

## Upholding Human Rights and Meaningful Public Participation in Development Projects

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### Abstract

*The United Nations 2030 Agenda for Sustainable Development Goals (SDGs) envisages a world where human lives will be improved alongside environmental conservation as much of the resources expected to achieve this are natural resources. However, to achieve this, the SDGs acknowledge that this will also require the concerted efforts of all players including, public, private as well as communities. Trade and investments are also expected to play a huge role in raising revenue as well as generating the relevant resources for development. This, however, comes with cases of these international corporations disregarding human rights law which is expected to bind all persons in Kenya and the rest of the world. Communities are expected to be impacted upon by the development and investment projects and activities but they are often sidelined by these investors where they are either not involved through public participation as provided for under the national laws or they suffer human rights violations. This is arguably counterproductive as far as sustainable development is concerned. This paper argues that if human rights of communities and their right to public participation in development projects as guaranteed under international law regime are not protected, then there is not only the risk of failure of the particular projects but also emergence of conflicts. The paper offers some recommendations on how such eventualities may be avoided.*

### 1. Introduction

The 2030 Agenda for Sustainable Development Goals (SDGs)<sup>1</sup> and specifically SDG 17 requires state parties to create partnerships for the Goals

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and specially to strengthen the means of implementation and revitalize the global partnership for sustainable development.<sup>2</sup> The United Nations reports that as at 2021, ‘Kenya aims to attract more than USD 30 billion in manufacturing investments over the next 5 years by focusing on sectors with high growth potential’ by ‘boosting domestic manufacturing which is believed to have huge potential to attract investment, create employment, stimulate growth, and linkages to all other sectors of the economy’.<sup>3</sup>

It has been observed that the adoption of rights-based approaches in development work – that is, approaches that are informed and guided by the framework of international human rights law, and the values that underpin it – has had a significant impact on the ways in which development agencies operate.<sup>4</sup> It is possible to have investments in the name of development that do not meet the needs or respect the human rights of poor or marginalised communities where these local communities can be affected both by the lack of consultation and participation and by the negative impact such projects have on the environment and their livelihoods.<sup>5</sup>

While participation means that people are closely involved in the economic, social, cultural and political processes that affect their lives, it may mean complete and direct control over these processes, or, partial or indirect; the most important thing is that people have constant access to decision-making and power.<sup>6</sup> Article 21(1) of the United Nations Universal Declaration of

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

<sup>2</sup> SDG 17.

<sup>3</sup> ‘United Nations Supporting Kenya’s Post COVID-19 Industrial Recovery and Growth to Achieve Inclusive and Sustainable Growth | United Nations in Kenya’ <<https://kenya.un.org/en/126013-united-nations-supporting-kenyas-post-covid-19-industrial-recovery-and-growth-achieve>> accessed 23 May 2021.

<sup>4</sup> ‘Rights-Based Approaches’ (GSDRC) <<https://gsdrc.org/topic-guides/human-rights/rights-based-approaches/>> accessed 22 May 2021.

<sup>5</sup> ‘Business & Human Rights | Protection International’ <<https://www.protectioninternational.org/en/our-work/what/business-human-rights>> accessed 24 May 2021.

<sup>6</sup> “UNDP. 1993. *Human Development Report 1993*, 21. <http://www.hdr.undp.org/en/reports/global/hdr1993.>”

Human Rights<sup>7</sup> guarantees that everyone has the right to take part in the government of his country, directly or through freely chosen representatives. Article 22 thereof also guarantees that everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality. The UN Declaration on the Rights of Indigenous Peoples<sup>8</sup> also provides that indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.<sup>9</sup> In addition, States are obligated to consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their Free, Prior and Informed Consent (FPIC) before adopting and implementing legislative or administrative measures that may affect them.<sup>10</sup> Indigenous peoples also have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.<sup>11</sup> Indigenous peoples also have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.<sup>12</sup>

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<sup>7</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

<sup>8</sup> UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295.*

<sup>9</sup> *Ibid*, Article 18.

<sup>10</sup> *Ibid*, Article 19.

<sup>11</sup> *Ibid*, Article 21(1).

<sup>12</sup> *Ibid*, Article 23.

Arguably, there is a need for governments together with its development partners to solicit proposals and suggestions from indigenous and local communities about policies, the Constitution, and development strategies to encourage communities to express their views and increase their sense of ownership and responsibility in the future of their country.<sup>13</sup> While Kenya has been making tremendous steps towards opening up the marginalised parts of the country such as the North Eastern parts of Kenya, there have been concerns about violation of human rights of the locals in these areas.<sup>14</sup> For instance, there have been reports that while Kenya's newest mega infrastructure project, the Lamu port, is aimed at integrating marginalised northern Kenya into the Kenyan economy and the nation, the planning and construction of the port have yielded a wide range of concerns and contestations, particularly on land rights, the environment, local livelihoods and security.<sup>15</sup> There have been documented reports by different rights groups from the residents about compulsory land acquisition with the government being accused of having taken more land than it paid compensation for.<sup>16</sup> If such reports on forceful acquisition of property were to be true, then such actions would be against Article 40 of the Constitution of Kenya 2010.<sup>17</sup> There have also been major concern on the environmental

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<sup>13</sup> Environmental Research Institute Science Technology and Environment Agency Lao People's Democratic Republic, "Public Participation in Development Projects in LAO PDR" <[http://pdf.wri.org/mekong\\_governance\\_mreg\\_eri.pdf](http://pdf.wri.org/mekong_governance_mreg_eri.pdf)> accessed 21 May 2021.

<sup>14</sup> Benard Musembi Kilaka and Jan Bachmann, 'Kenya Launches Lamu Port. But Its Value Remains an Open Question' (*The Conversation*) <<http://theconversation.com/kenya-launches-lamu-port-but-its-value-remains-an-open-question-161301>> accessed 24 May 2021.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> 40. Protection of right to property

(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property--

- (a) of any description; and
- (b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person--

impact of the port's construction<sup>18</sup>, and local protests against the project have been met with harassment by Kenyan security forces.<sup>19</sup> There were also

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(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation--

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that--

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

<sup>18</sup> See *Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR* where the Petitioners averred that the LAPSSSET Project was designed and implemented in violation of the Constitution and statutory law; the project would have far reaching consequences on the marine ecosystem of the Lamu region in terms of the destruction of the mangrove forests, discharge of industrial effluents into the environment, and effects of the fish species and marine life; and if the project was to be implemented as designed, it would affect their cultural heritage and way life as well as their livelihoods.

<sup>19</sup> Benard Musembi Kilaka and Jan Bachmann, 'Kenya Launches Lamu Port. But Its Value Remains an Open Question' (*The Conversation*)

<<http://theconversation.com/kenya-launches-lamu-port-but-its-value-remains-an-open-question-161301>> accessed 24 May 2021.

growing concerns about employment opportunities to residents.<sup>20</sup> Arguably, such allegations against the government, that is, inadequate meaningful public participation may raise concerns on the government's commitment to protection and promotion of human rights of the affected communities. This paper critically discusses the place of human rights and meaningful public participation in development projects within the context of Kenya.

## **2. Human Rights and Meaningful Public Participation in Development Projects: The Connection**

The United Nations *Declaration on the Right to Development*<sup>21</sup> states that development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.<sup>22</sup> The *Declaration* also provides that the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.<sup>23</sup>

*"People today have an urge - an impatient urge - to participate in the events and processes that shape their lives. And that impatience brings many dangers and opportunities. It can dissolve into anarchy, ethnic violence or social disintegration. But if properly nurtured in a responsive national and global framework, it can also become a source of tremendous vitality and innovation for the creation of new and more just societies." (UNDP, 1993: 1)<sup>24</sup>*

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<sup>20</sup> Ibid.

<sup>21</sup> UN General Assembly, *Declaration on the Right to Development: resolution / adopted by the General Assembly*, 4 December 1986, A/RES/41/128.

<sup>22</sup> Ibid, Preamble.

<sup>23</sup> Article 1.1, *Declaration on the Right to Development: resolution / adopted by the General Assembly*, 4 December 1986, A/RES/41/128.

<sup>24</sup> 'Human Development Report 1993 | Human Development Reports' <<http://hdr.undp.org/en/reports/global/hdr1993>> accessed 16 May 2021; Giles Mohan, 'Participatory Development' [2002] *The companion to development studies* 49.

The international human rights law is designed primarily to protect individuals and groups from abusive action by states and state agents.<sup>25</sup>

While it is true that most of the investment projects are financed and carried out by international companies, with Development Financial Institutions (DFIs) and multi-national development banks having long track records of being critical providers of financing in Africa, supplying riskier, longer term investment capital that tends to focus on sustainability<sup>26</sup>, some commentators have accused some international and multinational investors of alleged human rights and environmental abuses, including using child labor to clean toxic materials, failing to repair pipeline leakages, and operating in protected indigenous lands without authorization especially in developing countries.<sup>27</sup> As far as trade agreements are concerned, there have also been worldwide concerns in relation to the lack of transparency of the negotiations as far as citizens are concerned, in contrast with the fundamental role being played by the large multinationals.<sup>28</sup> Notably, the negotiations are the result of long-term efforts by ultraliberal circles, politicians and directors of multinationals, working through many common bodies and the treaties are not published until, at best, the negotiations have been concluded.<sup>29</sup>

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<sup>25</sup> Shelton Dinah, 'Protecting Human Rights in a Globalized World', *Human Rights and Corporations* (Routledge 2017).

<sup>26</sup> 'ESG Investments Will Fuel Africa's Post-Pandemic Recovery' (13 May 2021) <<https://www.internationalinvestment.net/opinion/4031186/esg-investments-fuel-africa-post-pandemic-recovery>> accessed 23 May 2021.

<sup>27</sup> 'Foreign Investors Gone Wild' <<https://archive.globalpolicy.org/soecon/develop/democracy/2007/0507wild.htm>> accessed 21 May 2021; 'What Are the Main Criticisms of the World Bank and the IMF?' (*Bretton Woods Project*, 4 June 2019) <<https://www.brettonwoodsproject.org/2019/06/what-are-the-main-criticisms-of-the-world-bank-and-the-imf/>> accessed 24 May 2021; see also 'Globalization, Tourism, and Indigenous Peoples: What You Should Know About the World's Largest Industry – Planeta.Com' <<https://www.planeta.com/globalization-1999/>> accessed 24 May 2021.

<sup>28</sup> Robert Joumard, 'The Free Trade Agreements: Contempt for Citizens, Sovereignty for Multinationals' (*CADTM*, 23 May 2021) <<https://www.cadtm.org/The-free-trade-agreements-contempt>> accessed 24 May 2021.

<sup>29</sup> *Ibid*; see also Eric Toussaint, 'The World Bank, the IMF and the Respect of Human Rights' (*CADTM*, 23 May 2021) <<https://www.cadtm.org/The-World-Bank-the-IMF-and-the-respect-of-human-rights>> accessed 24 May 2021.

It has been argued that the international protection of human rights and environmental protection represent two of the fundamental values and aims of modern international society.<sup>30</sup> It has been opined that ‘the rights to the highest attainable standard of health and to an adequate standard of living depend on a certain degree of environmental quality and in several cases, environmental degradation or destruction has been viewed as a violation of these human rights’.<sup>31</sup> In addition to this, destruction of the environment through such problems as pollution or global warming can directly interfere with the enjoyment of communities’ fundamental human rights including a wide range of social and cultural right as well.<sup>32</sup>

Notably, among the extraordinary achievements of the *Declaration on the Right to Development*<sup>33</sup> is the advancement of a human rights-based approach to development.<sup>34</sup> For those who advocate for this approach, ‘development from a human rights perspective embraces as key attributes: Social justice (through inclusion, equality and non-discrimination, taking the human person as the central subject of development and paying special attention to the most deprived and excluded); Participation, accountability and transparency (through free, meaningful and active participation, focusing on empowerment); and international cooperation (as the right to development is a solidarity-based right).<sup>35</sup>

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<sup>30</sup> Dinah Shelton, *A Rights-Based Approach to Public Participation and Local Management of Natural Resources* (2008), 20<  
[https://www.iges.or.jp/en/publication\\_documents/pub/conferenceproceedings/en/739/3ws-26-dinah.pdf](https://www.iges.or.jp/en/publication_documents/pub/conferenceproceedings/en/739/3ws-26-dinah.pdf)> Accessed 16 May 2021.

<sup>31</sup> Bridget Lewis, ‘Environmental Rights or a Right to the Environment? Exploring the Nexus between Human Rights and Environmental Protection.’ (2012) 8 *Macquarie Journal of International and Comparative Environmental Law* 36.

<sup>32</sup> *Ibid*, 36.

<sup>33</sup> UN General Assembly, *Declaration on the Right to Development: resolution / adopted by the General Assembly*, 4 December 1986, A/RES/41/128

<sup>34</sup> Flávia Piovesan, ‘Active, Free and Meaningful Participation in Development’ (2013) 25 Office of the High Commissioner for Human Rights, *Realizing the Right to Development: Essays in Commemoration of*, 103<  
<https://www.ohchr.org/Documents/Issues/Development/RTDBook/PartIIChapter6.pdf>> Accessed 16 May 2021.

<sup>35</sup> Flávia Piovesan, ‘Active, Free and Meaningful Participation in Development’ (2013) 25 Office of the High Commissioner for Human Rights, *Realizing the Right to Development: Essays in Commemoration of*, 104.



Participatory development, as it is popularly referred to, has been defined as: “development that seeks to give the poor a part in initiatives and projects that are designed by outside organizations in the hopes that these projects will be more sustainable and successful by involving local stakeholders in the projects goals.”<sup>36</sup>

Community participation has been defined as the involvement of people in a community in projects to solve their own problems, where people should be given the opportunity where possible to participate as a basic human right and a fundamental principle of democracy.<sup>37</sup>

The need for public participation and respect for human rights is important for development projects to gain social license to operate.<sup>38</sup> This is because as it has been observed, ‘a development process often has four phases: articulation of demand, knowledge generation, dissemination and knowledge utilization where the result of the development cycle is that the solutions are implemented, and the more ownership is felt in all steps of this process, the more applicable the solutions are.’<sup>39</sup> Thus, rapid and sustained economic growth (“development”), popular political participation (“democracy”), and respect for the rights of their citizens (“human rights”) are considered to be hegemonic political ideals all around the world.<sup>40</sup> A Social License to

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<sup>36</sup> ‘Why Is Participatory Development So Important for Your Nonprofit?’ (*grassrootscollective*) <<https://www.thegrassrootscollective.org/what-is-participatory-development>> accessed 22 May 2021.

<sup>37</sup> “Chapter 12 Community participation,” *Manual*, 2005 <[https://ec.europa.eu/echo/files/evaluation/watsan2005/annex\\_files/WEDC/es/ESI\\_2CD.pdf](https://ec.europa.eu/echo/files/evaluation/watsan2005/annex_files/WEDC/es/ESI_2CD.pdf)> accessed 21 May 2021.

<sup>38</sup> Kathleen Wilburn and Ralph Wilburn, ‘Achieving Social License to Operate Using Stakeholder Theory’ (2011) 4 *J. Int. Bus. Ethics* 3; Emmanuel Raufflet and others, ‘Social License’ in Samuel O Idowu and others (eds), *Encyclopedia of Corporate Social Responsibility* (Springer 2013) <[https://doi.org/10.1007/978-3-642-28036-8\\_77](https://doi.org/10.1007/978-3-642-28036-8_77)> accessed 24 May 2021; Lain Dare, Jacki Schirmer and Frank Vanclay, ‘Community Engagement and Social Licence to Operate’ (2014) 32 *Impact Assessment and Project Appraisal* 188.

<sup>39</sup> Chris J Koopmans, K van Veluw and FG Wijnands, ‘Participatory Development as a Way to Innovations: Five Key Elements for Success’ (2014) 3 *Building Organic Bridges* 791, at 792.

<sup>40</sup> Jack Donnelly, ‘Human Rights, Democracy, and Development’ (1999) 21 *Human Rights Quarterly* 608.

Operate (SLO) refers to the perceptions of local stakeholders that a project, a company, or an industry that operates in a given area or region is socially acceptable or legitimate.<sup>41</sup> Companies can gain the social license through: maintaining positive corporate reputation; understanding culture, customs, language history and history of communities, among others;<sup>42</sup> educating local stakeholders about project; ensuring open communication amongst all stakeholders;<sup>43</sup> business partnerships with communities; workforce training; community support and capacity building; and employing innovation and technology.<sup>44</sup> Arguably, these activities are capable of enhancing respect for human rights. As for communities, for them to grant the social license, they ask themselves the following questions: Do they Respect us? Are they Listening? Do they let us Participate? Do they let us Participate? Are they Transparent with us? Can we Believe what they say? Are they Responsive to our issues? Can we Trust them?<sup>45</sup> Companies must ensure that the answers to all these questions remain continually affirmative.

It has been argued that ‘democratic governance and human rights are critical components of sustainable development and lasting peace’, where ‘countries with ineffective government institutions, rampant corruption, and weak rule of law are estimated to have a 30-to-45 percent higher risk of civil war and a higher risk of extreme criminal violence than other developing countries’.<sup>46</sup> In addition, public involvement in decision-making processes is not only important for development projects affecting the environment, but is also necessary for identifying the impact projects will have on communities.<sup>47</sup>

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<sup>41</sup> Emmanuel Raufflet and others, ‘Social License’ in Samuel O Idowu and others (eds), *Encyclopedia of Corporate Social Responsibility* (Springer 2013) <[https://doi.org/10.1007/978-3-642-28036-8\\_77](https://doi.org/10.1007/978-3-642-28036-8_77)> accessed 24 May 2021.

<sup>42</sup> Ian Thomson and Susan Joyce, ‘The Social Licence to Operate: What It Is and Why Does It Seem so Difficult to Obtain?’, *Prospectors and Developers Association of Canada Convention, Toronto, Ontario, Canada* (2008).

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> ‘Democracy, Human Rights and Governance | U.S. Agency for International Development’ (26 March 2021) <<https://www.usaid.gov/democracy>> accessed 21 May 2021.

<sup>47</sup> Environmental Research Institute Science Technology and Environment Agency Lao People’s Democratic Republic, ‘Public Participation in Development Projects

Arguably, development, particularly at the local level, can be made much more effective by active public participation where effective civic action can hold governments accountable<sup>48</sup> and ensure that the decisions of government are in line with the needs of citizens and thus potentially solve failures in government that plague most poor countries including; wastage and leakage, unequal access, corruption, and poor coordination.<sup>49</sup>

Communities are mostly impacted upon by investments and development projects through what is popularly known as the impact investing, defined which is “part of the decades-old tradition of corporate social responsibility that holds domestic and international financial institutions and corporations accountable for harmful employment, community, or environmental impacts.”<sup>50</sup> Impact investments have also defined as “investments made into companies, organizations, and funds with the intention to generate social and environmental impact alongside a financial return.”<sup>51</sup> As far as impact investment in Kenya is concerned, Kenya has in the recent past been ranked highly compared to its East African counterparts,

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in LAO PDR” <[http://pdf.wri.org/mekong\\_governance\\_mreg\\_eri.pdf](http://pdf.wri.org/mekong_governance_mreg_eri.pdf)> accessed 21 May 2021.

<sup>48</sup> ‘How Can Participatory Development Be Improved? | Devex’ <<https://www.devex.com/news/how-can-participatory-development-be-improved-80472>> accessed 24 May 2021; ‘Determinants of Public Participation in Kenya County Governments - Antony Mbithi, Damiana Ndambuki, Fredrick Owino Juma, 2019’ <<https://journals.sagepub.com/doi/full/10.1177/0021909618794028>> accessed 24 May 2021; Berner, M. M., Amos, J. M., & Morse, R. S., “What constitutes effective citizen participation in local government? Views from city stakeholders.” *Public Administration Quarterly* (2011): 128-163; Alessandra Ricciardelli, ‘Governance, Local Communities, and Citizens Participation’ in Ali Farazmand (ed), *Global Encyclopedia of Public Administration, Public Policy, and Governance* (Springer International Publishing 2017) <[https://doi.org/10.1007/978-3-319-31816-5\\_3221-1](https://doi.org/10.1007/978-3-319-31816-5_3221-1)> accessed 24 May 2021.

<sup>49</sup> Devex Editor // 11 March 2013, ‘How Can Participatory Development Be Improved?’ (*Devex*, 11 March 2013) <<https://www.devex.com/news/sponsored/how-can-participatory-development-be-improved-80472>> accessed 21 May 2021.

<sup>50</sup> Ronald Phillips, ‘Impact Investing and Community Development’ (2016) 25 *Maine Policy Review* 63, 63.

<sup>51</sup> Castano, T., “Preparing for Impact: Five Ideas to Maximize the Potential of Impact Investing”, *New Start New Jersey*, April 2017, 1 <<https://ideas.nsnj.org/wp-content/uploads/2017/08/NSNJ-Preparing-for-Impact.pdf>> accessed 21 May 2021.

with Kenya representing nearly half of impact capital disbursed in East Africa—more than USD 650 million by non-development finance institutions (non-DFIs) impact investors and more than USD 3 billion by development finance institutions (DFIs), and more than triple the amount deployed in each of Uganda and Tanzania, the countries with the next highest amounts at around 13% and 12% respectively.<sup>52</sup>

It has been observed that ‘while governments at every level –local, state, national –determine how to meet fundamental needs with constrained resources, impact investing continues to mature into a vehicle for innovative, socially oriented enterprises, where the convergence of these two macro-level developments can create opportunities for stakeholders and communities.’<sup>53</sup>

The success of development activities is thus closely linked with the status of respect for human rights for concerned communities as well as how effectively these communities are involved in the processes leading to the negotiations leading to the seating up and operation of investment and development projects.

### **3. Kenya’s Legal and Policy Framework on Meaningful Public Participation in Development Projects: Challenges and Prospects**

Kenya’s position as a global investment destination has been improving significantly, with the World Bank’s latest ‘Ease of Doing Business’ ratings identifying Kenya as one of the most notably improved countries globally,

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<sup>52</sup> ‘Kenya Tops East Africa Blocs in Impact Investment - Ministry of Industrialization, Trade and Enterprise Development (MoITED)’ <<https://www.industrialization.go.ke/index.php/media-center/blog/240-kenya-tops-east-africa-bloc-in-impact-investment>> accessed 23 May 2021; ‘Kenya: The Country Impact Investors Cannot Afford to Ignore’ (20 January 2020) <<https://www.pioneerspost.com/news-views/20200120/kenya-the-country-impact-investors-cannot-afford-ignore>> accessed 23 May 2021; Global Impact Investing Network and Open Capital Advisors, *The Landscape for Impact Investing in East Africa* (ETHIOPIA 2015).

<sup>53</sup> Castano, T., “Preparing for Impact: Five Ideas to Maximize the Potential of Impact Investing”, New Start New Jersey, April 2017, 1 < <https://ideas.nsnj.org/wp-content/uploads/2017/08/NSNJ-Preparing-for-Impact.pdf>> accessed 21 May 2021.

progressing 24 places in two years from 80th in 2017 to 56th in 2019.<sup>54</sup> During the said period, the flow of foreign direct investment also saw a significant step up in 2018, increasing by 27 per cent to \$1.6 billion, according to the United Nations Conference on Trade and Development (UNCTAD).<sup>55</sup> In order to strengthen the private sector which is considered to be crucial to implementing the President's Big Four Agenda, and foreign direct investment which has a key role in increasing private sector activity, the Kenyan Government has been working towards increased foreign direct investment by taking steps to facilitate private enterprise and foreign investment, for instance, through predictable regulatory and tax practices.<sup>56</sup> The Presidency's *Big Four Agenda* which is a 5-year development plan under 4 key pillars, namely: food security, affordable housing, manufacturing, and affordable healthcare for all.<sup>57</sup>

This section highlights the regulatory framework which should guide the investment and development plans to also ensure that the same positively impacts on the livelihoods of its people. Specifically, it looks at the provisions that are aimed at enhancing and promoting public participation in development as part of ensuring that there is promotion of the development, transfer, dissemination and diffusion of environmentally sound technologies to developing countries on favourable terms, including on concessional and preferential terms, as mutually agreed, as envisaged under SDG 17, Target 17.7. Notably, the push for economic growth cannot only be driven by Kenya's Government but also by its people, hence the need for active and meaningful participation of the people.<sup>58</sup>

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<sup>54</sup> 'What's the Role of an Impact Investor like CDC in Kenya?' (CDC Group) <<https://www.cdcgroup.com/en/news-insight/insight/articles/whats-the-role-of-an-impact-investor-like-cdc-in-kenya/>> accessed 23 May 2021.

<sup>55</sup> Ibid.

<sup>56</sup> 'What's the Role of an Impact Investor like CDC in Kenya?' (CDC Group) <<https://www.cdcgroup.com/en/news-insight/insight/articles/whats-the-role-of-an-impact-investor-like-cdc-in-kenya/>> accessed 23 May 2021.

<sup>57</sup> 'The Big 4 - Empowering the Nation' <<https://big4.delivery.go.ke/>> accessed 25 December 2020.

<sup>58</sup> 'What's the Role of an Impact Investor like CDC in Kenya?' (CDC Group) <<https://www.cdcgroup.com/en/news-insight/insight/articles/whats-the-role-of-an-impact-investor-like-cdc-in-kenya/>> accessed 23 May 2021.

### **a. Constitution of Kenya 2010**

Articles 2(5) and (6) of the Constitution of Kenya 2010<sup>59</sup> provide that the general rules of international law, and any treaty or convention ratified by Kenya, form part of the laws of Kenya, thus binding Kenya to observe its human rights obligations under international bill of human rights.<sup>60</sup>

The Constitution of Kenya 2010 recognises public participation as an important component of governance in Kenya. Article 10 thereof provides for the national values and principles of governance which include the following: (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; (c) good governance, integrity, transparency and accountability; and (d) sustainable development (Emphasis added).<sup>61</sup> These national values and principles of governance are to bind all State organs, State officers, public officers and all persons whenever any of them- (a) applies or interprets this Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions.<sup>62</sup>

Article 20 of the Constitution of Kenya states that the Bill of Rights binds all state organs and all persons, which persons are defined under Article 260 as including a “company, association or other body of persons whether incorporated or unincorporated.”

Regarding public participation, one of the great motivations for the devolved system of governance in the country was to boost public participation, as captured under the Fourth Schedule Part 2 (14) of the Constitution of Kenya which provides that one of the functions of the County governments is ensuring and coordinating the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the functions

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<sup>59</sup> Republic of Kenya, Constitution of Kenya 2010 (Government Printer, Nairobi, 2010).

<sup>60</sup> See also Treaty Making and Ratification Act, No. 45 of 2012, Laws of Kenya.

<sup>61</sup> Constitution of Kenya 2010, Article 10(2).

<sup>62</sup> Constitution of Kenya 2010, Article 10(1).

and powers and participation in governance at the local level.<sup>63</sup> Similarly, Sections 87 to 92 and 115 of the County Governments Act, 2012<sup>64</sup> outline the principles of public participation and the procedure for facilitating public participation in County government governance and administration matters.

The Constitution also outlines the obligations of the State in respect of the environment which include, *inter alia*: encourage public participation in the management, protection and conservation of the environment; and establish systems of environmental impact assessment, environmental audit and monitoring of the environment.<sup>65</sup> However, it is worth pointing out that ‘every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources’.<sup>66</sup>

The Constitution obligates all State organs and all public officers to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.<sup>67</sup>

#### **b. Environment (Management and Co-ordination) Act, 1999**

The *Environmental Management and Co-ordination Act, 1999*<sup>68</sup> (EMCA) provides for “environmental audit and monitoring”<sup>69</sup> and “environmental impact assessment”<sup>70</sup>, among others, which are meant to ensure that all persons take care of the environment while carrying out any activities which may adversely affect the environment. Strategic Environmental Assessment

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<sup>63</sup> Fourth Schedule Part 2 (14), Constitution of Kenya 2010.

<sup>64</sup> County Governments Act, No. 17 of 2012, Laws of Kenya.

<sup>65</sup> Article 69 (1), Constitution of Kenya, 2010.

<sup>66</sup> Article 69 (2), Constitution of Kenya, 2010.

<sup>67</sup> Article 21(3), Constitution of Kenya, 2010.

<sup>68</sup> Environmental Management and Co-ordination Act, No. 8 of 1999, Laws of Kenya.

<sup>69</sup> *Ibid*, sec. 68;69.

<sup>70</sup> *Ibid*, secs 58-67; see also Environmental Management and Co-ordination (Amendment) Act, 2015 (No. 5 of 2015), sec. 57A (1) provides that “all Policies, Plans and Programmes for implementation shall be subject to Strategic Environmental Assessment”.

(SEA) is defined as the process by which environmental considerations are required to be fully integrated into the preparation of *policies, plans and programmes* and prior to their final adoption (emphasis added).<sup>71</sup> Environmental impact assessment means a systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impacts on the environment.<sup>72</sup> Environmental audit means the systematic, documented, periodic and objective evaluation of how well environmental organisation, management and equipment are performing in conserving or preserving the environment.<sup>73</sup> Strategic Environmental and Social Assessment (SESA) is seen to be a more effective tool since it integrates the social issues that are likely to emerge and not just the environmental considerations.<sup>74</sup>

The implementation of this Act is to be guided by the following principles of Sustainable Development: (a) the principle of public participation in the development of policies, plans and processes for the management of the environment; (b) the cultural and social principles traditionally applied by any community in Kenya for the management of the

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<sup>71</sup> Environmental protection Agency, ‘Strategic Environmental Assessment,’ available at <http://www.epa.ie/monitoringassessment/assessment/sea/#.Vi5tmGuJ2CA>. S. 57(2), EMCA, provides that for the avoidance of doubt, the plans, programmes and policies (referred to in the Act) are those that are- (a) subject to preparation or adoption by an authority at regional, national, county or local level, or which are prepared by an authority for adoption through a legislative procedure by Parliament, Government or if regional, by agreements between the governments or regional authorities, as the case may be; (b) determined by the Authority as likely to have significant effects on the environment.

<sup>72</sup> *Environmental Management and Co-Ordination Act*, No 8 of 1999 (Government Printer, Nairobi, 1999), s.2.

<sup>73</sup> *Ibid.*

<sup>74</sup> Notably, the *Energy Act*, No. 1 of 2019, Laws of Kenya, requires under sec. 107 that a person who intends to construct a facility that produces energy using coal shall, before commencing such construction, apply in writing to the Authority for a permit to do so. Such an application must be accompanied by, inter alia, a Strategic Environment Assessment and Social Impact Assessment licenses. Also notable are the provisions of s. 57A(1) of the *Environmental Management Co-ordination (Amendment) Act 2015* which are to the effect that all policies, plans and programmes for implementation shall be subject to Strategic Environmental Assessment.



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;(c) the principle of international co-operation in the management of environmental resources shared by two or more states;(d) the principles of intergenerational and intragenerational equity;(e) the polluter-pays principle; and (f) the pre-cautionary principle.<sup>75</sup>

EMCA outlines various environmental offences which include offences related to inspection, Environmental Impact Assessment, records and standards and offences related to hazardous wastes.<sup>76</sup> The Act also prescribes penalties for these offences.<sup>77</sup>

### **c. Kenya National Action Plan on Business and Human Rights**

The *Kenya national action plan on business and human rights For the Implementation of the United Nations Guiding Principles on Business and Human Rights*<sup>78</sup> (NAP) was drafted to domesticate the UN Guiding Principles on Business and Human Rights focusing on five thematic issues identified by stakeholders, namely: Land and Natural Resources; labour rights; revenue transparency; environmental protection; and access to remedy.<sup>79</sup> The objectives of this NAP are: To guide the State as it fulfils its duty to protect individuals and communities from business-related human rights abuses, consistent with its domestic and international obligations; To guide businesses on the measures they should undertake to meet their responsibility to respect human rights in their operations; To offer a roadmap of strengthening access to State-based judicial and non-judicial remedies for victims of business-related harm and to promote human rights due diligence by businesses, ensuring that they play their role in the attainment of SDGs in a manner that respects human rights; and

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<sup>75</sup> Environmental Management and Co-ordination Act, sec. 3(5).

<sup>76</sup> EMCA, s.137-146.

<sup>77</sup> Ibid.

<sup>78</sup> Republic of Kenya, Kenya national action plan on business and human rights For the Implementation of the United Nations Guiding Principles on Business and Human Rights, June 2019 <[https://www.ohchr.org/Documents/Issues/Business/NationalPlans/2019\\_FINAL\\_BHR\\_NAP.PDF](https://www.ohchr.org/Documents/Issues/Business/NationalPlans/2019_FINAL_BHR_NAP.PDF)> accessed 23 May 2021.

<sup>79</sup> Ibid, p. ii.

to form a basis for dialogue between the State, businesses, individuals and communities whose rights are adversely impacted by business operations, and civil society organisations on promoting respect for human rights by businesses.<sup>80</sup> The NAP outlines policy actions aimed at enhancing State duty to protect human rights as well as those aimed at enhancing and upholding corporate responsibility to respect human rights.<sup>81</sup> NAP is a step in the right direction and has the potential to enhance respect for human rights in the country.

The above national constitutional, policy and statutory instruments are not exhaustive as there are other various government policies, programmes, plans and actions meant to achieve the frameworks outline above.

#### **4. Upholding Human Rights and Meaningful Public Participation in Development Projects**

Kenya seeks to achieve economic and social development that positively impacts on its people while also seeking to achieve sustainable development, with the Kenya's Vision 2030<sup>82</sup>, the national development initiative, seeking to transform Kenya into an industrialised middle-income country by 2030.<sup>83</sup> Notably, President Uhuru Kenyatta's 'Big Four' development agenda which is part of this journey aims to deliver 500,000 affordable homes, achieve universal healthcare coverage, raise the share of manufacturing in the economy from 9 to 15 per cent, and improve food security – all by 2022.<sup>84</sup> Fundamental rights of citizens are considered to be the bedrock for managing and mitigating conflict, spurring economic growth, and protecting human dignity where countries with democratic freedoms are more just, peaceful, and stable, and citizens can fulfill their potential.<sup>85</sup>

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<sup>80</sup> Ibid, p. 11.

<sup>81</sup> Ibid, chapter two.

<sup>82</sup> Republic of Kenya, *Sessional paper No. 10 of 2012 On Kenya Vision 2030*, (Government Printer, 2012).

<sup>83</sup> 'What's the Role of an Impact Investor like CDC in Kenya?' (CDC Group) <<https://www.cdcgroup.com/en/news-insight/insight/articles/whats-the-role-of-an-impact-investor-like-cdc-in-kenya/>> accessed 23 May 2021.

<sup>84</sup> Ibid.

<sup>85</sup> 'Democracy, Human Rights and Governance | U.S. Agency for International Development' (26 March 2021) <<https://www.usaid.gov/democracy>> accessed 21 May 2021.

In addition, it has been opined that countries that are democratic, respect the rights of their citizens and observe the rule of law at home and abroad are also safer places to live, work and trade.<sup>86</sup>

#### **4.1 Addressing the Lack of Political Goodwill to enhance Public Participation**

It has been suggested that in order to enhance effective public participation, the duty bearers should do the following: ensuring that as duty bearers (leaders) they are accessible to and represent citizens; ensuring existence of forums and opportunities for citizens to participate and engage in matters affecting their lives; providing civic education; developing effective communication channels with citizens; providing timely information to citizens on critical and emerging issues; and providing resources to facilitate public participation.<sup>87</sup>

There is a need for promoting effective and meaningful public participation of communities in development activities in order to ensure that their rights are not only protected but also ensure that they benefit from the targeted development projects in order to improve their livelihoods.<sup>88</sup> Leaders should work closely with their constituents as a way of not only identifying their challenges but also ensuring that any investment projects within their localities are held accountable as per the law.

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<sup>86</sup> 'The Role of Human Rights, Democracy, and Good Governance in Promoting Sustainable Development' (GSDRC) <<https://gsdrc.org/document-library/the-role-of-human-rights-democracy-and-good-governance-in-promoting-sustainable-development/>> accessed 21 May 2021.

<sup>87</sup> Uraia, 'What is Public Participation?' <https://uraia.or.ke/wp-content/uploads/2016/11/Citizen-Participation-BOOKLET.pdf> accessed 21 May 2021.

<sup>88</sup> 'Rural Development ∴ Sustainable Development Knowledge Platform' <<https://sustainabledevelopment.un.org/topics/ruraldevelopment/decisions>> accessed 24 May 2021; 'Making the Case: Effective Public Participation Is Good for Business in the Mekong Region | Pact' <<https://www.pactworld.org/library/making-case-effective-public-participation-good-business-mekong-region>> accessed 24 May 2021.

## 4.2 Eradicating Illiteracy for Community Empowerment

The United Nations Environmental Assembly (UNEA) asserts that this development path should maintain, enhance and, where necessary, rebuild natural capital as a critical economic asset and source of public benefits, especially for poor people whose livelihoods and security depend strongly on nature.<sup>89</sup>

It is estimated that ‘more than one billion people in the world live in abject poverty on less than \$1.25 per day while the richest 1% people have almost half of the world’s wealth, leading to the conclusion that there is a huge gap and inequality in the distribution of the world economy’.<sup>90</sup> The high rates of poverty are more pronounced in developing countries mainly in the African continent,<sup>91</sup> despite the fact that Africa as a continent is endowed with immense natural and human resources as well as great cultural, ecological and economic diversity.<sup>92</sup> Some of the causes of poverty in Africa include,

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<sup>89</sup> ‘What Is an “Inclusive Green Economy”? | UNEP - UN Environment Programme’ <<https://www.unenvironment.org/explore-topics/green-economy/why-does-green-economy-matter/what-inclusive-green-economy>> accessed 24 December 2020.

<sup>90</sup> ‘Poverty Is a Human Rights Violation | Apolitical’ (17 June 2020) <[https://apolitical.co/en/solution\\_article/poverty-is-a-human-rights-violation](https://apolitical.co/en/solution_article/poverty-is-a-human-rights-violation)> accessed 24 December 2020.

<sup>91</sup> ‘Poverty in Africa Is Now Falling—but Not Fast Enough’ <<https://www.brookings.edu/blog/future-development/2019/03/28/poverty-in-africa-is-now-falling-but-not-fast-enough/>> accessed 25 December 2020; Chandy L, ‘Why Is the Number of Poor People in Africa Increasing When Africa’s Economies Are Growing?’ (*Brookings*, 30 November 1AD) <<https://www.brookings.edu/blog/africa-in-focus/2015/05/04/why-is-the-number-of-poor-people-in-africa-increasing-when-africas-economies-are-growing/>> accessed 25 December 2020; ‘On the Poorest Continent, the Plight of Children Is Dramatic’ (*SOS-US-EN*) <<https://www.sos-usa.org/SpecialPages/Africa/Poverty-in-Africa>> accessed 25 December 2020; ‘Poverty and Development in Africa’ <<https://www.globalpolicy.org/social-and-economic-policy/poverty-and-development/poverty-and-development-in-africa.html>> accessed 25 December 2020.

<sup>92</sup> ‘Poverty and Development in Africa’ <<https://www.globalpolicy.org/social-and-economic-policy/poverty-and-development/poverty-and-development-in-africa.html>> accessed 25 December 2020; Muigua K, *Utilizing Africa’s Natural Resources to Fight Poverty* (2014) <<http://kmco.co.ke/wp-content/uploads/2019/06/Utilizing-Africas-Natural-Resources-to-Fight-Poverty-26th-March2014.pdf>> accessed 25 December 2020.

*inter alia*, population growth, war and crises, climate change, illnesses, inadequate agricultural infrastructure, and unjust trade structures.<sup>93</sup>

SDG Goal 1 seeks to ensure that State Parties end poverty in all its forms everywhere by the year 2030.<sup>94</sup> Human poverty may also be perceived as a

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<sup>93</sup> 'On the Poorest Continent, the Plight of Children Is Dramatic' (SOS-US-EN) <<https://www.sos-usa.org/SpecialPages/Africa/Poverty-in-Africa>> accessed 25 December 2020.

<sup>94</sup> SDG Goal 1, United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1.

The related targets include:

*1.1 By 2030, eradicate extreme poverty for all people everywhere, currently measured as people living on less than \$1.25 a day.*

*1.2 By 2030, reduce at least by half the proportion of men, women and children of all ages living in poverty in all its dimensions according to national definitions.*

*1.3 Implement nationally appropriate social protection systems and measures for all, including floors, and by 2030 achieve substantial coverage of the poor and the vulnerable.*

*1.4 By 2030, ensure that all men and women, in particular the poor and the vulnerable, have equal rights to economic resources, as well as access to basic services, ownership and control over land and other forms of property, inheritance, natural resources, appropriate new technology and financial services, including microfinance.*

*1.5 By 2030, build the resilience of the poor and those in vulnerable situations and reduce their exposure and vulnerability to climate-related extreme events and other economic, social and environmental shocks and disasters.*

*1.A Ensure significant mobilization of resources from a variety of sources, including through enhanced development cooperation, in order to provide adequate and predictable means for developing countries, in particular least developed countries, to implement programmes and policies to end poverty in all its dimensions.*

*1.B Create sound policy frameworks at the national, regional and international levels, based on pro-poor and gender-sensitive development*

denial of human rights as it arguably infringes on, among others, human freedom and destroys human dignity. It is viewed as an intrusion into human dignity.<sup>95</sup>

Basic human rights are an integral part of human rights and their violation has been seen as sabotage of human dignity.<sup>96</sup> Education is considered to be *a key driver to transform lives*, build peace, eradicate poverty, and drive sustainable development, (Emphasis added)<sup>97</sup> as 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.<sup>98</sup>

The *World Declaration on Education for All, 1990*<sup>99</sup> provides that ‘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

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*strategies, to support accelerated investment in poverty eradication actions.*

<sup>95</sup> Rukooko, A.B., ‘Poverty and human rights in Africa: historical dynamics and the case for economic social and cultural rights’, *The International Journal of Human Rights*, Vol. 14, Iss. 1, 2010.

<sup>96</sup> *Vienna Declaration and Programme of Action*, Article 25, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

<sup>97</sup> ‘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.

<sup>98</sup> *Ibid.*

<sup>99</sup> 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.

participate fully in the development, to improve the quality of their lives, to make informed decisions, and to continue learning.<sup>100</sup>

The *General Comment No. 13 on the Right to Education*<sup>101</sup> 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’.<sup>102</sup>

The *International Covenant on Economic, Social, and Cultural Rights (ICESCR)*<sup>103</sup> states that the ‘States Parties to the Covenant 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’.<sup>104</sup>

By eradicating illiteracy amongst communities, it is possible to empower them to not only participate meaningfully in development projects and decision-making processes but also to be meaningfully employed in the projects.

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<sup>100</sup> World Declaration on Education for All, 1990, Article 1(1).

<sup>101</sup> 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.

<sup>102</sup> *Ibid.*, para. 1.

<sup>103</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

<sup>104</sup> *Ibid.*, Article 13(1).

### **4.3 Enhancing Corporate Social Responsibility for Human Rights Violations**

The UN Guiding Principles on Business and Human Rights were drafted and endorsed in recognition of: States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms; the role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights; and the need for rights and obligations to be matched to appropriate and effective remedies when breached.<sup>105</sup> The 31 principles therein "seek to provide for the first time an authoritative global standard for preventing and addressing the risk of adverse human rights impacts linked to business activity".<sup>106</sup>

Notably, the Principles obligate the States to protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.<sup>107</sup> Regarding the corporate responsibility to respect human rights, the Principles require that Business enterprises should respect human rights.<sup>108</sup> This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.<sup>109</sup> Additionally, in order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should: (a) Draw on internal and/or independent external human rights expertise; (b) Involve *meaningful consultation* (Emphasis added) with potentially affected groups and other relevant

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<sup>105</sup> UN Guiding Principles on Business and Human Rights, Resolution 17/4, 16 June 2011.

<sup>106</sup> Stefanie Ricarda Roos, 'UN Guiding Principles on Business and Human Rights' in Samuel O Idowu and others (eds), *Encyclopedia of Corporate Social Responsibility* (Springer 2013) <[https://doi.org/10.1007/978-3-642-28036-8\\_746](https://doi.org/10.1007/978-3-642-28036-8_746)> accessed 24 May 2021.

<sup>107</sup> UN Guiding Principles on Business and Human Rights, 3.

<sup>108</sup> UN Guiding Principles on Business and Human Rights, 13-16.

<sup>109</sup> *Ibid*, 13.



stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.<sup>110</sup>

There is a need for the government of Kenya to effectively enforce the NAP in order to ensure that corporations observe and respect human rights especially those of communities living within the localities where their projects are situated.

#### **4.4 Promoting Meaningful and Effective Impact Assessment Processes**

It has been observed that the issues raised in the Lamu Port construction project could have been averted if due process had been followed from the project's inception<sup>111</sup> including: timely and adequate compensation to everyone affected by the project; proper and robust environmental and social impact assessments; considering qualified residents for employment opportunities; and addressing the perennial problems of land rights in Lamu, all aimed at ensuring that the Lamu residents are treated as direct stakeholders and partners to the project where their voices, concerns and aspirations are taken seriously.<sup>112</sup>

The government should continually establish efficient systems of Strategic Environmental Assessment (SEA), Environmental Impact Assessment (EIA), Strategic Environmental and Social Assessment (SESA) and Environmental Audit and Monitoring of the environment and Environmental Security Assessment (ESA) and ensure that the same are periodically reviewed to ensure that they remain effective.

There is a need to ensure that these EIA processes are not only carried out as a formality but are also reflective of what is on the ground and there should also be a follow up mechanism to ensure that the companies engage the communities throughout and that they continually carry out their duties as

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<sup>110</sup> Ibid, 19.

<sup>111</sup> Benard Musembi Kilaka and Jan Bachmann, 'Kenya Launches Lamu Port. But Its Value Remains an Open Question' (*The Conversation*) <<http://theconversation.com/kenya-launches-lamu-port-but-its-value-remains-an-open-question-161301>> accessed 24 May 2021.

<sup>112</sup> Ibid .

per the law and the assessment reports.<sup>113</sup> There is also a need for the government to follow up on local content provisions such as those provided for under the regime regulating extractives industry in Kenya, namely, *Mining (Dealings in Minerals) Regulations, 2017*; *Mining (Licence and Permit) Regulations, 2017*; *Mining (Work Programmes and Exploration Reports) Guidelines, 2017*; *Mining (State Participation) Regulations, 2017*; *Mining (Use of Local Goods and Services) Regulations, 2017*; *Mining (Employment and Training) Regulations, 2017*; and *Mining (Use Of Assets) Regulations, 2017*.

The *Mining (Use of Local Goods and Services) Regulations, 2017*<sup>114</sup> were enacted to- promote job creation through the use of local expertise, goods and services, businesses and financing in the mining industry value chain and their retention in the country; achieve the minimum local level and in-country spend for the provision of the goods and services in the mining industry value chain; increase the capability and international competitiveness of domestic businesses; create mining and mineral related support industries that will provide jobs and sustain economic development; achieve and maintain a degree of participation for Kenyans or companies incorporated in Kenya for the supply of goods and the provision of services; and provide for a robust, transparent monitoring and reporting system in relation to the use of goods and services.<sup>115</sup>

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<sup>113</sup> ‘Chapter 3: EIA Process’ <<http://www.fao.org/3/V8350E/v8350e06.htm>> accessed 24 May 2021; ‘1.7 Overview of the Stages of the EIA Process’ <[https://www.soas.ac.uk/cedep-demos/000\\_P507\\_EA\\_K3736-Demo/unit1/page\\_14.htm](https://www.soas.ac.uk/cedep-demos/000_P507_EA_K3736-Demo/unit1/page_14.htm)> accessed 24 May 2021; ‘Our Role in Securing Public Participation in the Kenyan Legislative and Policy Reform Process’ (*Natural Justice*, 23 July 2020) <<https://naturaljustice.org/our-role-in-securing-public-participation-in-the-kenyan-legislative-and-policy-reform-process/>> accessed 24 May 2021; ‘Accountability, Transparency, Participation, and Inclusion: A New Development Consensus? - Carnegie Endowment for International Peace’ <<https://carnegieendowment.org/2014/10/20/accountability-transparency-participation-and-inclusion-new-development-consensus-pub-56968>> accessed 24 May 2021.

<sup>114</sup> *Mining (Use of Local Goods and Services) Regulations, 2017*, Legal Notice No. 83 of 2017, Laws of Kenya.

<sup>115</sup> *Mining (Use of Local Goods and Services) Regulations, 2017*, Regulation 3.

The *Mining (Employment and Training) Regulations, 2017*<sup>116</sup> were enacted to promote job creation through the use of local expertise in the mining industry, the entire mining value chain and to retain the requisite skills within the country; develop local capacities in the mining industry value chain through education, skills and technology transfer, research and development; and achieve the minimum local employment level and in-country spend across the entire mining industry value chain.<sup>117</sup>

These are some of the regulations that can go a long way in enhancing Public Participation in development projects as well as empowering communities as a way of upholding their human rights through changing their lives and ensuring that they hold both the government and the investors accountable as far as environmental and socio-economic obligations are concerned.

#### **4.5 Addressing Corruption**

The various laws and regulations dealing with the investment and development regime in the country, if fully enforced, can be a useful tool in fighting corruption and tax evasion by the investors as they seek to promote accountability and transparency on the income and expenses incurred by these companies.<sup>118</sup> These Regulations, alongside other transparency and accountability measures and practices are useful for developing countries such as Kenya, where non-declaration or under declaration of profits by the multinationals has been happening.<sup>119</sup> They can however work even better

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<sup>116</sup> *Mining (Employment and Training) Regulations, 2017*, Legal Notice No. 82, Laws of Kenya.

<sup>117</sup> *Mining (Employment and Training) Regulations, 2017*, Regulation 3.

<sup>118</sup> 'Helping Countries Combat Corruption: The Role of the World Bank' <<http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm>> accessed 24 May 2021; 'Influencing Governments on Anti-Corruption Using Non-Aid Means' (*U4 Anti-Corruption Resource Centre*) <<https://www.u4.no/publications/influencing-governments-on-anti-corruption-using-non-aid-means>> accessed 24 May 2021; G Shabbir Cheema and Jean Bonvin, 'Corruption and Integrity Improvement Initiatives in Developing Countries'.

<sup>119</sup> 'Accountability, Transparency, Participation, and Inclusion: A New Development Consensus?' - Carnegie Endowment for International Peace' <<https://carnegieendowment.org/2014/10/20/accountability-transparency-participation-and-inclusion-new-development-consensus-pub-56968>> accessed 24 May 2021; Susan Rose-Ackerman, 'The Challenge of Poor Governance and Corruption' (2005) 2005 *Revista Direito GV* 207; PMJRO Cheruiyot and others,

where communities are actively and meaningfully involved in the various stages of the projects.

It has been suggested that good institutional governance - specifically, a strong public voice with accountability, strong political stability, good regulations, and powerful anticorruption policies tend to conduce a positive relationship between natural resource richness and economic development.<sup>120</sup>

#### **4.6 Promoting Civil Education**

In the High Court case of *Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR*, the Court rightly pointed out that access to information is a key pillar in the environmental governance scheme in our Constitution because effective Public Participation in decision-making depends on full, accurate and up-to-date information.<sup>121</sup>

With enhanced literacy levels, it is possible to carry out civic education regarding various challenges that arise from given projects and also for communities to fully appreciate the merits and demerits of certain projects and also appreciate the compromises that they need to make, if any.<sup>122</sup>

#### **4.7 Promoting Fair and Equitable International Trade and Investments Regimes**

Previous studies on the role of citizens in trade and investment agreements processes have concluded that the declared objectives of the treaties for business freedom differ from their underlying and arguably, the nature, indeed if not clearly negative, of the socio-economic benefits that may be

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‘Effect of Public Financial Management Practices on Performance in Kericho County Government, Kenya: A Critical Review’ (2017) 5 *International Journal of Education and Research* 211.

<sup>120</sup> Zeynalov, A., "Do Sufficient Institutions Alter the Relationship between Natural Resources and Economic Growth?" *MPRA Paper* 46850 (2013), at p. 11. Available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2413867](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2413867) [Accessed on 16/1/2020].

<sup>121</sup> *Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR*, Petition 22 of 2012.

<sup>122</sup> ‘The Role of Civic Education’ <[https://civiced.org/papers/articles\\_role.html](https://civiced.org/papers/articles_role.html)> accessed 24 May 2021.

expected show that the objective of the free trade agreements is not growth and jobs, or even to protect investments or promote international trade.<sup>123</sup> Their only objective and it is a fundamental one, is to guarantee the priority of the rights of multinationals to do business and make profits.<sup>124</sup>

Some commentators, while pointing out the lopsided North-South trade and investment rules, call for review of the current international investment rules to make them more just and equitable ones which will require cooperation between North and South.<sup>125</sup> Notably, SDG 17 targets require that states should: enhance North-South, South-South and triangular regional and international cooperation on and access to science, technology and innovation and enhance knowledge sharing on mutually agreed terms, including through improved coordination among existing mechanisms, in particular at the United Nations level, and through a global technology facilitation mechanism;<sup>126</sup> Enhance international support for implementing effective and targeted capacity-building in developing countries to support national plans to implement all the sustainable development goals, including through North-South, South-South and triangular cooperation;<sup>127</sup> and Promote a universal, rules-based, open, non-discriminatory and equitable multilateral trading system under the World Trade Organization, including through the conclusion of negotiations under its Doha Development Agenda<sup>128</sup>, among others.

## 5. Conclusion

It has been argued that since Africa's poverty problems run deep, it is only the long process of building democratic institutions and the civil society needed to make them work will bring meaningful development to Africa,

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<sup>123</sup> Robert Joumard, 'The Free Trade Agreements: Contempt for Citizens, Sovereignty for Multinationals' (*CADTM*, 23 May 2021) <<https://www.cadtm.org/The-free-trade-agreements-contempt>> accessed 24 May 2021.

<sup>124</sup> *Ibid.*

<sup>125</sup> 'Foreign Investors Gone Wild' <<https://archive.globalpolicy.org/socecon/develop/democracy/2007/0507wild.htm>> accessed 21 May 2021.

<sup>126</sup> SDG 17 Target 17.6.

<sup>127</sup> SDG 17, Target 17.9.

<sup>128</sup> SDG 17, Target 17.10.

where empowerment of local people will ensure long-term poverty reduction.<sup>129</sup> Some authors have suggested several approaches for the promotion and protection of human rights in the era of globalization: (1) emphasizing state responsibility for the actions of non-state actors; (2) imposing international legal obligations directly on non-state actors, including international institutions, multilateral enterprises, and individuals; (3) encouraging private regulation through corporate codes of conduct, product labeling, and other consumer or corporate actions; and (4) involving non-state actors directly in the activities of international organizations to promote and protect human rights.<sup>130</sup>

The United Nations observes that achieving the 2030 Sustainable Development Agenda requires pooling resources and expertise, channeling public and private expertise, encouraging public and private investments together towards high-growth industrial sectors.<sup>131</sup>

Corporate Social Responsibility is arguably becoming less and less voluntary around the world.<sup>132</sup> There is a need for all the relevant stakeholders to work towards upholding human rights and enhancing meaningful Public Participation of communities in development projects as a way of ensuring that communities not only benefit from the said development projects but also guaranteeing that these communities fully appreciate and support the investments.

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<sup>129</sup> 'Development Requires Local Empowerment'

<<https://archive.globalpolicy.org/socecon/develop/democracy/2006/0927localempowerment.htm>> accessed 21 May 2021.

<sup>130</sup> Shelton Dinah, 'Protecting Human Rights in a Globalized World', *Human Rights and Corporations* (Routledge 2017).

<sup>131</sup> 'United Nations Supporting Kenya's Post COVID-19 Industrial Recovery and Growth to Achieve Inclusive and Sustainable Growth | United Nations in Kenya' <<https://kenya.un.org/en/126013-united-nations-supporting-kenyas-post-covid-19-industrial-recovery-and-growth-achieve>> accessed 23 May 2021.

<sup>132</sup> Kathleen Wilburn and Ralph Wilburn, 'Achieving Social License to Operate Using Stakeholder Theory' (2011) 4 *J. Int. Bus. Ethics* 3.

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