing countries have responded to this predicament by demanding the relaxation of international rules on IP, to provide them with the leeway to copy and adopt technologies without lingering on for offers of financial aid or even permission, from developed countries.¹³ This is interesting, considering that TRIPs impose that all countries (within the WTO) must comply with common IP standards.¹⁴

IPRs protection has delayed the entry of new medicines into the market, thus drawing high demand for the products and consequent high prices for developing countries' markets.¹⁵ For example, developing countries argue that due to patent protection, they cannot access certain products, such as pharmaceuticals, locally and therefore have to depend on developed countries for them; something which would be much more affordable than doing the latter.¹⁶ The patents on pharmaceutical products have a variable impact on local production, depending on the country of production and level of technical capacity of the pharmaceutical industry locally. Moreover, the reason why developing countries are disadvantaged by the strict protection of IPRs could be imputed to the lack of access to technological information which is impeded by factors such as poor infrastructure, low rate of R&D as well as poor domestic absorption capabilities.¹⁷ Even though international protection of IPRs is meant to protect the original inventors, by granting them temporary

¹³ Dalindyabo Shabalala, 'Climate Change, Technology Transfer and Intellectual Property: Options for Action at the UNFCCC' (Maastricht University 2014) <<https://cris.maastrichtuniversity.nl/portal/files/1425546/guid-54116ed7-5a51-4126-9407-b3579557f98c-ASSET1.0>> accessed 13 December 2018.

¹⁴ Ibid.

¹⁵ World Health Organization, 'Public Health Protection in Patent Laws: UHC Technical Brief Selected Provisions' (World Health Organization South East Asia 2017) <<http://apps.who.int/iris/bitstream/handle/10665/272976/Public-health-protection.pdf?sequence=1&isAllowed=y>> accessed 14 November 2018.

¹⁶ All Answers Ltd, 'Advantages and Disadvantages of World Trade Organization' <<https://www.lawteacher.net/free-law-essays/international-law/advantages-and-disadvantages-of-world-trade-organization-international-law-essay.php>> accessed 9 November 2018.

¹⁷ Keith Maskus and Jerome Reichman, *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime* (Cambridge University Press 2010).

monopolies (20 years long¹⁸) on their products, this will only make the products less accessible and more expensive.¹⁹ Developing countries will subsequently try as much to avoid investing in the costly products, opting to imitate rather than try and invent one, or even opt for the cheap ones, which might be counterfeit, and hence in a case of say, pharmaceuticals, would do more harm than good.²⁰

The reason why ToT has not lived up to expectations in developing countries is that they adopt new technologies without modification, hence participating in a '*massive but passive importation of technology*'.²¹ Moreover, many developing countries enter into such arrangements blindly, oblivious that this could be a strategy by donor countries aimed at rendering them to unceasingly depend on them for new technologies.²² Donor countries benefit more through over purchasing of raw materials, while also profiting through maintenance of technology.²³ Put differently, donor countries are reluctant to engage in ToT without the possibility of profit.²⁴ However, several things escape this research. Firstly, despite the call for ToT to be carefully planned, it still begs the question as to what research system or policy framework is required to ensure right technologies are accessible to the appropriate communities in the most time-efficient manner so as to preclude rights violations. If at all the technologies transferred are meant to cater to technological needs, should there not be some way to predict human rights threats in certain locations?²⁵

¹⁸ Neil Foster and Rod Falvey, 'The Role of Intellectual Property Rights in Technology Transfer and Economic Growth: Theory and Evidence' (United Nations Industrial Development Organization 2006) <https://www.unido.org/sites/default/files/2009-04/Role_of_intellectual_property_rights_in_technology_transfer_and_economic_growth_0.pdf> accessed 14 November 2018.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Anthony Akubue, 'Technology Transfer: A Third World Perspective Technology Transfer to the Third World' (2002) 28 (1) *Journal of Technology Studies* <<https://www.semanticscholar.org/paper/Technology-Transfer%3A-A-Third-World-Perspective.-Akubue/76bbd874f89cc92f05ec2579c85de712d131bb5b>> accessed 14 November 2018

²² Ibid.

²³ Ibid.

²⁴ Hee Jun Choi, 'Technology Transfer Issues and a New Technology Transfer Model' (2009)

²⁵ Humphreys (n 10).

4.0 Human Rights Based Approaches for ToT in Developing Countries.

Human Rights Based Approaches to ToT play an important role in so far as shedding light on the various rights infringements occasioned by the power imbalances between developing and developed countries.

4.1 Defining HRBA

HRBA refers to the integration of human rights standards into development processes.²⁶ Drawing from this, an HRBA places human rights as the focal point while pursuing certain development prospects. The HRBA is an ideology that was introduced as a substitute to needs-based and other discourses such as the economy-centred approach to development.²⁷ A needs-based approach (NBA) infers that the particular development process centres its focus on fulfilling specific needs. The difference between this approach and the HRBA boils down to who, or rather, what particular group is being targeted.²⁸ As the NBA necessitates targeting a particular group, for instance, the poor, and assessing their particular needs²⁹, the HRBA tends to take a more universal approach as human rights after all are universally entitled.³⁰ The economy-centred approach, on the other hand, focuses more extensively on furthering economic growth, with the spotlight placed explicitly on the World Bank (WB) on its place in furthering social and economic development—particularly concerning social capital as a tool in development.³¹ Social capital refers to the institutions, values, and relationships that regulate interactions among people and significantly aid economic and social development, and is a crucial part of the WB's strategy in the alleviation of poverty.³² It is apparent that aside from

²⁶ Jae-Eun Noh, 'From a Normative Discourse to Contextualised Practices: A Case Study of a Human Rights-Based Approach in Bangladesh' (2015) 251.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

³¹ Anthony Bebbington, Scott Guggenheim, Elizabeth Olson and Michael Woolcock, 'Exploring Social Capital Debates at the World Bank' (2004) 40 (5) *Journal of Developmental Studies*

<https://www.researchgate.net/publication/24084002_Exploring_Social_Capital_Debates_at_the_World_Bank> accessed 1 April 2019.

³² Andrea Cornwall, 'Buzzwords and Fuzzwords: Deconstructing Development Discourse' (2007) 17 *Development in Practice* 471

<<http://www.tandfonline.com/doi/abs/10.1080/09614520701469302>> accessed 2 April 2019.

the HRBA, there exist various approaches that assist in promoting development. Because the HRBA was introduced as an option to the NBA and the economy-centred approaches, it would be a sensible step to go ahead and delve into the historical milieu that culminated into the creation of the HRBA.

4.2 Historical background

The HRBA, as the name suggests, involves primarily a viewpoint of the consideration of human rights as an indispensable factor in the context of development. Thus it is not a coincidence that this doctrine stemmed from historical occurrences such as the conclusion of the Cold War, the adoption of the 1993 Vienna Declaration and Programme of Action in Austria—which was to strengthen the already existing UDHR³³ as well as recognizing the right to development.³⁴ The upswing of the HRBA subsequent to the aforementioned events catapulted it into being a crucial tool in development projects, having been adopted by several institutions such as the UN and other NGOs.³⁵

Since the HRBA is buttressed by such international conventions that accentuate the significance of human rights, it has inherited the ‘normative appeal’ of human rights, to say the least, as various literature has articulated. The goal, however, was to integrate the HRBA with development, a task which was seen to be intricate, as these were two disciplines that were considered worlds apart.³⁶ Besides, none of the existing discourses on development had taken up the idea. Ever since former US President Harry Truman’s 1949 inaugural speech where he categorized the world into ‘developed’ and ‘underdeveloped’ nations while pitching his Point Four Program; aimed at

³³ ‘OHCHR | World Conference on Human Rights’

<<https://www.ohchr.org/en/aboutus/pages/viennawc.aspx>> accessed 1 April 2019.

³⁴ ‘OHCHR | Declaration on the Right to Development’

<<https://www.ohchr.org/en/professionalinterest/pages/righttodevelopment.aspx>> accessed 1 April 2019.

³⁵ Paul Nelson and Ellen Dorsey, ‘At the Nexus of Human Rights and Development: New Methods and Strategies of Global NGOs’ (2003) 31(12) World Development <https://www.researchgate.net/publication/222739120_At_the_Nexus_of_Human_Rights_and_Development_New_Methods_and_Strategies_of_Global_NGOs> accessed 1 April 2019.

³⁶ Celestine Nyamu-Musembi and Samuel Musyoki, ‘Kenyan Civil Society Perspectives on Rights, Rights-Based Approaches to Development, and Participation’ <<https://opendocs.ids.ac.uk/opendocs/handle/123456789/4085>> accessed 3 April 2019.

promoting the growth of the latter through technical and scientific assistance by the former³⁷, discourses on development have been centred on economic growth. His speech initiated the 'age of development' which lasted four decades (1950s-1990s) after which the term 'development' became the fundamental frame of reference for the development of all nations following the war.³⁸

The discourses have been categorized distinctly into the dominant and alternative discourses on development. The former perceive development as a mere focus on economic growth, while the latter draws introduce a social dimension to development processes.³⁹ As the dominant approach rested heavily on the ideology of a rational economic man, driven by a market-oriented environment, the probable results would be occurrences of privatization which would widen inequality between economic classes.⁴⁰ The alternative discourse on development was a response of sorts to this, introducing a social dimension of development.⁴¹ Hence ideologies such as the People-Centred Development (PCD) and Sustainable Human Development (SHD) were introduced and recognized by the UN. This is apparent in the recent UNESCO programme where they put in place an agenda for sustainable development that integrates consideration for cultural rights.⁴²

This means taking into account and integrating traditional scientific knowledge and practices in sustainable development policies in the management of natural resources, food security and access to clean water.⁴³ Also, values such as participation and empowerment have become highly regarded. For instance, a principle such as the Participatory Learning and

³⁷ Gilbert Rist, *The History of Development: From Western Origins to Global Faith* (3rd edn, Zed Books 2008).

³⁸ Ibid.

³⁹ Noh (n 28).

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² United Nations Educational, Scientific and Cultural Organization, 'The Way Forward: A Human Centred Approach to Development | United Nations Educational, Scientific and Cultural Organization'

<<http://www.unesco.org/new/en/culture/themes/culture-and-development/the-future-we-want-the-role-of-culture/the-way-forward/>> accessed 2 April 2019.

⁴³ Ibid.

Action (PLA) accentuates on giving a voice to the local communities and disapproves the disempowering impacts on local capabilities particularly through the CD principle.⁴⁴

The HRBA was not at first introduced independently as a development discourse as it emerged rather as a protracted version of the alternative discourse of development and therefore shared certain values.⁴⁵ Its target, regardless, was to underscore human rights. Furthermore, the HRBA was well-placed to ensure participation and empowerment incentives that were well exhibited in the alternative discourse. Moreover, while exhibiting similar traits, they had their differences. For instance, the HRBA is positioned to address human rights from a universal standpoint, the alternative discourse; though the CD principle aims at local empowerment.⁴⁶ As mentioned, the HRBA is geared towards the upholding of human rights, which raises the query as to what particular rights are being targeted. This requires due diligence in mapping out the rights that are crucial to development. Following the Second World War, the focus was CPRs, but since development was more inclined towards economic growth, prominence was given to economic, social and cultural rights (ESCRs)⁴⁷ However, further arguments have advocated for the blending of such rights, with some interesting views claiming that realizing CPRs assists in attaining ESCRs.⁴⁸ These efforts to reconcile human rights and development have raised speculation that rights recognized in the ICCPR and ICESCR might be a practical guide to establishing priorities and resource allocation in development.⁴⁹

Notwithstanding the recognition and endorsement of the HRBA by international establishments such as the UN⁵⁰, this is not the approach that is taken up in various areas of development as the approach mostly taken is the

⁴⁴ Manohar Pawar, *Community Development in Asia and the Pacific* (Routledge, 2010)

⁴⁵ Noh (n 28).

⁴⁶ Nyamu-Musembi and Musyoki (n 38).

⁴⁷ Ibid.

⁴⁸ Noh (n 28).

⁴⁹ Nelson and Dorsey (n 37).

⁵⁰ Nyamu-Musembi and Musyoki (n 38).

dominant approach—as most entities see it fit to centre their focus on economic growth but without really considering human rights.⁵¹

4.3 Distinct features of HRBA

This section examines the applicability of the HRBA in development prospects; by explaining some of its distinct attributes and provides insights on how it could be implemented specifically in ToT. As pointed out in the previous section, ToT is buoyed by the intent of satisfying technological needs. It is thus safe to say that ToT agreements are governed by the NBA which exhibits a narrower scope than the HRBA with regard to development prospects. For instance, the HRBA introduces the idea of ‘equal’ resource allocation while the NBA tends to place marginalized groups as a priority.⁵² Despite these differences, both share similar approaches as they both argue a case for consideration of certain rights, and thus it is no coincidence that in a bid to practically implement the HRBA, it is examined against the backdrop of the NBA.⁵³ Having established the main mission of the HRBA, this begs the question as to what features define it and also complements it to carry out its respective objectives. This article therefore, examines distinct features of the HRBA and discusses hypothetically a practical strategy it would assume in a ToT setting.

4.3.1 The normativity of the HRBA

This particular feature is explained with respect to the significant legitimacy that the HRBA adopts from international instruments, let alone the support it garners from certain international institutions as well as NGOs.⁵⁴ Most deliberations regarding the HRBA have originated from the use of legislations in pursuing development.⁵⁵ In essence, the normative aspect of HRBA works

⁵¹ Andrea Cornwall and Deborah Eade (eds), *Deconstructing Development Discourse: Buzzwords and Fuzzwords* (Practical Action Pub ; Oxfam 2010).

⁵² Celestine Nyamu-Musembi and Andrea Cornwall, ‘What Is the Rights Based Approach All About? Perspectives from International Development Agencies’ (ResearchGate 2004) <https://www.researchgate.net/publication/237390540_What_is_the_Rights_Based_Approach_all_About_Perspectives_from_International_Development_Agencies> accessed 3 April 2019.

⁵³ Ibid.

⁵⁴ Noh (n 28).

⁵⁵ Nyamu-Musembi and Cornwall (n 54).

towards ensuring that development prospects work towards ensuring human rights are upheld. However, the HRBA should not be understood solely in light of its normative trait. One should be able to apply it to a particular context.⁵⁶ Put differently, it is prudent to contextualize the HRBA approach such that the objective is to further social and economic development while ensuring certain human rights are upheld. Furthermore, it is argued that the HRBA should be an interactive process.⁵⁷ This means that contextualizing the HRBA is not particularly enough, as it would require one to go down to the grassroots and interrogate on what particular rights are being infringed.⁵⁸ This means implementing particular principles of the alternative discourse of development that the HRBA inherits, such as participation.⁵⁹ By doing so, it attracts an increase in social and economic development towards the desired level, as the information will come directly from the affected group, which if addressed, will culminate in positive returns.

This could be ideal if applied in a ToT situation. For instance, when undertaking the transfer of machinery to be used in agricultural activities, one is expected to do due diligence in considering the climate change implications that would occur. The protection of the climate should be advocated for in light of existing rights concerning the environment.⁶⁰ This particular argument has been put forward by CIEL which has particularly campaigned for integrating human rights considerations into the UNFCCC's institutional framework and relevant processes, and as a key issue in subsequent negotiations regarding climate change.⁶¹ Many scholars have discussed the relevance of ToT in dealing with climate change has been extensively discussed.⁶² The HRBA is not a new aspect within climate change as past literature has already illuminated on the need to merge the two disciplines, as

⁵⁶ Noh (n 28).

⁵⁷ Ibid.

⁵⁸ Pawar (n 46).

⁵⁹ Noh (n 28).

⁶⁰ Lavanya Rajamani, 'The Increasing Currency and Relevance of Rights-Based Perspectives in the International Negotiations on Climate Change' (2010) 22 Oxford University Press.

⁶¹ Centre for International Environmental Law, *Climate Change & Human Rights: A Primer* (CIEL) <http://www.ciel.org/Publications/CC_HRE_23May11.pdf> accessed 14 November 2018.

⁶² Humphreys (n 10).

well as the need to transfer environmentally-sound technologies.⁶³ Most literature advocate for affordable technologies that will not only cater for the technological needs of the recipient country but also address the consequences which new technologies offer on basic subsistence such as water, food, and health.⁶⁴

It is however interesting to see how participation is implemented by the HRBA, considering that it takes more of a universal approach, as opposed to the NBA. The implementation of the HRBA depends entirely on the magnitude of the human right affected; as seen by the climate change implications, which certainly requires a universal approach. However, to accomplish this, it first requires us to incorporate context into the HRBA discourse practically.⁶⁵ Several organizations have attempted to do this. For instance, ActionAid Kenya has taken the approach of inducing participation by starting from a level of community development, which will rise to a regional basis and ultimately culminate into the international sphere.⁶⁶ According to ActionAid Kenya, the yardstick of their success is aimed at rights awareness and claiming of rights processes by marginalized communities.⁶⁷ Put differently, ActionAid Kenya not only uses the HRBA as a tool to educate the marginalized on their rights but more so to strengthen poor people through their organizations as well as to assist in claiming rights through functioning constructively and critically with governments⁶⁸; with the end goal being to create a policy and institutional atmosphere for the alleviation of impecuniousness.⁶⁹ This may explain why ActionAid has contextualized its HRBA towards the eradication of poverty and furnished it with an interactive process where the voice of the community therein is heard distinctively.

⁶³ Khor (n 6).

⁶⁴ Humphreys (n 10).

⁶⁵ Noh (n 28).

⁶⁶ Nyamu-Musembi and Cornwall (n 54).

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Nyamu-Musembi and Cornwall (n 54).

4.3.2 The obligatory implication of HRBA

The HRBA places a unique obligation of upholding human rights on national governments.⁷⁰ Besides, it is no surprise as even in local legislations such as the Constitution of Kenya⁷¹, the State is tasked with the same. The reason for this was to induce some form of accountability on part of the national governments to ensure that while they pursued development, they recognize and uphold human rights.⁷² It is argued that the HRBA doctrine is by itself a tool which demands accountability from the government and subsequently increases the chance of policies being implemented accordingly.⁷³ Furthermore, the HRBA provides a chance to widen the confines of accountability to include non-state actors.⁷⁴ The UN OHCHR, in light of this, highlighted, in the *Draft Guidelines for a Human Rights Approach to Poverty Reduction Strategies* that

“...Under international law, the State is the principal duty-bearer with respect to the human rights of the people living within its jurisdiction. However, the international community at large also has a responsibility to help realize universal human rights. Thus, monitoring and accountability procedures must not only extend to States, but also to global actors—such as the donor community, intergovernmental organizations, international NGOs and TNCs—whose actions bear upon the enjoyment of human rights in any country.”⁷⁵

This feature of the HRBA is relevant to ToT as commentators on the subject argue for state and non-state actors to be ‘duty-bearers’ in addressing various issues of human rights violations that are for instance result from climate change.⁷⁶ As the international community obligates states to ensure human

⁷⁰ Ibid.

⁷¹ ‘The Constitution of Kenya 2010’ Article 21.

⁷² Nyamu-Musembi and Cornwall (n 54).

⁷³ Ibid.

⁷⁴ Noh (n 28).

⁷⁵ United Nations, Office of the High Commissioner for Human Rights (UN OHCHR), ‘Draft Guidelines for a Human Rights Approach to Poverty Reduction Strategies’ para 230.

⁷⁶ Ian Christoplos and C McGinn, ‘Climate Change Adaptation from a Human Rights Perspective: Civil Society Experiences in Cambodia’ [2016] 43(3) *Forum for*

rights are upheld in their separate spheres⁷⁷; it is not the worst idea if states collaborated in ensuring human rights are upheld. Besides, this approach forms the whole basis of ToT. It is further buoyed by the fact that the UNFCCC urges developed states to assist their developing counterparts in battling climate change.⁷⁸

5.0 Analysis of human rights infringements in Technology Transfer

This section examines human rights infringements in the ToT process specifically with regard to the right to health. We point out the nexus between ToT and human rights and highlight various episodes of human rights violations by ToT. We also shed light on the various concrete examples in which Kenya has adopted various technologies. Further, we investigate the socio-political realities that influence the same behavior. This section finally attempts to set the basis on why the HRBA is an ideal tool to implement. As noted earlier, ToT refers to a goal-oriented interaction between two entities where technological knowledge/know-how is shared through the transfer of one or more technological components.⁷⁹ Drawing from this, one entity is deemed more 'developed' than the other, and is thus tasked with sharing their technological know-how with the latter entity in a bid to uplift them and trigger the development of all sorts; whether social, economic or cultural, therein.⁸⁰

ToT turns to be a key factor in assisting the development of countries and has ensued especially in fields such as medicine and agriculture. It also assists in addressing the climate change menace⁸¹, which forms an integral part of various international discussions and conventions such as the UNFCCC⁸².

Development Studies <<https://doi.org/10.1080/08039410.2016.1199443>> accessed 14 November 2018.

⁷⁷ 'Universal Declaration of Human Rights | United Nations' Preamble <<https://www.un.org/en/universal-declaration-human-rights/>> accessed 4 April 2019.

⁷⁸ 'The United Nations Framework Convention for Climate Change' Article 4 <<https://unfccc.int/resource/docs/convkp/conveng.pdf>> accessed 4 April 2019.

⁷⁹ E Autio and T Laamanen, 'Measurement and Evaluation of Technology Transfer: Review of Technology Transfer Mechanisms and Indicators.' (1995) 10.

⁸⁰ Baronson (n 5).

⁸¹ Uday Shankar, Tapas K Bandopadhyaya and Chandrika Mehta, 'Climate Change and Technology Transfer: Tying the Knot through Human Rights' (2018) 8.

⁸² 'The United Nations Framework Convention for Climate Change' (n 80).

Socio-political factors are also a great influence here as issues such as loss of patient data in the medical scene emphasize the need for a HRBA methodology in adopting technologies to cater for such a right. These examples illustrate the interactions between ToT and human rights paint a vivid picture of ToT having a significant role in improving human livelihoods, which it does; or rather, is essentially supposed to do.⁸³ Various international instruments have supported this notion, with some highlighting that scientific and technological development is entirely purposed to advance the socio-economic development of people coupled with realizing human rights and enshrined in the UN Charter.⁸⁴ Thus, one cannot ignore the profound positive influence that ToT has on human rights. But to what extent does ToT carry threats to human rights?

5.1 Technology Transfer and Human Rights Infringements

The idea of ToT being an obstacle to the upholding of human rights may sound far-fetched, especially in light of the foregoing observations on the steps ToT has taken in fulfilling improvement of human livelihood, as well as guarding human rights against being infringed. However, a paradox ensues herein, as the very same transferred technologies targeted at bettering human livelihood may; in the same breath, be a threat to their right to basic subsistence by adversely affecting food and water resources as well as their health. Another right vulnerable to infringement is the right to a clean and healthy environment—one recognized in Kenya's Constitution,⁸⁵ as well as immensely advocated for by certain international organizations. Moreover, IPRs is also a key factor that influences the nexus between ToT and human rights.⁸⁶ One of the most significant debates is centred on the nexus between the strong IPRs protection and ToT. Scholars argue that strong IPRs protection may, on one hand, promote innovation and cause smooth flow of technology diffusion in developing countries, but also have little impact in furthering the same in those

⁸³ Calin Vac and Avram Fitiu, 'Building Sustainable Development through Technology Transfer in a Romanian University' [2017] MDPI.

⁸⁴ 'OHCHR | Use of Scientific and Technological Progress' <<https://www.ohchr.org/EN/ProfessionalInterest/Pages/ScientificAndTechnologicalProgress.aspx>> accessed 8 April 2019.

⁸⁵ 'The Constitution of Kenya 2010' (n 73) Article 42.

⁸⁶ Piracés E, "The Future of Human Rights Technology" in Molly K Land and Jay D Aronson (eds), *New Technologies for Human Rights Law and Practice* (Cambridge University Press 2018).

countries.⁸⁷ This is because strong protection of IPRs will limit the access of developing countries to new technologies hence limiting their development prospects.⁸⁸

While strong IP protection aims at upholding the rights of patent holders, the corresponding effect would be high costs for those who want to access the respective technologies.⁸⁹ This means that those who fail to meet the costs resort to counterfeit products—such as cheap carbon-based agricultural technologies and pharmaceuticals that would inevitably infringe on basic rights such as health. Thus in light of ToT agreements, states would be stuck between upholding IP rights and paying attention to internationally recognized rights.⁹⁰ ToT is capable of infringing human rights and may carry a threat with regards to human rights. In the next section, we will focus specifically on the rights to health.

5.1. 1 The right to health

The right to health is universally acclaimed and is entrenched in international instruments and respective national laws worldwide. The UDHR recognizes

⁸⁷ Foster and Falvey (n 20).

⁸⁸ Micheal Njogah, 'The Role of Intellectual Property Rights in Technology Transfer and Economic Growth in Kenya' Academia <http://www.academia.edu/3662408/The_Role_of_Intellectual_Property_Rights_in_Technology_Transfer_and_Economic_Growth_in_Kenya> accessed 13 November 2018.

⁸⁹ Anna Dahlberg, 'Are Stronger Intellectual Property Rights an Obstacle or a Condition for International Technology Transfer' in Mpazi Sinjela (eds), *Human Rights and Intellectual Property Rights: Tensions and Convergences* (Martinus Nijhoff Publishers 2007) <https://books.google.co.ke/books?id=lawCQAAQBAJ&pg=PA31&lpg=PA31&dq=impact+of+technology+transfer+on+human+rights&source=bl&ots=Fr-Shv9nO3&sig=T5VRovr34r5o_Agzc6RpjaYY2RY&hl=en&sa=X&ved=2ahUKEwjDnrPgk9XeAhXitIsKHesEAgE4ChDoATAJegQIBxAB#v=onepage&q=impact%20of%20technology%20transfer%20on%20human%20rights&f=false> accessed 13 November 2018.

⁹⁰ Mirela Hristova, 'Are Intellectual Property Rights as Human Rights: Patent Protection and the Right to Health' (2011) <<https://www.lexisnexis.com/legalnewsroom/lexis-hub/b/commentary/posts/are-intellectual-property-rights-human-rights-patent-protection-and-the-right-to-health>> accessed 4 December 2018.

it⁹¹ and is also advocated for greatly by the UN through its WHO agency. The right to health is particularly affected by the strict patent protection of pharmaceuticals. Strict patents on such products have brought about extensive concern regarding the cost of medicines, and also how restrictive access to life-saving treatment and care by the underprivileged has become.⁹² The impact of strict patent protection of pharmaceuticals is largely felt in developing countries, where strong IPRs protection delays the ingress of new medicines into the market, thus drawing high demand for the products and ultimately higher prices for developing countries' markets.⁹³ Further, it also has had an impact on local production of new medicines for diseases like HIV/AIDS or pandemic flu⁹⁴, and more recently COVID-19. This problem is particularly acute in developing countries, as the intensity of patent protection limits the extent of imitation.⁹⁵ This is coupled with the notion that they lack innovation capacity and technical know-how to develop such drugs locally, thus forcing them to depend on the costly drugs being protected; something which would be uncalled for if they had the necessary knowledge.⁹⁶

TRIPs has been a revolutionary factor in this particular context of ToT and IPRs. It is noteworthy that prior to its inception, as countries had the freedom to choose their patent systems that would address their technological needs.⁹⁷ This provided leeway for developed countries to exclude their pharmaceuticals from being patented, thus providing affordable medicines to

⁹¹ 'Universal Declaration of Human Rights | United Nations' Article 25 (1) <<https://www.un.org/en/universal-declaration-human-rights/>> accessed 4 April 2019.

⁹² Hristova (n 92).

⁹³ World Health Organization (n 17).

⁹⁴ World Health Organization, *Pharmaceutical Production and Related Technology Transfer*. (World Health Organization 2011).

⁹⁵ Fatma Mrad, 'The Effects of Intellectual Property Rights Protection in the Technology Transfer Context on Economic Growth: The Case of Developing Countries' (2017) 23 *Journal of Innovation Economics Management* 33 <<https://www.cairn.info/revue-journal-of-innovation-economics-2017-2-page-33.htm>> accessed 15 February 2019.

⁹⁶ All Answers ltd (n 18).

⁹⁷ Emmanuel Kolawole Oke, 'Incorporating a Right to Health Perspective into the Resolution of Patent Law Disputes' (2013) 15(2) *Health and Human Rights Journal* 13 <<https://www.hhrjournal.org/2013/12/incorporating-a-right-to-health-perspective-into-the-resolution-of-patent-law-disputes>> accessed 14 November 2018

their citizens while growing their domestic pharmaceutical industries by depending on pharmaceutical inventions made in other countries.⁹⁸ TRIPs had initially provided a chance for the medicines made under a compulsory license to be marketed domestically in the producing country, hence not providing a chance to supply to other countries.⁹⁹ This did not sit well with LDCs, as they lacked sufficient capacity to create new drugs.¹⁰⁰ This triggered an amendment to TRIPs¹⁰¹ which provided a chance for those countries producing generic medicines through compulsory licensing to export all its medicines to LDCs.¹⁰² TRIPs has to a large extent harmonized IPRs standards of protection.¹⁰³ It increased the level of IPRs protection by for instance instituting that WTO member states cannot exempt pharmaceuticals from patent protection.¹⁰⁴ Thus, the barriers set by IP are slowly being removed to make healthcare more affordable and accessible to those in developing countries and LDCs.

5.2 Concrete adoption of technologies and prevailing influences

It is apparent that there exist human rights infringements in the process of adopting technologies. The immediate environment that surrounds the need for a HRBA is the socio-political realities that are prevalent in the country that would make it necessary to adopt technologies. This is because such factors heavily influence human rights and the adoption of technologies to address such factors; for instance AI to keep track of patient records so as to curtail instances of lost or wrong patient data, or digitizing the land registry to ensure proper and accurate information is kept regarding respective land owners and avoid cases of land grabbing. Such cases have an impact on rights to health and property. As such, socio-political influences such as these greatly impact the adoption of technologies.

⁹⁸ Ibid.

⁹⁹ 'WTO | Intellectual Property (TRIPS) - Amendment of the TRIPS Agreement' <https://www.wto.org/english/tratop_e/trips_e/wtl641_e.htm> accessed 18 February 2019.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ World Health Organization (n 17).

¹⁰⁴ Ibid.

Kenya has in its own way, made steps with regard to technology transfer. The country has set its sight especially on adopting blockchain technology and artificial intelligence. This is also timely, considering the President met with the German delegation last month in a bid to partner with them in technology transfer by prioritizing the transfer of technical skills and education with focus on applied sciences.¹⁰⁵ From a concrete standpoint, Kenya has been able to adopt various technologies. The creation of a Blockchain and Artificial Intelligence (AI) Taskforce is what marked Kenya's interest and involvement in technology, which is heavily influenced by socio-political factors; such as the heavy inclination of the *inter alia* financial sector to incorporate a digital aspect therein. The Blockchain and AI Taskforce; established under the Ministry of ICT was instituted in February 2018 and constitutes 11 members, headed by Prof. Bitange Ndemo.¹⁰⁶ The taskforce was created with the objective of exploring the use of distributed ledger technology and artificial intelligence for development in Kenya.¹⁰⁷ This was a direct consequence of President Uhuru Kenyatta's remarks that the nation needed to explore the opportunities in the new technology, especially in sectors such as land, where creating full-proof digital registries could forestall malpractice and parallel ownership.¹⁰⁸ The President's directive was welcomed warmly by blockchain enthusiasts, with more interest being placed on its possible use in digital money services.¹⁰⁹ The hope is, if blockchain does catch on in Kenya, we will be able to create a framework to help integrate bitcoin trading with M-PESA will allow millions of people to swap funds and send money home or abroad.¹¹⁰ Further, this will trigger its use in the business sector to make online payments.¹¹¹ The taskforce that was created was charged with this momentous

¹⁰⁵ People Daily, 'Kenya, Germany to Partner on Technology Transfer' (*People Daily*, 24 February 2020) <<https://www.pd.co.ke/news/kenya-germany-to-partner-on-technology-transfer-25951/>> accessed 10 April 2020.

¹⁰⁶ 'The Kenya Blockchain Taskforce Concludes Its Report' (*Kenyan Wallstreet*, 19 November 2018) <<https://kenyanwallstreet.com/the-kenya-blockchain-taskforce-concludes-report-on-blockchain-technology/>> accessed 9 April 2020.

¹⁰⁷ Ibid.

¹⁰⁸ Abdi Latif Dahir, 'Kenya Is Finally Softening Its Stance on Blockchain Technology' (*Quartz Africa*) <<https://qz.com/africa/1222541/kenya-has-created-a-blockchain-task-force/>> accessed 9 April 2020.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Ibid.

task of trying to figure out ways in which blockchain technology could be applied in Kenya¹¹² which was proposed by the Cabinet Secretary for ICT, Joe Mucheru. The taskforce completed the 192-page report in November 2018, in which they expressed their sentiments on how blockchain technology can be applied in line with the government's Big Four agenda¹¹³ While the report does not expressly mention technology transfer, it is safe to say that it has come into play mainly, under the guise of both Blockchain and AI. As noted, the report has tried to align them with the Big 4 Agenda, and primarily on food security and health-care. It is evident that the sudden interest in adopting such intricate technologies is heavily influenced by socio-political factors in the country. This is apparent in the prospective uses of blockchain and AI that have been enunciated in the report. As highlighted before, the country seeks to employ AI in hospitals to produce prescriptions and keep track of patient data records. Patients' data have a history of having massive errors and can now be assured of protection.¹¹⁴ The Nairobi Hospital had signed a deal with a US-based firm Access Mobile Inc. to enable it to offer patients real-time SMS updates on their ailments and appointment reminders.¹¹⁵ This move had faced a lot of criticism especially considering we lacked a data protection legislation, which has since been passed.

The report indicates that AI can be used to monitor weather patterns or even detect defects in foodstuffs.¹¹⁶ The report also indicates that the blockchain technology and cryptocurrency and AI will be used in election processes, as well as monitor the use of funds by county governments.¹¹⁷ This boils down directly to the rampant issues of corruption and election malpractices in the country. The adoption of blockchain in business agreements also involves the

¹¹² 'The Kenya Blockchain Taskforce Concludes Its Report' (n 108).

¹¹³ Ibid.

¹¹⁴ Gatonye Gathura, 'Massive Errors in Patient Records Exposed' (*The Standard*) <<https://www.standardmedia.co.ke/article/2001266556/massive-errors-in-patient-records-exposed>> accessed 10 April 2020.

¹¹⁵ 'KENYA:Nairobi Hospital, US Firm Sign Patient Data Deal' (*Universal Health 2030*, 7 September 2018) <<http://universalhealth2030.org/2018/09/07/kenyanairobi-hospital-us-firm-sign-patient-data-deal/>> accessed 10 April 2020.

¹¹⁶ 'Explainer: How to Use Blockchain' (*Daily Nation*) <<https://www.nation.co.ke/news/How-blockchains-could-change-Kenya/1056-5211014-151tj6gz/index.html>> accessed 10 April 2020.

¹¹⁷ Ibid.

adoption of smart contracts in the education sector; where infringement of copyright and fraud cases is prevalent.¹¹⁸ This is buoyed by the recent adoption of electronic signatures by the Business Laws Amendment Act in completing and approving business transaction.¹¹⁹

Other socio-political realities that influences adoption of technologies is the need to supply the public with information. The ICT Authority launched the Kenya Open Data Portal which makes public government datasets accessible for free to the public in easy reusable formats.¹²⁰ In addition, the information shared by one Government office is also vital to other government stakeholders such as county governments and ministries and agencies of the central government in planning and implementation of their program.¹²¹ These government sectors are encouraged to provide their developmental, demographic, statistical and expenditure data on the portal, which can then be availed in a useful digital format to various stakeholders and the general public.¹²² The adoption of the Open-data portal to makes access to public databases easier¹²³ hence this initiative supports the Government's drive to consistently inform and be accountable to its citizens and upholding the values and principles enshrined in Article 10 of the Constitution of Kenya. There is also an initiative to digitize the industrial sector. As claimed by Blockchain Sales Lead Director, Wellington Ayugi, the goal is to digitize the industrial sector to eliminate batch codes that are impossible for consumers to verify eventually reducing the risk of counterfeiting.¹²⁴ TechnoBrain; a technology, consulting, and outsourcing company, has taken steps in this venture, has

¹¹⁸ Ibid.

¹¹⁹ 'The Business Laws (Amendment) Act, 2020' (*Bowmans*) <<https://www.bowmanslaw.com/insights/finance/the-business-laws-amendment-act-2020/>> accessed 10 April 2020.

¹²⁰ 'Open Data – ICT Authority' <<http://icta.go.ke/open-data/>> accessed 10 April 2020.

¹²¹ Ibid.

¹²² Ibid.

¹²³ Access Partnership, 'Artificial Intelligence for Africa: An Opportunity for Growth, Development, and Democratisation' (University of Pretoria, 2018) <https://www.up.ac.za/media/shared/7/ZP_Files/ai-for-africa.zp165664.pdf> accessed 10 April 2020.

¹²⁴ 'Blockchain Becomes a Part of Everyday Life in Kenya' (*The Africa Report.com*, 30 January 2020) <<https://www.theafricareport.com/22735/blockchain-becomes-a-part-of-everyday-life-in-kenya/>> accessed 10 April 2020.

adopted the Number Series identification tool to trace products made in Kenya by recording in a database the codes assigned to each product created.¹²⁵

It is therefore apparent that technologies have been adopted with much influence from socio-political realities through factors such as fraud in business transactions, rampant corruption, and election malpractices. Another socio-political reality that affects us and the world over is the prevailing question of IPRs. The Big 4 Agenda introduced by the current government has also played a part in the country's move to adopt various technologies such as blockchain and AI.¹²⁶

6.0 Human rights implications in Medical Technology Transfer in Kenya and Africa

6.1 The link between Technology Transfer and Intellectual Property

As several scholars have noted, IP refers to conceptions, purely of the mind, for instance, inventions; symbols and images; literary as well as artistic works; *et cetera* which are extensively used in commerce.¹²⁷ IPRs are certain exclusive rights that the respective inventors derive from their creative expressions.¹²⁸ The manner in which IP and ToT link up is through the fact that protection of IPRs furthers technology advancement.¹²⁹ Technological advancement is the brainchild of innovation, which is in turn essential in the evolution of technology and inventions over time. Ordinarily, inventors require protection of their creative efforts, which attributes them to their respective inventions and excludes others from using them without his

¹²⁵ Ibid.

¹²⁶ The Blockchain and Artificial Intelligence Taskforce, 'Emerging Digital Technologies for Kenya; Exploration & Analysis' (The Ministry of ICT 2019) <<https://www.ict.go.ke/blockchain.pdf>> accessed 10 April 2020.

¹²⁷ 'What Is Intellectual Property?' <<https://www.wipo.int/about-ip/en/>> accessed 26 January 2019.

¹²⁸ Chandra Nath Saha and Sanjib Bhattacharya, 'Intellectual Property Rights: An Overview and Implications in Pharmaceutical Industry' (2011) 2 Journal of Advanced Pharmaceutical Technology & Research 88 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3217699/>> accessed 7 February 2019.

¹²⁹ Ibid.

authority.¹³⁰ Once assured of protection, inventive ventures will increase. ToT will subsequently follow, as other parties will be eager to utilize these new technologies. This is apparent where companies in countries with high innovation/developed countries opt to license their knowledge and collaborate with companies in developing countries, thus bringing high inflows of ToT into developing countries.¹³¹

6.2 Influence of IPRs Protection on Technology Transfer

As noted earlier, the assurance of IPRs protection encourages innovators to engage in innovation, thus furthering technological advancement. While many scholars consider that protection of IPRs is what fosters innovation and aids in technological diffusion, as it ensures companies in developed countries access sufficient incentives that can be used to invest in R&D; while also causing large inflows of ToT into developing countries.¹³² Others argue that the same also impacts ToT negatively.¹³³ It is the latter argument that strong IPRs protection has little impression on the effectiveness of ToT in LDCs and developing countries which lack sufficient innovation capacity and consequently impose additional costs. This ultimately makes it challenging to reduce the technological gap that exists between them.¹³⁴

Despite this, the argument for and against strong IPRs protection seems endless but it does not negate the contributions it has made. One of the reasons that culminated in the formation of TRIPs was due to cases in Japan as well as certain TNCs; which majored in the software and pharmaceuticals sectors, where they argued that non-protection of IP undermined their competitiveness and deprived them of just rewards.¹³⁵ Hence, there was a need for stronger IP protection. This controversial relationship between ToT and strong IPRs protection is apparent in medical ToT.

¹³⁰ Ibid.

¹³¹ Mrad (n 97).

¹³² Ibid.

¹³³ Foster and Falvey (n 20).

¹³⁴ Ibid.

¹³⁵ Ben Sihanya, *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development*. (First Edition, Sihanya Mentoring & Innovative Lawyering 2016).

6.2.1 Strong IPRs protection in Medical ToT

The access to essential drugs and vaccines raises key human rights issues especially when they are subject to high prices associated with strict patents on innovations such as pharmaceuticals.¹³⁶ Consequently, it raises key social implications as it touches on the right to health. Protection of pharmaceutical products and processes through patents has been subject to debate, with its proponents claiming that innovators have a right to enjoy benefits of their inventions while its critics claiming that patenting constrains access to essential drugs.¹³⁷ The emergence of diseases such as HIV/AIDS and pandemics such as COVID-19 necessitates the patent protection of effective drugs.¹³⁸ However, this raises a dilemma which is ‘either valuing IPRs or valuing the pricelessness of human life.’¹³⁹

TRIPs has been central to the controversy of strong IPRs protection and ToT. In the pre-TRIPs era, countries had the freedom to choose their patent systems that would address their technological needs.¹⁴⁰ This provided leeway for developed countries to exclude their pharmaceuticals from being patented, thus providing affordable medicines to their citizens while growing their domestic pharmaceutical industries by depending on pharmaceutical inventions made in other countries.¹⁴¹ Once TRIPs was enacted, it initially provided a chance for the medicines made under a compulsory license to be marketed domestically in the producing country, hence not providing a chance to supply to other countries. This did not sit well with LDCs, as they lacked sufficient capacity to create new drugs. This triggered an amendment to TRIPs¹⁴² which provided a chance for exportation of compulsory licensed generic medicines to LDCs.

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Oke (n 99).

¹⁴¹ Ibid.

¹⁴² ‘WTO | Intellectual Property (TRIPS) - Amendment of the TRIPS Agreement’ (n 104).

In the wake of the enactment of TRIPs, there was a requirement for patenting in all technological fields¹⁴³ and also allows for compulsory licensing along with parallel importation of the same¹⁴⁴ which still weakens the positions of patent holders in Kenya and Africa.¹⁴⁵ TRIPs also articulates the complete exclusion of certain inventions from being patented especially where protection of public morality and health or prevention of serious environmental prejudices is necessary.¹⁴⁶ However, the exclusion of certain inventions, especially drugs, despite the justifications of cases such as HIV/AIDS, would negatively affect R&D programmes that have been heavily invested in.¹⁴⁷

7.0 Conclusion

This article has demonstrated that a contextual based HRBA would ensure efficient ToT particularly in the area of medical and biotechnology. This developmental approach is ideal as it encompasses the universal attribute of human rights and when coupled with an understanding of the socio-economic and political context ToT can bridge the technological disparity between developing and developed countries. The HRBA approach is also ideal as it places the burden of primary duty-bearer on the individual states to ensure the human rights of their citizens are upheld.¹⁴⁸ While undertaking this obligation, they are expected to employ values and principles such as *inter alia* good governance, democracy, and public participation; some of which are espoused in our very own Constitution.¹⁴⁹ The objective is to make the state take primary responsibility for service delivery through the HRBA.¹⁵⁰ This, coupled with an international human rights regimen; that obligates states to ensure human rights are respected, essentially portrays support for HRBA.¹⁵¹ Also, it places the focus on the people by contextualizing and ensuring their participation

¹⁴³ 'The Agreement on Trade-Related Aspects on Intellectual Property Rights (TRIPS)' Article 27.

¹⁴⁴ Ibid Articles 6 and 31.

¹⁴⁵ Sihanya (n 137).

¹⁴⁶ 'The Agreement on Trade-Related Aspects on Intellectual Property Rights (TRIPS)' (n 126) Article 27 (2).

¹⁴⁷ Sihanya (n 137).

¹⁴⁸ Noh (n 28).

¹⁴⁹ 'The Constitution of Kenya 2010' (n 73) Article 10.

¹⁵⁰ Noh (n 28).

¹⁵¹ Ibid.

through a participatory approach.¹⁵² Ideally, the HRBA is an interactive process;¹⁵³ involving the people and various state along with non-state actors and therefore necessitates drawing of necessary data from the people themselves to ensure progress in development. Kenya has made steps in addressing the socio-political realities in adopting technologies. The advent of the Blockchain and AI taskforce report as well as the move made by the President to explore technology transfer as a priority as a country, have augmented the various ways in which the country has adopted technologies. This has especially come to light in the health sector, where prospectively AI will be employed in hospitals to produce prescriptions and keep track of patient data records as well as the introduction of blockchain into the financial and banking sectors. It is important to note that despite the call for ToT to be carefully planned, it still begs the question as to what research system or policy framework is required to ensure right technologies are accessible to the appropriate communities in the most time-efficient manner so as to preclude rights violations. If at all the technologies transferred are meant to cater to technological needs, should there not be some way to predict the human rights threats in certain locations? Nevertheless, a context specific approach to HRBA is a definite step towards ensuring technology transfer processes that are responsive to local realities.

¹⁵² Ibid.

¹⁵³ Ibid.

Restoring The Limits of Judicial Adjudication: Focus on Impeachments

By: Wamuti Ndegwa*

This paper discusses the trend in common wealth countries where courts purport to adjudicate controversies which cannot be fully or substantially resolved by applying the law only i.e. non-justiciable controversies¹. The paper argues that courts should distinguish and avoid non-justiciable controversies. This view is supported by De Smith who asserts that there are some issues which are inherently unsuited to judicial adjudication. He says that courts should acknowledge that in some cases, the litigation process and the expertise of the courts are unsuited to resolving the question at hand². One of the reasons is that judicial adjudication is futile. Roscoe Pound summarized the scenario as,

‘... the law should [not] interfere ...in every human relation and in every situation where someone chances to think a social want may be satisfied thereby. Experience has shown abundantly how futile legal machinery may be in its attempts to secure certain kinds of interest’³.

The objective of the paper is to revive the rapidly disappearing distinction between justiciable and non-justiciable controversies. It will also address the further distinction between disputes which are subject to judicial discretion and the others reserved for the non-judicial. Matters reserved for non-judicial discretion include administrative, political, electoral, personal, and moral. As society becomes more and more litigious, it is imperative for courts to demarcate the external limits of judicial power lest they stray into alieno-solo. For example, in *Walter Nixon v United States*, the Supreme Court of U.S was asked to review the decision of U.S Senate to impeach Justice Nixon⁴. The

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¹ J. Sumption, ‘Judicial and political decision –making: the Uncertain Boundary’ (2011) J.R.301 para. 12.

² De Smith, *Judicial Review*, 7th Ed. (Sweet & Maxwell 2015)124.

³ Roscoe Pound, *Philosophy of law* (1954) 42-47.

⁴ 506 U.S. 224, 113S.Ct.732 (1993).

judge was convicted and jailed for a criminal offence but refused to resign. Nixon raised a fairly valid complaint that he was tried by a committee of the Senate instead of the whole House contrary to Article I Section 3 Clause 6 of the Constitution of the United States. Dismissing the matter as non-justiciable, the U.S Supreme Court cautioned that subjecting the procedures used by Senate to try impeachment charges to judicial review could 'expose the political life of the Country to months or perhaps years of chaos'⁵. The rationale of the ruling is discussed below⁶. At this stage, the point is that blurring the line between the non-justiciable and justiciable portends constitutional and political chaos. It is therefore necessary to demarcate⁷. The demarcating lines are discussed below.

Identifying the non-justiciable

The term non-justiciable is often used interchangeably with political question⁸. Therefore in the cases cited, political question means non-justiciable. In *Baker v Carr*, the U.S Supreme Court identified the non-justiciable as below,

*'Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or for a court undertaking independent resolution without expressing lack of the respect due to coordinate branches of government; or unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question'*⁹.

⁵ Ibid.

⁶ n .45.

⁷ Mark Elliott, 'The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law' (1999) 58 The Cambridge Law Journal 129 JSTOR. <<https://www.jstor.org/stable/pdf/4508533.pdf?refreqid=excelsior%3Aafdd0483dae17ffc7805b5709190c47a>>

⁸ Jared P Cole, 'The Political Question Doctrine: Justiciability and the Separation of Powers' (2014) 7 Congressional Research Service 28. <<https://fas.org/sgp/crs/misc/R43834.pdf>>

⁹ 369 U. S. 186, 217

Though the decision is not binding on Kenyan courts, it is highly persuasive. In U.S, it is settled and applied to sieve out and dismiss the non-justiciable. Apart from impeachment, other matters held to be non-justiciable include challenges to internal procedures of the U.K Parliament¹⁰, matters outside territory of U.K¹¹, declaration of war and cessation of international hostilities¹², recognition of foreign governments¹³, status of persons as representatives of foreign governments¹⁴, recognition of tribes¹⁵, interests of various communities¹⁶, enacting statutes inconsistent with others¹⁷, etc. These decisions follow *Marbury v Madison* in which the US Supreme Court held that where the text of the Constitution, structure and theory indicates that the issue is to be decided by legislative or executive branch of government, courts should in the interest of separation of powers dismiss the suit¹⁸. *Marbury*, a nominee for the post of a Judge, sought mandamus to compel Madison, the new Secretary of State, to deliver the instrument of nomination to the President for appointment. Ruling that the constitutional discretion of the President in appointment of Judges is non-justiciable, Justice Marshall said,

*‘...the President with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience... Questions in their nature political, or which are, by the constitution and laws submitted to executive, can never be made in this court’*¹⁹.

¹⁰ *R v Chaytor* (2010) U.K.SC.52;(2011)1A.C.684 ; *R v Parliamentary Commissioner for Standards Ex. p Fayed* (1998)1 W.L.R. 669.

¹¹ *R (On the Application of Majaed) v Immigration Appeal Tribunal* (2003)EWCA civ.516 (2003 A.C.D 70 at 13.

¹² *Commercial Trust Co. v Miller*, 262U.S. 51, 57, 43 S.Ct.484, 490, 46 L. Ed.662.

¹³ *Terlinden v Ames*, 184 U.S. 270,22S.Ct.484 490, 46, L. Ed.534.

¹⁴ *Ex parte Hitz*, 111 U.S. 766,4S.Ct 698, 28 L. Ed.592.

¹⁵ *United States v Holliday*, 3 Wall, 407, 419, 18 L. Ed. 182.

¹⁶ *United States v Sandoval*, 231 U.S. 28, 46, 34S.Ct. 1.6,58 L. Ed. 107.

¹⁷ *Georgia v. Stanton*, 6 Wall.50, 18 L. Ed. 721.

¹⁸ 5 U.S. 137 (1803)

¹⁹ *Ibid* at 170.

Identifying areas of non-judicial discretion

De Smith says that the principle of separation of powers confers matters of social and economic policy upon the legislature and executive rather than the judiciary. He says that courts should avoid interfering with the exercise of discretion by the legislature or executive²⁰. Citing Dworkin's, he asserts that it is not for judges to weigh utilitarian calculations of social economic or political preferences²¹. Distinguishing controversies that are subject to judicial discretion from those that are not, U.S. courts hold that where the question involves action or inaction of the executive arm of government, they will not order the executive to take action unless the duty or action is purely ministerial. In *Swan v Clinton*, the U.S Circuit Court defined ministerial duties as those in which nothing is left to discretion²². The Court explained that even where the word shall is used; the duty is discretionary if it involves judgment, planning, or policy decisions²³. In such cases, the duty of the government official is to exercise the discretion. Courts cannot direct the official to exercise the discretion in any particular way. In *NTEU*, the U.S Circuit Court held that for it to be purely ministerial, the duty must be simple and definite as to leave no room for discretion or 'so plainly prescribed as to be free from doubt and equivalent to a positive command...'²⁴. In *Consol. Edison Co. of N.Y. v Ashcroft*, the U.S Court of Appeals, District of Columbia Circuit held that 'where the duty is not thus plainly prescribed but depends on a statute or statutes, the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion'²⁵. These principles apply to suits seeking orders compelling the executive to take specific actions as well as those seeking declaratory judgments only²⁶.

In the more recent *Citizens for Responsibility and Ethics in Washington v Donald J. Trump*, the applicants complained that President Trump violated the Presidential Records Act, the Federal Records Act, and the 'take care' clause of the Constitution by failing to create and maintain records of his interactions

²⁰ De Smith, *Judicial Review*, 7th Ed. (Sweet & Maxwell 2015) 19..

²¹ Ibid, 20.

²² 100 F.3d 973, 977(D.C. Cir 1996)

²³ Ibid *CREW v Trump*.

²⁴ 492 F. 2d at 607-608.

²⁵ 286 F. 3d 600, 605(D.C. Cir.2002).

²⁶ Ibid.

with foreign leaders²⁷. They sought mandamus and injunction to compel the President to comply with the duties in the said provisions. Citing *Franklin v Massachusetts*²⁸, the U.S District Court held that even where the statute employs the word ‘shall’, courts do not have jurisdiction to order the President in the performance of his official duties and that courts have never submitted the President to declaratory reliefs unless the duty imposed is purely ministerial. The court went further to distinguish ministerial from discretionary duties. It defined ministerial as those which admit no discretion so that the official in question has no authority to determine whether to perform the duty. It concluded that even if the plaintiffs suffered injury from the acts or omissions, inability to exclude discretion on the part of the official means that the court had no jurisdiction and judicial process cannot redress the injury.

Earlier in *Armstrong*, the U.S Court of Appeals, District of Columbia Circuit had held that Congress did not intend to allow courts ‘at the behest of private citizens, to rule on the adequacy of Presidential records management practices or to overrule his decisions regarding creating, managing and disposing records’.²⁹ Further, courts must not attempt to supervise the day to day operations of the White House even when a complaint presents legitimate concerns about ongoing practices that threaten preservation of and public access to Presidential records.

In Kenya, the distinction between the justiciable and the non-justiciable as well as judicial and non-judicial direction is largely overlooked. Courts realize that the controversy cannot be resolved by the law after getting deeply involved instead of investigating justiciability as a preliminary question. When the difficulties identified in *Baker v Carr* arise, they escape by referring the dispute to alternative methods of dispute resolution. A good example is *Council of Governors & 47 others v Attorney General & 3 others*, where the controversy was on the allocation of revenue between the National

²⁷ Civil Action No.19-1333(ABJ) United States District Court for the District of Columbia.

²⁸ 505 U.S 788, 802(1992).

²⁹ *Armstrong v the Executive of the President*, 810 F. Supp 335 (DDC 1993)

Government and the County Governments.³⁰ In other cases, courts disregard *Baker v Carr* and purport to determine, only to be reversed on appeal often with unkind remarks. In *Olive Mwihaki Mugenda v Okiya Omtatah and others*³¹ the ELRC directed the Council of Kenyatta University to convene a meeting with stakeholders of the University and chat a way forward for appointing the Vice Chancellor. On appeal, the Court of Appeal harshly reminded the ELRC that the ELRC is not the human resource department of any organization and specifically, that the ELRC is not charged with the constitutional or statutory mandate to determine and oversee recruitment of individuals to any employment position. The order directing Kenyatta University Council to convene a meeting with stakeholders to chat the way forward was overturned as ultra-vires. In addition, the Court of Appeal reminded the ELRC that the ELRC could not impose its own procedure for recruiting the Vice Chancellor contrary to the procedure in the Universities Act and specifically, that stakeholder consultation was not required by the Act. Other Kenyan decisions on non-justiciable controversies are discussed below.

Other decisions in non-justiciable controversies in Kenya

Using the test in *Baker v Carr* on non-justiciability and the other cases cited on non-judicial discretion, I demonstrate that in Kenya, courts often stray into non-justiciable controversies and non-judicial discretion.

Impeachment charges

Judicial decisions on impeachment of governors deserve special attention in order to show the true import of the decisions in *Martin Wambora & 3 Others v Speaker of the Senate & 6 others*³² and *Martin Nyaga Wambora v County Assembly of Embu & 37 Others*³³. The two decisions are hereafter referred to as Wambora 1 and 2 respectively. They held that the High Court has constitutional and judicial review mandate under Article 165(3) (d)(ii) and (7) to interrogate the grounds and the evidence laid before the Senate in impeachment charges. The decision bears directly on who between the Courts and the other arms of state has the final word on the exercise of all

³⁰ *Council of Governors & 47 others v Attorney General & 3 others (Interested Parties); Katiba Institute & 2 others (Amicus Curiae)* [2020] eKLR

³¹ Court of Appeal (Nrb) Civil Appeal No. 3 & 11 of 2016.

³² [2014] eKLR

³³ [2015] eKLR

constitutional powers. These include impeachment of the President by parliament, impeachment of Cabinet Secretaries, national budget, parliamentary approval or rejection of appointments to offices of Chief Justice, Cabinet Secretary, approval or rejection of nominees of Governors to the County Executive, appointment of military commanders, choice of individual voter in elections, dismissal of Cabinet Secretaries, declaration of war, withdrawal of troops from war, recognition of foreign powers, accreditation of diplomats, parliamentary calendar and every other decision that is made under the Constitution. Left undisturbed, Wambora 1 and 2 mean that the Courts have the final word in the exercise of these powers. I will therefore spend considerable space on Wambora 1 and 2.

The text of Article 181 of the Constitution of Kenya and section 33 of the County Governments Act commits the decision on whether to uphold or dismiss impeachment charges against governors on County Assemblies and the Senate as discussed below. Article 181 provides that a county governor may be removed from office for gross violation of the constitution or any other law, where there are serious reasons for believing that he has committed a crime, abuse of office, gross misconduct, or physical or mental incapacity to perform the functions of his office. Section 181(2) requires Parliament to legislate the procedure for removal. The legislation is the County Governments Act. Section 33(1) of the Act provides that a member of the County Assembly supported by a third of all the members may move a motion for the County Assembly to remove the Governor. Section 33(2) provides that if the motion is supported by at least two thirds of all the members, the Speaker of the County Assembly shall inform the Speaker of the Senate. Section 33(3) (a) provides that the Speaker of the Senate shall convene the Senate to hear the charges. Section 33(4-5) provides that the senate may appoint a committee to investigate the matter and the committee must hear the representations of the Governor. Section 33(7) provides that the Governor shall cease to hold office if the committee finds that the charges are substantiated and the Senate, after giving the Governor a plenary hearing, upholds the impeachment charges by a majority of all members.

The text of these provisions leaves no doubt that the Constitution and statute intended that the decision on whether to uphold impeachment charges against governors be decided by political processes of the County Assembly and

Senate. However, in Wambora 1 and Wambora 2, the Court of Appeal crafted a roundabout way of conferring the courts the final say on the impeachment charges and ultimately on whether the governor should be impeached. It held that it is incumbent upon the High Court to go beyond its supervisory jurisdiction and invoke its constitutional mandate under Article 165(3) (d)(ii) and (7) to interrogate the allegations and evidence laid before the Senate and determine if they meet and prove the threshold in Article 181 of the Constitution. Further, that there must be evidence connecting the wrong doing and the governor. The standard of proof was set at beyond the balance of probabilities but below reasonable doubt³⁴. Article 165(3)(d) (ii) provides that the High Court shall have jurisdiction to hear the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent or in contravention of the Constitution³⁵.

I disagree with the interpretation for several reasons. First, because in both cases, the Court of Appeal conceded that removal of a governor is a political process. Further, that the process is not about criminality or culpability but about accountability, political governance and policy³⁶. In *Wambora 2* the Court of Appeal held that the process lies entirely with the County Assembly where it starts and Senate where it is concluded. That accordingly, the court may only come in purely to confirm that the procedure was followed³⁷. I agree entirely that the process is quasi-judicial. Therefore, as argued by De-Smith, the furthest judicial process can venture is to examine whether the procedure was followed³⁸. Purporting to examine the evidence on whether the Members of the County Assembly had serious reason for believing that the Governor abused his office, committed a crime or gross misconduct ventures into a question which the text of the law commits unequivocally to the County Assembly and the Senate.

³⁴ *Martin Nyaga Wambora v County Assembly of Embu & 37 Others* [2015] eKLR at paragraph 47-51 and Paragraph 15-19 of judgment of Justice GBM Kariuki.

³⁵ Art. 165(3) (d) (ii) Constitution of Kenya, 2010

³⁶ Court of Appeal (Nyeri) Civil Appeal No.21 of 2014.

³⁷ *Martin Nyaga Wambora v County Assembly of Embu & 37 Others* [2015] eKLR at paragraph 33.

³⁸ De Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (5th edn, Sweet & Maxwell 1995).

The second reason for disagreeing is that although Article III (2) of the Constitution of the United States confers similar powers to U.S courts, courts in U.S follow *Baker v Carr* in interpreting the provision to respect the separation of powers between the courts and the other organs, and hold that exercise of powers committed to the other organs is not justiciable. The Article provides that ‘Judicial power shall extend to all cases, in law, and equity, arising under this Constitution, the Laws of the United States, and treaties made, or which shall be made, under their authority’.

The third reason for disagreeing is that controversies on impeachment charges fit perfectly in the criteria laid in *Baker v Carr*³⁹. As shown above with regard to the first limb, the text of Article 181 the Constitution and section 33 of the County Government Act commit the final say on the impeachment charges to County Assemblies and Senate. There cannot be a judicially discoverable and manageable standard for determining whether the members of the County Assembly had serious reason for believing that the governor committed a crime, abused office, or engaged in gross misconduct because the threshold in Article 181 is subjective. Article 181 of the Constitution and section 33 of the County Governments Act refers to the ‘belief’. In the absence of a conviction by criminal court, there is no legitimate reason for believing that a person has committed a crime including abuse of office, which also happens to be a crime under the Anti-Corruption and Economic Crimes Act. Gross misconduct cannot be objectively established without an investigation report by the responsible commission under section 35 of the Public Officers Ethics Act. Therefore, the High Court cannot objectively determine whether the governor is guilty of the wrongdoing since it is not sitting as the criminal court or other relevant primary tribunal. It has no objective standard for second guessing the subjective opinions of the members of the County Assembly or Senate. It is ultra-vires for the court to substitute its subjective beliefs for those of the County Assembly. After all, a vote of confidence or lack thereof is not a legal term. It is a political opinion. The extrinsic evidence for holding the opinion may be useful but not decisive⁴⁰. In the U.K case of *R v Secretary of State for Trade and Industry Ex.p. Lonhro Plc*, Lord Keith pointed out that ‘courts must be careful not to invade the political field and substitute their own judgment

³⁹ Ibid 8.

⁴⁰ H.W.R.Wade & C.F. Forsyth, *Administrative law* 8th ed. (Oxford 2000) 416.

for that of the Minister. The courts judge the lawfulness not the wisdom of the decision'⁴¹.

On prohibition against imposing policies that are beyond judicial discretion, Wambora 1 and 2 overstepped court's mandate by purporting to formulate a policy that Governors do not bear personal political responsibility for the wrongdoings of their officers. Without such a policy, it was not possible for the court to determine whether the County Assembly was entitled to hold Governor Wambora politically responsible for the wrongdoings of the tender committee. To create a basis for exonerating the Governor from political responsibility, the Court was forced to craft and impose the dubious policy that though section 30(3) of the County Government Act holds governors accountable for the management and use of the County resources, the governor does not bear personal political responsibility for the sins of officers in managing County resources⁴².

On embarrassment by contrary decisions of other organs of government, the High Court was embarrassed in Wambora 1, since the County Assembly commenced fresh process to impeach the Governor on April 16, 2014, the same day that the High Court nullified the decision of the Senate to uphold impeachment charges. Undeterred, the Court of Appeal in Wambora 2 nullified the second decision of the Senate to uphold impeachment charges. Clearly, the courts judicialised the politics of Embu County. In *Hon. Ferdinand Ndung'u Waititu v County Assembly of Kiambu & 4 others*, the High Court was again embarrassed when the Senate voted to uphold the impeachment charges while the suit to nullify the charges was pending before Court⁴³. Going by Wambora 1 and 2, it is not unreasonable to expect that the courts will again claim the final say on whether Senate should have upheld the impeachment charges against Governor Waititu.

The fourth reason for disagreeing with Wambora 1 and 2 is that literal interpretation of Article 165(3) (d)(ii), that Courts have power to interrogate

⁴¹ (1989) WLR 525 at 536.

⁴² *Martin Nyaga Wambora v County Assembly of Embu & 37 Others* [2015] eKLR at paragraph 47-51 and Paragraph 22 of judgment of Justice GBM Kariuki.

⁴³ High Court (Nbi) Constitutional Petition No. 29 of 2020

the grounds and evidential basis of anything done under the authority of the constitution, creates juristocracy and constitutional chaos in the political life of the country. With respect to juristocracy, the interpretation gives the court the final say on all the matters mentioned above⁴⁴. On chaos, the U.S. Supreme Court in *Nixon v United States* foresaw the dramatic lack of finality where a President convicted by the Senate and who by text of the Constitution must forthwith cease to hold office challenges the conviction in court⁴⁵. The court foresaw that the authority of the sitting president would be severely impaired during the pendency of the judicial process and if the impeachment was nullified, during retrial by perhaps a differently constituted senate. It questioned the reliefs the court could give especially whether the court could reinstate the impeached president, depose the sitting, or create a co-presidency. Upon those concerns, the U.S. Supreme Court held that the word ‘try’ in Article I (3) clause 6 of the U.S Constitution providing that ‘Senate shall have sole power to try impeachments’, does not impose limit on the methods by which Senate may try impeachments. The argument was that the word ‘try’ has multiple meanings including examine, investigate, or test. It does not necessarily require a court-like trial and therefore, there is no judicially manageable standard of reviewing the trial by Senate⁴⁶. Save for substituting the National Assembly for County Assembly, Article 145(1) of the Constitution on removal of the President by impeachment is a replica of the provisions of Article 181(1) and section 33 of the County Government Act on removal of a governor by impeachment. The decisions of the Court of Appeal in Wambora 1 and 2 suggest that under Article 165(3) (d)(ii) and (7), the High Court has jurisdiction to examine the grounds and materials upon which the Senate reached the decision to uphold or reject impeachment charges. On the converse, if the decision of Senate not to uphold the charges is challenged, the High Court has jurisdiction to overturn and order the Senate to uphold the charges and thereby remove the President from office. The possibility of legal proceedings challenging an acquittal is crystallized by the decision of the County Assembly of Kirinyaga County to challenge the acquittal of Governor

⁴⁴ Leslie Friedman Goldstein, ‘From Democracy to Juristocracy’ (2004) 38 Law & Society Review 611 JSTOR.

<<https://www.jstor.org/stable/pdf/1555146.pdf?refreqid=excelsior%3Ab765bf75c9c66432677fbf8a9dd775c5>>

⁴⁵ 506 U.S. 224, 113S.Ct.732 (1993).

⁴⁶ Ibid 2, Judgement of Chief Justice Rehnquist.

Waiguru in the High Court⁴⁷. Consequently, courts must now confront the question of the reliefs available in event proceedings in event the challenge succeed. If the High Court substitutes the decision of Senate with its own upholding the charges, it must confront the further question whether the court is really the forum for deciding whether politicians will hold or cease holding political offices.

The decisions in Wambora 1 and 2 mean that the decision of Senate to convict or acquit the President of the Republic of Kenya on impeachment charges can be challenged. Such proceedings must start in the High Court since Article 163 refers to the High Court and the Supreme Court does not have original jurisdiction saves in presidential elections disputes. Validity of impeachment of a president being a national matter, the proceedings may be instituted in any registry of the High Court including Garsen, Kapenguria, Migori or Kerugoya. Such proceedings Senate would spark prolonged political uncertainty since Article 163(4) (a) provides a right of appeal all the way to the Supreme Court with conservatory orders, stay of execution, injunctions, suspension of processes along the process. I think opening doors for courts to review impeachments is sure recipe for constitutional cum political chaos if not civil war especially in Kenya. However, this is not to suggest that violations of private personal legal rights in exercise of non-justiciable power are not justiciable⁴⁸. In fact, in *INS v Chadha*, it was held that that the doctrine of political question is not automatically invoked by heavy political overtones in an otherwise constitutional question⁴⁹.

Back to impeachments, jurists including Hart and Sacks agree that courts should keep off, including in other non-justiciable controversies⁵⁰. This suggests that there is a limit to court's constitutional powers in Article 165(3) (d)(ii) and the judicial review jurisdiction in Article 165(7). In my view, the all judicial power ends where the political or otherwise non-justiciable question begins. Impeachments especially should not be judicialised since it is essentially a vote of no confidence. As such, it is a political decision devoid

⁴⁷ Jacinta Mutura, 'Waiguru ouster row now set for the High Court', Sunday Standard (Nairobi 28th June 2020) 6.

⁴⁸ *Boyd v Nebraska ex. rel. Thayer* 143 U.S. 135, 12 S.Ct. 375.

⁴⁹ 462 U.S. 919, 942-43(1983).

⁵⁰ Henry Hart and Albert Sacks, *The Legal Process* (8th ed) p.1994

of legal notions such as charges, evidence, trial, conviction, etc. Black's law dictionary defines the no-confidence vote as the formal legal method by which a legislative body forces resignation of a cabinet or ministry⁵¹. It is really about having or not having confidence in the person and confidence, like other non-justiciable questions, is a subjective quality. It cannot be measured judicially. However, there are contrary views that judicial intervention is justified in some cases. Justice Souter of the U.S Supreme Court in *Nixon v U.S.A* visualized unusual circumstances such as the Senate determining the trial by tossing a coin. He argued that such would be beyond the constitutional authority of the Senate and undermines public confidence in the Senate⁵². Henkin also argues that courts can review how Senate goes about impeachment trials to prevent what she calls excesses and infirmities⁵³. Gerhardt agrees that judicial review may be appropriate in some cases but cautions that it should not be too intrusive. He says that it should be limited to ensuring that the political organ made the particular decision entrusted to it by the Constitution⁵⁴. I would agree with Bickel that although to some extent it is possible to use the principle of law to decide impeachments, the principles of law must yield to other considerations such as political stability, consensus, national security etc⁵⁵.

Intimations of the political character of Senate decisions

The Senate debates on the motion to remove Prof. Kithure Kindiki from the office of the Leader of Majority demonstrate the irrelevance of the law in Senate decisions despite most participants being prominent scholars and practitioners of the law. The Senate Standing Orders provide that the holder of the office may only be removed on grounds of inability to perform his functions. Senator Kindiki, a professor of law, pointed out that the process was unconstitutional because he was not served with specific charges, was denied the right to be heard and the outcome was pre-determined. Opposing the motion, Senator Murkomen, another scholar of law, and Senator Cheruyoit

⁵¹ Bryan A. Garner, *Black's Law Dictionary*, South Asia Ed. 8th ed. (2015) 1073.

⁵² Ibid 2

⁵³ Louis Henkin, 'Is there a 'political Question doctrine'?', 85 Yale .L.J 597, 622 (1976).

⁵⁴ Michael J. Gerhardt, 'Rediscovering non-justiciability: Judicial Review of Impeachments after Nixon' (1944) Duke L. J. Vo.44, 244.

⁵⁵ Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 183-197 (2nd ed.1986)

demanded specific charges. Without bothering to explain the lack of specific charges, the overwhelming majority of senators, made it clear that the removal was about politics rather than competence or conduct of Kindiki. Senator James Orendo, a prominent legal practitioner, said that ‘this is all about politics of power not principles’. Senator Ole Kina reiterated that ‘we are here to discuss party politics not your competence’⁵⁶. In the end the Speaker, also a lawyer, upheld the vote to remove Kindiki. Commenting, Prof. Makau Mutua argued that the removal demonstrated that the law is a servant of politics and not the other way round⁵⁷. I agree entirely with Prof. Makau but worry that courts would most probably have followed Wambora 1 and 2 and restrained or nullified the decision of Senate removing Senator Kindiki. In fact, in the contemporary dispute of *Caleb Kositany & 3 others vs Raphael Tuju and 4 others*, the Political Disputes Resolution Tribunal restrained Jubilee Party from entering into a coalition with the Kenya African National Union⁵⁸.

Decisions in other non-justiciable areas

Apart from impeachments, courts get involved in other areas that are either probably non-justiciable or beyond the bounds of judicial discretion. In the *Law Society of Kenya v Cabinet Secretary for Defence & 4 Others*, the Law Society sued the Government for allegedly threatening the right to life of Kenyans by allowing flights from China at a time when China was said to be the epicenter of the outbreak of the corona-virus pandemic⁵⁹. The High Court ordered the Cabinet Secretaries not to allow flights from China. In a separate petition, the Court ordered Cabinet Secretaries to track down all passengers who arrived via a certain flight from China and quarantine them in military barracks until they are declared free from the corona virus⁶⁰. The question in the application was the best measures for preventing corona virus from spreading. No doubt the question turns on policy, logistics, planning and resources. *Baker v Carr* labels such considerations as non-justiciable. The Government Spokesman later commented that to comply with the order, the

⁵⁶ The Standard Group, ‘Uhuru Raila rally troops, topple Ruto ally from top Senate Position’ Saturday Standard (Nairobi May 23, 2020)10.

⁵⁷ Prof. Makau Mutua, ‘Purge Against Senate Illustrates why the law is a servant of politics’ The Sunday Nation, Nation Media Group (Nairobi 24th May 2020)14.

⁵⁸ Appeal No.1 of 2020

⁵⁹ High Court (Nbi) Petition No. 78 of 2020.

⁶⁰ High Court (Nbi) Petition No. 79 of 2020.

Government was required to evacuate soldiers from the barracks since military barracks are dormitories for soldiers. A subsequent order directed the Government to file reports indicating the steps taken by Ministries to control the spread of the disease⁶¹. Whether in reaction or on its own motion, the government took measures that are far beyond contemplation of any court. It suspended all flights into the country, imposed a curfew from 7pm to 5am, closed down all institutions of learning, restaurants, public entertainment spots, ordered employers to release employees at 3 pm, and imposed no-travel into or out of some regions. If we agree that these are some of the measures required to contain spread of the disease, we would perhaps agree that courts ought to leave such decisions to public health officials.

In *Republic v Nairobi City County Government & 6 others Ex Parte Mike Sonko Mbuvi*,⁶² the High court issued mandamus compelling the Cabinet Secretary for Transport, the Kenya Highways Authorities, and the County Government to within 60 days remove bumps and rumble strips along Thika Superhighway at “Survey of Kenya” and “Homeland/Kenya Breweries” and replace them with footbridges for pedestrians. The question of what between foot bridges, bumps, and rumble strips is appropriate depends on engineering, funding, priority, planning, and other non-legal considerations that are either not justiciable, or beyond judicial discretion or both. The lingering question is the juridical standard for analyzing those non-judicial considerations when choosing between foot bridges, road bumps, and ruble strips.

In *Adrian Kamotho Njenga v Council of Governors & 3 others*, the Environment and Land Court ordered the Cabinet Secretary for transport to constitute and chair a Working Group that includes representatives of all the respondents, to formulate the policy for providing toilets and other sanitation facilities on road network in Kenya in order to give effect to the right to clean and healthy environment on the roads. Further, that the national transport policy should incorporate toilets and other sanitation facilities as part of the roadside developments in road designs for existing and new roads, and designate sufficient number of such facilities on stops on the national and international trunk roads. In addition, that the policy should take into account

⁶¹ The Standard , ‘Court demands report on foreigners’, (Nairobi 4th March 2020) 21.

⁶² [2017] eKLR

the need to have the toilets and other sanitation facilities maintained properly by the county governments once constructed. Despite the legal issues involved, it cannot be denied that the decisions of which public amenities are to be prioritized belongs to planning, policy, political manifesto, funding, viability, and other non-legal considerations. The duty, if any, to provide toilets, is not plainly prescribed in those terms by any statute and there is no judicially discoverable and manageable standard for determining where, when, how, or which toilets.

In *Kenya National Union of Teachers v Teachers Service Commission*, the Employment and Labour Relations Court nullified the career progression scheme formulated by the Teachers Service Commission on the ground that the scheme was not implemented in accordance with the Code of Regulations for Teachers⁶³. The subsequent developments suggest that courts should have not waded into the controversy. Rather than applaud the decision, the teachers who were clearly the winners in the judgment withdrew from the union en-mass. The outcome suggests that the controversy required the evidently non-judicial managerial discretion of the TSC to allow the promotions and other benefits obtained by the member teachers to stand or fall with the nullified scheme.

In *Aviation and Allied Workers Union v Kenya Airways Limited & 3 others*, the ELRC ordered Kenya Airways to re-employ 447 employees terminated by the airline despite its plea that it simply could not afford their salaries⁶⁴. As pointed out in *Armstrong*, the court basically judicialised the managerial discretion of the airline in the day to day management of the human resource. A few months after the decision, the airline collapsed under debts. Not surprisingly, the decision was reversed by the Court of Appeal in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others*⁶⁵ but after causing near fatal injuries to the financial health of the airline.

⁶³ [2019] eKLR

⁶⁴ *Aviation and Allied Workers Union v Kenya Airways Limited & 3 others* [2012] eKLR

⁶⁵ *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR

Appointments to senior positions in Government including transfers from one station to another and in promotions show up in court styled as employment disputes⁶⁶. In *Republic v Deputy Inspector General of National Police & 32 others*, the Court issued certiorari quashing the decision of the Inspector General to transfer 30 police officers to different stations⁶⁷.

Nevertheless, the distinction between justiciable and non-justiciable is not entirely lost. In *Kiriwa Wa Ngugi & 19 others v Attorney General & 2 others*⁶⁸, the court held that the issues would be more effectively resolved by diplomatic, legislative, policy and other executive interventions rather than by a constitutional decision. In *Born Bob Maren v Speaker Narok County Assembly & 3 others*⁶⁹, the court held that controversy over removal from the position of the leader of the majority was un-justiciable since one comes into and remains in office through an election which is an expression of the wishes of his party. In *Okiya Omtatah v KRA Board of Directors & 2 others*, the petitioner sought a declaration that it was unconstitutional to appoint John Njiraini as the Commissioner General of Kenya Revenue Authority after attaining the mandatory retirement age. The ELRC observed that retirement was a question of policy, which policy did not bind the government especially where there was a reasonable explanation for departing without violating the law or the constitution⁷⁰.

Echoes from other jurisdictions on adjudicating the un-justiciable

The problem of purporting to adjudicate non-justiciable controversies shows up in other jurisdictions. In the UK case of *R (on the application of Miller) v The Prime Minister of the United Kingdom*, the UK Supreme Court determined that the Prime Minister was not entitled to prorogue the House of Commons⁷¹. The Prime Minister countered that whether to or not to prorogue Parliament was for politicians, not judges. He told Parliament that his Government did not agree but would respect the decision. The electorate resolved the controversy with finality by electing the Conservative Party of the Prime Minister with an

⁶⁶ *Republic v Deputy Inspector General of National Police & 32 others* [2013]eKLR

⁶⁷ [2013] eKLR.

⁶⁸ [2020] eKLR.

⁶⁹ [2015] eKLR.

⁷⁰ ELRC (Nrb) Petition No.103 of 2017.

⁷¹ *R (on the application of Miller) v The Prime Minister* [2019] UKSC 41

overwhelming majority⁷². Irrespective of the law, the Supreme Court was politically wrong while the Prime Minister was correct.

In *State of Washington and State of Minnesota v Trump*, a U.S District Court nullified the policy of President Trump to deny visas to nationals of certain Islamic countries⁷³. President Trump countered that the immigration and security policies of the U.S are the prerogative of the Federal Government. Subsequently, the President issued other orders worded differently but with the same effect. Another court nullified the second decision⁷⁴. At this point, the government evaded further controversies by measures that made migrating into the U.S from the countries in question become prohibitively rigorous without formal policy directives⁷⁵.

The common thread across the cases and jurisdictions is that controversies cut across multiplicity of disciplines such that they cannot be resolved satisfactorily by the law alone. The decision of the County Assembly to commence fresh impeachment in the wake of nullification of impeachment in Wambora 1, the landslide of the election of the party of Prime Minister Boris Johnson by an overwhelming majority, and inability of the U.S Courts to give effective relief to the immigrants demonstrate the futility of attempting to resolve non justiciable controversies judicially. Equity is wiser in refusing to act in vain⁷⁶.

Conclusion

The law cannot cure non-justiciable controversies merely because a rule or two says something about some minute aspect of the controversy. Wading into controversies that are essentially or substantially political, moral, religious, economic or cultural risks contradicting the text of the law, deciding

⁷² World News TV, 'Election Results 2019: Boris Johnson Returns to Power with Big Majority', www.npr.org. >2019/12/13<.

⁷³ 847 F.3d 1151 (9th Cir. 2017)

⁷⁴ *Arab Americans Civil Rights League v Trump* No.2:17-cv-10310(E.D.Mich.2017)

⁷⁵ Hill, James; Keneally, Meghan; Jacobo, Julia (February 13, 2017). "Court blocks Trump's immigration order indefinitely". ABC News.

<<https://abcnews.go.com/Politics/government-lawyers-call-delay-trump-immigration-order-case/story?id=45467116>>Accessed June 13, 2020.

⁷⁶ RE Meggary and PV Baker, *Snell's Principles of Equity* (25th edn, Sweet & Maxwell 1966) 528.

without judicially discoverable standard, usurping the policy discretion of other institutions, embarrassing outmaneuver by other institutions, and ultimately undermining the public confidence in administration of justice. As advised by Nairobi Law Monthly, courts would do better leaving such controversies to other process especially politics where voters approve or disapprove and its maker by voting for or against⁷⁷. Indeed, in the controversy over the budget of the County Government of Makueni, the County Assembly voted to impeach Governor Professor Kibwana. In turn, the Governor collected signatures towards dissolving the Assembly. Makueni voters resolved the controversy neatly and with finality in the next election by voting out 29 out of the 30 members of the County Assembly and loudly pronounced their confidence in the decisions of Governor Professor Kibwana by re-electing him with an overwhelming majority⁷⁸. I still wonder what would have become of the Makueni controversy had it chanced in courts.

⁷⁷ Denis Nderitu, The Nairobi Law Monthly Vol.11 October 2019 at 85.

⁷⁸ Edmond Nyabola, 'Makueni MCA's who tried to impeach Kibwana lose seats', (NTV news Nairobi) <https://kenyans.co.ke/news>. Accessed 1 July 2020.

Promoting Community Based Approaches in Environmental and Natural Resources Management in Kenya: A Reality or Mere Formality?

*By: Kariuki Muigua**

Abstract

Exploitation of environmental and natural resources forms the source of livelihoods for many communities across the world and particularly Kenya. However, for assured flow of such benefits for the current and future generations, the Sustainable Development agenda calls for a balance between conservation and fulfilment of human needs. It also calls for active and meaningful participation of all stakeholders, including communities in the management of such resources. This paper discusses the place of community based natural resource management approach in Kenya and makes a case for enhanced use of the same in management of various resources in the country, as way of enhancing conservation measures as well as eradication of poverty among various communities.

1. Introduction

Natural Resource Management (NRM) is used to refer to the sustainable utilization of major natural resources, such as land, water, air, minerals, forests, fisheries, and wild flora and fauna.¹ Environmental and natural resources form the main source of livelihoods for majority of Kenyan communities. It is in recognition of this relationship that the Constitution of

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¹ Iyyanki V Muralikrishna and Valli Manickam, 'Chapter Three - Natural Resource Management and Biodiversity Conservation' in Iyyanki V Muralikrishna and Valli Manickam (eds), *Environmental Management* (Butterworth-Heinemann 2017) <<http://www.sciencedirect.com/science/article/pii/B9780128119891000038>> accessed 10 July 2020.

Kenya 2010 and the statutes on natural resources provide for co-management of these resources. This is not only meant to ensure that the communities are assured of food and maybe a source of income but also gives them a chance to participate in the conservation and management of these resources for the realisation of sustainable development agenda. This paper offers a critical discussion on the place of Community Based Natural Resource Management (CBNRM) in Kenya and whether the State has effectively implemented the provisions on the same.

2. Approaches to Environmental and Natural Resources Management

Notably, natural resources provide fundamental life support, in the form of both consumptive and public-good services while ecological processes maintain soil productivity, nutrient recycling, the cleansing of air and water, and climatic cycles.² In a bid to strike a balance between the consumptive and public-good services on the one hand and ecological processes on the other hand, different approaches to resource management have been adopted.

Policymakers often adopt one or a combination of these approaches when legislating on protection of the environment and natural resources.³ These approaches include command and control, market-based approaches, incentives (taxation and subsidies); Community based natural resource management (CBNRM) and traditional resource management institutions⁴; Ecosystem-based approaches such as integrated water resources management

² Iyyanki V Muralikrishna and Valli Manickam, 'Chapter Three - Natural Resource Management and Biodiversity Conservation' in Iyyanki V Muralikrishna and Valli Manickam (eds), *Environmental Management* (Butterworth-Heinemann 2017) <<http://www.sciencedirect.com/science/article/pii/B9780128119891000038>> accessed 10 July 2020.

³ Gunningham, N. & Sinclair, D., 'Designing Smart Regulation,' in Bridget M. Hutter (ed), *A Reader in Environmental Law* (Oxford University Press, 1999), p.305; Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi – 2015, Chapter Three.

⁴ See generally, Measham, T.G. & Lumbasi, J., "Success factors for Community Based Natural Resource Management (CBNRM): lessons from Kenya and Australia." *Environmental Management*, Vol. 52 (3), 2013, pp. 649-659.

(IWRM) or River basin management, integrated coastal zone management (ICZM) and integrated management of land⁵.

While the different approaches to environmental and natural resources management as listed above are to be applied as complementary tools in natural resource management and not mutually exclusive as they overlap with one another in their application⁶, this paper is mainly concerned with Community-based natural resource management approach.

2.1 Community Based Approaches in Environmental and Natural Resources Management

Community-based natural resource management (CBNRM) has been defined in different ways by different authors. One of the definitions that stand out is CBNRM as ‘a people-centered approach to the integration of conservation of the natural resource base (water, soil, trees and local biodiversity) and development to overcome poverty, hunger and disease’.⁷

Community based approaches in environmental and natural resources management come in various forms which include: social and community forestry, community wildlife management, cooperative or co-management, buffer zone management, participatory multipurpose community projects, communal area management for indigenous resources, among others.⁸

⁵ See Feeney, C. & Gustafson, P., “Integrating Catchment and Coastal Management-A Survey of Local and International Best Practice,” *Prepared by Organisation for Auckland Regional Council, Auckland Regional Council Technical Report 2009/092*, 2010.

⁶ Blanco, E. & Razzaque, J., *Globalisation and Natural Resources Law: Challenges, Key Issues and Perspectives*, (Edward Elgar Publishing Limited, 2011), p. 106; See also Miller, B. W. & Morisette, J. T., “Integrating research tools to support the management of social-ecological systems under climate change,” *Ecology and Society*, Vol. 19, No. 3, 2014, Art. 41.

⁷ ‘Community Based Natural Resources Management’ (*World Neighbors*) <<https://www.wn.org/what-we-do/community-based-natural-resources-management/>> accessed 8 July 2020.

⁸ Stephen R Kellert and others, ‘Community Natural Resource Management: Promise, Rhetoric, and Reality’ (2000) 13 *Society & Natural Resources* 705, at pp. 705-706.

Despite often important differences, all these expressions of CBNRM are associated with certain characteristics, including: a commitment to involve community members and local institutions in the management and conservation of natural resources; an interest in devolving power and authority from central and/or state government to more local and often indigenous institutions and peoples; a desire to link and reconcile the objectives of socioeconomic development and environmental conservation and protection; a tendency to defend and legitimize local and/or indigenous resource and property rights; and a belief in the desirability of including traditional values and ecological knowledge in modern resource management.⁹

CBNRM approaches have been associated with the following key elements: multi-stakeholder collaboration that involves all participants, from communities, to government, to NGOs, and promotes coordination among them; conflict management mechanisms – support processes to manage natural resource conflicts among stakeholders; participatory action research – collaborative fact-finding and analysis generates a mutually agreed upon perspective for action; strong local organizations, such as forest-farmer groups and inter-village networks built from the bottom-up; livelihood improvement and environmental services; policy support and law enforcement are essential to curbing illegal encroachment leading to ecosystem degradation; collaborative management plans– shared responsibilities and decision-making among all stakeholders through joint management plans of natural resources; participatory monitoring and evaluation – promote learning, trust and accountability through monitoring of the natural resource base and application of the management plan; and gender and social justice in access to, and control of, natural resources as the ultimate measure of the sustainability of community-based natural resource management efforts.¹⁰

The next section offers an overview of Kenya’s regulatory framework on the adoption and implementation of CBNRM approach as far as management of

⁹ Ibid, at p. 706.

¹⁰ ‘Community Based Natural Resources Management’ (*World Neighbors*) <<https://www.wn.org/what-we-do/community-based-natural-resources-management/>> accessed 10 July 2020.

environmental and natural resources in the country are concerned. It also critically discusses the effectiveness of Kenyan Government's efforts and commitment in adoption and application of Community-based natural resource management approach as per the statutory provisions.

3. Regulatory Framework on Community Based Approaches in Environmental and Natural Resources Management in Kenya: Challenges and Prospects

The regulatory framework on management of environmental and natural resources in Kenya consists of the Constitution and various sectoral laws and policies. This section highlights some of these provisions with a bias on those that provide for the use of community based environmental and natural resources management.

To begin with, the national values and principles of governance such as sharing and devolution of power; democracy and participation of the people and sustainable development provide a basis for CBNRM.¹¹ The Constitution obligates the State to protect and enhance indigenous knowledge of biodiversity of the communities.¹² The State is also obligated to encourage public participation in the management, protection and conservation of the environment.¹³ In settling land disputes, communities are encouraged to apply recognized local community initiatives consistent with the Constitution.¹⁴ This is meant to enhance community involvement in natural resource management since these provisions encourage in one way or the other the participation of local communities in the management, use or ownership of natural resources.¹⁵ Notably, the 2010 Constitution of Kenya envisages community land which is classified as land that is lawfully held, managed or used by specific

¹¹ Constitution of Kenya 2010, Art.10.

¹² *Ibid*, Art. 69(1) (c).

¹³ *Ibid*, Art. (1) (d).

¹⁴ *Ibid*, Art.60 (1) (g) and Art.67 (2) (f).

¹⁵ Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi – 2015, Chapter Three.

communities as community forests, grazing areas or shrines.¹⁶ It envisages a scenario where there is land management by communities.¹⁷

The Constitution also provides for community forests.¹⁸ The protection of community land and by extension forests is guaranteed in the Constitution in the sense that all unregistered land should be held in trust by the county governments on behalf of the communities.¹⁹ It is also provided that community land should not be disposed of or otherwise used in a manner that contravenes the rights of the members of that particular community.²⁰

Also worth mentioning is the paradigm shift towards the use of incentives to encourage community participation in wildlife management in Kenya.²¹ If private land owners and communities are given incentives to keep wildlife on their land, then they will perceive wildlife as an economic good and protect the wildlife in the same manner they protect their private property. This is important because command and control approaches to wildlife management have failed to curb loss of wildlife.

In forests management, the *Forest Conservation and Management Act 2016*²² provides for "community forest association" which means a group of local persons who have registered as an association or other organization established to engage in forest management and conservation.²³

¹⁶ Constitution of Kenya 2010, Art.63(d).

¹⁷ *Ibid.*

¹⁸ Kibugi, R. *Governing Land Use in Kenya: From Sectoral Fragmentation to Sustainable Integration of Law and Policy*. Thesis submitted to the Faculty of Graduate and Postdoctoral Studies in partial fulfillment for the Doctors of Laws (LL.D) degree, University of Ottawa (2011), p. 443.

¹⁹ Art.63(3) of the Constitution.

²⁰ *Ibid.*, Art.63 (4).

²¹ One of the objectives of the *National Wildlife Conservation and Management Policy, 2012* is to promote partnerships, incentives and benefit sharing to enhance wildlife conservation and management. The Policy further proposes that the Government should provide economic incentives to induce or promote sustainable wildlife conservation and management; See also the *Wildlife Conservation and Management Act, 2013*, No. 47 of 2013, s.5.

²² Forest Conservation and Management Act, No. 34 of 2016, Laws of Kenya.

²³ *Ibid.*, Sec. 48.

Where a community forest association has been granted permission to participate in the management or conservation of a forest in accordance with the provisions of the Act, that association has obligations to: protect, conserve and manage the forest or part of the forest in accordance with an approved management agreement entered into with the Service and the provisions of the management plan for the forest; formulate and implement sustainable forest programmes that shall be consistent with the traditional forest user rights of the relevant forest community; protect sacred groves and protected trees; assist the Service or any other relevant authority in enforcing the provisions of the Act including in relation to illegal harvesting of forest products; with the approval of the Service enter into partnerships with other persons for the purposes of ensuring the efficient and sustainable conservation and management of the forest; inform the Service of any developments, changes and occurrences within the forest which are critical for the conservation of biodiversity; help in firefighting; and do any other act that is necessary for the efficient conservation and management of the forest.²⁴

On the other hand, the management agreement between the Service and the community forest association confers on the association all or any of the following forest user rights: collection of medicinal herbs; harvesting of honey; harvesting of timber or fuel wood; grass harvesting and grazing; collection of forest produce for community based industries; ecotourism and recreational activities; scientific and education activities; plantation establishment through non-resident cultivation; contracts to assist in carrying out specified forestry operations; development of community wood and non-wood forest based industries; and other benefits which may from time to time be agreed upon between an association and the Service.²⁵

This is meant to motivate communities to invest in sustainable forestry management. Participation of communities in forests management is informed by the fact that exclusion of local communities in management and conservation of natural resources tends to escalate degradation rather than

²⁴ Ibid, sec. 49 (1).

²⁵ Ibid, sec. 49 (2).

conservation.²⁶ The sense of ownership by communities facilitates gainful benefits to the local communities as well as encouraging community eco-governance.²⁷

While it is commendable that the Act recognizes the constitutional provisions on public participation by incorporating participatory and collaborative management of forests, where the public can actively and meaningfully be more involved in the conservation and management of forests, it appears like the drafters only envisaged a non-residential kind of cooperation, where any person who wishes to participate in the form of Community Forests Association must first apply for a permit and then must also do so while living within the area surrounding the forest in question and not inside the forest. The question that arises in such situations is what happens when the State is dealing with communities that have traditionally resided in such forests. Notably, The *Forest Conservation and Management Act 2016* recognises that community forests include forests on ancestral lands and lands traditionally occupied by hunter-gatherer communities.²⁸ How the State treats such scenarios raises a number of issues. It is not clear whether the State should allocate alternative settlement for such communities in order to achieve the non-resident approach to co-management or the Government should simply evict such communities as it has been the case in the recent past.²⁹

²⁶ See Vyamana, V.G., *et al*, 'Participatory Forest Management in the Eastern Arc Mountain area of Tanzania: Who is benefiting?' Available at http://iasc2008.glos.ac.uk/conference%20papers/papers/V/Vyamana_134501.pdf [Accessed on 8/07/2020].

²⁷ 'Eco-social sustainability in the Murray-Darling Basin,' *Case study: regional sustainability efforts in the Murray-Darling Basin*, (Hawke Research Institute, University of South Australia, 2010). Available at <http://w3.unisa.edu.au/hawkeinstitute/research/ecosocial/eco-case-study.asp#top> [Accessed on 8/07/2020].

²⁸ Forest Conservation and Management Act, No. 34 of 2016, Sec. 30 (3) (e).

²⁹ 'Imminent Eviction of Ogiek from Homeland'

<<https://www.culturalsurvival.org/news/imminent-eviction-ogiek-homeland>> accessed 11 July 2020; 'Mau Forest Evictions Leave Ogiek Homeless' <<https://www.culturalsurvival.org/news/mau-forest-evictions-leave-ogiek-homeless>> accessed 11 July 2020; 'Press Release: Kenya's Mau Ogiek Remain Excluded from Ancestral Forest Three Years after Landmark Land Rights Win | Forest Peoples Programme' <<https://www.forestpeoples.org/en/Kenya-Ogiek-still-excluded-from->

The laws governing water resources in the country also envisage community involvement in the management of these resources. The *Water Act 2016*³⁰ provides that water resource users associations may be established as associations of water resource users at the sub-basin level in accordance with Regulations prescribed by the Authority.³¹ A water resource users association shall be a community based association for collaborative management of water resources and resolution of conflicts concerning the use of water resources.³² Notably, the basin water resources committees may contract water resource users associations as agents to perform certain duties in water resource management.³³

As one of the strategies for co-management, the *Water Act 2016* provides for the designation of a defined area from which rain water flows into a watercourse to be a basin area for the purposes of the Act.³⁴ In addition, the Cabinet Secretary is, by notice published in the *Gazette*, to establish a basin water resources committee for each respective basin area provided for under section 24.³⁵ Such a basin water resources committee shall be responsible for the management of the water resources within a respective basin area.³⁶ In appointing members of the basin water resources committee, the Authority must ensure that such persons are residents of the respective basin area and shall include: a representative of a ministry responsible for matters relating to water resources; a representative of farmers or pastoralists within the basin area concerned; a representative of a public benefits organisation engaged in

forest-three-years-after-land-rights-win> accessed 11 July 2020; ‘Two Years on, Kenya Has yet to Implement Judgment in Ogiek Case – MRG Statement’ (*Minority Rights Group*, 5 June 2019) <<https://minorityrights.org/2019/06/05/two-years-on-kenya-has-yet-to-implement-judgment-in-ogiek-case-mrg-statement/>> accessed 11 July 2020; ‘Ogiek: We Support Eviction of Illegal Settlers from Mau Forest’ (*Daily Nation*) <<https://www.nation.co.ke/kenya/counties/nakuru/ogiek-we-support-eviction-of-illegal-settlers-from-mau-forest-85436>> accessed 11 July 2020.

³⁰ Water Act, No. 43 of 2016, Laws of Kenya.

³¹ *Ibid*, sec. 29 (1).

³² *Ibid*, sec. 29 (2).

³³ *Ibid*, sec. 29 (4).

³⁴ *Ibid*, sec. 24 (1).

³⁵ *Ibid*, sec. 24 (2).

³⁶ *Ibid*, sec. 24 (3).

water resources management programmes within the basin area concerned; and a representative of the business community operating within the basin area concerned.³⁷

The powers and functions of the basin water resources committee shall be to advise the Authority and county governments, at the respective regional office, concerning: conservation, use and apportionment of water resources; the grant, adjustment, cancellation or variation of any permit; protection of water resources and increasing the availability of water; annual reporting to the users of its services and the public on water issues and their performance within the basin area; collection of data, analyzing and managing the information system on water resources; review of the basin area water resources management strategy; facilitation of the establishment and operations of water resource user associations; flood mitigation activities; information sharing between the basin area and the Authority; the equitable water sharing within the basin area through water allocation plans; and any other matter related to the proper management of water resources.³⁸

The Water Act 2016 requires that every county government must put in place measures for the provision of water services to rural areas which are considered not to be commercially viable for the provision of water services.³⁹ These measures shall include the development of point sources, small scale piped systems and stand pipes which meet the standards set by the Regulatory Board and which may be managed by the community associations, public benefits organizations or a private person under a contract with the county government.⁴⁰

Notably, the role of the user bodies established or appointed under the Water Act 2016 is merely to advise the Water Resources Management Authority, which is not obliged to take the advice. This was the same case in the pre-2010

³⁷ Ibid, sec. 26 (3).

³⁸ Ibid, sec. 27.

³⁹ Ibid, sec. 94 (2).

⁴⁰ Ibid, sec. 94 (3).

constitutional era where the Water Act 2002 had similar provisions.⁴¹ The National Water Policy 1999 and the Water Act 2002, provided for a new institutional set-up for water resources management and water services provision at national and basin level. For participation of users/consumers and their empowerment, the Water Resources Users Associations (WRUAs) and Water Consumer Groups (WCGs) were established. In addition, Water Services Boards (WSBs) were established to promote asset development.⁴² Despite all these provisions in both pre and post 2010 constitutional statutes, there is little evidence that decentralized co-management approaches to water management in the country have been well utilised to ensure that all people enjoy their right to clean water while ensuring sustainable management of the water resources in the country.

The *Wildlife Conservation and Management Act, 2013*⁴³ envisages community participation in wildlife resources management through community wildlife associations and wildlife managers.⁴⁴ These are to be established by communities, landowners, groups of landowners and existing representative organizations. The object and purpose for which an association is established is to facilitate conflict resolution and cooperative management of wildlife within a specified geographic region or sub-region.⁴⁵ An association or wildlife manager approved by the Cabinet Secretary on the recommendation of the Kenya Wildlife Service in consultation with the county wildlife conservation committees shall: ensure that the association membership or the wildlife manager protects, conserves and manages wildlife conservancies and sanctuaries under their jurisdictions pursuant to their respective approved management plans; assist the service in combating illegal activities, including poaching and bush meat trade; keep the regional wildlife conservation area committee informed of any development changes and

⁴¹ See generally, Akech M., "Governing Water and Sanitation in Kenya," in Okidi, C.O., et al, (eds) *Environmental Governance in Kenya: Implementing the Framework Law*, (EAEPL, 2008), p.324.

⁴² Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi, 2015, Chapter Three.

⁴³ Wildlife Conservation and Management Act, No. 47 of 2013, Laws of Kenya.

⁴⁴ Ibid, sec. 40 (1).

⁴⁵ Ibid, sec. 40 (2).

occurrences within their area that may adversely affect wildlife; assist in problem animal control through community wildlife scouts drawn from among their membership or employees; and do any other act that is necessary to enhance community participation in wildlife protection, conservation and management.⁴⁶

The provisions for co-management of wildlife resources are meant to address the perennial human-wildlife conflict Kenya.⁴⁷ However, the same has had little success in curbing the problem if the recent statistics are anything to go by.⁴⁸

Some authors have even argued for the adoption of collaborative management in wildlife sector on grounds that both the state-based and community-based models of managing wildlife and other natural resources have failed to successfully fulfil goals of conservation and meet the socio-economic needs of the local communities.⁴⁹ To them, the co-management approach (also sometimes referred to as joint management, multi-stakeholder management, or management in partnership) seeks to create negotiated agreements between the protected areas' managers and local resource users and, therefore, offers a possibility to overcome conflicting interests over resource exploitation.⁵⁰ The

⁴⁶ Ibid, sec. 41.

⁴⁷ Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi, 2015, Chapter Nine.

⁴⁸ '77 People Killed in Human-Wildlife Conflicts in 2018: Balala' (*Daily Nation*) <<https://www.nation.co.ke/kenya/news/77-people-killed-in-human-wildlife-conflicts-in-2018-balala-182650>> accessed 11 July 2020; 'Human-Wildlife Conflicts and Compensation for Losses in Kenya' (*AfricanBioServices*) <<https://africanbioservices.eu/human-wildlife-conflicts-and-compensation-for-losses-in-kenya/>> accessed 11 July 2020; Joseph M Mukeka and others, 'Human-Wildlife Conflicts and Their Correlates in Narok County, Kenya' (2019) 18 *Global Ecology and Conservation* e00620.

⁴⁹ John Mburu and Regina Birner, 'Wildlife Co-Management in Kenya: An Empirical Analysis of Landowners' Incentives for Participation'. *Deutscher Tropentag 2002 Witzhausen, October 9-11, 2002 Conference on International Agricultural Research for Development* <<https://pdfs.semanticscholar.org/8fa7/f0de16651abdf88ee91491a2c58a244c2f05.pdf>> accessed 11 July 2020.

⁵⁰ Ibid, pp. 1-2.

Wildlife Conservation and Management Act 2013 also envisages this co-management approach and the same should be explored.

In addition to the foregoing sectoral statutes, cultural and social principles applied traditionally by communities in management of environmental and natural resources are recognized under EMCA in so far as they are not inconsistent and repugnant to justice and morality or any other written law.⁵¹ Despite the statutory and constitutional provisions encouraging CBNRM approach in Kenya, there is overwhelming evidence that the State has done little if anything to implement the same. Indeed, the opposite may be said to be true if some of the State actions are anything to go by.

In this context, the Ogiek and the Endorois communities in Kenya are the main reference point. The reason for this is that they are forest dwellers and there has been an issue as to whether they should manage the forests in which they live in or it should be left to state institutions such as the Kenya Forestry Service. The Ogiek are a forest dwelling people who live in the Mau forest in Nakuru. The Endorois, on the other hand, live near the Lake Bogoria reserve. The claim of the two communities has been tenure rights within the forest and wildlife protected areas.⁵² The issue has been a subject of litigation at the African Commission on Human and Peoples Rights.⁵³ It can, therefore, be argued that the two communities have their rightful place in the forests according to the Constitution and since they manage the forests, they are part

⁵¹ S. 5(b) of the Environmental Management and Co-ordination Act, 1999.

⁵² 'Defending Our Future: Overcoming the Challenges of Returning the Ogiek Home' (*Minority Rights Group*, 27 May 2020) <<https://minorityrights.org/2020/05/27/defending-our-future-overcoming-the-challenges-of-returning-the-ogiek-home/>> accessed 11 July 2020.

⁵³ 276 / 2003 – *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*; Application No. 006/2012 – *African Commission on Human and Peoples' Rights v. The Republic of Kenya* (The Ogiek case arose from Communication No. 381/09 – *Centre for Minority Rights Development – Kenya and Minority Rights Group International (on behalf of the Ogiek Community of the Mau Forest) v Kenya*, which was before the African Commission on Human and Peoples' Rights (the Commission), and later referred to the Court.)

of the community-based organizations that should be meaningfully included in the management of natural resources.

4. Walking the Talk: Making Community Based Approaches in Environmental and Natural Resources Management Work in Kenya

Some commentators have argued that due to the ‘interdependence of community well-being and ecosystem health, there is a need to strengthen the capacity of communities to have a voice in decisions about planning and design of conservation initiatives affecting them’.⁵⁴ This is because ‘the natural environment plays a huge role in the health and welfare of people who rely on it as their sole source of income and food’.⁵⁵ CBNRM approach not only gives communities a voice in management of natural resources within their locality but also allows them to benefit from them and also avert any adverse effects of environmental degradation, in recognition of the right to clean and healthy environment⁵⁶. It allows them to enjoy environmental democracy. Environmental democracy entails the principle of equal rights for all including the public, community groups, advocates, industrial leaders, workers, governments, academics and other professionals to be involved in environmental governance.⁵⁷ It connotes the right of all whose daily lives are affected by the quality of the environment to participate in environmental decision-making as freely as they do in other public interest matters such as education, health care, finance and government.⁵⁸ Access to environmental information and justice for all those who choose to participate in such decision-making is integral to the concept of environmental democracy.⁵⁹ In addition, Principle 10 of the *Rio Declaration*⁶⁰ provides that environmental

⁵⁴ ‘Community Based Natural Resources Management’ (*World Neighbors*) <<https://www.wn.org/what-we-do/community-based-natural-resources-management/>> accessed 10 July 2020.

⁵⁵ *Ibid.*

⁵⁶ See Article 42, Constitution of Kenya, 2010.

⁵⁷ Hazen, S., *Environmental Democracy*, (1998). Available at <<http://www.ourplanet.com>> [Accessed on 12/7/2020]; Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016), Chapter Five.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ United Nations, *Rio Declaration of 1992*, UN Doc. A/CONF.151/26 (Vol. I).

issues are best handled with the participation of all concerned citizens, at the relevant level. It further provides for access to information by the public. At the national level, each individual must have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States must facilitate and encourage public awareness and participation by making information widely available.⁶¹

It has rightly been pointed out that ‘many indigenous peoples are still heavily dependent on natural resources for their survival, and have, over time, developed social and cultural mechanisms that reflect the very real dynamics of natural systems’.⁶²

CBNRM approach is informed by the view that sustainable management of natural resources is most likely to be achieved where local communities are able to manage and derive benefits from natural resources.⁶³ The approach calls for a commitment to involve community members and local institutions in management of natural resources, devolution of power and authority to the grass roots, a desire to reconcile the objectives of socio-economic development and environmental conservation, the tendency to defend and legitimize local and indigenous property rights and a desire to include traditional values in modern management of natural resources.⁶⁴

⁶¹ Report of the United Nations Conference on Environment and Development (Rio De Janeiro, 3-14 June 1992).

⁶² Jay Mistry, ‘Indigenous Knowledges’ In Kitchin R, Thrift N (eds) *International Encyclopedia of Human Geography*, Volume 5, pp. 371–376. Oxford: Elsevier. <https://www.academia.edu/940129/Indigenous_knowledges> accessed 10 July 2020.

⁶³ Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi – 2015, Chapter Three.

⁶⁴ Nelson F. & Agrawal, A., “Patronage or Participation? Community-based Natural Resource Management Reform in Sub-Saharan Africa,” *Journal of Development and Change*, vol. 39, No.4, 2008, pp.557-585; See also Kellert, S.R., *et al*, “Community Natural Resource Management: Promise, Rhetoric and Reality,” *Society and Natural Resources: An International Journal*, Vol.13 (8), p.706; Muigua, K., Kariuki, F.,

It is for these reasons that the Government of Kenya and other stakeholders in the management of environment and natural resources should reconsider and address the laxity experienced in the implementation of CBNRM approach in Kenya.

Kenya can learn from other countries within and beyond Africa. For instance, in Malawi, Lake Chilwa, a tropical lake without an outlet, and the second largest lake in Malawi, is a home to large populations of breeding waterfowls and an estimated 100 bird catchers are rely economically on the birds.⁶⁵ It is worth noting that the Lake is listed as a Ramsar site. The fertile Lake Chilwa Wetland also has a lot of agricultural activities with two main crops grown, maize and rice, and sustains thousands of people through rice farming and cultivation of a variety of vegetables.⁶⁶ A number of Community-Based Natural Resources Management (CBNRM) groups have been formed to manage different resources like fish, waterfowls, soil and trees.⁶⁷ While these groups are yet to receive user rights and legal tenure, Kenya can borrow a leaf especially around swampy areas and Lake Victoria which is currently choked by the invasive water hyacinth. The community living around the lake should be allowed to work closely with the Government to not only manage fish resources but also to keep the water resource clean. Kenya can also borrow a leaf from the management of the Okavango Delta System (a Ramsar site) in Botswana. The Okavango Delta is divided into Wildlife Management Areas (WMAs). These have been further divided into: Controlled Hunting Areas (CHAs); Commercial Wildlife Utilization; Community Managed Wildlife Utilization; Community Based Natural Resources Management Programme; and Non-Consumptive/Photographic.⁶⁸

Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi – 2015, Chapter Three.

⁶⁵ ‘Community-Based Natural Resources Management - the Case of Lake Chilwa Wetland, Malawi | Ramsar’ <<https://www.ramsar.org/news/community-based-natural-resources-management-the-case-of-lake-chilwa-wetland-malawi>> accessed 12 July 2020.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ JobeManga and Gertrude Matswiri, ‘Expert Meeting: Transboundary Cooperation For Protecting The Cubango-Okavango River Basin & Improving The Integrity Of The Okavango Delta World Heritage Property,’ 3-4 June, Cresta Hotel, Maun,

Zimbabwe's Communal Areas Management Programme for Indigenous Resources (CAMPFIRE) also offers valuable example to Kenya. CAMPFIRE, started in the late 1980s in Zimbabwe, and subsequently widely emulated elsewhere in southern Africa, involves the sale by rural authorities of the rights to access wildlife to entrepreneurs who in turn market safaris to hunters and eco-tourists.⁶⁹ CAMPFIRE was developed largely around the concept of managing wildlife and wildlife habitat in the communal lands of Zimbabwe for the benefit of the people living in these areas.⁷⁰

The Bigodi Wetland Sanctuary in Uganda is also another example where the local community has been running a successful community-based natural resource management programme (CBNRM) for the wetland for over a decade, with external visitors to the wetland providing ecotourism revenues and majority of households collecting a wide variety of plant and fish resources and water from the wetland for household use and livestock.⁷¹

Australia's Indigenous land and sea management projects, a funding program by the Australian Federal Government in recognition of the ecological value of Indigenous land management can also offer valuable lessons. Notably, the Australian programs provide funds to Indigenous people to support Indigenous land management activities) and are also known to generate social and economic benefits in addition to the ecological ones.⁷² They are thus considered as important economic vehicles for elimination of poverty in

Botswana Okavango Delta World Heritage Property –History, Governance & Current Conservation Issues< [whc.unesco.org/document](http://whc.unesco.org/document/127020)> 12 July 2020.

⁶⁹ Peter GH Frost and Ivan Bond, 'The CAMPFIRE Programme in Zimbabwe: Payments for Wildlife Services' (2008) 65 *Ecological economics* 776.

⁷⁰ Ibid.

⁷¹ A Gosling, Charlie M Shackleton and J Gambiza, 'Community-Based Natural Resource Use and Management of Bigodi Wetland Sanctuary, Uganda, for Livelihood Benefits' (2017) 25 *Wetlands Ecology and Management* 717.

⁷² Diane Jarvis and others, 'Indigenous Land and Sea Management Programs: Can They Promote Regional Development and Help "Close the (Income) Gap"? (2018) 53 *Australian Journal of Social Issues* 283.

Northern Australia.⁷³ Notably, Australia was emerging from a tradition of oppression of the indigenous peoples' rights to exploitation of natural resources.⁷⁴

While Kenya's legal framework on natural resource management may have provisions that envisage similar establishments, the implementation of the same has largely remained a challenge. Even where established, the same receive little, if any, support from the state agencies. Their establishment may therefore be argued to be a mere formality, with little involvement in the actual management of resources.

There is a need for the various state organs to work closely with stakeholders in the various natural resource sectors to establish the legal and institutional frameworks provided for under the statutes to ensure effective CBNRM. As things stand now, the statutes make provisions for the use of CBNRM but the actual implementation of these provisions is yet to be witnessed.

If water scarcity issues, logging problems, environmental degradation, poverty, human-wildlife conflicts and other social ills facing the natural resources sector in the country are to be eliminated, there is a need to revisit the above provisions and come up with ways on how best the same can be implemented. It is worth pointing out that the implementation of specific approaches under CBNRM may differ based on other factors, but the end result should be achieving conservation, poverty eradication and achievement of the sustainable development agenda. CBNRM is an important approach in the achievement of Sustainable Development Goals (SDGs). This is because it seeks to achieve several of the SDGs at a go. It seeks to achieve environmental conservation, economic and social empowerment through encouraging participation of communities in management of environmental and natural resources. This gives such a community a source of livelihood thus

⁷³ Ibid, p. 299; See also Diane Jarvis and others, 'Are Indigenous Land and Sea Management Programs a Pathway to Indigenous Economic Independence?' [2018] The Rangeland Journal.

⁷⁴ See *Mabo v. Queensland* (No. 1) (1988) 166 CLR 186 F.C. 88/062; *Mabo and others v. Queensland* (No. 2) [1992] HCA 23; (1992) 175 CLR 1 F.C. 92/014 (3 June 1992).

eliminating poverty while at the same time achieving conservation goals: all key goals of the sustainable development agenda as envisaged under the United Nations 2030 Agenda for Sustainable Development⁷⁵.

5. Conclusion

CBNRM approach is not only considered as a response to the challenges of a decentralized management system which occasions natural resources degradation but also as a modern attempt to revive traditional mechanisms for the conservation of natural resources.⁷⁶ Giving local communities the rights to manage, use or own resources, creates incentives for them to collectively invest in natural resources management.⁷⁷ It is against this background that this paper advocates for renewed efforts in the full implementation of CBNRM in Kenya as a step towards eradication of poverty and enhancing community participation in environmental and natural resources management as a means to an end, that is, for the achievement of sustainable development agenda.

⁷⁵ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

⁷⁶ Nelson F. & Agrawal, A., "Patronage or Participation? Community-based Natural Resource Management Reform in Sub-Saharan Africa," *Journal of Development and Change*, vol. 39, No.4, 2008, p.558.

⁷⁷ *Ibid*, p.558.

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<<https://minorityrights.org/2019/06/05/two-years-on-kenya-has-yet-to-implement-judgment-in-ogiek-case-mrg-statement/>> accessed 11 July 2020.

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Democracy and The Common Good: Decentralization in Kenya

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Abstract

Current debates in politics, socio economics and international business and even cross cultural practices are questioning the notion of common good. Often times, a question like “what good” and “good for who?” always follows throwing in doubt what was being discussed - an initiative or a policy, whose main objective is to benefit the people in society. This actualization of common good is perhaps needed more than ever before especially when one witnesses more and more leaders as well as citizens acting selfishly while projecting an absolute lack of thought or care of the other or the environment they reside in. It is against this backdrop that modern debates in democracies are encouraging a renewed investigation of the concept of common good. We seek to interrogate the development of the concept of common good and meaning over time, while identifying the various aspects of common good that correspond to the tenets of democracy and consequently, find out if devolution in Kenya is a common good.

Introduction

As more and more states advance their processes of democratization, it is vital to keep making reference to the reasons of transition from non-democracies to democracies. One of the reasons brought forth is that it is for achieving common interests that are beneficial to many. When asked literally the meaning of common good, one would say that it is ‘good’, common to all or rather to a majority. This only elicits more curiosity – to what ‘good’ is, who says it is good and for what purpose, if the good is for the individual, for a group of people or for a selected few. In addition, one is curious to know what qualifies what it is to be good. This probing is valid, and perhaps it is wise to go back to where it all began and develop it through time to enable application to real situations around us. This study will therefore attempt to look at various

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aspects of the common good in a democracy. The question to ask perhaps is "is common good a component of democracy or reversely, does democracy call for the common good. Are the characteristics or values of democracy a common good? And how practical is common good in Kenya? We will analyze data from texts were from journals, government documents, online material and books.

Ontology and Epistemology

The common good as a philosophical concept, is best understood as part of an all-inclusive model for practical reasoning among members of a political community. The model takes for granted that the citizens are rational beings who take a stand in political or civic relations that requires them to create and maintain certain common interest facilities that benefit them. To formulate an ontology in the study of democracy and common good would first enable the understanding that practical reason is the use of the reason to decide how to act. It then follows that this action is towards a good proper to, and attainable only by, the community, yet individually shared by its members¹.

The epistemology is post positivist.

1. Development of the concept and meaning of common good through time

In order to best define the concept of common good, its development through history should be considered. The basic tenets of the concept are based on the classical Greek philosophy, mainly Plato and Aristotle. As citizens were encouraged to participate in the life of the polis, there was a need to coexist. Their teachings were based on the search for a "good life", which is attainable in a "good society". Here, citizens were expected to live in harmony in an ideal political community. In Aristotle, the idea of political community characterizing the polis is founded on the principle of common good², that meant participation towards human flourishing of the society (eudemonia).

¹ Dupré, Louis. "The common good and the open society." *The Review of Politics* 55, no. 4 (1993): 687-712.

² Miller, Fred. "Aristotle's political theory." (1998).

The definition of common good therefore, is not exhaustible. Webster's Dictionary defines common good as "belonging to or shared by each or all"³. The idea of common good can also be described "as the product of a particular process, such as a democratic process." This can be a difficult version of common good as those within the procedure can argue what is in the interest of the common good and sometimes make decisions based on personal gain⁴. Will Kymlicka likens the common good to "the result of the process of combining preferences, all of which are counted equally consistent with the principles of justice"⁵. Jeremy Bentham sees the common good as the "sum of the interests of the several members who compose it"⁶.

1.1. Western philosophy

Common good concept is not common in Plato texts. However, he repeatedly indicates that a particular common goal exists in politics and society⁷. Plato promotes an environment of cooperation and friendship among different social groups, as each benefits while it adds to common good. In the Republic of Plato, his main character Socrates states that the greatest social good is the cohesion and unity that results from common sensitive reactions of pleasure and pain which one experiences when all members of society are glad or sorry for the same successes and failures⁸.

Aristotle, who was Plato's student par excellence is considered the father of the idea of common good. He used the concept 'the common interest' as the fundamental for his distinction between right and wrong constitutions. Right are those supported by the common interest and wrong are in the interest of

³ Webster's New World Dictionary. 3rd College Edition. Warner Books, Inc. 1990

⁴ Clemens, Walter W. Powell Elisabeth Stephanie. Private action and the public good. Yale University Press, 1998.

⁵ Kymlicka, Will. "Two theories of justice." Inquiry 33, no. 1 (1990): 99-119.

⁶ Bentham, Jeremy. "A Fragment on Government and an Introduction to the Principles of Morals and Legislation." (1948).

⁷ Simm, Kadri. "The concepts of common good and public interest: from Plato to biobanking." Cambridge Quarterly of Healthcare Ethics 20, no. 4 (2011): 554-562.

⁸ Ferrari, Giovanni R., ed. Plato: The Republic. Cambridge: Cambridge University Press, 2000.

rulers⁹. For Aristotle, the common good is constituted in the good of individuals. Individual good, in turn, consists in human flourishing—the fulfillment of the human's purpose—which is the right and natural thing for humans to do. On this teleological view, the good stems from objective facts about human life and purpose¹⁰. One of the greatest works of Aristotle is the *Nicomachean Ethics* in which he reiterates that there is greater value in common good than individual good¹¹. (Ross 1956).

In his politics, Aristotle discusses the types of political regime; Monarchy is the rule by one man for the common good, aristocracy is rule by few for the common good and polity is rule by many for the common good¹². However, by “common good”, Aristotle is specifically referring to the common good of citizens, that is adult men, and not necessarily to the good of non-citizens such as women, children, slaves and manual labourers who reside in the city¹³. This leads us to one contemporary usage rooted in Aristotle’s philosophy - common good refers to “a good proper to, and attainable only by, the community, yet individually shared by its members”¹⁴.

In the Medieval times, Thomas Aquinas (1225–1274) is one of the key figures. In his works on political philosophy, Aquinas defines Society, “as a union of men acting for a common purpose”. The categories of unity and order play a large role in the political thought of Thomas and he saw them as “the main contribution of the civic community”¹⁵. How can the common purpose be defined then, if society is organized for the same? That purpose is the common good, known both through man's natural knowledge as Aristotle knew it, and

⁹ Diggs, Bernard J. "The common good as reason for political action." *Ethics* 83, no. 4 (1973): 283-293.

¹⁰ *Ibid*

¹¹ Ross, David. "Aristotle: the *Nicomachean ethics*." (1956).

¹² Clayton, Edward. "Aristotle: *Politics*." (2004).

¹³ *Ibid*

¹⁴ Dupré, Louis. "The common good and the open society." *The Review of Politics* 55, no. 4 (1993): 687-712.

¹⁵ Cox, John F. *A Thomistic analysis of the social order*. Vol. 73. The Catholic university of America press, 1943.

as expressed in the will of God through revelation¹⁶. In chapter fourteen of the first book of *On Kingship* Aquinas discusses the centrality of the common good in understanding the purpose of the state. All members of the political society must work together to assure that this good is achieved. The state must always exist not for the good of any individual or group of its citizens but for the good of all (Thomas et al 1949). The common good "is the natural foundation for the being and the action of the state and the test of the justice of the laws the state enacts in the pursuit of its end"¹⁷.

Still in the later medieval times one finds Machiavelli (1469 – 1527). In his works on *Discourses on Livy* Machiavelli indicates that the "common good (*comune utilità*) is drawn from a free way of life (*vivere libero*)" but is not identical with it¹⁸. Additionally, he speaks of the *bene commune* (common good) or *comune utilità* (common utility), which refers to the general well-being of a community as a whole¹⁹.

In Modern times, one meets the likes of Jean- Jacques Rousseau (1712 – 1778). He composed *the social contract* in the mid-18th century. In it, Rousseau argues that for society to function properly, the individuals must have interests in common. Additionally, he stated that the end goal of any state is the realization of the common good²⁰. Famous for the concept of the *general will* of a political community, he posits that the common good can be identified and implemented only by heeding to that *will**. Further from the social contract, he maintains that the general will always tend towards the common good though he admits that democratic considerations of individuals will not always express the *general will*. General will and will of all can be distinguished as Rousseau clarified. The latter is simply the sum total of each

¹⁶ Crofts, Richard A. "The common good in the political theory of Thomas Aquinas." *The Thomist: A Speculative Quarterly Review* 37, no. 1 (1973): 155-173.

¹⁷ Lynam, Gerald J. "The Good Political Ruler According to St. Thomas Aquinas." (1953).

¹⁸ *Discourses*, I 16, p. 174

¹⁹ Hanasz, Waldemar. "The common good in Machiavelli." *History of Political Thought* 31, no. 1 (2010): 57-85.

²⁰ Rousseau, Jean Jacques, J. H. Brumfitt, and John C. Hall. *The social contract and discourses*. EP Dutton. London: JM Dent, 1950.

individual's desires, the former is the "one will which is directed towards their common preservation and general well-being."²¹ Political authority, to Rousseau, should be understood as legitimate only if it exists according to the general will and toward the common good. The pursuit of the common good, then, enables the state to act as a moral community²².

Contemporary period ushers in the likes of Adam Smith, Alexis de Tocqueville among others. In his *Wealth of Nations*, Adam, making reference to economics argues that the invisible hand of market competition automatically transforms individual self-interest into the common good²³. For any national or international economic system to work, there must be an agreement on common issues and common rules of engagement.

1.2. Oriental Philosophy

The Confucian political philosophy stresses the importance of the subordination of individual interests to group or collective interests²⁴ or at the very least, the mutual dependence between the flourishing of the individual and the flourishing of the group²⁵. In Islamic political thought, many modern thinkers have identified conceptions of the common good while endeavoring to ascertain the fundamental or universal principles underlying divine sharia law²⁶.

1.3. Africa

The development of the notion of the common good in Africa cannot be divorced from the notion of community life. In early centuries in Africa, people enjoyed the communal form of life where among the valuable options available, was the individual deriving their significance from the social

²¹ *Of the Social Contract*, Book IV, Chapter 1, Paragraphs 1 & 2

²² Lee, Simon. "Common good." *Encyclopedia Britannica* (2016).

²³ Skousen, Mark. "It All Started with Adam." In *The Making of Modern Economics*, pp. 21-54. Routledge, 2017.

²⁴ Wong, David. "Confucian Political Philosophy." In *The Oxford Handbook of the History of Political Philosophy*. 2011.

²⁵ Bloom, Irene. "trans. Mencius." (2009).

²⁶ Bulliet, Richard, David Cook, Roxanne L. Euben, Khaled Fahmy, Bernard Haykel, Robert W. Hefner, Timur Kuran, Jane McAuliffe, and Ebrahim Moosa. *The Princeton encyclopedia of Islamic political thought*. Princeton University Press, 2013.

forms²⁷. However, this has radically changed. There has been a disruption and or a location of negative forces of colonialism, slavery and authoritarian rule by African political elites which in concert, created a rift between the citizens and the state. The inability of the state to meet the aspirations of the citizens is majorly responsible for the distrust of the communal form of life that was inherent²⁸. In addition, there have been ideologies such as materialism, relativism and utilitarianism among others, which have disturbed the trend of community life in their demonstration.

Ethnicity is entrenched in African societies. Ethnic identities shape the meaning of the common good. However, while ethnic sentiments may undercut the nationalistic approach, they may also be a force that enhances any sense of nationhood and common good²⁹. Ethnic identity, be it in rural or urban areas, remains a powerful force to reckon with, although it varies like temperature, from time to time, depending on prevailing political circumstances such as times of elections or referenda³⁰. Despite many countries in the process of democratization calling for national unity, the typical understanding of the common good remains limited to the framework of particular ethnic groups. Important issues such as how to form a nation based on political consensus and ethnic identities have not been addressed³¹.

The task of African societies includes then, the formulation of an inclusive concept of the common good based upon ethnic identities, political consensus, and consent. To develop such a paradigm does not mean that ethnic differences must be suppressed. The challenge we face is how to orient such identities toward an overlapping consensus that fosters the common good. Such project entails developing a profound unity that respects ethnic diversity. It is not a

²⁷ Ebijuwu, T. "The common Good and Social Hope in Africa." *Prajñā Vihāra* 7, no. 1 (2006).

²⁸ Ibid

²⁹ Shue, Henry. *Basic rights: Subsistence, affluence, and US foreign policy*. Princeton University press, 2020.

³⁰ Mbiti, John S. *African Religions and Philosophy*: By John S. Mbiti. Doubleday, 1970.

³¹ Tarimo, Aquiline. "Ethnic Identities and the Common Good: Considerations on the Social Drama of Africa." *Revista Portuguesa de Filosofia* (2009): 577-592.

unity that imposes uniformity, but a unity that cherishes participation and creativity in the interest of the common good³². This way of proceeding is valuable because the African understanding of the common good is still limited to the framework of the ethnic community.

2. Aspects of common good that correspond to values of democracy

Democracy as a concept has prompted great debates and a continuous dialogue in the public and private sphere as more and more countries are in the process of democratization whilst few are already mature democracies. Some schools stress the rule of the majority, others the desire of man to govern themselves, others push for public participation and inclusivity. The process of democratization requires an agreement on certain norms, values that are generally accepted as good to be lived and practiced in a society. As a process, democracy has various phases that are both a consensus and or a conflict. In some of the many transitioned democracies, the notion of common good becomes a common tool of governance among other aspects.

2.1. Historical understanding of democracy

The idea of democracy takes us back to Greek city states such as Athens and Sparta. For the Greeks, democracy had a meaning... *Demos* meaning People and *Kratos* meaning power or to rule³³. In Athens, a political system of legislation and executive bills was practiced. Adult male citizens were the only ones allowed to participate in the political systems with the exclusion of woman, slave or foreign resident in as much as they made up a huge percentage of the population³⁴. In Greek democracy, unlike a Parliament, the assembly members were not elected, the officials of the democracy were in part elected by the assembly and largely chosen by lottery. Athens created a direct democracy rather than a representative democracy where the adult males could take part³⁵. The direct democracy of ancient Athens differs markedly

³² Hauerwas, Stanley. "Vision and Virtue (Notre Dame, IN." University of Notre Dame Press 1981 (1974): 204.

³³ Schmitter, Philippe. "Diagnosing and designing democracy in Europe." *The future of representative democracy* (2011): 191-211.

³⁴ Thorley, John. *Athenian Democracy*. Lancaster Pamphlets in Ancient History. Routledge. (2005). p. 74.

³⁵ *Ibid.* 32

from the representative democracy of constitutional republics such as the USA.

Aristotle was right when he said that man is by nature a political animal³⁶. Men necessarily dwell together in communities. It is no mere contingency that men dwell together in communities. But the form of that togetherness, at least at the most inclusive level of the city or nation-state, is not given along with the common end. Democracy is one of the historical alternatives. Democracy itself has assumed many different forms, and there is no reason to think that the democratic impulse in human governance has exhausted the historical possibilities for new structures³⁷.

2.2. Modern understanding of Democracy

Modern times scholars borrow many aspects of common good from the Greek ancients. For instance, Dahl³⁸ postulates that democracy entails having a framework in which all citizens are considered politically equal and participate in decision making. He further apprises that democracy can only thrive in jurisdictions that respect human rights. Additionally, Diamond and Plattner³⁹ contend that democracy entails creating a culture where all voices are valued as an instrument for change. Diamond and Plattner⁴⁰ argue that democratization is the process by which states move towards more democratic structures and processes. Simply put, it is a change in the political regime within a sovereign state from non-democracy to democracy. Tocqueville⁴¹ held that in democratic societies, there was a strong tendency for people to become totally absorbed in the search for earthly possessions. For him, people who cared only about such things were apt to sacrifice their political freedom

³⁶ Politics. No. 264. W. Heinemann, 1944. in Aristotle, in Twenty-Three Volumes, trans. H. Rackman (Cambridge, MA: Harvard University Press, 1972), p. 9

³⁷ Frank, William A. "Authority and the common good in democratic governance." *The Review of Metaphysics* (2007): 813-832.

³⁸ Dahl's, Robert. "Democracy and its Critics." New Haven, Conn./London (1989).

³⁹ Diamond, Larry, and Marc F. Plattner, eds. *Electoral systems and democracy*. JHU Press, 2006.

⁴⁰ Diamond, Larry Jay, and Marc F. Plattner. *Democracy: a reader*. Johns Hopkins Univ Pr, 2009.

⁴¹ Tocqueville, Alexandre de. "Democracy in America, New York (Vintage Books) 1945." (1945).

if it appeared to interfere with their endeavors. He called this attitude “individualism”, and he thought that one of the best ways to fight it was through religion⁴².

2.3. Some Criteria for Democratization

In his book, *Democracy and Its Critics* (1989), Dahl clarifies his view about democracy. No modern country meets the ideal of democracy, which is as a theoretical utopia. To reach the ideal requires meeting five criteria; (1) Effective participation where citizens get equal and adequate opportunity to exercise their freedoms and place questions for setting the public agenda; (2) Equality when voting by citizens with full knowledge that their vote counts; (3) Enlightened understanding where citizens are free to discover what is best for them eventually choosing it; (4) Agenda setting on political matters by citizens laying a foundation for what should be deliberated on and (5) Inclusivity meaning that every individual has a legitimate stake within the political process.

There is a high probability that the elements that form the criteria form the body of values of democracy. Are these principles by Dahl ideal? Can they be achieved? Amartya Sen discusses the values of democracy from a different perspective.

2.4. Values of democracy by Sen

What then is democracy? Sen moves away from the traditional definition of ‘a majority rule’ maintaining that democracy is an arduous system and not just a mechanical condition. He goes on to explain the merits of democracy. First is about the exercise of civil and political rights as a component of flourishing emanating from human freedom. Second, however much democracy may be in tension with economic development, it has an important instrumental value in enhancing the participation of people. Third is the idea that citizens learn from each other and in so doing, aids society form its values and priorities – a key factor.

⁴² De Tocqueville, Alexis. "Democracy in America, translated by G. Lawrence." (1988).

For universality of values to occur, there has to be a multiplicity of virtues including the inherent significance of political participation, accountability and constructive role in the formation of values, paying attention to needs, rights and duties of citizens. The question on what universal values are cannot just be answered as the responses can be as diverse. For a value to be universal however, it does not necessarily have to have everyone's consent – rather, the reasoning is that people anywhere may have a commitment and see it as valuable. For instance, the countries in the process of democratization have good reason to see it and accept it as a good, as a value. This is because the features democracy supports are consistent with human nature and freedom, a person's yearning⁴³.

In summary, Sen reiterates the value of democracy includes its intrinsic significance in people's life, its contributory role in creating political incentives and its constructive role in the formation of values including order and discipline; merits of which are not regional in character but universal*. Heterogeneity of values seems to characterize most, perhaps all major cultures.

3. Decentralization and The Common Good in Kenya

Aquinas stated that the purpose of the state is to function for the common good. If that is the case, three related questions arise that can be applied to the Kenyan scenario: (1) Is resistance to the state based on commitment to the common good lawful or seditious? (2) What is the best form of government for the sake of the common good? (3) To what extent must popular sovereignty or the consent of the governed be involved in a state based upon the common good?⁴⁴ In Kenya, there is notably an increased resistance to various projects that are proposed, constitutional or not. These are such as the national census and or devolution. One wonders if the resistance is because of the question of common good. As the devolution process continues, there is a discourse on the best form of government. This is propounded in the Building Bridges

⁴³ Ibid

⁴⁴ Crofts, Richard A. "The common good in the political theory of Thomas Aquinas." *The Thomist: A Speculative Quarterly Review* 37, no. 1 (1973): 155-173.

Initiative of 2019. In all this, the question to ask is, where is individual sovereignty? Where is the person in all these?

3.1. Decentralization in Kenya

Juma and Mulongo⁴⁵ define decentralization as a means of fostering development has been a focus of intense academic, policy and popular debate in Africa and Kenya in particular especially after the 2013 elections that effectively brought to life counties as prescribed in Constitution of Kenya 2010. On the policy front, the government has over the years adopted a series of decentralization policies, although their implementation has in most cases fallen short of expectation. The most notable of the decentralization policies include, the Swynerton Plan (1948), Majimboism (1963), District Development Grant Program (1966), the Special Rural Development Program (1969/70), the Rural Development Fund, District Development Planning (1971), the District Focus for Rural Development (1983) and the CDF (2003)⁴⁶.

Decentralization can be defined as the transfer of powers from central government to lower levels in a political-administrative and territorial hierarchy^{47, 48, 49}. Decentralization can take two broad models: deconcentration and devolution. According to Kauzya⁵⁰, decentralization is a generic term which covers a number of modes such as the following: (i) deconcentration which refers to the process of administrative decentralization whereby the

⁴⁵ Juma, C., C. I. Omboto, and L. S. Mulongo. "The Concept of Decentralization: Kenya Experience and Lesson from Mozambique." (2018).

⁴⁶ Juma, C., C. I. Omboto, and L. S. Mulongo. "The Concept of Decentralization: Kenya Experience and Lesson from Mozambique." (2018).

⁴⁷ Crook, Richard C., Richard C. Crook, and James Manor. *Democracy and decentralisation in South Asia and West Africa: Participation, accountability and performance*. Cambridge University Press, 1998.

⁴⁸ Agrawal, Arun. "Accountability in decentralization: A framework with South Asian and West African cases." *The Journal of Developing Areas* 33, no. 4 (1999): 473-502.

⁴⁹ Ribot, Jesse C. "Decentralisation, participation and accountability in Sahelian forestry: legal instruments of political-administrative control." *Africa* 69, no. 1 (1999): 23-65.

⁵⁰ Kauzya, John-Mary. "Decentralization: Prospects for peace, democracy and development." (2005).

central government designs a structure that enables its field agents and offices to work in close proximity to the local people (ii) delegation which is the transfer of responsibilities from central government to semiautonomous bodies that are directly accountable to the central government, (iii) devolution which is the process of transferring decision-making and implementation powers, functions, responsibilities and resources to legally constituted, and popularly elected local governments, (iv) delocalization which is the spatial distribution of central government socio-economic development facilities and activities such as schools, hospitals, etc. in peripheral regions⁵¹. Also, there is (v) privatization which refers to the passing of all responsibility or functions to non-governmental organizations or private individuals and enterprises independent of the government. Amitava Mukherjee⁵² adds another concept of decentralization, to the above-mentioned ones is (vi) dispersal which means the posting of personnel outside the national capital without any significant transfer of functions or powers to them. Ribot⁵³ and Juma et al⁵⁴ note that deconcentration, also known as administrative decentralization, refers to a transfer of power to lower-level central government authorities, or to other local authorities who are upwardly accountable to the central government for example districts, provinces, regions or local councils.

3.2. Elements of decentralization

Choosing the most appropriate form of Decentralization may be based on the reasons for decentralization: decentralization is believed to have the following elements: (a) it should be Democratic, substantively referring to the accountability of leaders to the people⁵⁵. (b) Accountability, meaning checks

⁵¹ Kauzya, John-Mary. "Decentralization: Prospects for peace, democracy and development." (2005).

⁵² Mukherjee, Amitava. *Researches in decentralisation with special reference to district planning in India*. Heritage Publishers, 1990.

⁵³ Ribot, Jesse C. "Representation, citizenship and the public domain in democratic decentralization." *Development* 50, no. 1 (2007): 43-49.

⁵⁴ Juma, C., C. I. Omboto, and L. S. Mulongo. "The Concept of Decentralization: Kenya Experience and Lesson from Mozambique." (2018).

⁵⁵ Ribot, Jesse C. "Representation, citizenship and the public domain in democratic decentralization." *Development* 50, no. 1 (2007): 43-49.

and balances by citizens and the power holders^{56,57}. (c) Participatory in political, economic and social activities while increasing the government officials' sensitivity to local conditions and needs (Kirira 2011). (d) Equity in a sense of reaching to more people and allowing them greater representation. (e) Enhancing creative, innovative and responsive programs by allowing local experimentation. (f) Alleviation of complex bureaucratic procedures. (g) Reduction of opportunities for "corruption", particularly large scale corruption. We argue that these elements correspond to those of democracy and interpreted as for common interest for all if not majority since these are aspirations of many people in any society.

3.3. Advantages and disadvantages of decentralization

First, the basic reason for decentralization is to bring government close to the people. This enables local people to be able to participate and exert influence using the existing local political avenues. Bringing power to people makes the political process more tangible and transparent. Second, since decentralization implies a division of power in society, it enables the creation of a more open political system initiating channels of representation and power sharing. In this respect, a decentralized political system can function as an open 'market'^{58, 59}. Third, ethnically divided societies and presence of minority groups' support for political exclusion lead to serious polarizing effects. A decentralized system thus, according to Lijphart and other theorists is more

⁵⁶ Agrawal, Arun. "Accountability in decentralization: A framework with South Asian and West African cases." *The Journal of Developing Areas* 33, no. 4 (1999): 473-502.

⁵⁷ Ribot, Jesse C. "Decentralisation, participation and accountability in Sahelian forestry: legal instruments of political-administrative control." *Africa* 69, no. 1 (1999): 23-65.

⁵⁸ Oates, Wallace E. "An essay on fiscal federalism." *Journal of economic literature* 37, no. 3 (1999): 1120-1149.

⁵⁹ Crook, Richard; Manor, James.. *Democratic decentralization* (English). Operations Evaluation Department (OED) working paper series ; no. 11. Washington, D.C. (2000): The World Bank.

<http://documents.worldbank.org/curated/en/646841468765299512/Democratic-decentralization>

accessible to new political movements and minority groups which then gives them a voice⁶⁰, ⁶¹, ⁶².

Fourth, due to the ‘proximity of politics’ and a greater involvement of citizens, decentralization legitimizes the public institutions. In turn, the government’s ability to implement is strengthened⁶³. Furthermore, a decentralized bureaucracy adapts more easily to local identities and norms, which may increase effectiveness⁶⁴. Fifth, most of all, devolution was seen as a means to address Kenya’s chronic ethnic conflicts: ‘the new Constitution establishes national values and principles of governance that seek to diffuse, if not eliminate altogether, the ethnic tensions fuelled by perceptions of marginalization and exclusion’ ⁶⁵.

According to Dorotan⁶⁶, decentralization is also associated with the following generic challenges: For standardized, routine and network-based services, it may not always be efficient; the central government can experience the loss of economies of scale and control over scarce financial resources; there could be weak administration or lack of technical capacity or financial resources at the local levels and finally, there can arise a distrust between public and private sectors that eventually undermines corporation impeding development and progress.

⁶⁰ Lijphart, Arend. *Democracy in plural societies: A comparative exploration*. Yale University Press, 1977.

⁶¹ Grindle, Merilee S. *Audacious reforms: institutional invention and democracy in Latin America*. JHU Press, 2000.

⁶² Hadenius, Axel. *Institutions and democratic citizenship*. Oxford University Press on Demand, 2001.

⁶³ Bhattacharyya, S. C. "Rural Reforms in West Bengal." *Economic and Political Weekly* (1994): 2110-2110.

⁶⁴ Navarro, Zander. "Decentralization, participation and social control of public resources: "Participatory Budgeting" in Porto Alegre (Brazil)." In Conference Paper, Workshop on "Citizen Participation in the Context of Fiscal Decentralization: Best Practices in Municipal Administration," Tokyo and Kobe, Japan. 2002.

⁶⁵ Akech, M. 2010. *Institutional reform in the new Constitution of Kenya*. Nairobi: International

Center for Transitional Justice.

⁶⁶ Dorotan, Eddie. "Importance of Decentralization." Cambodia: Second Social Accountability School (2008).

4. Characteristics of Common Good

In this part, the following characteristics of common good are derived from the writings of various scholars through time. It is clear from the familiar opening lines of the *Nicomachean Ethics* and the *Politics* that Aristotle locates the good at the center of practical thought. Every craft, inquiry, action, and decision, he says in the *Ethics*, aims at some good; the *polis*, he observes in the *Politics*, like every community, is established for the sake of some good⁶⁷. Answering the question of what is the good for the sake of which the political community is organized, he argued that it is excellent activity of the rational soul, supported by external resources, over the course of a lifetime⁶⁸. Aristotle also encouraged the education in virtue as opposed to vice. This supported good life and human flourishing in the *polis*⁶⁹.

Plato asserts the practice of corporation and friendship in the communities in turn enhances cohesion and unity. In the same vein, Aquinas insists on unity and order as contributing to a civic community. He affirms that state exists for the good of all. Rousseau on the other hand contends that the *general will* is for the common good. Confucian philosophy advocates for the subordination of individual interests to group or collective interests. In a sense, this curbs self-interest. Africans had the communal life and ethnic settings that coexisted and was never a problem until a lethal seed was sowed – that of looking at an ethnic group as ‘*the other*’, that is either superior or inferior or means no good to ‘*my ethnic group*’. Inversely so, Machiavelli’s conceptualization is interpreted as more utilitarian. Utilitarianism has a lot of problems in democracy which we discuss further under critic on common good. We posit that the tenets of democracy are similar if not same as those supporting common good. This is therefore an appealing attribute to what most people would want.

⁶⁷ Kraut, Richard. "I4 Aristotle and Rawls on the common good." *The Cambridge Companion to Aristotle's Politics* (2013): 350.

⁶⁸ NE I 10, 1101a14–16

⁶⁹ 1280b10–12; NE 1179b

5. Critic of Common Good

Schumpeter (1883 – 1950) is known for his redefinition of democracy as merely leadership completion⁷⁰. As much as he did not welcome socialism, even less did he welcome popular democracy⁷¹. His definition is a construction intended to preserve elite domination in the unwelcome socialist democracies of the future⁷². In the name of realism, his definition stripped democracy of all ethical content. Schumpeter's redefinition, shorn of its dark origins, became canonical in postwar American political science⁷³. Schumpeter denies that individual will, common will, or common good are essential to democracy. Democracy is only a method, of no intrinsic value, its sole function is to select leaders, according to Schumpeter⁷⁴.

Schumpeter submits that if there is no common good there can be no will of the people. Schumpeter is attacking utilitarianism, and he believes that the utilitarian view is that there is an independently defined utilitarian principle of the greatest good for the greatest number that all would assent to in rational argument⁷⁵. If there is no greatest good for the greatest number, then there is nothing for the people to assent to. Additionally, he argues, that there is no independently defined common good⁷⁶.

Hart Ely⁷⁷ suggests that “democracy is a sort of applied utilitarianism, unfortunately possessing utilitarianism's weaknesses as well as its strengths – an institutional way of determining the happiness of the greatest number.”

⁷⁰ In 1942, he published his *Capitalism, Socialism and Democracy*, an analysis of the inevitability of socialism

⁷¹ Medearis, John. *Joseph Schumpeter's two theories of democracy*. Harvard University Press, 2013.

⁷² Ibid

⁷³ Scheuerman, William E. *Carl Schmitt: The end of law*. Rowman & Littlefield, 1999.

⁷⁴ Mackie, Gerry. "Schumpeter's leadership democracy." *Political Theory* 37, no. 1 (2009): 128-153.

⁷⁵ Schumpeter, J. A. "Capitalism, Socialism and Democracy, New York: Harper, 1975." (1942).

⁷⁶ Ibid

⁷⁷ Ely, John Hart. "Constitutional Interpretivism: Its Allure and Impossibility, 53 IND." *LJ* 399 (1978): 405-08.

Alexis de Tocqueville⁷⁸ offers a similar suggestion: “Democratic laws generally tend to promote the welfare of the greatest possible number; for they emanate from the majority of the citizens, who are subject to error, but who cannot have an interest opposed to their own advantage. Furthermore, the advantage of democracy does not consist in favoring the prosperity of all, but simply in contributing to the well-being of the greatest number.

6. Discussion

Question is “Is decentralization / devolution a common good”? the main aim of decentralization is to bring government close to the people and enabling local people to participate and be represented in the political process and giving a voice to all. Therefore, working for the good of all supporting a good life and human flourishing. Following the aforementioned, it can be presumed that for the ordinary political discourse in Kenya, common good refers to those facilities common to all, whether material, cultural or institutional that have a relational obligation for all to care since they benefit the common interests of the majority. In a growing democracy like Kenya, some undisputed examples of common good includes the road network, the public libraries, the public health facilities, the public water and drainage systems, museums, courts and judicial systems among others. These form part of the decentralized functions in Kenya.

Common good as a philosophical concept helps one reflect on the philosophical meaning of the role of public and private dimensions of social life. Public life is the participation in the political process locally, nationally or internationally. It is a shared effort among the citizens to maintain certain facilities for the sake of common interests. Private life however, each individual member must pursue distinct set of personal projects to support the achievement of the common interest.

When we look at how other occupations such as journalists, corporate executives or consumers act on the basis of common good to actualize decentralization. This could be through working in close proximity to the local

⁷⁸ Tocqueville, Alexandre de. "Democracy in America, New York (Vintage Books) 1945." (1945).

people, delocalizing the distribution of its services throughout the country and ensuring they play a role in representing the local population.

More fundamentally, we should we care about the common good as it promotes corporation and friendship in the communities in turn enhances cohesion and unity.

However, Dahl, while postulating that democracy allows for a citizenry that is politically equal and participate in decision making while respecting human rights holds that democratic societies have a strong tendency “individualism”; whereby we have a situation whereby community members withdraw from public life and focus exclusively on their own private lives.

7. Conclusion

In conclusion, the study notes that with the changing times, the discourse in international relations needs to reflect on going back to systematic philosophy in order to ground the current events. This paper aimed at examining various aspects of the common good in a democracy. We have established that democracy and decentralization support common good but from different perspectives. It almost seems that they are intertwined as they all aim at achieving the greatest good for the greatest number.

The transfer of powers from central government to lower levels in a political-administrative and territorial hierarchy is ideal for Kenya since it increases representation of the local people to the central government. This will also help in tackling the corruption menace since having decision-making and implementation powers, functions, responsibilities and resources to legally constituted, and popularly elected local governments increases the level of accountability of office holders. Devolution ensures the spatial distribution of central government socio-economic development facilities and activities such as schools, hospitals in all parts of Kenya equally. This paper finds that Kenya would benefit greatly from a devolution system as a common good as it seeks the best interests of all citizens.

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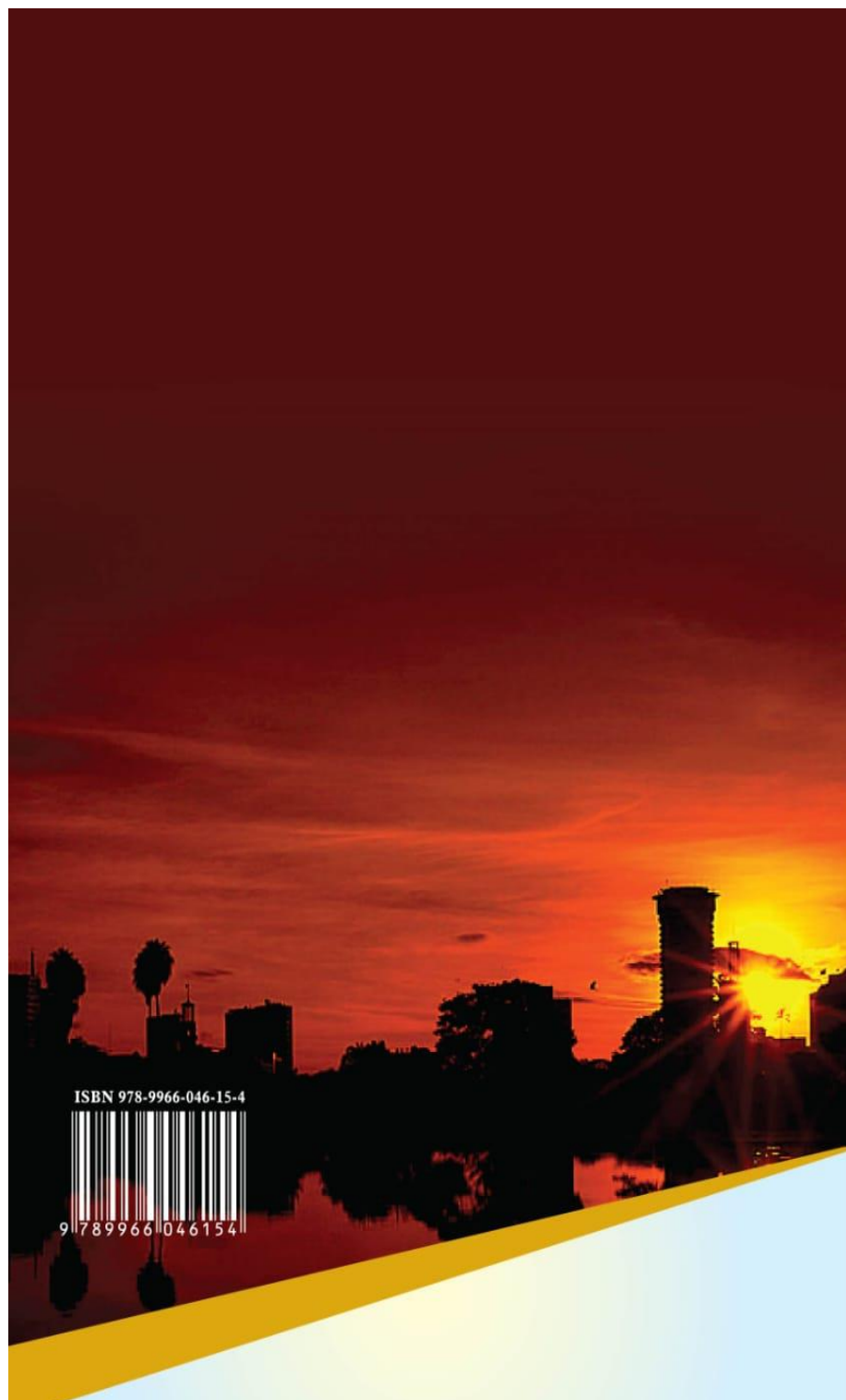
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