

Journal of Conflict Management & Sustainable Development



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Realising Sustainable Development Goals in Kenya

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Journal of Conflict Management and Sustainable Development

Editor's Note

Happy new year 2021!

Welcome to Volume 6 issue 1 of the *Journal of Conflict Management and Sustainable Development*.

Since its launch, the Journal has continued to cement its place as a leading publication in the fields of conflict management and sustainable development in Kenya and across the globe. The same is peer reviewed and refereed so as to ensure the highest quality of scholarly standards and credibility of information.

The concept of Sustainable development is now globally accepted as a blueprint for development as captured by the Sustainable Development Goals. Sustainable development goal no. 16 aims to promote peaceful and inclusive societies for purposes of development.

However, development in Kenya, Africa and across the globe has often been curtailed by conflicts that occur in various dimensions. Thus, many nations are faced with the problem of achieving conflict free environments that would facilitate sustainable development.

The journal offers insight on this issue through the overall theme of achieving sustainable development through effective and efficient conflict management.

This volume covers pertinent topics on conflict management and sustainable development including: *Harnessing Traditional Knowledge Holders' Institutions in Realising Sustainable Development Goals in Kenya; Towards Inclusive and Quality Education as a Tool for Empowerment in Kenya; Impact of Sporting Activities on the Environment in Kenya; Ensuring Healthy Lives and Well-being for all*

Kenyans and Combating Un-Freedom: A Panacea for the Growth Lull in Africa.

The Journal is expected to trigger political, economic, social, technological, environmental and legal responses aimed at facilitating conflict management and sustainable development.

We are greatly indebted to our dedicated team of reviewers, editors, contributors and everyone who has made publication of this Journal possible. We welcome feedback from our readers across the globe to enable us continuously improve the Journal.

The editorial team welcomes submissions of papers, case reviews, commentaries and book reviews 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, FCIArb (Chartered Arbitrator),
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Managing Editor,

January, 2021

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Harnessing Traditional Knowledge Holders' Institutions in Realising Sustainable Development Goals in Kenya

*By: Francis Kariuki**

Abstract

The paper examines the role of traditional knowledge (TK) holders' institutions in the realisation of components of Sustainable Development Goals (SDGs)-9 and 16. Using two case studies, from the kaya elders (Mijikenda community) and Mbeere traditional potters, the study found that TK holders' institutions are essential, and can play pivotal roles in attaining aspects of the said SDGs. As key drivers of, and essential governance frameworks for innovation, they contribute to the creation, diffusion and application of innovation (a component of SDG 9); while the innovation they generate continues to replenish and strengthen them. Additionally, their role in promoting peace and justice, and an inclusive and practical approach to gender means that they can be instrumental in strengthening formal institutions, especially the intellectual property (IP) institutions (a component of SDG 16). As data repositories and governance frameworks, they have an impact on the prevalence, type and nature of entrepreneurial activities that TK holders can engage in.

Keywords: Traditional knowledge holders' institutions, sustainable development goals, traditional knowledge, traditional knowledge holders' innovation, entrepreneurship, data

1 Introduction

Traditional institutions encompass different types of Indigenous organisations that differ based on their functions such as local governance, community resource mobilisation, security, asset management, conflict resolution, management committees for infrastructure and sector services, among others.

¹ They are complex and multifaceted and have been typologised into land-based, livestock-based, labour-sharing, mutual assistance (social), health, traditional beliefs (including rituals, spiritual leaders & sacred areas), traditional leaders, recreational, and conflict resolution institutions.²

The study conceptualises traditional knowledge (TK) holders' institutions³ broadly, as socially embedded, flexible, legitimate, inclusive and holistic frameworks with regulatory, cognitive and normative dimensions, making them a valuable resource for achieving SDGs.⁴ They encompass the laws, customs, traditions, social networks and entities (including councils of elders and certain individuals holding specialised knowledge).

*** PhD (Wits), LLM, LLB (UON), Dip. Law (KSL), FCI Arb & Lecturer at Strathmore University Law School.**

Email: kariukifrancis06@gmail.com

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¹ Paula Donnelly-Roark, Karim Ouedraogo, and Xiao Ye, 2001 'Can local institutions reduce poverty? Rural decentralization in Burkina Faso' *Policy Research Working Paper 2677*, Environmental and Social Development Unit, Africa region (2001) at 3.

² Jeremias Mowo, Zenebe Adimassu, Kenneth Masuki, Charles Lyamchai, Joseph Tanui & Delia Catacutan 'The Importance of Local Traditional Institutions in the Management of Natural Resources in the Highlands of Eastern Africa' *Working Paper No 134*, World Agroforestry Centre (2011) at 7-12.

³ Different terms have been used to describe TK holders' institutions including indigenous, customary, traditional or informal.

⁴ Sujai Shivakumar 'The Place of Indigenous Institutions in Constitutional Order' 14(1) (2003) *Constitutional Political Economy* at 10; Elizabeth Watson 'Examining the Potential of Indigenous Institutions for Development' (2003) *Development and Change* at 287-309; and Shirin Elahi, Jeremy de Beer, Dick Kawooya, Chidi Oguamanam & Nagla Rizk, *Knowledge and Innovation in Africa: Scenarios for the Future* (Open AIR, 2013) at 126.

The study focuses on SDGs-9 and 16. SDG-9 deals with industries, innovation, and infrastructure,⁵ while SDG-16 focuses on peaceful and inclusive societies, access to justice and the building of strong institutions.⁶ The study focuses on SDG-9 because TK holders' institutions have a role in the promotion of innovation. Whereas most studies have focused on the interplay between IP institutions and innovation, there is less focus on the role of TK holders' institutions in promoting innovation. Analyzing TK holders' institutions, will shed light on their role in driving innovation, and addressing institutional barriers (e.g. failure to meet the test of rigidly established industrial standards within IP rights) to the commercialisation of innovations by communities and realisation of their entrepreneurial potential.⁷ Moreover, and while IP institutions have been criticised for being gender biased against women innovators and creators,⁸ local institutions 'may feature more or less restrictive gender norms' and hence create opportunities for the different groups to participate in, and benefit from innovation processes.⁹ The case studies in this work will illuminate on the gender dimension of TK holder's innovation, and the inclusive and practical approach to gender of TK holders' institutions.

Promoting SDG-16 holds the promise for building institutions to promote justice and empower TK holders, most of whom are living in abject poverty yet their TK and associated resources continue to be misappropriated through the IP regime. It, therefore, becomes necessary to evaluate the role of TK holders' institutions in strengthening formal institutions such as the IP institutions.

⁵Available at <https://sdg-tracker.org/infrastructure-industrialization>, accessed on 16/01/2020.

⁶Available at <https://www.un.org/development/desa/disabilities/envision2030-goal16.html>, accessed on 16/01/2020.

⁷ See Mugabe John 'Intellectual Property Protection and Traditional Knowledge: An Exploration in International Policy Discourse' (2001) at 25.

⁸ Ann Bartow 'Fair use and the fairer sex: Gender, feminism, and copyright law' (2006) 14(3) *Journal of Gender, Social Policy & the Law* at 551 – 584.

⁹ Patti Petesch, Lone Badstue, Gordon Prain, Marlene Elias & Amare Tegbaru 'Entry points for enabling gender equality in agricultural and environmental innovation' GENNOVATE resources for scientists and research teams (2017) at 5. See Julio Berdegue 'Pro-poor innovation systems' Background Paper, IFAD (2005) at 7.

Relatedly, due to the data generated by TK holders' institutions, and their role in driving innovation, they provide a conducive environment for entrepreneurship, and determine prevalence, type and nature of entrepreneurship. This is particularly true in Africa where most goods and services are sourced, produced and sold within families or other trusted social networks in a collaborative manner.¹⁰

Moreover, TK holders' institutions are data repositories and data governance frameworks that can be deployed in designing a strong regime for TK holders' data sovereignty. The data they hold underlies their innovative capacity; strengthens institutions; manages, monitors and mitigates risks; and thus hold the promise for the realisation of the developmental needs and aspirations of TK holders including the attainment of other SDGs such as SDG-15¹¹ and 13.¹² The paper has six sections. Section 1 is this introduction that sets out the general outline of the study. Section 2 discusses the methodology. In section 3, the two case studies are discussed to set the research context. The broad conceptual parameters are set out in section 4, where TK holders' institutions are discussed. It then situates TK holders' innovation within the wider framework of innovation. It then discusses TK holders' institutions, and their contribution in strengthening formal institutions such as the IP institutions. Thereafter, the study conceptualises TK holders' institutions, and their role in driving entrepreneurship, and in data governance. Section 5 sets out the findings of the study thematically including the challenges bedevilling the TK holders' institutions while section 6 is the conclusion.

2 Research methodology

The research was a desktop study supplemented by semi-structured interviews and focus group discussions (FGDs) in the two case studies.¹³ The Mbeere

¹⁰ Elahi *et al* op cit note 4 at 95.

¹¹ SDG-15 requires the protection, restoration and promotion of sustainable use of ecosystems, forests, combat desertification and halt land and biodiversity degradation.

¹² SDG-13 *inter alia*, seeks to strengthen resilience and adaptive capacity to climate-related hazards and natural disasters; and improve education and awareness-rising and human and institutional capacity on climate change mitigation, adaptation, impact reduction and early warning.

¹³ I obtained ethics clearance from the Strathmore University Institutional Ethics Review Committee (SU-IERC) which is one of the accredited institutions by the

community was selected because of its traditional pottery practices while the Mijikenda community was selected because of their effective form of traditional management systems of the *kaya* forests (sacred groves). In the Mijikenda case study, I built upon previous research that I carried out as part of my doctoral project in 2018 on the role of traditional institutions in the protection of TK. Through that study, I was able to establish close personal, professional relations and mutual trust with the community, allowing easy access to information. Thus, it was easy to identify the respondents to participate in the interviews and FGDs.

The findings are based on 25 interviews conducted in the 2 case studies mainly with TK holders' representatives, researchers, civil society organisations (CSOs) and government agencies. I contacted some of the interviewees via phone especially those from CSOs and government agencies that I had interviewed previously in the course of the doctoral project. The interviews were conducted between 14/10/2019 and 05/11/2019. Among the Mijikenda, I interviewed 15 people. 10 of the interviews were *kaya* elders, 2 members of CSOs working in the area (Community Action for Nature Conservation (CANCO), and Trust for Indigenous Culture and Health (TICAH)), and 3 government representatives (Kenya Forest Service (KFS), Coastal Forest Conservation Unit (CFCU) and Kenya Resource Center for Indigenous Knowledge (KENRIK) based at the National Museum of Kenya (NMK).

In the Mbeere case study, I interviewed 10 people. Majority of the interviewees were women involved in pottery (6) and 4 from CSOs (African Biodiversity Network (ABN) and the Institute for Culture and Health (ICE). The length of the semi-structured interviews ranged from 30 minutes to one hour and 15 minutes, on average lasting approximately 45 minutes, where questions focused on the role of TK holders' institutions in the promotion of innovation and building of strong institutions. Both closed and open-ended questions were used to ensure comprehensive coverage of the issues, and to minimise the disadvantages arising from using only one form of questioning, while maximising the advantages of each. The interviews allowed respondents

National Commission for Science, Technology and Innovation (NACOSTI) in Kenya to conduct ethics reviews of research protocols in the human and behavioral sciences.

to express views in their own terms and in detail. Purposive selection was used to identify the key informants.

To complement the interviews and to verify some of the claims made during the interviews, 2 FGDs were organised with key informants identified during the interview process. One in Kaloleni in Kilifi on 4 November 2019 for the *kaya* elders, and another in Ishiara on 12 November 2019 for the Mbeere. Each of the FGDs lasted approximately 45 minutes. There were 15 people in the Mijikenda FGD comprising mostly *kaya* elders, community members, county forest guards, representatives from National Museum of Kenya (NMK), and the Coastal Forest Conservation Unit (CFCU). In the Mbeere case study, the FGD comprised of 10 potters since there are currently no efforts by government or CSOs to support the potters. The purpose of the FGDs was to obtain information from informants on how TK holders' institutions can be harnessed to realise innovation and strengthen institutions. Moreover, through the FGDs, the researcher gained insights into the data that TK holders' institutions generate, their role in data governance and entrepreneurship.

The interviews, FGDs and literature review were structured so as to answer the following questions. What are the existing TK holders' institutions with the potential to contribute to innovation and strong institutions in Kenya? How can TK holders' institutions be harnessed in the realisation of innovation and strong institutions in Kenya? What role do women play in driving innovation, and in relation to TK holders' institutions? What data do TK holders' institutions generate and how does the said data strengthen those institutions and innovation, and thus boost the SDGs? And what role can TK holders' institutions play in data governance to engender transformational entrepreneurial potential for TK holders?

The qualitative data gathered from the semi-structured interviews and FGDs was analysed using a thematic deductive analysis approach. This approach aided in the identification of themes and interpretation of information. The interviews were recorded and transcribed, while notes were taken from the FGDs. Transcripts were reviewed and systematically coded using a coding grid. The common codes in the grid were then interlinked to highlight similarities and differences within and between the codes. Selected codes were

consolidated and given a descriptive label in order to reflect a specific theme bearing in mind the research questions. The themes were then reviewed and refined to eliminate coding redundancies, and to ensure the data is accurately portrayed. Thereafter, the themes were defined, named and those reflecting a similar idea merged into global themes, and inserted in a column within the coding grid. Interpretation was done by identifying and examining the underlying ideas, assumptions, conceptualisations and ideologies that shape or inform the data, bearing in mind the research questions. Lastly, the research project was written up in a way that illustrates the trustworthiness and validity of the results, relating analytically the experiences from the three case studies, and linking them to relevant literature. The broad themes that rose from the data are: existence and nature of TK holders' institutions and the roles of TK holders' institutions in: innovation, building strong institutions, entrepreneurship and data governance.

3 Research context

The Mijikenda, *kaya* elders and their TK practices

The first case study relates to the *kaya* forests, the sacred forests of the Mijikenda, a Bantu-speaking people consisting of nine sub-communities namely: the *Chonyi*, *Digo*, *Duruma*, *Giriama*, *Jibana*, *Kambe*, *Kauma*, *Rabai* and *Ribe* who are closely related linguistically and culturally.¹⁴ The name Mijikenda is a Swahili derivative from the expression *midzi chenda* (nine homes) referring to the nine constituent sub-communities. According to historians, the Mijikenda migrated into the coastal area in the 16th century or earlier from a northern homeland known as Singwaya or Shungwaya.¹⁵ When they migrated into Kenya, they settled in fortified hilltop villages known as *kaya* (meaning a settlement, village or home) as they were at risk of attack from other communities.¹⁶ Each Mijikenda sub-community has its own *kaya*, which is a political institution and a settlement with a closely-knit society

¹⁴ Paul Ongugo, Doris Mutta, Mohamed Pakia & Peter Munyi 'Protecting Traditional Health Knowledge in Kenya: The role of customary laws and practices' International Institute for Environment and Development (2012) at 4.

¹⁵ James de V. Azzen & Jim Allen 'Shungwaya, the Mijikenda, and the Traditions' (1983) 16(3) *The International Journal of African Historical Studies*, 455-485 at 455.

¹⁶ Celia Nyamweru 'Sacred Groves and Environmental Conservation' (1998) *The 1998 Frank P. Pistor Faculty Lecture*, 1-27 at 9.

controlled by a council of elders, the *kambi* or *ngambi*.¹⁷ Each *kaya* has its own history, committee of elders, and set of environmental and socio-cultural circumstances; but there are common themes traceable amongst them.¹⁸ Currently, there are about 60 *kaya* forests, covering an area of about 4,000 acres and representing ‘some of the few patches of undisturbed vegetation in an increasingly densely-populated landscape.’¹⁹ Today, the Mijikenda are found in Kilifi, Kwale and Mombasa counties. There are however no *kayas* in Mombasa County. Kwale County is home to the Digo and Duruma sub-communities while Kilifi County has the other 7 Mijikenda sub-communities. The study focused on Kilifi County since it has some of the best-managed *kayas* and there is strong adherence to cultural traditions. Moreover, most of the Kilifi *kayas* are on the World Heritage listing whereas in Kwale it is only the Duruma *kayas* that are listed.



¹⁷ Ongugo *et al* op cit note 14 at 4.

¹⁸ Celia Nyamweru ‘Report on Socio-Cultural Research carried out in Kwale and Kilifi Districts of Kenyan’ unpublished manuscript, at 12 (a copy in the researcher’s file).

¹⁹ Nyamweru (1998) op cit note 16 at 15.

Figure 1: An image of *kaya* Kauma in Kilifi County. It is listed as a World Heritage Site.



Figure 2: An image of *kaya* Kambe in Kilifi County. It is also listed as a World Heritage Site.

Over time, the *kaya* elders have developed a system for protecting their TK and forests. Under that system, the elders are viewed as custodians, with the responsibility for regulating access, use and control of resources (including TK) in accordance with customary laws (including rites and taboos) and enforcing them. Through taboos, for instance, they regulate who can access

the forests, when, how and for what reasons. For example, it is a taboo to enter; bring flames; fence; or cut trees in the *kaya* without the consent of the elders.²⁰ Moreover, TK is held at the individual, family/clan or community levels. Individuals may hold specialised knowledge on the use of specific plants and carving of *vigango* (memorial statues erected on tombs), which means it is their prerogative to share it.²¹ TK relating to spiritual healing is viewed as family/clan property, and is selectively inherited either before or after the life of a practising healer, or spiritually guided, where a selected heir falls sick until he takes up the practice.²² At the community level, certain rituals/ceremonies are conducted by initiated elders for community benefit including: prayers in times of drought or famine; cleansing of land; thanksgiving prayers and blessing of the harvest; prayers for healing community members; prayers for peace; and divination.²³

Apart from holding TK, and conserving the *kaya* forests, the elders play a key role in promoting unity, conflict resolution, rule-making, and enforcement of those rules.²⁴ The elders and forests are a symbol of unity and cultural identity for the Mijikenda people.²⁵ Moreover, elders are the first port of call wherever there are disputes (including land, family and political) in the community. Further, local politicians, must seek the blessings of the *kaya* elders, before venturing into politics, illustrating their acceptance and legitimacy.²⁶

²⁰ Interview with an environmental scientist working with the CFCU at Kilifi on 05/11/2019. Some trees are sacred, and are believed to be the abode or shelter of ancestral spirits as well as the secret objects of the community and cannot be harvested.

²¹ Interview with an environmental scientist working with the CFCU at Kilifi on 05/11/2019.

²² Ongugo *et al* op cit note 14 at 13-14.

²³ A meeting with *kaya* elders at Kaloleni on 04/11/2019.

²⁴ Ibid.

²⁵ Celia Nyamweru & Elias Kimaru 'The contribution of ecotourism to the conservation of natural sacred sites: A case study from coastal Kenya' (2008) 2(3) *JSRNC*, 327-350 at 328.

²⁶ A meeting with *kaya* elders at Kaloleni on 04/11/2019.



Figure 3: The researcher (holding a cap) attended a customary court session on 26th April 2018 at *Mwembe Marunga* where Rabai elders sit (under a mango tree) to hear and determine disputes touching on land, adultery, witchcraft, marital and family disputes every Monday and Wednesday among locals.

There are collaborations between *kaya* elders and governmental and non-governmental agencies to protect their TK and resources.²⁷ For example, some *kaya* forests are World Heritage Sites²⁸ and are under the management of the

²⁷ Ibid.

²⁸ For example, *kaya* Mudzimwiru, Mudzimuvya and Bomu-Fimboni; Fungo, Kambe, Kauma, Ribe, Kinondo and Jibana.

NMK and the stewardship of United Nations Educational, Scientific and Cultural Organisation (UNESCO). Additionally, NMK in collaboration with UNESCO and the State Department of Culture runs a program aimed at recognising the intangible cultural heritage (ICH) in the *kayas* and the recognition of secondary *kayas*, in need of urgent protection from extinction.²⁹ Moreover, CFCU is working with *kaya* elders to sensitise the youth on the cultural and ecological value of forests (through essay competitions, visits to schools, and field trips); strengthen traditional institutions; support elders in fencing some forests; and recruit guards to monitor the forests and report any infraction of regulations to the elders.³⁰ Similarly, the County Government of Kilifi, has established the County Forest Guards who work with elders to prevent encroachment into the forests. TICAHA, a local NGO, has a program on TK and culture, where it is working with elders to document their TK, rituals and traditions. In particular, TICAHA is working to document and commercialise TK relating to medicine.³¹

The Mbeere and their traditional pottery practices

This study focused on pottery among the Mbeere people, in Ishiara area. Ishiara is famous for traditional pottery, and has a market for pots. Pottery is done by women (mothers and grandmothers) who pass on those skills to their daughters as they grow up. They practise pottery on a part-time basis and seasonally since most potting takes place during the dry season (August) after harvesting, when the potters have time to spare. Thus, pottery helps women supplement their income, and mitigate against food shortages in their families.³²

The pots are used for various purposes such as cooking vessels, as hearths, *jiko* (cooker) linings, storage equipment and flower vases. Food prepared using the pots is tastier than that prepared using aluminium vessels.³³ Moreover, the pores in the clay helps filter dirt from water hence making it

²⁹ Interview with an environmental scientist working with the CFCU at Kilifi on 05/11/2019.

³⁰ Nyamweru (1998) op cit note 16 at 23.

³¹ Available at <https://www.ticahealth.org/indigenous-knowledge-culture/indigenous-knowledge-culture/> accessed on 16/01/2020.

³² Workshop with traditional potters in Ishiara held on 13/11/2019.

³³ Ibid.

relatively clean and safe for drinking. Additionally, since Mbeere is an arid and semi-arid area, and temperatures can rise up to 40 degrees, the community uses the pots to cool drinking water. Further, the pots retain more heat than normal cooking pots thus conserving firewood.³⁴

Pottery making goes through the following processes: procurement of raw materials, preparation of the clay, forming the vessels, surface treatment, decoration, drying and firing.³⁵ The raw materials used are red-brown clay (from a place called *Cianthugi*), water and fire. Potters prefer clay derived from weathered rocks as it has small particle sizes and plate-like characteristics, and other chemical properties that allow it to be worked into shape and baked, to create the vessels.³⁶ Preparation of the clay entails removing any organic and inorganic impurities which may crack the pot while drying. It is then finely ground, mixed with water and treaded before kneading to improve plasticity and remove air bubbles. Thereafter, the process of forming/shaping the pots begins, which entails coming up with flattened coils out of the kneaded clay that are joined together to form a circular structure as shown in Figure 4 below. Surface treatment/finishing helps to remove impurities/marks left while forming/shaping the pot such as finger depressions.³⁷

³⁴ Ibid.

³⁵ Rosemary Wangari 'An ethnoarchaeological study of pottery in Evurore division, Mbeere North District, Embu county, Kenya' Master of Arts Thesis, Kenyatta University (2013) at 35.

³⁶ Ibid at 36.

³⁷ Ibid.



Figure 4: a potter engaged in pot forming

Where decorations are necessary, they are incised using a piece of stick or a broken piece of calabash. The decorations consist of simple horizontal rows of dots/lines, grooved horizontal zigzag or wavy lines confined to or just below the neck of the pot.³⁸ Decorations are also applied using different colours especially for pots meant for use as flower vases, see Figures 7 and 8 below.

³⁸ Ibid.

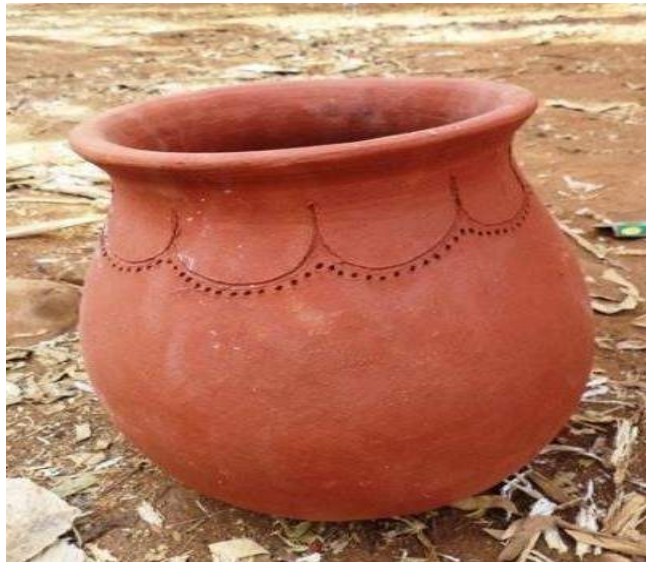


Figure 5: grooves and dots decorations



Figure 6: Zigzag line decoration on a pot



Figure 7: A flower vase decorated using black and white colour paint



Figure 8: Colour decorations on a pot meant for use either as a flower vase or a house decoration

Thereafter, the vessel is dried under a shade, away from direct sunlight for about 5 days to remove water that is mechanically combined with clay particles.³⁹ Direct sunlight is avoided since rapid drying due to high temperatures can cause cracks. After the initial drying, the pot is dried directly under the sun. The duration for direct drying varies depending on the size and relative humidity. When dry, the pots are baked hard by firing them under high temperatures. To ensure even and/or controlled firing, firing is usually done late in the evening when the wind is not blowing. Thereafter, they allow the

³⁹ Workshop with traditional potters in Ishiara held on 13/11/2019.

pots to cool before pulling them out from the fire using tongs thus preventing cracking through rapid heat loss. Once ready, the women hawk the pots around the village or take them to Ishiara market.⁴⁰



Figure 9: Pots for sale at Ishiara market

The vessels may also have different shapes. There are wide-mouthed pots (mostly for cooking); narrow-mouthed (for storing water and grains); and with varying basal shapes-flat bases (used as flower vases) and rounded/cylindrical bases (for cooking).⁴¹

⁴⁰ Ibid.

⁴¹ Ibid.



Figure 10: wide-mouthed pots



Figure 11: pots with a rounded or cylindrical bases

4 Conceptual context

4.1 TK holders' institutions

TK holders' institutions are complex, multifaceted governance frameworks that deal with diverse subject matters, depending on their functions, to wit: land, livestock, labour-sharing, mutual assistance (social), health, traditional

beliefs (including rituals, spiritual leaders & sacred areas), traditional leadership, recreational, and conflict resolution.⁴² They include customary laws and practices; family secrets; oral agreements; sharing mechanisms; community sanctions; trust; and ostracism.⁴³ They have remained resilient, and enjoy popular legitimacy because of their ‘proximity and intimate familiarity with their communities’ which makes them ‘more effective in adjudicating disputes, allocating land, and advocating for their constituents than many MPs, local councillors, and state institutions.’⁴⁴ The legitimacy also stems from the fact that they function according to cultural norms which people are deeply familiar with, thus facilitating both access and (non-electoral) accountability,⁴⁵ especially where formal state institutions have failed or had limited access. This is in consonance with studies suggesting that ‘successful engagement with rural communities should start with recognizing that they have institutions through which they can practise or organize collective action.’⁴⁶ A study conducted on the Mijikenda, confirms that ‘respect for the indigenous institutions remains strong’ in the community.⁴⁷

As governance frameworks for TK and natural resources, and data repositories (holding knowledge, social networks, ethos, values, methods of utilising resources and conservation etc.).⁴⁸ They are also custodial institutions that aim at ‘the continuous use and preservation of the place, its values, and its

⁴² Mowo *et al* op cit note 2 at 111.

⁴³ Jeremy de Beer & Sacha Wunsch-Vincent ‘Appropriation and Intellectual Property in the Informal Economy’ in Erica Kraemer-Mbula & Sacha Wunsch-Vincent (eds.) *The Informal Economy in Developing Nations-Hidden engine of innovation?* (Cambridge University Press, 2016) at 243; see also Nagla Rizk, Ayah El Said, Nadine Weheba & Jeremy de Beer ‘Towards an Alternative Assessment of Innovation in Africa’ OpenAir, *Working Paper 10* (2018) at 40.

⁴⁴ Carolyn Logan ‘The roots of resilience: Exploring popular support for African traditional authorities’ (2013) 112(448) *African Affairs*, 353-376 at 358.

⁴⁵ Ibid; Judith Kamoto, Graham Clarkson, Peter Dorward & Derek Shepherd ‘Doing more harm than good? Community based natural resource management and the neglect of local institutions in policy development’ (2013) 35 *Land Use Policy* at 293–301 at 293; see also Heidi Wittmer, Felix Rauschmayer & Bernd Klauer ‘How to select instruments for the resolution of environmental conflicts?’ (2006) 23 *Land Use Policy*, 1–9 at 4.

⁴⁶ Mowo *et al* op cit note 2 at 2.

⁴⁷ Nyamweru & Kimaru op cit note 25 at 327-350.

⁴⁸ Shivakumar op cit note 4 at 6.

surrounding environment, including the preservation of its symbolic and cosmological significance.’⁴⁹

TK holders’ institutions generate social capital-binding and bridging social capital-that is considered ‘an additional factor of production.’⁵⁰ Social capital (social norms, relationships and networks) can be mobilized to address societal challenges, create positive synergies, and ensure efficient use of resources since ‘people who share a common background, language, culture, and customs’ are able to mobilise resources effectively.⁵¹ Social networks allow the formation of linkages between local knowledge and formal sciences that can have positive impacts in society.⁵²

Withal, local institutions have been conceptualized within a broader set of theories of institutions, where the aim is to ‘get institutions right’ and/or strengthen institutions.⁵³ This approach is informed by various factors. First, there is a prevailing view that good governance, strong and accountable institutions are crucial for poverty reduction and development effectiveness.⁵⁴ Second, the massive failure of formal state institutions to project their

⁴⁹ Ibid at 107.

⁵⁰ Moina Rauf ‘Innovations and informal institutions: An institutionalist approach to the role of social capital for innovation’ (2009) *Journal of Academic Research in Economics* at 34.

⁵¹ Ibid. See Donnelly-Roark *et al* op cit note 1 at 4.

⁵² Maria-Constanza Torri & Julie Laplante ‘Enhancing innovation between scientific and indigenous knowledge: pioneer NGOs in India’ 5(29) (2009) *Journal of ethnobiology and ethnomedicine* at 1. See Peter Drahos & Susy Frankel ‘Indigenous peoples’ innovation and intellectual property: The issues’ in Peter Drahos & Susy Frankel (eds.) *Indigenous peoples’ innovation: Intellectual Property Pathways to Development* (ANU Press, 2012) at 4.

⁵³ Watson op cit note 4 at 290; Frances Cleaver ‘Moral Ecological Rationality, Institutions and the Management of Common Property Resources’ 31(2) (2000) *Development and Change* at 361-383; and World Bank *World Development Report 2002: Building Institutions for Markets* (Oxford Press, 2002).

⁵⁴ International Development Association (IDA) ‘IDA at Work: Building Strong Institutions for Sustained Results’ available at <https://ida.worldbank.org/sites/default/files/pdfs/ida-at-work-building-strong-institutions.pdf> accessed on 16/01/2020.

authority, especially in rural contexts, has produced a development agenda fixated on building institutional capacity.⁵⁵

Consequently, the inordinate focus on formal institutions, for instance, in the context of TK protection, means that great efforts have been dedicated towards harnessing the IP regime to protect TK rather than on TK holders' institutions. Moreover, overemphasis on formal institutions, has resulted in a negative attitude towards traditional institutions. They have been highly criticised, *inter alia*, for being prone to manipulation by powerful forces in the community, gender bias, and abuse of power.⁵⁶ Such criticism, for instance that the institutions have a gender bias, is at times misplaced, since as this study shows, the roles of men and women are clearly recognised in those institutions. This limits the extent to which they can be deployed in encouraging innovation, building strong institutions and promoting entrepreneurship.

Despite the focus on formal institutions, the use of some of those institutions, like the IP regime to protect TK holders' innovations, faces certain technical and practical challenges. For instance, TK and TK based innovation may not meet the necessary criteria for IP protection. Besides, the sort of exclusive rights granted through formal IP protection cannot offer the necessary protection and appropriation to TK holders' innovations, which are mostly developed collectively. In the TK context, non-pecuniary incentives (intrinsic motivation) plays a considerable role in driving innovative behaviour unlike with IP where the 'prospects of exclusivity and financial rewards' are the main incentives.⁵⁷ Further, the use of the IP system by TK holders is constrained by low levels of awareness of IP, challenges in accessing IP protection measures, lack of technical expertise/personnel and financial resources, low investments

⁵⁵ McKenzie Johnson 'Strong Institutions in Weak States: Institution Building, Natural Resource Governance, and Conflict in Ghana and Sierra Leone' PhD thesis, Duke University (2017) at 12. See also Mamadou Dia *Africa's Management in the 1990s and Beyond: Reconciling Indigenous and Transplanted Institutions* (World Bank, 1996).

⁵⁶ Ashish Aggarwal 'Indigenous Institutions for Natural Resource Management: Potential and Threats' 43(23) (2008) *Economic & Political Weekly*, 21-24 at 23.

⁵⁷ Beer & Wunsch-Vincent op cit note 43 at 242.

in R&D, high cost of filing and challenging enforcement, and inadequate administrative infrastructure.⁵⁸

Nonetheless, TK holders’ can, for instance, use the IP system (such as patent, trademark, geographical indications, or trade secret or confidential information) to: protect their innovation against unauthorised usage of protected IP by competitors; help commercialise IP-protected products and services; help license inventions and create corresponding technology markets; increase brand-based enterprise recognition; signal to potential venture capital to obtain business finance; limit the right of employees to enter employment with competitors; ensure that information is kept confidential; ensure the transfer of rights related to inventions from employees to companies; and facilitate sharing of rights in the results of cooperative projects in a manner that satisfies all contracting parties.⁵⁹ Indeed, IP becomes more important as interaction between the informal and formal sectors for joint collaborative innovation increases.⁶⁰ Sometimes, too, innovation in the informal sector occurs with the help of formal sector scientific institutions, and vice versa⁶¹ hence the need for the much-developed IP system in protecting the ensuing innovation.

4.2 TK holders’ institutions and innovation

An innovation is defined as ‘the implementation of a new or significantly improved product (good or service), or process, a new marketing method, or a new organizational method in business practices, workplace organization or external relations.’⁶² In this context, innovative activities include ‘the acquisition of machinery, equipment, software and licenses, engineering and development work, design, training, marketing and R&D where undertaken to

⁵⁸ Ibid at 237.

⁵⁹ Ibid at 236.

⁶⁰ Ibid at 240.

⁶¹ Jeremy de Beer, Kun Fu & Sacha Wunsch-Vincent ‘Innovation in the informal economy’ in Erica Kraemer-Mbula & Sacha Wunsch-Vincent (eds.) *The Informal Economy in Developing Nations-Hidden engine of innovation?* (Cambridge University Press, 2016) at 73.

⁶² OECD & Eurostat, *Oslo Manual: Guidelines for Collecting and Interpreting Innovation Data* (Paris: OECD Publications, 2005) at 46.

develop and/or implement a product or process innovation.’⁶³ The motivation for innovation includes the desire to increase market share, enter new markets, improve product range, increase the capacity to produce new goods, reduce costs and so on.⁶⁴ In the formal sector, markets are recognised as one of the main drivers of innovation. In the context of TK holders, formal markets may not exist,⁶⁵ as communities might be interested in non-market transactions such as sharing a product rather than taking it to the market to increase market share.

Institutions play a key role in driving innovations, and are one of the five building blocks of innovation systems.⁶⁶ Institutions determine the speed, magnitude and quality of innovation processes,⁶⁷ manage uncertainty, provide information, manage conflicts, promote trust among groups, diffuse innovations, and mediate distributional effects of innovation processes related to social class, gender, age, ethnicity, or political power.⁶⁸ They also provide incentives for learning, knowledge and innovation production.⁶⁹

TK holders’ institutions play a critical role in driving TK holders’ innovation and innovation processes. TK holders’ innovations are part of, and are a by-product of TK since TK entails ‘knowledge, know-how, innovations, skills and practices’⁷⁰ of local communities. Indeed, the innovation process has been

⁶³ Ibid.

⁶⁴ Jacques Charmes, Fred Gault & Sacha Wunsch-Vincent ‘Formulating an Agenda for the Measurement of Innovation in the Informal Economy’ in Erica Kraemer-Mbula & Sacha Wunsch-Vincent (eds.) *The Informal Economy in Developing Nations- Hidden engine of innovation?* (Cambridge University Press, 2016) at 338; see also Beer *et al* op cit note 61 at 54.

⁶⁵ Luiz Carlos Beduschi, Raúl Contreras & Raúl Holz ‘Innovation for sustainable rural development’ FAO (2017) at 2.

⁶⁶ The others are a regulatory and policy framework; entrepreneurial ecosystem and access to finance; human capital; and technical and R&D infrastructure. See UNCTAD ‘Technology and Innovation Report 2018-Harnessing frontier technologies for sustainable development’ (2018) at 55.

⁶⁷ Berdegue op cit note 18 at 6.

⁶⁸ Ibid at 7.

⁶⁹ UNCTAD ‘Technology and Innovation Report 2018’ op cit note 66 at 56.

⁷⁰ Oguamanam Chidi ‘Tiered or Differentiated Approach to Traditional Knowledge and Traditional Cultural Expressions: The Evolution of a Concept,’ CIGI Papers No.

conceptualized as one where ‘knowledge’ is both ‘an input and output’ since innovations ‘reflect the introduction of a new combination of existing knowledge into the economy, and the innovation itself represents new knowledge.’⁷¹

Social capital among TK holders’ spurs and enhances innovation⁷² by facilitating access to resources (contacts, markets, credit and diverse domains of knowledge), and plays a critical role not only in the generation and diffusion of innovation.⁷³ Bridging social capital allows TK holders to increase their innovative capacity, meet social goals and expand institutional networks at local level and beyond, as they interact with actors such as financial institutions, development agencies, political elites in the community, and technical experts (including researchers and extension staff) in order to advance their innovation processes.⁷⁴ Hence, their institutions are useful in bridging the gap between the formal and informal institutions. Conversely, innovation processes contribute to building social capital, both bonding capital (intra-group) and bridging capital (inter-group) within local communities.

Indeed, what makes social capital a vital ingredient to the innovative process is the fact that it ‘reduces certain costs like information sharing, transaction costs and enforcement costs and this leaves many resources available for use for innovation-related expenditure.’⁷⁵ In rural areas, the diffusion of innovation can greatly benefit from the involvement of women since they play a central role in building social networks that are the main media through which new products or services, commercial or otherwise, are proposed, deliberated and accepted or rejected.⁷⁶ However, in the context of small firms,

185 (2018) at 5; see also Article 8(j), *Convention on Biological Diversity*, 1760 UNTS 79 (1992).

⁷¹ See Erica Kraemer-Mbula & Sacha Wunsch-Vincent (eds.) *The Informal Economy in Developing Nations-Hidden engine of innovation?* (Cambridge University Press, 2016) at xxvi.

⁷² Drahos & Frankel op cit note 52 at 16-18. Torri & Laplante op cit note 52 at 1.

⁷³ Rauf op cit note 50.

⁷⁴ Ibid at 1; Stephen Oluwatobi, Uchenna Efobi, Isaiah Olurinola & Philip Alege ‘Innovation in Africa: why institutions matter?’ (2015) *South African Journal of Economics* at 2; see also Torri & Laplante op cit note 52 at 1.

⁷⁵ Ibid at 36.

⁷⁶ UNCTAD ‘Pro-poor technology, innovation and entrepreneurship policies’

strong social capital could be a liability as well as an asset. Sometimes, dense networks might inhibit ‘innovative practices and new ideas’ while other times absence of ties is said to promote the generation of new ideas and knowledge. Weak ties may also play an important role in bridging the gap between the formal and informal institutions.⁷⁷ However, with TK holders’ institutions, the existence of dense networks might not inhibit innovation since there are customary laws that act as normative frameworks, governing the rights and obligations of community members at the individual, clan, family and community levels.

Studies suggest that innovation is occurring in the informal economy⁷⁸ ‘in a new set of under-studied contexts’,⁷⁹ some of which are relevant to TK holders. One of these contexts is innovation in community-based settings, such as homes, villages, craft workshops and among informal and semi-formal networks.⁸⁰ Innovation activities in these contexts are ‘extremely diverse, as are the sources of knowledge, learning and innovation that shape and diffuse them.’⁸¹ Those innovations are described variously as grassroots, informal, rural, pro-poor, frugal or *jugaad*, local, social, endogenous innovation.⁸² A discussion of all these innovations is clearly beyond the scope of this study. However, some of these forms of innovation are relevant to TK holders’ innovation, as they tend to go beyond enterprise innovation and typical firm incentives to innovate (such as increased revenue and market share).⁸³

UNCTAD/B/C. II/MEM.1/12, Geneva, 16-18 January 2012 at 11.

⁷⁷ Rauf *op cit* note 50.

⁷⁸ See generally, Beer & Wunsch-Vincent *op cit* note 43; Oluwatobi *et al* *op cit* note 74; Torri & Laplante *op cit* note 52 at 2.

⁷⁹ Elizabeth Hoffecker, ‘Local Innovation: what it is and why it matters for developing economies’ Working Paper 01, May 2018 at 2; see also Beer *et al* *op cit* note 61.

⁸⁰ The other context is within peer-to-peer networks of product users (also described as open, horizontal or user innovation. Open innovation ‘transcends organization and locational boundaries, relying instead on digital connectivity to link participants in the innovation process across disparate locales’, Hoffecker *op cit* note 79.

⁸¹ Beer *et al* *op cit* note 61 at 63.

⁸² See generally Berdegue *op cit* note 9 at 9.; UNCTAD ‘Pro-poor technology, innovation and entrepreneurship policies’ UNCTAD/B/C. II/MEM.1/12, Geneva, 16-18 January 2012; Hoffecker *op cit* note 79; Britta Rutert and Cath Traynor ‘Complexities of Social Innovation and Social Entrepreneurship by Two Indigenous Organisations in Rural South Africa’ Open Air, Working Paper 20 (2019).

⁸³ Charmes *et al* *op cit* note 64 at 345.

Moreover, such innovations incorporate knowledge domains beyond science, engineering and technology, by paying more attention to innovation metrics that capture spontaneous, process-based, and needs-driven innovations on the demand-side of the economy,⁸⁴ as discussed below.

Social innovation refers to innovations and processes of innovation that are social in nature (such as networking, collaboration, group formation, organisational governance and management practices), that improve a society’s ability to create opportunities for investment, growth and development.⁸⁵ Social innovation recognises that innovations can emerge through self-organisation, self-empowerment and development,⁸⁶ making it particularly relevant to TK holders who have unique institutions for self-governance, and who hold their TK collectively, and at times for certain social purposes, such as environmental conservation. Pro-poor innovation is relevant to TK holders due to their poor social and economic conditions. Inclusive innovation, *inter alia*, seeks to, ensure the inclusion of all the necessary stakeholders (including the excluded population) in the design, development, and in defining the problems and solutions that an innovation seeks to address.⁸⁷ Therefore, inclusive innovation is apposite to TK holders, and women as it eschews the exclusionary nature of conventional innovation where big firms ‘produce innovations that are associated with inequality’, and that have little connection to low-income populations.⁸⁸

⁸⁴ Rizk *et al* op cit note 43 at 4.

⁸⁵ Bureau of European Policy Advisers (BEPA) ‘Empowering People, Driving Change: Social Innovation in the European Union’ (European Communities, 2011); Geoff Mulgan, Simon Tucker, Rushanara Ali, and Ben Sanders ‘Social Innovation: What it is, Why it Matters, and How it can be Accelerated’ Skoll Centre for Social Entrepreneurship, Working Paper (2007) at 8-10.

⁸⁶ Rutert & Traynor op cit note 82 at 5.

⁸⁷ Jussi Jauhiainen and Lauri Hooli, ‘Indigenous Knowledge and Developing Countries’ Innovation Systems: The Case of Namibia,’ 1(1) (2017) *International Journal of Innovation Studies* 89-106 at 92. See Charmes *et al* op cit note 64 at 345.

⁸⁸ Richard Heeks, Mirta Amalia, Robert Kintu & Nishant Shah ‘Inclusive Innovation: Definition, Conceptualisation and Future Research Priorities’ *Manchester Centre for Development Informatics Working Paper* 53 (2013) at 2. See Petesch *et al* op cit note 9 at 1.

Indigenous innovation is rooted in the diverse and distinct cultures of Indigenous peoples’ and tied to their long inhabitation in a particular place.⁸⁹ Indigenous innovation entails ‘...cultural autonomy, remembrance and retrieval, self-determination, and community-based values linked with the maintenance, preservation, restoration and revitalisation of indigenous knowledge systems that merge episteme with place and cultural practice.’ Each of these aspects are ‘continually articulated, debated, redefined, and expanded both within and outside of indigenous communities.’⁹⁰ Indigenous innovation develops in response to threats engendered by ecological and cultural challenges,⁹¹ especially at the ‘level of systems maintenance, where the systems being maintained are interlocking ecological systems and sub-systems.’⁹²

However, TK holders’ innovation marks a conceptual departure from the various domains of innovation, highlighted above, in a number of ways. It departs from inclusive innovation, in the sense that, the latter does not specify the ‘marginalised’ groups that it is concerned with. Indeed, the target group within inclusive innovation, tends to vary in different contexts.⁹³ TK holders’ innovation focuses on TK holders. Local innovation differs from TK holders’ innovation in that, with the former, the innovation may not have the necessary linkage to TK, culture, tradition or heritage of the innovators. Moreover, there is also no necessary link between the innovator and the relevant resources (plants and animals) in a cosmological sense. Further, local innovation connotes only context-specific and internal innovation, and is thus conceptually narrower than TK innovation.⁹⁴ Hence, TK innovation can be described as local, but local innovation may not necessarily be TK innovation. There are relatively more overlaps between TK and Indigenous innovation than with the other types of innovation. While TK innovation is generally informed by TK, Indigenous innovation is underpinned by Indigenous

⁸⁹ Elizabeth Sumida Huaman ‘Indigenous-Minded Innovation in Shifting Ecologies’ in Elizabeth Sumida Huaman & Bharath Sriraman (eds.), *Indigenous Innovation: Universalities and Peculiarities*, (SensePublishers, Rotterdam, 2015) at 1-10.

⁹⁰ Ibid at 4.

⁹¹ Ibid at 5.

⁹² Drahos & Frankel op cit note 52 at 22.

⁹³ Heeks *et al* op cit note 88 at 4.

⁹⁴ Hoffecker op cit note 79 at 1, 3.

knowledge (IK). TK is the 'totality of all knowledge and practices' used in the management of socio-economic and ecological facets of life while IK is the local knowledge unique to a particular culture and society that identifies itself as Indigenous.⁹⁵ Nonetheless, TK and IK may also overlap depending on the political context and experiences of the claimants to the knowledge. For instance, the Indigenous people of North America, may describe IK the same way as TK, but their recognition in international law as Indigenous People, has a jurisprudential connotation that ties them to the use of IK, even though they may not support any suggestion that IK is not TK. Thus, TK holders' innovation is broader, and may encompass indigenous innovation. However, there is a convergence between Indigenous and TK innovation in that both are 'place-based' and 'cosmologically linked to land' in the sense that there is a special relationship between the innovators and a place.⁹⁶

However, and for a long time, research and metrics on innovation has focused on innovation within large firms, to the extent that innovation (especially product innovation) is more often equated with R&D⁹⁷ expenditures than on informal means such as 'learning-by-doing,' 'learning-by-using,' 'learning on the job,' self-training and apprenticeships.⁹⁸ Moreover, conventional innovation metrics value the standardisation of innovation through either IP standards or levels of educational enrolment or attainment, hence inappropriate in investigating the nature, type and extent of TK holders' innovation;⁹⁹ which could be uncoded and transmitted

⁹⁵ Mugabe op cit note 7 at 3; WIPO 'The Protection of Traditional Knowledge: Outline of Policy Options and Legal Elements' WIPO/GRTKF/IC/7/6, para 17; Republic of Kenya *The National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions* (Government of Kenya, 2009) 1.

⁹⁶ Drahos & Frankel op cit note 52 at 2.

⁹⁷ Beer *et al* op cit note 61 at 53-55; Hoffecker op cit note 79; Drahos & Frankel op cit note 52 at 3; and Asli Kunt, 'What Explains Firm Innovation in Developing Countries?', available at <http://blogs.worldbank.org/allaboutfinance/what-explains-firm-innovation-developing-countries>, accessed on 30/11/2019.

⁹⁸ Rizk *et al* op cit note 43 at 3-4; Michaela Trippl 'Regional Innovation Systems and Knowledge-sourcing Activities in Traditional Industries – Evidence from the Vienna Food Sector' (2011) 43(7) *Environment and Planning A*, 1599-1616 at 1599; Drahos & Frankel op cit note 52 at 18.

⁹⁹ Beer *et al* op cit note 61 at 55. see Rizk *et al* op cit note 43 at 21.

transgenerationally.¹⁰⁰ Further, R&D is equated more or less with product innovation-intensive technological breakthroughs or, in IP circles, patentable inventions,¹⁰¹ making it insufficient in the context of TK holders' innovations that are place-based, cumulative (limited newness), collectively developed and result from interactions with nature, and not R&D.¹⁰²

Thus, there is lack of comprehensive research outlining a coherent theoretical and practical account of TK innovation. Indeed, Rizk *et al* rightfully opine that TK is not included within the broader definition, and understanding of knowledge and innovation.¹⁰³ Consequently, there is a lack of research linking TK holders' institutions and innovation in Africa, more so in the context of the SDGs.

4.3 TK holders' institutions and building of strong institutions

As mentioned earlier, the popularity, legitimacy and resilience of TK holders' institutions means that they still play crucial roles in society. TK holders rely on these institutions in natural resources governance, conflict resolution, in maintenance of law and order, and even politics, as is illustrated in the case studies. This means that they can perform important roles in building and strengthening formal institutions, especially where the latter are weak or non-existent.

Social capital helps TK holders build important linkages, within and beyond the community, including with public and private institutions, which help in strengthening institutions.¹⁰⁴ The ability of TK holders' institutions to generate innovation, provides knowledge and capacity for implementing policy initiatives, and 'fill in the void created by the limited penetration of national institutions' especially 'in the presence of weak state capacity'.¹⁰⁵ For instance, with the institutional crisis bedeviling IP institutions in spurring and

¹⁰⁰ Drahos & Frankel op cit note 52 at 18.

¹⁰¹ Beer *et al* op cit note 61 at 54.

¹⁰² Triplpl op cit note 98 at 1599.

¹⁰³ Rizk *et al* op cit note 43 at 8; Watson op cit note 4 at 290; Cleaver op cit note 53; World Bank op cit note 53; and Berdegue op cit note 9 at 3-4.

¹⁰⁴ Torri & Laplante op cit note 52 at 10; see also Rauf op cit note 50 at 37.

¹⁰⁵ Stelios Michalopoulos and Elias Papaioannou 'Pre-colonial Ethnic Institutions and Contemporary African Development' (2013) 81 *Econometrica* at 117.

promoting TK holders’ innovation among communities,¹⁰⁶ collaborations between TK holders’ and IP institutions can enrich the latter, and address the inadequacy, deficiency and unsuitability of the IP regime in protecting TK. Such collaborations, can break the barrier to scaling up TK holders’ innovative activity, for instance, if communities can have some ‘exclusive rights’ over their innovations, they might develop their businesses beyond a certain stage, and possibly be incentivised to invest in machines or human capital.¹⁰⁷ This is so because, the dynamics of innovation benefits from a system in which all actors (including TK holders and their institutions) in the innovation paradigm work together in a collaborative manner. Such collaborations enhance good governance, inclusivity in innovation and the building of strong institutions from below, as communities participate in the development dialogue.

Moreover, TK holders’ institutions are able to address the gender gap and institutional barriers to innovation within the IP regime. For instance, in a study of Zulu women bead-workers, Desmond Oriakhogba demonstrates that through social entrepreneurship and inclusive innovation, rural women crafters are ‘getting around the challenges within the IP regimes by developing a community which fosters inclusion, collaboration, knowledge-sharing and continuous learning among themselves.’¹⁰⁸ This way, the women are ‘constantly improving and harnessing their indigenous knowledge and empowering themselves to be able to address their personal and shared social challenges of poverty, inadequate health care, housing, access to education for their children, among others.’¹⁰⁹

¹⁰⁶ Beduschi *et al* op cit note 65 at 6.

¹⁰⁷ Beer & Wunsch-Vincent op cit note 43 at 255.

¹⁰⁸ Desmond Oriakhogba ‘Empowering Rural Women Crafters in KwaZulu-Natal: The dynamics of intellectual property, traditional cultural expressions, innovation and social entrepreneurship’ (2020) 137 *The South African Law Journal* at 145-172.

¹⁰⁹ Ibid at 145-172.

4.4 TK holders' institutions and transformative entrepreneurship

UNCTAD identifies the institutional framework, as one of the priority areas in devising an entrepreneurship policy in developing countries.¹¹⁰ The institutional framework has a strong impact on the type of entrepreneurship that arises, and its broader societal impact, including its contribution to structural transformation.¹¹¹

TK holders' institutions contain data that has a decisive impact on the prevalence, type and nature of entrepreneurial activities¹¹² that TK holders can engage in. The data also assists in determining if, how, and under what conditions community members can access available resources such as knowledge to generate output, skills, innovation, labour, finance etc.¹¹³

Social capital enables TK holders access vital contacts, resources (markets, credit, and diverse domains of knowledge) and information by linking them to other social and economic agents, within the community and beyond, whose capabilities could boost entrepreneurship.¹¹⁴ Conversely, the new actors (entrepreneurs) provide the necessary resources needed in the innovation process such as tools, production equipment, access to seed capital and grant

¹¹⁰ The others are national entrepreneurship strategy; education and skills; innovation and technology; access to finance; and awareness and networking. See UNCTAD 'UNCTAD Entrepreneurship Policy Framework and its implementation' (2013) available at <https://unctad.org/en/Pages/DIAE/Entrepreneurship/EPF-4.aspx> accessed on 02/01/2020.

¹¹¹ UNCTAD 'The Least Developed Countries Report 2018- Entrepreneurship for structural transformation: Beyond business as usual' (2018) at 14.

¹¹² Niels Bosma, Jeroen Content, Mark Sanders & Erik Stam 'Institutions, Entrepreneurship, and Economic Growth in Europe' 51(2) (2018) *Small Business Economics* at 483.

¹¹³ Ibid; see also Brendan Tobin 'Bridging the Nagoya Compliance Gap: The Fundamental Role of Customary Law in Protection of Indigenous Peoples' Resource and Knowledge Rights' (2013) 9(2) *Law Environment and Development Journal*, 142-162 at 151-153.

¹¹⁴ Beduschi *et al* op cit note 65 at 3; see also Mowo *et al* op cit note 2 at 2. Torri & Laplante op cit note 52 at 10; see also Rauf op cit note 50 at 37.

funds for innovation development.¹¹⁵ Thus, while spurring innovation, TK holders’ institutions also enhance and promote their entrepreneurial spirit.¹¹⁶

Successful entrepreneurship is also seen as ‘a cooperative endeavour, mediated by social networks’ rather than ‘a purely individualistic and competitive’ effort.¹¹⁷ Consequently, the environment within which entrepreneurship takes place impacts its nature and success. Rutert and Traynor show in their research that TK holders are social entrepreneurs¹¹⁸ who generate process innovations, for example, in ‘networking, collaboration, group formation, and organisational governance and management practices.’¹¹⁹ These activities are entrepreneurial, irrespective of their economic outputs, as they not only produce ‘tangible, alienable (economic) values’ but also develop ‘inalienable (social) values and (inter)actions.’¹²⁰ Likewise, Oriakhogba’s study shows how rural Zulu women bead workers, are addressing personal and shared social challenges of poverty, inadequate health care, housing, access to education for their children, among others, through social entrepreneurship and inclusive innovation.¹²¹ Thus, TK holders engage in entrepreneurship to meet local needs due to gaps left by a State, which is no longer supplying the much-needed products and services.¹²²

TK holders’ institutions, also hold great promise in driving transformational entrepreneurship amongst TK holders, since transformational

¹¹⁵ Ibid.

¹¹⁶ UNCTAD (2018) op cit note 111 at 11; see also UNCTAD (2012) op cite note 76 at 9; Rochelle Spencer, Martin Brueckner, Gareth Wise & Marika Bundak ‘Capacity Development and Indigenous Social Enterprise: The Case of the Rirratjingu Clan in Northeast Arnhem Land’ (2017) 23 *Journal of Management & Organization* at 841.

¹¹⁷ Ibid.

¹¹⁸ Rutert & Traynor op cit note 82 at 5. See also UNCTAD (2018) op cit note 111 at 9.

¹¹⁹ Rutert & Traynor op cit note 82 at 4.

¹²⁰ Ibid at 5.

¹²¹ Oriakhogba op cit note 108 at 145-172.

¹²² Tatiana Thieme ‘Turning Hustlers into Entrepreneurs, and Social Needs into Market Demands: Corporate–Community Encounters in Nairobi, Kenya’ (2015) 59 *Geoforum* at 230; see also Kari Koskinen ‘Inclusive Innovation in the Private Sector: The Case of East African Technology Start-Ups’ (2017) *Proceedings of the 50th Hawaii International Conference on System Sciences*, 4159-4168 at 4162.

entrepreneurship foresees the possibility of transformational contribution by non-firms, that is, organizations such as cooperatives, non-governmental organizations and public institutions.¹²³ Be that as it may, existing literature has not critically examined the role of TK holders’ and their institutions in promoting entrepreneurship yet they hold vital data that can be tapped to spur entrepreneurship for community benefit.

4.5 TK holders’ institutions, data and data governance

TK holders’ institutions are data repositories explaining why they are able to generate innovations, and contribute towards the strengthening of other institutions. Through the institutions, vital data is collected, shared, analysed and applied to provide expertise, monitor, plan, and manage disasters such as drought, famine, disease or bad omen to the community.¹²⁴ For instance, the Afar pastoralists in Ethiopia are able to predict weather and climate through the observation of stars, winds, livestock, insects, birds, trees and other wildlife.¹²⁵

While data is defined as ‘factual information that has been collected together for reference or analysis, or numerical information represented in a form suitable for computer processing’¹²⁶ in the context of Indigenous peoples, the term refers to ‘information or knowledge, in any format or medium, which is about and may affect Indigenous peoples both collectively and individually.’¹²⁷ Data is a critical tool for advancing and attaining the cardinal objectives and development aspirations of Indigenous Peoples¹²⁸ including realising the right to self-determination. However, data is intimately linked to

¹²³ UNCTAD ‘The Least Developed Countries Report 2018- Entrepreneurship for structural transformation: Beyond business as usual’ (2018) at 13.

¹²⁴ Nyamweru (1998) op cit note 16 at 11.

¹²⁵ International Fund for Agricultural Development (IFAD) ‘The Traditional Knowledge Advantage: Indigenous peoples’ knowledge in climate change adaptation and mitigation strategies’ (2016) at 7.

¹²⁶ Elahi *et al* op cit note 4 at 18.

¹²⁷ Open Communique from the Indigenous Data Sovereignty Summit, Canberra, ACT, to all individuals involved in data and data infrastructure in Australia, *Indigenous Data Sovereignty* (June 20, 2018) available at <https://perma.cc/8VPR-9TTL> accessed on 12/12/2020.

¹²⁸ Chidi Oguamanam ‘Indigenous Data Sovereignty: Retooling Indigenous Resurgence Development’ CIGI Papers No. 234 (2019) at 8.

the sovereignty and self-determination of all nations¹²⁹ hence the term data sovereignty, which refers to the right of States in relation to other States or entities to govern the collection, ownership, access and use of data within its jurisdiction.¹³⁰ Consequently, the concept of data sovereignty allows States to control and own data belonging to TK holders (some of whom are Indigenous peoples).

Due to contestation over the sovereignty of Indigenous peoples and some of their rights in specific national contexts, they have had a troubled relationship since colonial times regarding how data concerning them is generated, accessed, shared, applied and owned by the State.¹³¹ This is in spite of the fact that their ability to realise their rights to self-determination and leverage their development aspirations is anchored, to a large degree, on the issue of data sovereignty.¹³²

While the conventional conceptions of the term data are broad, this study conceptualises the term data narrowly, by focusing on the TK that is generated, maintained, controlled, protected and developed by a community, and that is essential to their survival and livelihoods. Such TK (data), is developed within, and through TK institutions.

The data produced by TK holders provides ‘information, guidance, help and support and gain most from developing social capital.’¹³³ In the context of Indigenous peoples, ‘authentic data drives policy formulation, decision making and mapping of development aspirations, problem solving and other calculations critical to Indigenous resurgence in a range of fields.’¹³⁴ Moreover, data produces ways of doing which are unique to a specific place;¹³⁵ and is responsible for ‘the effective and sustainable expansion of the

¹²⁹ Ibid at 4.

¹³⁰ Ibid; see also Rebecca Tsosie ‘Tribal Data Governance and Informational Privacy: Constructing “Indigenous Data Sovereignty”’ 80(2) (2019) *Montana Law Review* at 230.

¹³¹ Oguamanam op cit note 128 at 4.

¹³² Ibid at 10.

¹³³ Kamoto *et al* op cit note 126.

¹³⁴ Oguamanam op cit note 128 at 5.

¹³⁵ Hoffecker op cit note 79 at 4.

capabilities and opportunities of the poor.’¹³⁶ This is because it is accessible and applicable, and communities are able to effectively build on it to create innovative processes.¹³⁷ In a collaborative context, TK can ‘empower other types of knowledge and innovation,’¹³⁸ explaining why development activities that work with and within TK and traditional institutions have several advantages over projects that operate outside them.¹³⁹ Indeed, development agencies including the World Bank recognise the importance of integrating TK into development and poverty eradication ventures¹⁴⁰ yet there is little research about the role of TK in innovation policies and ISs.¹⁴¹

The social networks created by TK holders around their innovations do enhance their capacities to create, use and disseminate TK.¹⁴² As noted earlier, such networks interface with external networks, thus giving insights into how TK holders’ innovation can be influenced by, or interact with, scientific (secondary) innovation specifically, and formal systems at large. While this interaction can result in the revitalisation of TK, it might occasion the conversion of TK into commodities that are controlled by new elites, due to power imbalances.¹⁴³ This is so because some of the efforts at revitalisation of TK, such as documentation, may among other things, alienate the relevant TK from the “protocols and epistemologies in which they were previously embedded.”¹⁴⁴ In addition, engagement with external actors may invoke concerns regarding what kind of TK should be disclosed in local innovation networks, and what should not. Moreover, engagement with external entities,

¹³⁶ Berdegue op cit note 9 at 10; see also Nicolas Gorjestani ‘Indigenous Knowledge for Development’ available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwjdpfaApZHIhVB2AKHSSAB68QFjAAegQIABAB&url=http%3A%2F%2Fweb.worldbank.org%2Farchive%2Fwebsite00297C%2FWEB%2FIMAGES%2FIKPAPER_.PDF&usq=AOvVaw2kFdKUZvXetZEktv7dHpZH, accessed on 25/09/ 2019.

¹³⁷ Torri & Laplante op cit note 52 at 10.

¹³⁸ Rizk *et al* op cit note 43 at 31.

¹³⁹ Torri & Laplante op cit note 52 at 10.

¹⁴⁰ Gorjestani op cit note 136 at 3.

¹⁴¹ Jauhiainen & Hooli op cit note 87 at 90.

¹⁴² Torri & Laplante op cit note 52 at 1.

¹⁴³ Ibid at 7.

¹⁴⁴ Ibid at 8.

primarily science-based innovation firms, tends to fill the void left by insufficient government investment in TK, only in instances where they become entitled to the appropriation of TK through the IP system.¹⁴⁵ This justifies an exploration of TK holders’ institutions, and the roles they can perhaps play, in defining what constitutes TK holders’ data, and appropriate ways of securing that data.

5 Findings and analysis

5.1 TK holders’ institutions: nature and existence

In the case studies, there is evidence of existence of TK holders’ institutions, in the form of customary laws, customs, traditions, family secrets, oral agreements, sharing mechanisms, community sanctions, trust, councils of elders, social capital and individuals holding specialised TK.

TK holders’ institutions are grassroots decision-making units through which diverse social problems are identified and solutions provided at the local level. For instance, among the Mijikenda, the *kaya* elders seem to perform most of the functions listed by Mowo *et al.* In the Mbeere case study, the main institution in charge of traditional pottery are elderly women,¹⁴⁶ who do not have many other roles in the community like the *kaya* elders.

As mentioned earlier, TK holders’ institutions are governance frameworks that provide answers to contemporary problems faced by TK holders, as evidenced by the work of *kaya* elders in conservation. As data repositories, they play a central role in the creation, diffusion and application of innovation; while the innovation they generate continues to replenish and strengthen them. This also explains why those institutions can boost and contribute to peace, justice and the building of strong institutions.

Unlike conventional IP institutions, TK holders’ institutions take a more inclusive and pragmatic approach to gender, as demonstrated by the prominent

¹⁴⁵ Grant Isaac & William Kerr ‘Bioprospecting or Biopiracy: Intellectual Property and Traditional Knowledge in Biotechnology Innovation’ (2005) 7 *The Journal of World Intellectual Property*, 35-52 at 36.

¹⁴⁶ Interview with Mbeere traditional potters on 12/11/2019.

role played by elderly Mbeere women in conducting traditional pottery and transmitting those skills to young women. Studies have shown that the IP system does promote gender bias against women innovators and creators¹⁴⁷ demonstrating its inappropriateness in promoting and protecting innovative activities by women. Therefore, TK holders’ institutions are able to accommodate the participation of women, and even men depending on a given context as aspects of their gender inclusivity in innovation. Further, they thus produce varied innovations that may deal with a wide range of social problems, such as environmental degradation, and poverty that may affect different segments of society.

5.2 Roles of TK holders’ institutions in promoting innovation

TK holders’ institutions have a role in advancing innovation. Those institutions (social capital/networks) provide what De Beer *et al* describe as a ‘local innovation system.’¹⁴⁸ They are the space that supports learning, knowledge production and utilisation; innovation promotion and exchange; and flow of knowledge and innovation.¹⁴⁹ In the Mbeere case study, senior women transmit intergenerationally pottery skills and practices to young women, either through apprenticeships or experiential learning.¹⁵⁰ Similarly, among the *kaya* elders, TK can be passed through divine intervention, for instance, where prophets get information on different calamities, diseases and outbreaks, and pass the same to elders.¹⁵¹ The respective innovations have thus survived courtesy of the institutional dynamics that allow the flow and transmission of innovation intergenerationally.

TK holders’ institutions allow communities to enhance their innovative capacity, and expand their institutional networks, at the local level and beyond. This increases their innovation output, as they access information and learn new techniques of production. The General Coordinator of ABN explained that in their work they ‘encourage the sharing of seeds within and outside

¹⁴⁷ Bartow op cit note 8 at 551 – 584.

¹⁴⁸ Beer *et al* op cit note 61 at 60.

¹⁴⁹ Torri & Laplante op cit note 52 at 1.

¹⁵⁰ Interview with Mbeere traditional potters on 12/11/2019.

¹⁵¹ A meeting with *kaya* elders at Kaloleni on 04/11/2019.

communities to encourage diversity.¹⁵² The *kaya* elders have had a collaboration with UNESCO, where the latter supported the formation of the Mijikenda Council of Elders for all the nine sub-communities, and gave funding to hire forest guards.¹⁵³ Moreover, UNESCO has donated funds that were used to give awards to *kayas* that are doing well in conservation thus incentivising elders and enhance competitiveness in conservation.¹⁵⁴ Thus, strengthening TK holders' institutions, would correspondingly enable communities to collaborate effectively with relevant actors, and help advance their innovation activities.

TK holders' innovations are mainly geared towards meeting some social goals (drawing parallels with social innovation), and not necessarily profit making. One respondent indicated that 'the driving force for TK holders is not economic but revitalization of knowledge and practices.'¹⁵⁵ Among the Mbeere people, pottery was not done for sale, although nowadays this has changed.¹⁵⁶ Additionally, the goals and expression of TK holders' innovations, at times, have less to do with products, and everything to do with services to society. The innovations tend to take the form of 'services to the land' with huge public benefits in terms of biodiversity, and environmental and climate values, which are not easily convertible into income streams.¹⁵⁷ The *kaya* elders have through long interaction with their environment, developed innovative practices and systems for regulating access to the forests, medicinal plants, sacred *kaya* areas, rare species, traditional knowledge and agricultural activities.¹⁵⁸ Moreover, the pottery activities of the Mbeere women contributes to firewood conservation, as the traditional pots retain more heat than normal cooking pots.¹⁵⁹ According to the General Coordinator of African Biodiversity Network (ABN),

¹⁵² Interview with the General Coordinator of ABN at Thika on 14/10/2019.

¹⁵³ A meeting with *kaya* elders at Kaloleni on 04/11/2019.

¹⁵⁴ A meeting with *kaya* elders at Kaloleni on 04/11/2019.

¹⁵⁵ Interview with the General Coordinator of ABN at Thika on 14/10/2019.

¹⁵⁶ Interview with Mbeere traditional potters on 12/11/2019.

¹⁵⁷ Drahos & Frankel op cit note 52 at 24.

¹⁵⁸ Interview with an environmental scientist working with the CFCU at Kilifi on 05/11/2019.

¹⁵⁹ Workshop with women potters in Mbeere held on 13/11/2019.

“The greatest contribution of communities to SDGs mostly is in climate change, environment and water. The revival of seeds, biodiversity and ecosystems contributes to SDGs because we work in a holistic manner. This work contributes to adaptation and improved nutritional levels amongst the communities.”¹⁶⁰

Through bridging social capital, TK holders’ institutions act as special vehicles that promote the commercialisation and efficient diffusion of innovation in society.¹⁶¹ For instance, the *kaya* elders have collaborated with TICAHA, a CSO, in efforts towards documenting and commercialising their traditional medicine. The *kaya* elders provided knowledge on plants with various healing properties, while TICAHA offered training on various ways of preparing drugs for purposes of commercialisation and wider reach of the drugs. The elders indicated that the collaboration was successful, and it helped improve the relationship between the youth and elders.¹⁶² They have also collaborated with NMK in preserving their TK, traditions and cultures, and with the county government of Kilifi in having forest guards to protect the forests.¹⁶³

Whereas through collaborations, TK can empower other types of knowledge and innovation,¹⁶⁴ as mentioned earlier, collaborations aimed at commercialisation, may occasion the loss of TK and innovation, especially if they are not carried out through TK holders’ institutions. For instance, efforts by the government and some non-governmental organisations to introduce the throwing wheel (a modern technique of making pots instead of hand pottery) among the pottery communities to make the process more efficient and less labour intensive, was rejected by potters so as to preserve the sanctity of cultural and communal processes of knowledge production.¹⁶⁵ Moreover, they may have rejected mechanised production as it is likely to weaken traditional

¹⁶⁰ Interview with the General Coordinator of ABN at Thika on 14/10/2019.

¹⁶¹ UNCTAD (2012) op cite note 76 at 9.

¹⁶² A meeting with *kaya* elders at Kaloleni on 04/11/2019.

¹⁶³ Ibid.

¹⁶⁴ Rizk *et al* op cit note 43 at 31.

¹⁶⁵ Angela Langenkamp ‘Structural Changes of the Potters Craft in Kenya: A Regional and Gender-based Disparities’ PhD Thesis, Universitätsverlag Rasch Osnabrück (2000).

institutions due to less reliance on TK and related practices. Further, they could have been motivated by market demands, since hand-made and home-made crafts and cuisines respectively, tend to attract higher value than mechanised and mass produced/commercial counterparts of the same crafts. To preserve the sanctity of cultural and traditional processes of production, from adulteration and destruction, there is need to strengthen TK holders' institutions.

Further, TK holders' institutions can also facilitate the adaptation of new innovation and technologies to local needs and conditions by, *inter alia*, improving access to, and management of natural resources, sharing experiences, facilitating access to inputs and outputs, offering training, improving the availability of information, strengthening bargaining power with intermediaries and participating in public research and extension.¹⁶⁶ For instance, whereas the pottery practices and skills of the Mbeere have been transmitted intergenerationally,¹⁶⁷ there are new designs and/or shapes that the community is developing. A good example is vessels designed for planting flowers, which have perforated bases, to serve as flower vases. Such shapes and designs have not been archaeologically discovered¹⁶⁸ meaning they are new additions to the design repertoire.

The fact that TK holders' institutions take a pragmatic approach to gender suggests that they engender inclusivity in innovation processes by enabling women, men and other social groups in a community to participate and benefit from innovations.¹⁶⁹ The Mbeere case study shows that TK holders' innovation is gendered. Traditional pottery is a preserve of women since time immemorial, and men only offer ancillary support, such as transportation of large clay bags to the potting sites, or of finished pots to the market.¹⁷⁰ This contrasts with the Mijikenda, where the *kaya* elders are mostly men. Thus, TK holders' innovation and processes have a pragmatic approach to gender, and offer women opportunities to innovate, participate in, and benefit from

¹⁶⁶ Beduschi *et al* op cit note 65 at 4. UNCTAD (2012) op cite note 76 at 10.

¹⁶⁷ Interview with Mbeere traditional potters on 12/11/2019.

¹⁶⁸ Wangari op cit note 35 at 62.

¹⁶⁹ Petesch *et al* op cit note 9 at 5.

¹⁷⁰ Ibid.

innovation processes.¹⁷¹ Strengthening TK holders' institutions will allow both men and women to participate in and benefit from innovation, and diversify the innovation and innovation processes, creating more opportunities for the community to better their livelihoods.

5.3 Roles of TK holders' institutions in the building and strengthening of other institutions

The popularity, resilience and legitimacy of TK holders' institutions suggests that there is need to interrogate how they can be harnessed to promote the building of strong institutions in view of failure by most African governments to provide critical goods and services to communities.

As custodial institutions, TK holders' institutions are being used in the case studies to regulate access to and use of natural resources (including associated TK). Among the Mijikenda, the governance of the *kaya* forests is through customary rules that are enforced by elders using traditional sanctions to censor misuse of resources.¹⁷² The *kaya* elders 'control access to resources such as medicinal plants, sacred *kaya* areas, and rare species; traditional knowledge and agricultural activities' and 'are the ones who allocate those resources to clans and individuals.'¹⁷³ Indeed, the very existence of the *kaya* forests is attributed to the work of elders in conservation, and not gazettement as a forest reserve, national monument or listing as a world heritage site.¹⁷⁴ The demarcation, surveying, and mapping of territories; gazettement as national monuments and listing of the *kaya* forests, as World Heritage Sites is done with the assistance of elders and other community members.¹⁷⁵ The role of the *kaya* elders in environmental conservation is thus useful in realising other SDGs such as energy (SDG-7), food (SDG-2), water (SDG-6) and climate action (SDG-13), and ultimately in strengthening formal institutions dealing with these SDGs.

¹⁷¹ Berdegue op cit note 9 at 7.

¹⁷² Patrick A. Kafu & Genevieve N. Simwelo 'Forest conservation in Kenya: Lessons from the African Traditional/Indigenous Education' (2015) 5(8) *Developing Country Studies* 140-144 at 142.

¹⁷³ Interview with an environmental scientist working with the CFCU at Kilifi on 05/11/2019.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

Moreover, social capital contributes to the strengthening of both the TK holders’ and formal institutions involved in the collaboration. As communities begin to work together, bonding social capital is strengthened within the group, particularly in terms of trust between members, the development of group norms, roles, and processes, and the development of a sense of ‘can-do spirit’ within the group which contributes to a growing sense of collective efficacy.¹⁷⁶ This explains why TK holders’ institutions promote cultural unity and identity. For instance, the *kaya* elders and forests, are seen as a significant unifying factor for the Mijikenda people. The *kaya* forests are the ‘cultural and traditional home’ of the Mijikenda that ‘serves to remind them and future generations of how they migrated from Shungwaya to that place.’¹⁷⁷

Bridging social capital within TK holders’ institutions enhances collaborations between those institutions and other institutions. Government agencies and civil society actors are relying on these institutions in their work of protecting and preserving TK. Among the Mijikenda, there are on and off collaborations between elders and NMK in preserving traditions and cultures.¹⁷⁸ For instance, *kaya* elders participated in the preparation of the 2014-2018 Mijikenda Kaya Forest Management Plan prepared by NMK. In conservation, herbalists from *kaya* Kauma have collaborated with the Gede Kenya Forest Research Institute (KEFRI) regional headquarters to get technical advice on research programs that can improve the mangrove forest medicinal value. Moreover, they contributed in the preparation of the National Mangrove Management Plan being developed by the Kenya Marine and Fisheries Research Institute (KEMFRI). One respondent lamented how the engagement with formal state institutions has been disrespectful and contemptuous of TK institutions, thus hampering their effective incorporation in governance.¹⁷⁹ In Mbeere, while the potters are usually invited to schools to teach students how to make pots, the respondents indicated that there are no CSOs that supports their pottery practices.¹⁸⁰

¹⁷⁶ Hoffecker op cit note 79 at 12.

¹⁷⁷ A workshop with *kaya* elders on 22/04/2018.

¹⁷⁸ Meeting with *kaya* elders at Kaloleni, Kilifi on 05/11/2019.

¹⁷⁹ Ibid.

¹⁸⁰ Interview with Mbeere traditional potters on 12/11/2019.

As mentioned earlier, collaborations between TK holders' institutions and the IP frameworks can enrich the IP regime and address the inadequacy, deficiency and unsuitability of the IP regime in protecting TK. Effectively, they can mediate interactions between the IP system and TK holders, and thus tame the misappropriation and loss of TK and genetic resources. For instance, TK holders' institutions can be used in granting prior informed consent (PIC) and in developing bio-cultural protocols to govern access to TK.¹⁸¹ Additionally, having PIC and disclosure of origin as a criterion for patentability, would benefit TK holders since their institutions could be involved in the decision-making processes and institutions under the IP regime and *vice versa*. This collaboration can bridge the TK protection gap as TK holders can withhold their PIC so as to safeguard their rights, while the grant of IP rights over TK could also be withheld by relevant authorities, if there is non-disclosure of origin or proof of PIC is missing. This way the TK holders' institutions will contribute to the strengthening of IP institutions.

Moreover, the participation of women in TK holders' innovation (as is the case with the Mbeere potters) can help address institutional barriers to innovation created by the IP regimes. This way, TK holders' institutions can strengthen the IP policies, laws and institutions by making them gender sensitive by including women in decision-making processes, as key agents of innovation. Similarly, TK holders' institutions are used in determining political leadership and maintenance of law and order. The *kaya* elders were described 'as a social-political epicentre of the Mijikenda people that is resorted to even by local politicians for blessings before venturing into politics.'¹⁸² It is commonplace for those vying for political positions to seek the endorsement of the *kaya* elders. Clearly, they can play a role in strengthening political institutions, and in holding elected leaders to account.

As customary governance systems, TK holders' institutions are being used in conflict resolution among the Mijikenda. The *kaya* elders are the first port of call wherever there are disputes (including land, family and political) in the

¹⁸¹ A meeting with the director of Natural Justice in Kenya on 06/11/2019.

¹⁸² Interview with an environmental scientist working with the CFCU at Kilifi on 05/11/2019.

community.¹⁸³ They therefore contribute to enhanced access to justice, and strengthen institutions of justice.

5.4 Roles of TK holders' institutions in driving transformative entrepreneurship

Due to their role in driving innovation, TK holders' institutions provide a conducive environment for entrepreneurship, as they enhance the entrepreneurial capabilities and mind-set in the community.

As mentioned earlier, TK holders are 'not-for-profit entrepreneurs' as they mainly pursue social and collective goals. For instance, the conservation work of the *kaya* elders. However, that is not to say that they cannot derive economic benefits out of their entrepreneurial work. Some communities have traded, and are ready to convert some of their TK products and entrepreneurial activities into income generating ventures to improve their livelihoods. Among the *kaya* elders there are income generating activities such as establishment of tree nurseries, poultry farming and so on, aimed at reducing community dependency on natural resources for livelihood.¹⁸⁴ In *kaya* Kauma, there are plans to start levying students, researchers and tourists who may want to pay a visit to the permitted parts of the *kaya*. Additionally, there is a plan to register traditional songs and dances of the Kauma and provide entertainment services during government events and other communal gatherings.¹⁸⁵

In Mbeere, whereas pottery plays cultural functions in the community, it is a source of livelihood to the potter. Thus, nowadays pottery is a complementary source of income to the women who sell their pots on market days especially in Ishiara town. Wangari explains that the shift towards commercialisation of pottery, is occasioned by the demand for pottery in neighboring regions such as Nyeri, Mururi, Kerugoya, Murang'a and Meru where pottery making does not take place.¹⁸⁶ The Mbeere potters explained that they are not paid *per se* for training school children traditional pottery, but only get refund for transport expenses, costs for transporting soil and a small token for the days spent

¹⁸³ Ibid.

¹⁸⁴ Meeting with *kaya* elders at Kaloleni, Kilifi on 05/11/2019.

¹⁸⁵ Ibid.

¹⁸⁶ Wangari op cit note 35 at 78.

training.¹⁸⁷ This allows the women to generate some income, and gives them an incentive to continually look for new training opportunities, and create new networks and social relations, thus engender entrepreneurship. Likewise, among the Mijikenda, plans to introduce income-generating activities by a CSO, Careway-Trust such as putting up tree nurseries, inventory of a craft industry, window curtains or manufacturing workshop are meant to reduce community dependence on the *kaya* forests for livelihoods/subsistence needs.¹⁸⁸ Therefore, strengthening TK holders' institutions, will not only advance innovation, but will help safeguard their survival and livelihoods, which are met through their innovative activities.

The intangible capacities within TK holders' institutions continue to enhance and promote TK holders' entrepreneurial spirit. For instance, the Mbeere women indicated that the people they sell their pots to are their ambassadors, as they market their pots and activities to other people and organisations.¹⁸⁹ There are other entrepreneurship initiatives around the conservation work of the Mijikenda people. For example, a community-based organisation, Care Way-Trust has come up with different thematic areas to promote entrepreneurship. One scheme called '*tubadilike* scheme' seeks to introduce bee keeping around *kaya* forests, educating the wider community on terrestrial tree nurseries in their homes and starting grafting of citrus trees as income generating activities.¹⁹⁰ The '*mtoto asome*' seeks to create awareness among the youth on the importance of environmental conservation by teaching them techniques on tree planting for income generation.

5.5 Roles of TK holders' institutions in data governance

TK holders' institutions are data repositories and data governance structures holding data on community affairs such as knowledge, beliefs, values, 'regularized practices', customary rules, norms and practices. In the case studies, most data is gathered, stored and transmitted intergenerationally through TK holders' institutions. Among the Mijikenda, traditional ceremonies, rituals, prayers, and legends play a critical role in storage and

¹⁸⁷ Interview with Mbeere traditional potters on 12/11/2019.

¹⁸⁸ Interview with Caxton Mwanyenje, CEO Careway-Trust on 05/11/2019.

¹⁸⁹ Interview with Mbeere traditional potters on 12/11/2019.

¹⁹⁰ Care Way-Trust inventories, document with author.

sharing of information and knowledge.¹⁹¹ A respondent stated that, ‘cultural rituals for example the rites of passage in most communities provide a system of transmitting and guarding TK’ since ‘as one goes through the rites of passage, there is knowledge that is passed on to initiates.’¹⁹² Some reports document how legends are used to pass on rules against cutting trees, fishing, hunting or cultivating in the sacred sites, among the Meru people of Kenya.¹⁹³ Moreover, there are legends about the ability of sacred sites to self-protect themselves ‘from destruction by reacting and attacking any person who interfered with them by venturing into or doing anything forbidden at the sites.’¹⁹⁴ Similarly, the *kaya* elders explained that at times they ‘rely on prophets who get information through divine intervention on how to deal with different calamities, diseases and outbreaks. That information is then given to elders.’¹⁹⁵ Data governance among the Mijikenda has a divine aspect in the sense that “once an elder die (chairman), elders keep his record/memory in a *kigango*, which represents the dead *kaya* elder and continues to ‘speak’ on his behalf.”¹⁹⁶ The elders explained that most of these *vigango* were stolen and taken to museums abroad, although there are efforts to repatriate them.

As data governance structures, they are the forum through which community decisions and norms are made¹⁹⁷ including regulating who can access, use, add data and have control of communal resources.¹⁹⁸ Among the Mijikenda, ‘the *kambi* controls access to resources such as medicinal plants, sacred *kaya* areas, and rare species; traditional knowledge and agricultural activities’ and ‘are the ones who allocate those resources to clans and individuals.’¹⁹⁹ Access, use and

¹⁹¹ A meeting with *kaya* elders at Kaloleni on 04/11/2019.

¹⁹² Interview with the General Coordinator of ABN at Thika on 14/10/2019.

¹⁹³ Institute for Culture and Ecology (ICE) ‘Documentation of traditional and ecological laws of Tharaka’ undated report, 14 available at <https://www.icekenya.org/publications/> accessed on 20/06/2018.

¹⁹⁴ Ibid.

¹⁹⁵ A meeting with *kaya* elders at Kaloleni on 04/11/2019.

¹⁹⁶ Ibid.

¹⁹⁷ Mark Bevir *Governance: A Very Short Introduction* (Oxford University Press, 2012) at 1.

¹⁹⁸ Jeremy de Beer ‘Ownership of Open Data: Governance Options for Agriculture and Nutrition’ Global Open Data for Agriculture and Nutrition Report) (2016) at 7.

¹⁹⁹ Interview with an environmental scientist working with the CFCU at Kilifi on 05/11/2019.

sharing of data within the community is mediated by core principles like trust, honour, and integrity.²⁰⁰ While common knowledge may easily be accessible, secret and sacred TK might not be accessible. This has significant implications since it means that secret and sacred TK might not be a proper subject of innovation collaborations and entrepreneurship because for local innovation to thrive, it is essential that the infrastructure and networks relating to it is disclosed to actors outside the circle of local innovators themselves.

The role of traditional institutions in TK governance includes: the identification of TK; ascertainment of beneficiaries; definition of custodianship; the nature of community custodianship over TK; the rights and responsibilities associated with custody, access rights, protection of customary use, means of dissemination and preservation of knowledge; and the customary mode of defining modalities of PIC, benefit sharing mechanisms, dispute settlement, and sanctions for infringement of customary law.²⁰¹

In addition, the TK held by communities is ‘a key element of the social capital of the poor and constitutes their main asset in their efforts to gain control of their own lives.’²⁰² Moreover, TK is ‘the basis for decisions pertaining to food security, human and animal health, education, natural resources management, and other vital activities.’²⁰³ Among the Mbeere, for example, pot making is done during the dry season (August-October) because they can easily get dry grass and wood to harden the pots.²⁰⁴ Further, reliance on TK holders’ institutions in conflict resolution reveals that they hold vital information that aids in mediation of disputes with high degrees of societal and ecological complexity, as demonstrated by the work of *kaya* elders.²⁰⁵

²⁰⁰ Beer op cit note 233 at 12.

²⁰¹ Tobin op cit note 113; see also Ken Chisa and Ruth Hoskins ‘African customary law and the protection of indigenous cultural heritage: Challenges and issues in the digitization of indigenous knowledge in South Africa’ (2016) 15 *African Journal of Indigenous Knowledge Systems*, 1-15 at 4.

²⁰² Gorjestani op cit note 136 at 1.

²⁰³ Ibid.

²⁰⁴ Interview with Mbeere traditional potters on 12/11/2019.

²⁰⁵ Interview with an environmental scientist working with the CFCU at Kilifi on 05/11/2019.

Evidently, the above discussion shows that TK holders' institutions are pivotal in designing a strong regime for TK holders' data sovereignty.²⁰⁶ Those institutions are better placed than formal state institutions in defining what constitutes data, outlining appropriate ways of securing the data, and governing control, use or reuse of their data by third parties, even where such data is gathered in the context of research studies. Indeed, one cannot conduct research among communities, such as the Mijikenda, without an ethical clearance and permission. Thereafter, the *kaya* elders determine the data and areas (within a *kaya*) that a researcher can access. Further, reliance on TK holders' institutions in developing community bio-cultural protocols and granting PIC,²⁰⁷ strongly suggests that it is indeed possible to develop a collaborative framework where those institutions can be legally mandated with TK holders' data governance.

5.6 Challenges bedevilling TK holders' institutions

In spite of the existence of TK holders' institutions in both case studies, their vitality and influence are waning due to a multiplicity of factors. These include, leadership wrangles among elders, each claiming to be the legitimate elders; cultural erosion; loss of Indigenous territories due to developmental projects; and the influence of modern education and religions, which have contributed to the loss of traditional beliefs and values. For instance, among the Mbeere, young women and girls see pottery as 'foolishness and shameful' and have no interest in the art and practice. One respondent, who has practiced pottery for over 50 years, indicated that 'my daughter is almost 40 years but doesn't want to learn the practice.'²⁰⁸ In the Mijikenda community, a negative perception towards elders has occasioned numerous attacks and killings of elders. One elder observed that, 'We will die with our knowledge, we are seen as witches. We are being killed because of white hair. We are not seen as good people.'²⁰⁹ However, the elders indicated that they continue to conduct prayers, cultural rituals and other traditions to continually replenish and

²⁰⁶ Oguamanam op cit note 128 at 12-14.

²⁰⁷ Francis Kariuki 'Traditional justice systems as *sui generis* frameworks for the protection of traditional ecological knowledge in Kenya' PhD thesis, University of the Witwatersrand (2019), 218-225.

²⁰⁸ Interview with Mbeere traditional potters on 12/11/2019.

²⁰⁹ Interview with a *kaya* elder at Kaloleni on 04/11/2019.

revitalise their TK and cultural expressions so that they are not lost.²¹⁰ Similarly, urbanisation has contributed to the low demand for pottery because many people in towns have resorted to the use of gas and electric cookers as compared to the pots that are commonly used on *jikos* and hearthstones.²¹¹ However, and inasmuch as traditional pots are commonly used in cooking with firewood (in which case they are more energy efficient than ordinary aluminum pots), they can also be used with gas and electric cookers (which are more energy friendly than firewood) thus promoting conservation.

Most TK holders are living in poverty, and are experiencing capacity, financial, educational, skills, information, and infrastructure constraints to innovate on a large scale. Likewise, these constraints are also hindering entrepreneurship among TK holders and beyond due to lack of essential skills for business organization such as 'writing, reading, bookkeeping, project management, and even (potentially) fluency in the English language.'²¹² The Mbeere potters face difficulties when transporting pots to distant markets due to their bulkiness and fragility, and lack expertise for mass production of pots to meet rising demands for pots, and get more income to meet survival and livelihood needs.²¹³ However, earlier studies show that the potters had shunned mechanised forms of production.²¹⁴ To scale up and commercialise (if permissible by the holders) some of their innovations, TK holders can utilize their institutions to enter into collaborations with other players to develop (according to their terms) and diffuse them. Nonetheless, there is need for caution in embracing modern systems of production, as they may erode the innovative capacity of TK holders and their institutions. Moreover, and as observed earlier, there are people who still prefer hand-made crafts as opposed to machine-made ones, for cultural, aesthetic, and functional reasons, which are factors that create demand for hand-made products. Hence those collaborations must acknowledge the value and potential for TK to empower other forms of knowledge and innovation.

²¹⁰ Interview with a *kaya* elder from *kaya* Kambe at Kaloleni on 04/11/2019.

²¹¹ Wangari op cit note 35 at 86.

²¹² Rutert & Traynor op cit note 82 at 7.

²¹³ Workshop with women potters in Mbeere held on 13/11/2019.

²¹⁴ Langenkamp op cit note 165.

The respondents lamented lack of support from government and CSOs. The author observed the lack of programs from CSOs or government to support and promote the pottery practices of the Mbeere. Unless there are concerted efforts to support the Mbeere women, the traditional pottery practices are likely to become extinct. As opined earlier, through their institutions, TK holders can increase their innovation output, learn new techniques of production, but also document their pottery knowledge and techniques, so that they can remain sustainable.

Similarly, the *kaya* elders observed that there is tension between them and chiefs and sub-chiefs, and in most cases the latter do not recognise or engage them in community affairs.²¹⁵ Finally, the *kaya* elders decried the fact that although they ‘bless’ or endorse secular or political actors, those leaders end up undermining them once they get power.²¹⁶

6 Conclusions

The study sought to examine the role of TK holders’ institutions in the realisation of SDG-9 (the study focused on innovation) and SDG-16 (study focused on the building of strong institutions) using the Mijikenda and Mbeere communities in Kenya. The study finds the existence of TK holders’ institutions in the case studies. They have been resilient and are legitimate explaining their continued use in natural resources governance, conflict resolution and even in politics. Importantly, the findings show that the institutions have a role in driving innovation, building strong institutions, engendering entrepreneurship and as data governance structures.

Regarding innovation, the study has shown that TK holders’ institutions are instrumental in enhancing the innovation capacity of TK holders by creating the space that supports learning, creation and utilization of innovation; promotion of innovation; and the flow and exchange of innovation. The institutions also increase the innovation output of TK holders, by enabling the latter access information and learn new techniques of production. Additionally, the institutions allow TK holders to expand institutional networks, at the local level and beyond, thus accessing resources to advance

²¹⁵ A meeting with *kaya* elders at Kaloleni on 04/11/2019.

²¹⁶ Ibid.

their innovation. Through those networks, TK holders' institutions promote the commercialisation and efficient diffusion of innovation in society; and facilitate the adaptation of new innovation and technologies to local needs and conditions. Further, and due to their pragmatic approach to gender, they engender inclusivity in innovation processes by enabling women, men and other social groups in a community to participate and benefit from innovations. Lastly, TK holders' institutions are better placed in protecting TK holders' innovation in view of the challenges they encounter in using the IP systems. However, and whereas TK holders, are likely to benefit from collaborations with formal institutions like the IP framework in promoting their innovations and transformational entrepreneurship, those collaborations ought to be built through strong institutions that are dynamic, flexible, locally legitimate and responsive to social, political and environmental changes. Reliance on stronger TK holders' institutions can help stop the disenfranchising outcomes while interacting with external networks, and uphold communities' self-determining rights.

In the building of strong institutions as desired by SDG-16, the study has shown that TK holders' institutions continue to enjoy popular legitimacy, and play an essential role in conflict resolution, natural resources governance, in determining political leadership and maintenance of law and order, especially in the Mijikenda case study. As such, they can be used collaboratively with formal institutions like the justice system, natural resources governance institutions, and the IP system, to build strong and inclusive governance frameworks. From the case studies, it is evident that unlike the IP regime, TK holders' institutions have an inclusive and pragmatic approach to gender (thus promoting attainment of SDG-16 by being inclusive), offering both men and women opportunities to participate in, and benefit from innovation processes (essentially meeting SDG-9 by encouraging inclusivity in innovation). The study shows that the role of TK holders' institutions in the attainment of SDG-9 and 16 contributes positively in the realisation of other SDGs also. Some of the innovative activities that TK holders are engaged in, such as conservation of the environment, and making of pots that are energy efficient, can contribute to advancing other SDGs such as energy (SDG-7), climate action (SDG-13), food (SDG-2), life on land (SDG-15) and water (SDG-6).

Due to their role in driving innovation, TK holders’ institutions provide a conducive environment for entrepreneurship, as they enhance the entrepreneurial capabilities and mind-set in the community. They also determine the prevalence, type and nature of entrepreneurial activities that TK holders engage in. through bridging social capital, TK holders are able to link up with other social and economic agents, and thus access vital resources, infrastructure, skills and knowledge within the community and beyond, which boost entrepreneurship.

Lastly, the study has shown that TK holders’ institutions are pivotal in designing a strong regime for TK holders’ data sovereignty, as they are data repositories and data governance frameworks. The data they hold underlies their capacity to innovate; strengthens institutions; manage, monitor and mitigate risks; and has impact on prevalence, type and nature of entrepreneurial activities that they can engage in. As data governance frameworks, they hold the promise in the realisation of the developmental needs and aspirations of TK holders.

Impact of Sporting Activities on the Environment in Kenya: Proposal for a Specific Policy on Sports and Environment

By: Caroline Shisubili Maingi & Mercury Shitindo †*

Abstract

Sport is a necessary part of life that is intricately interconnected to the environment. On one hand, sports need a good environment to be played on whilst at the same time, sports through its activities affects the environment. When the world was hit with a global pandemic in 2019, sports was one of the areas that was most affected. With the encouragement of social and physical distance as a means of reducing infection rates and limiting physical contact in sports, it also acted as a period of restoration of the environment. This article emphasizes how sport promotes good health, physical fitness, mental well-being, social interaction and contributes to the socio-economic, political and cultural development of a country. The article highlights how sports can attract infrastructure that requires heavy machinery that can impact the environment negatively, this in addition to the economic activities linked to it, and how this directly affects man. The article delves into sports in Kenya identifying how there are no clear guidelines on how to do sports while taking care of the environment. The study will recommend policies that will encourage a balance between having sports while also giving consideration to the environment.

1. Introduction

Sport, like any other human activity, is set in the physical environment and is bound to have effects on it and be affected by it. Sport is a major component of society, but as one of its effects, it also impinges on the environment¹. Most environmental problems are deeply rooted in conditions and actions directed

* PhD International Relations Student at USIU-A, MA Philosophy and Ethics from Strathmore University.

† Partnerships and Resource Mobilization Manager Africa International University, P.O Box 24686, 00502, Nairobi-Kenya

¹ Abhi., Impact of Sport on Environment. 2015.

<https://www.sportskeeda.com/sports/detailed-look-impact-sports-environment>

to it, therefore the interaction of the sporting activities with the environment must be viewed with a keen eye, with the intent of ensuring that there is benefit of all. Since the concepts of sport and environment are intertwined, there is need for the issues arising to be addressed simultaneously.

Mccullough notes that the active participation in sport and physical activity in and of itself has an environmental impact adding that likewise, watching sport or spectating, whether at home or at an event has an impact as well, since consuming sport through spectating is much more about an emotional experience, i.e. An intangible experience which has tangible and actual impacts on the natural environment.² The bilateral relationship between sport and environment, whereby the impact of environment on sport is more profound and direct as it influences the planning of certain sporting events depending on how appropriate the venue is in terms of climate and the physical environment.

The Brundtland Commission, in 1987, defined a “sustainable society” as one that “meets the needs of the present without compromising the ability of future generations to meet their own needs.” This definition calls upon mankind to harmonize its activities on earth and thus environment with the aim of achieving a sustainable development³. It is on this premise that this study seeks to demonstrate a link between sporting activities and the impact they have on the environment and how these impacts have created the need to reduce the ecological footprint of sports activities. This study finds evidence that there is no direct policy guiding how sports should be handled with regard to the environment, an area that is usually overtaken by current events, usually political. It is therefore, appropriate to bring together sports and environment and identify sport management practices that promote environmental sustainability. This study seeks to recommend policies that will address the gap.

² McCullough, B. P. "Introduction to environmental sport management." (2015).

³ World Commission on Environment and Development, and Gro Harlem Brundtland. *Presentation of the Report of the World Commission on Environment and Development to the Commission of the European Communities, the EC and EFTA Countries...* 5 May 1987, Brussels. World Commission on Environment and Development, 1987.

The study will provide a historical background of sports, the relationship of sport and environment, highlight the issues arising from the practice of sport amidst current views of sustainability in sport, and provide an overview of sporting in Kenya, current policies in Kenya followed by an in depth analysis of the problem and bring in the aspect of how sporting activities have been affected by the COVID 19 pandemic and how this has affected the environment and the sporting world. Finally, we offer a recommendation to policy and suggest ways of balancing sporting activities with the intention to minimize sports impact on the natural environment while achieving common objectives.

2. Brief historical background on sports

Sports and sporting events are as old as the existence of humanity. This results from the fact that sports form part of social cultural events. Man in nature, reaches out to the other to manifest themselves, and in so doing, discover themselves and more often, become more, by doing ‘things’ with the other. Etymologically, the English word ‘sport’ has its roots in old Latin, ‘*deportare*’ which means to divert oneself or have fun⁴. Diverting oneself refers to change of activity from the normal usual one to another one, usually lesser in intensity; and coupled with fun, may refer to the present meaning of recreation and leisure. In the olden times, some of the contests held were footraces, the long jump, *diskos* and javelin throwing, wrestling, the pentathlon (a combination of these five events), boxing, the pankration (a combination of wrestling and boxing), horse races, and chariot races.⁵ The word would evolve into ‘athletes’, to include more outdoor events such as cycling and skating, implying a paradigm shift.

The earliest recorded sporting events was from 700 BCE to 450 BCE in ancient Greece⁶. The games were mainly in honor of the god Zeus⁷. The games would later evolve into a more complex and organized event that moved

⁴ Arda alan ışık. ‘Origins of sports philosophy and Greek athletics’. Daily Sabah, April 2020

⁵ Hemingway, Colette, and Seán Hemingway. "Athletics in Ancient Greece." *Heilbrunn Timeline of Art History* (2002).

⁶ *ibid*

⁷ Swaddling, Judith. The ancient Olympic games. University of Texas Press, 1999.

from a day to three to five. As the sporting events progressed, there would be judges who checked that athletes had trained and the competing grounds were standard. In those times, one cared only to win, a notion in tandem with the word 'athletes' with connotes contest (*athlos*) and prize (*Athlon*), unlike in modern times where a lot more goes into the preparation, the actual games and even aftermath. Ethics and morals were observed by all the players and the spectators.

In those ancient times, the games were by males only. Women were neither allowed to participate nor spectate. During the eighteenth and nineteenth centuries in the Western contexts, women were restricted, or forbidden, from participation in sport due to concerns over their perceived frailness and inability to cope with the competitive nature of sport.⁸ History also informs us that the participants were naked; completely nude⁹. This regulation has highly evolved such that women are literally involved in all types of sport. In the modern tradition of sports, the Greek ways have been professionalized. Currently, there is an array of sports gear, each team adorning in their chosen colours and each individual participant with their unique label. Sports gear enables us to identify a team, country or person, a great deal to do with identity. In addition, the sporting events are now global, involve bigger and more sophisticated infrastructure and has economic activities linked to it. Sports are also a big event in international relations. The mere fact of getting to host these games speaks a lot of what a country can do. Other than showing its might and prowess, a host country should be able to interrelate with all participating states and individuals.

Ancient Olympia is where the oldest sporting events took place, in modern Greece, it hosts the lighting of Olympic lights.¹⁰ These games continued into early Christian times, inspiring the modern Olympic games. The first ones

⁸ Coakley, J. J. 2007. *Sports in Society: Issues and Controversies*. New York: McGraw-Hill Higher Education.

⁹ Christesen, Paul. *Olympic victor lists and Ancient Greek history*. Cambridge University Press, 2007.

¹⁰ Gaitatzes, Athanasios, Dimitrios Christopoulos, and Georgios Papaioannou. "Virtual reality systems and applications: the ancient olympic games." In *Panhellenic Conference on Informatics*, pp. 155-165. Springer, Berlin, Heidelberg, 2005.

were held in Athens in 1896. For the first time as an independent country, Kenya participated in the 1964 Summer Olympics in Tokyo, Japan.

In Africa, the modern sporting events were introduced during the colonization period¹¹. Sports such as football (soccer), cricket and hockey were spread by European Colonial Government as part of their civilizing and conquering programs. This is notwithstanding the fact that the African people had their own sporting events. Another was the aspect of discipline and further down, physical exercise.

In the period of decolonization, the Africans started emerging independently in their sporting events, organizing Pan African Games and later on, All African games. Kenya competed at the 1987 All-Africa Games which was held at Kenya's capital city of Nairobi, at the then Moi International Sports Centre in Kasarani (now Safaricom Stadium), and won 63 medals in total. In so doing, they consolidated their National and Pan African identities, creating a unique place in the international community. Racism was frowned upon and incidences of boycotts were manifested in countries such as South Africa¹², when racism was rampant due to apartheid.

Onyebueke, categorizes sports on the African continent into three broad categories i.e. team sports which include football, basketball, and hockey; individual sports which includes athletics, cycling, golf, tennis, etc.; and combat sports that comprise boxing, judo, taekwondo, etc. He further adds that there are other popular sports that have become widespread in Africa include basketball, athletics, cricket and rugby. Noting that Kenya is a key international player in marathons, while South Africa is world renowned for cricket and rugby champions. Other famous traditional sports in Africa

¹¹ Mählmann, Peter. "Sport as a Weapon of Colonialism in Kenya: A Review of the Literature." *Transafrican journal of history* 17 (1988): 152-171.

¹² Sikes, Michelle. "Sport History and Historiography." *Oxford Research Encyclopedia of African History*. 20 Nov. 2018; Accessed 14 Jan. 2021.

include Dambe boxing (Nigeria), Nguni or 'stick fighting' (South Africa), donkey racing (Kenya), etc. are also thriving.¹³

3. Sport and environment

There are several definitions for environment depending upon the subject and area where it is applied. The Kenya National Environment Policy of 2013 defines environment in a broad sense. It states that "environment characterizes the totality of the surroundings including physical factors, plants, animals' microorganisms, socio economic and cultural factors, the biological factors of animals and plants and the social factors"¹⁴. The Merriam Webster dictionary defines environment as the "aggregate of social and cultural conditions that influence the life of an individual or community"¹⁵. These definitions encompass other areas of one's being that are not necessarily related or linking to the physical world. Whilst, Environmental Encyclopedia (1999), describes environment is the total of the things or circumstances around an organism – including humans though environs are limited to the surrounding neighborhood of a specific place, the neighborhood or vicinity.¹⁶ In summary, environment can be defined as a sum total of all the living and non-living elements and their effects which influence human life. While all living or biotic elements are animals, plants, forests, fisheries, and birds, etc. The non-living or abiotic elements include water, land, sunlight, rocks, and air, etc.¹⁷

¹³ Onyebueke, Victor U. "Globalisation, football and emerging urban tribes': fans of the European leagues in a Nigerian city." *Department of Urban and Regional Planning University of Nigeria Enugu Campus, Nigeria* (2015).

¹⁴ National Research Council, and Committee on Population. "US health in international perspective: Shorter lives, poorer health." (2013).

¹⁵ Hernandez, Lyla M., and Dan G. Blazer. "Institute of Medicine (US) Committee on Assessing Interactions Among Social, Behavioral, and Genetic Factors in Health Genes, behavior, and the social environment: moving beyond the nature/nurture debate." *Proc Natl Acad Sci USA* (2006).

¹⁶ Environmental Encyclopedia (1999): Jaico Publishing House, 121, M.G. Road, Mumbai

¹⁷ *Byju's' app* by Think and Learn Pvt Ltd - <https://byjus.com/commerce/meaning-and-functions-of-environment/>

What is the meaning of sport? Sport as a concept has many definitions depending on various approaches. Matt defines sport as involving some type of moving the body through the environment and burning calories doing so¹⁸. This involves the experience of a physical activity.

Since sport may also involve some type of competition, Matt further explains that sport deals with conflict because of the struggle between individuals or teams that usually tends to end with winner(s) and loser(s).

The United Nations Interagency Task Force (UNIATF) on Sport for Development and Peace defines sport as “all forms of physical activity that contribute to physical fitness, mental well-being and social interaction¹⁹”. These include but are not limited to play; recreation; organized, casual or competitive sport; and indigenous sports or games. These two terms are intertwined.

As much as these definitions focus on sports as only being limited to the practice of physical activities, it is important to note the assertion of the International Organization for Peace Building that sport environment is “a recreational space where a healthy lifestyle is promoted, through physical and mental development”, adding that “it is a place where individuals converge to improve their social skills, strengthen cultural values and adapt to rules”²⁰. In this regard, there is need for the sports authorities to provide a peaceful and secure environment for sporting events. Mählmann while commenting on sports and colonization in Kenya; notes that sport aids in self-development

¹⁸Matt K. ‘First Shift Protect Profiling Women in Sport. What is Sport?’. 2009 <http://faculty.elmira.edu/dmaluso/sports/members/matt/whatissport.html>

¹⁹ What is ‘sport’? - United Nations Inter-agency Taskforce on Sport for Development and Peace.

<https://www.sportanddev.org/en/learn-more/what-sport-and-development/what-sport0#:~:text=%E2%80%9CIncorporated%20into%20the%20definition%20of,and%20indigenous%20sports%20or%20games.%E2%80%9D>

²⁰ International Organization for Peace Building. ‘Sport, a tool for peace?’ April 5, 2017, <https://www.interpeace.org/2017/04/sport-tool-peace/>

through play-like activities, which lead to high performance, making one agile having its own rules, specific organization and are highly competitive²¹.

Sports has been a form of entertainment for people since time immemorial. Schmidt explains how sports exemplifies good health and ironically, notwithstanding as sports contributes towards good health, they can also degrade the environment upon which good health depends.²² Environmental markers are always left behind whether sports are played or watched through its use and abuse of natural resources. Using golf courses as an example, they occupy large tracts of land, which requires maintenance thereby consuming large amounts of pesticides and water.

In 1995, the International Olympic Committee (IOC), together with the United Nations Environment Programme (UNEP), hosted a World Conference on Sport and the Environment. The IOC President Samaranch remarked that

“The International Olympic Committee is resolved to ensure that the environment becomes the third dimension of the organization of the Olympic Games, the first and second being sport and culture²³”.

This elicits a worrying issue and a subsequent question. What has Kenya done on the same? While it is true that as a country no Olympics have been hosted yet, sports and culture have been key for the country. Yet this study reveals little emphasis on the issue of taking care of the sporting environment both materially e.g., the states of sporting venues like the stadia and immaterial e.g. the ambiance and circumstances surrounding sporting events.

²¹ Mählmann, Peter. "Sport as a Weapon of Colonialism in Kenya: A Review of the Literature." *Transafrican Journal of History* 17 (1988): 152-171.

²² Schmidt, Charles W. "Putting the earth in play: environmental awareness and sports." (2006): A286-A295.

²³ Jagemann, Hans. "Sports and the environment: ways towards achieving the sustainable development of sport." *The sport journal* 7, no. 1 (2004).

4. Sporting in Kenya

Kenya is a very sportive country. It stands among the firsts internationally especially when it comes to games like long distance running and rugby. Locally, marathons and football are very popular. Kenyan fans flood the stadia to support their teams, sometimes accompanied by prominent personalities in government.

However, most modern sports in Kenya owe credit to the British colonization.²⁴ This included the settlers and missionaries whose perspective was that African (native) games were evil and savage thus discouraging or discontinuing them²⁵. Post-independence, the country's main focus was on matters unity and development rendering sports to depend on the government of the day. Then there was the issue of foreign aid that was directed to funding various sports such as cricket and rugby while also commissioning football coaches from time to time to help boost the national teams.

Olympics put Kenya on the international map. The athletes would scoop the gold, the silver and the bronze. Kenya, new from independence, used sports to forge a narrative of decolonization, dialoging with the past while building platforms for the future.²⁶ Athletics became a symbol of international diplomacy and public relations.

Sports in Kenya are organized from two perspectives; educational for schools, and out of school for recreational or competition. For the schools, it is coordinated by the Ministry of Education and the latter, by the Ministry of Sport, Culture and Arts.

4.1 Sporting venues in Kenya

In Kenya, there are over ten classy and big resorts for excellent golfing such as the Limuru Country club and the Muthaiga golf club to name a few. These

²⁴ Godia, G. (1989). Sport in Kenya. In E. A. Wagner (Ed.). Sport in Asia and Africa: A comparative handbook (pp. 267–281). Westport, CT: Greenwood Press, Inc.

²⁵ Rintaugu, E. G., S. Munayi, and I. Mwangi. "The Grand Coalition Government in Kenya: A recipe for sports Development." (2011).

²⁶ Bale, John, and Joe Sang. *Kenyan running: movement culture, geography, and global change*. Psychology Press, 1996.

golf resorts are very well manicured, and going by the rules and regulations in golf clubs, the golf courses are environmentally friendly. Since they are exclusive, they are easy to manage.

Stadiums and arenas required large areas of paved surfaces. The stadia were strategically constructed to attract international sports and even hold large events like the aforementioned African Cup of Nations. Schmidt states that major sports events use energy which at times emit greenhouse gases and end up producing voluminous trash.²⁷ There are many people who go to the stadia in Kenya to watch especially football. Some of them come in their cars, some come walking and other by cycling. As a result, parking becomes a matter of concern aside from the impact of the spectators on the ground surface. In addition, these people carry food and drink, calling for a proper way of disposing trash. This if not regulated, is a disaster to the environment.

When it comes to long distance running, a lot of the preparations take place at the countryside whereas others such as the *Standard Chartered Nairobi Marathon*, happens in the city. Others like *Lewa Safari Marathon* in the great outdoors away from the city. Other professional marathoners do their preparations mainly in sports camps that have specialized equipment for their needs. All in all, there is a huge effect on the environment in terms of the preparations and the races all involving participants, supporters and spectators.

Swimming in Kenya is both public and private, competitive and recreational. Competitive swimming activities in Kenya are coordinated by the Kenya Swimming Federation. Swimming pools need a high maintenance because of the direct contact of water by the swimmers. Other issues include source and treatment of water and safety of swimmers in terms of life savers.

4.2 Sporting policies in Kenya

A policy is a primary organ that are utilized by nations and governments to attempt to their meet national development goals as they seek to provide

²⁷ ibid

guidelines and operational principles that can be used in governance²⁸. This paper delves into the workings of the sporting policy in Kenya or its lack of.

Sports is widely accepted and well liked in Kenya especially since it contributes greatly towards social, cultural, economic and political development of the country. As a result, the various governments in Kenya have gradually underscored the significance of sports in the country's development. In doing so, the government has put in place management and administrative structures to oversee the running and development of sporting activities in the country through the ministry of sports. The Kenya National Sports Council, which was established through the Societies Act CAP 108 in 1966, is the umbrella organization that coordinates the activities of all the national sports federations and organizations, and also acts.²⁹

According to Mahlman, Asembo and Korir³⁰, between 1970 to 1974, Kenya's second national development plan was rolled out. Emphasis was laid on values of participation in sports so as to gain the benefits of good health, physical fitness, nation building, corporation, capacity for excellence and a positive image. As the country rolls out different developmental plans, some of these values are inculcated.

In 2005, Kenya presented in Sessional Paper no. 3 on Sports and Development, a framework on sustainable growth and development of sports countrywide. Further, were policy guidelines that would realize a holistic approach to sports governance.³¹ Currently, the Ministry of Gender, Sports, Culture and Social

²⁸ Byron, Kipchumba, and Jepkorir Rose Chepyator-Thomson. "Sports policy in Kenya: deconstruction of colonial and post-colonial conditions." *International Journal of Sport Policy and Politics* 7, no. 2 (2015): 301-313.

²⁹ Mwisukha, A., Njororai, W. W. S., & Onywera, V. (2003). Contributions of sports towards national development in Kenya. *East African Journal of Physical Education, Sports Science, Leisure and Recreation Management*, 1(2), 73-81.

³⁰ Mahlmann, P, Asembo, J.M and Korir M. (1994). A Target oriented Analysis of sport in Kenya. *Journal of East African research and development* 24, 102-117

³¹ Ministry of Gender, Sport, Culture and Social Services Handbook, 2005. Sessional paper no. 3 of 2005 on sports development. Nairobi: NBO: Government of Kenya, i–35.

Services is charged with the responsibility of sports policy formulation and facilitation.

4.3 The problem

Sport and the Environment is regarded as an important subject in many countries as they epitomize an important part of people's lifestyles and is part of the daily life. Jagemann (2004), notes that many sports associations which have built professional and voluntary structures, factor in environmental issues in their public relations.³² These issues are dealt with by scientists, sports associations, relevant arms of authorities, and conservation groups. Moreover, issues concerning lifestyle have been on the agenda for environmental debates since the World Conference 1992 in Rio de Janeiro³³.

Despite the fact that the Kenya National Environmental Policy of 2013 calls for sustainable management of terrestrial and aquatic resources to improve the livelihoods and raise the standard of living for Kenyans, it does not make any references to the impact of sporting activities in the country in relation to the environment. This goes too for the Sports Act of 2016 which is more of what is required to register a sport or a sports club. Clearly then, there is a gap in policy on how the environment can be conserved even as the citizens enjoy their sporting activity of choice. There is no specific policy guiding sports and the environment.

4.4 Analysis of the problem

In today's society, sports play a key role and an indispensable function in a person's development. They also offer opportunities for physical activity in a world where physical movement and activity is reducing exponentially due to in part technological advancement. The days of lockdowns and sessions due to the COVID 19 pandemic have only advanced this problem. However, when pursued in moderation, sports promote good health and personal well-being, providing means of social contact and intensive experiences. In the same

³² Jagemann, Hans. "Sports and the environment: ways towards achieving the sustainable development of sport." *The Sport Journal* 7, no. 1 (2004).

³³ United Nations. "United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June, 1992." (1992).

vein, sports have caused substantial destruction to nature and the environment. This destruction occurs directly as a result of the practicing of sports activities on the environment and or the construction and operation of the basic infrastructure, or it can be caused by indirect factors such as the use of cars to travel to and from sports activities.³⁴

The conflict between sport and environment can be attributed to two causes. The first one is inherent in sport itself and the second one is deep rooted social changes. Some sports in themselves like football, racing or marathons and car rallies, popularly known in Kenya as Safari Rally have direct impact on the environment. Impact of sports on the environment can be thus in three fold (i) by the sporting activity i.e. the impact of football or rugby on earth (ii) by the spectators i.e. they come to watch the sports by car, air, sea or foot and in so doing, affect the earth and cosmos (iii) the third fold is the reverse, the effect of environment on sports i.e. not being able to run or play because of rain or fog, or too much sun or cold³⁵.

From aforementioned, one can discover that the impact and effect of the environment is two ways. Balance between doing the sport enjoyment of the sport has to be exercised because these kind of sports attract so many people at once which comes with its own demands. For instance, car rallies are directed to virgin lands away from people. This in turn either opens up the places for other activities such as cultivation or micro business. As it follows, it is a slippery slope. The president of Green and Gold in Ottawa, Canada perceives it as a dichotomy in the sense that as an activity it has environmental consequences while on the other hand, it is also heavily impacted by degraded environments that eventually affects an athlete.³⁶ Essentially, to play good sports, one needs a good environment while sports may affect the environment negatively if not well managed.

³⁴ *ibid*

³⁵ Schmidt, Charles W. "Putting the earth in play: environmental awareness and sports." (2006): A286-A295.

³⁶ Chernushenko, David. "Greening our games: Running sports events and facilities that won't cost the earth." (1994).

Since the meaning of environment is beyond the physical, there is the general social milieu, powered by individual's behaviour and personality or character, and the psychological and mental environment. If sports are good for the body, they are then good for the mind- a healthy mind. If a body is physically fit, the chances of elevating mentally are higher than in an unfit body. Social changes are increasing as the world advances in terms of technology, more exposure through education, better communication and infrastructure and enhanced delivery of services among others. Additionally, there is evidence of an improved income, greater agility more leisure and the growth of individualization which have formed the basis for major and continuing changes in sport. Social change efforts, for example those of Nelson Mandela in South Africa, have utilized sport as a rallying point, an impetus for a society to come together and forge an identity^{37, 38, 39}.

More and more people are now pursuing sport activities even to a professional level thanks to the invention of more sports each requiring specialized sporting areas and equipment. There is noted fewer ties of the emerging sports with tradition and culture among others. There are some sports pursued for leisure and recreation while other is for competition and income generation. These sports are played out in private or public areas but all in all on mother earth that is, same environment, and same resources however in different degrees and measures. Some sporting activities takes place in the rural others in urban areas. The impact on the environment will be different in either of these places.

Environmental issues can directly cause conflict, and as such, sporting activities are used to bring people together. The "Ndakaini Half Marathon" directly tackles the issue of lack of water as a basic resource which causes

³⁷ Billings, A. C., P. J. MacArthur, S. Licen, and W. Dan. 2009. "Superpowers on the Olympic Basketball Court: The United States versus China through Four Nationalistic Lenses." *International Journal of Sport Communication* 2 (4): 380–397.

³⁸ Carlin, John. *Playing the enemy: Nelson Mandela and the game that made a nation*. Penguin, 2008.

³⁹ Cho, Y. 2009. "Unfolding Sporting Nationalism in South Korean Media Representations of the 1968, 1984, and 2000 Olympics." *Media, Culture & Society* 31 (3): 347–364.

conflict⁴⁰. The annual marathon aims at increasing awareness amongst Nairobi residents on the importance of conserving the capital's main source of drinking water⁴¹.

On the western part of Kenya in the Kakamega County, there is the "*Ingo Marathon*", organized by the Kakamega Forest Heritage Foundation as a way of protecting the environment. It is worth noting that environmental degradation is a threat to livelihoods, jobs, children and its future, all of which can lead to conflict among a people⁴². In all these, it is observed that there is not a coordinated way see through the marathons taking place. Each County is trying to do something unique and better than the other, sort of introducing competition. Now, competition will not be healthy if the environment, both physical and abstract is not taken care of.

There is an element of production and consumption when it comes to sports, and this has the prospects of an economic growth, not just for the country, but also the participants.⁴³ Development of cities such as Eldoret on the Western side of Kenya is both progress for the country, but has tremendous effects on the environment as some flora and fauna will be lost. Another significant impact on the environment is in terms of sports gear and equipment. As more and more people buy the sport merchandise for use, issues of storage and dumping will arise. The government has to be clear on the procedures to deal. If not well handled, it ends up creating unconducive environment for engaging in the sporting activities. Sports and environment is like an ecosystem where one activity has an effect on other areas and aspects of being/life.

⁴⁰ NEMA working towards zero waste 2030 JULY SEP ISSUE. Sep 17, 2016. <https://www.nema.go.ke/images/Docs/Mediacentre/Publication/NEMA%20News%20Magazine%20July-Sept%202016.pdf>

⁴¹ *ibid*

⁴² (www.ingomarathon.or.ke).

⁴³ Byron, Kipchumba, and Jepkorir Rose Chepyator-Thomson. "Sports policy in Kenya: deconstruction of colonial and post-colonial conditions." *International Journal of Sport Policy and Politics* 7, no. 2 (2015): 301-313.

5 Sporting activities and the COVID 19 pandemic

According to Reilly, Skogvang et al, sporting activities attract millions of participants and spectators all over the world.^{44, 45}. This is because sports make substantial contribution to the socio-economic, political and cultural development of a country.^{46, 47}. Mass sport is important in enhancing the health of the general public, thereby, making them more productive and at the same time, reducing expenditure on healthcare. It pulls people together and hence, provides opportunity for socialization and national integration.⁴⁸

The COVID-19 pandemic has affected all areas of life - and sports has not been spared either. Social distancing measures, as one of the ways adopted to reduce the spread of coronavirus, has adversely affected how sports is done, if done at all. With each aspect of sport has been touched, from the athletes, to media coverage and nations. In other ways competitions were cancelled and or postponed and millions of monies lost in the process and rendered a breather to the environment for regeneration of earth⁴⁹. E.g. grass was able to grow, the air clear due to less air travel, the waters clean due to less pollution. Practicing sports and staying active during this pandemic needs for one to be very creative.

This has also significantly affected everyone in terms of economic, social life, mental health and the environment. The World Health Organization - WHO recommended social distancing and human-to-human contact was discouraged

⁴⁴ Reilly, T. (1996). *Science and Soccer*. London, E & FN Spon.

⁴⁵ Skogvang, Bente, Birger Peitersen, and Karen Stanley-Kehl. *Soccer Today*. Wadsworth/Thomson Learning, 2000.

⁴⁶ McPherson, Barry D., James E. Curtis, and John W. Loy. *The social significance of sport: an introduction to the sociology of sport*. Human Kinetics Publishers, 1989.

⁴⁷ Mwisukha & Onywera, *Contributions of sports towards national development in Kenya*. 73-81.

⁴⁸ Coakley, Jay J. *Sport in society: Issues and controversies*. No. Ed. 4. CV Mosby Company, 1990.

⁴⁹ Hancock Stephanie & Horne Felix . Can Covid-19 Help Ease the Climate Crisis? The Global Pandemic Offers Chance to Embrace Clean Energy. May 22, 2020. <https://www.hrw.org/news/2020/05/22/can-covid-19-help-ease-climate-crisis>

to control the transmission.⁵⁰ It has put many countries in a state of lockdown and sporting events (including the 2020 Olympics) have been affected. Kenya saw the postponement of three major global sports events: The World Athletics Under-20 Championships, WRC Safari Rally and the Magical Kenya Open Golf Championships. Participation in sports and exercise, which is generally regarded as healthy activities, became impossible to do.

In March 2020, the Ministry of Sports, Culture and Heritage called for a cessation of sports competitions and group sports activities in the country following the reporting of the first positive cases of Covid-19 in Kenya. Contact sport is a sport in which the participants necessarily come into bodily contact/interaction with one another.⁵¹ Contact sports, even without spectating crowds, pose an infection risk; while exercising with face-masks significantly increase in physiological demand, transmission risk for the spectators and on-field players. Large spectating crowds are well-known to be infectious hazards.⁵²

WHO (2019), recommended that “countries should actively combat the disease through critical preparedness, readiness, and response actions” according to the “Strategic Preparedness and Response Plan for COVID-19”.⁵³ These included measures to control local spread by raising public awareness, promotion of personal hygiene, and postponement or cancellation of large-scale public gatherings.⁵⁴ Therefore, for sporting activities to be taken up again, there must be a way to minimize the number of people gathered at one

⁵⁰ World Health Organization. "Key Messages and Actions for COVID-19 Prevention and Control in Schools." (2020).

⁵¹ Guidelines for Resumption of Sporting Activities During the Covid-19 Pandemic.

⁵² Wong, Ashley Ying-Ying, Samuel Ka-Kin Ling, Lobo Hung-Tak Louie, George Ying-Kan Law, Raymond Chi-Hung So, Daniel Chi-Wo Lee, Forrest Chung-Fai Yau, and Patrick Shu-Hang Yung. "Impact of the COVID-19 pandemic on sports and exercise." *Asia-Pacific journal of sports medicine, arthroscopy, rehabilitation and technology* 22 (2020): 39-44.

⁵³ World Health Organization. Critical preparedness, readiness and response actions for COVID-19: interim guidance, 22 March 2020. No. WHO/2019-nCoV/Community Actions/2020.3. World Health Organization, 2020.

⁵⁴ *ibid*

place and time through closed events without spectators and minimizing nonessential staff present at the event.

One recommended way to manage COVID 19 is through exercising which can be achieved through sports. Shepherd and Shek observed that moderate-levels of exercise can boost the overall immunity of a person,⁵⁵ while Nieman, and Pedersen reiterate that intensive and prolonged physical exertion has been linked with an 'open-window' of impaired immunity up to 72 hours after the exercise.⁵⁶ Peterson et al states that common infections for athletes mostly comprises of dermatological related infections especially in contact sports, including upper respiratory tract infections, and gastrointestinal infections.⁵⁷ Further, previous studies show that coronavirus is a respiratory pathogen and the risk of upper respiratory tract infections was almost six times more likely in endurance races.⁵⁸

Additional crucial preventive measures should be encouraged to minimize human-to-human contact since physical contact cannot entirely avoided and the practicing of proper personal hygiene. Sportsmen and athletes should also avoid on-field own risky behaviors to reduce the risk of as close contact with others is unavoidable during contact sports. The decision to resume sporting events should correlate to the local number of cases and strict adherence to preventive measures. Sports and exercise is important, but safety is still paramount.

6 A perspective

It has to be noted that sports in Kenya have undergone tremendous changes from pre-colonial, through colonial, to post-colonial times when Kenya is now

⁵⁵ Shephard, R. J., and P. N. Shek. "Potential impact of physical activity and sport on the immune system--a brief review." *British journal of sports medicine* 28, no. 4 (1994): 247-255.

⁵⁶ Nieman, David C., and Bente K. Pedersen. "Exercise and immune function." *Sports Medicine* 27, no. 2 (1999): 73-80.

⁵⁷ Peterson, Andrew R., Emma Nash, and B. J. Anderson. "Infectious disease in contact sports." *Sports health* 11, no. 1 (2019): 47-58.

⁵⁸ Pedersen, B. K., T. Rohde, and M. Zacho. "Immunity in athletes." *The Journal of sports medicine and physical fitness* 36, no. 4 (1996): 236-245.

a leading nation in the world of sports. The three main sports areas in which Kenyans have excelled are football (soccer) which is the most popular; athletes, which is the most successful sport and boxing. Members of particular communities have been strongly associated with each of these sports (Kalenjin with athletics, Luo with soccer and Kikuyu with boxing). (Mahlamann & Mählmann 1990).⁵⁹

Different groups are now concerned with sports sustainability including environmental groups, businesses, and nongovernmental organizations; the United Nations Environment Programme whereby in 1994, it created a Sports and Environment Program⁶⁰, and charged it with promoting environmental awareness through sports as well as the design of sustainable sports facilities and equipment.

A worldwide meeting held in Nairobi in November 2005 by the Nairobi Declaration on Sport, Peace, and Environment, which calls upon the International Olympic Committee - IOC and public Olympic advisory groups to go about as pioneers in advancing ecological maintainability through sports. ⁶¹ UNEP worked with the IOC to build up an "Agenda 21" for the Olympic Movement dependent on ecological manageability rules. the IOC is focused on advancing maintainability among its part countries and sports administering bodies. This plan has been received by a few National Olympic Committees for supportable improvement work at the public level. ⁶²

In Kenya, there is an example of a youth organization known as Mathare Youth Sports Association (MYSA). It started in 1987 as self-help youth sports and community development project in Nairobi's Mathare valley slum, where more than 100, 000 people live in shacks made of old plastic, cardboard and

⁵⁹ Mahlamann, Peter, and Peter Mählmann. "Physical Activity and Development in Kenya." *Transafrican Journal of History* 19 (1990): 165-179.

⁶⁰ This is currently headed by Eric Falt, UNEP's director of communications and public information in Nairobi, Kenya, the program has fostered numerous initiatives

⁶¹ UNEP has also organized three meetings of the Global Forum for Sport and Environment (G-ForSE) since 2001, in which sports stakeholders in and beyond the Olympic Movement review their contributions to sustainable development.

⁶² Sitarz, Dan. "Agenda 21: The earth summit strategy to save our planet." (1993).

rusted corrugated iron sheets.⁶³ The main aim of MYSA is to use sports as a tool for change in a community that is poverty-stricken, environmentally unhealthy and crime-infested⁶⁴. From the findings, one discovers a dire need for concrete direction on how sporting activities will take place while conserving the environment in the best way possible.

7 Recommendations on a way forward

The achievement of sustainable development through sport should involve the reconciliation and the improvement of economic and social living conditions of human beings, while also giving consideration to the environment. This is how it can be protected in the long term, consequently also safeguarding the opportunities for future generations. The promotion and development of forms of sport which are compatible with nature and the environment should be adopted not only by governments, but also for the large industries, corporations and citizens. Centers of authorities should ensure that sports-related infrastructure are more attuned to the environment with reduced damage to vulnerable areas.

Jagemann recommends the provision of secure and improved opportunities for sport and physical activity away from vulnerable areas. He proposes the following steps towards making sports facilities ecological⁶⁵. The commencement and backing of green counseling administrations for sports office administrators; the subsidizing for sports offices through awards and advances to satisfy ecological norms; and the permitting of utilizing existing territories and structures for sports offices while consolidating natural administration into the activities of sports organizations, clubs, affiliations and business sports administrators. The Government of Kenya can benefit immensely from these steps.

⁶³ Awuor, George, and James Njuguna. "The Mathare Youth Sports Association (MYSA) ShootBack Project." *Children Youth and Environments* 17, no. 3 (2007): 227-235.

⁶⁴ *ibid*

⁶⁵ Jagemann, Hans. "Sports and the environment: ways towards achieving the sustainable development of sport." *The Sport Journal* 7, no. 1 (2004).

The area of sports and environment is so wide and diverse. For example, it extends to health of people working in the industries that make sports equipment. This particular area also keeps evolving. It thus requires top notch strategic planning and actualization of the ideals. In order to formulate policy on this matter, the Government of Kenya can concentrate on four thematic areas:

- The nature and type of sport; to check if the sport for competition or for recreation.
- The sport facilities; to check on the stadia; to check if the sports indoor or in the natural environment e.g. water, forest areas
- The sport equipment; to check if they are manufactured goods e.g. hockey sticks, footballs, or just the natural resources or playfields or arenas?
- Environmental Education; there should be a concerted effort to make aware the whole notion of sports impact on environment know.

The proposed policy should include;

- Education programs environmentally sound sports.
- Encouraging the recycling or environment-friendly disposal of widespread sports articles.
- Expansion opportunities for sports, game and physical activity by enhancing the residential environment within the urban and rural areas.
- Encouragement of use of bicycles or walking to link to sport arena. Set up good secure parking for the bicycles while providing security for the pedestrians.
- Improved methods of hiring and storing facilities for sport equipment.
- Allocation of national sports resources distributed to all counties.

8 Conclusion

As much as sporting activities are a good thing for the person in different measures and capacities, at the centre of either sports and or the environment, is the Person. As a rational being, he needs to reason out how he ought to take of himself and care for his surroundings. It takes this intrinsic experience to move man to realize what needs to be done to achieve that, thus policy formulation. Therefore, as man drafts policy, it has to be for his good and the good of others, and mother earth where he resides.

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Towards Inclusive and Quality Education as a Tool for Empowerment in Kenya

By: **Kariuki Muigua***

Abstract

The realization of sustainable development goals depends not only on the availability of natural resources but also on the availability of relevant human knowledge. It is out of this recognition that the United Nations 2030 Agenda on Sustainable Development acknowledges the place of education and gives the right of access to education prominence under Goal 4. Arguably, the right to education forms the basis for the realization of many other sustainable development goals especially those related to empowerment, poverty eradication, peacebuilding, justice, and development, among others. Despite this recognition, many countries, including Kenya, are still struggling with the achievement of this right. This paper discusses the economic, social, cultural, and political constraints that have held back Kenya from achieving the right to inclusive and quality education for all.

1. Introduction

Empowerment is defined as the process by which people's capabilities to demand and use their human rights grow. They are empowered to claim their rights rather than simply wait for policies, legislation, or the provision of services, where initiatives should be focused on building the capacities of individuals and communities to hold those responsible to account. The goal is to give people the power and capabilities to change their own lives, improve their communities, and influence their destinies.¹

*** PhD in Law (Nrb), FCI Arb (Chartered Arbitrator), LL. B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); Dip. In Arbitration (UK); MKIM; Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; Advocate of the High Court of Kenya; Senior Lecturer at the University of Nairobi, School of Law; CASELAP [December, 2020].**

¹ UNICEF and UNESCO (eds), *A Human Rights-Based Approach to Education for All* (UNICEF 2007) < <https://unesdoc.unesco.org/ark:/48223/pf0000154861> > accessed 6 December 2020.

Education is considered to be a key driver to transform lives, build peace, eradicate poverty, and drive sustainable development.² Arguably, education promises to free all citizens from the shackles of ignorance, poverty, and disempowerment, and endow them with the capacity to be architects of their destiny, and catalysts of entrepreneurship, innovation, and global citizenship.³ It is thus viewed, and rightly so, as an empowerment tool. This is recognized under *General Comment No. 13 on the Right to Education*⁴ which states that ‘as an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth’.⁵

Despite this, the provision of education in Kenya is often hampered by several challenges and while the law guarantees the right for all learners and other groups of people, there still exists practical challenges in the country. The challenges are attributable to different factors which range from social, economic, cultural, and political among others.

This paper highlights these challenges and offers some viable recommendations aimed at assisting the Government to meet its international and national obligations on the implementation of the right to education as a tool for empowerment for the Kenyan people.

² ‘Why Africa Needs to Ensure Inclusive and Equitable Quality Education and Lifelong Learning for All | Blog | Global Partnership for Education’ <<https://www.globalpartnership.org/blog/why-africa-needs-ensure-inclusive-and-equitable-quality-education-and-lifelong-learning-all>> accessed 7 December 2020.

³ Ibid.

⁴ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10.

⁵ Ibid, para. 1.

2. Inclusive and Quality Education: Definition and Scope

According to the United Nations' Committee on Economic, Social and Cultural Rights (CESCR), the right to education "epitomizes the indivisibility and interdependence of all human rights".⁶ Education has been formally recognized as a human right since the adoption of the Universal Declaration of Human Rights in 1948.⁷

It has been argued that quality education should provide children and young people with the necessary skills and knowledge, attitudes, and behaviour to lead positive and productive lives, and it should include not only literacy and numeracy but also wider life skills that empower them to be leaders and change-makers.⁸

The *General Comment No. 13 on the Right to Education*⁹ states that education is both a human right in itself and an indispensable means of realizing other human rights.¹⁰ The publication by the UN Committee on Economic, Social, and Cultural Rights elaborates the right to receive an education and states that:

While the precise and appropriate application of the terms will depend upon the conditions prevailing in a particular State party, education in all its forms and at all levels shall exhibit the following interrelated and essential features:

(a) *Availability*: Functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party. What they require to

⁶ Ibid.

⁷ UNICEF and UNESCO (eds), *A Human Rights-Based Approach to Education for All* (UNICEF 2007), 7 < <https://unesdoc.unesco.org/ark:/48223/pf0000154861> > accessed 6 December 2020.

⁸ 'The Right to Inclusive, Quality Education' (*Plan International*) <<https://plan-international.org/education/right-inclusive-quality-education>> accessed 7 December 2020.

⁹ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10.

¹⁰ Ibid, para. 1.

function depends upon numerous factors, including the developmental context within which they operate; for example, all institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as a library, computer facilities, and information technology;

(b) *Accessibility*: Educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party. Accessibility has three overlapping dimensions: *Non-discrimination* - education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds (see paras. 31-37 on non-discrimination); *Physical accessibility* - education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g. a neighbourhood school) or via modern technology (e.g. access to a “distance learning” programme); *Economic accessibility* - education has to be affordable to all. This dimension of accessibility is subject to the differential wording of article 13 (2) in relation to primary, secondary, and higher education: whereas primary education shall be available “free to all”, States parties are required to progressively introduce free secondary and higher education;

(c) *Acceptability* - the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents; this is subject to the educational objectives required by article 13 (1) and such minimum educational standards as may be approved by the State (see art. 13 (3) and (4));

(d) *Adaptability* - education has to be flexible so it can adapt to the needs of changing societies and communities and

respond to the needs of students within their diverse social and cultural settings.

Thus, for any education to be considered quality, it should satisfy the above features.

Inclusive education has been defined as follows:

Inclusive education refers to securing and guaranteeing the right of all children to access, presence, participation, and success in their local regular school. Inclusive education calls upon neighbourhood schools to build their capacity to eliminate barriers to access, presence, participation, and achievement to be able to provide excellent educational experiences and outcomes for all children and young people.¹¹

Notably, inclusive education is secured by principles and actions of fairness, justice, and equity. It is considered to be a political aspiration and an educational methodology.¹²

3. International and Domestic Legal and Institutional Frameworks on Education

3.1. International and Relevant Regional Legal and Institutional Frameworks

There are various international human rights instruments, ranging from agreements, charters, protocols, treaties, recommendations, conventions, and declarations, which have established a solid international normative framework providing for the right to education for all.¹³

¹¹ Roger Slee, *Defining the Scope of Inclusive Education Think Piece Prepared for the 2020 Global Education Monitoring Report Inclusion and Education 2* (2019).

¹² Ibid.

¹³ UNESCO, 'The Right to Education - Law and Policy Review Guidelines' (UNESCO, 28 July 2014), 5 <<https://en.unesco.org/news/right-education-law-and-policy-review-guidelines>> accessed 6 December 2020.

The *United Nations Educational, Scientific and Cultural Organization* (UNESCO) is the only United Nations agency mandated to cover all aspects of education, and its main objective is to contribute to peace and security in the world by promoting collaboration among nations through education, science, culture, and communication. Its mandate is universal and works with governments around the world to promote education for all.¹⁴

a) Universal Declaration of Human Rights, 1948

The *Universal Declaration of Human Rights*¹⁵ guarantees that everyone has the right to education. It also guarantees that education shall be free, at least in the elementary and fundamental stages. Elementary education should also be compulsory. Besides, technical and professional education should be made generally available and higher education shall be equally accessible to all based on merit.¹⁶

It also provides that education shall be directed to the full development of the human personality and the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance, and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.¹⁷

b) UNESCO Convention against Discrimination in Education, 1960

Notably, Kenya is yet to ratify the UNESCO Convention against Discrimination in Education (1960)¹⁸. The Convention defines 'discrimination' to include any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinions, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular: of depriving any person or group of persons of access to

¹⁴ UNESCO, 'Education for the 21st Century', available at <http://en.unesco.org/themes/education-21st-century> accessed 6 December 2020.

¹⁵ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

¹⁶ Ibid, Article 26(1).

¹⁷ Ibid, Article 26(2).

¹⁸ UN Educational, Scientific and Cultural Organisation (UNESCO), *Convention against Discrimination in Education*, 14 December 1960.

education of any type or at any level; of limiting any person or group of persons to the education of an inferior standard; subject to the provisions of Article 2 of this Convention, of establishing or maintaining separate educational systems or institutions for persons or groups of persons; or of inflicting on any person or group of persons conditions which are incompatible with the dignity of man.¹⁹

For this Convention, the term 'education' refers to all types and levels of education and includes access to education, the standard and quality of education, and the conditions under which it is given.²⁰

In order to eliminate and prevent discrimination within the meaning of this Convention, the States Parties thereto are required: to abrogate any statutory provisions and any administrative instructions and to discontinue any administrative practices which involve discrimination in education; to ensure, by legislation where necessary, that there is no discrimination in the admission of pupils to educational institutions; not to allow any differences of treatment by the public authorities between nationals, except on the basis of merit or need, in the matter of school fees and the grant of scholarships or other forms of assistance to pupils and necessary permits and facilities for the pursuit of studies in foreign countries; not to allow, in any form of assistance granted by the public authorities to educational institutions, any restrictions or preference based solely on the ground that pupils belong to a particular group; and to give foreign nationals resident within their territory the same access to education as that given to their own nationals.²¹

The States Parties to this Convention are required to undertake furthermore to formulate, develop and apply a national policy which, by methods appropriate to the circumstances and to national usage, will tend to promote equality of opportunity and of treatment in the matter of education and in particular: to make primary education free and compulsory; make secondary education in its different forms generally available and accessible to all; make higher education equally accessible to all on the basis of individual capacity; assure

¹⁹ UNESCO Convention against Discrimination in Education (1960), Article 1(1).

²⁰ Ibid, Article 1(2).

²¹ UNESCO Convention against Discrimination in Education (1960), Article 3.

compliance by all with the obligation to attend school prescribed by law; to ensure that the standards of education are equivalent in all public educational institutions of the same level, and that the conditions relating to the quality of the education provided are also equivalent; to encourage and intensify by appropriate methods the education of persons who have not received any primary education or who have not completed the entire primary education course and the continuation of their education on the basis of individual capacity; and to provide training for the teaching profession without discrimination.²²

c) Convention on Technical and Vocational Education, 1989

Kenya is yet to ratify the UNESCO Convention on Technical and Vocational Education, 1989²³. The Convention defines 'technical and vocational education' to refer to all forms and levels of the educational process involving, in addition to general knowledge, the study of technologies and related sciences and the acquisition of practical skills, know-how, attitudes, and understanding relating to occupations in the various sectors of economic and social life.²⁴

The Convention requires the Contracting States to frame policies, to define strategies and to implement, following their needs and resources, programmes and curricula for technical and vocational education designed for young people and adults, within the framework of their respective education systems, to enable them to acquire the knowledge and know-how that are essential to economic and social development as well as to the personal and cultural fulfillment of the individual in society.²⁵

d) Recommendation on the Development of Adult Education, 1976

The Recommendation defines the term 'adult education' to denote the entire body of organized educational processes, whatever the content, level, and method, whether formal or otherwise, whether they prolong or replace initial

²² Ibid, Article 4.

²³ UN Educational, Scientific and Cultural Organisation (UNESCO), *Convention on Technical and Vocational Education*, 10 November 1989.

²⁴ Ibid, Article 1(a).

²⁵ UNESCO Convention on Technical and Vocational Education, 1989, Article 2(1).

education in schools, colleges, and universities as well as in apprenticeship, whereby persons regarded as an adult by the society to which they belong develop their abilities, enrich their knowledge, improve their technical or professional qualifications or turn them in a new direction and bring about changes in their attitudes or behavior in the twofold perspective of full personal development and participation in balanced and independent social, economic and cultural development; adult education, however, must not be considered as an entity in itself, it is a subdivision, and an integral part of, a global scheme for life-long education and learning.²⁶

The Recommendation defines the term 'life-long education and learning', to denote an overall scheme aimed both at restructuring the existing education system and at developing the entire educational potential outside the education system; creating an understanding of and respect for the diversity of customs and cultures, on both the national and the international planes; in such scheme men and women are the agents of their own education, through continual interaction between their thoughts and actions; education and learning, far from being limited to the period of attendance at school, should extend throughout life, include all skills and branches of knowledge, use all possible means, and allow all people for the full development of the personality; the educational and learning processes in which children, young people, and adults of all ages are involved in the course of their lives, in whatever form, should be considered as a whole.²⁷

According to this Recommendation, the aims of adult education should be to contribute to: promoting work for peace, international understanding and co-operation; developing a critical understanding of major contemporary problems and social changes and the ability to play an active part in the progress of society with a view to achieving social justice; promoting increased awareness of the relationship between people and their physical and cultural environment, and fostering the desire to improve the environment and to respect and protect nature, the common heritage and public property; creating an understanding of and respect for the diversity of customs and

²⁶Recommendation on the Development of Adult Education, 1976, Para. 1.

²⁷ Ibid.

cultures, on both the national and the international planes; promoting increased awareness of, and giving effect to various forms of communication and solidarity at the family, local, national, regional and international levels; developing the aptitude for acquiring, either individually, in groups or in the context of organized study in educational establishments specially set up, for this purpose, new knowledge, qualifications, attitudes or forms of behavior conducive to the full maturity of the personality; ensuring the individuals' conscious and effective incorporation into working life by providing men and women with an advanced technical and vocational education and developing the ability to create, either individually or in groups, new material goods and new spiritual or aesthetic values; developing the ability to grasp adequately the problems involved in the upbringing of children; developing the aptitude for making creative use of leisure and for acquiring any necessary or desired knowledge; developing the necessary discernment in using mass communication media, in particular radio, television, cinema and the press, and interpreting the various messages addressed to modern men and women by society; and developing the aptitude for learning to learn.²⁸

e) World Declaration on Education for All, 1990

According to this Declaration²⁹, 'every person – child, youth and adult – shall be able to benefit from educational opportunities designed to meet their basic learning needs. These needs comprise both essential learning tools (such as literacy, oral expression, numeracy, and problem-solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in the development, to improve the quality of their lives, to make informed decisions, and to continue learning.'³⁰

²⁸ Para 2(2).

²⁹ World Conference on Education for All: Meeting Basic Learning Needs. 1990. *World declaration on education for all and framework for action to meet basic learning needs adopted by the World Conference on Education for All: Meeting Basic Learning Needs, Jomtien, Thailand, 5-9 March 1990*. New York, N.Y.: Inter-Agency Commission (UNDP, UNESCO, UNICEF, World Bank) for the World Conference on Education for All.

³⁰ World Declaration on Education for All, 1990, Article 1(1).

f) Doha Declaration, 2015

The *Doha Declaration on Integrating Crime Prevention and Criminal Justice into the Wider United Nations Agenda to Address Social and Economic Challenges and to Promote the Rule of Law at the National and International Levels and Public Participation*³¹ emphasizes that that education for all children and youth, including the eradication of illiteracy, is fundamental to the prevention of crime and corruption and to the promotion of a culture of lawfulness that supports the rule of law and human rights while respecting cultural identities. In this regard, we also stress the fundamental role of youth participation in crime prevention efforts. Therefore, the participants declared their endeavour: to create a safe, positive and secure learning environment in schools, supported by the community, including by protecting children from all forms of violence, harassment, bullying, sexual abuse, and drug abuse, per domestic laws; to integrate crime prevention, criminal justice, and other rule-of-law aspects into our domestic educational systems; to integrate crime prevention and criminal justice strategies into all relevant social and economic policies and programmes, in particular those affecting youth, with a special emphasis on programmes focused on increasing educational and employment opportunities for youth and young adults; to provide access to education for all, including technical and professional skills, as well as to promote lifelong learning skills for all.³²

g) World Declaration on Higher Education for the Twenty-first Century, 1998

Notably, Higher Education plays a vital role in educating the current and next generation of leaders, driving the research agenda for both the public and private sectors, and playing a critical role in shaping the direction of national economies.³³ The World Declaration on Higher Education for the Twenty-first

³¹ 'Doha Declaration on Integrating Crime Prevention and Criminal Justice into the Wider United Nations Agenda to Address Social and Economic Challenges and to Promote the Rule of Law at the National and International Levels, and Public Participation' 22.

³² Ibid, para. 7.

³³ 'Statement to the Education Post-COVID-19: Extraordinary Session of the Global Education Meeting | Department of Economic and Social Affairs' <<https://sdgs.un.org/news/statement-education-post-covid-19-extraordinary-session-global-education-meeting-24726>> accessed 6 December 2020.

Century³⁴ affirms that the core missions and values of higher education, in particular the mission to contribute to the sustainable development and improvement of society as a whole, should be preserved, reinforced and further expanded, namely, to: educate highly qualified graduates and responsible citizens able to meet the needs of all sectors of human activity, by offering relevant qualifications, including professional training, which combine high-level knowledge and skills, using courses and content continually tailored to the present and future needs of society; provide opportunities for higher learning and for learning throughout life, giving to learners an optimal range of choice and a flexibility of entry and exit points within the system, as well as an opportunity for individual development and social mobility in order to educate for citizenship and for active participation in society, with a worldwide vision, for endogenous capacity-building, and for the consolidation of human rights, sustainable development, democracy and peace, in a context of justice; advance, create and disseminate knowledge through research and provide, as part of its service to the community, relevant expertise to assist societies in cultural, social and economic development, promoting and developing scientific and technological research as well as research in the social sciences, the humanities and the creative arts; help understand, interpret, preserve, enhance, promote and disseminate national and regional, international and historic cultures, in a context of cultural pluralism and diversity; help protect and enhance societal values by training young people in the values which form the basis of democratic citizenship and by providing critical and detached perspectives to assist in the discussion of strategic options and the reinforcement of humanistic perspectives; contribute to the development and improvement of education at all levels, including through the training of teachers.³⁵

The Higher Education Sustainability Initiative (HESI), is a partnership between the United Nations Department of Economic and Social Affairs,

³⁴ World Declaration on Higher Education for the Twenty-first Century: Vision and Action and Framework for Priority Action for Change and Development in Higher Education adopted by the World Conference on Higher Education Higher Education in the Twenty-First Century: Vision and Action, 9 October 1998.

³⁵ World Declaration on Higher Education for the Twenty-first Century, 1998, Article 1.

UNESCO, United Nations Environment, UN Global Compact's Principles for Responsible Management Education (PRME) initiative, United Nations University (UNU), UN-HABITAT, UNCTAD and UNITAR, created in 2012 in the run-up to the United Nations Conference on Sustainable Development (Rio+20).³⁶ HESI provides higher education institutions with a unique interface between higher education, science, and policy-making where these institutions commit to: teach sustainable development across all disciplines of study; encourage research and dissemination of sustainable development knowledge; green campuses and support local sustainability efforts; and engage and share information with international networks.³⁷

h) International Covenant on Economic, Social and Cultural Rights (ICESCR)

The International Covenant on Economic, Social, and Cultural Rights (ICESCR)³⁸ states that the 'States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance, and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace'.³⁹

i) International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights⁴⁰ provides that 'the States Parties to the present Covenant undertake to have respect for the liberty

³⁶ 'Higher Education Sustainability Initiative. Sustainable Development Knowledge Platform' <<https://sustainabledevelopment.un.org/sdinaction/hesi>> accessed 6 December 2020.

³⁷ Ibid.

³⁸ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

³⁹ Ibid, Article 13(1).

⁴⁰ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their convictions'.⁴¹

j) Convention on the Rights of the Child

The *Convention on the Rights of the Child*⁴² guarantees that 'States Parties recognize the right of the child to education, and to achieve this right progressively and based on an equal opportunity, they shall, in particular: make primary education compulsory and available free to all; encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need; make higher education accessible to all based on capacity by every appropriate means; make educational and vocational information and guidance available and accessible to all children, and take measures to encourage regular attendance at schools and the reduction of drop-out rates'.⁴³

k) Convention on the Elimination of Discrimination against Women (CEDAW)

CEDAW⁴⁴ provides that 'States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women: the same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training; access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality; the elimination of any stereotyped concept of the roles of men

⁴¹ Ibid, Article 18(4).

⁴² UN Commission on Human Rights, *Convention on the Rights of the Child*, 7 March 1990, E/CN.4/RES/1990/74.

⁴³ Ibid, Article 28(1).

⁴⁴ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, A/RES/34/180.

and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods; the same opportunities to benefit from scholarships and other study grants; the same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women; the reduction of female student drop-out rates and the organization of programmes for girls and women who have left school prematurely; the same opportunities to participate actively in sports and physical education; and access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.⁴⁵

l) African Charter on Human and Peoples' Rights

The *African Charter on Human and Peoples' Rights*⁴⁶ guarantees that every individual shall have the right to education.⁴⁷ Regarding the place of human rights in the education system, *Banjul Charter* states that States parties to the present Charter shall have the duty to promote and ensure through teaching, education, and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights, as well as corresponding obligations and duties, are understood.⁴⁸

m) Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003⁴⁹ provides that as a way of eliminating discrimination against women, States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through

⁴⁵ Ibid, Article 10.

⁴⁶ Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights* ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

⁴⁷ *African Charter on Human and Peoples' Rights* ("Banjul Charter"), Article 17.1.

⁴⁸ *African Charter on Human and Peoples' Rights* ("Banjul Charter"), Article 25.

⁴⁹ African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003.

public education, information, education, and communication strategies, to achieve the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or stereotyped roles for women and men.

State Parties are also required to ensure equal enjoyment of the right to education by both men and women through, inter alia, taking all appropriate measures to eliminate all forms of discrimination against women and guarantee equal opportunity and access in the sphere of education and training.⁵⁰

n) Convention on the Rights of Persons with Disabilities

The *Convention on the Rights of Persons with Disabilities*⁵¹ states that States Parties recognize the right of persons with disabilities to education. To realize this right without discrimination and based on an equal opportunity, States Parties shall ensure an inclusive education system at all levels and lifelong learning directed to the full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity; the development by persons with disabilities of their personality, talents, and creativity, as well as their mental and physical abilities, to their fullest potential; and enabling persons with disabilities to participate effectively in a free society.⁵²

o) 2030 Agenda on Sustainable Development Goals

The 2030 Agenda for Sustainable Development (SDGs)⁵³, which was adopted by all United Nations Member States in 2015 acknowledges the place of education in the sustainable development debate.⁵⁴ SDG Goal 4 requires that all State Parties should ensure inclusive and equitable quality education and promote lifelong learning opportunities for all. The corresponding Targets are that: by 2030, ensure that all girls and boys complete free, equitable and

⁵⁰ Ibid, Article 12.

⁵¹ UN General Assembly, *Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly*, 24 January 2007, A/RES/61/106.

⁵² Ibid, Article 24(1).

⁵³ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

⁵⁴ 'Education | Department of Economic and Social Affairs'
<<https://sdgs.un.org/topics/education>> accessed 6 December 2020.

quality primary and secondary education leading to relevant and Goal-4 effective learning outcomes; by 2030, ensure that all girls and boys have access to quality early childhood development, care and preprimary education so that they are ready for primary education; by 2030, ensure equal access for all women and men to affordable and quality technical, vocational and tertiary education, including university; by 2030, substantially increase the number of youth and adults who have relevant skills, including technical and vocational skills, for employment, decent jobs and entrepreneurship; by 2030, eliminate gender disparities in education and ensure equal access to all levels of education and vocational training for the vulnerable, including persons with disabilities, indigenous peoples and children in vulnerable situations; by 2030, ensure that all youth and a substantial proportion of adults, both men and women, achieve literacy and numeracy; by 2030, ensure that all learners acquire the knowledge and skills needed to promote sustainable development, including, among others, through education for sustainable development and sustainable lifestyles, human rights, gender equality, promotion of a culture of peace and non-violence, global citizenship and appreciation of cultural diversity and of culture's contribution to sustainable development; build and upgrade education facilities that are child, disability and gender sensitive and provide safe, nonviolent, inclusive and effective learning environments for all; by 2020, substantially expand globally the number of scholarships available to developing countries, in particular least developed countries, small island developing States and African countries, for enrolment in higher education, including vocational training and information and communications technology, technical, engineering and scientific programmes, in developed countries and other developing countries; and by 2030, substantially increase the supply of qualified teachers, including through international cooperation for teacher training in developing countries, especially least developed countries and small island developing states.⁵⁵

3.2 Legal Framework Regarding the Right to Education in Kenya

As a result of the foregoing international normative framework on the realization of the right to education, and as a result of the outlined commitments to making education for all a reality, countries are expected to

⁵⁵ SDG 4 Targets 4.1-4.7(a)(b)(c).

put in place frameworks that related to enhancing the delivery, quality, and relevance of their education systems.⁵⁶

a) Constitution of Kenya 2010

In line with the Sustainable Development Goal 4 (the provision of quality education and Sustainable Development) and Goal 16 (Promote peaceful and inclusive societies for sustainable development, provide access to justice for all, and build effective, accountable, and inclusive institutions at all levels) the constitution of Kenya provides for the right of education to all children in and including the youth. Article 53 of the constitution of Kenya 2010 provides for the rights of children to the effect that every child has a right to free and compulsory basic education.

Article 54 of the Constitution guarantees that a person with any disability is entitled to: be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning; to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person; to reasonable access to all places, public transport and information; to use sign language, braille or other appropriate means of communication; and to access materials and devices to overcome constraints arising from the person's disability. All these rights are important in access to education for persons with disabilities and should therefore be fully implemented in the spirit of realizing the right t nor this group of persons in the society.

The Constitution also secures the rights of the minorities and marginalized groups in society by guaranteeing that the State shall put in place affirmative action programmes designed to ensure that minorities and marginalized groups, inter alia, are provided special opportunities in educational and economic fields.⁵⁷

⁵⁶ UNESCO, 'The Right To Education - Law and Policy Review Guidelines' (UNESCO, 28 July 2014),⁵ <<https://en.unesco.org/news/right-education-law-and-policy-review-guidelines>> accessed 6 December 2020.

⁵⁷ Article 56, Constitution of Kenya 2010.

It has been argued that the African continent's youthful population presents a powerful opportunity for accelerated economic growth and innovation while other world regions face an aging population with subsequent issues such as high health costs for elderly care and high demand for skilled and qualified labour.⁵⁸ However, the same demographic group also presents economic and social challenges, as well as implications for peace and security.⁵⁹

By providing for the right of education to the youth, the Constitution envisions the provision of quality higher education to the youth considering that most, if not all, of the students learning at the tertiary institutions, are of the youth age bracket. The Constitution states that the state shall take measures, including affirmative action programmes, to ensure that the youth access relevant education and training and have opportunities to associate, be represented, and participate in political, social, economic, and other spheres of life. Through this, it is evident that the Government of Kenya has adopted the provision of education as the main pillar in the national development agenda. All that is required is the necessary funding and political goodwill.

Regarding the elderly in society, the Constitution provides that the State shall take measures to ensure the rights of older persons— fully participate in the affairs of society; and pursue their personal development.⁶⁰

b) Basic Education Act (2013)

The Basic Education Act, 2013⁶¹ was enacted to give effect to Article 53 of the Constitution and other enabling provisions; to promote and regulate free and compulsory basic education; to provide for accreditation, registration, governance, and management of institutions of basic education; to provide for the establishment of the National Education Board, the Education Standards and Quality Assurance Commission, and the County Education Board and for connected purposes.⁶²

⁵⁸ 'Youth Empowerment | Office of the Special Adviser on Africa, OSAA' <<https://www.un.org/en/africa/osaa/peace/youth.shtml>> accessed 7 December 2020.

⁵⁹ Ibid.

⁶⁰ Article 57, Constitution of Kenya 2010.

⁶¹ Basic Education Act, No 14 of 2013, Laws of Kenya.

⁶² Ibid, Preamble.

The Act provides for various forms of education intended for a different group of people.

The Act defines “adult and continuing education” to mean the learning processes within the perspective of lifelong learning in which an adult or out-of-school youth is granted an opportunity in an institution of basic education for purposes of developing abilities, enriching knowledge, and improving skills.⁶³

“Adult basic education” is used under the Act to mean basic education offered as a full-time or part-time course to a person who is above the age of eighteen years and includes education by correspondence, the media of mass communication, and the use of libraries, museums, exhibitions or other means of visual or auditory communication for educational purposes and “Adult learning” shall be construed accordingly.⁶⁴

“Basic education” is used to mean the educational programmes offered and imparted to a person in an institution of basic education and includes Adult basic education and education offered in pre-primary educational institutions and centres.⁶⁵

“Formal education” under the Act refers to the regular education provided in the system of schools and other formal educational institutions.⁶⁶

“Non-formal education” is used to refer to any organized educational activity taking place outside the framework of the formal education system and targets specific groups/categories of persons with life skills, values, and attitudes for personal and community development.⁶⁷

“Institution of basic education and training” under the Act means a public or private institution or facility used wholly or partly, regularly or periodically

⁶³ Ibid, sec. 2.

⁶⁴ Ibid, sec. 2.

⁶⁵ Basic Education Act, sec. 2.

⁶⁶ Ibid, sec. 2.

⁶⁷ Ibid, sec. 2.

for conducting basic education and training and includes a school, a tuition facility, an educational centre, an academy, a research institution, a school correctional facility or a borstal institution.⁶⁸

The Act envisages “special education needs” which means conditions, physical, mental or intellectual conditions with substantial and long term adverse effects on the learning ability (other than exposure) or the needs of those who learn differently or have disabilities that prevent or hinder or make it harder for them to access education or educational facilities of a kind generally provided for learners of the same age in the formal education system.⁶⁹

It also provides for “special needs education” which includes education for gifted or talented learners as well as learners with disability and includes education which provides appropriate curriculum differentiation in terms of content, pedagogy, instructional materials, alternative media of communication or duration to address the special needs of learners and to eliminate social, mental, intellectual, physical or environmental barriers to learners.⁷⁰

The provision of basic education under the Act is to be guided by the following values and principles: the right of every child to free and compulsory basic education; equitable access for the youth to basic education and equal access to education or institutions; promotion of quality and relevance; accountability and democratic decision making within the institutions of basic education; protection of every child against discrimination within or by an education department or education or institution on any ground whatsoever; protection of the right of every child in a public school to equal standards of education including the medium of instructions used in schools for all children of the same educational level; without prejudice to paragraph (f) above, advancement and protection of every child in pre-primary and lower primary level of education to be instructed in the language of his or her choice where this is reasonably practicable; encouraging independent and critical thinking;

⁶⁸ Ibid, sec. 2.

⁶⁹ Ibid, sec. 2.

⁷⁰ Ibid, sec. 2.

and cultivating skills, disciplines and capacities for reconstruction and development; promotion of peace, integration, cohesion, tolerance, and inclusion as an objective in the provision of basic education; elimination of hate speech and tribalism through instructions that promote the proper appreciation of ethnic diversity and culture in society; imparting relevant knowledge, skills, attitudes and values to learners to foster the spirit and sense of patriotism, nationhood, unity of purpose, togetherness, and respect; promotion of good governance, participation and inclusiveness of parents, communities, private sector and other stakeholders in the development and management of basic education; transparency and cost effective use of educational resources and sustainable implementation of educational services; ensuring human dignity and integrity of persons engaged in the management of basic education; promoting the respect for the right of the child's opinion in matters that affect the child; elimination of gender discrimination, corporal punishment or any form of cruel and inhuman treatment or torture; promoting the protection of the right of the child to protection, participation, development and survival; promotion of innovativeness, inventiveness, creativity, technology transfer and an entrepreneurial culture; non-discrimination, encouragement and protection of the marginalised, persons with disabilities and those with special needs; enhancement of co-operation, consultation and collaboration among the Cabinet Secretary, Teachers Service Commission, the National Education Board, the County Education Boards, the education and training institutions and other related stakeholders on matters related to education; and provision of appropriate human resource, funds, equipment, infrastructure and related resources that meet the needs of every child in basic education.⁷¹

The Act establishes a National Education Board⁷² and a County Education Board for every county⁷³ all of which should facilitate close working relations between the National and County governments in discharging their mandates towards the realization of the right to free and compulsory basic education for all.⁷⁴

⁷¹ Basic Education Act, sec. 4.

⁷² Ibid, sec. 5.

⁷³ Ibid, sec. 17.

⁷⁴ Ibid, sec. 28.

The National Government should, through the Cabinet Secretary: provide free compulsory basic education to every child; ensure compulsory admission and attendance of children of compulsory school age at school or an institution offering basic education; ensure that children belonging to marginalized, vulnerable or disadvantaged groups are not discriminated against and prevented from pursuing and completing basic education; provide human resource including adequate teaching and non-teaching staff according to the prescribed staffing norms; provide infrastructure including schools, learning and teaching equipment and appropriate financial resources; ensure quality basic education conforming to the set standards and norms; provide special education and training facilities for talented and gifted pupils and pupils with disabilities; ensure compulsory admission, attendance and completion of basic education by every pupil; monitor functioning of schools; advise the national government on financing of infrastructure development for basic education; and provide free, sufficient and quality sanitary towels to every girl child registered and enrolled in a public basic education institution who has reached puberty and provide a safe and environmentally sound mechanism for disposal of the sanitary towels.⁷⁵

Notably, the Act not only provides for adequate structures and government obligations towards the provision of the right to education but also makes provisions for different forms of education targeting different groups of learners and their needs. The Act mainly requires adequate funding and goodwill in its implementation.

c) Technical and Vocational Education and Training Act, 2013

The Technical and Vocational Education and Training Act, 2013⁷⁶ was enacted to provide for the establishment of a technical and vocational education and training system; to provide for the governance and management of institutions offering technical and vocational education and training; to provide for coordinated assessment, examination, and certification; to institute

⁷⁵ Ibid, sec. 39.

⁷⁶ Technical and Vocational Education and Training Act, No. 29 of 2013, Laws of Kenya.

a mechanism for promoting access and equity in training; to assure standards, quality, and relevance; and for connected purposes.⁷⁷

In the discharge of its functions and exercise of their powers under this Act, the implementing authorities are to be guided by following principles: training shall be availed to all qualified Kenyans without discrimination; there shall be instituted appropriate mechanisms to promote access, equity, quality and relevance in training to ensure adequate human capital for economic, social and political development; training programmes shall take into account—(i) the educational, cultural and social-economic background of the people; (ii) the technical and professional skills, knowledge and levels of qualification needed in the various sectors of the economy and the technological and structural changes to be expected; (iii) the trends towards integration of information and communication technologies to multiply access and improve training capacity, delivery modes and life-long employability of graduates; (iv) the employment opportunities, occupational standards and development prospects at the international, national, regional and local levels; and (v) the protection of the environment and the common heritage of the country.⁷⁸

The Act prohibits discrimination on grounds of race, colour, gender, religion, national or social origin, political or other opinions, economic status, or any other ground save as provided under this Act.⁷⁹

d) Teachers Service Commission Act, 2012

The Teachers Service Commission Act, 2012⁸⁰ as enacted to make further provision for the Teachers Service Commission established under Article 237 of the Constitution, its composition; functions and powers; the qualifications and procedure for appointment of members; and connected purposes.⁸¹ In addition to the functions set out in Article 237 of the Constitution, the Commission shall: formulate policies to achieve its mandate; provide strategic direction, leadership, and oversight to the secretariat; ensure that teachers

⁷⁷ Ibid, Preamble.

⁷⁸ Ibid, sec. 3(1).

⁷⁹ Ibid, sec. 3(2).

⁸⁰ Teachers Service Commission Act, No. 20 of 2012, Laws of Kenya.

⁸¹ Ibid, Preamble.

comply with the teaching standards prescribed by the Commission under this Act; manage the payroll of teachers in its employment; facilitate career progression and professional development for teachers in the teaching service including the appointment of headteachers and principals; monitor the conduct and performance of teachers in the teaching service; and do all such other things as may be necessary for the effective discharge of its functions and the exercise of its powers.⁸²

e) Higher Education Loans Board Act, 1995

The Higher Education Loans Board Act, 1995⁸³ was enacted to provide for the establishment of a Board for the management of a Fund to be used for granting loans to assist Kenyan students to obtain higher education at recognized institutions within and outside Kenya and for matters incidental thereto and connected therewith.⁸⁴ “Higher education” under the Act means any course of education offered by an institution above the standard of Kenya Certificate of Secondary Education or any equivalent certificate approved by the Board.⁸⁵

4. The Right to Education in Practice: Challenges Facing Provision of Right to Education Sector in Kenya

Despite the positive steps made by successive governments in Kenya towards ensuring that all persons have access to inclusive and quality education in the country, many children of school-going age are still unable to access education opportunities and are still out of school as well as many other adults who are deprived of learning opportunities.⁸⁶

⁸² Ibid, sec. 11.

⁸³ Higher Education Loans Board Act, No. 3 of 1995, Laws of Kenya.

⁸⁴ Ibid, preamble.

⁸⁵ Ibid, sec. 2.

⁸⁶ ‘Impact of Covid-19 on Children’s Education in Africa’ (*Human Rights Watch*, 26 August 2020) <<https://www.hrw.org/news/2020/08/26/impact-covid-19-childrens-education-africa>> accessed 7 December 2020; ‘COVID-19: At Least a Third of the World’s Schoolchildren Unable to Access Remote Learning during School Closures, New Report Says’ <<https://www.unicef.org/press-releases/covid-19-least-third-worlds-schoolchildren-unable-access-remote-learning-during>> accessed 7 December 2020; ‘Children of Kenya’ (*Humanium*) <<https://www.humanium.org/en/kenya/>> accessed 7 December 2020.

The situation may be attributed to many challenges which include but may not be limited to social, cultural, and economic factors.⁸⁷ It is estimated that sub-Saharan Africa has the highest rates of education exclusion, with about 97.5 million children and adolescents being out of school in the sub-Saharan Africa region.⁸⁸ It has been argued that without an urgent will and combined resources and efforts, the situation will likely get worse as the region faces a rising demand for education due to a still-growing school-age population.⁸⁹

As of April 2016, UNESCO Observatory on the Right to Education raised their concern that ‘that the State party had not dedicated sufficient resources to financing school facilities and qualified teachers, and to ensure effective enjoyment of the right to free primary education for all.’⁹⁰ The Committee on Economic, Social and Cultural Rights was also concerned that inadequacies in the public schooling system had led to the proliferation of so-called “low-cost private schools”, which has led to segregation or discriminatory access to education, particularly for disadvantaged and marginalized children, including children living in informal settlements and arid and semi-arid areas.⁹¹

Some of the other challenges that have been identified regarding the education system in Kenya include very low school enrolment and completion rate in the arid and semi-arid areas and urban informal settlements, as well as low retention rate of teachers in these areas which undermines the quality of education; higher barriers faced by girls, compared to boys, in obtaining education due to heavy domestic workloads, adolescent marriages, and pregnancies, negative societal attitudes towards the importance of educating the girl child as well as unaffordable menstrual protection and sanitary wear and lack of sanitation facilities in schools; the Basic Education Act (2013)

⁸⁷ Ibid.

⁸⁸ ‘Why Africa Needs to Ensure Inclusive and Equitable Quality Education and Lifelong Learning for All | Blog | Global Partnership for Education’ <<https://www.globalpartnership.org/blog/why-africa-needs-ensure-inclusive-and-equitable-quality-education-and-lifelong-learning-all>> accessed 7 December 2020.

⁸⁹ Ibid.

⁹⁰ ‘Database on the Right to Education | Observatory on the Right to Education’, para. 57<<http://www.unesco.org/education/edurights/index.php?action=countries&lng=en>> accessed 6 December 2020.

⁹¹ Ibid, para. 57.

allows schools to charge tuition fees to non-Kenyan citizens; low quality of education and rapid increase of private and informal schools, including those funded by foreign development aids, providing sub-standard education and deepening inequalities.⁹²

5. Towards Inclusive and Quality Education as a Tool for Empowerment in Kenya

The achievement of the right to inclusive and quality education plays an important role in the achievement of many other rights and freedoms which all jointly are imperative for the empowerment of individuals and communities in general.⁹³ This section offers some recommendations that the Government and other stakeholders should consider to enhance the realization of the right to inclusive and quality education for all.

5.1. Equality and Equity in Provision of Education Services

Considering the need to address non-discrimination in education, and the fact that the State has the primary responsibility in ensuring the right to education, the UNESCO Committee on Economic, Social and Cultural Rights recommended that the State party should take all the measures necessary to strengthen its public education sector. The State party should increase the budget allocated to primary education and take all the measures necessary to improve access to and the quality of primary education for all without hidden costs, particularly for children living in informal settlements and arid and semi-arid areas.⁹⁴

⁹² 'Database on the Right to Education | Observatory on the Right to Education', para. 56<<http://www.unesco.org/education/edurights/index.php?action=countries&lng=en>> accessed 6 December 2020.

⁹³ 'A Human Rights-Based Approach to Education for All: A Framework for the Realization of Children's Right to Education and Rights within Education - UNESCO Digital Library' <<https://unesdoc.unesco.org/ark:/48223/pf0000154861>> accessed 7 December 2020; 'Quality Education for All: A Human Rights Issue - UNESCO Digital Library' <<https://unesdoc.unesco.org/ark:/48223/pf0000150273>> accessed 7 December 2020; Peters S, 'Inclusive Education: Achieving Education for All by Including Those with Disabilities and Special Education Needs'.

⁹⁴ 'Database on the Right to Education | Observatory on the Right to Education', para. 58<<http://www.unesco.org/education/edurights/index.php?action=countries&lng=en>> accessed 6 December 2020.

The UNESCO Committee also recommended that the State party bring the Registration Guidelines for Alternative Provision of Basic Education and Training in line with articles 13 and 14 of the Covenant and other relevant international standards; that it ensures that all schools, public, private, formal or non-formal, are registered; and that it monitors their compliance with the Guidelines.⁹⁵

While noting the measures taken to assist children who have left school to continue to study, the Committee on Economic, Social, and Cultural Rights reiterates its concern at the large number of children dropping out of school, particularly girls due to early marriage and pregnancy.⁹⁶ It went further to recommend that the State party take the measures necessary to address the underlying reasons why children drop out of school, to intensify its efforts to prevent students from doing so, and to bring those children back to school to complete their education.⁹⁷

It has been noted that in Kenya, it is estimated that 2.2% (0.9 million people) live with some form of disability (Kenya Population and Housing Census, 2019). PWDs are among the most vulnerable populations in Kenya. They are more likely to suffer opportunistic infections, lack employment, lack adequate livelihood opportunities, live in precarious conditions, and normally are dependent on their families and community for their living.⁹⁸ Even in school, children with disabilities may fail to attend school because of unsuitable school buildings. Besides, the limited understanding within their communities and among teachers about their learning needs affect the quality of education they receive, an outcome often fuelled by prejudices around disability.⁹⁹

⁹⁵ Ibid, para. 58.

⁹⁶ Ibid, para. 59.

⁹⁷ Ibid, para. 60.

⁹⁸ Kigundu Nicholas, 'NGEC Calls for Proactive Action to Protect Persons with Disabilities' (*KBC | Kenya's Watching*, 2 December 2020) <<https://www.kbc.co.ke/ngec-calls-for-proactive-action-to-protect-persons-with-disabilities/>> accessed 6 December 2020.

⁹⁹ 'Inclusive Education for Children with Disabilities' (*Plan International*) <<https://plan-international.org/education/inclusive-education-children-disability>> accessed 7 December 2020.

There is a need for the Government of Kenya to not only invest in but also to ensure that education is available to all regardless of their social status in society and devoid of any form of discrimination as envisaged under Article 27 of the Constitution of Kenya which guarantees that every person is equal before the law and has the right to equal protection and equal benefit of the law, which equality includes the full and equal enjoyment of all rights and fundamental freedoms. Those with special needs should also have their needs in education taken care of.

Non-formal education holds opportunities for ensuring equality and equity in providing education to the different types of students and groups of people in the country. For instance, it has been argued that non-formal education can ensure that out-of-school children can access opportunities. In some cases, non-formal education programs can bridge children back into the formal education system. For young mothers or girls who have been married early, non-formal education can address their unique needs.¹⁰⁰

Access to education for all is guaranteed under the law. It being a right as enshrined in the Constitution, everyone is entitled to go to school regardless of gender. There is no gender discrimination and, the same Constitution of Kenya, 2010 under Article 27 provides for equality and freedom from discrimination. It has been observed especially that early childhood care and pre-primary education are vital components of a quality education that are of critical value for the early socialization of gender equality. Quality education must be gender-sensitive at a minimum and aim to be gender transformative by transforming harmful gender stereotypes, norms, and biases in schools and society more broadly.¹⁰¹

¹⁰⁰ 'The Right to Inclusive, Quality Education' (*Plan International*) <<https://plan-international.org/education/right-inclusive-quality-education>> accessed 7 December 2020.

¹⁰¹ Ibid.

5.2 Comprehensive Compliance with the Legislation and Adequate Funding Opportunities for Inclusive Education

Ideally, education should be a tool for empowerment and should therefore meet the international standards on education. While reviewing the state of education, including vocational training and guidance in Kenya as of April 2016, regarding the Committee's general comment No. 1 (2001) on the aims of education, the Committee recommended that Kenya should: prioritize the elimination of geographical and gender disparities through targeted programmes and resource allocations that improve primary access, completion rates, retention and transition to secondary school; guarantee the legal right to free mandatory education for all, without direct or hidden costs, including non-Kenyan citizens such as in particular refugee children. In doing so, prioritize free primary quality education at public schools over private schools and informal low-cost schools and regulate and monitor the quality of education provided by private informal schools in line with the Convention; address root causes of low educational attainment of girls, including stereotypes discriminatory against girls and harmful practices.¹⁰²

5.3 Use of Technology in the Education Sector in Kenya

Notably, some of the challenges facing the education sector in the country relate to affordability, availability, and accessibility. Some of these challenges may be solved by integrating information technology in the education system delivery mode.

As technological advancements take root across the world, teaching and learning are moving towards the adoption of certain types of digital learning concepts, where new methods of learning will replace traditional individual classroom learning.¹⁰³

¹⁰² 'Database on the Right to Education | Observatory on the Right to Education' <<http://www.unesco.org/education/edurights/index.php?action=countries&lng=en>> accessed 6 December 2020.

¹⁰³ Vikram R Jadhav, Tushar D Bagul and Sagar R Aswale, 'COVID-19 Era: Students' Role to Look at Problems in Education System during Lockdown Issues in Maharashtra, India', International Journal of Research and Review, Vol.7; Issue: 5; May 2020.

Recent studies conducted in developed countries on the impact of technology in learning, focusing on remedial and low-achieving students, have shown gains of 80 percent for reading and 90 percent for math when computers were used to assist in the learning process; multimedia instruction models, aided by digital learning, found to save more time by up to 30 percent compared with conventional teaching methods such as board and chalk; and technology also improved achievement and cost savings of 30 to 40 percent, and had a direct positive link between the amount of interactivity provided and instructional effectiveness.¹⁰⁴ Also, students using technology as an education tool become more engaged in the process and more interested in growing their knowledge base.¹⁰⁵ Interactive solutions also boost retention rates and test scores, being far more engaging and memorable than voluminous textbooks; provide better context, a greater sense of perspective, and more arresting activities that allow them to better connect with students, and also frequently offer a more interesting and involving way to assimilate information.¹⁰⁶ Digital learning has thus been found to offer an unprecedented ability to provide educational experiences that are tailor-made for each student.¹⁰⁷

According to reports by the UNDP, school closures have affected over 90 percent of the world's student population — 1.6 billion children and youth. As a result, accounting for the inability to access the internet for remote learning, this could result in out-of-school rates in primary education not seen since the mid-1980s, setbacks that are especially worrisome as they can translate into life-long deficits, perpetuating inequalities across generations.¹⁰⁸ Remote access to education by students has never been more needed than during the COVID-19 pandemic period. It is estimated that during the

¹⁰⁴ Patricia King'ori, 'How Technology Can Solve Challenges in Education Sector' (*The Standard*)

<<https://www.standardmedia.co.ke/sci-tech/article/2001271511/could-technology-be-the-answer-to-our-education-challenges>> accessed 6 December 2020.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ 'Sustainable Development Outlook 2020: Achieving SDGs in the Wake of COVID-19: Scenarios for Policymakers' 58, 14

< https://sdgs.un.org/sites/default/files/2020-07/SDO2020_Book.pdf> accessed 6 December 2020.

COVID-19 pandemic, many schools are offering remote learning to students through virtual classrooms to mitigate the impact of school closures.¹⁰⁹ However, while this is an option for some, it is out of reach for many who lack access to computers and the Internet at home, as well as a low level of computer-related skills, all of which put many already marginalized students at a further disadvantage.¹¹⁰

It is therefore imperative that the government salvages the situation and avoid more children being affected through continuous investment in and full implementation of the government's *Digital Literacy Programme* which will see more children especially from the marginalized and far-flung areas in the country.¹¹¹ The programme which was started by the government in 2013 aims at ensuring pupils in standard one to three can use digital technology and communication tools in learning with an overarching objective of transforming learning in Kenya into a 21st Century education system.¹¹² Considering that the tablets and other gadgets meant for the Programme are being assembled locally by the Jomo Kenyatta University of Agriculture and Technology (JKUAT) and Moi University, there is a need for these

¹⁰⁹ Amit Kumar Arora and R Srinivasan, 'Impact of Pandemic COVID-19 on the Teaching-Learning Process: A Study of Higher Education Teachers' (2020) 13 Prabandhan: Indian Journal of Management 43.

¹¹⁰ United Nations Department For Economic And Social Affairs, *Sustainable Development Goals Report 2020*. (United Nations 2020) 33.

¹¹¹ Web Admin, 'Digital Literacy Programme on Course, Says ICT CS' (*Ministry of Information, Communications and Technology*) <<https://ict.go.ke/digital-literacy-programme-on-course-says-ict-cs/>> accessed 6 December 2020; 'DigiSchool – ICT Authority' <<http://icta.go.ke/digischool/>> accessed 6 December 2020; 'Update On The Digital Literacy Programme Being Implemented By The ICT Authority – ICT Authority' <<http://icta.go.ke/update-on-the-digital-literacy-programme-being-implemented-by-the-ict-authority/>> accessed 6 December 2020; Staff Writer, 'Government Spends Sh27billion in Digital Literacy Programme' (*CIO East Africa*, 15 May 2019) <<https://www.cio.co.ke/government-spends-sh27billion-in-digital-literacy-programme/>> accessed 6 December 2020; 'Bringing the Digital Revolution to All Primary Schools in Kenya' <<https://www.itu.int/en/myitu/News/2020/05/29/09/24/Bringing-the-digital-revolution-to-all-primary-schools-in-Kenya>> accessed 6 December 2020.

¹¹² Web Admin, 'Digital Literacy Programme on Course, Says ICT CS' (*Ministry of Information, Communications and Technology*) <<https://ict.go.ke/digital-literacy-programme-on-course-says-ict-cs/>> accessed 6 December 2020.

universities and other institutions of higher learning to be supported through funding and political goodwill as well as through cooperation with international organizations and initiatives such as Higher Education Sustainability Initiative (HESI) to make these initiatives more successful. Notably, The Digital Literacy Programme “Digischool” is also considered as a key deliverable under the Kenya Vision 2030.¹¹³

The adoption of robust curricula that provides for quality education and training is the key to the transformation of the country through technological innovation and the shift from knowledge reproduction to knowledge production which will eventually empower learners and communities as part of sustainable development.

5.4 Incorporating Customary and Indigenous Knowledge into the Formal and Non-Formal Education Curricula

The Constitution of Kenya recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.¹¹⁴

Where possible, it is important that schools, including institutions of higher learning, ensure that their students appreciate and understand the place of indigenous knowledge in the development discourse to give them wider choices in life.

Kenyan universities and especially the University of Nairobi boasts of robust curriculums that incorporate and encourage innovation. The University of Nairobi, for instance, does not just teach formal education but it also allows the students to be taught on a first-hand basis informally. They have incorporated clinical internships and externships in their curriculum. With this, the students can go for fieldwork where they interact with local members of the society such as the village elders where they get to learn about and

¹¹³ Republic of Kenya, *Digital Literacy Programme Management Guidelines*, September, 2016, 4

<https://publicadministration.un.org/unpsa/Portals/0/UNPSA_Submitted_Docs/2018/F6520F09-6F26-48A7-852D-2EFB5991C720/DIGISCHOOL%20GUIDELINES%20VERSION%202.pdf?ver=1439-05-26-155541-053> accessed 6 December 2020.

¹¹⁴ Article 11, Constitution of Kenya, 2010.

appreciate the customs of the society and/or different community settings. Through this, the students have an opportunity of knowing and learning the customary laws which form part of the laws of Kenya. Article 2 of the constitution embraces customary law as a form of law in Kenya. This is affirmed by Article 159 of the constitution which provides for the application of customary laws unless the same is repugnant to justice.

It is through such units as clinical externships being offered to the students that the learners can acquire the knowledge and skills needed to promote sustainable development through education for sustainable development and sustainable lifestyles, human rights, gender equality, promotion of a culture of peace and non-violence and appreciation of cultural diversity.

At the Wangari Maathai Institute of Environmental Studies (WMI), University of Nairobi, lecturers have an opportunity to impart skills necessary for sustainable development. It is an opportunity and platform that lecturers should and indeed use to impact and transform future generations by teaching them the nexus between education, peace, democracy, and environmental freedom, among other sustainable development concepts.

5.5 Crisis-Sensitive Education Planning for Future Peace and Stability

It has been observed that the consequences, whether from conflict, natural hazards, climate change, or epidemics, are severe for many sectors and societies, and the education sector is no exception since it may suffer from: the destruction of school infrastructure, a reduction in the number of teachers, an increase in gender disparities, or overall system dysfunction.¹¹⁵ There is a need for the Government to continually invest in peacebuilding efforts as part of ensuring that children from all parts of the country enjoy a peaceful learning environment. This is because the detrimental effects of crises on education systems – in terms of access, quality, equity, and management – and on learning cannot be underestimated since children and young people growing

¹¹⁵ ‘Crisis-Sensitive Education Planning’ (*IIEP-UNESCO*, 21 November 2014) <<http://www.iiep.unesco.org/en/our-expertise/crisis-sensitive-education-planning>> accessed 6 December 2020.

up in fragile and conflict-affected places are more than twice as likely to be out of school as their peers who live in safe and stable environments.¹¹⁶

Education can play a critical role in the prevention of future disasters and conflicts and the construction of peace. The Government should thus incorporate crisis-sensitive educational planning in its peace and education policies, which has been defined as involving:

‘Identification and analysis of the risks to education posed by conflict and natural hazards. This means understanding: how these risks impact education systems; and, how education systems can reduce their impact and occurrence. The aim is to lessen the negative impact of crises on education service delivery while at the same time fostering the development of education policies and programmes that will help prevent future crises arising in the first place’.¹¹⁷

6 Conclusion

There is a higher need than ever before for the Government to concentrate more on investment in education and training as part of its efforts towards the realization of sustainable development agenda and the country’s development blueprint, Vision 2030.

If the right to quality and inclusive education for individual and community empowerment is to be realized, then there is a need for strong national legal and policy frameworks that lay the foundation and conditions for the delivery and sustainability of good quality education. Education holds great potential in addressing most of the problems that slow down the realization of sustainable development goals and eventual empowerment of individuals, such as poverty, injustice, inclusivity, environmental degradation, among others.

Inclusive and quality education is indeed a tool for empowerment for the present and future generations.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

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57<<http://www.unesco.org/education/edurights/index.php?action=countries&lng=en>> accessed 6 December 2020.

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Combating Un-Freedom: A Panacea for the Growth Lull in Africa

By: Henry Murigi*

Abstract

The competing claims as to what development should look like has not escaped African thinkers and scholars. There have also been attempts by the global north, in the name of genuine humane concern, to offer support such as aid for Africa hoping that development will automatically occur. There is also a concern that Africa is embroiled in continuous quest for development, yet the expected development is not achieved. This paper attempts to bring to the fore some of the reasons why Africa remains in chains of unfreedom even though it was initially free like any other continent. Starting from the conceptual and definitional difficulties of the terms in development discourses, the paper proposes the importance of the correct perspectives toward the past, the present and peace as the best approaches to unshackle Africa from the growth lull. The paper posits that democracy is overrated since it cannot guarantee that development will be achieved if all the democratic ideals are adhered to strictly. The paper posits that development should be the primary focus by putting a measured or tampered emphasis on democracy. The claim made here is that it is important to ensure that the focus is on peace and as a precursor to development which eventually produces democracy.

1. Introduction

Jean Jacques Rousseau suggested that man is born free but everywhere he is in chains (Rousseau, 1895). If this claim is true today, why then does man remain in chains? In the context of international development, the global south remains relatively underdeveloped despite numerous internal and external efforts to develop. Generally, while man has freedom to development, there are certain factors that constrain them from operating optimally in the growth journey. The paper claims that the growth lull in Africa is caused by a

* Henry Kinyanjui Murigi, PhD Student of International Relations at USIU Africa, M.A Peace and Conflict Management (Hons) Kenyatta University Post Grad Diploma in Law Kenya School of law LL. B (Hons) Kampala International University.

combination of unique challenges that constrain development. These constraints will be referred to as un-freedoms. The argument here is that unfreedom arises from an array of factors based on Africa's history, political economy posture, and predilection toward governance. Although these are not the only factors that cause unfreedom, this paper posits that these factors when considered carefully in light of international development theories will reveal that they are self-inflicted constraints. It is therefore imperative that they are interrogated resolutely and confronted mercilessly to unshackle Africa from the growth lull.

The central argument made in this paper is that when the subject of development was introduced in Africa two perspectives arose. One perspective has been that during colonialism, Africans were denied cognitive justice to think through the challenges they faced and propose their own unique way forward for themselves (Hoppers, 2015). The second perspective has been that development was introduced to Africa as a better alternative to the African way of life while in actual fact no empirical analysis was carried out by the West before arriving at this position (Diamond, 2008). Some of the solutions that have been put forward include African solutions to African problems. Although such contentions have been constantly misapplied, when correctly understood, they pose the most liberating reality for the continent of Africa. The paper proposes that one of the foremost un-freedom that should be combatted is the romanization of the effect of the struggle for independent Africa by asking hard questions as to what exactly must Africa do to attain the status of equals with other continents. The second un-freedom that must be combatted is the prioritization of approaches to democracy and politics in Africa. The third un-freedom is related to conflict and wars which have ravaged most of the post independent African States. Here the paper argues that peace is the foundation for development in Africa. It is conceded that there is abundance of perspectives and literature on peace and international development, this paper will constrain itself to justice as the main pillar for peace and consequently international development in Africa. These are some of the solutions to the growth lull in Africa. At the end it hoped that the best approach to combating un-freedom is viewing development in the prism of freedom (Sen, 2000)

2. Definitional Difficulties

Most social science subjects face similar difficulties in finding convincing and mutually acceptable definition to concepts. Consequently, there is no globally accepted standard of defining international development. Perhaps this is due to its multiple and multidisciplinary dimensions. (Hopkins A. G., 1995) argues that the definition of a problem has a strong, even a determining, influence on the solution proposed is a truism acknowledged by historians more often than it is acted upon. It is therefore important to periodically inspect the substantial historical controversies that have persisted from a generation or more. There are several attempts at defining international development albeit with difficulties. First, development can be considered from its different etymological strands such as growth, conversion, construction, start to exist, evolution, maturity, advancement, among others. Second, one may argue that development is as old as human quest for knowledge and began when man started wondering and experimenting on ideas. Third, and a more pointed view of international development thinking was seen after the age of enlightenment when human progress was tied to the economy by contributions from thinkers such as (1) David Hume who treated economy as a moral science (Rotwein, 1976), (2) Adam Smith on the factors of increasing production based on labor and argued that this happens more in developed nations (Smith, 1976), (3) John Stuart Mill argues that utilitarianism and political economic theories of demand and supply should be viewed and valued as independent units (Mill, 1848).

Fourth, considering the antonym for development (which for the sake of this paper is poverty) can offer some understanding albeit with similar difficulties. In the context of Africa, poverty is one of the concepts that is used to define development albeit in a pejorative sense (Rodney, 1972). This ends up not being a good attempt for several reasons. Some have argued that poverty in Africa was (is) created, not a natural occurrence, as such it remains relative rather than absolute (Rodney, 1972).

Poverty has different levels and dimensions which end up being comparative as well as being created to bring in the notion of wealth as the possession of a certain level of material, political, spiritual, and cultural commodities (Munene, *Historical Reflections on Kenya : Intellectual Adventurism, Politics and International Relations* , 2012). The purpose of those commodities is to

provide service that is deemed appropriate to a given people to make them lead what is considered decent lives. It follows then that if people are meeting their material, social, spiritual, political, and cultural needs, then they cannot be said to be poor. This argument is further supported by the fact that the imposition of colonialism in Africa created famine and political relief mentality based on the “conquerors often created famine” which was a method of control (Waal, 1997). This also find agreement with (Klein, 2007) who argues that there is a rise of disaster capitalism based on manufactured crisis in the global south.

The other approach of interest is the right based approach. Here the emphasis is on human rights. This approach accepts the Amartya Sen definition of development that insist on freedom as the truest measure of development. This explains what David Flynn contends with when he suggests (1) the universality of rights, hierarchy of rights, fusion, and distinction of rights is the major factors that support the call for rethinking human rights and responsibilities and (2) one must look at human rights as discursive and not positive in the same fusion as social work considers both the macro and micro (Flynn, 2005).

Last but not least, evidently, there is no unanimity among historians on the exact time when development thinking commenced perhaps due to the fact that it is difficult to define it. (Diamond, 2008) argues that the appropriate date for investigating the development discourse is 13000 years ago. He suggests that the medieval age is appropriate because it can show that every society at the time was in the same development state. (Weber, 1958) on the other hand, traces the historical development of capitalism and industrialization to the protestant ethics that promoted development in the age of the Renaissance. One must factor the etymological uniqueness of ‘under’- development and ‘un’-development. Here the argument is that Africa and the global south generally was underdeveloped by the hegemonic tendencies of the global north (Tandon, 2016) (Mazrui, 2006) (Omkarnath, 2016).

How to Explain International Development

a) Modernisation Theory

The initial proponent of modernization theory was Max Weber the German Sociologist who argued for rationalization of growth and development. His

seminal work considered protestant ethics as the basis for growth of capitalism (Weber, 1958). The theory has since been modified to adapt to new realities and assumes that all states basically follow the same pathway or journey to industrialization by focusing on primary products such as minerals, agriculture and incrementally learn to invest in new activities that lead to take off which create new individual and a modern society that is democratic (Rustow, 2014), (Moore, 1958) (Schumpeter, 1942) (Lipset S. M., 1959). (Huntington, 1996).

Reaction to Modernization Theory

First, in my view this theory fails to clarify whether the relationship between economic growth and democracy is positive or negative. It has been argued by (Dankwart, 1970) that correlation does not mean causality and that there ought to be focus also on other conditions that lead to economic development beyond democracy. Secondly, the theory fails to consider that modernization process could also lead to political instability and bring about authoritarian regimes. For instance, the fascist regimes in Europe in the 1930s or the bureaucratic-authoritarian regimes in South America in the 1970s are a product of attempt to develop these countries as argued by (Frank, 2014). Third, the theory does not take into account aspects of creative disruptions that introduces dynamic changes to the markets forces and facilitate development through outliers, innovators and capitalist (Dru, 1997), (Gladwell, 2011). Fordism fits into the creative disruption principle and arose when Ford Motor Company introduced methods for large-scale manufacturing of cars and management of an industrial workforce using elaborately engineered manufacturing categorizations characterized by shifting construction positions. A more local example such as mobile technology companies that entered the market in early 2000 unsettled the telecommunication industry in Kenya and revolutionized communication. In addition, mobile money transfer caused the banking sector to adjust to the realities of the emerging economic platforms without necessarily going through the stages of modernization as postulated in this theory. The question is not whether Africans cannot come up creative initiatives, instead it is whether the global north is ready to accept African innovation and embrace it. It is important that we unshackle Africa from the pejorative perspective of history, development aid and deal with conflicts in Africa. This theory does not fully address these three aspects.

b) Dependency Theory

Dependency theory is diametrically opposed to modernization theory. This theory was coined by Raul Prebisch a Latin America economist as a rejoinder to the modernization theory (Prebisch, 1950). The central argument of the dependency theory is that because poor states are underprivileged, the rich States are obligated to develop the poor states with a view to having them integrated into the world system (Wallerstein, 1989). The principal assumption of this theory is that that economic and political power are heavily concentrated and centralized in the industrialized countries. Integration of Africa into the world capitalist system works against her development even in the Post World War II era (Lipset S. M., 1959). This is because it promotes an unfair relationship that is sustained by the African bourgeoisies who are the proxies of the global financiers that rely on these oppressive behaviors for their survival. They do so use the ideas such as the unholy trinity principles where policymakers of a country pursue only two out of these three (1) the free movement of capital, (2) an independent monetary policy, and a (3) fixed or pegged exchange rate policy directions, yet development requires all three (Chagn, 2002).. These leads to un-freedom that must be combatted to liberate Africa and ready it for take-off.

Reaction to Dependency Theory

The main concern is why Africa has to keep relying on aid, ideas, and influence from other quarters instead of coming up with unique globally competitive solutions. There are three competing arguments in attempting to answer this question. First, Jeffery Sachs, argues that as part of doing away with aid, the focus should be on capital (human, business, infrastructure, natural, public institution, and knowledge capital) (Sachs, 2015). He suggests that there is clear need to fix the plumbing of international development assistance in order to be effective in the well governing countries. He concedes that aid has produced more debt, corruption, poor governance and has not worked. He concludes that there is no magic bullet since all the previous attempts to use aid as a development vehicle has not worked (Sachs, 2015).

Second, Dambisa Moyo argues that aid has not worked in Africa and is indeed a silent killer for growth (Moyo, 2010). She suggests the Marshall plan worked well in rebuilding Europe as opposed to the building from scratch that is needed in Africa. She argues that since 1940 approximately 1 trillion dollars

has been transferred from rich countries to Africa which is nearly USD1000 for every man woman and child in the planet today (Moyo, 2010). She attacks the international development agencies by suggesting that the conditions for the aid do not necessarily produce better economic growth. For instance, the Brentwood institutions insist on democracy in Africa has not produced better governance structure but created a bureaucracy that is used as a pong for the western elitist. Aid therefore achieves negative development.

Third, William Easterly, argues that Aid cannot achieve the end of poverty and it is only homegrown development based on dynamism of individual firms in free markets can do that (Easterly, 2006). He suggests that aid agencies should allow the staff that work on certain programs to determine what works since they have a better view of what is on the ground than a generalized bureaucratic perspective that these agencies adopt. In other words, he suggests that solution to the problem of aid should come from those who are either on the ground or those in touch with those on the ground.

Fourth, Paul Collier argues that aid contributes to the challenges that bedevil the bottom billion such that to an extent aid does make the conflict trap worse (Collier, 2007). Aid has a direct correlation with several aspects such as natural resource trap, landlocked countries, and it is an incentive to bad governance. Aid is both a contributor to conflict and development because for instance aid significantly reduced capital flight (Collier, 2007).

c) Influence of Actors to Approaches

With the foregoing literature, this paper argues that to unshackle Africa from the growth lull, the actors must be brought on board so that their ideology is sharpened. There are some challenges that will emerge in attempting to do so. First, the actors in international development keep shifting the goal post on what development should look like. Secondly the international development actors often called choice architects are ideally driven by natural laws to consider assisting the plight of those who cannot access basic needs. However, these architects are not very innocent since they can manufacture or invent crisis for sustain their continued existence in poverty-stricken areas (Klein, 2007). Also, (Moyo, 2010) has argued against over-reliance on aid in Africa. Third, one cannot easily confine international development to a definite timetable or singular framework. It is an evolving concept with different

strands and meaning. Evolution of international development is therefore a continuous matter that should be studied in the lenses of time, space, ideas, and human agency among others using the several approaches. Here this paper suggests that there is a need to have a clear approach that would be used in its uniqueness to Africa. The marked based approach is highly westernized and influenced by the modernization and neoliberal thinking. It operates in the framework that supports global trade and industrialization without placing the individual at the center of the discourse. The approach that this paper advocates for is the rights-based approach which places the human person as the ontological unit of analysis. In so doing the discourse becomes how to better the human being and as a consequence development emerges.

Perspectives on the Past, Present and Peace

Scholars such as (Tandon, 2016) (Mazrui, 2006) began the debate that suggest that one should not focus on the economic argument as the only discourse on international development. This part of the paper considers the appropriate responses to the growth lull in Africa. Perspective is everything without it no one would offer any solution to the world's problems. Here the paper suggests three perspectives that are critical in unshackling Africa from the growth lull. First, the perspective of the past in terms of history has been one that makes Africans to be in bondage. There is a perspective that views the historical injustice brought about by slavery, colonialism, and post colonialism as being fatal flaws toward Africa's development (Munene, Historical Reflections on Kenya : Intellectual Adventurism, Politics and International Relations , 2012). Here it is critical to distinguish between under-development and un-development. In the context of Africa, the former applies while for Europe the latter applies. Second, the perspective about the present is also critical to decisions made now that have an impact on the future. Here it is proposed that democracy does not precede development in fact it is the converse. In other words, Africa will only develop when overemphasis on democracy is toned down slightly. The argument is not to chock democracy completely but reduce the hyperbolic significance placed on it in Africa. Third, the premise of peace in Africa is always mired the epistemological disputations on how to critically define peace. Peace is a purely subjective term and as such the African thinking should define its own framework of peace. The argument made here is that the cost of development in Africa must always consider that peace precedes development.

Historical Roots of Development in Africa

First, the main unfreedom that must be combatted is the perspective with which Africa looks at its history. Although African historians do not provide a direct answer to this question, Gaddis offers images that demonstrate that the person telling history is influenced by his context, structures, and process (Gaddis, 2002). He argues that if time and space would provide the field in which history happens, then context, structure and process would provide the mechanism. He argues that those telling history such as (Carr, 1961) avoid some details with a view to 'sell' a certain narrative to the audience. An illustration is made where Carr admitted privately that he omitted and bypassed the horrors, persecution and brutality in narrating history (Gaddis, 2002). The utilitarian approach of history is not a useful tool to telling the whole story of Africa. (Aseka, 1993) argues that the whole story of Africa's underdevelopment in the context of environmental degradation has not been properly explored historically. The suggestion here is that in the face of the increased underdevelopment and the historical dimensions of environmental degradation the question of imperialist misuse and technological abuse of the environment occupies a significant amount of influence in the politics of policy formulation.

Romanticizing Colonialism

There is a clear need to liberate Africans from the shackles of colonialism in its various facets. The regular issue that is missed in the quest for this liberty is understanding the right perspective to consider colonialism. Colonialism and all its ills have been documented with suggestions of the misery that was visited upon Africans. For instance, the Mau-Mau struggle is a proper illustration of the true struggle that befell Africans and it shows that indeed crimes were committed in the quest for domination (Anderson, 2005).

Theoretical foundations of significant historic polemics require regular scrutiny, especially if they have been operating beyond one generation. But the wider issues that ought to summon wide attention is the problem of the long-run economic under-development of Africa by considering a set of the broader international context, one that encompasses European imperialism in the late nineteenth century (Hopkins A. G., 1995). Although this argument is very compelling, it must be combatted since it seems to suggest that Africans have to be treated as a special category due to the historical injustices visited

on them by the West through slavery, colonialism and systemic discrimination. These response presents two attitudes; on the one hand some would argue that Africa should not be given an olive branch and compensated for the atrocities the other argument is that the atrocities occasioned by colonialism produced under development.

This second argument creates an impression that the reason for Africa's underdevelopment is because of colonialism and Africans have nothing to do with the current growth lull. This has caused unfreedoms from the past and it must be combatted. (Ekanem, 2006) argues that the documentation of the historical development of the world, Africa has been tacitly ignored. He suggests that majority of Western historians, sociologists, anthropologists, and scholars, Africa has no history, no philosophy and as such, the Africans do not possess the cognitive power to engage in the rigorous exercise of philosophizing. This is one of the main untruths that must be combated because it is convoluted by some westernized African scholars, who have relegated Africa to the backbench of world development and history. Here the argument is that if one is bothered enough to look keenly at the history of world development will see Africa as the cradle of world civilization and development. This becomes more conspicuous and introductory when we view development, not only from the traditional theoretical agenda of economics, but from the standpoint of multi-dimensional concept. In all the facets of development, Africans have made tremendous contributions. Africans, through their philosophical approaches to culture, environment and nature have helped to add significance to alterations, progress and advances of African societies and the world at large (Ekanem, 2006).

But the wider issues that ought to command wide attention go to the heart of the problem of the long-run economic underdevelopment of Africa. These includes broader, international context, that encompasses European imperialism in the late nineteenth century (Rempel, 2008). (Odhiambo, 2003) argues that development perspective that is informed by the realities of Africa today are essential to the views of current institutional framework of global challenges. The views of African human agency and philosophers on development underscore the need to go back to construction on the ethnic origins of African civilization as a way forward.

Politics, Democracy and Development

The second unfreedom that must be addressed is the thinking that democracy without doubt produces development. The question is whether states are developed because they are democratic or whether states are democratic because they are developed? There are at least three possible responses in an attempt to resolve this issue. First states are not democratic because they are developed. Second, modernization theory anticipates democracy as its byproduct but does not sufficiently consider the historical terrain of underdeveloped countries. And third, while it is true that dependency theory responds to underdeveloped countries realities, it also fails to unshackle the global South from chains of poverty. These responses can be addressed as follows; First, States are democratic because they are developed. For instance, America endured rule by one in order to arrive at the idea of rule by many. At the time of rule by one, protectionist policies were used to ensure internal growth and global domination is achieved. However, while adopting the definition of development as freedom as suggested by (Sen, 2000), it is clear that to arrive at the status of development states must undergo certain processes before they become free. It has been argued and correctly in my view that there are stages (beginning traditional society, precondition for take-off, take-off, dive to maturity and age of high consumption) that states have to go through in their journey toward development (Rustow, 2014).

The journey to democracy that produces development is not always smooth or straightforward but often times odious with push and pull which have occasioned the growth lull in Africa. It contains several variables and dynamics such as culture, politics, and history among others that must be accounted for in determining why states fail to develop or remain underdeveloped. On the one hand (Daron Acemoglu, 2012) argues that cultural differences do not matter in the process of development since states like China, North and South Korea and East Asia generally developed in spite of the cultural constraints. On the other hand, it is my contention that States in Africa were modelled for extraction by the Colonialist since the Berlin conference in 1884. For instance, the rich Democratic Republic of Congo is always exploited by choice architects who seek to benefit from its resources to the detriment of her development. This argument is supported by (Rodney, 1972) (Chagn, 2002) who argue that one must take account of the history of a state before passing a verdict as to why it is or remains underdeveloped.

This paper suggests that when states become developed democracy is a byproduct. The other challenge with these arguments is that democracy is a flawed concept borrowed from the west and may not be effective in Africa. It contains certain milestones that are not reachable in the context of Africa. This expounded more by (Schumpeter, 1942), (Hantington, 1996), (Moore, 1958), and democracy calls for reimagination especially on the questions of who represents which part of the Africans. The more realistic approach is having a good balance between social factors and political/democratic factors. To confront empire as suggested by (Roy, 2008), there is a serious need to ensure balance between the competing political and economic expectations. (Tandon, 2016) presents a creative formula that suggests Social factors (free from exploitation) + Democratic factors (participation of the people) – imperial factor (liberation from imperial colonial domination) = development. He argues that there is a need to break away from the structures of domination structures by resistance and not revolution and going back to barter trades and move away from economic policies. He suggests that this path is what Brazil, Russia, India, China, and South Africa (BRICS) went through in order to develop. This thinking finds support from (Ting, 2016). In sum, here the suggestion is that it is easier to get development first before focusing on democracy. Politics should be conjured toward development and then democracy becomes a byproduct.

Peace and Development

The claim made in this part is that when focus is placed on development and not democracy then we certainly will have peace. First, peace will become a product of the right perspective to development. Here we adopt the definition of peace given by Macharia Munene as being generic and a product of interaction within social structures (Munene, Generic Peace and The peace: A discourse, 2009) . The greatest injustice is to insist on democracy at the expense of peace and development. It is obvious that there can be no development when the guns, boots and armies are in use in any State. Immanuel Kant argued that there will come a time when standing armies are abolished, national debt shall not be contracted without external friction, and there will be no interference with other governments. (Kant, 1903). This will be brought about by focusing on development and not merely democracy. The reality is that it is nearly impossible to develop in an atmosphere where conflict is ripe. Here we adopt the definition of conflict by (Esteban, 2017) which includes demonstration,

strikes, coups, detaining of political prisoners and growth of economic crimes. The interpretation of conflict here is that it comes at an opportunity cost where poor countries do not engage true efforts for development and weak institution hamper development. In the context of peace, there are certain causes of conflict including conflict trap, natural resource curse, landlocked neighbors, and bad governments.

Second, democracy is overrated. Countries such as United States were not constructed by placing democracy as the most important pillar (Chagn, 2002). Instead, the idea was to ensure that development is achieved first before democracy. Indeed, democracy does not always produce what it promises (Ngugi, 2005). Democracy promises equality and equity but, in the end, produces inequality and injustice due to the majoritarian ideal that it espouses (Dahl A. R., 1998). The trouble of placing democracy at the fore front of State building is that it has no guarantee of fulfilling developmental ideals of any society. Democratization is a process that is hard to achieve and greatly value laden and context specific containing many variables (Huntington, 1996) (Lipset S. M., 1959) (Moore, 1958) (Schumpeter, 1942) (Lipset S. M., 1960) (Dahl A. R., 1998) (Dahl R. A., 1964) (Lipset S. M., 1959). What is however clear is that it does not follow a certain prescription in any given context. For avoidance of doubt, the argument here is not that democracy should be choked and ignored or taken to the back seat. This would be very unfortunate since it would entrench domination and dictatorship. However, Countries like Rwanda, Botswana, Singapore, Nordic countries cannot be credited as being the best democracies, yet they have managed to develop in terms of how they approach issue of the social welfare of their people and infrastructure. Therefore, the argument made here is that peace should be viewed as the precursor to development and the producer of democracy.

Conclusion

From the foregoing it is then clear why there are several approaches to international development that have not worked in unshackling Africans from the unfreedoms. Some approaches place emphasis on the economic aspects of a nation which is commonly referred to as Market Based Approach (MBA). This approach insists that a working society capable of producing goods for internal consumption and external markets can be classified as developed. This brings to mind the distinction between States that focus on production for

export and those that focus on production for consumption. The latter is likely to be considered developed. This concentration by States produces different types of development. What we have seen is that this approach may not work on itself since it does not guarantee freedom from historical injustice. Therefore, it would mean that adopting this approach will not unshackle the past. Instead, the suggestion made is that to unshackle Africa some introspection should be had by avoiding the romanticization of the historical injustices occasioned by slavery, colonialism, and post colonialism. The focus should then be on considering valuable lessons on how to chart a path that produces unique history. This paper wholly adopts (Roy, 2008) suggestions on confronting empire.

What this paper has suggested is that when comparing the historical posture of other continents, it is apparent that development has not followed the Rostow's suggestion on stages of growth. The idea therefore is not to be bogged down by history that leads to a focus on democracy. The paper posits that democracy is overrated since it cannot guarantee that development will be achieved if all the democratic ideals are adhered to strictly. The paper posits that development should be the primary focus by putting a measured or tempered emphasis on development. The imperialist would have that Africa remains chained to the historical injustices and narrow their focus on democracy as the most important ideal and producer of development. This must be combatted by rejecting such narrative and insisting on a framework that supports the primacy of development approaches that are unique to each situation. The focus should be on home grown solutions to the unique challenges of each Country in Africa. The focus should be on an all-rounded approach to development. What however remains abundantly clear is that we must unshackle Africa from the unfreedoms that have been identified as the past, present and peace.

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Ensuring Healthy Lives and Well-being for All Kenyans

By: **Kariuki Muigua***

Abstract

Sustainable Development Goal (SDG) 3 of the United Nations 2030 Agenda on Sustainable Development obligates State Parties to work towards ensuring healthy lives and well-being of people of all ages in their territories by the year 2030. The Corona Virus Disease Pandemic (COVID-19) has drawn the attention of all countries to the status of their health system, mostly by exposing the weaknesses. This ranges from the inadequate health facilities, shortage of health workers and even the limited financial investment in emergency treatment requirements. The results have been devastating on most countries' economies. Kenya has not been left behind as it has had to mainly rely on grants and loans from foreign sources to meet its public health obligations and needs. This paper highlights these challenges in line with Sustainable Development Goal 3 (SDG 3) which requires all states to put in place measures geared towards ensuring healthy lives and the general well-being of their citizens. The paper also offers some recommendations in line with the same.

1. Introduction

The Corona Virus Disease Pandemic (COVID-19) has exposed and brought to the attention of the whole world just how important health and well-being of the population is. Indeed, the fact that COVID-19 has affected all sectors of the global economy is evidence enough that human health and well-being form the backbone of the global economy. It has become clear that no matter how much governments invest in other areas of the economy, if the health sector is ailing, then all the other efforts come to naught. Indeed, it has been argued that 'health care is not only a problem of healthcare but also a problem of a profound social nature, making it an integral part of all the social and economic development conditions'.¹

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

While Kenya has been investing and making efforts towards guaranteeing the realisation of the right to health care and well-being for all, there are still a lot of challenges facing the health sector. This paper discusses some of the main challenges and offers recommendations on what the country can do in its efforts towards realisation of Sustainable Development Goal (SDG) 3 on ensuring healthy lives and well-being of all its citizens.² SDG 3 spells out the

Kenya; Senior Lecturer at the University of Nairobi, School of Law; CASELAP [December, 2020].

¹ Tomaziu-Todosia M, 'The Importance of Public Health Policies in the Social-Economic Development of Romania' (2019) 10 *Postmodern Openings* 162.

² SDG 3 seeks to "ensure healthy lives and promote well-being for all at all ages". The Health targets for SDG 3 include: By 2030, reduce the global maternal mortality ratio to less than 70 per 100 000 live births; By 2030, end preventable deaths of newborns and children under 5 years of age, with all countries aiming to reduce neonatal mortality to at least as low as 12 per 1000 live births and under-5 mortality to at least as low as 25 per 1000 live births; By 2030, end the epidemics of AIDS, tuberculosis, malaria and neglected tropical diseases and combat hepatitis, water-borne diseases and other communicable diseases; By 2030, reduce by one third premature mortality from non-communicable diseases through prevention and treatment and promote mental health and well-being; Strengthen the prevention and treatment of substance abuse, including narcotic drug abuse and harmful use of alcohol; By 2020, halve the number of global deaths and injuries from road traffic accidents; By 2030, ensure universal access to sexual and reproductive health-care services, including for family planning, information and education, and the integration of reproductive health into national strategies and programmes; Achieve universal health coverage, including financial risk protection, access to quality essential health-care services and access to safe, effective, quality and affordable essential medicines and vaccines for all; By 2030, substantially reduce the number of deaths and illnesses from hazardous chemicals and air, water and soil pollution and contamination; 3.a Strengthen the implementation of the WHO Framework Convention on Tobacco Control in all countries, as appropriate; 3.b Support the research and development of vaccines and medicines for the communicable and non-communicable diseases that primarily affect developing countries, provide access to affordable essential medicines and vaccines, in accordance with the Doha Declaration on the TRIPS Agreement and Public Health, which affirms the right of developing countries to use to the full the provisions in the Agreement on Trade-Related Aspects of Intellectual Property Rights regarding flexibilities to protect public health, and, in particular, provide access to medicines for all; 3.c Substantially increase health financing and the recruitment, development, training and retention of the health workforce in developing countries, especially in least developed countries and small island developing States; and 3.d Strengthen the capacity of all countries, in particular developing countries, for early warning, risk reduction and management of national and global health risks.

(‘WHO | Sustainable Development Goal 3: Health’ (WHO))

specific targets and end goals that countries should aspire to achieve. Notably, SDG 3 outlines targets that touch on various aspects of right to health for all groups of people, including men, women and children and their group-specific health needs.

2. Right to Health: Definition and Scope

The 1946 Constitution of the World Health Organization (WHO) defines health as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”. The preamble further states that “the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.”³

The *CESCR General Comment No. 14 on The Right to the Highest Attainable Standard of Health*⁴, defines the right to health as a; “... a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.”⁵

Arguably, the right to health is conditioned by the health system and the socio-economic factors, which are reflected in the health of the population.⁶ Notably, socioeconomic status underlies three major determinants of health: health care, environmental exposure, and health behaviour.⁷

The World Health Organization's Commission has defined the Social Determinants of Health, that is, the factors apart from medical care that can be

<<http://www.who.int/topics/sustainable-development-goals/targets/en/>> accessed 16 December 2020).

³ Preamble, *Constitution of the World Health Organization*, Basic Documents, Forty-fifth edition, Supplement, October 2006, pp.1-18.

⁴ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health* (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4.

⁵ Ibid, para. 1.

⁶ Tomaziu-Todosia M, ‘The Importance of Public Health Policies in the Social-Economic Development of Romania’ (2019) 10 *Postmodern Openings* 162.

⁷ Nancy E Adler and Katherine Newman, ‘Socioeconomic Disparities in Health: Pathways and Policies’ (2002) 21 *Health Affairs* 60.

influenced by social policies and shape health in powerful ways, as “the conditions in which people are born, grow, live, work and age” and “the fundamental drivers of these conditions”.⁸ Related to this is the fact that ‘health-related behaviours are strongly shaped by social factors, including income, education, and employment’.⁹

The scope, content and nature of State obligations under Article 12 of the ICESCR have been expounded by the *Committee on Economic, Social and Cultural Rights (CESCR)* under the *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*.

The *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*¹⁰ acknowledges that ‘the right to health is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement, all of which and other rights and freedoms address integral components of the right to health.’¹¹

It has been observed that while it is difficult to pinpoint exactly what the right to health entails, there are specific elements that constitute the core content of the right to health and these include: a) access to maternal and child health care, including family planning; b) immunisation against the major infectious diseases; c) appropriate treatment of common diseases and injuries; d) essential drugs; e) adequate supply of safe water and basic sanitation; and f) freedom from serious environmental health threats. In addition to the scope of core content, a number of guidelines constitute the framework of the right to health: a) availability of health services; b) financial, geographic and cultural

⁸ Paula Braveman and Laura Gottlieb, ‘The Social Determinants of Health: It’s Time to Consider the Causes of the Causes’ (2014) 129 *Public Health Reports* 19.

⁹ *Ibid.*

¹⁰ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4.

¹¹ *Ibid.*, para. 3.

accessibility of health services; c) quality of health services; and d) equality in access to available health services.¹²

In addition to the foregoing, the right to health is also considered to be part of the broader right to an adequate standard of living.¹³ Under Article 25(1) of the 1948 Universal Declaration of Human Rights, ‘everyone has the right to a standard of living adequate for the health and well-being of himself and his family’ and this includes the following elements: a) food; b) clothing; c) housing; d) medical care; and e) necessary social services.¹⁴ These elements are also all captured under Article 43 of the Constitution of Kenya 2010 on socio-economic rights.

It is therefore evident that the right to health is not a standalone right but instead it is intertwined with many other rights.

3. Right to Health: International and National Legal Frameworks

3.1. Right to Health and International Law

The *Universal Declaration of Human Rights*¹⁵ guarantees that ‘everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control’.¹⁶ In addition, ‘motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection’.¹⁷

¹² ‘The Right to Health’ (*Icelandic Human Rights Centre*)

<<https://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-health>> accessed 16 December 2020.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

¹⁶ Ibid, Article 25(1).

¹⁷ Ibid, Article 25(2).

The *International Covenant on Economic, Social and Cultural Rights*¹⁸ is one of the main international human rights instrument laying basis for a comprehensive recognition of the right to health. It guarantees that 'the States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'.¹⁹ In addition, 'the steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: the provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; the improvement of all aspects of environmental and industrial hygiene; the prevention, treatment and control of epidemic, endemic, occupational and other diseases; and the creation of conditions which would assure to all medical service and medical attention in the event of sickness.'²⁰

The *Convention on the Elimination of All Forms of Discrimination against Women*²¹ captures the State Parties' concern that in situations of poverty women have the least access to food, health, education, training and opportunities for employment and other needs.²² The Convention requires State Parties to take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women, *inter alia*: access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.²³ In addition, States Parties are to take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular,

¹⁸ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, A/RES/2200.

¹⁹ *International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights*, Article 12(1).

²⁰ *Ibid* Article 12(2).

²¹ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, A/RES/34/180.

²² *Ibid*, Preamble.

²³ *Ibid*, Article 10 (h).

inter alia: the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.²⁴

Besides the foregoing, the Convention states that States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.²⁵ Notwithstanding the provisions of paragraph I of this article, States Parties are also obligated to ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.²⁶

The State Parties to this Convention are supposed to ensure that these rights extend to all women including those in the rural areas by ensuring that they have, *inter alia*, access to adequate health care facilities, including information, counselling and services in family planning.²⁷

The *Convention on the Rights of the Child*²⁸ requires that States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform to the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.²⁹ Under the Convention, States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall thus strive to ensure that no child is deprived of his or her right of access to such health care services.³⁰ In line with this, States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: to diminish infant and child

²⁴ Ibid, Article 11(f).

²⁵ Ibid, Article 12(1).

²⁶ Ibid, Article 12(2).

²⁷ Ibid, Article 14.

²⁸ UN Commission on Human Rights, *Convention on the Rights of the Child*, 7 March 1990, E/CN.4/RES/1990/74.

²⁹ Ibid, Article 3(3).

³⁰ Ibid, Article 24(1).

mortality; to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care; to combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution; to ensure appropriate pre-natal and post-natal health care for mothers; to ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents; and to develop preventive health care, guidance for parents and family planning education and services.³¹

The *African Charter on Human and Peoples' Rights*³² guarantees that 'every individual shall have the right to enjoy the best attainable state of physical and mental health'.³³ In addition, States Parties to the Charter are obligated to take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.³⁴

Notably the foregoing international and regional legal instruments spell out the state obligations relating to the realization of the right to health which obligations relate to: the obligations to *respect*, *protect* and *fulfil*. Under the *General Comment No. 14 on the right to health*:

The *obligation to fulfil* contains *obligations to facilitate, provide and promote*. The *obligation to respect* requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health. The *obligation to protect* requires States to take measures that prevent third parties from interfering with article 12 guarantees. Finally, the *obligation to fulfil* requires States to adopt appropriate

³¹ Ibid, Article 24(2).

³² Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights* ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

³³ Ibid, Article 16(1).

³⁴ Ibid, Article 16(2).

legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health.³⁵

These obligations are in turn captured under the domestic laws of state parties and are supposed to define the content of legal and institutional frameworks. Notably, the right to health is not to be understood as a right to be healthy but it contains both freedoms and entitlements.³⁶ The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. On the other hand, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.³⁷

3.2. Right to Health under the Domestic Law in Kenya: Legal and Institutional Framework

Notably, Article 2 (5) and (6) of the Constitution of Kenya make any treaty or convention ratified by Kenya, part of the laws applicable to Kenya.³⁸ Thus, in addition to the legal instruments discussed under this section, the international ones discussed in the foregoing section are also applicable in Kenya in so far as the same have been ratified accordingly.

The Constitution of Kenya 2010 has numerous provisions that capture not only the various elements of the right to health/health care services but also guarantees this right for all groups of persons.³⁹

³⁵ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, para. 33.

³⁶ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, para. 8.

³⁷ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, para. 8.

³⁸ See also Treaty making and Ratification Act, No. 45 of 2012, Laws of Kenya.

³⁹ Section 26 of the Bill of Rights provides for the fundamental right to life.

Article 27(1) and (2) of the Constitution of Kenya states that every person is equal before the law and has a right to equal protection, equal benefit and equal enjoyment of all rights and fundamental freedoms. (4) The State shall not

The Constitution guarantees that ‘every person has the right— to the highest attainable standard of health, which includes the right to health care services,

discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

Article 43 (1) (a) of the Constitution provides that every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care.

Article 43 (2) also provides that a person shall not be denied emergency medical treatment.

Article 46. Consumer rights

(1) Consumers have the right—

- (a) to goods and services of reasonable quality;
- (c) to the protection of their health, safety, and economic interests;

Article 53. Children

(1) Every child has the right—

- (c) to basic nutrition, shelter and health care;
- (d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;

56. Minorities and marginalised groups

The State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups—e) have reasonable access to water, health services and infrastructure.

57. Older members of society

The State shall take measures to ensure the rights of older persons—

- (d) to receive reasonable care and assistance from their family and the State.

204. Equalisation Fund

- (2) The national government shall use the Equalisation Fund only to provide basic services including water, roads, health facilities and electricity to marginalised areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation, so far as possible.

including reproductive health care.⁴⁰ Article 43(2) thereof also provides that a person shall not be denied emergency medical treatment.⁴¹

The state of health is closely the state of the environment and as such, Article 42 of the Constitution guarantees that ‘every person has the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and to have obligations relating to the environment fulfilled under Article 70.’⁴²

⁴⁰ Constitution of Kenya 2010, Article 43(1).

⁴¹ Ibid, Article 43(2). Art 42: See also Article 26. Right to life

(1) Every person has the right to life.

(2) The life of a person begins at conception.

(3) A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law.

(4) Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.

⁴² In *Kiluwa Limited & another v Commissioner of Lands & 3 others* [2015] eKLR, Constitutional Petition 8 of 2012, the Court stated as follows:

137. The right to a clean and healthy environment, guaranteed under 42 of the Constitution includes the right to have the environment protected for the benefit of the present and future generations not only through legislative and other measures, and particularly those measures contemplated in Article 69 to ensure inter alia sustainable exploitation, utilization, management and conservation of the environment and natural resources and ensure the equitable sharing of the accruing benefits.

.....

142. On the question of the right to clean and healthy environment, though Article 43 of the Constitution guarantees that right, it would not be remiss for this court to refer to the much earlier law, the Environment Management and Control Act No. 8 of 1999) (EMCA) which came into force on 14th January, 2000 (as amended by Acts of that name Nos. 6 of 2006, No. 17 of 2006, and No. 5 of 2007), had in section 3(1) thereof, declared that every person in Kenya is entitled to a clean and healthy environment, and has the duty to safeguard and enhance the environment. That right is granted constitutional sanctity in Article 42 of the constitution, that every person has the right to a clean and healthy environment and this includes –

(a) *the right to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly, those contemplated in Article 69, and*

(b) *to have the obligations relating to the environment fulfilled under Article 70.*

143. *Under section 3(2) of EMCA, the entitlement to a clean and healthy environment under section 3(1) includes the access by any person in Kenya to the various public elements or segments of the environment for recreational, educational, health, spiritual and cultural purposes. Section 3(4) gives capacity or standing to any person to bring an action notwithstanding that such a person cannot show that the Defendant's act or omission has caused or is likely to cause him any personal injury provided that such action—*

(a) *is not frivolous or vexatious, or*

(b) *is not an abuse of the court process.*

144. *An action seeking any orders on protection of the environment, may include orders to -*

(1) *prevent, discontinue any act or omission deleterious to the environment;*

(2) *to compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment.*

145. *In granting any of the above orders, the court will be guided by the following principles –*

(1) *the principle of public participation in the development of policies, plans and processes for the management of the environment;*

(2) *the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and are not repugnant to justice and morality or inconsistent with any written law;*

(3) *the principles of international co-operation on the management of environmental resources shared by two or more states;*

(4) *the polluter pays principle; and*

(5) *the precautionary principle.*

This connection has been affirmed in various courts, locally and internationally.⁴³ In the case of *Peter.K.Waweru vs R*⁴⁴, the High Court of Kenya affirmed that indeed, the right to life and right to clean and healthy environment are connected, in the following words:

“it is quite evident from perusing the most important international instruments on the environment that the word life and the environment are inseparable and the word “life” means much more than keeping body and soul together.”

The UN Conference on the Human Environment 1972, that is the Seminal Stockholm Declaration noted that the environment was “essential to ... the enjoyment of basic human rights – even the right to life itself.” Principle 1 asserts that:

“Man has the fundamental right to freedom, equality and adequate conditions of life; in an environment of a quality that permits a life of dignity and well-being.”⁴⁵

⁴³ Peter K. Waweru v Republic [2006] eKLR, Mis.Civl Appli.No. 118 OF 2004; In *Ms. Shehla Zia v. WAPDA*, PLD 1994 SC 693 Justice SALEEM AKHTAR (Supreme Court of Pakistan) held as follows:

“The Constitution guarantees dignity of man and also right to “life” under Article 9 and if both are read together, question will arise whether a person can be said to have dignity of man if his right to life is below bare necessity line without proper food, clothing shelter education, healthcare, clean atmosphere and unpolluted environment.”

⁴⁴ Peter K. Waweru v Republic [2006] eKLR, Mis.Civl Appli.No. 118 OF 2004.

⁴⁵ As quoted in Peter K. Waweru v Republic [2006] eKLR, Mis.Civl Appli.No. 118 OF 2004.

In *Mohamed Ali Baadi and others v Attorney General & 11 others* [2018] eKLR⁴⁶, the High Court of Kenya stated as follows:

109. In addition to the above, one of the issues implicated in this Petition is what is now generally recognized minimum requirements for existence of environmental democracy, namely, "the tripartite of the so-called access rights in environmental matters, namely, (a) access to information, (b) participation in decision-making, and (c) access to justice." [53] These three access rights have the common denominator that they empower individuals to have a meaningful voice in decisions that affect them and their development. The Constitution of Kenya and Environmental Law recognizes these three access rights.

110. As pointed out later in this judgment, the above rights are also intertwined in that achievement and application of each impact on realization of the others. For instance, access to information ensures that all persons who choose to participate in environmental decision-making are equipped with the necessary, or at least, basic facts about quality of their environment and their legitimate expectation on the same.

111. Thus, violation of rights to a clean and healthy environment can easily lead to the violation of other rights in the Bill of Rights such as the right to life. Yet, the determination of violations or threats of violation of any rights in the Bill of Rights undoubtedly falls within the province of this Court.

.....

277. Article 70 of the Constitution confers standing upon a person who alleges violation of rights to a clean and healthy

⁴⁶ Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR, Petition 22 of 2012.

environment. This means that “the environmental right is sufficiently comprehensive and all-encompassing to provide ‘everyone’ with the possibility of seeking judicial recourse in the event that any of several potential aspects related to the right or guarantee derived therefrom is infringed.” From the foregoing, it is clear that protection of the environment has now become an urgent responsibility to which our legal system responds to inadequately. It is undisputed that environmental protection in Kenya has constitutional protection.

The right to clean and healthy environment is thus recognised under the laws of Kenya as an integral part of the right to health and general well-being for all people.⁴⁷

The Health Act, 2017⁴⁸ was enacted to establish a unified health system, to coordinate the inter-relationship between the national government and county government health systems, to provide for regulation of health care service and health care service providers, health products and health technologies and for connected purposes.⁴⁹ The objects of the Act are to—establish a national health system which encompasses public and private institutions and providers of health services at the national and county levels and facilitate in a progressive and equitable manner, the highest attainable standard of health services; protect, respect, promote and fulfill the health rights of all persons in Kenya to the progressive realization of their right to the highest attainable standard of health, including reproductive health care and the right to emergency medical treatment; protect, respect, promote and fulfill the rights of children to basic nutrition and health care services contemplated in Articles 43(1) (c) and 53(1) (c) of the Constitution; protect, respect, promote and fulfill the rights of vulnerable groups as defined in Article 21 of the Constitution in all matters regarding health; and recognize the role of health regulatory bodies

⁴⁷ See Muigwa, K., "Reconceptualising the Right to Clean and Healthy Environment in Kenya." (2015).

⁴⁸ Health Act, No. 21 of 2017, Laws of Kenya.

⁴⁹ Ibid, Preamble.

established under any written law and to distinguish their regulatory role from the policy making function of the national government.⁵⁰

The Health Act, 2017 guarantees that it is a fundamental duty of the State to observe, respect, protect, promote and fulfill the right to the highest attainable standard of health including reproductive health care and emergency medical treatment by inter alia—developing policies, laws and other measures necessary to protect, promote, improve and maintain the health and well-being of every person; ensuring the prioritization and adequate investment in research for health to promote technology and innovation in health care delivery; ensuring the realization of the health related rights and interests of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalized communities and members of particular ethnic, religious or cultural communities; ensuring the provision of a health service package at all levels of the health care system, which shall include services addressing promotion, prevention, curative, palliative and rehabilitation, as well as physical and financial access to health care; and ensuring adequate investment in research for health to promote technology and innovation in health care delivery.⁵¹

The Health Act also guarantees that every person has the right to the highest attainable standard of health which shall include progressive access for provision of promotive, preventive, curative, palliative and rehabilitative services.⁵² In addition, every person shall have the right to be treated with dignity, respect and have their privacy respected in accordance with the Constitution and this Act.⁵³

The other relevant national legal instruments include: Public Health Act Cap 242⁵⁴; Public Health Officers (Training Registration and Licensing) Act of

⁵⁰ Health Act, 2017, sec. 3.

⁵¹ Health Act, 2017, sec. 4.

⁵² Health Act, 2017, sec. 5(1).

⁵³ Health Act, 2017, sec. 5(2).

⁵⁴ An Act of Parliament to make provision for securing and maintaining health.

2013⁵⁵; Kenya Health Sector Referral Implementation Guidelines 2014⁵⁶; Kenya Health Sector Referral Strategy 2014-2018; Kenya Health Policy 2012-2030⁵⁷; and Kenya National Patients' Right Charter 2013⁵⁸.

While Kenya's healthcare system is made up of several systems: public, private and faith-based or NGO, it is estimated that about 48% are public and operate under the Ministry of Health, 41% are in the private sector, 8% are faith-based health services, and 3% are run by NGOs.⁵⁹

In a bid to implement Sustainable Development Goal 3 on Good Health and Well-being, the institutional stakeholders working together in Kenya include but are not limited to: Ministry of Health (MOH); Ministry of labour;

⁵⁵ An Act of Parliament to make provision for the training, registration and licensing of public health officers and public health technicians, to regulate their practice, to provide for the establishment, powers and functions of the Public Health Officers and Public Health Technicians Council and for connected purposes.

⁵⁶ The goal of the referral guidelines is to guide the effective management of referral services to ensure continuity of care and effective management of the health needs of the population of Kenya (para. 1.4.1); The referral guidelines have the following objectives: Increase the use of services at lower levels of the health care system; Reduce self-referral to the higher levels of care; Develop service providers' capacity to offer services and appropriately refer at each level of the health care system; Improve the health system's ability to transfer clients, client parameters, specimens and expertise between the different levels of the health care system; Improve supportive supervision, thereby ensuring up-to-date management practices in use across the country; Improve referral performance monitoring and coordination; Improve preparedness and response to emergencies and disasters; Improve counter referral and referral feedback information system and strengthen out-reach systems for provision of referral health services to marginalized and vulnerable populations; Provide quality emergency health services at the point of need, regardless of ability to pay.

⁵⁷ The Kenya Health Policy 2012–2030 has defined the approach to strengthen comprehensive service delivery in the country. It emphasises the elaboration of service delivery solutions across the six levels of care from the community health services (level 1), primary care services (levels 2 and 3), county health services (levels 4 and 5), and the national referral services (level 6).

⁵⁸ The patient's rights charter explains the rights of patients and how patients can register complaints or compliments about any health professional or facility.

⁵⁹ Mohiddin A and Temmerman M, 'COVID-19 Exposes Weaknesses in Kenya's Healthcare System. And What Can Be Done' (*The Conversation*) <<http://theconversation.com/covid-19-exposes-weaknesses-in-kenyas-healthcare-system-and-what-can-be-done-143356>> accessed 15 December 2020.

Government of Kenya (GOK); Council of Governors (COG); Ministry of Education; Elizabeth Glaser Pediatric AIDS Foundation (EGPAF); and National Social Security Fund (NSSF).⁶⁰

4. The State of Health Sector in Kenya: Challenges and Successes

In 2018, the Government of Kenya launched the national Universal Health Coverage pilot programme in a controlled population in four counties namely: Kisumu County, because it leads in the high number of infectious diseases like HIV/AIDS and tuberculosis; Machakos County hospital visits are mostly because of accidents and injuries; Nyeri County which is leading in cases of non-communicable diseases, particularly diabetes; and Isiolo County which was ideally meant to assess how the package will work among the nomadic population.⁶¹

The Government of Kenya has made some progress and key reforms towards achieving Universal Health Care, and these include: free maternity services in all public health facilities since 2013; free primary health care in all public primary healthcare facilities – about 3,300 facilities; major programme to equip major public hospitals across the country with modern diagnostic equipment (94 facilities) where contracts have already been signed up with suppliers; a National Referral Strategy has been developed and piloted; health insurance subsidies through NHIF targeting disadvantaged groups continues to be implemented; provision of infrastructure and equipment to health facilities across county governments (new wards, ambulances, additional health workers); among other initiatives.⁶²

It is however worth pointing that despite this, the Kenyan population is struggling with financing medical care and it is estimated that about 20% of Kenyans have some form of health insurance coverage, including national

⁶⁰ 'Sustainable Development Goal 3: Good Health and Well-Being | United Nations in Kenya' <<https://kenya.un.org/en/sdgs/3>> accessed 14 December 2020.

⁶¹ 'County Governments at the Centre of Achieving Universal Health Care | Kenya Vision 2030' <<https://vision2030.go.ke/county-governments-at-the-centre-of-achieving-universal-health-care/>> accessed 15 December 2020.

⁶² 'Beyond The Conference – Kenya's Progress towards Affordable and Accessible Health Care | Kenya Vision 2030' <<https://vision2030.go.ke/beyond-the-conference-kenyas-progress-towards-affordable-and-accessible-health-care/>> accessed 16 December 2020.

health insurance, but this varies by region, with 41% of residents in Nairobi having cover, while under 3% have cover in marginalised rural areas such as Wajir and West Pokot.⁶³

While the Government of Kenya, both at national and devolved levels of governance, has been making efforts to achieve the right to health for the people of Kenya, there are a lot of challenges that have been identified as still affecting the sector. According to a Report published by the National Commission on Human Rights in 2017 focusing on a Case Study of Kisumu County on realization of the right to health, there has been progress in the realization of the right to health, but significant gaps still exist, which include: concerns about poor services or the total lack of some aspects of health services in the country. In addition, the ability of the county governments to ensure the realization of the right to health has also been questioned by some stakeholders, including medical practitioners and members of the public.⁶⁴ The complaints range from underequipped public facilities; inability of the infrastructure in place to contain the growing population of residents; inadequate human resource in comparison to persons seeking medical treatment, thereby limiting the ability of residents to access quality and affordable health care services, among others.⁶⁵

Kenyans wake up every other day to threats of strikes by medical staff ranging from doctors to nurses in public health facilities. The strikes are attributable to

⁶³ Mohiddin A and Temmerman M, 'COVID-19 Exposes Weaknesses in Kenya's Healthcare System. And What Can Be Done' (*The Conversation*) <<http://theconversation.com/covid-19-exposes-weaknesses-in-kenyas-healthcare-system-and-what-can-be-done-143356>> accessed 15 December 2020; Dutta, A., T. Maina, M. Ginivan, and S. Koseki. 2018. Kenya Health Financing System Assessment, 2018: Time to Pick the Best Path. Washington, DC: Palladium, Health Policy Plus <http://www.healthpolicyplus.com/ns/pubs/11323-11587_KenyaHealthFinancingSystemAssessment.pdf> accessed 15 December 2020.

⁶⁴ Kenya National Commission on Human Rights, *The Right to Health: A Case Study of Kisumu County*, 2017 <<https://www.knchr.org/Portals/0/EcosocReports/Report%20on%20the%20Right%20to%20Health%20in%20Kisumu%20County.pdf?ver=2018-02-19-123045-547>> accessed 14 December 2020.

⁶⁵ Kenya National Commission on Human Rights, *The Right to Health: A Case Study of Kisumu County*, 2017.

limited career opportunities, insufficient workforce, and low remuneration thus increasing the risk of the health care staff migrating from their countries but also within countries such as from public hospitals to private ones.⁶⁶ This is despite the fact health care staff are crucial for health service delivery and the provision of quality care to patients.⁶⁷

5. Ensuring Healthy Lives and Well-being for All Kenyans

The *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health* affirms that the realization of the right to health may be pursued through numerous, complementary approaches, such as the formulation of health policies, or the implementation of health programmes developed by the World Health Organization (WHO), or the adoption of specific legal instruments.⁶⁸ This section outlines some recommendations that can help Kenya get closer to ensuring that all its citizens enjoy healthy lives and general well-being.

5.1 Addressing the Socioeconomic Factors that Affect Right to Health in Kenya: Way Forward

As already pointed out, the health status of any population is not independent of the socioeconomic status of the group of people in question. Studies, although some contentious, have established a relation between health and other factors such as poverty, income and education, among others.⁶⁹ It is however acknowledged that these factors do not work in isolation even in their influence on health-genetics also may play a role in an individual's

⁶⁶ Goetz K and others, 'Working Atmosphere and Job Satisfaction of Health Care Staff in Kenya: An Exploratory Study' (*BioMed Research International*, 4 October 2015) <<https://www.hindawi.com/journals/bmri/2015/256205/>> accessed 15 December 2020; Waithaka D and others, 'Prolonged Health Worker Strikes in Kenya- Perspectives and Experiences of Frontline Health Managers and Local Communities in Kilifi County' (2020) 19 *International Journal for Equity in Health* 23.

⁶⁷ Goetz K and others, 'Working Atmosphere and Job Satisfaction of Health Care Staff in Kenya: An Exploratory Study' (*BioMed Research International*, 4 October 2015) <<https://www.hindawi.com/journals/bmri/2015/256205/>> accessed 15 December 2020.

⁶⁸ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health* (Art. 12 of the Covenant), para. 1.

⁶⁹ See Paula Braveman and Laura Gottlieb, 'The Social Determinants of Health: It's Time to Consider the Causes of the Causes' (2014) 129 *Public Health Reports* 19.

vulnerability or resilience to socioeconomic adversity: different individuals' biological responses to the same socio-environmental trigger can vary markedly according to specific genetic polymorphisms.⁷⁰

Studies carried out on socio-economic inequality and inequity in use of health care services in Kenya have established that:

*‘there is significant inequality and inequity in the use of all types of care services favouring richer population groups, with particularly pronounced levels for preventive and inpatient care services. These are driven primarily by differences in living standards and educational achievement, while the region of residence is a key driver for inequality in preventive care use only. Pro-rich inequalities are particularly pronounced for care provided in privately owned facilities, while public providers serve a much larger share of individuals from lower socio-economic groups’.*⁷¹

There are also other studies which support the fact that individuals from poorer households show lower propensity to seek care in health facilities (as opposed to relying on traditional healers or self-treating with medicines bought directly from pharmacies) when facing health problems and illness and the quality of service providers is lower in poorer areas.⁷²

There is a need for the Government to continually address abject poverty that afflicts huge parts of the Kenyan population. This is because it has been argued that children growing up in socioeconomically disadvantaged neighborhoods face greater direct physical challenges to health status and health-promoting behaviours; they also often experience emotional and psychological stressors, such as family conflict and instability arising from chronically inadequate

⁷⁰ Paula Braveman and Laura Gottlieb, ‘The Social Determinants of Health: It’s Time to Consider the Causes of the Causes’ (2014) 129 Public Health Reports 19.

⁷¹ Ilinca S and others, ‘Socio-Economic Inequality and Inequity in Use of Health Care Services in Kenya: Evidence from the Fourth Kenya Household Health Expenditure and Utilization Survey’ (2019) 18 International Journal for Equity in Health 196.

⁷² Ilinca S and others, ‘Socio-Economic Inequality and Inequity in Use of Health Care Services in Kenya: Evidence from the Fourth Kenya Household Health Expenditure and Utilization Survey’ (2019) 18 International Journal for Equity in Health 196.

resources.⁷³ It is worth pointing out that the realization of these socio-economic factors is also closely related to the realization of the right to dignity as guaranteed under Article 28 of the Constitution which provides that; *“Every person has an inherent dignity and the right to have that dignity respected and protected.*

*Article 19 of the Constitution of Kenya is categorical that ‘the Bill of Rights is an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies’.*⁷⁴ *In addition, it provides that ‘the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings’.*⁷⁵

5.2 Multisectoral Approach and Collaboration among Different Stakeholders

While continued investment on improving the health sector in the country is a commendable move, ‘in order to achieve equity in health and access to care, such efforts must be paralleled by multi-sectoral approaches to address all key drivers of inequity: persistent poverty, disparities in living standards and educational achievement, as well as regional differences in availability and accessibility of care’.⁷⁶

Under the current Constitution of Kenya, primary health care provision is a shared responsibility between the national and county governments.⁷⁷ It has been argued that while the pilot implementation of UHC in four counties in Kenya has demonstrated better impact on the health outcome and greater accessibility while building Resilient and Sustainable Health system that can respond to unforeseen shocks, the success of UHC in Kenya will require more than executive or national-level goodwill; with health as a devolved function,

⁷³ See Paula Braveman and Laura Gottlieb, ‘The Social Determinants of Health: It’s Time to Consider the Causes of the Causes’ (2014) 129 Public Health Reports 19.

⁷⁴ Constitution of Kenya 2010, Article 19 (1).

⁷⁵ Constitution of Kenya 2010, Article 19 (2).

⁷⁶ Ilinca S and others, ‘Socio-Economic Inequality and Inequity in Use of Health Care Services in Kenya: Evidence from the Fourth Kenya Household Health Expenditure and Utilization Survey’ (2019) 18 International Journal for Equity in Health 196.

⁷⁷ Constitution of Kenya 2010, Fourth Schedule.

each of the 47 counties must put in systems and resources to ensure its success.⁷⁸

The county governors ought to prioritize delivery of a better healthcare system to citizens through a deliberate cohesive approach to UHC between the central government and the counties in order to achieve desired outputs within a short time.⁷⁹

The collaboration should however go beyond provision of healthcare services to tackling the challenges that hinder enjoyment of the right to health care by all, such as persistent poverty, disparities in living standards and educational achievement, as well as regional differences in availability and accessibility of care'. There must be better coordination between the government, private and faith or NGO institutions especially in relation to specialist care and other empowerment programmes.⁸⁰

5.3 Strict Regulation of Private Health Care Providers

Due to socio-economic inequalities, the private sector primarily serves wealthier individuals, whereas those from poorer households more commonly rely on public care providers or use lower standard, often unlicensed, private care facilities.⁸¹

Reports from as recent as the year 2019 indicated that as at March 2019, at least 7,900 health facilities in Nairobi County were not registered or licensed and were therefore operating illegally.⁸² These numbers would grow

⁷⁸ 'COVID-19: Lessons from the Losses' (*Inter Press Service*, 7 September 2020) <<http://www.ipsnews.net/2020/09/covid-19-lessons-losses/>> accessed 15 December 2020.

⁷⁹ Ibid.

⁸⁰ Mohiddin A and Temmerman M, 'COVID-19 Exposes Weaknesses in Kenya's Healthcare System. And What Can Be Done' (*The Conversation*) <<http://theconversation.com/covid-19-exposes-weaknesses-in-kenyas-healthcare-system-and-what-can-be-done-143356>> accessed 15 December 2020.

⁸¹ Ilinca S and others, 'Socio-Economic Inequality and Inequity in Use of Health Care Services in Kenya: Evidence from the Fourth Kenya Household Health Expenditure and Utilization Survey' (2019) 18 *International Journal for Equity in Health* 196.

⁸² Omulo C, 'Kenya: 7,900 Clinics Operating Illegally in Nairobi, Committee Reports' (*allAfrica.com*, 11 April 2019) <<https://allafrica.com/stories/201904110184.html>> accessed 15 December 2020; <https://www.the-star.co.ke/authors/maureen-kinyanjui>,

astronomically if a study were to document the whole country. It also follows that a huge number of the poor sections of the general population has either suffered loss or obtained substandard medical attention.

There is a need for the relevant Regulatory boards such as the Kenya Medical Practitioners and Dentists Board, the Nursing Council, the Clinical Officers Council, Laboratory Board, Radiation Board and the Pharmacy and Poisons Board to crack the whip and weed out all these illegal facilities in a bid to protect the health and well-being of the Kenyan populace.

5.4 Affordable and Sustainable Health Insurance Cover in Kenya

COVID-19 disease pandemic has exposed the challenges of health care financing in the country, especially with the National Health Insurance Fund (NHIF) declining to fund treatment for its members who contract the disease, with the exception of civil servants, police and prisons service.⁸³ Notably, even the private insurers declined to cover the cost of treating COVID-19 cases thus complicating the problem further.⁸⁴

NHIF is the primary provider of health insurance in Kenya and the primary vehicle through which Kenya intends to expand insurance coverage.⁸⁵ It is one of the most common employment based health financing scheme in the

‘7,964 Health Facilities in Nairobi Are Illegal’ (*The Star*) <<https://www.the-star.co.ke/counties/nairobi/2019-04-11-7964-health-facilities-in-nairobi-are-illegal/>> accessed 15 December 2020; Thiong’o J, ‘90pc of Nairobi Clinics Do Not Have Licenses - Standard Health’ (*Health*) <<https://www.standardmedia.co.ke/health/article/2001320591/90pc-of-nairobi-clinics-do-not-have-licenses>> accessed 15 December 2020.

⁸³ pm EM on 18 N 2020-12:52, ‘NHIF to Only Cover Covid-19 Costs for Govt Workers’ (*Kenyans.co.ke*) <<https://www.kenyans.co.ke/news/59265-nhif-only-cover-covid-19-costs-govt-workers>> accessed 15 December 2020; Thiong’o J, ‘Over 100,000 Nairobi County Staff Risk Losing NHIF Cover’ (*The Standard*) <<https://www.standardmedia.co.ke/business/article/2001369484/over-100-000-nairobi-county-staff-risk-losing-nhif-cover>> accessed 15 December 2020.

⁸⁴ am EM on 15 N 2020-9:07, ‘Father’s Agony as Family Billed 750K After 4 Days’ (*Kenyans.co.ke*) <<https://www.kenyans.co.ke/news/59153-crisis-nhif-private-insurers-refuse-settle-covid-19-bills>> accessed 15 December 2020.

⁸⁵ Dutta, A., T. Maina, M. Ginivan, and S. Koseki. 2018. Kenya Health Financing System Assessment, 2018: Time to Pick the Best Path. Washington, DC: Palladium, Health Policy Plus, 60; see also National Hospital Insurance Act of 1966.

country. While the NHIF has been expanding in coverage areas and the target population,⁸⁶ the failure or inability to cover COVID-19 cases has demonstrated all the more the urgent need for the Universal Health Coverage (UHC) for all.⁸⁷ Recent studies have concluded that ‘Through its focus on increasing affordability of care for all Kenyans, the newly launched universal health coverage scheme represents a crucial step towards reducing disparities in health care utilization’.⁸⁸

The country’s development blueprint, Vision 2030 and the Presidency’s Big Four Agenda all have 100% Universal Health Coverage (UHC) as one of the main pillars, a commendable step.⁸⁹ The 100% Universal Health Coverage (UHC) aims to: actualize 100% cost subsidy on essential health services and reduce medical out-of-pocket expenses by 54% as a percentage of household expenditure.⁹⁰ The Government has been distributing World Class medical equipment to all counties, introduced a free maternity health program and expanded National Hospital Insurance Fund.⁹¹

There is a need for financial investment and political goodwill towards ensuring that the UHC is realised for all Kenyans to benefit, both rich and poor. UHC might be more stable than the employment based health financing as a source of health revenue, because employment based health financing is unstable, fragmented, and inequitable, particularly during economic crises as evidenced during the covid-19 pandemic where many people lost access to employment linked healthcare because of a job loss in the family.⁹²

⁸⁶ ‘President’s Delivery Unit - Flagship Projects - NHIF Expansion’ <<https://www.delivery.go.ke/flagship/nhif>> accessed 15 December 2020.

⁸⁷ ‘COVID-19: Lessons from the Losses’ (*Inter Press Service*, 7 September 2020) <<http://www.ipsnews.net/2020/09/covid-19-lessons-losses/>> accessed 15 December 2020.

⁸⁸ Ilinca S and others, ‘Socio-Economic Inequality and Inequity in Use of Health Care Services in Kenya: Evidence from the Fourth Kenya Household Health Expenditure and Utilization Survey’ (2019) 18 *International Journal for Equity in Health* 196.

⁸⁹ ‘The Big 4 - Empowering the Nation’ <<https://big4.delivery.go.ke/>> accessed 15 December 2020.

⁹⁰ *Ibid.*

⁹¹ ‘President’s Delivery Unit - Flagship Projects’ <<https://www.delivery.go.ke/flagship>> accessed 15 December 2020.

⁹² Vijayasingham L and others, ‘Employment Based Health Financing Does Not Support Gender Equity in Universal Health Coverage’ (2020) 371 *BMJ* m3384.

While employment based health financing remains an important source of revenue, especially for low and middle income countries that need to mobilise additional domestic resources, it has been suggested that universal healthcare entitlements, mandatory inclusion in national schemes, general tax contributions for resource pooling, and a move away from voluntary or contributory schemes that are linked to benefits entitlements are recommended.⁹³

Notably, the realization of UHC in Kenya will only be achieved if the Government of Kenya will increase its budget allocation towards health and lead solid health system strengthening initiatives – as for example the NHIF reform – to increase efficiency, effectiveness and accountability within the health sector.⁹⁴

Medical care should however also be made generally affordable. In *Pharmaceutical Society of South Africa v. Tshabalala-Msimang*, South African High Court held that ‘access to health care services required services to be both physically accessible and affordable, and acknowledged that prohibitive pricing of medicines may amount to a denial of access.’⁹⁵

5.5 Improved Working Conditions for Health workers in Kenya

Job satisfaction and working atmosphere are considered to be important for optimal health care delivery.⁹⁶ In the face of frequent strikes by health workers in Kenya, there is a need for the national government and the county governments to work closely with all the stakeholders and health workers’

⁹³ Ibid.

⁹⁴ ‘NHIF Reform Critical to Affordable Health For All in Kenya’ (*Inter Press Service*, 27 March 2019) <<http://www.ipsnews.net/2019/03/nhif-reform-critical-affordable-health-kenya/>> accessed 16 December 2020; cf. Okungu V, Chuma J and McIntyre D, ‘The Cost of Free Health Care for All Kenyans: Assessing the Financial Sustainability of Contributory and Non-Contributory Financing Mechanisms’ (2017) 16 *International Journal for Equity in Health* 39.

⁹⁵ *Pharmaceutical Society of South Africa v. Tshabalala-Msimang* 2005 (3) SA 23 8 (SCA)

paras 42, 53, 77.

⁹⁶ Goetz K and others, ‘Working Atmosphere and Job Satisfaction of Health Care Staff in Kenya: An Exploratory Study’ (*BioMed Research International*, 4 October 2015) <<https://www.hindawi.com/journals/bmri/2015/256205/>> accessed 15 December 2020.

unions' leaders to address the challenges of limited career opportunities, insufficient workforce, and low remuneration in order to curb the risk of the health care staff migrating to other countries as well as also within countries such as from public hospitals to private ones. This should be done as part of ensuring that Kenyans are guaranteed access to health care services and well-being.⁹⁷

Even as the national and county governments continually invest in health infrastructure and facilities under the UHC programmes, there is a need for the investment in infrastructure to be done simultaneously with that in human capital, competent and well-trained personnel to handle the equipment and patients in these facilities.⁹⁸

Even as the Government of the Republic of Kenya continue to hire foreign doctors and in particular doctors from Cuba to work in Kenyan public medical facilities, there is need for capacity building within the local medical health workers.⁹⁹

5.6 Use of Technology in Health care Provision: Telemedicine

Telemedicine has been taking root in Kenya, especially with the outbreak of the COVID-19 pandemic. The World Health Organisation observes that Information and Communication Technologies (ICTs) have great potential to address some of the challenges faced by both developed and developing countries in providing accessible, cost-effective, high-quality health care services through the use of telemedicine. Telemedicine uses ICTs to overcome geographical barriers, and increase access to health care services. This is

⁹⁷ Waithaka D and others, 'Prolonged Health Worker Strikes in Kenya- Perspectives and Experiences of Frontline Health Managers and Local Communities in Kilifi County' (2020) 19 International Journal for Equity in Health 23.

⁹⁸ 'COVID-19: Lessons from the Losses' (*Inter Press Service*, 7 September 2020) <<http://www.ipsnews.net/2020/09/covid-19-lessons-losses/>> accessed 15 December 2020.

⁹⁹ Cf. Samuel Nduati & 3 others v Cabinet Secretary Ministry of Health & 9 others [2018] eKLR, Petition 42 & 46 of 2018 (Consolidated).

particularly beneficial for rural and underserved communities in developing countries – groups that traditionally suffer from lack of access to health care.¹⁰⁰ The World Health Organization uses the following broad description of the term ‘telemedicine’:

*“The delivery of health care services, where distance is a critical factor, by all health care professionals using information and communication technologies for the exchange of valid information for diagnosis, treatment and prevention of disease and injuries, research and evaluation, and for the continuing education of health care providers, all in the interests of advancing the health of individuals and their communities”.*¹⁰¹

Notably, telemedicine is an open and constantly evolving science, as it incorporates new advancements in technology and responds and adapts to the changing health needs and contexts of societies.¹⁰²

Telemedicine episodes may be classified on the basis of: (1) the interaction between the client and the expert (i.e. real-time or prerecorded), and (2) the type of information being transmitted (for example, text, audio, video).¹⁰³

In Kenya, a large portion of the population is unable to have face-to-face consults with medical providers and as a result, much of the care is triaged through community health workers and nurses and only those patients deemed to be in critical need of hospital services are transferred to see a medical provider.¹⁰⁴ This situation is made worse by the fact that there is a shortage of approximately 50% of the needed health care workforce to meet the needs of

¹⁰⁰ Seewon Ryu, ‘Telemedicine: Opportunities and Developments in Member States: Report on the Second Global Survey on EHealth 2009 (Global Observatory for EHealth Series, Volume 2)’ (2012) 18 *Healthcare Informatics Research* 153, 8.

¹⁰¹ Ibid, 9.

¹⁰² Ibid.

¹⁰³ Craig J and Patterson V, ‘Introduction to the Practice of Telemedicine’ (2005) 11 *Journal of telemedicine and telecare* 3.

¹⁰⁴ ‘Telehealth, MHealth, Mobile Medical Care, Telehealth Technology’, (*Village HopeCore International*, 6 September 2018)

<<https://www.villagehopecore.org/telehealth-in-rural-kenya/>> accessed 16 December 2020.

the population in Africa.¹⁰⁵ Telemedicine and other telehealth services are thus meant to address the very limited access to face-to-face medical consults and high medical cost which can consequently see a reduction in poverty, improved health and well-being, improved education, and economic growth.¹⁰⁶

In places such as Lamu County, where residents face extremely limited access to healthcare, the residents have now access to care-at-a-distance through the telemedicine project initiated by Huawei, Safaricom and local partners, which allows local healthcare workers and patients to remotely consult with specialists in towns and cities.¹⁰⁷ There is a scarcity of licensed doctors and specialists in Lamu, and telemedicine is expected to transform medical care for low-income families in the region by reducing travel time and expenses; and 50% more patients will attend referrals each year, leading to significantly better patient outcomes.¹⁰⁸

The Philips Foundation, a registered charity and platform for the worldwide societal activities of Royal Philips, has also since introduced mobile ultrasound technology, meant to improve maternal and child health, where ways will be explored to use mobile ultrasound technology at primary care level, performed by midwives and supported by remote experts through

¹⁰⁵ Ibid.

¹⁰⁶ Ibid; See also Holmes K and others, 'Pilot Results of a Telemedicine Social Franchise in Rural Kenya: Evidence of Sustainable Livelihood Creation' (2014) 78 *Procedia Engineering* 200; 'Profit-Making Idea: The Time for Telemedicine Has Arrived in Kenya' (*How We Made It In Africa*, 31 July 2020) <<https://www.howwemadeitinafrica.com/profit-making-idea-the-time-for-telemedicine-has-arrived-in-kenya/69458/>> accessed 16 December 2020; 'Telemedicine Takes Root in Kenya amid COVID-19 Infection Fears - Xinhua | English.News.Cn' <http://www.xinhuanet.com/english/africa/2020-05/12/c_139050942.htm> accessed 16 December 2020.

¹⁰⁷ 'Making Remote Healthcare a Reality in Kenya' (*huawei*) <<https://www.huawei.com/en/industry-insights/outlook/mobile-broadband/wireless-for-sustainability/cases/making-remote-healthcare-a-reality-in-kenya>> accessed 16 December 2020.

¹⁰⁸ Ibid.

telehealth, to enhance availability of affordable services in the underserved communities and remote areas of Kenya.¹⁰⁹

While telemedicine is no longer new in Kenya¹¹⁰, there is a need for the regulators to continually review the regulatory framework that will not only promote its growth and development, but also to ensure that those who use it are either held or benefit from the same standards of professional care as those under the traditional forms of medical care and data protection.¹¹¹ Notably, the Health Act, 2017 defines “e-Health” to mean the combined use of electronic communication and information technology in the health Sector including telemedicine.¹¹²

Telemedicine and telehealth services can indeed supplement the investment in physical infrastructure in provision of health care services.¹¹³

¹⁰⁹ ‘Philips Foundation Announces Projects in Kenya’ (*Philips*)

<<https://www.philips.co.ke/a-w/about/news/archive/standart/news/press/2019/20190307-philips-foundation-announces-projects-in-kenya.html>> accessed 16 December 2020.

¹¹⁰ ‘Tele-Health Providers in Kenya – Kenya Healthcare Federation’

<https://khf.co.ke/covid19_khf-news/tele-health-providers-in-kenya/> accessed 16 December 2020; ‘Kenya Launches Telemedicine Initiative for the Poor’ (*Sub-Saharan Africa*)

<<https://www.scidev.net/sub-saharan-africa/news/kenya-launches-telemedicine-initiative-poor/>> accessed 16 December 2020; CORRESPONDENT, ‘Smart Applications Partners with Rural Private Hospitals Associations’ (*Capital Business*, 22 October 2020) <<https://www.capitalfm.co.ke/business/2020/10/smart-applications-partners-with-rural-private-hospitals-associations/>> accessed 16 December 2020; Sue Anderson, ‘Telemedicine In Kenya: Big Idea Creating Access To Healthcare’ (*MATTER*, 25 September 2020)

<<https://www.matter.ngo/telemedicine-kenya/>> accessed 16 December 2020; Bonner L, ‘Kenya Opens First Telemedicine Center for COVID-19 Detection - Axis Imaging News’ <<https://axisimagingnews.com/news/kenya-opens-first-telemedicine-center-for-covid-19-detection>> accessed 16 December 2020.

¹¹¹ Rangasamy M and others, ‘Role of Telemedicine in Health Care System: A Review’ “Role of telemedicine in health care system: a review,” *Int J Recent Adv Pharma Res* 2 (2011): 1-10; ‘The Emerging Practice of Telemedicine and the Law: Kenya’s Stance’ (*Centre for Intellectual Property and Information Technology law*, 20 August 2020) <<https://cipit.strathmore.edu/the-emerging-practice-of-telemedicine-and-the-law-kenyas-stance/>> accessed 16 December 2020.

¹¹² Sec. 2, Health Act, 2017.

¹¹³ ‘Telemedicine Takes Root in Kenya amid COVID-19 Infection Fears - Xinhua | English.News.Cn’

5.7 Investment in Advanced medical technologies: The Viability of Medical Tourism

A working health system is not only capable of ensuring that the citizens enjoy healthy lives and well-being, but is also capable of earning some extra income for the government through what is now commonly known as ‘medical tourism’, defined as the travel of people to a place other than where they normally reside for the purpose of obtaining medical treatment in that country.¹¹⁴ India has emerged as one of the countries that have heavily invested in medical tourism. Medical tourism is a multi-billion dollar industry that has been heavily promoted by governments and the medical and tourism industries for the potential mutual benefits.¹¹⁵ India takes pride in being uniquely placed by virtue of its skilled manpower, common language, diverse medical conditions that doctors deal with, the volume of patients, and a large nonresident Indian population overseas.¹¹⁶ They have also invested in provision of dedicated services to alleviate the anxiety of foreign patients which include translation, currency conversion, travel, visa, post treatment care system, and accommodation of patient relatives during and after

<http://www.xinhuanet.com/english/africa/2020-05/12/c_139050942.htm> accessed 16 December 2020; ‘Africa Can Improve Future Health Systems Resilience by Complementing Gaps in Physical Infrastructure with Digital Health Solutions | African Arguments’ <africanarguments.org/2020/11/africa-can-improve-future-health-systems-resilience-by-complementing-gaps-in-physical-infrastructure-with-digital-health-solutions/> accessed 16 December 2020.

¹¹⁴ ‘India’s Medical Tourism Gets Africans’ Attention’ (*Africa Renewal*, 25 November 2016)

<<https://www.un.org/africarenewal/magazine/december-2016-march-2017/india%E2%80%99s-medical-tourism-gets-africans%E2%80%99-attention>> accessed 15 December 2020; ‘Medical Tourism and The Value Of Technology In Medicine - Electronic Health Reporter’

<<https://electronichealthreporter.com/medical-tourism-and-the-value-of-technology-in-medicine/>> accessed 16 December 2020; Manickam R and others, ‘Emerging Trends and Future Prospects of Medical Tourism in India’ (2015) 7 *Journal of Pharmaceutical Sciences and Research* 248.

¹¹⁵ ‘Medical Tourism in India: Winners and Losers | Indian Journal of Medical Ethics’ <<https://ijme.in/articles/medical-tourism-in-india-winners-and-losers/?galley=html>> accessed 15 December 2020.

¹¹⁶ Gupta V and Das P, ‘Medical Tourism in India’ (2012) 32 *Clinics in Laboratory Medicine* 321; ‘Why Medical Tourism Is Booming In India | The Dope Why Medical Tourism Is Booming In India’ (*The Dope*, 25 February 2020) <<https://thedope.news/why-medical-tourism-is-booming-in-india/>> accessed 16 December 2020.

treatment.¹¹⁷ In 2019, India was ranked as the third most preferred destination for medical tourism, with the industry set to reach \$9 billion in valuation in 2020, although the projection might have since been affected by the COVID-19 pandemic.¹¹⁸

Notably, South Africa has also been making medical advances, and in addition to shorter travel times than India, South Africa advertises the added allure of safaris and spas.¹¹⁹ As Kenya pursues the dream of UHC as a key delivery under Vision 2030 and the Big Four Agenda, the government and all the relevant stakeholders in the health care sector should consider following in the footsteps of India and South Africa. In India, while the private sector has always been prominent as a source of medical care, since 1991 neoliberal government policies supporting the private sector have created conditions for its rapid growth.¹²⁰ This may, therefore, take a while to achieve, but continuous investment in infrastructure and the medical personnel will see to it that we finally get there. While the country may not yet benefit from patients from outside the continent, it may first target patients from the region and the African continent in general. Medical tourism, however, should not be pursued at the expense of the poor in the country: the Government should ensure that the general populace in the country can access health care services before it seeks to extend the same to the foreigners. Kenya should consider going the Cuban way where, Cuba, which has been a pioneer in medical tourism for almost four decades, has hospitals for Cuban residents and others for foreigners and diplomats. Both kinds are run by the government and Cubans

¹¹⁷ Ibid.

¹¹⁸ Biswas D, 'In Dire Straits: India's Medical Tourism Companies Find No Business amid COVID-19' (*YourStory.com*, 24 June 2020)

<<https://yourstory.com/2020/06/coronavirus-medical-tourism-industry-lockdown-business>> accessed 15 December 2020; CNN MS, 'India Wants to Make Medical Tourism a \$9 Billion Industry by 2020' (*CNN*)

<<https://www.cnn.com/2019/02/13/health/india-medical-tourism-industry-intl/index.html>> accessed 16 December 2020.

¹¹⁹ 'India's Medical Tourism Gets Africans' Attention' (*Africa Renewal*, 25 November 2016) <<https://www.un.org/africarenewal/magazine/december-2016-march-2017/india%E2%80%99s-medical-tourism-gets-africans%E2%80%99-attention>> accessed 15 December 2020.

¹²⁰ 'Medical Tourism in India: Winners and Losers | Indian Journal of Medical Ethics' <<https://ijme.in/articles/medical-tourism-in-india-winners-and-losers/?galley=html>> accessed 15 December 2020.

receive free healthcare for life while tourists have to pay for it.¹²¹ In addition, the Cuban government has developed medical tourism to generate income which is then reinvested into the country's medical sector to benefit its country's citizens.¹²²

6 Conclusion

The right to health is not an isolated right as demonstrated in this paper. It not only forms the basis for the realisation and enjoyment of other rights but it also requires the implementation and protection of other human rights for its full enjoyment. While Kenya has made commendable steps towards ensuring that its citizens enjoy healthy lives and general well-being, there is still a lot that requires to be done. This calls for multisectoral approach and cooperation between stakeholders to ensure that the same is realised. Any nation that seeks to develop must first invest in the health of its people. A healthy population is a wealthy population.¹²³ Ensuring Healthy Lives and Well-being for all Kenyans is a vital Sustainable Development goal that should be attained at the earliest.

¹²¹ Ibid.

¹²² Ibid; Network eHealth, 'Medical Tourism in Puducherry, an Under-Exploited Potential - EHealth Magazine' <<https://ehealth.eletsonline.com/2018/07/medical-tourism-in-puducherry-an-under-exploited-potential/>> accessed 15 December 2020; Hernández Nariño A, 'Cuban Medical Tourism: Strategies to Make It More Competitive' (2008).

¹²³ 'The Health and Wealth of Nations' (*ResearchGate*) <https://www.researchgate.net/publication/238827665_The_Health_and_Wealth_of_Nations> accessed 16 December 2020; '(PDF) Population Health and Economic Growth in Sub-Saharan Africa: A Panel Cointegration Analysis' (*ResearchGate*) <https://www.researchgate.net/publication/343281582_Population_health_and_economic_growth_in_sub-Saharan_Africa_A_Panel_Cointegration_Analysis> accessed 16 December 2020; Baum F, 'Wealth and Health: The Need for More Strategic Public Health Research' (2005) 59 *Journal of Epidemiology & Community Health* 542.

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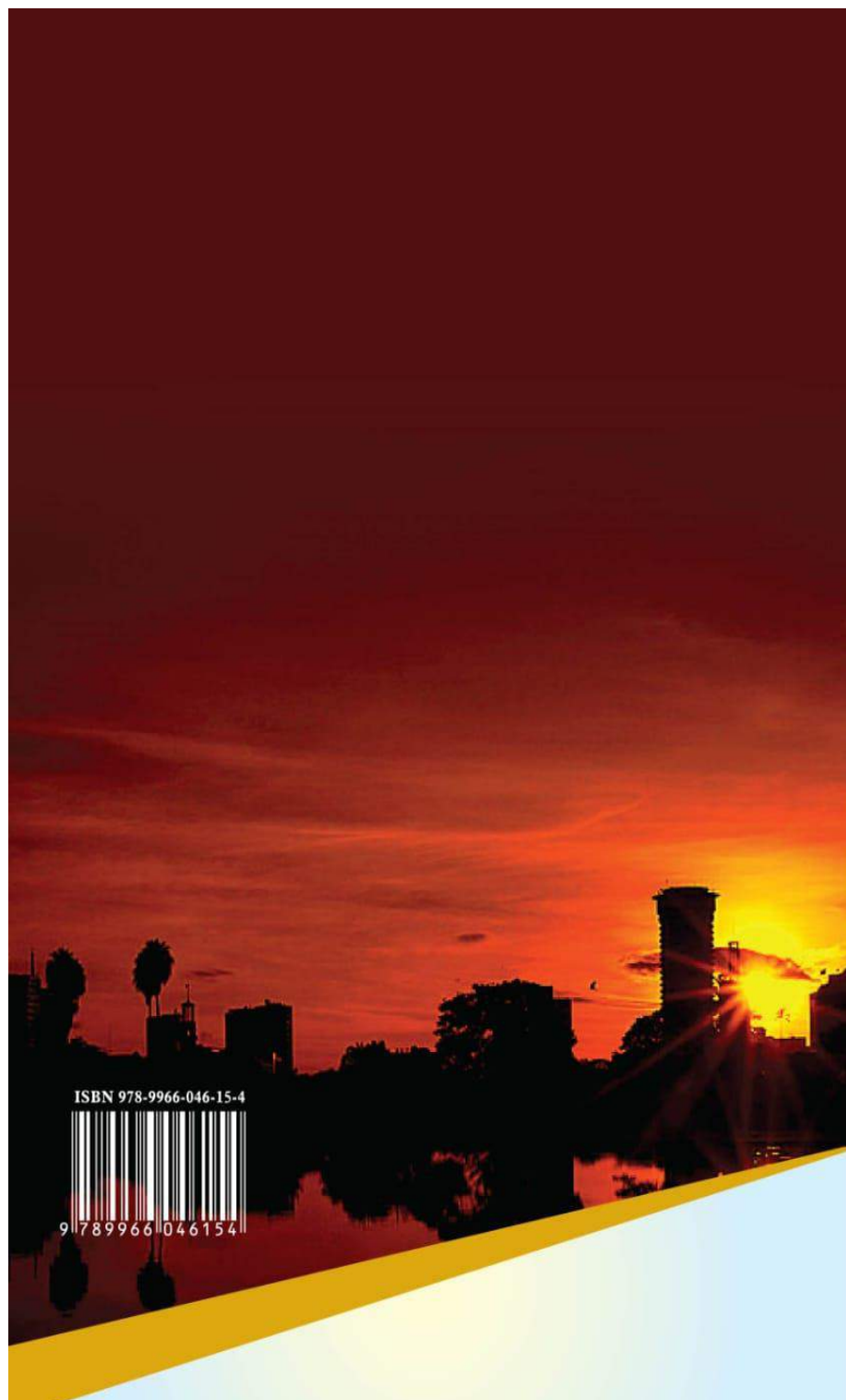
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