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Editor's Note

Welcome to volume 6, issue 5 of the Journal of Conflict Management and Sustainable Development (JCMSD).

The Journal is a publication that provides a platform for scholarly engagement on germane issues relating to conflict management and sustainable development.

Sustainable Development is arguably the most important theme of the 21st century. It continues to shape political, economic, environmental, social and legal discourse across the globe. The Sustainable Development Goals (SDGs) were adopted by the United Nations in 2015 as the blueprint towards a better and sustainable future for all.

However, attainment of sustainable development is often hindered by several challenges. Development is not feasible in an environment marred with conflicts. The Journal provides insight on some of these issues with the aim of enhancing realization of Sustainable Development through adoption of necessary political, economic, social, technological, environmental and legal reforms.

The Journal adheres to the highest level of academic and publication standards. It is peer reviewed and refereed to achieve this end.

This issue covers pertinent themes on Conflict management and Sustainable Development such as *Conflict of Interest and Public Office in Kenya; Conserving Biodiversity for a Better Future; Seizing The Ripe Moment: A Critical Analysis of the Resolution of the Twenty Years Ethiopia-Eritrea Conflict in 2018**;** Promoting Sustainable Consumption and Production Patterns in Kenya for Development; Disability Inclusion and World Bank's Kenya Urban Support Program: Analysis of Disability Inclusion in City Board; Demystifying The Right to A Clean and Healthy Environment in Kenya and How It Can Be Enforced; Recognising The Intellectual Property in Indigenous Knowledge and Leveraging the Same for Sustainable Development in Kenya and Political parties' system in democratization and good governance entrenchment in post-colonial Kenya (1963-2021).*

The Editorial Team welcomes feedback from readers across the globe to enable us continue improving the Journal and steer it to greater heights.

I take this opportunity to thank our able and dedicated team of reviewers, editors, contributors, publishers and all those who have made the publication of this Journal possible.

The Editorial Team welcomes submission of papers, commentaries, case reviews and book reviews on the themes of Conflict management and Sustainable Development and other related and pertinent fields of knowledge for publication in subsequent issues of the Journal. These submissions should be channeled to editor@journalofcmsd.net and copied to admin@kmco.co.ke

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Managing Editor,
July, 2021.

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He is also a recipient of different international youth leadership fellowships, including the Prestigious Millennium Fellowship, a worldwide student leadership programme organized in liaison with the United Nations Academic Initiative, the World Youth Alliance Fellowship Programme, the MCW Global Youth Leadership forum among others.

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Conflict of Interest and Public Office in Kenya

By: ***Prof. Tom Ojienda, SC* and Lydia Mwalimu Adude*****

Abstract

A confluence of private interest and public interest in a public officer results in conflict of interest. For a proper discharge of public duties by public officers, conflict of interest must be managed and regulated for the good of the public. This article is majorly triggered and influenced by Kenya's Conflict of Interest Bill, 2019. It focuses on the management and regulation of conflict of interest of public officers in the discharge of their official duties in Kenya, as depicted in the Constitution of Kenya, 2010 and relevant statutes, such as the Public Officer Ethics Act, 2003 and the Leadership and Integrity Act, 2012. In doing so, the article entails a comparative study of the management and regulation of conflict of interest for public officers in South Africa, Canada and the United Kingdom to tease out the best practices in that regard.

1. Introduction

This article is majorly triggered and influenced by Kenya's Conflict of Interest Bill, 2019 (COI Bill, 2019). It focuses on the management and regulation of conflict of interest of public officers in the discharge of their official duties in Kenya, as depicted in the Constitution of Kenya, 2010 (the Constitution) and relevant statutes such as the Public Officer Ethics Act, 2003 (POEA, 2003),[1] and the Leadership and Integrity Act, 2012 (LIA,

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Lydia's recent publications are: ***Prof. Tom Ojienda, SC and Lydia Mwalimu Adude,*** *'Access to Justice: A Critique of the Small Claims Court in Kenya' (2021) Alternative Dispute Resolution Journal (CIArb-Kenya), Vol 9, Issue 2, ISBN: 978-9966-046-14-7, pp 170-201; Prof. Tom Ojienda, SC and Lydia Mwalimu Adude, 'Access to Justice in the Era of COVID-19: Adaptations and Coping Mechanisms of the Legal Services Industry in Kenya' (2021) Journal of Conflict Management & Sustainable Development, Vol 6, Issue 2, ISBN: 978-9966-046-15-4, pp 1-46; Prof.*

2012)[2]. In doing so, the article entails a comparative study of the management and regulation of conflict of interest in South Africa, Canada and the United Kingdom to tease out the best practices in that regard.

The Merriam-Webster dictionary defines 'conflict of interest' as 'a conflict between the private interests and the official responsibilities of a person in a position of trust'.[3] Private interest is also known as 'self-interest' and is defined by the Merriam-Webster Dictionary as 'a concern for one's own advantage and well-being' or 'one's own interest or advantage'.[4] Conflict of interest for a public officer entails a confluence of private interest and public interest. The Merriam-Webster dictionary defines 'public interest' as 'the general welfare and rights of the public that are to be recognized, protected, and advanced', 'a specific public benefit or stake in something', or ' the concern or attention of the public'.[5]

Conflict of interest has equally been defined in the tenth edition of Black's Law Dictionary as **'a real or seemingly incompatibility between one's**

Tom Ojienda, SC and Lydia Mwalimu Adude, 'Criminal Liability of Corporate Entities and Public Officers: A Kenyan Perspective' (2021) Journal of Conflict Management and Sustainable Development, Vol 6, Issue 2, ISBN: 978-9966-046-15-4, pp 117-212; and a book chapter on 'Sovereign and Diplomatic Immunity vis-a-vis International Criminal Justice' published in Joseph O. Wasonga and James Nyawo (eds.) (2019), International Criminal Justice in Africa Since the Rome Statute (Nairobi: LawAfrica Publishing Ltd). She can be reached through lydiaadude@gmail.com or ladude@llm16.law.harvard.edu.

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[1] Act No 4 of 2003, Laws of Kenya (assented to on 30 April 2003 and came into force on 2 2 2003).
[2] Act No 19 of 2012, Laws of Kenya (assented to on 27 August 2012 and obtained the force of law the same day).
[3] See <https://www.merriam-webster.com/dictionary/conflict%20of%20interest#h1>. See also OECD, 'Managing Conflict of Interest in the Public Sector: A Toolkit' <https://www.oecd.org/gov/ethics/49107986.pdf>.
[4] See <https://www.merriam-webster.com/dictionary/self-interest>.
[5] See <https://www.merriam-webster.com/dictionary/interest#legalDictionary>.

private interests and one's public or fiduciary duties.' In *Belvin Wanjiru Namu v National Police Service Commission & another,*[6] Justice Mwita defined conflict of interest as:

> [A] situation where an individual has interests or loyalties competing against each other. It involves dual relationships where person in a position in one relationship is in another competing relationship in another position such that the person has conflicting responsibilities.[7]

Accordingly, conflict of interest by public officers must be managed and properly regulated for the proper discharge of public duties and for the public good. This article is concerned about conflict of interest and public office in Kenya. That said, the management and regulation of conflict of interest in Kenya implicates those serving in public office and State office as both are constitutionally regarded as public officers.[8] The Constitution defines 'public office' as 'an office in the national government, a county government or the public service,[9] if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament', and a 'public officer' as: '(a) any State officer; or (b) any person, other than a State Officer, who holds a public office'. Under the Constitution, a 'State Officer' is a person holding a 'State office', which means any of the following offices:

a) President;

b) Deputy President;

c) Cabinet Secretary;

[6] [2019] eKLR, HC (Nairobi) Const and Human Rights Div, Pet No 96 of 2018.
[7] *Belvin Wanjiru Namu v National Police Service Commission & another* [2019] eKLR, para 23.
[8] Constitution of Kenya, 2010, art 260.
[9] Ibid defines 'public service' as 'the collectivity of all individuals, other than State officers, performing a function within a State organ', and a 'State organ' as a commission, office, agency or other body established under the Constitution. See also article 1(3) of the Constitution as pertains to State organs in the national and county levels of government; and chapter thirteen of the Constitution in regards to the public service.

d) Member of Parliament;

e) Judges and Magistrates;

f) member of a commission to which Chapter Fifteen of the Constitution applies (that is, a member of the Kenya National Human Rights and Equality Commission, the National Land Commission, the Independent Electoral and Boundaries Commission, the Parliamentary Service Commission, the Judicial Service Commission, the Commission on Revenue Allocation, the Public Service Commission, the Salaries and Remuneration Commission, the Teachers Service Commission, and the National Police Service Commission); [10]

g) holder of an independent office to which Chapter Fifteen of the Constitution applies (that is, the Auditor-General, and the Controller of Budget);[11]

h)member of a county assembly, governor or deputy governor of a county, or other member of the executive committee of a county government;[12]

i) Attorney-General;

j) Director of Public Prosecutions;

k) Secretary to the Cabinet;

l) Principal Secretary;

m) Chief of the Kenya Defence Forces;

n) commander of a service of the Kenya Defence Forces;

o) Director-General of the National Intelligence Service;

p) Inspector-General, and the Deputy Inspectors-General, of the National Police Service; or

q) an office established and designated as a State office by national legislation.

[10] Ibid art 248(2).
[11] Ibid art 248(3).
[12] See chapter 11 of the Constitution of Kenya, 2010 as concerns devolved government.

2. The Current Legal Framework on Conflict of Interest and Public Office in Kenya

Currently, the legal framework for the management and resolution of conflict of interest for public officers can largely be drawn from the Constitution, POEA, 2003 and LIA, 2012. Other relevant legislation are the Penal Code,[13] the Anti-Corruption and Economic Crimes Act, 2003,[14] the Ethics and Anti-Corruption Commission Act, 2011,[15] the Public Finance Management Act, 2012,[16] and the Public Procurement and Asset Disposal Act, 2015.[17]

2.1 The Constitution of Kenya, 2010

As already highlighted above, the constitution has endeavoured to define what is meant by public office, public officer, public service, State office, State officer, and State organ.[18] Constitutional provisions on conflict of interest and public office include articles 75, 76 and 77 in chapter six of the Constitution, particularly as concerns State officers. In a bid to regulate the conduct of State Officers, the Constitution stipulates that a State officer is to behave in a manner that avoids: any conflict between personal interests and public or official duties; compromising any public or official interest in favour of a personal interest; or demeaning the office the officer holds—whether in public or in his or her official life, or in his or her private life, or in association with other persons.[19]

The Constitution is also particular about the financial probity of State Officers. A gift or donation to a State officer on a public or official occasion

[13] Cap 63, Laws of Kenya. See e.g., chapter XIII of the Penal Code, on miscellaneous of fences against public authority. Section 127 of the Penal Code makes provision for the offence of frauds and breaches of trust by persons employed in the public service, in that; '(1) Any person employed in the public service who, in the discharge of the duties of his office, commits any fraud or breach of trust affecting the public, whether the fraud or breach of trust would have been criminal or not if committed against a private person, is guilty of a felony. (2) A person convicted of an offence under this section shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding ten years or to both.' Section 128 of the Penal Code entails offences by public officers.
[14] Act No 3 of 2003, Laws of Kenya.
[15] Act No 22 of 2011, Laws of Kenya.
[16] Act No 18 of 2012, Laws of Kenya.
[17] Act No 33 of 2015, Laws of Kenya.
[18] Constitution of Kenya, 2010, art 260.
[19] Ibid art 75(1).

is a gift or donation to the Republic of Kenya and is to be delivered to the State, unless exempted under an Act of Parliament.[20] Moreover, a State officer is not to maintain a bank account outside the country, except in accordance with an Act of Parliament, or seek or accept a personal loan or benefit in circumstances that compromise the integrity of the State officer.[21]

The Constitution also places restrictions on the activities of State Officers.[22] A full-time State officer is not participate in any other gainful employment. Further, any appointed State officer is not to hold office in a political party. Furthermore, a retired State officer who is receiving a pension from public funds is not to hold - or be remunerated from public funds for - more than two concurrent remunerative positions as chairperson, director or employee of a company owned or controlled by the State or a State organ.

A person who contravenes the foregoing constitutional provisions under articles 75, 76 and 77 is to be subjected to disciplinary proceedings accordingly, and thereafter may be dismissed or removed from office and will be disqualified from holding any other State office subsequent to such dismissal or removal from State office.[23]

2.2 Leadership and Integrity Act, 2012

LIA, 2012 contains provisions on conflict of interest concerning both State officers and public officers. The Act provides for a general leadership and integrity code,[24] and specific leadership and integrity Codes[25]. Section 16 of the Act is particular to conflict of interest. The Act requires a State officer or a public officer to use the best efforts to avoid being in a situation where personal interests conflict or appear to conflict with the State officer's or public officer's official duties.[26] In that regard, a State officer or a public

[20] Ibid art 76(1).
[21] Ibid art 76(2).
[22] Ibid art 77.
[23] Ibid art 75(2) and (3).
[24] Leadership and Integrity Act, 2012, pt II.
[25] Ibid pt III.
[26] Ibid s 16(1). Under section 16(6) of the Act 'personal interest' refers not only to the interest of the State Officer of public officer, but also includes 'the interest of a spouse, child, business associate or agent or any other matter in which the State officer or public officer has a direct or indirect pecuniary or non-pecuniary interest.'

officer is not to hold shares or have any other interest in a corporation, partnership or other body, directly or through another person, if doing so would result in a conflict of the State officer's or public officer's personal interests and the officer's official duties.[27]

As a result, a State officer or a public officer whose personal interests conflict with their official duties is to declare the personal interests to the subject public entity or the Ethics and Anti-Corruption Commission (EACC).[28] When personal interests are so declared, the subject public entity or EACC, as applicable, may issue directions on the appropriate action to be taken by the State officer or public officer to avoid the conflict of interest.[29] The State officer or public officer is to comply with the directions given and refrain from participating in any deliberations on the matter.

Moreover, a State officer or a public officer is not to award or influence the award of a public contract to himself or herself, the State officer's or public officer's spouse or child, a business associate or agent of the State officer or public officer, a corporation, private company, partnership or other body in which the State officer or a public officer has a substantial or controlling interest.[30] In addition, where a State officer or a public officer is present at a meeting where an issue which is likely to result in a conflict of interest is to be discussed, the officer is to declare the interest at the beginning of the meeting or before the issue is deliberated upon, and the declaration is to be recorded in the minutes of that meeting.[31]

[27] Ibid s 16(2).
[28] Ibid s 16(3).
[29] Ibid s 16(4).
[30] Ibid s 16(5).
[31] Ibid s 16(7) and (8). See also section 16(9) and (10) of the Act and regulation 11 of the Leadership and Integrity Regulations, 2015, in regards to declarations by a Member of Parliament or a Member of a County Assembly in debates, proceedings and transactions where they have a direct pecuniary interest or benefit, except debates, proceedings and transactions in Parliament under article 116(3) and (4) of the Constitution for an Act of Parliament that confers pecuniary interest on members of Parliament, and interests that Members of Parliament have as members of the public. The Clerk of the Senate, the National Assembly and the county assembly is to keep a register of conflicts of interest, which is to be open to the public.

Every public entity is to open and maintain a Register of Conflicts of Interest in which State officers or public officers are to register the particulars of their registrable interests, that is, details on the nature and extent of the conflict of interest, and the entries in the register are to be continuously updated as the officers notify the public entity or EACC of any changes in the registrable interests, within one month of the occurrence of each change.[32] The Register of Conflicts of Interest is to be kept for five years after the last entry in each volume of the register.[33]

In *Belvin Wanjiru Namu v National Police Service Commission & another*,[34] Justice Mwita interpreted section 16 of LIA, 2012 as follows:

> Section 16 of the Leadership and Integrity Act on conflict of interest is to the effect that a public officer should use the best efforts to avoid being in a situation where personal interest conflicts with the officer's official duties. In that case, conflict of interest would arise where a person finds oneself confronted by two different interests so that serving one interest would be against the other. For there to be conflict of interest in the petitioner's case, her participation in the business while at the same time performing duties as a police officer should be shown to have been inconsistent, incompatible and prejudicial to her official duties.[35]

Part III of the Leadership and Integrity Regulations, 2015[36] reinforces the provisions of the Act on conflict of interest and equally imposes upon on a State officer or a public officer a duty to declare conflict of interest—personal interest, pecuniary interest, proprietary interest, personal relationships or business relationships. A State officer or a public officer is to declare a personal interest, in the prescribed form, to the public entity

[32] Leadership and Integrity Act, 2012, s 16(11) and (12). The second schedule of the Act includes interests which are also considered registrable interests. See also regulations 12 and 13 of the Leadership and Integrity Regulations, 2015.
[33] Leadership and Integrity Act, 2012, s 16(13) and (14).
[34] [2019] eKLR, HC (Nairobi) Const and Human Rights Div, Pet No 96 of 2018.
[35] *Belvin Wanjiru Namu v National Police Service Commission & another* [2019] eKLR, para 24.
[36] Legal Notice No 13 of 2015.

where he or she is employed, if that personal interest conflicts with the officer's official duties.[37]

Per the Regulations, the Register of Conflicts of Interest to be opened and maintained by a public entity is to include the following information: the name and address of the State officer or the public officer; registrable interest; nature of the conflict of interest; date the conflict of interest is declared; directions given by the commission or public entity to the officer making the declaration; date of entry in the register; and signature of the officer giving directions on behalf of the Commission or the public entity.[38] The Register of Conflicts of Interest, which is kept in the custody of the accounting officer of the public entity or his or her nominee, is open for public inspection upon application.[39]

2.3 Public Officer Ethics Act, 2003

POEA, 2003 is an Act of Parliament that generally advances the ethics of public officers and in that regard provides for a general code of conduct and ethics for public officers,[40] specific codes of conduct and ethics for specified public officers,[41] and the Public Service Code of Conduct and Ethics, 2016, which is applicable to public officers who are subject to the Public Service Commission.[42] POEA, 2003 also requires public officers to make certain

[37] Leadership and Integrity Regulations, 2015, reg 10. See Form C in the schedule of the Leadership and Integrity Regulations, 2015 for the Declaration of Conflict of Interest Form.

[38] Ibid reg 12. See Form E in the schedule of the Leadership and Integrity Regulations, 2015 for the Register of Conflict of Interest form.

[39] Ibid reg 13. See Form F in the schedule of the Leadership and Integrity Regulations, 2015 for the Application for Inspection of the Register of Conflict of Interest form.

[40] POEA, 2003, pt III, ss 7-25.

[41] Ibid pt II, ss 5 and 6.

[42] Under section 2 of POEA, 2003, a 'public officer' is 'any officer, employee or member, including an
unpaid, part-time or temporary officer, employee or member, of any of the following— (a) the Government or any department, service or undertaking of the Government; (b) the National Assembly or the Parliamentary Service; (c) a local authority; (d) any corporation, council, board, committee or other body which has power to act under and for the purposes of any written law relating to local government, public health or undertakings of public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law; (e) a co-operative society

financial declarations to ward off instances of conflict of interest.[43] Section 12 of POEA, 2003, a single section of the said Act, makes specific provision for conflict of interest, and provides as follows:

> (1) A public officer shall use his best efforts to avoid being in a position in which his personal interests conflict with his official duties.
> (2) Without limiting the generality of subsection (1), a public officer shall not hold shares or have any other interest in a corporation, partnership of other body, directly or through another person, if holding those shares or having that interest would result in the public officer's personal interests conflicting with his official duties.
> (3)A public officer whose personal interests conflict with his official duties shall—
>
> (a) declare the personal interests to his superior or other appropriate body and comply with any directions to avoid the conflict; and
>
> (b) refrain from participating in any deliberations with respect to the matter.
>
> (4) Notwithstanding any directions to the contrary under subsection (3)(a), a public officer shall not award a contract, or influence the award of a contract, to-
>
> (a) himself;
>
> (b) a spouse or relative;
>
> (c) a business associate; or
>
> (d) a corporation, partnership or other body in which the officer has an interest.
>
> (5)The regulations may govern when the personal interests of a public officer conflict with his official duties for the purposes of this section.

established under the Co-operative Societies Act (No. 12 of 1997): Provided that this Act shall apply to an officer of a co-operative society within the meaning of that Act; (f) a public university; (g) any other body prescribed by regulation for the purposes of this paragraph.'

[43] POEA, 2003, pt IV, ss 26-34.

3. The Proposed Legal Framework under the Conflict of Interest Bill, 2019

The Conflict of Interest Bill, 2019 (COI Bill, 2019) is for an Act of Parliament to provide for the management and regulation of conflict of interest for public officials in the discharge of their official duties. The COI Bill, 2019 is intended to apply to public officials.[44] Under the Bill, a 'public official' means:

> (a) a person engaged in any capacity in the delivery of government programmes or services whether for remuneration or not;
> (b) a person who renders a public service, whether appointed or elected, including state officers, public officers, temporary staff, consultants and volunteers;
> (c) a person who renders a service of public nature which includes provision of services in the following institutions— (i) a Cooperative Society; (ii) a Retirement Benefit Scheme; (iii) a Public Private Partnership; or (iv) a Strategic Public Utility;[45] or

[44] Ibid cl 4.

[45] Under clause 2 of the Conflict of Interest Bill, 2019 a 'strategic public utility' means: '(a) a body in which the government owns majority shares; (b) a state corporation within the meaning of the State Corporations Act; (c) a body that receives, uses, administers or manages a Government fund, whether in form of a grant, loan or government guaranteed loan; or (d) any undertaking that supplies an essential service to the public or a section of the public as a monopoly.' Under section 2 of the State Corporations Act (Cap 446) a 'state corporation' means: ' (a) a state corporation established under section 3; (b) a body corporate established before or after the commencement of this Act by or under an Act of Parliament or other written law but not—(i) the Permanent Secretary to the Treasury incorporated under the Permanent Secretary to the Treasury (Incorporation) Act (Cap. 101) [Now, Cabinet Secretary to the Treasury (Incorporation) Act (Cap 101)]; (ii) a local authority established under the Local Government Act (Cap. 265); (iii) a co-operative society established under the Co-operative Societies Act (Cap. 490) [Repealed by Cooperative Societies Act, No. 12 of 1997]; (iv) a building society established in accordance with the Building Societies Act (Cap. 489); (v) a company incorporated under the Companies Act (Cap. 486) [Repealed by the Companies Act, No. 17 of 2015] which is not wholly owned or controlled by the Government or by a state corporation; (vi) the Central Bank of Kenya established under the Central Bank of Kenya Act (Cap. 491); (...) (c) a bank or a financial institution licensed under the Banking Act (Cap. 488) or other company incorporated under the

(d) a person who renders a service involving the collection or administration of a levy, fee or funds authorized by legislation.[46]

In essence, the intended legislation will apply to all persons engaged in the public service, whether on a full-time or part-time basis, or on a permanent or temporary basis.

The Bill is dedicated entirely to conflict of interest for public officials and is divided into five parts: part I encompasses the preliminary provisions stipulating the necessary definitions, the objects, and application of the intended legislation; part II provides for the administration of the intended legislation, that is, the Commission responsible for the implementation and enforcement of the legislation; part III outlines the conflict of interest rules relevant to public service; part IV provides for the compliance measures, which entail the methods for managing and resolving conflict of interest for public officials; and part V constitutes general provisions, including penalties for violation of the intended legislation.

COI Bill, 2019 is aimed to: promote objectivity and impartiality in decision making by public officials; ensure that the integrity of a public official in decision-making is not compromised by the public official's private interests; enhance public confidence in delivery of public services; provide a framework for the regulation and management of real, apparent or potential conflict between public interest and private interest; and provide an institutional framework for the management of conflict of interest.[47]

It is noteworthy that Kenya is not the first country to seek to enact legislation to manage and regulate conflict of interest, as countries all over the globe equally have in place conflict of interest legislation, either as self-standing legislation or as part of the public ethics general regulations, or policies that pertain to public office holders generally. This article aims to evaluate the COI Bill, 2019 through a comparative lens, that is, by looking at similar

Companies Act (Cap. 486) [Repealed by the Companies Act, No. 17 of 2015], the whole or the controlling majority of the shares or stock of which is owned by the Government or by another state corporation;(d) a subsidiary of a state corporation.'

[46] Conflict of Interest Bill, 2019, cl 2.

[47] Ibid cl 3.

legislation or policies in other countries and through jurisprudence emanating from Kenyan Courts. The aim is to interrogate the likely impact of the intended legislation, flag up any flaws in the Bill, and propose amendments to the Bill accordingly.

3.1 The Impact of the Bill

The COI Bill, 2019, should it become law as it is, will impact on public officials in a number of ways which are highlighted below.

3.1.1 When a conflict of interest will be considered to arise

Under the COI Bill, 2019, a public official will be considered to be in a conflict of interest if the official:

> (a) exercises an official power, duty or function that provides an opportunity to further the official's private interests or those of the official's relatives or friends or to improperly further another person's interests;
> (b) is in a situation where the official's private interests can reasonably be perceived to impair or influence the official's ability to act objectively in the performance of an official duty; or
> (c) has private interests that could conflict with the official's duties in future.[48]

However, merely having a conflict of interest does not necessarily translate into impropriety, misconduct or corruption on the part of the public official. As already indicated above, Justice Mwita in his interpretation of section 16 of LIA, 2012 in *Belvin Wanjiru Namu v National Police Service Commission & another*,[49] stated that it has to be proven that the public official's

[48] Ibid cl 8.

[49] [2019] eKLR, HC (Nairobi) Const and Human Rights Div, Pet No 96 of 2018. In this case, the Petitioner, Belvin Wanjiru Namu, a member of the Kenya Police Service who had been vetted on 9 June 2016, sued the National Police Service Commission and the National Police Service following a finding that she was unfit to serve in the National Police Service. The reason for failing the vetting was that the Petitioner was involved in a matatu business (she was a director of a family company that ran a matatu business) which the National Police Service Commission considered to be in conflict with her duties as a police officer. In its verdict, the

participation in the private endeavour while at the same time performing their official duties is inconsistent, incompatible and prejudicial to their official duties.[50] Justice Mwita went on to express himself as follows:

> A conflict of interest that should constitute unsuitability to serve should, in my view, consist a situation of Self-dealing in which someone in a position of responsibility has outside conflicting interest and acts in his/her own interest rather than the interest of the public. In other words, there should be evidence that the person actually acted in favour of the self-interest as opposed to public interest.[51]

Moreover, the occurrence of the conflict of interest must be 'clear and manifest'[52] and should not be merely presumptive as the court found it to be in this particular instance:

> Although the petitioner was involved in traffic duties, there was no evidence at all that her position allowed the company's vehicles receive preferential treatment or that they did not comply with the law. Being a traffic officer is not a permanent engagement. One may act as a traffic officer one day and perform different duties another day. The question of conflict must be clear and not presumptive. The fact that the petitioner is a police officer could not disentitle her family from engaging in business. She could have been given an option to resign from the directorship or leave the Service in the absence of direct acts of conflict. It was too harsh in my view, to terminate her service on grounds of perception.[53]

National Police Service Commission stated that; 'The Commission observes that there exists a direct conflict of interest where a police officer operates a matatu business. It is likely that the matatus will not be subjected to the consequences arising from breach of traffic rules and regulations.' See paragraphs 16-22 of the decision.

[50] *Belvin Wanjiru Namu v National Police Service Commission & another* [2019] eKLR, para 24. See also paragraphs 25-27, 29 and 31 of the decision.

[51] Ibid para 28.

[52] Ibid para 31.

[53] Ibid para 33.

3.1.2 The duty of public officials to avoid conflict of interest

COI Bill, 2019 provides a range of rules regarding the various aspects of conflict of interest in relation to public office and imposes penal sanctions upon contravention of any of those rules. Under the intended legislation, there will be a general duty on public officials to take reasonable steps to avoid any conflict of interest, real, apparent or potential, between their private interests and their official duties, and to disclose details of any private interests in conflict with their public duties.[54] Besides, where a public official makes a decision or participates in a decision-making process where the public official knows or reasonably should know that the exercise of their official power, duty or function would give rise to a conflict of interest, this will be tantamount to the commission of an offence.[55]

In addition, the intended legislation will prohibit public officials from using their official powers, duties or functions to give special treatment or advantage to any person, beyond what is allowed by law or written policy.[56] A public official who contravenes this provision will have committed an offence. Further, the intended legislation will bar public officials from using, whether directly or indirectly, official information obtained in the course of performing their official duties to improperly pursue or seek to pursue theirs or another person's private interests.[57] If not, the public official will equally have committed an offence. Besides, it will be an offence for a public official to use his position to influence the decision of another person or another public official, so as to further theirs or another person's private interests.[58]

In particular, Members of Parliament (MPs), both from the National Assembly and the Senate, and Members of County Assemblies (MCAs) will be under obligation to declare any conflicts of interest in relation to their participation in proceedings or debates in Parliament or County Assemblies, or Committees of Parliament or County Assemblies; including the transactions and communications which MPs or MCAs have with their

[54] Conflict of Interest Bill, 2019, cl 9.
[55] Ibid cl 10.
[56] Ibid cl 12. Article 27 of the Constitution on equality and freedom from discrimination would prove useful in the interpretation and implementation of this provision.
[57] Conflict of Interest Bill, 2019, cl 13.
[58] Ibid cl 14.

colleagues or other public officials.[59] Upon declaring such conflicts of interest, the MP or MCA will be prohibited from participating in any proceedings or debates in respect of such declarations, or using any information obtained by the MP or MCA in the discharge of their official powers, duties or functions to advance their private interests. Otherwise, the MP or MCA will have committed an offence.

Nonetheless, all this is not new. For example, paragraph 6 of the Code of Conduct for Members of Parliament provided for in section 37(3) and the Fourth Schedule to the Parliamentary Powers and Privileges Act, 2017[60] requires MPs to register their financial and non-financial interests as they relate to their parliamentary actions, and states that:

> (1) Members of the House shall—
>
> (a) register with the relevant Speaker all financial and non-financial interests that may reasonably influence their parliamentary actions;
> (b) before contributing to debate in the House or its Committees, or communicating with State Officers or other public servants, declare any relevant interest in the context of parliamentary debate or the matter under discussion; and
> (c) observe any rules agreed of the House in respect of financial support for Members or the facilities of the House.
>
> (2) A relevant interest is an interest that may be seen by a reasonable member of the public to influence the way in which a Member discharges his or her parliamentary duties.
> (3) Members shall ensure that registered interests are accurate and updated within one month of any change in particulars.

[59] Ibid cl 11. This is subject to article 116(3) and (4) of the Constitution of Kenya, 2010 as concerns debates, proceedings and transactions in Parliament for an Act of Parliament that confers pecuniary interest on Members of Parliament, and interests that Members of Parliament have as members of the public.
[60] Act No 29 of 2017, Laws of Kenya.

Paragraph 4 of the Code of Conduct for Members of Parliament also requires that in the conduct of their parliamentary duties, MPs are to act in the public interest, and any conflict between their personal interest and the public interest is to be resolved in favour of the public interest.

COI Bill, 2019 also prohibits public officials from conspiring with other public officials to conceal conflict of interest. Under the Bill, it will be an offence for a public official to enter into an arrangement with a public official of another public entity in furtherance of an action which would amount to or be reasonably perceived to conceal a conflict of interest.[61]

3.1.3 Restrictions on outside employment and other gainful employment by public officials

The intended legislation will limit outside engagements by public officials. Under the Bill, 'offers of outside employment' means 'offers of future engagements or benefits by an entity other than the current employer.'[62] A public official will be expected not to allow himself or herself to be influenced in the exercise of an official power, duty or function by plans for or offers of outside employment.[63] In that regard, a public official will be required to disclose in writing to the appointing authority, the accounting officer, or the equivalent, any offers of outside employment that could place the public official in a situation of conflict of interest, within seven days of receiving the offer.[64]

Moreover, a public official who accepts an offer of outside employment will have to disclose that in writing to the Ethics and Anti-Corruption Commission (EACC) as well as to the appointing authority, within seven days of such acceptance, or they will have committed an offence.[65]

Alongside restrictions on offers of outside employment, the intended legislation will impose restrictions on public officials as concerns their engagement in other gainful employment. A public official would not be allowed to engage in any other gainful employment which: is inherently

[61] Conflict of Interest Bill, 2019, cl 22.
[62] Ibid cl 15(3).
[63] Ibid cl 15(1)(a).
[64] Ibid cl 15(1)(b).
[65] Ibid cl 15(2).

incompatible with the duties of the public official; results in the impairment of the judgment of the public official in the execution of official duties; results in conflict of interest; or the official is mandated to regulate or exercise oversight.[66]

In addition, public officials engaged on a full-time basis will not be allowed to participate in any other employment that amounts to: holding another salaried office; privately practicing the same profession for which the official is engaged; acting as a paid arbitrator or consultant; holding an honorary public position; or engaging in such employment during official working hours.[67] In this case, if the Bill is enacted into law as it is, this provision will have unprecedented impact on the engagement of professionals in public service as it requires their total and undivided dedication to public office only.

Nonetheless, the restrictions concerning offers of outside employment and on participation in other gainful employment by public officials are not entirely new concepts in law either.[68] Currently, under the Constitution of Kenya, 2010 and LIA, 2012, the restriction on participation in other gainful employment applies to both State officers and public officers. Article 77(1) of the Constitution provides that 'A full-time State officer shall not participate in any other gainful employment,'[69] while article 80(c) of the Constitution states that, 'Parliament shall enact legislation (…) providing for the application of [Chapter Six of the Constitution], with the necessary modifications, to public officers'; hence the application of LIA, 2012 to both State officers and public officers.

[66] Ibid cl 23(1).
[67] Ibid cl 23(2).
[68] See e.g., section 27 of the Leadership and Integrity Act, 2012, which imposes restrictions on offers of future employment in relation to State Officers and provides that; '(1) A State officer shall not allow himself or herself to be influenced in the performance of their duties by plans or expectations for or offers of future employment or benefits. (2) A State officer shall disclose, in writing, to the public entity and the Commission, all offers of future employment or benefits that could place the State officer in a situation of conflict of interest.'
[69] Leadership and Integrity Act, 2012, s 26(1).

Moreover, section 26(2) of LIA, 2012 provides for the grounds for restricting a State officer or public officer from participating in other gainful employment;[70] grounds which are conspicuously similar to clause 23(1)(a-c) of COI Bill, 2019. In that regard, the Bill introduces the fourth ground, that public officials are restricted from participating in other gainful employment where 'the official is mandated to regulate or exercise oversight.'[71]

Courts have also interpreted the parameters around participation in other gainful employment by MPs that is, Members of the Senate and those of the National Assembly, in a number of cases.[72] Recently, in *Office of the Director of Public Prosecutions v James Aggrey Bob Orengo*,[73] the court was called upon to determine whether there existed a conflict of interest by virtue of Hon Senator James Aggrey Bob Orengo, Senator for Siaya, representing the Petitioner as their advocate in the matter therein, and if the continued appearance of the Senator or any other State officer in the

[70] Section 26(2) of the Leadership and Integrity Act, 2012 defines 'gainful employment' to mean 'work that a person can pursue and perform for money or other form of compensation or remuneration which is inherently incompatible with the responsibilities of the State office or which results in the impairment of the judgement of the State officer in the execution of the functions of the State office or results in a conflict of interest in terms of section 16.'

[71] Conflict of Interest Bill, 2019, cl 23(1)(d).

[72] See e.g., *Office of the Director of Public Prosecutions v James Aggrey Bob Orengo; Daniel Ogwoka Manduku & 2 others (Interested Parties)* [2021] eKLR, HC (Mombasa) Const and Human Rights Div, Const Pet No 204 of 2019; *Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party)* [2018] eKLR HC (Nairobi) Const and Human Rights Div, Const Pet No 295 of 2018 (*Mwilu case*); *Regine Bhutt v Haroon Bhutt & another* [2015] eKLR, HC (Mombasa) Civil Suit No 8 of 2014 (OS) (*Bhutt case*); *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* [2015] eKLR, HC (Nairobi) Const and Human Rights Div, Pet No 628 of 2014 (Consolidated with Pet No 630 of 2014 and Pet No 12 of 2015); *Coalition for Reform and Democracy (CORD) & another v Republic of Kenya & another* [2015] eKLR, HC (Nairobi) Const and Human Rights Div, Pet Nos 628 and 630 of 2014; *John Okelo Nagafwa v The Independent Electoral & Boundaries Commission & 2 others* [2013] eKLR, HC (Busia) Election Pet No 3 of 2013 (*Nagafwa case*); and *Samuel Muigai Ng'ang'a v The Minister for Justice, National Cohesion & Constitutional Affairs & another* [2013] eKLR, HC (Nairobi) Const and Human Rights Div, Pet No 354 of 2012 (*Ng'ang'a case*).

[73] [2021] eKLR, HC (Mombasa) Const and Human Rights Div, Const Pet No 204 of 2019.

proceedings was against the spirit of chapter 6 of the Constitution of Kenya, 2010. Relying on sections 16 and 26 of LIA, 2012 and articles 75 and 77 of the Constitution, Justice Ogola found that:

> Senator Orengo cannot be said to be a full time State officer given that there exists no employer-employee relationship between Senators, Members of Parliament and the executive. As such Members of Parliament are at liberty to engage in gainful employment in as long as the nature of the gainful employment is not inherently incompatible with their duties and/or functions as State Officers. The Constitution also accepts that some state officers may be engaged on part-time rather than full time basis and the Constitution allows this category to participate in any other gainful employment.[74]

However, applying the said provisions of LIA, 2012 and the Constitution of Kenya, 2010 to the case at hand, Justice Ogola found and held that the continued representation of the petitioner by the Senator raised issues of conflict of interest *vis-à-vis* his official duties as a Senator and member of the Justice, Legal Affairs and Human Rights Committee of the Senate:

> The upshot to this application is this; there is no bar to Senator Orengo, or indeed to any other Member of Parliament from engaging in gainful employment. However, in pursuit of such gain, members of parliament must strictly operate within the law and the Constitution. (…)
> Determining what is a personal interest will not always be easy, and will often be made on a case by case basis. The absurdity in the matter herein is as follows; it was alleged, and not refuted by the Respondent that on 28/8/2020, the Respondent herein Senator James Orengo appeared at the Milimani Chief Magistrate's Court being driven in his official government registered Motor Vehicle GKB 178E, Toyota Prado grey in color registered under the ownership of the National Assembly. The Senator emerged from his official motor vehicle and

[74] *Office of the Director of Public Prosecutions v James Aggrey Bob Orengo; Daniel Ogwoka Manduku & 2 others (Interested Parties)* [2021] eKLR, para 46.

proceed to the Court and appeared on behalf of the Petitioner herein. Granted that the Senator is entitled to pursue private gain, what perception does the public get when the accused person who is charged with economic crimes and/or corruption, has as his counsel, a Senator, a State Officer, driven to Court in his official motor vehicle bought for him by the public. He is driven by a driver employed to drive him by the government, and then in Court he submits with the authority of a Senator. In my view, it does not require any taxing of the mind to find a glaring perception of conflict of interest. To the accused person he has the Senator as his advocate; driven to Court in a State motor vehicle; chauffeured by a State provided driver; and the vehicle fueled by the State. To the accused, despite facing grave charges of economic crimes, his defence appears to have the blessings of the State. To the counsel, the unsaid story to the accused is that the accused has the best counsel, who appears to have State support, and therefore the accused needs not unduly worry since he is in good hands; to the public tax payer, he or she is confused, stands a–kimbo and wonders where the world is going: Why has the accused been charged when he is to be represented by a State Officer who arrives in Court using state resources?

I must emphasize that none of the above perceptions is bad or is unlawful. But all of them create scenarios of possible conflict of interest, at least in perception. It is the duty of this Court to interpret the Constitution wholesomely and in a manner to bring out the mischief intended to be cured by the Constitution. The Sections of the law quoted above, together with the Articles of the Constitution cited, leave no doubt that State Officers, ever when free to pursue employment for private gain, must avoid scenarios in which they are either conflicted, or in which they create perception of conflict of interest.

In this petition, the Petitioner seeks orders to stop investigations and possible arrest over allegations of corruption, or economic crimes. Senator Orengo is the lead counsel for the Petitioner. Although Senator Orengo has not been said to have arrived in

> this Court in the manner and style he is alleged to have done in Milimani Court while representing the same client in criminal charges, the perceptions on conflict of interest I have described in relation to the Milimani Court appearance are applicable. It is not in doubt in my mind that if the foregoing Articles of the Constitution and Statute Law are applied to their natural end, it is inescapable to conclude that there exists conflict of interest in Senator Orengo representing the Petitioner herein.
>
> This perception is highlighted by the fact that the Petitioner may at one time be summoned to appear before a Committee of Senate to answer to some of the matters the Petitioner is being investigated on. Should this happen Senator Orengo will be in attendance. Even if he recuses himself from the Committee, that alone will not alley the perception of conflict of interest, or put bluntly, the perception that the Petitioner has friends in the Senate. This would be very unfortunate. In interpreting the Constitution, a literal interpretation approach, which avoids all doubts and rhymes with the spirit of the Constitution takes priority.
>
> Accordingly therefore, it is the finding hereof that the continued representation of the 1st Interested Party by the Respondent or any other State Officer is against the spirit of chapter 6 of the Constitution of Kenya, for failure to conform to the mandatory provisions of Section 26 of the Leadership and Integrity Act.
>
> I allow the Notice of Motion dated 10/1/2020 and I direct that the 1st Interested Party/Petitioner herein be and is hereby at liberty to engage the services of another advocate other than Senator James Orengo, S.C., to represent him in the proceedings herein.[75]

Earlier, in *Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others* (*Mwilu case),*[76] the Director of Public Prosecutions (DPP), the 1st Respondent, sought orders to disqualify Senior Counsel Hon James Orengo, the Senator for

[75] Ibid paras 55-62.
[76] *Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others*; Stanley Muluvi Kiima (Interested Party) [2018] eKLR, HC (Nairobi) Const and Human Rights Div, Const Pet No 295 of 2018 (*Mwilu case*).

Siaya County, and Senior Counsel Hon Okong'o Omogeni, the Senator for Nyamira County, from representing the petitioner in the petition as well as in criminal proceedings before the Chief Magistrate's Court and all related matters.[77] The two Senior Counsel were both members of the Senate's Committee on Justice, Legal Affairs and Human Rights. It was said that the two Senior Counsel did not excuse themselves from the proceedings of the Senate Committee when the issue of the appointment of Queen's Counsel Mr Khawar Qureshi, who was to act as special prosecutor for the DPP in the prosecution of the Petitioner for criminal charges, came up.[78] The DPP argued that there was a conflict of interest in the concurrent participation of the two Senior Counsel in the Senate Committee while representing the Petitioner in the petition and in the criminal proceedings. In considering the question whether such a conflict of interest had been demonstrated in the proceedings, the High Court (Omondi, Ngugi, Tuiyott, Musyoka and Mwita JJ) stated as follows:

> A conflict of interest means a situation where a person finds himself or herself confronted by two different interests so that serving one interest would be against the other interest. The definition of conflict of interest in Black's Law Dictionary, 10th Edition, that is applicable in this matter, is that 'conflict of interest is a real or seeming incompatibility between one's private interest and one's public or fiduciary duties.'
> For there to be conflict of interest, therefore, the participation of the two Senior Counsel in the Senate Committee, and their role as counsel for the petitioner in this matter, or any other related matter, must be inconsistent or incompatible, bearing in mind the information they receive or that may come to their knowledge during the exercise of their oversight role over the 1st respondent and which may be prejudicial to the course of justice.
>
> There is no dispute that Mr. Orengo and Mr. Omogeni (SC), are members of the Senate and sit in the Senate Committee of Justice Legal Affairs and Human Rights Committee. They were in that Committee on the material day when the 1st respondent

[77] *Mwilu case* para 55.
[78] Ibid paras 56, 61 and 67.

> appeared before the Committee as Senators and members of the Committee. Any matters that were discussed in the Senate Committee were discussed in their presence by virtue of their position as members of the Committee.
> It is contended by the 1st respondent that the two misconducted themselves by failing to disclose that they had a personal interest in the matter under discussion. What we need to consider is whether their failure to make that disclosure by itself warrants us to make a finding that a conflict of interest arises from their representing the petitioner in the matters before court.[79]

In the *Mwilu case*, the High Court found that there was no conflict of interest:

> We have considered the discussions of the day as captured in the Hansard, and what is clear from the proceedings of that day is that the issues that were discussed were general in nature and did not go into specifics that would be prejudicial to the hearing of this petition. We have not seen evidence of discussion relating to the petition before this court or the case before the Chief Magistrate's Court to give an impression that the merits of this petition or that case were indeed discussed.
> In our view, a party alleging a conflict of interest bears the burden of presenting clear evidence that the person said to be acting in conflict of interest is acting in a manner prejudicial to the interests of the other party. In this case, the facts placed before us do not in any way satisfy us that the conduct of the two Senior Counsel would amount to a conflict of interest in so far as this petition or related matters are concerned. From the record of proceedings before the Committee, the information that was given to the Committee by the 1st respondent related to the appointment of Mr. Qureshi, QC. It did not touch on or have any bearing on the merits of this petition or any other matter involving the petitioner.
>
> We therefore find the application by the 1st respondent to be without merit.[80]

[79] Ibid paras 69-72.
[80] Ibid paras 76-78.

In *Regine Bhutt v Haroon Bhutt & another* (*Bhutt case),*[81] where the Defendants objected to the appearance of Hon Peter Kaluma, Member of the National Assembly for Homa Bay Town Constituency, as the lead counsel for the Plaintiff, Justice Muriithi held that:

> [T]he court allows the Honourable Member of Parliament to appear in the matter and act for the Plaintiff, whether as lead counsel or as part of his legal team, provided that the Advocate/Member of Parliament in writing undertakes that he shall not charge nor receive any payment for his services to the plaintiff and that he shall not seek, in the event that costs are awarded to the plaintiff, any certification for costs for two counsel as provided under Rule 59 of the Advocates' (Remuneration) Order.[82]

In essence, Justice Muriithi expressed the view that a full-time Member of Parliament who, being an advocate, decides to engage in private legal practice can only undertake pro bono or public interest litigation in order to avoid unjust enrichment on his or her part as a public official.

In another case, *John Okelo Nagafwa v The Independent Electoral & Boundaries Commission & 2 others* (*Nagafwa case)*,[83] the Petitioner alleged that Hon James Aggrey Bob Orengo (SC), the Senator for Siaya County, had compromised the political neutrality of his office by appearing as counsel for the 3rd Respondent, Paul Otuoma Nyongesa; the Petitioner alleged that the 3rd Respondent's response to the Petition was incurably defective, having been signed by an unqualified person and/or a full-time State officer, and argued that Hon Orengo (SC) by acting as counsel in the matter and by signing pleadings, was contravening the provisions of article 77(1) of the Constitution and section 26(1) of LIA, 2012. In addressing the question whether a Senator, as a full-time State Officer (as assumed by the Court), could engage in other gainful employment, Justice Tuiyott was of the view that;

[81] [2015] eKLR, HC (Mombasa) Civil Suit No 8 of 2014 (OS) (*Bhutt case*).
[82] *Bhutt case* para 20.
[83] [2013] eKLR, HC (Busia) Election Pet No 3 of 2013 (*Nagafwa case*).

> Read together, Section 26(1) and 26(2) [of LIA, 2012] permits a full time State officer to pursue other work (other than his State duties) for money or other form of compensation or remuneration provided that work or its pursuit is:- (i) not inherently incompatible with the responsibilities of the State office, or (ii) does not result in the impairment of the judgement of the State officer in execution of the functions of the State office, or (iii) does not result in a conflict of interest in terms of Section 16 of The Act.[84]

Per Justice Tuiyott's interpretation of section 26 of LIA, 2012 above, a State officer is permitted to engage in any other gainful employment, whether for monetary or non-monetary compensation, provided that none of the grounds under section 26(2) of LIA, 2012 arises. Justice Tuiyott went on to state that it was upon the party that alleges that any of the grounds under section 26(2) of LIA, 2012 existed to demonstrate so.[85] In this case, the Petitioner argued that Hon Orengo's participation as counsel in the matter would keep him away from his office as a Senator and as such prevent him from fully engaging himself in the Senate. In that regard, having considered the role of a Senator as set out under article 96 of the Constitution and the work-hours for the Senator's engagement in parliamentary business as stipulated in the Standing Orders of the Senate,[86] Justice Tuiyott expressed himself in the manner that:

> Evidently, the work of a Member of the Senate involves both Parliamentary and non-Parliamentary business. The work-hours for Parliamentary business are regulated by the Standing Orders of the House. This Court has looked up those Standing Orders and in particular Standing Order 30.1 which provides:- '(i) unless the Speaker for the convenience of the Senate otherwise

[84] *Nagafwa case* para 24.
[85] Ibid para 25.
[86] See Standing Order 31 of the Standing Orders of the Senate <http://www.parliament.go.ke/sites/default/files/2018-08/Senate%20Standing%20Orders%20%28final%29.pdf>; See also Standing Order 30.1 of the Standing Orders of the National Assembly <http://www.parliament.go.ke/sites/default/files/2018-09/The%20National%20Assembly-4th%20Edition.pdf>

> directs, the Senate shall meet at 9.00 a.m on Wednesday and at 2.30 p.m on Tuesday, Wednesday and Thursday, but more than one sitting may be directed during the same day.' It seems that even if a Member of Senate was to be involved in other business of the House (e.g. Committees), Parliamentary business may not engage a Member fully from Monday to Friday, 8.00 a.m to 5.00p.m. In respect to non-Parliamentary business, this Court was unable to find any regulation governing the work-hours.[87]

Justice Tuiyott thus went on to find that in the matter at hand, the existence of a conflict of interest had not been demonstrated:

> The Petitioner has not persuaded this Court that Hon Orengo has used up public time in preparing for and participating in this Election Petition. No evidence has been shown to this Court to demonstrate that Counsel's conduct this far is inherently incompatible or fundamentally in conflict with his role as a Member of The Senate.[88]

It is worth noting that all the foregoing cases are High Court cases and what is clear from the analysis is that the alleged existence of a conflict of interest must be demonstrated on a case-by-case basis, and the determination of the court is dependent on the circumstances of the case under consideration as weighed against the applicable constitutional and statutory provisions.

3.1.4 Restrictions on gifts and other benefits to public officials

COI Bill, 2019 intends to limit the receipt of gifts and other benefits by public officials and their families in a personal capacity.[89] Clause 16(1) of the Bill stipulates that, '[a] public official or a member of the public official's family shall not accept any gift or other advantage, including from a trust or

[87] *Nagafwa case* para 26
[88] Ibid para 27.
[89] The Conflict of Interest Bill, 2019 does not define what a gift and other benefits means. However, the Canadian Conflict of Interest Act defines its equivalent, that is, 'gifts or other advantage' which under section 2 of the Act means: '(a) an amount of money if there is no obligation to repay it; and (b) a service or property, or the use of property or money that is provided without charge or at less than its commercial value.'

foundation, that may influence the public official's judgment in the exercise of an official power, duty or function.'

On the other hand, public officials would be able to receive gifts and other benefits in an official capacity. Even so, there are restrictions as any such gift would only be acceptable if: it is received as a normal expression of courtesy or protocol, or is within the customary standards that normally accompany the public official's position; is not monetary; or does not exceed such value as may be prescribed by the EACC.[90] Moreover, the acceptance of any such gift would be followed by a declaration of such acceptance.[91]

In any case, contravention of clause 16(1) and (3) of the Bill would be tantamount to the commission of an offence.[92] In that regard, every public entity will be required to maintain a register of gifts received by public officials serving in the public entity, a register of gifts given by the public entity to public officials, and a register of donations received by the public entity for a specific cause.[93]

Complementary treatment of public officials, such as offers for travel, holiday, hospitality, training, scholarship or medical treatment will also be limited under the intended legislation. Under clause 18(1) of the Bill, a public official or a member of his family will be prohibited from accepting an offer for complementary treatment for any purpose, unless the complimentary treatment offered is required in his capacity as a public official or in exceptional circumstances. On the contrary, a public official or member of the official's family who accepts any complimentary treatment will be required, within forty eight hours of resumption of duty, to make a declaration of such acceptance in the prescribed form, giving sufficient detail on the nature of the treatment accepted, the donor and the circumstances

[90] Conflict of Interest Bill, 2019, cl 16(2).
[91] Ibid cl 16(3) stipulates that, 'If a public official or a member of the official's family accepts any gift or benefit, the public official shall, within forty-eight hours of resumption of duty, make a declaration of such acceptance, giving sufficient detail on the nature of the gift or other advantage accepted, the donor and the circumstances under which it was accepted.'
[92] Ibid cl 16(4).
[93] Ibid cl 17.

under which it was accepted. Contravention of clause 18 of the Bill would equally be tantamount to the commission of an offence.

3.1.5 Restrictions on contracts between public officials and public entities

COI Bill, 2019 aims to restrict public officials from contracting with public entities and from influencing the grant of public contracts in furtherance of their private interests. Under the intended legislation, a public official would not be party to a contract for the supply of goods, works and services with any public entity.[94] Further, a public official would not, in the exercise of his or her official power, duty or function, award or influence the award of a contract in which the official has private interests.[95] Furthermore, a public official would be restricted from having an interest in a partnership, private company or any other legal entity that is a party to a contract with a public entity under which the partnership, private company or any other legal entity receives a benefit.[96] Contravention of the foregoing would amount to the commission of an offence.

3.1.6 Restriction of appointed public officials from participating in political activities

COI Bill, 2019 calls for political neutrality of appointed public officials in the duration of their public service engagement. An appointed public official will not engage in any political activity that may compromise or be seen to compromise the political neutrality of their office.[97] In that regard, an appointed public official will not be allowed to act as an agent for, nor further the interests of a political party or a candidate in an election, nor manifest support for or opposition to any political party or candidate in an election.[98] Contravention of this provision will be tantamount to the commission of an offence.[99]

[94] Ibid cl 19(1).
[95] Ibid cl 19(2).
[96] Ibid cl 20.
[97] Ibid cl 25(1).
[98] Ibid cl 25(2).
[99] Ibid cl 25(3).

But, this is equally not new as the political neutrality requirement is currently embodied in section 23 of LIA, 2012.[100] Moreover, in the *Nagafwa case*, the Petitioner argued that by representing a party in an election petition, Hon James Orengo, the Senator for Siaya County, would be compromising the political neutrality of his office. However, Justice Tuiyott held that the political neutrality requirement did not apply to elected public officials but only applied to appointed public officials:

> I would not agree. Section 23 of The Act is a provision on political neutrality expected of appointed State officers. Hon Orengo holds an elective position. Elected Members of Senate are politicians. The provisions of Section 23 do not apply to them. So, even if it was to be assumed that by representing the 3rd Respondent Hon Orengo is pursuing a political agenda that would not be inimical to his office as a Member of Senate.[101]

3.1.7 Restriction of public officials from taking part in public collections

COI Bill, 2019, if enacted as is, will restrict public officials from participating in public collections or fundraisers, otherwise known as *Harambees*. A public official would not be allowed to solicit for contributions from the public except for national disasters gazetted as such by the President and allowing for a public collection for that purpose.[102] A public official would also not be allowed to participate in collection of funds from the public, either as a collector or promoter, in a way that reflects adversely on that public official's integrity, impartiality or interferes with the performance of the official's duties nor use official social media platforms or his place of work as a venue for soliciting or collecting funds. Likewise,

[100] Section 23 of the Leadership and Integrity Act, 2012 states that; '(1) An appointed State officer, other than a Cabinet Secretary or a member of a County executive committee shall not, in the performance of their duties—(a) act as an agent for, or further the interests of a political party or candidate in an election; or (b) manifest support for or opposition to any political party or candidate in an election. (2) An appointed State officer or public officer shall not engage in any political activity that may compromise or be seen to compromise the political neutrality of the office subject to any laws relating to elections.'
[101] *Nagafwa case* para 28.
[102] Conflict of Interest Bill, 2019, cl 26.

a public official would not be allowed to use his official position to solicit funds or coerce any person to contribute towards a private fund collection. Contravention of these requirements would amount to the commission of an offence.

3.1.8 Restriction of public officials from participating in recruitments

COI Bill, 2019 also aims to make it an offence for a public official to participate in or influence a recruitment and selection process in which the official has a private interest, or canvass for a candidate in a recruitment and selection process in which the official has a private interest.[103] However, this does not apply to the recruitment of personal staff permitted to the public official.[104]

3.1.9 Restriction on post-employment engagements by public officials

COI Bill, 2019, if enacted into law as is, will also impose restrictions on post-employment engagements by public officials.[105] A former public official would not:

> (a)act for or on behalf of any person in connection with any specific proceeding, transaction, negotiation or case to which the State is a party and with respect to which the former public official had acted for, or provided advice to the State;
> (b)be engaged by or act for or against his former employer for at least two years after ceasing to be a public official;
> (c)use information obtained in his official capacity and which is not available to the public to further the interests of another person or entity; or
> (d)accept appointment to a board of directors of, or employment with, a private entity with which he had significant official dealings, either directly or through

[103] Ibid cl 21.
[104] Ibid cl 21(2).
[105] Ibid cls 45-48. See also section 28 of the Leadership and Integrity Act, 2012, a current provision of law imposing post-employment restrictions on State officers and states that, 'A former State officer shall not be engaged by or act for a person or entity in a matter in which the officer was originally engaged in as a State officer, for at least two years after leaving the State office.'

> private affiliations, during the period of two years immediately preceding the termination of his service. [106]

Also, unless officially called upon, a former public official will be prohibited from representing, vouching for or defending any public entity on behalf of a person or an entity outside the public service with which the former official had significant official dealings, during the period of two years immediately preceding the termination of service.[107] This restriction applies whether the engagement is remunerated or not. However, a former public official may apply for exemption on the grounds that:

> (a)the former public official was not a senior member of the State organ;
> (b)the former public official's functions did not include the handling of files of a political or sensitive nature, such as confidential cabinet documents;
> (c)the former public official had little influence, visibility or decision-making power in the office of a State organ; and
> (d)by virtue of the official's expertise in public service.[108]

A former public official who contravenes the provisions on post-employment restrictions will have committed an offence. In addition, if EACC establishes that a former public official is not complying with the post-employment restrictions, EACC will be allowed to order any current public official not to have any official dealings with the former public official.[109]

3.2 Compliance Measures

Under COI Bill, 2019, there are various means of compliance with the intended legislation towards the management and control of conflict of interest, which entail recusals, financial declarations, and divestment of assets by public officials. Firstly, the intended legislation will require public

[106] Conflict of Interest Bill, 2019, cl 45.
[107] Ibid cl 46.
[108] Ibid cl 47.
[109] Ibid cl 48.

officials to recuse themselves from discussions, proceedings, debates, transactions, votes or decisions in which they have a conflict of interest.[110] Upon recusing themselves, the recusal shall be recorded in the minutes of the transaction in question. The public official will also be required to file a declaration of the recusal with the employer and EACC, within sixty days after the day on which the recusal took place, providing sufficient details on the conflict of interest that was avoided.[111]

Secondly, if the intended legislation comes into force, it will be a mandatory requirement for public officials to make financial declarations, that is, a declaration of their income, assets and liabilities, to the EACC at the beginning, in the duration of, and the conclusion of their public service.[112] This would also include a financial declaration for the public official's spouse(s) and dependent children under the age of eighteen years. The timelines for the financial declarations are: one, an initial declaration within thirty days of becoming a public officer, as concerns the year immediately preceding their appointment; two, a periodical declaration every two years in the duration of the public service engagement; and a final declaration within thirty days of ceasing to be a public officer.[113] The financial declarations will be accessible to the public upon application to EACC and will be retained by EACC for at least five years after a person ceases to be a public official.[114]

The periodical and final financial declarations will entail a disclosure of information on any material changes in, or affecting any of the categories of

[110] Ibid cl 27(1).
[111] Ibid cl 27(2).
[112] Ibid cl 28.
[113] Ibid cl 29 makes provision for the timelines for the declarations as follows; '(1) A public official shall, within thirty days of appointment as a public official, submit an initial declaration relating to the financial affairs of the public official for the period of one year prior to appointment as a public official. (2) Every public official shall, once every two years within the period of service, submit a declaration relating to the affairs of the public official as at 1st of November of the declaration year, and such declaration shall be made within the month of December next following. (3) A public official shall, within thirty days after ceasing to be a public official, submit a final declaration relating to the financial affairs of the public official as at the date the official ceased to be a public official.'
[114] Ibid cls 32 and 33.

income, assets or liabilities in the schedule of mandatory declarations that have occurred within the two-year period prior to the declaration.[115] Such material change would entail:

> (a)at least twenty five percent increase or decrease in the value of an income, asset or liability;
> (b)the disposal or acquisition of an asset or liability;
> (c)changes in marital status;
> (d)appointment or changes in directorships;
> (e)changes in membership in companies or partnerships and other legal entities howsoever established; or
> (f)changes in membership in social associations, societies, clubs, foundations or trusts.[116]

Likewise, the requirements on financial declarations by public officers under the Bill are not new. Part IV of POEA, 2003, particularly sections 26 and 27 of the Act, currently requires public officers to submit to the Commission responsible for the public officer an initial financial declaration within thirty days of becoming a public officer, periodic declarations every two years, and a final declaration within thirty days of ceasing to be a public officer.[117]

Thirdly, under the intended legislation, a public official shall within ninety days after the day of appointment or in the course of employment divest any private interest that would place them in a conflict of interest situation, by selling them in an arm's-length transaction or by placing them in a blind trust.[118] The requirements for the blind trust will be such that:

[115] Ibid cl 28(3). Pursuant to clause 30 of the Bill, the public official will include in the declarations special disclosures of all benefits that the public official, any member of their family, or any partnership or private corporation in which the public official or a member of their family has an interest or is entitled to receive as a result of a contract with a public entity.
[116] Ibid cl 28(4).
[117] See also Public Service Commission of Kenya, 'Guidelines on Declaration of Income, Assets and Liabilities', 29 May 2009 <https://www.publicservice.go.ke/images/guidlines/Wealth_Declaration_Guidelines.pdf >.
[118] Conflict of Interest Bill, 2019, cls 36-44

(a)the assets to be placed in trust shall be registered to the trustee unless they are in a registered retirement savings plan account;
(b)the public official shall not have any power of management or control over the trust assets;
(c)the trustee shall not seek or accept any instruction or advice from the public official concerning the management or the administration of the assets;
(d)the assets placed in the trust shall be listed in a schedule attached to the instrument or contract establishing the trust;
(e)the term of any trust shall be for as long as the public official who establishes the trust continues to hold the office, or until the trust assets are depleted;
(f)the trustee shall deliver the trust assets to the public official when the trust is terminated;
(g)the trustee shall not provide information about the trust, including its composition, to the public official, except for information that is required by law to be filed by the public official and periodic reports on the overall value of the trust;
(h)the public official may receive any income earned by the trust, and add to or withdraw from the capital funds in the trust;
(i)the trustee shall be at arm's length from the public official and the Commission is to be satisfied that an arm's length relationship exists;
(j)the trustee may be—

(i)the public trustee;
(ii)a registered trustee; or
(iii)a listed company or a subsidiary wholly owned by a listed company, including a trust company or investment company, that is qualified to perform the duties of a trustee; or

(k)the trustee shall provide the Commission, on every anniversary of the trust, with a written annual report verifying the accuracy, nature and market value of the

> trust, a reconciliation of the trust property, the net income of the trust for the year preceding, and the fees of the trustee, if any.[119]

Conversely, three categories of assets are expressly excluded from divestment: one, the assets in a registered retirement savings plan account;[120] two, the assets that have been given as security to a lending institution; [121] and three, the assets that are of such minimal value that they do not pose any risk of conflict of interest in relation to the public official's duties and responsibilities.[122]

3.3 Penalties for Non-Compliance under the Bill

3.3.1 Compliance Orders

Under COI Bill, 2019, EACC may issue orders to any public official to undertake a compliance measure under the intended legislation, that is, a recusal, financial declaration, or divestments of private interests. [123] Thereafter, the public official will be required to provide the EACC with a Report on Compliance with the Orders of the Commission.[124] The Report will contain details on: the asset or private interest of the public official in issue and the method used to divest the private interest(s); the process to be put in place by the reporting public official to effect a recusal where one is necessary; and the matter and the order, and the steps taken to comply with the compliance order(s) of the Commission.

3.3.2 Temporary vacation of office to allow for investigations

COI Bill, 2019 has defined 'temporary vacation of office' to mean 'temporary withdrawal or deprivation of powers and privileges of an office including, participating in decision making, voting, supervising, drawing of facilitative allowances and benefits linked to the office or function.'[125] If the Bill is enacted into law as is, a public official who is under investigation for

[119] Ibid cl 38.
[120] Ibid cl 38(1)(a).
[121] Ibid cl 41.
[122] Ibid cl 42.
[123] Ibid cl 43.
[124] Ibid cl 44.
[125] Ibid cl 34(3).

alleged violation of the intended legislation will temporarily vacate office for ninety days, in order to facilitate investigations.[126]

Temporary vacation of office will happen following EACC's recommendation to the appointing authority, where there are reasonable grounds to suspect that the public official is likely to interfere with evidence, witnesses, or the investigation itself through concealing, altering, destroying or removing records, documents or evidence, or intimidating or threatening witnesses.[127] In case a public official refuses to vacate office within seven days of receipt of the notice to temporarily vacate office, EACC will be empowered to make an *ex parte* application to the High Court for orders to compel the public official to temporarily vacate office.[128]

The provisions on temporary vacation of office by public officials who are being investigated, however, raises a number of issues, such as:

> (a)the effect of the temporary vacation of office on the public official's powers, duties and functions;
> (b)when the temporary vacation of office should occur;
> (c)the length of the temporary vacation of office;
> (d)the suspect's participation in the EACC deliberations on whether the temporary vacation of office should be recommended to the appointing authority or not; and
> (e)the requirement that the application by the EACC to the High Court is to be made *ex parte*.

The temporary vacation of office concerns the conduct of investigations by EACC but is not for an ongoing trial, especially where charges have not yet been preferred regarding the contravention of the provisions of the intended legislation. This smells of malice, especially due to the lack of provision of opportunity for the suspect to participate in the EACC deliberations to determine the suspect's likelihood to interfere with evidence, witnesses or the investigations. Since the intended legislation adopts a punitive approach, it would be prudent to allow only for temporary vacation of office where

[126] Ibid cl 34(1).
[127] Ibid cl 34(2).
[128] Ibid cl 34(4).

criminal charges have been preferred against the public official and a trial is ongoing. Also, the application by EACC to the High Court to compel the public official to go on temporary vacation of office should be made *inter partes,* to allow participation by the suspect as the person greatly affected by the order.[129]

Regarding the effect of the temporary vacation of office on the powers, duties and functions of a public official, the public officials suspected of violating the provisions of the intended legislation should merely be barred from physically accessing the office without supervision, as this in itself is sufficient to prevent any interference with evidence, witnesses and the investigation. However, the effect of such temporary vacation of office on the powers, duties and functions of the public official is subject to the constitutional provisions in that regard and any other written laws specific to the public office involved, as is the length of the temporary vacation of office.[130] As such, there is need to rework the definition and provisions on 'temporary vacation of office' under the Bill.

3.3.3 Penal Sanctions

COI Bill, 2019 adopts punitive measures for violation of the various provisions of the intended legislation by criminalizing such violations, as already highlighted in the various parts above. In that regard, the general penalty, where a public official commits an offence for which no penalty has been specifically provided for, is a fine not exceeding five million shillings or a term of imprisonment not exceeding four years, or both, upon conviction.[131]

[129] See generally *Director of Public Prosecutions v Tom Ojienda t/a Prof Tom Ojienda & Associates Advocates & 3 others* [2019] eKLR; and *Tom Ojienda t/a Tom Ojienda & Associates Advocates v Ethics and Anti-Corruption Commission & 5 others* [2016] eKLR.

[130] Consider the impact of section 62 of the Anti-Corruption and Economic Crimes Act, 2003 (Act No 3 of 2003) on suspension of State officers and public officers from office, if charged with corruption or economic crime; and the reasoning of the Court of Appeal (Musinga, Kairu & Murgor JJA) in *Ferninand Ndung'u Waititu Babayao v Republic* [2019] eKLR, at paras 38-49.

[131] Conflict of Interest Bill, 2019, cl 49.

3.4 Effects of the Bill on Existing Legislation

3.4.1 Repeal of the Public Officer Ethics Act, 2003 (POEA, 2003)[132]

COI Bill, 2019, if enacted into law, will repeal POEA, 2003 which currently applies to public officers, as already highlighted above. Section 2 of POEA defines a 'public officer' as:

> [A]ny officer, employee or member, including an unpaid, part-time or temporary officer, employee or member, of any of the following—
>
> (a)the Government or any department, service or undertaking of the Government;
>
> (b)the National Assembly or the Parliamentary Service;
>
> (c)a local authority;
>
> (d)any corporation, council, board, committee or other body which has power to act under and for the purposes of any written law relating to local government, public health or undertakings of public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law;
>
> (e)a co-operative society established under the Co-operative Societies Act (No. 12 of 1997):
>
> Provided that this Act shall apply to an officer of a co-operative society within the meaning of that Act;
>
> (f)a public university;
>
> (g)any other body prescribed by regulation for the purposes of this paragraph.

Besides, under article 260 of the Constitution of Kenya, 2010, a 'public office' means 'an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament'; 'public officer' means '(a) any State officer; or (b) any person, other than a State Officer, who holds a public office'; and 'public service'

[132] Act No 4 of 2003, Laws of Kenya.

means 'the collectivity of all individuals, other than State officers, performing a function within a State organ.'

Unlike POEA, 2003, the intended Conflict of Interest Act will be more expansive because of the broad definition of 'public official' adopted under clause 2 of COI Bill, 2019. Also, unlike POEA, 2003, the intended Conflict of Interest Act is not pegged solely on the public entity involved, but on the service being performed, that is public or government services or programmes.

The major drawback of repealing POEA, 2003, however, is that POEA, 2003 has been a general legislation covering various aspects of the ethics of public officers, conflict of interest included.[133] On the other hand, the intended Conflict of Interest Act is a special legislation focused solely on conflict of interest in relation to public service, hence leaving out other aspects of ethics in the public service such as professionalism, among others.

3.4.2 Amendments to LIA, 2012 and ACECA, 2003

COI Bill, 2019 proposes amendments to the Leadership and Integrity Act, 2012 (LIA, 2012),[134] and the Anti-Corruption and Economic Crimes Act, 2003[135] (ACECA, 2003).[136] Nonetheless, the Bill is not expressive of the particular amendments at this point in time.

3.5 Implementation and Enforcement of the Intended Legislation

COI Bill, 2019 tasks the Ethics and Anti-Corruption Commission (EACC), established under the Ethics and Anti-Corruption Commission Act, 2011,[137] with the implementation and enforcement of the intended Conflict of Interest Act.[138] The functions of EACC in that regard will entail to:

> (a)administer and manage conflict of interest under the Act for all public officials;

[133] See Public Officer Ethics Act, 2003, pt II.
[134] Act No 19 of 2012, Laws of Kenya.
[135] Act No 3 of 2003, Laws of Kenya.
[136] Conflict of Interest Bill, 2019, cl 58.
[137] Act No 22 of 2011, Laws of Kenya.
[138] Conflict of Interest Bill,2019 cl 5.

> (b)develop an effective system for reporting allegations of violations of the conflict of interest laws;
> (c)develop standards and promote best practices for the management of the conflict of interest;
> (d)develop administrative procedures for the management of conflict of interest;
> (e)receive and process requests related to management of conflict of interest;
> (f)conduct inquiries on matters of conflict of interest and make recommendations to the relevant bodies;
> (g)recommend appropriate sanctions to be taken against public officials for violation of obligations under the Act;
> (h)provide advisory opinions on conflict of interest on its own volition or on request by any person;
> (i)conduct public awareness on the management of conflict of interest;
> (j)analyse, seek for clarification and verify conflict of interest disclosures; and
> (k)institute proceedings for forfeiture of undeclared and unexplained assets.[139]

In enforcing the intended Act, EACC will equally be empowered to summon witnesses to give evidence orally, or in writing, under oath or affirmation, or even to produce any evidence or exhibits that EACC considers necessary; including requesting for external professional assistance or advice.[140]

Conversely, the Bill empowers EACC to delegate it powers of administration of the intended Conflict of Interest Act to any person or body which will then be deemed to be the Commission responsible for administration and management of conflict of interest in respect of a class of public officials specified by EACC.[141] But, the said delegatory power of EACC should be subjected to the Constitution and other written laws for it to work.

[139] Ibid cl 6.
[140] Ibid cl 7(1) and (2).
[141] Ibid cl 7(3).

In marked contrast, currently under POEA, 2003, the implementation and enforcement of POEA, 2003 has been left to the responsible Commission for each public officer, with the Committee of the National Assembly responsible for the ethics of members being responsible for: one, members of the National Assembly, the President, the Speaker and the Attorney-General; two, members of the Electoral Commission and the Public Service Commission; three, the Budget Controller and Auditor-General; and four, Directors and Assistant Directors of the Kenya Anti-Corruption Commission (now, EACC).[142]

[142] Section 3 of the Public Officer Ethics Act, 2003 provides as follows, as concerns the determination of the responsible Commission;

> (1) This section determines what body is the responsible Commission for a public officer for the purposes of this Act.
> (2) The committee of the National Assembly responsible for the ethics of members is the responsible Commission for—
> (a) members of the National Assembly including, for greater certainty, the President, the Speaker and the Attorney-General;
> (b) members of the Electoral Commission and the Public Service Commission; and
> (c) the Controller and Auditor-General;
> (d) Directors and Assistant Directors of the Kenya Anti-Corruption Commission.
> (3) The Public Service Commission is the responsible Commission for the public officers in respect of which it exercises disciplinary control and for the public officers described in paragraphs (d) and (e) of section 107(4) of the Constitution and for public officers who are officers, employees or members of state corporations that are public bodies.
> (4) The Judicial Service Commission is the responsible Commission for judges, magistrates and the public officers in respect of which it exercises disciplinary control.
> (5) The Parliamentary Service Commission is the responsible Commission for the public officers in respect of which it exercises disciplinary control.
> (6) The Electoral Commission is the responsible Commission for councillors of local authorities.
> (7) The Teachers Service Commission established under the Teachers Service Commission Act (Cap. 212) is the responsible Commission for teachers registered under that Act.
> (8) The Defence Council established under the Armed Forces Act (Cap. 199) is the responsible Commission for members of the armed forces, within the meaning of that Act.
> (9) The National Security Intelligence Council established under the National Security Intelligence Service Act, 1998 (No. 11 of 1998) is

This means that with the repeal of POEA, 2003, EACC officials will be exercising an oversight role over themselves. As such, there is need to specify under the Bill who will be exercising an oversight role over EACC officials as concerns conflict of interest. Also, bringing all public officials under the roof and eye of EACC is equivalent to digressing into the realm of bodies with special mandates over certain classes of public officials. For instance, the Judicial Service Commission is specifically responsible as concerns the conduct of judges, magistrates and other judicial officers and staff.[143] As such, it is imperative to rectify this before the Bill is enacted into law.

Another new aspect introduced by COI Bill, 2019 is the Register of Conflicts of Interest which will contain the particulars of a public official's registrable interests, state the nature and extent of a conflict of interest, and will be open for public inspection.[144] On the other hand, the maintenance of the same does not fall under the mandate of EACC as the Bill charges the accounting officer of the responsible public entity with maintaining the register of conflicts of interest in the prescribed manner. This would mean having multiple registers of conflicts interest owing to the numerous public entities currently in existence.

Moreover, unlike POEA, 2003, the Attorney General would be responsible for coming up with regulations for the better carrying out of the provisions of the intended conflict of interest legislation.[145]

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the responsible Commission for members of the National Security Intelligence Service established under that Act.
(9A) The Witness Protection Advisory Board established under the Witness Protection Act, 2003 shall be the responsible commission for the members of the Witness Protection Agency established under that Act.

[143] See Constitution of Kenya, 2010, arts 168 and 172(1)(c).

[144] Conflict of Interest Bill, 2019, cl 24. See also sections 36 and 37 of the Public Officer Ethics Act, 2003 on publication of disciplinary action taken against public officers who contravene the provisions of the Public Officer Ethics Act, 2003.

[145] See Conflict of Interest Bill, 2019, cl 55; and Section 42 of the Public Officer Ethics Act, 2003.

4. The Management and Regulation of Conflict of Interest in other Jurisdictions

4.1 South Africa

In South Africa, conflict of interest among public officials has been addressed by the Constitution, as the supreme law of the land, and relevant statute. Section 195(1) of the Constitution of the Republic of South Africa, 1996 [146] sets out the basic values and principles that govern public administration and stipulates that services must be provided impartially, fairly, equitably and without bias, and that public administration must be accountable. The values and principles of public administration apply to administration in every sphere of government, organs of state and public enterprises.[147]

Section 30 of the Public Service Act, 1994 (PSA, 1994)[148] provides that employees in the public sector are not to perform remunerative work outside their public employment except with the written permission of the executive authority of the department.[149] Even so, the said executive authority must take into account whether the outside work could reasonably be expected to interfere with or impede the effective performance of the employee's functions in the department or contravene the Code of Conduct for Public Servants provided for in section 41(1) (b)(v) of PSA, 1994.

[146] As adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly of South Africa; approved by the Constitutional Court (CC) on 4 December 1996 and came into force on 4 February 1997. See <https://www.gov.za/documents/constitution/constitution-republic-south-africa-1996-1>. Chapter 10 of the Constitution of the Republic of South Africa, 1996 is dedicated to public administration.

[147] Constitution of the Republic of South Africa, s 195(2).

[148] Proclamation 103 published in Government Gazette (GG) No 15791 of 3 June 1994. See <http://www.dpsa.gov.za/dpsa2g/documents/acts&regulations/psact1994/PublicServiceAct.pdf>.

[149] Under section 1 of the Public Service Act, 1994, 'department' means 'a national department, a national government component, the Office of a Premier, a provincial department or a provincial government component'.

The Public Service Regulations, 2016[150] also make further provisions as pertains to conflict of interest among public officials. Under the Regulations, incidences of conflict of interest are generally referred to an independent panel for review; the panel is constituted on ad hoc basis as applicable to the various classes of public officials.[151] The Regulations require all members of senior management service (SMS) level, employees on grade 13 or above, to minimise conflicts of interest and to put public interest first in the performance of their functions.[152] Members of SMS are required to disclose their financial interests to their executive authorities by 30 April each year.[153] The financial interests to be disclosed are:

(a) Shares, loan accounts or any other form of equity in a registered private or public companies and other corporate entities recognised by law: (i) The number, nature and nominal value of shares of any type in any public or private company and its name; and (ii) other forms of equity, loan accounts, and any other financial interests owned by an individual or held in any other corporate entity and its name.

(b) Income-generating assets: (i) A description of the income-generating asset; (ii) the nature of the income; and (iii) the amount or value of income received.

(c) Trusts: (i) The name of the trust, trust reference or registration number as provided by the Master of the High Court, and the region where the trust is registered; (ii) the purpose of the trust, and your interest or role in the trust; and (iii) the benefits or remuneration received (these include fees charged for services rendered).

(d) Directorships and partnerships: (i) The name, type and nature of business activity of the corporate entity or

[150] Came into force on 1 August 2016. See <http://www.dpsa.gov.za/dpsa2g/documents/acts&regulations/regulations2016/Public%20Service%20Regulations,%202016%20(effective%201%20August%202016).pdf>.

[151] See Public Service Regulations, 2016 (SA), reg 7.

[152] See Ibid reg 91.

[153] See Ibid regs 16-19.

partnership; and (ii) if applicable, the amount of any remuneration received for such directorship or partnership.

(e) Remunerated work outside the employee's employment in her or his department: (i) The type of work; (ii) the name, type and nature of business activity of the employer; (iii) the amount of the remuneration received for such work; and (iv) proof of compliance with section 30 of the Act must be attached.

(f) Consultancies and retainerships: (i) The nature of the consultancy or retainership of any kind; (ii) the name, type and nature of business activity of the client concerned; and (iii) the value of any benefits received for such consultancy or retainership.

(g) Sponsorships: (i) The source and description of direct financial sponsorship or assistance; (ii) the relationship between the sponsor and the employee; (iii) the relationship between the sponsor and the department; and (iv) the value of the sponsorship or assistance.

(h) Gifts and hospitality from a source, other than a family member: (i) A description, value and source of a gift; (ii) the relationship between the giver and the employee; (iii) the relationship between the giver and the department; and (iv) a description and the value of any hospitality intended as a gift in kind.

(i) Ownership and other interests in immovable property: (i) A description and extent of the land or property; (ii) the area in which it is situated; (iii) the purchase price, date of purchase and the outstanding bond on the property; and (iv)the estimated market value of the property.

(j) Vehicles: (i) A description (make and model) of the vehicle; (ii) the registration number of the vehicle; and (iii) the purchase price, date of purchase and the outstanding amount owing on the vehicle.[154]

Regulation 21 highlights the procedure for managing and eradicating conflict of interest for members of SMS and designated employees who are not

[154] Ibid reg 19.

members of SMS. As concerns members of SMS, executive authorities are required to send the financial disclosure forms to the Public Service Commission (PSC) each year.[155] The PSC must assess the financial disclosures for potential conflict of interest. Declaration in a register of interests provides a permanent mechanism to allow for the declaration in advance of potential conflict of interest. As a result, PSC has played an increasingly important role in building ethical conduct in the public service in South Africa, which has led to a process of compiling a register of interests for members of SMS to help identify and manage potential conflicts of interest.

On the other hand, conflicts of interest by designated employees who are not members of SMS are dealt with by the heads of department who indulge the affected employees on the appropriate steps to remove the conflict of interest and take disciplinary action in case of non-compliance, and make annual reports to the Minister for Public Service and Administration in that regard.[156]

The mechanisms of ad hoc financial disclosures and declaration in a register of interests complement each other. However, public access to financial declaration forms and the register of interests is limited, subject to a court order requiring disclosure.[157]

In addition, the Prevention and Combatting of Corrupt Activities Act, 2004[158] (PRECCA, 2004) prohibits members of public bodies from holding private interests in contracts, agreements or investments with that body, that is, any public officer who acquires a private interest in a contract, agreement or investment connected with the public body is guilty of an offence.[159] Exceptions to this offence include: where the public officer's conditions of employment do not prohibit him or her from such holdings; where the public official's interest is as a shareholder of a listed company; where the contract, agreement or investment is awarded through a tender process and the

[155] Ibid reg 21(1).
[156] Ibid reg 21(2).
[157] Ibid reg 20.
[158] Act No 12 of 2004 (SA). See <https://www.gov.za/sites/default/files/gcis_document/201409/a12-04.pdf>.
[159] PRECCA, 2004, s 17. See also section 12 of the Act.

official's contract of employment does not prohibit this and the tender process is independent.

Moreover, conflict of interest among public officials in South Africa is regulated through laws relating to public procurement and the rules and regulations made thereunder. These include: one, regulations pursuant to the Public Finance Management Act, 1999[160] (PFMA Regulations),[161] which creates a framework for supply chain management applicable to national and provincial departments and trading entities, constitutional institutions, and public entities; two, regulations pursuant to the Local Government: Municipal Finance Management Act, 2003 [162] (MFMA Regulations), applicable to the municipalities and institutions in the local government sphere, in particular the Municipal Supply Chain Management Regulations;[163] and three, schedules 1 and 2 of the Local Government: Municipal Systems Act, 2000,[164] which provide for Codes of Conduct for Councillors and Municipal Staff Members, respectively, and their corresponding obligations as pertains to the management of conflicts of interest.

Incidences of conflict of interest may also take a criminal prosecution angle as seen in the South African case of *S v Yengeni*.[165] The case concerned contraventions of the conflict of interest regulations specified under the Parliamentary Code of Conduct in regard to financial interests of members of Parliament, adopted in Parliament on 21 May 1996. The Code provided *inter alia* that generally no person bound by the Code was to place himself

[160] Act No 1 of 1999 (SA), assented to on 2 March 1999 and came into force on 1 April 2020. See <http://www.treasury.gov.za/legislation/pfma/act.pdf>.
[161] See <https://www.gov.za/sites/default/files/gcis_document/201409/257670.pdf>, See e.g., PMFA reg 8(3).
[162] Act No 56 of 2003 (SA). See <https://www.gov.za/sites/default/files/gcis_document/201409/a56-03.pdf>.
[163] Gazette No 27636, 30 May 2005. See <http://mfma.treasury.gov.za/RegulationsandGazettes/Gazette27636/Pages/default.aspx>. See e.g., regulations 21(c), 44 and 46(2).
[164] Act No 32 of 2000 (SA). See <https://www.gov.za/sites/default/files/gcis_document/201409/a32-000.pdf>.
[165] (A1079/03) [2005] ZAGPHC 117 (11 November 2005) <http://www.saflii.org/za/cases/ZAGPHC/2005/117.html>.

or herself in a position which conflicts with his or her responsibilities as a public representative in Parliament, nor take any improper benefit, profits or advantage from the office of the member. The Code required Members of Parliament to register certain interests which raised conflicts of interest. In this case, the Appellant, a former member of Parliament, was the chairperson of the Parliamentary Joint Standing Committee on Defence. He received a discount of 47% on a new Mercedes Benz 4x4 motor vehicle (intended to be introduced into the South African market) from one Woerfel, employed by Daimler-Chrysler AG, a company connected with the manufacture of Mercedes Benz motor vehicles and also a shareholder of a potential supplier of military equipment, namely ADS.

The Appellant did not disclose the private interest in the Parliamentary record of benefits despite it being a registrable interest. The information on the benefit became public knowledge and the Appellant made misrepresentations in an attempt to conceal his actions. Criminal proceedings were preferred against the Appellant and he pleaded guilty to charges of fraud on the basis of a plea and sentence agreement which promised a lenient sentence. He appealed his conviction, claiming that failure to make disclosures to Parliament was not tantamount to fraud, and the four-years imprisonment sentence imposed on him, which he considered to be harsh. The Court faulted his arguments against his conviction, especially as it was based on his clear and unequivocal plea of guilt. Regarding his sentence, the Appellant argued against the trial court's disregard of the plea and sentence agreement, and also argued that his resignation from Parliament should have been taken into account as a mitigating factor. The Court dismissed the appeal stating that:

> In terms of section 105A(7)(b)(i) [of the Criminal Procedure Act, 1977] the trial court has the power to enquire into all relevant circumstances relating to the sentence proposed in the agreement. This power should be exercised whenever a proposed sentence appears to be too lenient in the light of the relevant offence the accused is convicted of.
> In the present case, a non-custodial sentence for the crime of which the appellant is guilty would be flagrantly inappropriate, given the aggravating features we have pointed out above.

> Certain misdirections are said to have occurred during the sentencing process in the regional court. Even if this were so, the imposition of an appropriate sentence was not affected thereby.
>
> It was urged upon us that the fact that the appellant had resigned from Parliament should be taken into account as a mitigating factor. This argument is a fallacy. The removal of a corrupt or dishonest official or elected office bearer from the position of trust occupied and abused by her or by him is not a punishment and it is inappropriate to take such removal from office into account as a mitigating circumstance. The removal from an office of trust of a person who has, by dishonesty and greed, demonstrated that she or he is unfit to hold such office, is a natural consequence of such unfitness. The immediate and permanent removal from an office of trust should follow in every case of a crime involving an element of dishonesty as a matter of law and of public policy. This principle has long been recognised in our law in the case of an attorney who has misappropriated trust funds and of a company director or a trustee who has been convicted of a crime of which dishonesty is an element.[166]

From the foregoing, it is clear that similar to the current state of the law in Kenya, South Africa does not have a specific conflict of interest legislation in force. But, like Kenya, South Africa addresses conflict of interest among public officials through general legislation regarding ethics in public office, public procurement, and anti-corruption and criminal statutes.

4.2 Canada

Unlike Kenya and South Africa, Canada has in place a Conflict of Interest Act (the Act).[167] The purpose of the Act is to:

[166] Ibid paras 72-74.

[167] Enacted by section 2 of chapter 9 of the Statutes of Canada, 2006, in force on 9 July 2007 (SC 2006, c 9, s 2) <https://laws-lois.justice.gc.ca/PDF/C-36.65.pdf>. Canada's Conflict of Interest Act was assented to on 12 December 2006.

(a) establish clear conflict of interest and post-employment rules for public office holders;
(b) minimize the possibility of conflicts arising between the private interests and public duties of public office holders and provide for the resolution of those conflicts in the public interest should they arise;
(c) provide the Conflict of Interest and Ethics Commissioner with the mandate to determine the measures necessary to avoid conflicts of interest and to determine whether a contravention of this Act has occurred;
(d) encourage experienced and competent persons to seek and accept public office; and
(e) facilitate interchange between the private and public sector.[168]

Under the Act, a 'public office holder' means

(a) a minister of the Crown, a minister of state or a parliamentary secretary;
(a.1) the Chief Electoral Officer;
(b) a member of ministerial staff;
(c) a ministerial adviser;
(d) a Governor in Council appointee, other than the following persons, namely,

(i) a lieutenant governor,
(ii) officers and staff of the Senate, House of Commons and Library of Parliament,
(iii) a person appointed or employed under the Public Service Employment Act who is a head of mission as defined in subsection 15(1) of the Department of Foreign Affairs, Trade and Development Act,
(iv) a judge who receives a salary under the Judges Act,
(v) a military judge within the meaning of subsection 2(1) of the National Defence Act,
(vi) a Deputy Commissioner of the Royal Canadian Mounted Police, and

[168] Conflict of Interest Act (CA), s 3.

(vii) a member of the National Security and Intelligence Committee of Parliamentarians;
(d.01) the Parliamentary Budget Officer;
(d.1) a ministerial appointee whose appointment is approved by the Governor in Council; and
(e) a person or a member of a class of persons if the person or class of persons is designated under subsection 62.1(1) or 62.2(1).[169]

The Act also defines a 'public sector entity' to mean 'a department or agency of the Government of Canada, a Crown corporation established by or under an Act of Parliament or any other entity to which the Governor in Council may appoint a person, but does not include the Senate or the House of Commons.' The Act also demarcates 'reporting public officer holders', and this means a public officer holder who is:

(a) a minister of the Crown, minister of state or parliamentary secretary;
(a.1) the Chief Electoral Officer;
(b) a member of ministerial staff who works on average 15 hours or more a week;
(c) a ministerial adviser;
(d) a Governor in Council appointee, or a ministerial appointee whose appointment is approved by the Governor in Council, who exercises his or her official duties and functions on a part-time basis but receives an annual salary and benefits;
(e) a Governor in Council appointee, or a ministerial appointee whose appointment is approved by the Governor in Council, who exercises his or her official duties and functions on a full-time basis;
(e.1) the Parliamentary Budget Officer; or
(f) a person or a member of a class of persons if the person or class of persons is designated under subsection 62.1(2) or 62.2(2).[170]

[169] Ibid s 2.
[170] Ibid.

The Act is implemented and enforced by the Conflict of Interest and Ethics Commissioner (the Commissioner) appointed under section 81 of the Parliament of Canada Act.[171] Under the Act, a public officer holder is in a conflict of interest 'when he or she exercises an official power, duty or function that provides an opportunity to further his or her private interests or those of his or her relatives or friends or to improperly further another person's private interests.'[172] The Act therefore imposes a general duty on public office holders to arrange their private affairs in a manner that prevents them from being in a conflict of interest.[173] The Act then proceeds to impose a number of conflict of interest rules that target specific issues that affect public office holders, such as decision making by public office holders, preferential treatment, use of insider information, use of public influence, receipt of gifts or other advantages (especially those that have a value of $1,000 or more), contracts with public sector entities, offers of outside employment, participation in political activities, and participation in fundraisers.[174]

Regarding offers of outside employment, the Conflict of Interest Act prohibits a public office holder from allowing himself or herself to be influenced in the exercise of an official power, duty or function by plans for, or offers of, outside employment.[175] Moreover, section 15 of the Act provides that, except as required in the exercise of their official powers, duties and functions, reporting public office holders are prohibited from: one, engaging in employment or the practice of a profession; two, managing or operating a business or commercial activity; continuing as, or becoming, a director or officer in a corporation or an organization; holding office in a union or professional association; serving as a paid consultant; or being an active partner in a partnership. It is interesting how this would work in the Kenyan context without incorporating the needed exceptions!

[171] RSC, 1985, c P-1. See <https://laws-lois.justice.gc.ca/eng/acts/p-1/>; and the Canadian Office of the Conflict of Interest and Ethics Commissioner <https://ciec-ccie.parl.gc.ca/en/Pages/default.aspx>.
[172] Conflict of Interest Act (CA), s 4.
[173] Ibid s 5.
[174] See Ibid pt 1, ss 6-19.
[175] Ibid s 10.

That said, section 15 of Canada's Conflict of Interest Act does provide exceptions to the foregoing general rule, which is similar to the current position in Kenya. For instance, a reporting public office holder may engage in employment or the practice of a profession in order to retain any licensing or professional qualifications or standards of technical proficiency necessary for the purpose of maintaining their employment opportunities or ability to practice their profession on leaving public office. But, only if the reporting public office holder does not receive any remuneration, and the Commissioner is of the opinion that it is not incompatible with the reporting public office holder's duties as a public office holder. Participation of a reporting public office holder as a director or officer in a corporation or an organization is also subject to the Commissioner's satisfaction that it is not incompatible with the reporting public office holder's duties as a public office holder. In any case, nothing in section 15 of the Act prohibits or restricts a reporting public office holder from engaging in political activities.

The Act puts in place a number of compliance measures as a means to manage and address the occurrence of conflict of interest among public office holders. Such compliance measures include recusals,[176] confidential disclosures (of assets, liabilities, benefits from contracts, gifts, and offers of and acceptances of outside employment),[177] public declarations (of recusals, certain assets, liabilities, outside employment activities, gifts, and travel),[178] and divestment upon appointment.[179]

The Commissioner enforces the Act by imposing administrative monetary penalties, [180] issuing compliance orders, [181] and launching formal

[176] Ibid s 21.
[177] Ibid ss 22-24.
[178] Ibid s 25.
[179] Ibid s 27.
[180] Ibid s 52.
[181] Such compliance orders are provided for under section 30 of the Conflict of Interest Act (CA) and would require the public office holder to take any compliance measure, including an order to submit documents for the mandatory annual review of the information contained in the public office holder's confidential report, to cease prohibited outside activities, to divest controlled assets, or to refrain from seeking to influence a decision through a recusal. <https://ciec-ccie.parl.gc.ca/en/investigations-enquetes/Pages/CompOrders-Ordonnances.aspx>.

investigations of possible contraventions of the Act.[182] Administrative monetary penalties of up to $500[183] will be issued for failures by public office holders to meet the reporting deadlines stipulated under the Act, such as confidential report filings, disclosures of material changes to the initial confidential report, firm offers of outside employment and their acceptance, and public declarations of gifts and recusals.[184] Upon issuance of such penalties, the Commissioner is required to make public the nature of the violation, the name of the public office holder and the amount of the penalty, through its addition in the public registry.[185]

Nevertheless, the Commissioner can only investigate possible contraventions of the Act but he is not empowered to impose sanctions under the Conflict of Interest Code for Members of the House of Commons (the Code),[186] which does not create penalties.[187] However, the Commissioner may recommend sanctions in his investigation reports when he finds the Code has been contravened.[188]

As pertains to independence, the Office of the Conflict of Interest and Ethics Commissioner is solely responsible to Parliament and not to the federal government of Canada or an individual minister, and is part of the parliamentary infrastructure.[189] Moreover, the Commissioner is an Officer of

[182] See Conflict of Interest Act, pt 4. See also <https://ciec-ccie.parl.gc.ca/en/About-APropos/Pages/Enforcing-Appliquer.aspx>; <https://ciec-ccie.parl.gc.ca/en/investigations-enquetes/Pages/InvestReport-RapportEnquete.aspx>

[183] The maximum penalty of $500 is set with a view to encourage compliance rather than punishment per section 52 as read with section 53(3)(a) of the Conflict of Interest Act (CA).

[184] See <https://ciec-ccie.parl.gc.ca/en/investigations-enquetes/Pages/Penalties-Penalites.aspx>;<https://ciec-ccie.parl.gc.ca/en/investigations-enquetes/Pages/AMPRegime-RegimePenalites.aspx>.

[185] See Conflict of Interest Act (CA), ss 51 and 53.

[186] <https://www.ourcommons.ca/About/StandingOrders/appa1-e.htm>

[187] <https://ciec-ccie.parl.gc.ca/en/About-APropos/Pages/Enforcing-Appliquer.aspx>

[188] <https://ciec-ccie.parl.gc.ca/en/About-APropos/Pages/Enforcing-Appliquer.aspx>

[189] See Parliament of Canada Act, ss 85-87. <https://ciec-ccie.parl.gc.ca/en/About-APropos/Pages/Independence-Independance.aspx>.

Parliament and reports directly to Parliament rather than through a minister of the federal government.[190]

However, addressing conflict of interest in Canada may also take a criminal angle in the nature of the offence of breach of trust by a public officer.[191] This was the case in *R v Boulanger*,[192] where the Supreme Court of Canada held that the offence of breach of trust by a public officer is established where the Crown proves beyond a reasonable doubt that: (1) the accused is an official; (2) the accused was acting in connection with the duties of his or her office; (3) the accused breached the standard of responsibility and conduct demanded of him or her by the nature of the office; (4) the accused's conduct represented a serious and marked departure from the standards expected of an individual in the accused's position of public trust; and (5) the accused acted with the intention to use his or her public office for a purpose other than the public good, for example, a dishonest, partial, corrupt, or oppressive purpose.[193]

4.3 The United Kingdom (UK)[194]

In the UK, conflicts of interest by public officials, especially Members of Parliament, are addressed by encouraging transparency rather than creating numerous restrictions or regulations on the activities of the parliamentarians.[195] As such, parliamentarians can engage in outside employment or remunerated activity, but they have to disclose their private

[190] See Parliament of Canada Act, s 90.
[191] Criminal Code, RSC 1985, c C-46, s 122 <https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html>.
[192] [2006] 2 SCR 49, 2006 SCC 32 (CanLII) <https://www.canlii.org/en/ca/scc/doc/2006/2006scc32/2006scc32.html>.
[193] Ibid para 58.
[194] See e.g., Council of Europe's Group of States Against Corruption (GRECO), 'Fifth Evaluation Round, Preventing Corruption and promoting integrity in central governments (top executive functions) and law enforcement agencies: Evaluation Report, United Kingdom' (adopted by GRECO at its 78th Plenary Meeting at Strasbourg on 4-8 December, 2017) pp 24-33 and 46-49 <https://rm.coe.int/fifth-evaluation-round-preventing-corruption-and-promoting-integrity-i/168088ea4c>.
[195] Council of Europe's Group of States Against Corruption (GRECO), 'Fourth Evaluation Round, Corruption Prevention in Respect of Members of Parliament, Judges and Prosecutors: Evaluation Report, United Kingdom" (Adopted at GRECO's 57th Plenary Meeting (Strasbourg, 15-19 October, 2012), p 2.

interests in writing under a registration system provided for and make ad hoc oral declarations of any conflicts of interest at the onset of parliamentary proceedings. The registers on written private interests and of oral declarations on conflicts of interests are both available for public inspection. Paid advocacy or the receiving of financial inducement for parliamentary influence is also banned under specific rules.[196]

In the UK, parliamentarians also serve as ministers and the Ministerial Code helps them to manage their private interests, constituency interests and ministry interests.[197] The Ministerial Code is enforced by the Prime Minister. Following their appointment to each new public office, Ministers have to provide their Permanent Secretary with a full list in writing of all private interests which might give rise to conflict, including the interests of their spouse or partner and close family which might give rise to conflict.[198] Thereafter, the Minister will, where necessary, meet the Permanent Secretary and the Independent Adviser on Ministers' Interests to agree on how to handle the conflict(s) of interest.[199] The Minister is required to record in writing the action taken to manage the conflicts of interest(s) and provide the Permanent Secretary and the independent adviser on Ministers' interests with a copy of that record;[200] but in case the Minister retains a private interest, they have to disclose that to their Ministerial colleagues if discussions on public business affect the interest in any way and the Minister is to remain detached from the consideration of that business.[201] Moreover, while personal information that Ministers disclose remain confidential, a statement covering the relevant Ministers' interests will be published twice annually.[202]

[196] Ibid.
[197] See UK Ministerial Code, pp 14-19 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/826920/August-2019-MINISTERIAL-CODE-FINAL-FORMATTED-2.pdf>
[198] Ibid s 7.3.
[199] Ibid s 7.4.
[200] Ibid s 7.6.
[201] Ibid s 7.5.
[202] Ibid.

The Permanent Secretary and the Independent Adviser on Minister's Interests also advises Ministers on how to manage conflicts of interests involving their private financial interests.[203] This includes advice on when to dispose of the financial interest, alternative ways to manage the conflict of interest, when to retain the financial interests, and when to cease holding the public office. Civil servants are also bound to avoid situations of conflicts of interest and are guided by the Civil Service Code in that regard.

In essence, different countries have made commendable steps, through legislation or policies, or values and principles, to manage and resolve conflicts of interest among public officials, as depicted in Kenya, South Africa, Canada and the UK. What works, however, is debatable and is dependent on many other factors, such as the independence of the judiciary, the independence of the ethics and crime investigators and prosecutors, political will in terms of accountability and enforcement, and individual and institutional incentive to comply with the conflict of interest policy and legal frame work in place. For instance, in the case of South Africa, a strict and harsh legislative framework has proved unworkable and an attempt to shift to the promotion of integrity through values and principles, norms and standards seems more imperative.[204]

5. Flaws in the Conflict of Interest Bill, 2019

From the discourse above, I have highlighted some drawbacks in the Bill, especially as pertains to temporary vacation of office by public officials in order to allow for EACC investigations, and the sole empowerment of EACC with the implementation and enforcement of the intended legislation. Nonetheless, from an independent study of the Bill and the comparative study on conflicts of interest among public officers in South Africa, Canada, France and the United Kingdom, the other flaw that exists in the Bill as it is now is the lack of vital definitions.

The interpretation clause of COI Bill, 2019, clause 2, fails to define what 'a conflict of interest' means. On the other hand, article 2 of the French Act No 2013-907 of 11 October 2013 on transparency in public life defines a

[203] Ibid s 7.7-7.9.
[204] See e.g., Modimowabarwa Hendrick Kanyane, 'Conflict of Interest in South Africa: A Comparative Case Study' (2006).

'conflict of interest' as 'any situation that causes interference between a public interest and public or private interests, which could influence or appear to influence the independent, impartial and objective performance of a duty.'[205] The French definition of conflict of interest envisages not only a conflict between public interests and private interests but also a conflict between public interests themselves. However, an analysis of the intended Kenyan Conflict of Interest Act reveals that the focus of the intended legislation will be on conflict between the public interest and private interests of public officials.[206] Although Kenya would not be alone in failing to define a conflict of interest,[207] a definition would be helpful in the interpretation of the same, in setting the necessary parameters, and in ensuring certainty and transparency in what constitutes a conflict of interest.

The Bill equally does not define what constitutes or does not constitute 'private interest'. According to the Canadian Conflict of Interest Act,[208] which does not say what private interest is but rather what it is not, 'private interest does not include an interest in a decision or matter (a) that is of general application; (b) that affects a public office holder as one of a broad class of persons; or (c) that concerns the remuneration or benefits received by virtue of being a public office holder.'[209]

The Bill also does not define 'family'. On the contrary, the Canadian Conflict Interest Act defines both 'family' and 'relatives' for purposes of the Act. 'Family' means a public office holder's spouse or common-law partner, and his or her dependent children and the dependent children of his or her spouse or common-law partner.[210] 'Relatives' mean 'Persons who are related to a public office holder by birth, marriage, common-law partnership, adoption or affinity are the public office holder's relatives for the purposes of [the]

[205] Act No 2013-907 of 11 October 2013 on Transparency in Public Life.
[206] See e.g., clause 3(2)(b) and (d) of the Bill.
[207] See e.g., 'The Conflict of Public Interests, a French Exception', High Authority for Transparency in Public Life, 21 December, 2017) <https://www.hatvp.fr/english_news/the-conflict-of-public-interests-a-french-exception/>.
[208] Conflict of Interest Act, S C 2006, c 9, s 2 (Enacted by section 2 of chapter 9 of the Statutes of Canada, 2006, in force on 9 July, 2007, Last amended on 6 October, 2017) <https://laws-lois.justice.gc.ca/PDF/C-36.65.pdf>.
[209] Ibid s 2(1).
[210] Ibid s 2(2).

Act unless the Commissioner determines, either generally or in relation to a particular public office holder, that it is not necessary for the purposes of [the] Act that a person or a class of persons be considered a relative of a public office holder.'[211]

Accordingly, there is need to define the vital aspects of the intended legislation as applicable to conflicts of interest, particularly for purposes of certainty of law.

6. Conclusion

The intended Conflict of Interest Act has been fronted to have effects only on advocates or counsel who are serving in the public service, particularly the Members of Parliament. However, should the intended legislation come into force, all public officials in professional practice and business, whether in the Executive,[212] the Judiciary, Parliament, parastatals and other public entities will be affected. In particular, as much as the public interest seems to be served best when all public officials are restricted as concerns outside professional practice or other gainful employment, the public interest of having qualified and competent professionals in the public service is equally undermined.

In any case, the management of conflict of interest as coined in both the current scattered provisions of law and the intended Conflict of Interest Act is not a blanket restriction as pertains to the various aspects of conflicts of interest. On the contrary, the proper management of conflict of interest entails a case-by-case approach, whenever a real or apparent conflict of interest is said to or perceived to arise. Accordingly, as the jurisprudence on the issue of conflicts of interest indicates, the person who alleges a conflict of interest on the part of a public official must demonstrate the occurrence of the same in any particular case.[213] Otherwise, unqualified restrictions in

[211] Ibid s 2(3).
[212] See e.g., United States Office of Government Ethics, 'Outside Employment Limitations' (26 February 2016) <https://www.oge.gov/Web/oge.nsf/Resources/Outside+Employment+Limitations>; for the applicability of conflict of interest rules on the Federal Executive branch employees in the United States of America, especially as concerns outside employment.
[213] See n 72.

public service engagement on the grounds of conflict of interest would give rise to hesitations by professionals before choosing to participate in and offer their competence and expertise in the public service, as was witnessed in the *Ng'ang'a case* above.[214]

Ideally, certain aspects of the conflict of interest rules may not apply equally and in like manner to all public officials, hence there is need to modify some of the rules, especially those regarding restrictions on other gainful employment by public officials. Such modifications would entail taking into account the public entity involved, the different areas of risk for conflicts of interest for that public entity, and the nature of employment of the public official involved as relates to the areas of risk for conflicts of interest in the respective public entity.[215] That said, although enacting a conflict of interest legislation seems proper and necessary, the primary goal should be to build the capacity of public officials to be able to identify a conflict of interest and how to balance their public duties and their private interests for the public benefit.

In view of the above, the following specific recommendations to improve the COI Bill, 2019 are vital:

1. **Amendments to clause 2 of the Bill** –
    a) Incorporate the vital definitions that are missing, which are definitions of 'conflict of interest', 'private interest', 'family', and 'relatives';

[214] *Samuel Muigai Ng'ang'a v The Minister for Justice, National Cohesion & Constitutional Affairs & another* [2013] eKLR, HC (Nairobi) Const and Human Rights Div, Pet No 354 of 2012 (*Ng'ang'a case*), para 2 (See n 72).

[215] See e.g., USLegal.Com, 'Outside Employment Policies Public Employer Law and Legal Definition' <https://definitions.uslegal.com/o/outside-employment-policies-public-employer/> which indicates that outside employment limitations for Federal employees in the United States of America is determined by the job classification of the employee, such that whereas some federal employees may not engage in outside employment or may require approval before undertaking outside employment, some other federal employees, such as special government employees, generally do not require approval before undertaking outside employment (for example, special government employees appointed to perform temporary duties on a full-time or intermittent basis, with or without compensation, for no more than 130 days of any period of 365 consecutive days.)

b) The definition of 'registrable interests' is tied to what is set out in the Second Schedule of the intended Act yet the said schedule does not exist as at now, hence there is need to incorporate the Second Schedule to the Bill to allow for public scrutiny;
c) The phrase 'gainful employment' should be adjusted to 'other gainful employment' or 'outside employment' to capture the fact that the kind of employment referred to is an additional employment to the public engagement by the public official;
d) The activities that connote the 'other gainful employment' should be those provided for under clause 23(1) of the Bill and not clause 22(1) of the Bill;
e) Redefine 'Commission' to mean 'the Commission or appointing authority responsible for the public official' in line with the view above that conflict of interest areas arise differently for every public entity hence can best be managed by the responsible commission or appointing authority that the public official reports to;
f) Rather than adopting the definition of 'unexplained assets' under the Anti-Corruption and Economic Crimes Act, which is basically tied to corruption or economic crimes' investigations, there is need to define the same in the context of the intended Conflict of Interest Act.

2. Amendments to part II of the Bill (clauses 5-7 of the Bill) –

a) Part II of the Bill needs to be adjusted accordingly to remove the administration of the intended act (in terms of enforcement and implementation) from the sole ambit of EACC. The administration of the intended Act should be left to the Commission or appointing authority for the public office involved. For example, the Judicial Service Commission should administer the conflict of interest rules pertaining to judges, magistrates and other judicial officers and staff, as stipulated under the Constitution and the Judicial Service Act, 2011 (Act No 1 of 2011).
b) The Bill should also specify who will be exercising an oversight role over EACC officials as concerns conflicts of interest.

3. **Amendments to clause 23 of the Bill** –
    a) Since clause 23(3) of the Bill makes reference to the fact that public officials are generally permitted to engage in other gainful employment that is permitted under the Act, clause 23(1) of the Bill should be amended to reflect this general rule. The reworked clause 23(1) of the Bill could read in part, 'A public official may engage in any other gainful employment unless it is ....'
    b) In order not to disincentivize professionals from engaging in public service because of the risk of closing and losing their professional practice, clause 23(2) of the Bill is not necessary except as concerns engagement in such other gainful employment during official working hours of the public engagement. As such, clause 23(2)(a-d) should be deleted from the intended Act while clause 23(2)(e) is retained but subjected to the official hours as defined by the regulations, orders or policies of the affected public office. The alternative is to create job classifications and apply the restrictions on other gainful employment as necessitated by the functions of each public office as has been done for Federal employees in the US.
    c) Amend clause 23(4) of the Bill to remove the need for permission from the appointing authority for a public official to engage in other gainful employment. What is required is for the affected public official to disclose the other gainful employment that they are engaged in and any conflicts of interest that may arise in relation to their public engagement.
4. **Amendments to clause 34 of the Bill** –
    a) Adjust clause 34(1) of the Bill to make temporary vacation of office apply only where charges have been preferred against a public official for contravention of the provisions of the intended Act;
    b) Adjust clause 34(2) of the Bill to allow the Commission to provide the affected public official with notice to show cause why they should not be subjected to temporary vacation of office and commit not to interfere with evidence, witnesses, and the investigations;

c) Adjust the definition of 'temporary vacation of office' under clause 34(3) of the Bill to be subject to the Constitution and other written laws as concerns the effects of the same on the powers and other aspects that pertain to the public office involved; and

d) Adjust clause 34(4) of the Bill to make the subject application *inter partes* so as to allow the affected public official to participate in the process, being the person most affected by the recommendation for temporary vacation of office.

5. Amendment to clause 53 of the Bill –

a) Clause 53 of the Bill protects EACC officials from personal liability, both in civil and criminal proceedings, for actions taken in 'good faith' pursuant to the intended Act, but there is need to define what 'good faith' means in the context of the intended Act. As undefined as 'good faith' is now under the Bill, it is very general and open to numerous interpretations despite the grave impact of the intended legislation on public officials.

6. Amendment to clause 54 of the Bill –

a) Clause 54 of the Bill provides that '[e]very reporting entity shall file returns with the Commission once every quarter in the prescribed manner.' As it is, this provision is unclear as neither clause 2 nor clause 54 of the Bill define what a 'reporting entity' means and the annual returns to be filed by such reporting entities are equally unclear, hence there is need to amend the Bill in that regard to clear the ambiguity.

7. Amendments to Clauses 56 and 57 of the Bill –

a) The intended Conflict of Interest Act has a narrow and special focus on conflicts of interest, leaving out other aspects of ethics in the public service which are well covered under POEA, 2003. Therefore, the best move in this case should be to repeal or amend specific aspects of POEA, 2003 that only relate to conflicts of interest, and preserve POEA, 2003 as concerns the other aspects of ethics in the public service that the Bill has left out.

b) The alternative option would be to amend POEA, 2003 to broaden the coverage of conflicts of interest therein rather than

enacting a Conflict of Interest Act, as the Bill affects public officers in any case.

8. **Amendment to Clause 58 of the Bill** –
   a) More clarification is required as concerns the specific amendments to be made to LIA, 2012 and ACECA, 2003 which ideally should be set out clearly under the Bill.

Conserving Biodiversity for a Better Future

By: ***Kariuki Muigua****

Abstract

Biological diversity is a term used to refer to the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems. These resources play a huge role in not only environmental processes but also in provision of ecosystem resources for all living organisms, including human beings. Arguably, if the world is to achieve the sustainable development goals, then the conservation of these resources must be treated with urgency and it also calls for the concerted efforts of all stakeholders and cooperation from all countries, at least at the international level. The world must address the human activities that have been contributing to the degradation of these resources. This paper critically discusses in the context of Kenya some of challenges affecting the environment and offers recommendations on effective conservation of biodiversity for a better future for both the human world and the environment.

1. Introduction

It has rightly been observed that while 'biodiversity can be greatly enhanced by human activities, it can also be adversely impacted by such activities due to unsustainable use or by more profound causes linked to our development models'.[1] This is despite the fact that biodiversity is considered to be very

PhD in Law (Nrb), FCIArb (Chartered Arbitrator), LL. B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); Dip. In Arbitration (UK); MKIM; Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; Advocate of the High Court of Kenya; Senior Lecturer at the University of Nairobi, School of Law; CASELAP [June, 2021].

[1] 'Conserving Biodiversity for Life and Sustainable Development | United Nations Educational, Scientific and Cultural Organization' <http://www.unesco.org/new/en/media-services/single-view/news/conserving_biodiversity_for_life_and_sustainable_development/> accessed 29 May 2021; 'Threats to Biodiversity – Biodiversity Clearing House

important for sustenance of all forms of life on earth.[2]

It is worth acknowledging that biodiversity is essential not only to the proper functioning of earth systems; it is also key to the delivery of those ecosystem services that are crucial to human dignity and well-being including: the provision of potable water, food and fibers; soil fertility; maintenance of the 'genetic library of biodiversity' – an irreplaceable source of new innovations, pharmaceuticals and chemicals; and climate regulation – among others.[3] The concept of ecosystem services was inspired by the desire to give an economic assessment of these functions thus leading to the appearance of the concept of ecosystem services, that is, consideration with regard to their usefulness for humans.[4] Arguably, ecosystem services are divided into four categories namely: provisioning services refer to natural products that are directly used by humans for food, clothing, medicines, tools, or other uses; cultural services provide recreational opportunities, inspiration for art and music, and spiritual value; regulating services include pest control and carcass removal; and supporting services, such as pollination, seed dispersal, water purification, and nutrient cycling, provide processes essential for ecological communities and agricultural ecosystems.[5]

It is against this background that this paper discusses the important role of biodiversity in ensuring that the sustainable development agenda is achieved for the sake of current and future generations. The concept of sustainable development seeks to strike a balance between using ecosystem services to improve human lives and the need to ensure that the environment can

Mechanism' <http://meas.nema.go.ke/cbdchm/major-threats/> accessed 31 May 2021.

[2] Dmitrii Pavlov and Elena Bukvareva, 'Biodiversity and Life Support of Humankind' (2007) 77 Herald of the Russian Academy of Sciences 550.

[3] 'Conserving Biodiversity for Life and Sustainable Development | United Nations Educational, Scientific and Cultural Organization' <http://www.unesco.org/new/en/media-services/single-view/news/conserving_biodiversity_for_life_and_sustainable_development/> accessed 29 May 2021.

[4] Dmitrii Pavlov and Elena Bukvareva, 'Biodiversity and Life Support of Humankind' (2007) 77 Herald of the Russian Academy of Sciences 550, 551.

[5] Wenny, D.G., Devault, T.L., Johnson, M.D., Kelly, D., Sekercioglu, C.H., Tomback, D.F. and Whelan, C.J., 'The Need to Quantify Ecosystem Services Provided by Birds' (2011) 128 The Auk 1.

comfortably replenish itself, that is, based on the ecocentric approaches to conservation against the anthropocentric approaches only.[6]

2. Biodiversity: Definition and Scope

Notably, *Biodiversity*, a contraction of the phrase "biological diversity," can be traced to the first usage by Walter G. Rosen during a planning meeting for the 1986 National Forum on Biodiversity held in Washington, DC, while the first appearance of the word in the print literature likely occurred with the 1988 publication of the proceedings of the said conference.[7]

The Convention on Biological Diversity defines 'biodiversity' to mean "the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems".[8]

United Nations Educational, Scientific and Cultural Organization (UNESCO) defines 'biodiversity' as the diversity of all living forms at different levels of complexity: genes, species, ecosystems and even

[6] Louis J Kotzé and Duncan French, 'The Anthropocentric Ontology of International Environmental Law and the Sustainable Development Goals: Towards an Ecocentric Rule of Law in the Anthropocene' (2018) 7 Global Journal of Comparative Law 5; 'Putting Ecosystems into the SDGs' (*Water, Land and Ecosystems*, 9 October 2015) <https://wle.cgiar.org/news/putting-ecosystems-sdgs> accessed 3 June 2021; Bullock, C. H. "Nature's values: From intrinsic to instrumental. A review of values and valuation methodologies in the context of ecosystem services and natural capital." *National Economic and Social Council* 10 (2017); 'Striking a Balance between Conservation and Development' (*UNEP*, 13 May 2019) <http://www.unep.org/news-and-stories/story/striking-balance-between-conservation-and-development> accessed 3 June 2021; McCartney, M., Finlayson, M., de Silva, S., Amerasinghe, P., & Smakhtin, V., 'Sustainable Development and Ecosystem Services' (2014); Rülke, J., Rieckmann, M., Nzau, J. M., & Teucher, M., 'How Ecocentrism and Anthropocentrism Influence Human–Environment Relationships in a Kenyan Biodiversity Hotspot' (2020) 12 Sustainability 8213.

[7] John Creech, 'Biodiversity Web Resources' <http://www.istl.org/12-fall/internet.html> accessed 29 May 2021; David L Hawksworth and Royal Society (Great Britain), *Biodiversity: Measurement and Estimation* (Springer Science & Business Media 1995).

[8] Article 2, Convention on Biological Diversity.

landscapes and seascapes.[9] Biological diversity or biodiversity has also been defined as the variety of the planet's living organisms and their interactions.[10] The term is meant to encompass all of life's variation, expressed in genes, individuals, populations, species, communities and ecosystems.[11]

These definitions are relevant especially in the context of Sustainable Development debate as they reflect the important role that biological diversity can and indeed plays in meeting the essentials of realising Sustainable Development goals such as food security, alleviating poverty, among others.[12] The World Bank argues that while biodiversity provides many instrumental benefits, from food and fuel to recreation, even where biodiversity is not immediately instrumental, it represents global public goods that must be protected, if only for their potential value in the future.[13]

[9] United Nations Educational, Scientific and Cultural Organization, 'Conserving Biodiversity for Life and Sustainable Development | United Nations Educational, Scientific and Cultural Organization' <http://www.unesco.org/new/en/media-services/single-view/news/conserving_biodiversity_for_life_and_sustainable_development/> accessed 29 May 2021.

[10] Wes Sechrest and Thomas Brooks, 'Biodiversity – Threats' (2002).

[11] Ibid, 1; see also Matta, G., Bhadauriya, G., & Singh, V., "Biodiversity and Sustainable Development: A Review." *Fecundity of fresh water prawn Macrobrachium Assamense Penensularae from Khoh River, India*: 72.

[12] Måns Nilsson, 'Biodiversity's Contributions to Sustainable Development' [2019] Nature Sustainability <https://www.sei.org/publications/biodiversity-contributions-sustainable-development/> accessed 3 June 2021; Gagan Matta, Gaurav Bhadauriya and Vikas Singh, 'Biodiversity and Sustainable Development: A Review' Fecundity of fresh water prawn Macrobrachium Assamense Penensularae from Khoh River, India 72.

[13] Sobrevila, Claudia; Hickey, Valerie, *The Role of Biodiversity and Ecosystems in Sustainable Development. 2010 Environment Strategy Analytical Background Papers*; World Bank, Washington, DC. © World Bank, 2010. https://openknowledge.worldbank.org/handle/10986/27584 License: CC BY 3.0 IGO< accessed 29 May 2021.

3. Biodiversity Conservation: International and National Regulatory Frameworks

3.1 International and Regional Regulatory framework on Biodiversity Conservation

This section highlights some of the main instruments under the international regulatory framework on conservation of biodiversity.

a. Convention on Biological Diversity

The Convention on Biological Diversity (CBD) is the first global agreement to cover all aspects of biological diversity: the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding,[14] and the same was signed at the Earth Summit in Rio de Janeiro, Brazil, in 1992 and entered into force on 29 December 1993.[15]

The main principle that guides the application of CBD is that 'States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[16]

The CBD calls for cooperation among Contracting States in conservation and sustainable use of biological diversity.[17] As for individual States, the CBD requires them to develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programmes which should reflect, *inter*

[14] Article 1, Convention on Biological Diversity.
[15] Biosafety Unit, 'Welcome to the CBD Secretariat' (8 April 2013) <https://www.cbd.int/secretariat/> accessed 29 May 2021.
[16] Article 3, Convention on Biological Diversity.
[17] Ibid, Article 5.

alia, the measures set out in this Convention relevant to the Contracting Party concerned; and integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies.[18]

As for sustainable use of components of biological diversity, CBD requires Contracting States to, as far as possible and as appropriate: integrate consideration of the conservation and sustainable use of biological resources into national decision-making; adopt measures relating to the use of biological resources to avoid or minimize adverse impacts on biological diversity; protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements; support local populations to develop and implement remedial action in degraded areas where biological diversity has been reduced; and encourage cooperation between its governmental authorities and its private sector in developing methods for sustainable use of biological resources.[19]

CBD also requires each Contracting Party to, as far as possible and as appropriate, adopt economically and socially sound measures that act as incentives for the conservation and sustainable use of components of biological diversity.[20]

In order to build capacity through research and training, CBD requires all the Contracting Parties, taking into account the special needs of developing countries, to: establish and maintain programmes for scientific and technical education and training in measures for the identification, conservation and sustainable use of biological diversity and its components and provide support for such education and training for the specific needs of developing countries; promote and encourage research which contributes to the conservation and sustainable use of biological diversity, particularly in developing countries, inter alia, in accordance with decisions of the Conference of the Parties taken in consequence of recommendations of the Subsidiary Body on Scientific, Technical and

[18] Article 6, Convention on Biological Diversity.
[19] Ibid, Article 10.
[20] Ibid, Article 11.

Technological Advice: and in keeping with the provisions of Articles 16, 13 and 20, promote and cooperate in the use of scientific advances in biological diversity research in developing methods for conservation and sustainable use of biological resources.[21] In addition to this, the Contracting Parties should: promote and encourage understanding of the importance of, and the measures required for, the conservation of biological diversity, as well as its propagation through media, and the inclusion of these topics in educational programmes; and cooperate, as appropriate, with other States and international organizations in developing educational and public awareness programmes, with respect to conservation and sustainable use of biological diversity.[22]

In order to reduce or eliminate adverse impacts on biodiversity, CBD requires States to invest in impact assessment measures and/or procedures. [23]

Notably, Kenya is a signatory to the Convention on Biological Diversity, and thus obligated to consider as well as adopt the Aichi Targets in its national plans and programs on biological diversity conservation.[24]

b. International Convention on Protection of New Plant Varieties

The International Convention on Protection of New Plant Varieties [25] established the International Union for the Protection of New Varieties of Plants (UPOV) as an intergovernmental organization with headquarters in Geneva (Switzerland), to provide and promote an effective system of plant

[21] Ibid, Article 12.
[22] Article 13, Convention on Biological Diversity.
[23] Article 14, Convention on Biological Diversity.
[24] Biosafety Unit, 'Main Details' <https://www.cbd.int/countries/profile/?country=ke> accessed 3 June 2021; 'Convention on Biological Diversity | Treaties Database' <http://kenyalaw.org/treaties/treaties/87/Convention-on-Biological-Diversity> accessed 3 June 2021; 'Ministry of Environment and Forestry » Blog Archive » Statement By Kenya On Strategic Plan For Biodiversity 2011-2020' <http://www.environment.go.ke/?p=3091> accessed 3 June 2021.
[25] International Union for the Protection of New Varieties of Plants, *International Convention for the Protection of New Varieties of Plants of December 2, 1961*, as Revised at Geneva on November 10, 1972, on October 23, 1978, and on March 19, 1991, UPOV Publication no: 221(E).

variety protection, with the aim of encouraging the development of new varieties of plants, for the benefit of society.[26] The UPOV Convention encourages and rewards the ingenuity and creativeness of breeders developing new varieties of plants.[27] The UPOV system establishes basic legal principles of protection by providing the breeders exclusive rights to their plant invention for a specific period of time, while making available the genetic material to others to use in their breeding programs.[28]

C. Convention on International Trade in Endangered Species of Wild Fauna and Flora

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)[29] was adopted in March 1973 to regulate worldwide commercial trade in wild animal and plant species in order to ensure that international trade does not threaten the survival of any species.[30] CITES is a legally binding Convention on state parties to the convention, which are obliged to adopt their own domestic legislation to implement its goals.[31] CITES assigns each protected species to one of three lists namely; Appendix I lists endangered species that are at risk of extinction and these species require both import and export permits approved by the "management authority and scientific authority" of the nations involved; Appendix II species are those that are not threatened with extinction but that might suffer a serious decline in number if trade is not restricted and their trade is thus regulated by permit; and Appendix III species are protected in

[26] 'International Union for the Protection of New Varieties of Plants (UPOV)' <https://www.upov.int/portal/index.html.en> accessed 5 June 2021.
[27] 'International Convention for the Protection of New Varieties of Plants (UPOV)' <https://www.uspto.gov/ip-policy/patent-policy/international-convention-protection-new-varieties-plants-upov> accessed 5 June 2021.
[28] Ibid.
[29] United Nations, *Convention* on *International Trade* in *Endangered Species* of *Wild Fauna* and *Flora*, March 3rd, 1973, 993 U.N.T.S. 243.
[30] 'Convention on International Trade in Endangered Species | Description, Members, & Provisions' (*Encyclopedia Britannica*) <https://www.britannica.com/topic/Convention-on-International-Trade-in-Endangered-Species> accessed 6 June 2021.
[31] Ibid.

at least one country that is a CITES member and that has petitioned others for help in controlling international trade in that species.[32]

The implementation of CITES requires international co-operation due to the international nature of trade in the affected plants and animals.[33]

c. World Trade Organization Trade-Related Aspects of Intellectual Property Rights (WTO-TRIPs) Agreement

The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)[34] is considered to be the most comprehensive multilateral agreement on intellectual property (IP) which also plays a central role in facilitating trade in knowledge and creativity, in resolving trade disputes over IP, and in assuring WTO members the latitude to achieve their domestic policy objectives.[35] TRIPS Agreement provides the minimum standards of protection that WTO members must grant to copyrights, trademarks, geographical indications, industrial designs, and patents held by nationals of fellow WTO members, as well as exceptions to these minimum standards.[36]

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[32] Kathryn A Saterson, 'Government Legislation and Regulations in the United States' in Simon A Levin (ed), *Encyclopedia of Biodiversity (Second Edition)* (Academic Press 2013) <https://www.sciencedirect.com/science/article/pii/B9780123847195001866> accessed 6 June 2021; 'Convention on International Trade in Endangered Species | Description, Members, & Provisions' (*Encyclopedia Britannica*) <https://www.britannica.com/topic/Convention-on-International-Trade-in-Endangered-Species> accessed 6 June 2021.

[33] 'What Is CITES? | CITES' <https://cites.org/eng/disc/what.php> accessed 6 June 2021.

[34] World Trade Organization, General Agreement on Trade-Related Aspects of Intellectual Property, 1869 U.N.T.S. 299.

[35] '>WTO | Intellectual Property (TRIPS) - Gateway' <https://www.wto.org/english/tratop_e/trips_e/trips_e.htm> accessed 6 June 2021.

[36] 'International: WTO Considers Waiving Certain Intellectual Property Protections for the Prevention, Containment, and Treatment of COVID-19 | Global Legal Monitor' (24 March 2021) <//www.loc.gov/law/foreign-news/article/international-wto-considers-waiving-certain-intellectual-property-protections-for-the-prevention-containment-and-treatment-of-covid-19/> accessed 6 June 2021.

d. International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)

The International Treaty on Plant Genetic Resources for Food and Agriculture[37] was adopted in 2001 with the objectives of conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security.[38] The sustainable use of plant genetic resources for food and agriculture may include such measures as, *inter alia*: strengthening research which enhances and conserves biological diversity by maximizing intra- and inter-specific variation for the benefit of farmers, especially those who generate and use their own varieties and apply ecological principles in maintaining soil fertility and in combating diseases, weeds and pests; and supporting, as appropriate, the wider use of diversity of varieties and species in on-farm management, conservation and sustainable use of crops and creating strong links to plant breeding and agricultural development in order to reduce crop vulnerability and genetic erosion, and promote increased world food production compatible with sustainable development.[39]

e. COP 10 Decision X/2, Strategic Plan for Biodiversity 2011-2020

The *COP 10 Decision X/2, Strategic Plan for Biodiversity 2011-2020*[40], with its *Aichi Targets*[41], were adopted by the United Nations where Parties and other Governments, with the support of intergovernmental and other organizations, as appropriate, were urged to implement the Strategic Plan for Biodiversity 2011-2020 whose main mission is to: "take effective and urgent action to halt the loss of biodiversity in order to ensure that by 2020 ecosystems are resilient and continue to provide essential services, thereby securing the planet's variety of life, and contributing to human well-being,

[37] United Nations, International Treaty on Plant Genetic Resources for Food and Agriculture, Food and Agriculture Organization of the United Nations 13 December 2006, 2400 (p.303).
[38] Ibid, Article 1.1.
[39] Ibid, Article 6.2 (b)(f).
[40] 'The Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets' <https://www.cbd.int/kb/record/decision/12268> accessed 3 June 2021.
[41] Biosafety Unit, 'Aichi Biodiversity Targets' (18 September 2020) <https://www.cbd.int/sp/targets/> accessed 3 June 2021.

and poverty eradication. To ensure this, pressures on biodiversity are reduced, ecosystems are restored, biological resources are sustainably used and benefits arising out of utilization of genetic resources are shared in a fair and equitable manner; adequate financial resources are provided, capacities are enhanced, biodiversity issues and values mainstreamed, appropriate policies are effectively implemented, and decision-making is based on sound science and the precautionary approach."[42]

The Plan was meant to provide an overarching framework on biodiversity, not only for the biodiversity-related conventions, but for the entire United Nations system and all other partners engaged in biodiversity management and policy development.[43]

f. COP 8 Decision VIII/28, Impact Assessment: Voluntary Guidelines on Biodiversity-Inclusive Impact Assessment

VIII/28. Impact assessment: Voluntary guidelines on biodiversity-inclusive impact assessment is one chapter as part of the Report of The Eighth Meeting of The Parties to The Convention on Biological Diversity, held in Curitiba, Brazil, 20-31 March 2006.[44] The Guidelines provide detailed guidance on whether, when, and how to consider biodiversity in both project- and strategic-level impact assessments and are also an elaboration and refinement of guidelines previously adopted by the CBD (Decision VI/7-A), the Ramsar Convention on Wetlands (Resolution VIII.9) and the Convention on Migratory Species (Resolution 7.2).[45]

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[42] Ibid.

[43] Biosafety Unit, 'Strategic Plan for Biodiversity 2011-2020, Including Aichi Biodiversity Targets' (21 January 2020) <https://www.cbd.int/sp/> accessed 3 June 2021.

[44] 'VIII/28. Impact Assessment: Voluntary Guidelines on Biodiversity-Inclusive Impact Assessment Chapter from the Report Of The 8th Meeting Of The Parties To The Convention On Biological Diversity 2006 - Convention on Biological Diversity Cartagena Documents | Tonga Environment Data Portal' <https://tonga-data.sprep.org/dataset/convention-biological-diversity-cartagena-documents/resource/7712d75d-1173-4707-84ab> accessed 6 June 2021.

[45] 'Biodiversity in Impact Assessment, Background Document to CBD Decision VIII/28: Voluntary Guidelines on Biodiversity-Inclusive Impact Assessment | NBSAP Forum' <http://www.nbsapforum.net/knowledge-base/resource/biodiversity-impact-assessment-background-document-cbd-decision-viii28-0> accessed 6 June 2021.

Notably, Article 14 of the Convention on Biological Diversity (CBD) identifies impact assessment as a key instrument for achieving the conservation, sustainable use and equitable sharing objectives of the Convention.

The Voluntary Guidelines call for the Conduct of Cultural, Environmental and Social Impact Assessments regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or used by Indigenous and Local Communities.[46]

Parties, other Governments and relevant organizations are to apply the voluntary guidelines on biodiversity-inclusive environmental impact assessment as appropriate in the context of their implementation of paragraph 1 (a) of Article 14 of the Convention and of target 5.1 of the provisional framework of goals and targets for assessing progress towards 2010 and to share their experience, inter alia, through the clearing-house mechanism and national reporting.[47]

g. United Nations Framework Convention on Climate Change, 1994

The United Nations Framework Convention on Climate Change, 1994[48] ultimate objective together with any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.[49]

[46] Para. 1, COP 8 Decision VIII/28, Impact Assessment: Voluntary Guidelines on Biodiversity-Inclusive Impact Assessment.
[47] Ibid, para. 5.
[48] United Nations Framework Convention on Climate Change, 1994, A/RES/48/189.
[49] Ibid, Article 2.

3.1. Kenya's Regulatory Framework on Biodiversity Conservation

This section highlights Kenya's regulatory framework on the conservation of biodiversity and environment in general.

a. Constitution of Kenya 2010

The Constitution of Kenya 2010[50] took bolder steps than its predecessor to not only incorporate environmental conservation and sustainable development issues as a stand-alone chapter but also notably puts emphasis on a rights-based approaches to conservation which require such conservation measures to also focus on the livelihoods and rights aspects of projects, programmes, and activities.[51] It has been argued that adopting rights-based approaches to conservation serves to ensure that the protection of rights and biodiversity conservation are mutually reinforcing.[52] These rights are both procedural and substantive.[53]

The Constitution outlines favourable legislative protection of biodiversity as envisaged in Chapter Five on Land and the Environment, where there is the emphasis on sustainable use of land and other natural resources, including biodiversity as a key principle.[54]

Article 69 of the Constitution is relevant in the quest for biodiversity conservation especially in relation to the obligations of the State in respect of the environment and natural resources management.[55] The provisions of Article 69 are notably comprehensive, addressing a number of cross-sectoral

[50] The Constitution of Kenya [Government Printer, Nairobi, 27 August 2010.
[51] See Preamble; Article 10; and Chapter Five of the Constitution of Kenya 2010.
[52] 'Rights-Based Approaches to Conservation' (*IUCN*, 14 December 2015) <https://www.iucn.org/theme/governance-and-rights/about/our-work/governance-and-rights-based-approaches/rights-based-approaches-conservation> accessed 4 June 2021.
[53] Joshua Gellers and Chris Jeffords, 'Procedural Environmental Rights and Environmental Justice: Assessing the Impact of Environmental Constitutionalism' [2015] SSRN Electronic Journal; Dinah Shelton, 'Developing Substantive Environmental Rights' (2010) 1 Journal of Human Rights and the Environment 89; UN Environment, 'What Are Environmental Rights?' (*UNEP - UN Environment Programme*, 2 March 2018) <http://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/what> accessed 7 June 2021.
[54] The Constitution of Kenya 2010, Article 60, 69.
[55] The Constitution of Kenya 2010, Article 69(1).

biodiversity concerns outlined by the CBD including issues of benefit sharing, traditional knowledge, elimination of activities harmful to biodiversity and the role of the community in conservation and sustainable use of biodiversity.[56]

The Constitution also altered the legal landscape in Kenya by introducing a devolved system of governance in Kenya, with authority, roles and responsibilities split between the national government and the 47 county governments.[57] Regarding the environment and biodiversity conservation, the National Government is charged with: use of international waters and water resources; protection of the environment and natural resources with a view to establishing a durable and sustainable system of development, including, in particular-(a) fishing, hunting and gathering; (b) protection of animals and wildlife; (c) water protection, securing sufficient residual water, hydraulic engineering and the safety of dams; and (d) energy policy; agricultural policy; and capacity building and technical assistance to the counties.[58]

As for the county governments, they are charged with: Agriculture, including—(a) crop and animal husbandry; (b) livestock sale yards; (c) county abattoirs; (d) plant and animal disease control; and (e) fisheries; control of air pollution, noise pollution, other public nuisances and outdoor advertising; implementation of specific national government policies on natural resources and environmental conservation, including-- (a) soil and water conservation; and (b) forestry; and ensuring and coordinating the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level.[59] However, Counties may perform other functions assigned through an Act of Parliament. Notably, some of the functions related to environmental conservation fall within the

[56] Ibid.
[57] Fourth Schedule to the Constitution of Kenya 2010 on Distribution of functions between National and the county governments.
[58] Fourth Schedule, Part 1, Constitution of Kenya, 2010.
[59] Fourth Schedule, Part 2, Constitution of Kenya, 2010 on distribution of functions between National and the county governments; see also Section 5 of the County Governments Act (2012) which outlines the functions of County Governments.

shared jurisdiction of both national and county levels of government and should, therefore, be performed in a cooperative way.[60]

b. Kenya's Vision 2030

The Vision 2030[61] was launched in 2008 as a long-term development blue print for the country, with the goal of transforming Kenya into "a newly-industrialised, middle-income country providing a high quality of life to all its citizens in a clean and secure environment".[62] The development blueprint acknowledges the environment and all its aspect as an important part of achieving sustainable development and calls for conservation and sustainable use of these resources. The Vision 2030 acknowledges that invasive alien species and lack of a biodiversity inventory and inadequate procedures for access and benefit-sharing for biodiversity resources remain key challenges for the country.[63]

c. Environment (Management and Coordination) Act 1999

The Environmental Management and Co-ordination Act, 1999[64] provides that no person should, without prior written approval of the Authority given after an environmental impact assessment, in relation to a river, lake, sea or wetland in Kenya, carry out any of the following activities: erect, reconstruct, place, alter, extend, remove or demolish any structure or part of any structure in, or under the river, lake or wetland; excavate, drill, tunnel or disturb the river, lake or wetland; introduce any animal whether alien or indigenous in a lake, river or wetland; introduce or plant any part of a plant specimen, whether alien or indigenous, dead or alive, in any river, lake or wetland; deposit any substance in a lake, river or wetland or in, on, or under its bed, if that substance would or is likely to have adverse environmental effects on the river, lake or wetland; direct or block any river, lake or wetland from its natural and normal course; drain any lake,

[60] Article 186, 189, Constitution of Kenya.
[61] Sessional Paper 10 of 2012 on Kenya Vision 2030, Government of Kenya.
[62] Sessional Paper 10 of 2012 on Kenya Vision 2030, Government of Kenya, Office of the Prime Minister
Ministry of State for Planning, National Development and Vision 2030.
[63] Chapter 4.6, Vision 2030.
[64] Environmental Management and Co-ordination Act, No. 8 of 1999, Laws of Kenya.

river or wetland, any other matter prescribed by the Cabinet Secretary on the advice of the Authority.[65]

Overall, EMCA provides for the establishment of an appropriate legal and institutional framework for the management of the environment and for the matters connected therewith and incidental thereto.[66] The Environmental Management and Co-ordination (Amendment) Act 2015[67] was enacted to amend EMCA 1999 and notably introduced further measures on impact assessment and a schedule to outline the development activities that must require impact assessment before they are carried out and to generally align the Act with the current Constitution.[68] The objects of the devolution of government are—to promote democratic and accountable exercise of power; to foster national unity by recognising diversity; to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them; to recognise the right of communities to manage their own affairs and to further their development; to protect and promote the interests and rights of minorities and marginalised communities; to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya; to ensure equitable sharing of national and local resources throughout Kenya; to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya; and to enhance checks and balances and the separation of powers.[69]

d. Wildlife Conservation and Management Act 2013

The Wildlife Conservation and Management Act 2013[70] was enacted to provide for the protection, conservation, sustainable use and management of wildlife in Kenya and for connected purposes.[71] The implementation of this Act is to be guided by the following principles: wildlife conservation and

[65] Ibid, sec. 42(1); see also Environmental Management and Co-ordination (Amendment) Act, 2015, sec. 28.
[66] Ibid, Preamble.
[67] Environmental Management and Co-ordination (Amendment) Act, No. 5 of 2015, Laws of Kenya.
[68] Ibid, Second Schedule; Sec. 57A.
[69] Article 174, Constitution of Kenya 2010.
[70] Wildlife Conservation and Management Act, No. 47 of 2013, Laws of Kenya.
[71] Ibid, Preamble.

management should be devolved, wherever possible and appropriate to those owners and managers of land where wildlife occurs; conservation and management of wildlife should entail effective public participation; wherever possible, the conservation and management of wildlife shall be encouraged using an ecosystem approach; wildlife conservation and management should be encouraged and recognized as a form of land use on public, community and private land; benefits of wildlife conservation should be derived by the land user in order to offset costs and to ensure the value and management of wildlife do not decline; wildlife conservation and management should be exercised in accordance with the principles of sustainable utilization to meet the benefits of present and future generations; benefits accruing from wildlife conservation and management should be enjoyed and equitably shared by the people of Kenya.[72]

The Act prohibits "bio-piracy", that is, the exploration of biological resources without the knowledge and non-coercive prior consent of the owners of the resources and without fair compensation and benefit sharing as well as illegal "bio-prospecting" which means the exploration of biodiversity for commercially valuable genetic and biochemical resources.[73] The related *Wildlife Conservation and Management (Implementation of Treaties) Regulations* [74] were made by the Cabinet Secretary for Environment and Natural Resources under section 109 of the Wildlife Conservation and Management Act, 2013, and require the Kenya Wildlife Service, as the lead agency, in consultation with stakeholders: meet the requirements of the treaties and the implementation of resolutions and decisions; accomplish the requirements of the treaties and the enforcing resolutions; execute the specific decisions directed to Kenya; budget for and make arrangements for the payment of respective annual convention fees; engage in the negotiation of resolutions and decisions that are beneficial and of interest to Kenya; lobby necessary amendments on treaties, decisions and resolutions in the interest of safeguarding Kenya's wildlife; comply with and monitor compliance with international treaties; implement international treaties; monitor and prevent trade that is inconsistent with international

[72] Ibid, sec. 4.
[73] Ibid, sec. 22.
[74] Wildlife Conservation and Management (Implementation of Treaties) Regulations, 2017 (L.N. No. 241 of 2017).

treaties in accordance with the Act and the Regulations made under it; confiscate species traded in contravention with any international treaty that Kenya is party to; and take any other necessary measures for the implementation of and enhancing compliance with international treaties.[75] Each county is also to ensure that its legislation conforms with wildlife international treaties to which Kenya is a party.[76]

Similarly, the *Wildlife Conservation and Management (Protection of Endangered and Threatened Ecosystems, Habitats and Species) Regulations, 2017*[77] were made by the Cabinet Secretary for Environment and Natural Resources under section 116 (2) (f) of the Wildlife Conservation and Management Act, 2013, to: implement the classification of ecosystems, habitats and species into the following categories- critically endangered; endangered; vulnerable; protected; and threatened; provide for protection of ecosystems that are threatened or endangered so as to maintain their ecological integrity; provide for the protection of species that are threatened, endangered, vulnerable, or protected to ensure their survival in the wild; implement Kenya's obligations under international agreements regulating international trade in endangered species; and ensure sustainable management and utilisation of biodiversity.[78] The Service is required to: identify the agencies that the Service shall permit to deal with fragile ecosystems; identify the officers and offices that shall regulate access to fragile ecosystems; create corridors and buffer zones and take such measures, as the it considers necessary for the protection of fragile ecosystems; regulate the removal or introduction of any species or genetic material into the ecosystem; and take measures to maintain the natural balance in the ecosystem.[79]

[75] Ibid, Regulation 3.
[76] Ibid, Regulation 4.
[77] Wildlife Conservation and Management (Protection of Endangered and Threatened Ecosystems, Habitats and Species) Regulations, 2017 (L.N. No. 242 of 2017).
[78] Ibid, Regulation 4.
[79] Ibid, Regulation 5.

The *Wildlife Conservation and Management (Joint Management of Protected Water Towers) Regulations, 2017*[80] were made by the Cabinet Secretary for Environment and Natural Resources under section 116 of the Wildlife Conservation and Management Act, 2013, makes provision with respect to conservation of protected water towers. The objective of these Regulations is to— ensure conservation of protected water towers; and enhance cooperation between the Service and the lead agencies in management of protected water towers.[81]

e. The Forest Policy, 2020

The overall goal of this Policy[82] is sustainable development, management, utilization and conservation of forest resources and equitable sharing of accrued benefits including the flow of ecosystem services for present and future generations of the people of Kenya. In order to achieve this overall goal, ten per cent of the land area in Kenya should comprise forest cover.[83]

This policy aims at enhancing management of forest resources for conservation of soil, water biodiversity and environmental stability. Additionally, indigenous knowledge and intellectual property rights embodied in forest biodiversity and genetic resources will be harnessed and protected.[84]

f. The Forest Conservation and Management Act, No. 34 of 2016

The *Forest Conservation and Management Act 2016*[85] was enacted to give effect to Article 69 of the Constitution with regard to forest resources and to provide for the development and sustainable management, including conservation and rational utilization of all forest resources for the socio-economic development of forest adjacent communities.[86] The Forest Act 2016 acknowledges community participation in forest governance through

[80] Wildlife Conservation and Management (Joint Management of Protected Water Towers) Regulations, 2017 (L.N. No. 243 of 2017).
[81] Ibid, Regulation 3.
[82] Republic of Kenya, *Draft National Forest Policy, 2020* (Government Printer, Nairobi, 2020).
[83] Ibid, Para. 3.1.
[84] Ibid, para. 3.2.
[85] *Forest Conservation and Management Act,* No. 34 of 2016, Laws of Kenya.
[86] Preamble, No. 34 of 2016, Laws of Kenya.

establishment of community forest associations with the twin objective of sustainable conservation of forest resources and rural livelihoods.[87]
The *Forest Conservation and Management Act 2016* was enacted to give effect to Article 69 of the Constitution with regard to forest resources; to provide for the development and sustainable management, including conservation and rational utilization of all forest resources for the socio-economic development of the country.[88]

g. Water Act 2016

Water is the basic ingredient for agriculture and survival of all biodiversity. The Constitution acknowledges access to clean and safe water as a basic human right.[89] The Water Act 2016[90] provides for the regulation, management and development of water resources in line with the Constitution. The Act also gives priority to use of abstracted water for domestic purposes over irrigation. The Act provides for establishment of Water Resource User Associations (WRUAs), which are community-based associations for collective management of water resources and resolution of conflicts concerning the use of water resources.[91]

The Act requires the Cabinet Secretary responsible for water, following public participation, to formulate every five years, a National Water Resource Strategy which should contain, among other things, details of-existing water resources and their defined riparian areas; measures for the protection, conservation, control and management of water resources and approved land use for the riparian area; minimum water reserve levels at national and county levels; institutional capacity for water research and technological development; functional responsibility for national and county governments in relation to water resources management and any other matters the Cabinet Secretary considers necessary.[92]

[87] Ibid, see Parts IV and V (Sections 30-52).
[88] Preamble, No. 34 of 2016, Laws of Kenya.
[89] Article 43, Constitution of Kenya 2010.
[90] Water Act, No. 43 of 2016, Laws of Kenya.
[91] Ibid, sec. 29.
[92] S. 10, Water Act, No. 43 of 2016.

h. Seeds and Plant Varieties Act, Cap 326

This is an Act of Parliament to confer power to regulate transactions in seeds, including provision for the testing and certification of seeds, for the establishment of an index of names of plant varieties, to empower the imposition of restriction on the introduction of new varieties, to control the importation of seeds, to authorize measures to prevent injurious cross-pollination, to provide for the grant of proprietary rights to persons breeding or discovering and developing new varieties, to establish a national centre for plant genetic resources and to establish a Tribunal to hear appeals and other proceedings and for connected purposes.[93]

This Act establishes a National Plant Genetic Resources Centre which shall be responsible for the conservation and sustainable utilization of plant biodiversity in Kenya.

i. Biosafety Act, 2009

Biosafety Act, 2009[94] is an Act of Parliament to regulate activities in genetically modified organisms, to establish the National Biosafety Authority, and for connected purposes. The objectives of this Act include to facilitate responsible research into and minimize the risks that may be posed by genetically modified organisms; to ensure an adequate level of protection for the safe transfer, handling and use of genetically modified organisms that may have an adverse effect on the health of the people and the environment and to establish a transparent, science-based and predictable process for reviewing and making decisions on the transfer, handling and use of genetically modified organisms and related activities.[95]

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[93] Preamble, Seeds and Plant Varieties Act, Cap 326, Laws of Kenya.
[94] Biosafety Act (No. 2 of 2009), Laws of Kenya.
[95] See also United Nations, *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*,
Montreal, 29 January 2000, United Nations, *Treaty Series*, vol. 2226, p. 208. Article 1 thereof outlines the objective of the Protocol as follows:

> *In accordance with the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development, the objective of this Protocol is to contribute to ensuring an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into*

j. Climate Change Act No. 11 of 2016

The Climate Change Act [96] is to be applied for the development, management, implementation and regulation of mechanisms to enhance climate change resilience and low carbon development for the sustainable development of Kenya.[97] The Act is also to be applied in all sectors of the economy by the national and county governments to mainstream climate change responses into development planning, decision making and implementation; build resilience and enhance adaptive capacity to the impacts of climate change; formulate programmes and plans to enhance the resilience and adaptive capacity of human and ecological systems to the impacts of climate change; mainstream and reinforce climate change disaster risk reduction into strategies and actions of public and private entities; mainstream intergenerational and gender equity in all aspects of climate change responses and provide incentives and obligations for private sector contribution in achieving low carbon climate resilient development.[98]

k. Environmental Sustainability Guidelines for Ministries, Departments and Agencies (MDAs)

The Environmental Sustainability Guidelines for Ministries, Departments and Agencies (MDAs)[99] require MDAs in undertaking their mandates, integrate environmental considerations in their operations to fulfil the requirement of a clean, healthy and sustainable environment for all as per article 42 of the Constitution and EMCA through adoption and maintenance of good practices that contribute to the quality of environment on a long-term basis.[100]

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account risks to human health, and specifically focusing on transboundary movements.

[96] Climate Change Act No. 11 of 2016, laws of Kenya.

[97] Ibid, preamble.

[98] Ibid, sec. 3.

[99] 'National Environment Management Authority (NEMA) - Environmental Sustainability Guidelines for MDAs' <https://www.nema.go.ke/index.php?option=com_content&view=article&id=110&Itemid=124> accessed 3 June 2021.

[100] Ibid.

l. Environmental Management and Co-Ordination (Conservation of Biological Diversity and Resources, And Access to Genetic Resources and Benefits Sharing) Regulations, 2006

The *Environmental Management and Co-Ordination (Conservation of Biological Diversity and Resources, And Access to Genetic Resources and Benefits Sharing) Regulations, 2006*[101] are to apply to access to genetic resources or parts of genetic resources, whether naturally occurring or naturalised, including genetic resources bred for or intended for commercial purposes within Kenya or for export, whether in in-situ conditions or ex-situ conditions.[102] The Regulations shall, however, not apply to- the exchange of genetic resources, their derivative products, or the intangible components associated with them, carried out by members of any local Kenyan community amongst themselves and for their own consumption; access to genetic resources derived from plant breeders in accordance with the Seeds and Plant Varieties Act, Cap 326; human genetic resources; and approved research activities intended for educational purposes within recognized Kenyan academic and research institutions, which are governed by relevant intellectual property laws.[103]

The Regulations require Environmental Impact Assessment for activities that may: have an adverse impact on any ecosystem; lead to the introduction of any exotic species; or lead to unsustainable use of natural resources.[104] The Regulations also require the National Environment Management Authority (NEMA), in consultation with the relevant lead agencies, to impose bans, restrictions or similar measures on the access and use of any threatened species in order to ensure its regeneration and maximum sustainable yield as a way to conserve threatened species.[105] NEMA is also

[101] Environmental Management and Co-Ordination (Conservation of Biological Diversity and Resources, and Access to Genetic Resources and Benefits Sharing) Regulations, Legal Notice No. 160 of 2006, Laws of Kenya.

[102] 'National Environment Management Authority (NEMA) - Biodiversity Regulations' <https://www.nema.go.ke/index.php?option=com_content&view=article&id=30&Itemid=170> accessed 3 June 202.

[103] Environmental Management and Co-Ordination (Conservation of Biological Diversity and Resources, and Access to Genetic Resources and Benefits Sharing) Regulations, 2006, sec. 3.

[104] Ibid, Regulation 4(1).

[105] Ibid, Regulation 5.

tasked with, in consultation with the relevant lead agencies, to identity and prepare an inventory of biological diversity of Kenya, which should include threatened, endangered, or rare species.[106]

m. Environmental Management and Co-Ordination (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulations, 2009

These Regulations were made under the Environmental Management and Co-ordination Act, 1999, to make provision for the management, conservation and sustainable use of wetlands and wetland resources and the sustainable utilization and conservation of (resources on) river banks, lake shores, and the seashore.[107]

The Environmental Management and Co-Ordination (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulations, 2009[108] seek to achieve the following in relation to management of wetlands and wetland resources: to provide for the conservation and sustainable use of wetlands and their resources in Kenya; to promote the integration of sustainable use of resources in wetlands into the local and national management of natural resources for socio-economic development; to ensure the conservation of water catchments and the control of floods; to ensure the sustainable use of wetlands for ecological and aesthetic purposes for the common good o all citizens; to ensure the protection of wetlands as habitats for species of fauna and flora; provide a framework for public participation in the management of wetlands; to enhance education research and related activities; and to prevent and control pollution and siltation.[109]

As far as management of river banks, lake shores and sea shore are concerned, the Regulations are meant: to facilitate the sustainable utilization and conservation of resources on river banks, lake shores, and on the

[106] Ibid, Regulation 6.
[107] Preamble, Environmental Management and Co-Ordination (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulations, Legal Notice No. 19 of 2009, Laws of Kenya.
[108] Environmental Management and Co-Ordination (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulations, Legal Notice No. 19 of 2009, Laws of Kenya.
[109] Environmental Management and Co-Ordination (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulations, 2009, Regulation 4.

seashore by and for the benefit of the people and community living in the area; promote the integration of sustainable use of resources in riverbanks lake shores and the seashore into the local and national management of natural resources for socio economic development; enhance education, research and research related activities; and prevent siltation of rivers and lakes and control pollution or and other activities likely to degrade the environment.[110]

Every owner, occupier or user of land which is adjacent or contiguous to a wetland shall, with advice from the Authority, have a duty to prevent the degradation or destruction of the wetland, and should maintain the ecological and other functions of the wetland.[111]

A developer intending to a undertake a project which may have a significant impact on a wetland, river bank, lake shore or the sea shore is required to carry out an environmental impact assessment in accordance with the provisions of the Act.[112]

n. The Integrated Coastal Zone Management Policy 2007

The Integrated Coastal Zone Management Policy 2007[113] paper provides for the development of a coastal zone policy in Kenya and it is intended to guide actions and policies related to the use and management of Kenya's coastal zone resources, including their protection and restoration.[114] The Paper highlighted the fact that major threats facing coastal forests include encroachment for settlement and farming, illegal logging, human wildlife conflict, deforestation and loss of biodiversity mainly attributed to a reduction of forest cover.[115] Thus, the Integrated Coastal Zone Management (ICZM) aims at ensuring that the current and future generations of coastal stakeholders realise their basic needs and improve

[110] Ibid, Regulation, 16.
[111] Ibid, Regulation 14(1).
[112] Ibid, Regulation 21(1).
[113] Republic of Kenya, *Integrated Coastal Zone Management Action Plan For Kenya* (2007) < https://www.nema.go.ke/images/Docs/Legislation%20and%20Policies/ICZM%20Draft%20Policy%20.pdf. Accessed 29 May 2021.
[114] Ibid, para. 1.1.
[115] Ibid, para. 4.2.

their quality of life whilst maintaining diverse, healthy and productive coastal ecosystems.[116]

o. Draft National Strategy for Achieving and Maintaining Over 10% Tree Cover By 2022

The Draft National Strategy for Achieving and Maintaining Over 10% Tree Cover By 2022[117] is aligned to the National Forest Program, as a cross-sectoral framework that provides for: broad institutional and multi-stakeholder participation in accelerating the achievement of the Constitutional target of 10% tree cover of the national land area as provided under Article 69 (1) (b) of the Constitution of Kenya 2010; implementation of Presidential Directives that the Constitutional target of 10% national tree cover should be achieved by 2022 through among other initiatives the revival of Chief's tree nurseries with technical support of Kenya Forest Service and allocation of 10% Corporate Social Responsibility (CSR) to tree growing; opportunity to achieve national and global commitments with respect to climate change, biodiversity conservation, and land degradation. The government has committed to restore 5.1 million Ha of degraded landscapes as a contribution to the Africa Forest Landscape Initiative (AFR100), 50% reduction of greenhouse gases from the forest sector by 2030 as part of its Nationally Determined Contribution (NDC) to climate change, and to achieve land degradation neutrality by 2030 as a commitment to United Nations Convention to Combat Desertification (UNCCD); shared responsibility towards addressing public concerns with regard to continued deforestation, forest degradation and the need for enhanced protection, conservation and sustainable management of forest resources; enhancing the contribution of the forestry sector towards implementation of the Big 4 Agenda. The environment and forest sector is the foundation upon which the performance of the key primary sectors of the economy is anchored including, manufacturing, energy, health and agriculture.[118] It was estimated that by 2010 the national forest cover stood at 4.18 million Ha, representing 6.99% of the total land area while the

[116] Ibid, para. 12.1.
[117] Republic of Kenya, *Draft National Strategy for Achieving and Maintaining Over 10% Tree Cover By 2022*, May 2019< http://www.environment.go.ke/wp-content/uploads/2019/08/revised-Draft-Strategy-for-10-Tree-Cover-23-5-19-FINAL.pdf> accessed 31 May 2021.
[118] Ibid, para. 1.1.

gazzetted public forests managed by Kenya Forest Service covered 2.59 million Ha.[119] In 2015, the forest cover was estimated at 7.2% based on the national projection from the 2010 forest cover data.[120] This is below the recommended minimum global standard of 10% thus necessitating Kenya's goal of increasing and maintaining the national tree cover to at least 10% by 2022.[121] Most of the forestland in Kenya has been attributed to change of and use over the years thus shrinking the country's forest cover to below the international accepted standards.[122] This is despite the fact that forests are considered important for the provision of vital ecosystem services to communities living around them, contributing immensely to their livelihoods.[123] Natural forests also provide many ecosystem services needed for biodiversity conservation and sustainable management.[124]

p. Kenya Plant Health Inspectorate Service Act, 2012

The Kenya Plant Health Inspectorate Service Act[125] is an Act of Parliament to establish the Kenya Plant Health Inspectorate Service as a regulatory body for the protection of plants, seeds and plant varieties and agricultural

[119] Ibid.

[120] Ibid.

[121] https://www.the-star.co.ke/authors/gilbertkoech, 'Why State Wants You to Plant Trees on 10% of Your Land' (*The Star*) <https://www.the-star.co.ke/news/2021-03-14-why-state-wants-you-to-plant-trees-on-10-of-your-land/> accessed 3 June 2021; Anyango Otieno and Jeckoniah Otieno, 'Sh48b Needed to Raise Forest Cover to 10 per Cent' (*The Standard*) <https://www.standardmedia.co.ke/kenya/article/2001394403/sh48b-needed-to-raise-forest-cover-to-10-per-cent> accessed 3 June 2021.

[122] Donald Kipruto Kimutai and Teiji Watanabe, 'Forest-Cover Change and Participatory Forest Management of the Lembus Forest, Kenya' (2016) 3 Environments 20; Sylvester Ngome Chisika and Chunho Yeom, 'Enhancing Ecologically Sustainable Management of Deadwood in Kenya's Natural Forests' (2021) 2021 International Journal of Forestry Research e6647618; Jebiwott, A., Ogendi, G. M., Makindi, S. M., & Esilaba, M. O., 'Forest Cover Change and Ecosystem Services of Katimok Forest Reserve, Baringo County, Kenya'.

[123] Jebiwott, A., Ogendi, G. M., Makindi, S. M., & Esilaba, M. O., 'Forest Cover Change and Ecosystem Services of Katimok Forest Reserve, Baringo County, Kenya'.

[124] Sylvester Ngome Chisika and Chunho Yeom, 'Enhancing Ecologically Sustainable Management of Deadwood in Kenya's Natural Forests' (2021) 2021 International Journal of Forestry Research, 1.

[125] Kenya Plant Health Inspectorate Service Act, No. 54 of 2012, Laws of Kenya.

produce, to be responsible for administering several other written laws and for matters incidental thereto or connected therewith.

q. The National Spatial Plan (NSP) 2015-2045

The National Spatial Plan aims at creating a spatial planning context that:- enhances economic efficiency and strengthens Kenya's global competitiveness, promotes balanced regional development for national integration and cohesion, optimizes utilization of land and natural resources for sustainable development, creates livable and functional human settlements in both urban and rural areas, secures the natural environment for a high quality of life and establishes an integrated national transportation network and infrastructure system.

The National Spatial Plan 2015-2045 highlights the fact that Kenya's diverse ecosystems and habitats are home to numerous biodiversity which is a result of unique topography, climate, geology, and drainage systems. [126] Furthermore, the various communities with diverse cultural heritages and livelihoods offer Kenya diversity in socio-economic activities such as crop farming, pastoralism, tourism, mining, fishing, water transport, hydro and geothermal power generation and urban entrepreneurships. This has implications on spatial and economic planning.[127]

The international best practices call for the states to link conservation measures with local land use planning in order to achieve a comprehensive approach to habitat and biodiversity preservation.[128] Uncontrolled growth or development may lead to land fragmentation and consequently lead to habitat loss or diminished biodiversity.[129] This calls for connection of land use planning and biodiversity preservation or conservation. There is need for identification of areas that offer particularly high value for conserving biotic

[126] Republic of Kenya, National Spatial Plan 2015-2045, p.41.
[127] Ibid, p.41.
[128] Theobald, David M., Thomas Spies, Jeff Kline, Bruce Maxwell, N. T. Hobbs, and Virginia H. Dale. "Ecological Support for Rural Land-Use Planning," *Ecological Applications*, Vol.15, no. 6 (2005), pp.1906-1914 at p. 1910.
[129] Fetene, Aramde, Kumlachew Yeshitela, and Hayal Desta. "Approaches to Conservation and Sustainable Use of Biodiversity-A Review." *Nature and Science* 10, no. 12 (2012): 51-62 at p.52.

resources during planning activities by both county and national governments.[130]

r. Draft National Land Use Policy, 2016

The overall goal of the National Land use Policy 2016[131] is to provide legal, administrative, institutional and technological framework for optimal utilization and productivity of land and land related resources in a sustainable and desirable manner at National, County and local level.

The policy particularly offers a framework of recommendations and principles designed to ensure the maintenance of a land use system that will provide for land-use planning, resource allocation and resource management for sustainable development to promote public good and general welfare; environmental management and sustainable production initiatives in the utilization of land resources; coordination and integration of institutional linkages in planning at sectoral and cross-sectoral levels to foster collaboration and decision making among different land users; optimum utilization of land resources to meet governance, social-economic, political and cultural obligations of the people of Kenya; anchoring land development initiatives that will respond positively to the market demands; integrated framework for the preparation of a National Spatial Plan and review of various land use plans; mainstreaming of gender and special interest groups in land use planning and management; a comprehensive, efficient and affordable computer based land use information management system; an appropriate, accountable and democratic institution for land use conflicts resolution and mitigating problems associated with poor land use.[132]

4. Effective Conservation of Biological Diversity: Prospects and Challenges in Kenya

Biodiversity conservation in developing countries is affected by several challenges which include, *inter alia*, slow economic development, high levels of poverty, unequal land distribution, a highly segmented society, high

[130] See Theobald, David, and N. Thompson Hobbs, "A framework for evaluating land use planning alternatives: protecting biodiversity on private land," *Conservation Ecology,* Vol. 6, No. 1 (2002).
[131] Republic of Kenya, National Land use Policy 2016 (Government Printer, Nairobi, 2016).
[132] Ibid, Chapter Three.

population increase as well as commercial interests in natural resource extraction.[133] Kenya's National Environment Management Authority (NEMA) highlights *drivers of biodiversity loss* as including *both direct and indirect causes* where direct threat includes land use change, habitat destruction, and introduction of invasive alien species, among others, while indirect threats are economic system and policy of the country; unsustainable exploitation of resources and weak management system; gaps in spatial information, and lack of public awareness, to mention but a few (Emphasis added).[134]

This is also highlighted in the country's Sixth national report to the Convention on Biological Diversity[135] dated January 2021 which points out that 'while the Government of Kenya has been making efforts towards biodiversity conservation, land degradation and ecosystem destruction are still witnessed through increasing siltation of water bodies and rivers, waste management, air and water pollution in most of our urban centers mostly due to rapid population growth and urbanization.[136] Efforts to improve the management and conservation of environment and natural resources are affected by impacts of climate change, increasing population, as well as expansion of agriculture and settlements into fragile and water towers ecosystems.[137]

It is, therefore, arguable that unless these challenges are addressed, any efforts towards sustainable use of environmental resources for biodiversity conservation will remain a mirage.

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[133] Regina Birner and others, 'Prospects and Challenges for Biodiversity Conservation in Guatemala' [2005] Valuation and Conservation of Biodiversity: Interdisciplinary Perspectives on the Convention on Biological Diversity 285.

[134] NEMA, 'Threats to Biodiversity – Biodiversity Clearing House Mechanism' <http://meas.nema.go.ke/cbdchm/major-threats/> accessed 31 May 2021.

[135] Government of the Republic of Kenya, *Kenya Sixth national report to the Convention on Biological Diversity*, Ministry of Environment and Forestry, 2020 < www.environment.go.ke/wp-content/uploads/2021/01/FINAL-REPORT-MOEF-CBD-SIXTH-NATIONAL-REPORT-January-2021.docx> accessed 31 May 2021.

[136] Ibid, p. 15.

[137] Ibid, p. 15.

5. Conserving Biodiversity for a Better Future

It has been argued that the key to sustainable development is achieving a balance between the exploitation of natural resources for economic development and conserving ecosystem services that are critical to everyone's wellbeing and livelihoods.[138] This section offers some recommendations on how the world and Kenya in particular can achieve sustainable development agenda through enhanced biodiversity conservation which is a prerequisite to not only healthy environment but also important for replenishing the ecosystem services which meet the basic human needs as captured in the United Nations 2030 Agenda for Sustainable Development Agenda.

5.1. Adoption of Sustainable Agricultural Production methods and Diversification of Livelihoods

The agricultural sector in Kenya comprises the following subsectors: industrial crops, food crops, horticulture, livestock, fisheries and forestry—and employs such factors of production as land, water and farmer institutions (cooperatives, associations).[139] It is estimated that Kenya has an area of about 587,000 km^2 out of which 11,000 km^2 is water. Of the remaining 576,000 km^2 landmass, only about 16 per cent is of high and medium agricultural potential with adequate and reliable rainfall. This potentially arable land is dominated by commercial agriculture with cropland occupying 31 per cent, grazing land 30 per cent, and forests 22 per cent. The rest of the land is used for game parks, urban centres, markets, homesteads and infrastructure.[140]

Arguably, the services provided by biodiversity cover a large spectrum of factors contributing to the generation of agricultural income: crop yield and quality, soil fertility, pest control and pollination.[141] It is also worth pointing out that agricultural environments and landscapes constitute a reservoir of

[138] McCartney, M., Finlayson, M., de Silva, S., Amerasinghe, P., & Smakhtin, V., 'Sustainable Development and Ecosystem Services'. *Sustainable development and ecosystem services* (No. 612-2016-40661).

[139] Republic of Kenya, *Agricultural Sector Development Strategy 2010–2020*, p. 1.

[140] Republic of Kenya, Agricultural Sector Development Strategy, 2010-2020, p. 9. (Government Printer, Nairobi, 2010).

[141] Le Roux, X., Barbault, R., Baudry, J., Burel, F., Doussan, I., Garnier, E., Herzog, F., Lavorel, S., Lifran, R., Roger-Estrade, J. and Sarthou, J.P., 'Agriculture and Biodiversity: Benefiting from Synergies' [2008] Multidisciplinary Scientific Assessment. INRA, Paris.

diversity in terms of the number of species and the number of functions useful for agriculture (pollination, recycling of organic matter, amongst others).[142]

Notably, under Kenya's Vision 2030, agriculture is identified as a key sector to deliver the 10 per cent economic growth rate per annum envisaged under the economic pillar. As a result, the Development Blueprint leans heavily towards promotion of a commercially-oriented, and modern agricultural sector, which it plans to accomplish through institutional reforms in agriculture and livestock, increasing productivity of crops and livestock, introducing land use policies for better utilisation of high and medium potential lands, developing more irrigable areas in arid and semi-arid lands for both crops and livestock and improving market access for our smallholders through better supply chain management.[143]

While intensification of agricultural production has the potential to lead to an increase in the productivity of cultivated areas, associated with the use of mineral fertilizers and synthetic pesticides and with the "simplification" of agricultural landscapes resulting from a reduction in the diversity of production systems in order to feed the growing world population,[144] the same has also been cited as one of the main drivers of worldwide biodiversity decline. [145] The adverse effect has been on broad ecosystems and environmental aspects such as freshwater ecosystems which have suffered as excess nutrients from agricultural practices enter surface and ground waters and inefficient irrigation systems deplete water sources,[146] while

[142] Ibid, 1.
[143] Sessional Paper 10 of 2012 on Kenya Vision 2030, para. 3.3.
[144] Le Roux, X., Barbault, R., Baudry, J., Burel, F., Doussan, I., Garnier, E., Herzog, F., Lavorel, S., Lifran, R., Roger-Estrade, J. and Sarthou, J.P., 'Agriculture and Biodiversity: Benefiting from Synergies', p.2.
[145] Kleijn, D., F. Kohler, A. Báldi, P. Batáry, E. D. Concepción, Y. Clough, M. Díaz et al. "On the relationship between farmland biodiversity and land-use intensity in Europe." *Proceedings of the Royal Society of London B: Biological Sciences* 276, no. 1658 (2009): 903-909, p.903.
[146] Geier, Bernward, Jeffrey A. McNeely, and Sue Stolton. "The relationship between nature conservation, biodiversity and organic agriculture." *Stimulating positive linkages between agriculture and biodiversity. Recommendations for building blocks for the EC-Agricultural Action Plan on Biodiversity. European*

biological control of pests in arable fields which is an important ecosystem service provided by high-diversity landscapes and species-rich enemy communities can be affected by the intensification of agriculture.[147]

In addition, use of mineral fertilizers and pesticides can lead to degradation of habitat quality at local-field scales, while transformation of perennial habitats (grassland) to arable fields and destructions of field boundaries and hedges can lead to a loss of semi-natural habitats and simplification at landscape scales, including changes in the distribution and supply of resource for many species and the food webs building on them.[148] Soils may also deteriorate as a result of erosion, compaction, loss of organic matter and contamination with pesticides, and in some areas, heavy metals.[149]

Biodiversity is, therefore, important at all levels of the agricultural landscape, from the different soil microbes that help cycle nutrients and decompose organic matter, to wasps and bats that help reduce crop pests, and to birds and insects that pollinate high value crops, biodiversity helps farmers successfully grow food and maintain sustainable farm landscapes.[150] Thus, not only does the maintenance of biodiversity help ensure viable crop production, but many organisms and species have come to rely on particular

Centre for Nature Conservation, ECNC Technical report series, Tilburg, The Netherlands (2000): 101-105 at p. 102.

[147] Thies, Carsten, Sebastian Haenke, Christoph Scherber, Janne Bengtsson, Riccardo Bommarco, Lars W. Clement, Piotr Ceryngier et al., "The relationship between agricultural intensification and biological control: experimental tests across Europe." *Ecological Applications* 21, no. 6 (2011): 2187-2196, p. 2187.

[148] Ibid, p. 2187.

[149] Chris Stoate and others, 'Ecological Impacts of Arable Intensification in Europe' (2002) 63 Journal of Environmental Management 337.

[150] GRACE Communications Foundation, Biodiversity, available at http://www.sustainabletable.org/268/biodiversity; see also Benton, T.G., Bryant, D.M., Cole, L. and Crick, H.Q., 'Linking Agricultural Practice to Insect and Bird Populations: A Historical Study Over Three Decades' (2002) 39 Journal of applied ecology 673; Saunders, M.E., Peisley, R.K., Rader, R. and Luck, G.W., 'Pollinators, Pests, and Predators: Recognizing Ecological Trade-Offs in Agroecosystems.' (2016) 45 AMBIO-A Journal of the Human Environment; Wenny, D.G., Devault, T.L., Johnson, M.D., Kelly, D., Sekercioglu, C.H., Tomback, D.F. and Whelan, C.J., 'The Need to Quantify Ecosystem Services Provided by Birds' (2011) 128 The auk 1.

agricultural landscapes for their very survival. That is, agriculture both supports, and is supported by, the maintenance of biodiversity.[151]

5.2. Enhancing Environmental Education in School Curricula

Agenda 21 recognises the role of education in achieving sustainable livelihoods and thus calls for "re-orientation" of all education toward sustainability.[152] It states that both formal education and non-formal education are indispensable to changing people's attitudes so that they have the capacity to assess and address their sustainable development concerns as well as achieving environmental and ethical awareness, values and attitudes, skills and behaviour consistent with sustainable development and for effective public participation in decision-making.[153]

Environmental education has been defined as a process that allows individuals to explore environmental issues, engage in problem solving, and take action to improve the environment. As a result, individuals develop a deeper understanding of environmental issues and have the skills to make informed and responsible decisions.[154] Students are expected to be equipped with the following: awareness and sensitivity to the environment and environmental challenges; knowledge and understanding of the environment and environmental challenges; attitudes of concern for the environment and motivation to improve or maintain environmental quality; skills to identify and help resolve environmental challenges; and participation in activities that lead to the resolution of environmental challenges.[155] Notably, while environmental information is important, environmental education is more than that as it goes beyond the citizens' right to giving their opinion to incorporate: increased public awareness and knowledge of environmental issues; building up critical thinking capacity; enhanced individuals' problem-solving and decision-making skills; and it does not advocate a particular

[151] Ibid.
[152] Chapter 36, Agenda 21.
[153] Ibid, para. 36.3.
[154] OA US EPA, 'What Is Environmental Education?' (*US EPA*, 13 December 2012) <https://www.epa.gov/education/what-environmental-education> accessed 3 June 2021.
[155] Ibid.

viewpoint.[156] Environmental education is thus important for creating awareness and understanding about environmental issues which eventually leads to responsible individual and group actions.[157] As far as the role of education in achieving sustainable development is concerned, education is considered to play an important role in ensuring that human beings acquire knowledge, skills, attitudes, and values necessary to shape a sustainable future.[158] Continued enhanced and effective environmental education in Kenyan school curricula is important if Kenyans are to appreciate from their formative years the need to protect and conserve their environment and biodiversity in particular, as a perquisite for achieving sustainable development.[159]

5.3. Adopting Rights-Based Approaches to Biological Diversity Conservation

Rights-based approaches to conservation have been defined to mean "integrating rights norms, standards, and principles into policy, planning, implementation, and outcomes assessment to help ensure that conservation practice respects rights in all cases, and supports their further realisation where possible".[160]

Conservation of ecosystem goods and services is considered important for upholding economic, social and cultural rights, such as the rights to health,

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[156] OA US EPA, 'What Is Environmental Education?' (*US EPA*, 13 December 2012) <https://www.epa.gov/education/what-environmental-education> accessed 3 June 2021.

[157] Beatus Mwendwa, 'Learning for Sustainable Development: Integrating Environmental Education in the Curriculum of Ordinary Secondary Schools in Tanzania.' [2017] Journal of Sustainability Education.

[158] Ibid.

[159] AM Karugu, 'Aspects of Environmental Education in Kenya's Preschool Curriculum' <https://ir-library.ku.ac.ke/handle/123456789/8020> accessed 3 June 2021; see also Unger, Suanne, "Environmental education in Kenya: the need for a community-based biology curriculum in the secondary schools." (1993) *Graduate Student Theses, Dissertations, & Professional Papers*. 7615 < https://scholarworks.umt.edu/cgi/viewcontent.cgi?article=8650&context=etd> accessed 3 June 2021; Matthias Winfried Kleespies and Paul Wilhelm Dierkes, 'Impact of Biological Education and Gender on Students' Connection to Nature and Relational Values' (2020) 15 PLOS ONE e0242004.

[160] 'Rights-Based Approaches to Conservation' (*IUCN*, 14 December 2015) <https://www.iucn.org/theme/governance-and-rights/about/our-work/governance-and-rights-based-approaches/rights-based-approaches-conservation> accessed 4 June 2021.

an adequate standard of living, freedom from hunger and cultural freedom.[161] The discussion on human rights approaches to conservation is usually informed by the procedural rights, such as to participate in decision making, acquire information and access justice; and the substantive rights, such as to life, personal security, health, an adequate standard of living, education, freedom to practice culture and freedom from all forms of discrimination, amongst others.[162]

Notably, many international human rights instruments and multilateral environmental agreements now recognise rights to participation in environmental decision making, the importance of the environment for sustainable development and substantive rights to a clean and healthy environment. [163] Furthermore, at the national level, many national constitutions, including Kenya's, explicitly recognise rights to a clean or healthy environment and acknowledge the need for environmental protection and conservation as a prerequisite for the fulfillment of other social and economic rights. For instance, the Constitution of Kenya provides that:

> *19. (1) The Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.*
> *(2) 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.*

At the international law level, CBD Decision XII/7 2, encourages Parties to give gender due consideration in their national biodiversity strategies and action plans and to integrate gender into the development of national indicators.[164] Adopting a rights-based approach to biodiversity conservation can go a long way in enhancing the rights of both men and women. These

[161] Campese, J., Sunderland, T., Greiber, T. and Oviedo, G. (eds.), *Rights-based approaches:*
Exploring issues and opportunities for conservation. (CIFOR and IUCN. Bogor, Indonesia, 2009), p.1.
[162] Ibid, p. 2.
[163] Ibid, p. 5.
[164] CBD Decision XII/7, para.2.

rights include both procedural and substantive rights.[165] Procedural rights relate to access to the processes by which people can assert their rights where procedural rights are important in themselves, and also help ensure the realization of substantive rights, including by informing rights-holders and duty-bearers about their respective rights and responsibilities, and giving rights-holders space to make effective claims in systems of mutual accountability.[166] The relevant procedural rights conservation include: Right to information[167]; Right to participation[168]; and the right to access to justice (including redress)[169].

On the other hand, substantive rights are defined as rights to the "substance" of human wellbeing (such as rights to life, housing, water and a healthy environment) and contextually include:[170] Right to life;[171] Right to health;[172]

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[165] UN Environment, 'What Are Environmental Rights?' (*UNEP - UN Environment Programme*, 2 March 2018) <http://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/what> accessed 7 June 2021.

[166] Jenny Springer, Jessica Campese and M Painter, 'Conservation and Human Rights: Key Issues and Contexts. Scoping Paper for the Conservation Initiative on Human Rights' [2011] Unpublished report. Conservation Initiative on Human Rights Working Group, 16-17.

[167] See Article 10 of the Constitution on national values and principles of governance; Article 33 on freedom of expression; Article 35 on access to information; Article 69 on State obligations in respect of the State; *Access to Information Act*, 2016 (No. 31 of 2016), Laws of Kenya.

[168] See Article 10 of the Constitution on national values and principles of governance; Article 33 on freedom of expression; Article 69;

[169] Article 10 of the Constitution on national values and principles of governance; Article 21 on implementation of rights and fundamental freedoms; Article 22 on enforcement of Bill of rights; Article 23 on authority of Courts to uphold and enforce the Bill of Rights; Article 27 on equality and freedom from discrimination; Article 48 on access to justice; Article 70 on enforcement of environmental rights; and Article 159 on judicial authority.

[170] Jenny Springer, Jessica Campese and M Painter, 'Conservation and Human Rights: Key Issues and Contexts. Scoping Paper for the Conservation Initiative on Human Rights' [2011] Unpublished report. Conservation Initiative on Human Rights Working Group.

[171] See Article 26 of the Constitution of Kenya 2010 on right to life; see also the case of *Peter K. Waweru v Republic* [2006] eKLR12 where the Court relied on, inter alia, case law from India to equate right to life to the right to clean and healthy environment.

[172] See Article 42 of the Constitution of Kenya on right to clean and healthy environment; see also Article 43(1) (a) on the economic and social rights which

Right to an adequate standard of living, including food;[173] Right to water;[174] Right to development;[175] Right to practice one's culture;[176] Right to work;[177] Right to property;[178] and the peoples' right to self-determination, use of natural wealth and resources, and not to be deprived of means of subsistence.[179]

As already pointed out, biodiversity and generally ecosystem services are important in fulfilment of the foregoing substantive rights and hence, any efforts towards conservation of biodiversity should bear this in mind not only for the sake of fulfilling human rights but also to ensure that the benefiting group of persons have the incentive to participate in conservation measures as envisaged under Article 69(2) of the Constitution of Kenya.[180] This is also

include the right- to the highest attainable standard of health, which includes the right to health care services, including reproductive health care.

[173] See Article 43(1) (b) (c) on the economic and social rights which include the right- (b) to accessible and adequate housing, and to reasonable standards of sanitation; and (c) to be free from hunger, and to have adequate food of acceptable quality.

[174] See Article 43(1) (d) on the economic and social rights which include the right- o clean and safe water in adequate quantities.

[175] See Article 10 of the Constitution on national values and principles of governance; see also Article 27 on the equality and freedom from discrimination; Part 3 of the constitution on the specific application of rights relating to persons with disabilities, youth, minorities and marginalised groups, older members of society and specifically in reference to their right to participate in national development affairs.

[176] See Article 11 of the Constitution of Kenya; Article 32 on freedom of conscience, religion, belief and opinion; and Article 44 on language and culture.

[177] See Article 41 of the Constitution of Kenya on labour relations; Employment Act, 2007, Cap 226; Employment and Labour Relations Court Act, No. 20 of 2011; Labour Relations Act, 2007.

[178] See Article 40 of the Constitution on protection of property rights.

[179] See United Nations. Declaration on the Rights of Indigenous Peoples, 2007; *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3; *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

[180] 69. Obligations in respect of the environment:
(2) 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;
see also Emily Woodhouse and J Terrence McCabe, 'Well-Being and Conservation: Diversity and Change in Visions of a Good Life among the Maasai of Northern Tanzania' (2018) 23 Ecology and Society.

in line with the Aichi targets of the Convention on Biological Diversity (CBD) which calls upon States to ensure that biodiversity resources are "effectively and equitably managed", where equity or justice is conceptualized in three areas of concern: (i) distribution of costs and benefits from conservation; (ii) procedure referring to participation in decision making; (iii) recognition of social and cultural difference.[181]

Thus, building strategies for the protection of ecosystem services into conservation and land-use planning is essentially the promotion of human survival, and not merely a luxury task.[182] The *Natural Resources (Benefit Sharing) Bill, 2018* is meant to establish a system of benefit sharing in resource exploitation between resource exploiters, the national government, county governments and local communities; and for connected purposes.[183] The legislation is to apply to: sunlight; water resources; forests, biodiversity and genetic resources; wildlife resources; industrial fishing; and wind.[184] Its application is to be guided by the following principles: transparency and inclusivity; revenue maximization and adequacy; efficiency and equity; accountability and participation of the people; rule of law and respect for human rights of the people; and sustainable natural resources management.[185] Once enacted, this legislation has the potential to entrench a rights-based approach to natural resources management in Kenya.

5.4. Effective Pest Control for Biodiversity Conservation

Pests have a negative effect not only on agricultural production but also on biodiversity conservation. It has been observed that the damage caused by pest organisms is one of the most important factors in the reduced productivity of any crop plant species, losses can occur in the field (pre-

[181] Emily Woodhouse and J Terrence McCabe, 'Well-Being and Conservation: Diversity and Change in Visions of a Good Life among the Maasai of Northern Tanzania' (2018) 23 Ecology and Society, 52.
[182] Wenny, D.G., Devault, T.L., Johnson, M.D., Kelly, D., Sekercioglu, C.H., Tomback, D.F. and Whelan, C.J., 'The Need to Quantify Ecosystem Services Provided by Birds' (2011) 128 The Auk 1.
[183] Preamble, Natural Resources (Benefit Sharing) Bill, 2018.
[184] Ibid, clause 3.
[185] Ibid, clause 4.

harvest) and during storage (post-harvest).[186] However, accurate estimates of agricultural losses caused by insects are difficult to obtain because the damage caused by these organisms depends on a number of factors related to environmental conditions, the plant species being cultivated, the socioeconomic conditions of farmers, and the level of technology used.[187] It is important to address the problem of pests if food security and biodiversity conservation are to be achieved. Pest control is part of the ecosystem services that improve and sustain human life.[188]

One of the possible and effective approaches in pest control for biodiversity conservation is the integrated pest control. Integrated Pest Management (IPM) is an ecosystem approach to crop production and protection that combines different management strategies and practices to grow healthy crops and minimize the use of pesticides.[189] IPM has been developed as a way to control pests without relying solely on pesticides.

FAO promotes IPM as the preferred approach to crop protection and regards it as a pillar of both sustainable intensification of crop production and pesticide risk reduction.[190] FAO defines Integrated Pest Management to mean '*the careful consideration of all available pest control techniques and subsequent integration of appropriate measures that discourage the development of pest populations and keep pesticides and other interventions to levels that are economically justified and reduce or minimize risks to human health and the environment. IPM emphasizes the growth of a healthy crop with the least possible disruption to agro-ecosystems and encourages natural pest control mechanisms*.'[191]

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[186] Oliveira, C. M., A. M. Auad, S. M. Mendes, and M. R. Frizzas, "Crop Losses and The Economic Impact of Insect Pests on Brazilian Agriculture," *Crop Protection* 56 (2014), pp. 50-54, p.51.

[187] Ibid.

[188] Philpott Stacy M., Biodiversity and Pest Control Services. In: Levin S.A. (ed.), *Encyclopedia of Biodiversity*, second edition, Waltham, MA: Academic Press, 2013, Volume 1, pp. 373-385.

[189] FAO, 'AGP - Integrated Pest Management,' available at http://www.fao.org/agriculture/crops/core-themes/theme/pests/ipm/en/.

[190] Ibid.

[191] 'Plant Production and Protection Division: Integrated Pest Management' <http://www.fao.org/agriculture/crops/thematic-sitemap/theme/pests/ipm/en/> accessed 7 June 2021.

The Protection of Traditional Knowledge and Cultural Expressions Act, 2016 [192] was enacted *to provide a framework for the protection and promotion of traditional knowledge and cultural expressions; to give effect to Articles 11, 40 and 69(L) (c) of the Constitution; and for connected purposes*. The Act defines "traditional knowledge" to include *any knowledge contained in the codified knowledge systems passed on from one generation to another including agricultural, environmental or medical knowledge, knowledge associated with genetic resources or other components of biological diversity, and know-how of traditional architecture, construction technologies, designs, marks and indication*s.[193]

Similarly, Aichi Target 18 envisages that by *2020, the traditional knowledge, innovations and practices of indigenous and local communities relevant for the conservation and sustainable use of biodiversity, and their customary use of biological resources, are respected, subject to national legislation and relevant international obligations, and fully integrated and reflected in the implementation of the Convention with the full and effective participation of indigenous and local communities, at all relevant levels*.[194]

Farmers should be encouraged to use the least harmful approaches to pest control, including applying indigenous methods of pest control.[195]

5.5. Biodiversity Mainstreaming for Food and Nutrition Security

Biodiversity for food and agriculture includes the variability among living organisms contributing to food and agriculture, including also the forestry and fisheries sectors.[196] The sustainable use of genetic resources for food and

[192] Protection of Traditional Knowledge and Cultural Expressions Act, No. 33 of 2016, Laws of Kenya.
[193] Protection of Traditional Knowledge and Cultural Expressions Act, s.2.
[194] 'Target 18 – Traditional Knowledge and Customary Sustainable Use – Local Biodiversity Outlooks' <https://localbiodiversityoutlooks.net/targets/target-18-traditional-knowledge-and-customary-sustainable-use/> accessed 7 June 2021.
[195] D Grzywacz and others, 'The Use of Indigenous Ecological Resources for Pest Control in Africa' (2014) 6 Food Security 71; 'Cultural Methods of Pest, Primarily Insect, Control' <https://eap.mcgill.ca/publications/eap58.htm> accessed 6 June 2021.
[196] FAO, 'Climate Change and Biodiversity for Food and Agriculture,' Technical Background Document
From The Expert Consultation Held on 13 to 14 February 2008, p.1.

agriculture will be the foundation for many of the adaptation strategies required in food and agriculture. Arguably, in order to adapt to climate change, plants and animals important for food security will need to adjust to abiotic changes such as heat, drought, floods and salinity.[197]

Genetic resources are generally seen as the living material that local communities, breeders and researchers use to adapt to changing socio-economic needs and ecological challenges. Maintaining and using a wide basket of genetic diversity at a time of climate change is considered an essential insurance policy for the food and agriculture sectors.[198] Crop genetic diversity is considered a source of continuing advances in yield, pest resistance and quality improvement, and it is widely accepted that greater varietal and species diversity would enable agricultural systems to maintain productivity over a wide range of conditions.[199] It has been argued that maintaining and enhancing the diversity of crop genetic resources is of increasing importance to ensure the resilience of food crop production particularly in light of climate change challenges.[200] One of the ways of promoting food security in the face of climate change is adoption of climate smart agriculture. FAO defines Climate-Smart Agriculture (CSA) as an approach that helps to guide actions needed to transform and reorient agricultural systems to effectively support development and ensure food security in a changing climate.[201] CSA aims to tackle three main objectives: sustainably increasing agricultural productivity and incomes; adapting and building resilience to climate change; and reducing and/or removing greenhouse gas emissions, where possible. CSA is an approach for developing agricultural strategies to secure sustainable food security under climate change. CSA provides the means to help stakeholders from local to

Available at http://www.fao.org/uploads/media/FAO_2008a_climate_change_and_biodiversity_02.pdf

[197] Ibid.

[198] Ibid, p.3.

[199] Carpenter, Janet E., "Impact of GM crops on biodiversity," *GM crops* 2, no. 1 (2011): 7-23, p.7.

[200] Ibid, P.7.

[201] 'Climate-Smart Agriculture | Food and Agriculture Organization of the United Nations' <http://www.fao.org/climate-smart-agriculture/en/> accessed 7 June 2021.

national and international levels identify agricultural strategies suitable to their local conditions.[202]

Pollinators are part of the food production chain and must therefore be taken care of. Experts have warned that climate change will profoundly impact insects, including their physiology (how they live and reproduce), their behaviour and physical features, as well as relationships with other species (like host plants and natural enemies).[203] As a result, immense shifts are predicted in population dynamics, abundance and geographical spread of insects. In turn, these alterations will have positive and negative outcomes for people, livestock and crops, in terms of vulnerability to insect-transmitted diseases, and availability of essential services provided by insects such as pollination and pest regulation.[204] Thus, this must form part of the wider debate in the quest for food and nutrition security.

6. Conclusion

This paper has offered a critical discussion on effective conservation of biodiversity as a way of securing the future both for the sake of human beings as well as all other living organisms. As discussed in the paper, biodiversity is an important part of the efforts towards achieving sustainable development agenda as it is the source of all life and all raw materials required to meet human needs. Any efforts to secure human life for both the present and future generations must, therefore, include conservation of biodiversity as a matter of necessity. Conserving Biodiversity for a Better Future is thus an idea that we must deeply reflect on as a matter of urgency.

[202] FAO, "Climate-Smart Agriculture," available at http://www.fao.org/climate-smart-agriculture/en/

[203] 'Insects and Climate Change | Icipe - International Centre of Insect Physiology and Ecology' <http://www.icipe.org/news/insects-and-climate-change> accessed 7 June 2021.

[204] International Centre of Insect Physiology and Ecology *(icipe), 'Insects and Climate Change,'* available at http://www.icipe.org/news/insects-and-climate-change Accessed on 6/06/2021.

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204 International Centre of Insect Physiology and Ecology (icipe), 'Insects and Climate Change,' available at http://www.icipe.org/news/insects-and-climate-change Accessed on 6/06/2021.Conserving Biodiversity for a Better Future
38 © Kariuki Muigua, Ph.D., June, 2021'Cultural Methods of Pest, Primarily Insect, Control' <https://eap.mcgill.ca/publications/eap58.htm> accessed 6 June 2021.

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Seizing The Ripe Moment: A Critical Analysis of the Resolution of the Twenty Years Ethiopia-Eritrea Conflict in 2018

By: ***Berita Mutinda Musau****

Abstract

After two decades of protracted conflict, Ethiopia and Eritrea resolved their differences in 2018 ending a conflict that had persisted between the two countries since their border conflict in 1998. The the two countries signed a historic peace agreement in July 2018 and committed to end their mutual hostility and embrace peace, friendship, development and cooperation. Nearly twenty years earlier, externally led mediation and arbitration had failed to resolve the conflict leading to a situation of "no peace no war" between the two countries. This paper seeks to critically analyze the successful conflict resolution in 2018 viz a vis the unsuccessful resolution of the same conflict nearly twenty years earlier. Applying the ripe moment and human needs theories of conflict resolution, this paper examines and finds that there were domestic and international conditions that ripened the conflict for resolution in 2018 leading to largely internally driven negotiations, mediation and that successfully resolved the conflict. The paper also finds that mediation and arbitration failed to resolve the conflict about twenty years earlier (1998-2002) owing to the fact that it was predominantly externally driven and thus lacked ownership by the parties to the conflict (Ethiopia and Eritrea) in addition to the fact that the conflict was at that time unripe for resolution. The paper concludes that internally driven conflict resolution coupled with the existence of the ripe moment is likely to succeed and be more durable compared to an externally driven conflict resolution.

Introduction

In 2018, the Horn of Africa caught world media attention, not for bad news of violent conflict but for good news that caught the whole world by surprise. Two arch enemies: Ethiopia and Eritrea had successfully resolved their conflict after twenty years of hostility towards each other. The two countries

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signed a historical agreement on July 9 2018 indicating their commitment to lay down their mutual animosity and embrace peace, development and cooperation in the Horn of Africa (Ylönen 2019:245). Speaking about these profound changes, Antonio Guterres, the Secretary General of the United Nations, made the following comments " There is a powerful wind of hope blowing across the Horn of Africa"…. 'We have seen a conflict that has lasted for decades, ending, and that has a very important meaning in a world where we see, unfortunately so many conflicts multiplying, and lasting forever' (UN News 2018).

Sixteen years earlier, in 2000 when the two countries were engaged in violent confrontations over a border dispute, mediation and arbitration efforts from external actors were unable to resolve the conflict leading to a situation of "no peace no war" between the two Horn of Africa states. How then were the two countries able to silently resolve their conflict successfully? Why did conflict resolution fail in 2000 and why did it succeed in 2018? This paper analyses the alternative dispute resolution mechanisms, conflict resolution theories, approaches and models/frameworks that were applied in the two conflicts and seeks to establish the failure of the 2000 conflict resolution vis a vis the success of conflict resolution in 2018. It begins by discussing the theoretical framework to be applied in analyzing the Ethiopia- Eritrea conflict resolution and then looks at the background to the Ethiopia-Eritrea conflict so as to put the conflict into perspective. This is then followed by the analysis of the two conflict resolution processes. The paper concludes that internally driven conflict resolution is likely to be successful and durable compared to one that is externally driven.

Theoretical Framework for the Analysis of the Ethiopia-Eritrea Conflict Resolution

Wallensteen (2007:8) defines conflict resolution as a situation where conflicting parties enter into an agreement that solves their central incompatibilities, accept each other's continued existence as parties and cease all violent action against each other. Tesfay (2012:189) contrasts classical and contemporary conflict resolution. He argues that while the classical view of conflict resolution focused on top-down intervention that addressed the core parties to the conflict and gave primary responsibility to external actors, the contemporary view focuses on a bottom up process that

appreciates the role of indigenous peacemakers. Contemporary view also takes a broad nature of the timing of intervention in conflicts.

Conflict resolution in the year 2000 sought to address the 1998-2000 border conflict between Ethiopia and Eritrea. The conflict resolution process was guided by the liberal theory which places a high value in international organizations in resolving conflict. Consequently, it applied the liberal peace model of conflict resolution. The liberal model is a top-down model that seeks to bring the leaders (especially state leaders) of the conflicting parties together for mediation with the help of an external party (Tesfay 2012). The external parties involved in the resolution of the 1998-2000 border conflict were international organizations such as the United Nations and the Organization of African Unity (OAU) as well as powerful states such as the United States (U.S). The liberal theory and model also place value in international institutions such as international law in managing behavior of states and enhancing international peace and stability. The Ethiopia Eritrea Boundaries Commission was established so as to arbitrate the border conflict and give a verdict guided by international law. The approaches of conflict resolution applied were mediation and arbitration whose outcomes were a peace agreement (the Algiers Peace Agreement) and the binding ruling (the EEBC verdict) respectively. Bercovitch (1996:242) defines Arbitration as settlement of a dispute by a binding award rendered by an entity that is granted with such powers by the parties themselves. The award is arrived at by an authoritative legal process. This means that arbitration is a zero sum process that produces a winner and a loser in the conflict.

This paper applies the ripe moment theory and the human needs theory to analyze the 2018 successful conflict resolution and resumption of peace between Ethiopia and Eritrea. According to the ripe moment theory, a conflict can only be successfully resolved when it is ripe for resolution. Ripeness is a condition that is necessary for initiation of negotiations which must be seized by the parties to the conflict themselves or through persuasion by a mediator (Zartman 2001). There are two conditions for ripeness, the conflicting parties 'perception of a mutually hurting stalemate as well as a mutually enticing opportunity (Zartman 2001). This is coupled with the parties' cost benefit analysis leading to the realization that the conflict is costlier to them than peace. This paper argues that there were domestic and

international conditions that enhanced the ripening of the Ethiopia-Eritrea conflict for resolution. The human needs theory posits that deprivation of basic human needs leads to conflict. Burton (1990) identifies the main human needs whose deprivation can cause violent conflict as needs such as the need for identify, recognition, and security. This paper maintains that, Ethiopia, which initiated the 2018 conflict resolution, recognized and fulfilled Eritrea's needs for identify and recognition as a sovereign state as well as security. Negotiation was adopted as the necessary approach of conflict resolution. Although some external intervention played some role, the negotiations were majorly driven by the key parties to the conflict (the leaders of the two countries) and the outcome was a peace agreement that both parties were willing to implement.

Background to the Ethiopia-Eritrea Conflict

Mayer asserts that "the history of the people involved in a conflict , of the system in which the conflict is occurring as well as the history of the issues themselves can powerfully influence the course of the conflict (Meyer 200:4, cited in Tesfay 2012:167). Thus the history of Eritrea which is intricately related to Ethiopia can help understand the conflict between the two countries and therefore inform the success and failure of various conflict resolution approaches.

Eritrea's Colonization and Struggle for Independence

The journey to Eritrea's independence began with colonization by Italy until the defeat of Italy during World War II in 1941. From 1941, Eritrea was administered by the British administration up to 1950 and then, following a United Nation resolution, it was federated with Ethiopia as an autonomous entity under the sovereignty of the Ethiopian Emperor (Tesfay 2012: 164); Abbay 2001; Negash & Tronvoll 2000:9). This affected the Tigrinya of Eritrea and the Tigreans of Ethiopia, who were of the same ethnic group but now belonged to different political entities. In 1961, the Eritreans formed a movement called The Eritrean People's Liberation Front (EPLF) and began an armed struggle for independence from Ethiopia (Abbay 2001:481, Makinda 1982) but were kept at bay by the powerful Ethiopian military. In 1975, The Tigrayan Peoples Liberation Front (TPLF) which was formed in Ethiopia to fight against the repressive military junta of Megistu Haile-

Mariam supported Eritrea's struggle for independence (Negash & Tronvoll 2000:10).

In 1991, after the defeat of the Mengistu Haile Mariam's military junta in Ethiopia, the Eritrean People's Liberation Front (EPLF) entered into Asmara, signaling an emergence of a de facto independent state of Eritrea (Negash & Tronvoll 2000:31). However, Eritrea remained legally a part of Ethiopia until April 1993 when a referendum was held and Eritrea was formally declared an independent state on 24th May 1993 and Ethiopia formally recognized Eritrea's independence (Prunier 1998). Eritrea became a one party state with Isaias Afwerki as the president. He has remained president to date.

Eritrea-Ethiopian Short Lived Cordial Relations (1991-1997)

After Eritrea assisted Ethiopia in toppling Mengistu Haile-Mariam's military junta in 1991 a brief rapprochement between Eritrea and Ethiopia ensued (Connell 1999:5). The two leaders of Eritrea and Ethiopia, Issaias Afwerki and Meles Zenawi promised to work together, to cooperate and uphold peace and democracy and work towards development. The two countries signed a Friendship and Cooperation Agreement (FCA) anchored on three essential points: i. the application of a common currency (the Ethiopian Birr) until Eritrea was able to issue its own currency, ii. That Ethiopia would have free access to the Eritrean ports of Assab and Massawa and iii. That Ethiopia would run and maintain the Assab oil refinery without paying taxes and duties (Negash & Tronvoll 2000:35; Mesfin 2012; Bereketeab 2010:18).

In spite of the spirit of cooperation that the leaders extended to each other, economic and political tensions persisted, deteriorating their relations. The agreement of a common currency was watered down a few years later, in 1997, when Eritrea introduced a new Eritrean currency (*the Nafka*) without consultations with Ethiopia (Negash & Tronvoll 2000:35). The Eritrean government proposed for the two currencies (*the Birr and the Nafka*) to have the same value and to be used in both countries, but the Ethiopian government rejected this proposal and insisted that all trade transactions between the two countries should carried out using foreign currency (Negash & Tronvoll 2000; Bereketeab 2010:18; Mesfin 2012:97). Unable to reach an agreement, Ethiopia boycotted Eritrean seaports and instead

redirected its trade through Djibouti (Bereketeab 2010:18). This worsened the already deteriorating relations setting the stage for the 1998 border war.

Ethiopia-Eritrean Border Conflict and the Twenty Year Hostility

Minor disagreements had been in existence between Ethiopia and Eritrea concerning border definition. In an effort to resolve this latent conflict diplomatically, a bilateral Ethio-Eritrean commission had been established in November 1997 to address the issue (Prunier 1998). The commission met regularly either in Asmara or in Addis Ababa. The Ethiopia-Eritrean border conflict began in May 1998 when Eritrean soldiers allegedly crossed into territories that were under the Ethiopian administration, sparking a shootout between Eritrea and Ethiopian forces (Tronvoll 2009). The Eritrean army later invaded Badme area and occupied several villages that had been perceived to be in Ethiopian territory sparking Ethiopia's reaction. Badme, the area of contention has surprisingly been described as a barren strip of land, piece of desert or an inconsequential piece of estate owing to its small size and absence of any known valuable resources (Tesfay 2012; Khadiagala 1999; Connell 1999). In a month's time what started as border skirmishes, escalated into an all-out bilateral war that attracted international attention.

The international community expressed concern about the outbreak of aggression between two of Africa's poorest and most militaristic countries (Tronvoll 2009:4). A joint proposal by the United States of America (USA) and Rwanda for a peace negotiation was accepted by Ethiopia but rejected by Eritrea (Tronvoll 2009, Khadiagala 1999). Later, the Organization of African Unity (now African Union) and the United Nations (UN) took over the responsibility of resolving the conflict, and international mediators moved between Addis Ababa in Ethiopia and Asmara in Eritrea trying to broker peace without success. Skirmishes continued intermittently for the next two years.

In May 2000, Ethiopia launched a major offensive leading to a *de facto* victory of the Ethiopian army and the withdrawal of the Eritrean army from the border deep into Eritrea. The Ethiopian Army took control of a wide stretch of Eritrean territories along the common border (Tronvoll 2009:5). In addition to the casualties, several people were internally displaced and others became refugees. Moreover, Ethiopia deported over 75,000 Eritreans while

Ethiopians of Eritrean origin were deported and stripped off their citizenship rights; Eritrea also expelled over 70,000 Ethiopians working in Eritrea (Tronvoll 2009:5). A United Nations (UN) peacekeeping mission (UN peacekeeping mission to Ethiopia and Eritrea UNMEE) was deployed in 2001 to the Eritrean-Ethiopian border to temporarily guard a buffer zone between the two armies. It was later withdrawn in 2008.

Efforts to Resolve the Ethiopia-Eritrea Conflict

The escalation of the border conflict from a low scale to a full blown war between Ethiopia and Eritrea attracted response from regional as well as international attention and called for efforts to resolve the conflict using various alternative dispute resolution mechanisms.

Efforts to Resolve the 1998-2000 Border Conflict: Mediation and Arbitration

The 1998 – 2000 conflict between the two countries, international mediation was pursued by the international community. The main parties involved were the United Nations, the Organization of African Union, the European Union and the USA. This led to the Algiers Agreement/Accord which was signed in June 2000 (Bereketeab 2019:6). The agreement consisted of an arbitration component in that one of its provisions was the establishment of the Eritrea-Ethiopia Boundary Commission whose mandate was to delimit and demarcate the border based on pertinent colonial treaties and applicable international law (The Algiers Agreement, 2000; Bereketeab 2019). The decision of the commission was to be final and binding to both Ethiopia and Eritrea. Thus, by signing the Algiers Agreement/Accord, Ethiopia and Eritrea committed to accept the decision of the commission without objection.

In April 2002, the commission gave its verdict. The commission's decision on Badme, the disputed region was that the Badme Plain was largely on the Ethiopian side but the village of Badme was on the Eritrean side of the border (Tronvoll 2009:5). The reaction to the ruling signaled a further conflict as it clearly highlighted incompatibility of goals between the two conflict parties. Ethiopia rejected the verdict terming it illegal, irresponsible and unjust and demanded renegotiation (Bereketeab 2019). On the other hand, Eritrea accepted it and called for its unconditional implementation. Ethiopia appealed arguing that the decision divided local communities on each side

of the border but the appeal was rejected since both countries had agreed to abide by the commission's decision. A nation-wide protest pressured the Ethiopian government to reject the commission's decision to grant Badme village to Eritrea. This however did not change the decision of the EEBC.

In spite of the ensuing stalemate, in 2007, the EEBC declared the border virtually demarcated and the case legally closed. The Commission's decision to adopt virtually demarcated borders on electronic maps as opposed to a physical demarcation on the ground was accepted by Eritrea while Ethiopia rejected it as "legal nonsense" (Nystuen and Tronvoll 2008, cited in Tronvoll 2009:6). Ethiopia called for dialogue to resolve the border dispute. Eritrea however maintained that there was no border dispute since the border had been legally delimited and demarcated and termed Ethiopia's presence in Badme as deliberate occupation of sovereign Eritrean territory (Bereketeab 2019:9).

Source: ***http://www.eritrea.be/old/eritrea-maps.htm***

Ethiopia's rejection of the commission's decision lead to a situation of "no war no peace, with occasional clashes between the armies of both states. The stalemate lasted 16 years until 2018 (Bereketeab, 2019:5). There was therefore every indication that the conflict had not yet been resolved. Both states remained diametrically opposed regarding Badme, the area of contention, with each party claiming to have sovereign authority over it. The border between the two countries remained closed separating families, relatives and friends that had lived on each side of the border as Eritrea-Ethiopian relations increasingly became sour. Embassies in both countries were closed, economic relations frozen and Ethiopia could no longer access

the Eritrean ports of Assab and Massawa. Consequently, the condition of the ports as well as their economic value deteriorated.

The unresolved border conflict led to wide raging repercussions in Eritrea. Before the border conflict, Eritrea was hailed internationally and domestically for upholding democracy, protecting human rights and freedoms and having an institutional set up and atmosphere that seemed to deliver the promised hope, peace and justice (Hepner 2014:154). However, following the end of a border conflict with Ethiopia in 2000, things took a dramatic turn. Citing security concerns and vulnerability to attacks by Ethiopia and other international enemies the government embarked on massive repression and torture of religious leaders, real or perceived political dissidents, journalists, student union leaders and gross human rights violations. Non-Governmental organizations and human rights organizations were repelled from the country (Hepner 2014:160). People began fleeing the country such that by the year 2011-2012, relative to its small population, Eritrea produced the highest number of refugees and asylum seekers in the world (Jopson 2009, UNHCR 2013). President Isaias Afwerki dismissed reports about his repressive government as a "boring joke" based on fabrications (Hepner 2014:153).

Eritrea was also accused of destabilizing the Horn of Africa region by supporting militia groups to destabilize the governments of Djibouti, Ethiopia, Somalia and Sudan. The United Nations on various occasions imposed wide ranging sanctions on Eritrea such as arms embargoes, asset freezes and travel bans on top leaders (Plaut 2010:576). Indeed, the UN declared Eritrea an international pariah state in 2013. Eritrea then turned its back on the West, the UN, International Organizations and even the African Union and opted to turn East, to countries such as China. The country alienated many of its former friends. Eritrea also carried out unprovoked aggression towards her neighbors including Ethiopia, Djibouti and Yemen (Milkias 2004:70). Consequently, the country suffered isolation not only regionally but also internationally.

The relationship between Ethiopia and Eritrea was characterized by enemy perceptions towards each other. As the impasse between the two countries prevailed, both parties continued engaging in a war of words and proxy in

order to sustain their entrenched political positions. Ethiopia accused Eritrea of arming rebel and terrorist groups in Ethiopia in order to destabilize the country (Negash & Tronvoll 2000:88). On her part, Ethiopia worked hard to keep Eritrea isolated in the region and (Stauffer 2018:13).

Successful Resolution of the Ethiopia-Eritrea Conflict in 2018

Since the 1998 border war, Ethiopia and Eritrea had remained arch enemies for twenty years until 2018, when a rapprochement marked a major resolution of the conflict. A series of events triggered the rapprochement which caught the whole world by surprise. The winds of change began with the selection of Ethiopian Prime Minister Ahmen Abiy, who took over after Hailemariam Desalegn announced his resignation amidst rising protests against his government earlier in the year (Lyammouri 2018). During his inauguration early in April, Abiy announced his intention to resolve Ethiopia's dispute with Eritrea which had led to thawed relations and a militarized border since 2000.

Two months later, on 5 June 2018, the Prime Minister Abiy Ahmed announced that his government had accepted the 2002 EEBC's border ruling and was ready to implement it completely and unconditionally. In a show of commitment to his words, he extended an invitation to the Eritrean government to conclude peace and end the "no war no peace" state that had characterized the relations between the two neighbors (Bereketeab 2019:14). The Eritrean president on 20 June announced his intention to send a delegation to Ethiopia, which he did a few days later.

A series of reciprocal visits followed and in July, amid huge jubilation and rejoicing, the two leaders: Isaias Afwerki and Abiy Ahmed jointly declared the end of the 20 year war between the two countries (Mohammed 2018). They signed a Peace and Friendship Agreement in Eritrea. The peace agreement consisted of five key points: (i) an end to the state of war; (ii). Cooperation on political, economic, social and cultural issues and the opening of embassies in their respective capitals; (iii) links in trade, communication and transport, (iv). Implementation of the border decision and (v) joint work toward peace and security in the region (Stauffer 2018:5; Berekeateb 2019: 14). Implementation of the agreement followed and on 11th September, Ethiopia reopened its land border with Eritrea. The two

neighbors further opened embassies and resumed flights as well as trade relations. They also agreed to cooperate on several areas including reopening of two roads that connect Ethiopia to Eritrea's seaports of Assaba and Massawa. Several other developments followed signaling reconciliation and the resumption of friendship between the two states. The developments snowballed further in the region whereby Somalia and Djibout also resumed friendly relations with Eritrea after many years of thawed relations. This signaled a wind of hope in the Horn of Africa region indicating that the Ethiopia-Eritrea conflict had been internationalized further and become a major source of strained inter-state relations in the region.

Across the globe, media focused on the Ethiopia-Eritrea rapprochement as a world event (Berekteab 2019:13). Pursuant to the Asmara agreements, the two leaders were invited to Jeddah on 16 September 2018 by the King of Saudi Arabia where they signed the Peace and Friendship Agreement in the presence of the UN Secretary General Antonio Guterres, and the king of Saudi Arabia (UN News 2018). This internationalized the peace agreement. All in all, the move by Ethiopia and Eritrea to resolve their conflict by themselves through negotiation was hailed as a great move in the right direction in the resolution of the long-term hostilities between the two neighbors. The implementation of the peace and friendship agreement began immediately unlike the Algiers agreement that the two countries signed back in 2000 but did not implement at all.

A Critical Analysis of the Ethiopia-Eritrea Conflict Resolution

This paper has thus far presented two efforts to resolve the Ethiopia-Eritrea conflict: the 2000 mediation and arbitration efforts by the international community and the 2018 conflict resolution in which negotiation was initiated by the leaders of the two countries: Ethiopian Prime Minister Abiy Ahmed and the Eritrean president Isaias Afwerki. While in 2000 conflict resolution failed and resulted in a situation of "no peace no war", which is in itself a relatively latent form of conflict, the 2018 negotiation and some mediation initiated by the United States and Saudi Arabia was hailed as a great success. This part of the paper critically analyses the failure of mediation and arbitration as the main approaches to conflict resolution applied in 2000 and negotiation and some mediation as the approaches applied in the successful resolution in 2018.

Failure of International Mediation and Arbitration in 2000

The efforts of the top –down approach that was applied by the international community in resolving the Eritrea-Ethiopia conflict bore little fruit. Both parties still maintained their hardline stances. The international community actors involved in the mediation drafted the Algiers Agreement for Ethiopia and Eritrea to sign. Thus both Ethiopia and Eritrea did not own the process. Arbitration also did very little to resolve the conflict. The challenge with arbitration is that it establishes a winner and a loser. In the case of the Eritrea-Ethiopia border conflict, the ruling of the EEBC was in favor of Eritrea to whom it granted the village of Badme. Ethiopia contested the verdict but there was no alternative since the ruling was binding. Nevertheless, the commission concluded its work citing that the dispute was over. This was clearly unfinished business. The peace agreement as well and the ruling of the EEBC were not implemented by the parties to the conflict (Eritrea and Ethiopia). It also implies that the conflict was not ready for resolution since the parties to the conflict were unwilling to cooperate.

This therefore proves that although external interventions are usually important and sometimes decisive in ending conflicts, a crucial factor is the willingness of the conflicting parties themselves to consider a negotiated agreement (Ramsbotham, Woodhouse and Miall 2016:209). In addition external actors, interested in concluding agreements as a measure of success tend to overlook deep seated causes. For instance the mediators only focused on the border and failed to look into the history of the two countries and identify as well as other economic, political and socio-cultural factors.

The international mediators (the US, the UN, the OAU and the EU) who drafted the agreement were also the witnessed and guarantors of the peace agreement. As such, they bore the responsibility of supervising or enhancing its implementation. They however did nothing when Ethiopia refused to honor and implement the ruling of the EEBC. Their failure to take a position on Ethiopia thus undermined the arbitration as well as the whole arbitration process. They thus contributed to the "no peace no war "situation between Ethiopia and Eritrea which lasted 16 years causing a lot of human suffering (Bereketeab 2019: 42). It also undermined the credibility of international law.

The US later sought to twist the binding and final nature of the EEBC judgment by openly proposing a renegotiation of the border decision. In 2006 the US Assistant Secretary of State for African Affairs Jendayi Frazer visited the Badme village which was under the control of Ethiopian forces and suggested that a referendum be held in order for the villagers to determine to which country they wanted to belong (Bereketeab 2019:42). This would greatly undermine the Algiers Agreement. These moves by the US indicate the influence of power and geostrategic interests on international mediation as an alternative dispute resolution mechanism and it also highlights the fact that some of the external parties may not be neutral mediators.

Success of Internally Driven Negotiation and some Mediation in Resolving the Conflict in 2018

For conflicts especially protracted conflicts to be resolved, the presence of the right conditions is imperative. This is the argument that William Zartman (2001) postulates in his ripe moment theory. Conflict resolution is predicated on the conditions being right (Bereketeab 2019:23). The conditions for ripeness may be influenced by both internal and external factors.

This paper argues that the success of conflict resolution in 2018 was as a result of the timing of the ripe moment for the conflict. Bereketeab (2018:23) submits that the conditions for ripeness of the Eritrea-Ethiopia conflict entailed various objective and subjective factors in Ethiopia coupled with a trust factor from Eritrea. Objective conditions are external to human will but are essential for the maturity of subjective conditions. Subjective conditions on the other hand relate to human will and feeling. Other idiosyncratic factors such as experience and one's world view also matter. Objective conditions necessary to sustain or enhance the solution of a conflict include: economic, political, military, security, diplomatic and other material resources (Bereketeab 2019:24). Various conditions in both countries came into play that led to the ripeness of the conflict for resolution.

Conditions in Ethiopia that Ripened the Conflict for Resolution

Ethiopia under the leadership of Abiy Ahmed made the first move towards conflict resolution by announcing the country's willingness and readiness to honour the Algiers Agreement and the verdict of the EEBC concerning Badme (the disputed village) unconditionally. Abiy, extended a hand of

peace to Eritrea's president. The following are some of the various internal and external conditions/factors in Ethiopia that ripened the conflict for successful resolution.

Domestic uprisings and regime change in Ethiopia

Since 2015, a popular youth uprising engulfed Ethiopia indicating deep seated popular dissatisfaction. There was a major opposition on the ruling coalition, the Ethiopian People's Revolutionary Democratic Front (EPRDF). The party consists of four parties: the Oromo People's Democratic Front (now the Oromo Democratic Party (OPD); the Amhara National Democratic Movement (ANDM (now the Amhara Democratic Party); Southern Ethiopian People's Democratic Movement (SEPDM); and the Tigray People's Liberation Front (TPLF) (Bereketeab 2019). Although the coalition consisted of different ethnic groups, the TPLF that represented only 6% of the population had dominated the political and economic sphere for close to 30 years, a situation that led to growing dissatisfaction in the country. People were also fighting for democratic space (Bereketeab 2019). The government's oppressive response to the political unrest led to arrest and detention of numerous people (Dixon 2018). It also deeply affected the economy and brought the country to a near collapse and the international community, particularly the European Union and the USA expressed their displeasure with what was happening in the country (Bereketeab 2019).

After years of resistance, the then Prime Minister Hailemariam Desalegn resigned early 2018 and was replaced by Abiy Ahmed. This change of regime presented an opportunity for conflict resolution. Abiy was aware of the political situation in the country and he knew that things had to be done differently. He began my making reshuffles in the ruling coalition so as to balance the government considering Ethiopia's ethnic and institutional dynamics and also to satisfy the EPRDF coalition parties.

He adopted a policy of reconciliation which involved releasing prisoners in Ethiopia and in foreign countries, to welcome those who had gone to exile back to their country, and to pacify rebels (OLF, LNLG, and Gin 7) as a step towards reconciliation. That consideration made reconciliation essential in the Ethiopian context owing to the fact that Ethiopia is a highly militarized state and that party opposition to the Ethiopian government had persisted in

the country. Abiy's nationwide tour asking for forgiveness and promising positive change to citizens can be interpreted as an act of humility which was essential to the reconciliation policy taking into account the political unrest that had prevailed. This enabled peace and cohesion, widespread support and domestic stability. Once things calmed domestically, the Prime Minister could now concentrate on international matters. He was aware that unless the conflict with Eritrea was resolved, reforms in Ethiopia would be incomplete (Bereketeab 2019:26).

Strategic Political Leadership and Leader's Idiosyncratic Factors

It is also important to acknowledge some idiosyncratic factors that contributed to the ripeness of the conflict for resolution. Prime Minister Abiy Ahmed is very strategic and has a strong personality that enabled him to push Ethiopia's agenda domestically and internationally. He is a charismatic leader who is energy driven. Indeed, he was likened with renowned leaders such as Nelson Mandela and Barrack Obama (Burke 2018). This image has however changed since Abiy's government began a military operation against TPLF in November 2020 leading to the Tigray crisis (Kirby, 2021).

A number of Abiy Ahmed's background factors played a key role in enhancing his reformist goals. His Muslim-Christian (mixed) background enabled him to bridge communal and sectarian divides and this endeared him to majority of the population. Abiy Ahmed's educational background particularly his masters in transformational leadership and doctorate in peace and security studies added credibility to his qualifications and ability to make informed decisions based on his wealth of knowledge and worldview concerning leadership, peace and security issues pertaining his country, the country's neighbor Eritrea and the Horn of Africa region at large. He also possesses a wealth of professional experience that is essential for sound foreign policy decision-making on Ethiopia and Eritrea. Of particular interest is his military intelligence experience gained during his service in the military, including his participation in the revolution, whereby Ethiopia's EPRDF fought side by side with Eritrea's EPLF to oust Mengistu's junta.

This is coupled with the many years he has served in the Ethiopian government as well as international experience as a UN peace keeper in Rwanda. Due to his long experience with Eritrea, Prime Minister Abiy

Ahmed knew the strategy to use towards Eritrea's acceptance of his reconciliation proposal (The border issue which had been the main bone of contention). His past experience in which he witnessed his predecessor resign owing to antigovernment protests and political pressure kept him on his toes since from the onset, he was aware that he had to do things differently.

Ethiopia's Geopolitical goal

Ethiopia wishes to strategically position herself as a regional hegemony in the Horn of Africa. The resolution of her conflict with Eritrea was one of the main moves towards that goal as it brougt with it regional stability and prospects of economic growth. The Prime Minister Abiy Ahmed had been keen on access to the sea ports in the Red Sea as a means to becoming a regional economic powerhouse. Through shuttle diplomacy, Abiy Ahmed was able to secure access to four sea ports in Somalia including Barbera port in Somaliland and the two ports in Eritrea following the two countries' reconciliation. Another port that Ethiopia has access to is Mombasa port in Kenya through the Lamu Port-South Sudan – Ethiopia Transport (LAPSSET) Corridor project. On the same note Ethiopia was seeking to position herself strongly in Africa's aviation industry. Under Abiy Ahmed's premiership, Ethiopian Airlines, Africa's largest carrier expanded international air routes, owns 45% shares in Zambian airlines and planned to establish airlines in other African countries such as Zambia and Guinea (Giles 2018).

In light of all the above considerations, it was apparent that the resolution of the conflict with Eritrea was the gateway to Ethiopia's prosperity domestically, regionally and even internationally. Eritrea on her part reciprocated Ethiopia's call for conflict resolution. It is therefore important to look at the factors that predisposed Eritrea to heed calls for conflict resolution by Ethiopia.

Changes in the International Environment

Changes in the international environment also triggered conflict resolution between Ethiopia and Eritrea. For a long time, foreign powers have had keen interest in the Horn of Africa Region which is a strategic region that connects

Europe, Africa, the Middle East and Asia. The US, Japan, Italy, France, Spain and Germany for instance have military bases in Djibouti.

However, of particular interest here regarding Ethiopia's motivation to resolve her conflict with Eritrea is Chinese presence at the Horn of Africa, especially in Djibouti which was worrying not only to Ethiopia but also to the West. China established its first ever overseas military base in Djibouti in 2017, has constructed a port and is currently building Africa's largest Free trade Zone at the Djibouti port (Pieper 2018, Crabtree 2018). In addition it was (and still is) feared that Djibouti might be at the risk of falling into the China debt trap (Chaziza 2021). The country has borrowed more from China than it can pay back, most of the money having gone to infrastructural projects under the China Belt and Road initiative (Cheng 2018). Since Ethiopia is landlocked it had been heavily reliant on the Djibouti port (Fick and Kasolowsky 2018). Ethiopian government leaders led by Abiy Ahmed perceived Chinese presence at Djibouti as a threat to Ethiopia's economy and therefore had to find an alternative access to a sea port through Eritrea.

The construction of a Chinese military base in Djibouti and Beiing's increasing influence in the Horn of Africa raised triggered the US' interest in the resolution Ethiopia-Eritrea conflict. In order to expand its influence in the region, the US working closely with its ally Saudi Arabia initiated some external mediation to facilitate the rapprochement between the two countries (Ylönen 2019: 28).

Conditions in Eritrea that Ripened the Conflict for Resolution

The call on Eritrea by the Prime Minister of Ethiopia Abiy Ahmed for a resolution of the conflict was not the first one. The former Prime Minister, Desalegn indicated that he had made similar calls for negotiation with Eritrea but Eritrea held a different position (Tesfay 2012:197). However, when Abiy extended the same hand, Eritrea trusted and reciprocated leading to the grand conflict resolution. This had to do with the shift of power in Ethiopia's ruling coalition EPRDF from TPLF dominated by the Tigryans to ODP dominated by the Oromo. From the time Eritrea peacefully seceded from Ethiopia up until the resignation of Prime Minister Desalegn, the EPRDF was dominated by the TPLF who had deprived Eritrea of her need for identity and recognition as a sovereign state with territorial integrity. Although Meles

Zenawi supported Eritrea's independence, his intention was for Eritrea to remain part of Ethiopia as he asserted "But we really hope that Eritrea can remain part of a federated Ethiopia" (Bereketeab 2019: 30). According to John Burton's human needs theory, group identity and recognition form key human needs whose deprivation can lead to protracted conflicts (Burton 1990).

In addition, after the 1998-2000 conflict, the TPLF dominated EPRDF tried to economically subdue Eritrea. Ethiopia also made efforts to isolate Eritrea regionally and internationally. Meles Zenawi, the then Prime Minister took advantage of Ethiopia's power to get the UN to impose sanctions on Eritrea for claims that Eritrea was supporting Al-Shabaab and other militia and causing instability in the region (Bereketeab 2019). Simillar allegations from Ethiopia also led to Eritrea being blocked from the Intergovernmental Authority on Development (IGAD) for about seven years.

Thus Eritrea deeply distrusted Ethiopia and any calls for conflict resolution were suspiciously received and dismissed. The shift in power from the TPLF (representing the Tigray people) to the ODP (representing the Oromo people) meant a reconfiguration of Ethiopia-Eritrea relations and by the same token the Ethiopia-Eritrea conflict. There was a sense of trust, and that is why Eritrea's President Isaias Afwerki honored Ethiopian Prime Minister Abiy Ahmed's invitation setting the ball rolling for a successful conflict resolution. The commitment of the Ethiopian government to respect the EEBC ruling that granted Badme to Eritrea signaled Ethiopia's respect for Eritrea's identity and recognition as a sovereign state.

Mutually Hurting Stalemates and Mutually Enticing Opportunities in Ethiopia and Eritrea

In the Ethiopia-Eritrea conflict case, this paper applies the terms mutually hurting stalemates and mutually enticing opportunities to refer to the common challenges and common opportunities respectively that encouraged the two states to resolve the conflict. The main challenge that the two countries experienced was the TPLF question. The TPLF had dominated Ethiopian politics and security forces for nearly thirty years and had persistently securitized the relations between the two countries (Ylönen 2019:247). The continued occupation of Badme by Ethiopian forces most of

who belonged to the TPLF faction of the EPRDF was a constant threat to Eritrea's sovereignty and territorial integrity. On his part, Abiy Ahmed who was carrying out sweeping reforms to rid the government of TPLF domination feared facing resistance or even a coup from TPLF hardliners who also dominated the Ethiopian military. Consequently the leaders of both countries, Isaias Afwerki and Abiy Ahmed faced an existential threat from the TPLF and therefore had to gloss over their differences and unite against a common adversary (Bruton, 2018). This cooperation came in handy when Abiy's government began a military operation against the TPLF in November 2020 reportedly in retaliation to the TPLF's attack and seizure of an army command centre near Mekele, the capital of the Tigray region (Ylönen 2021:7). Eritrean forces were reported to have been fighting alongside the Ethiopian government forces in Tigray (Gebre Egziabher, 2021). Abiy Ahmed could confidently count on Eritrea's military support in the operation.

The resolution of the conflict was also crucial in opening Eritrea to the international arena after years of diplomatic isolation owing to the country's gross violation of human rights and aggressive foreign policy behavior towards other states. In fact after the reconciliation, the UN lifted sanctions on Eritrea (Zere 2018). The US also started warming up to Eritrea Eritrea which is politically and economically weaker stands to benefit from Ethiopia's strong economic and political strength. Ethiopia on the other hand can access Eritrea's two ports Massawa and Assab, thus have access to the Red Sea which is of great importance for her geopolitical interests.

Both countries stood to gain and actually gained from the conflict resolution. Ethiopia was able to negotiate with Ethiopian armed rebel groups which had been destabilizing the country from Asmara. In deed Abiy Ahmed already negotiated with them and they abandoned armed struggle and were welcomed back home. This is of great importance for the stability of Ethiopia. For Eritrea, gains came in form of the end of the devastating war and respect for its territorial integrity and sovereignty (the need for identity and recognition were met) and lifting of sanctions that had been imposed on it almost ten years before by the UN Security Council (Berekteab 2019:16). Eritrea became integrated into region and the world and Ethiopia played a key role in this. Lyammouri (2008) observed that just as Ethiopia led the

charge behind Eritrea's isolation since 2000, paving the way for the sanctions imposed in 2009, Ethiopia led the way behind Eritrea's regional and international integration.

Conclusion

This paper has analyzed the Ethiopia-Eritrea conflict focusing on two conflict resolution efforts pursued: the resolution of the 1998-2000 border conflict which applied mediation and arbitration as the key approaches and was mainly driven by external actors and the 2018 conflict resolution which applied internally driven negotiation mainly involving the state leaders in both countries with some little external mediation from the US and Saudi Arabi. While international mediation and arbitration failed to resolve the conflict, internally driven negotiation proved successful and brought about peace between the two long term rivals. The international mediators in 2000 were partly to blame for failing to enforce implementation of the agreement particularly by Ethiopia and for being partisan. Since they are the ones who drafted the agreement, there was no sense of ownership from Ethiopia and Eritrea and thus the agreement could be considered as an externally imposed agreement.

On the other hand, in 2018, there was successful resolution of the protracted conflict between Ethiopia and Eritrea. This was mainly internally driven, and spearheaded by the top leadership of the two countries. This paper has identified that domestic conditions in both states especially in Ethiopia coupled with international conditions and Eritrea's trust in Ethiopia served to ripen the conflict for resolution. Challenges faced by both due to the conflict as well as opportunities that would result from a peace deal served as mutually hurting stalemates and mutually enticing opportunities respectively for both Ethiopia and Eritrea. Internally driven negotiations between the two parties produced a peace agreement that both were willing to implement and actually began implementing immediately. Their conflict resolution model was a hybrid model which combined top state leadership as well as people in the grassroots sparking euphoria in both countries, an indication that the conflict resolution was highly appreciated by the citizens of both countries. This was also hailed internationally. Although things might have taken a different turn in Ethiopia due to the Tigray crisis that began in November 2020, this paper concludes that internally driven conflict

resolution coupled with the presence of the ripe moment for conflict resolution likely to be successful and durable compared to one that is majorly externally driven.

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Promoting Sustainable Consumption and Production Patterns in Kenya for Development

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Abstract

This paper discusses how Kenya can achieve sustainable consumption and production patterns as envisaged under the United Nations 2030 Agenda for Sustainable Development Goal 12. The paper identifies the challenges that still make it difficult to achieve this goal and offers solutions based on the same. The solutions range from social, economic, political and environmental in nature and also require the participation of all stakeholders.

1. Introduction

The world is faced with dwindling environmental and natural resources attributable to a myriad of reasons which include but are not limited to climate change, environmental degradation due to pollution and other unsustainable consumption and production practices by the human race.[1] The potential for human kind to destroy the environment was indeed acknowledged in 1972 when the UN Conference on the Human Environment stated: "In our time, man's capability to transform his surroundings, if used wisely, can bring to all peoples the benefit of development and the opportunity to enhance the quality of life. Wrongly or heedlessly applied, the

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[1] '1.4 The Environmental Crisis' <https://www.soas.ac.uk/cedep-demos/000_P500_ESM_K3736-Demo/unit1/page_11.htm> accessed 6 November 2020; 'Sustainable Consumption and Production Global Edition. A Handbook for Policymakers: Sustainable Development Knowledge Platform' <https://sustainabledevelopment.un.org/index.php?page=view&type=400&nr=1951&menu=35> accessed 6 November 2020; see also Magnus Bengtsson and others, 'Transforming Systems of Consumption and Production for Achieving the Sustainable Development Goals: Moving beyond Efficiency' (2018) 13 Sustainability Science 1533.

same power can do incalculable harm to human beings and human environment".[2] Undoubtedly, this human power has been used wrongly through unsustainable consumption and production patterns, and the results have been devastating, the world over, including in Kenya where there have been rampant cases of environmental degradation.[3] The United Nations argues that the human population is currently consuming more resources than ever, exceeding the planet's capacity for generation.[4]

As a way of addressing this challenge, the United Nations 2030 Agenda on Sustainable Development Goals[5] (SDGs) dedicates SDG Goal 12 to ensuring sustainable consumption and production patterns by all countries.[6] It has

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[2] 'What Is Sustainable Consumption and Production?' (*One Planet Network*, 13 September 2016) <https://www.oneplanetnetwork.org/about/what-Sustainable-Consumption-Production> accessed 6 November 2020.

[3] Adam Lampert, 'Over-Exploitation of Natural Resources Is Followed by Inevitable Declines in Economic Growth and Discount Rate' (2019) 10 Nature Communications 1419; *Global Environment Outlook: GEO4 : Environment for Development* (United Nations Environment Programme [host 2007) 93; Washington Odongo Ochola and others (eds), *Managing Natural Resources for Development in Africa: A Resource Book* (co-published by University of Nairobi Press in association with International Development Research Centre, International Institute of Rural Reconstruction, Regional Universities Forum for Capacity Building in Agriculture 2010).

[4] UN Environment, 'Sustainable Consumption and Production Policies' (*UNEP - UN Environment Programme*, 2 October 2017) <http://www.unenvironment.org/explore-topics/resource-efficiency/what-we-do/sustainable-consumption-and-production-policies> accessed 7 November 2020.

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

[6] **Goal 12. Ensure sustainable consumption and production patterns**

12.1 Implement the 10-Year Framework of Programmes on Sustainable Consumption and Production Patterns, all countries taking action, with developed countries taking the lead, taking into account the development and capabilities of developing countries

12.2 By 2030, achieve the sustainable management and efficient use of natural resources

12.3 By 2030, halve per capita global food waste at the retail and consumer levels and reduce food losses along production and supply chains, including post-harvest losses

12.4 By 2020, achieve the environmentally sound management of chemicals and all wastes throughout their life cycle, in accordance with agreed international frameworks, and significantly reduce their release to air,

been observed that although consumption and production are at the core of the global economy, the current unsustainable production and consumption patterns lead to deforestation, water scarcity, food waste, and high carbon emissions, and cause the degradation of key ecosystems.[7]

Sustainable Consumption and Production (SCP) can be defined as: *"the use of services and related products which respond to basic needs and bring a better quality of life while minimising the use of natural resources and toxic materials as well as the emission of waste and pollutants over the life cycle of the service or product so as not to jeopardise the needs of future*

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water and soil in order to minimize their adverse impacts on human health and the environment
12.5 By 2030, substantially reduce waste generation through prevention, reduction,
recycling and reuse
12.6 Encourage companies, especially large and transnational companies, to adopt sustainable practices and to integrate sustainability information into their reporting cycle
12.7 Promote public procurement practices that are sustainable, in accordance with national policies and priorities
12.8 By 2030, ensure that people everywhere have the relevant information and awareness for sustainable development and lifestyles in harmony with nature
12.a Support developing countries to strengthen their scientific and technological capacity to move towards more sustainable patterns of consumption and production
12.b Develop and implement tools to monitor sustainable development impacts for sustainable tourism that creates jobs and promotes local culture and products
12.c Rationalize inefficient fossil-fuel subsidies that encourage wasteful consumption by removing market distortions, in accordance with national circumstances, including by restructuring taxation and phasing out those harmful subsidies, where they exist, to reflect their environmental impacts, taking fully into account the specific needs and conditions of developing countries and minimizing the possible adverse impacts on their development in a manner that protects the poor and the affected communities.

[7] United Nations, 'Goal 12—Ensuring Sustainable Consumption and Production Patterns: An Essential Requirement for Sustainable Development' (*United Nations*) <https://www.un.org/en/chronicle/article/goal-12-ensuring-sustainable-consumption-and-production-patterns-essential-requirement-sustainable> accessed 6 November 2020.

generations".[8] It has also been defined as: *a holistic approach to minimising the negative environmental impacts from consumption and production systems while promoting quality of life for all".*[9]

Thus, while Sustainable Consumption and Production (SCP) may mean different things to different people, it can generally be agreed that SCP is about systemic change, decoupling economic growth from environmental degradation and applying a lifecycle thinking approach, taking into account all phases of resource use in order to do more and better with less.[10]

2. Sustainable Consumption and Production Patterns in Kenya: Challenges

It has rightly been pointed out that a major challenge in environmental policymaking is determining whether and how fast our society should adopt sustainable management methods as these decisions may have long lasting effects on the environment.[11]

2.1. Excessive Use of agrochemicals and Overreliance on Agriculture

It has rightly been pointed out that commercialization of horticulture farming, expansion of farms, and the practice of monoculture favour the proliferation of pests, which in turn increases the need for pesticides.[12]

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[8] 'What Is Sustainable Consumption and Production?' (*One Planet Network*, 13 September 2016) <https://www.oneplanetnetwork.org/about/what-Sustainable-Consumption-Production> accessed 6 November 2020.

[9] Lewis Akenji, Emily Briggs, and United Nations Environment Programme, *Sustainable Consumption and Production: A Handbook for Policymakers* (2015), 10.

[10] Ibid.

[11] Adam Lampert, 'Over-Exploitation of Natural Resources Is Followed by Inevitable Declines in Economic Growth and Discount Rate' (2019) 10 Nature Communications 1419, 1.

[12] Aliyu Ahmad Warra and Majeti Narasimha Vara Prasad, 'Chapter 16 - African Perspective of Chemical Usage in Agriculture and Horticulture—Their Impact on Human Health and Environment' in Majeti Narasimha Vara Prasad (ed), *Agrochemicals Detection, Treatment and Remediation* (Butterworth-Heinemann 2020) <http://www.sciencedirect.com/science/article/pii/B9780081030172000167> accessed 7 November 2020; Binoy Sarkar and others, 'Chapter 8 - Sorption and Desorption of Agro-Pesticides in Soils' in Majeti Narasimha Vara Prasad (ed), *Agrochemicals Detection, Treatment and Remediation* (Butterworth-Heinemann 2020)

Currently, due to agricultural industrialization, more and more farmers in Kenya and indeed globally, are using agro-chemicals (fertilizers and pesticides) in their farms to deal with pests and all other destructive insects as well as increasing productivity.[13] The need for increased food production is occasioned by the growing population thus making it imperative to ensure food security by increasing crop production.[14] Some commentators have argued that application of excessive fertilizers and pesticides to improve crop production has negative environmental implications, including soil degradation, enhanced greenhouse gas emissions, accumulation of pesticides, and decline in the availability and quality of water.[15] Indeed, indiscriminate use of chemical pesticides not only affects the texture and productivity of soil but also affects the environment, health-related issues, and the non-target microorganism.[16]

2.2. High Levels of Abject Poverty

Arguably, environmental unsustainability is due to both structural features and historically specific characteristics of industrial capitalism resulting in specific patterns of production and consumption, as well as population growth.[17] Poverty has often contributed to unsustainable production and consumption patterns and ultimately to environmental degradation in the country.[18] It has been observed that the objective of SCP is to: conserve

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<http://www.sciencedirect.com/science/article/pii/B9780081030172000088> accessed 7 November 2020.

[13] Ibid.

[14] Sachchidanand Tripathi and others, 'Chapter 2 - Influence of Synthetic Fertilizers and Pesticides on Soil Health and Soil Microbiology' in Majeti Narasimha Vara Prasad (ed), *Agrochemicals Detection, Treatment and Remediation* (Butterworth-Heinemann 2020) <http://www.sciencedirect.com/science/article/pii/B9780081030172000027> accessed 7 November 2020.

[15] Ibid.

[16] Vipin Kumar Singh and others, 'Chapter 10 - Impact of Pesticides Applications on the Growth and Function of Cyanobacteria' in Prashant Kumar Singh and others (eds), *Advances in Cyanobacterial Biology* (Academic Press 2020) <http://www.sciencedirect.com/science/article/pii/B9780128193112000103> accessed 7 November 2020.

[17] Helen Kopnina, 'The Victims of Unsustainability: A Challenge to Sustainable Development Goals' (2016) 23 International Journal of Sustainable Development & World Ecology 113.

[18] Lewis Akenji, Emily Briggs, and United Nations Environment Programme, *Sustainable Consumption and Production: A Handbook for Policymakers* (2015).

natural resources through more efficient use so that human needs can be satisfied without exhausting the world's finite supply of such resources, leaving behind enough for future generations; and ensure that the goods and services we produce and consume and the manner in which they are produced, used and discarded does not pollute the planet.[19]

The poor depend much more on nature for their livelihoods than the rich. Thus "natural" changes – for instance those brought about by climate change due to man-made activities – are likely to hit the poor much harder than the rich, although ultimately they will affect all.[20] Thus, poverty may make communities more susceptible to environmental degradation or contribute to the same.

2.3. Food Wastage and losses at Consumer and Production Levels

It has been noted that although Sub-Saharan Africa faces severe food shortages, on one hand, it experiences high rates of postharvest loss on the other, with an estimation that about 50% of fruits and vegetables, 20% of cereals, pulses and legumes and 40% of roots and tubers are lost before they reach the consumer.[21] Thus, such wastage and loss not only leaves the people hungry with inadequate food to consume but also exerts undue pressure on the lands for higher production of food to feed the ever growing population.

3. Promoting Sustainable Consumption and Production Patterns in Kenya for Sustainable Development: Prospects

It has been observed that although environment does not feature in Vision 2030 as a pillar, there has been a wide range of policy, institutional and legislative frameworks by the Government aimed at addressing the major

[19] Ibid.

[20] Ibid; Jeremy Millard and others, 'Social Innovation for Poverty Reduction and Sustainable Development: Some Governance and Policy Perspectives', *Proceedings of the 9th International Conference on Theory and Practice of Electronic Governance - ICEGOV '15-16* (ACM Press 2016) <http://dl.acm.org/citation.cfm?doid=2910019.2910079> accessed 8 November 2020; United Nations Environment Programme (ed), *Towards a Green Economy: Pathways to Sustainable Development and Poverty Eradication* (UNEP 2011).

[21] Huho, Julius M. "Reducing food loss and waste through innovative food preservation technologies applied by women in rural areas in Kenya." *International Journal of Latest Research in Humanities and Social Science (IJLRHSS) Vol* 3, no. 1 (2020): 76-82.

causes of environmental degradation and negative impacts on ecosystems emanating from industrial and economic development programmes.[22]

As already pointed out, SDG 12 requires countries around the globe to work towards the following: implement the 10-Year Framework of Programmes on Sustainable Consumption and Production Patterns, all countries taking action, with developed countries taking the lead, taking into account the development and capabilities of developing countries; by 2030, achieve the sustainable management and efficient use of natural resources; by 2030, halve per capita global food waste at the retail and consumer levels and reduce food losses along production and supply chains, including post-harvest losses; by 2020, achieve the environmentally sound management of chemicals and all wastes throughout their life cycle, in accordance with agreed international frameworks, and significantly reduce their release to air, water and soil in order to minimize their adverse impacts on human health and the environment; by 2030, substantially reduce waste generation through prevention, reduction, recycling and reuse; encourage companies, especially large and transnational companies, to adopt sustainable practices and to integrate sustainability information into their reporting cycle; promote public procurement practices that are sustainable, in accordance with national policies and priorities; by 2030, ensure that people everywhere have the relevant information and awareness for sustainable development and lifestyles in harmony with nature; support developing countries to strengthen their scientific and technological capacity to move towards more sustainable patterns of consumption and production; develop and implement tools to monitor sustainable development impacts for sustainable tourism that creates jobs and promotes local culture and products; and rationalize inefficient fossil-fuel subsidies that encourage wasteful consumption by removing market distortions, in accordance with national circumstances, including by restructuring taxation and phasing out those harmful subsidies, where they exist, to reflect their environmental impacts, taking fully into account the specific needs and conditions of developing countries and minimizing the possible adverse impacts on their development in a manner that protects the

[22] United Nations, 'Sustainable Development in Kenya: Stocktaking in the run up to Rio+20'(2012) Nairobi: United Nations, 3.

poor and the affected communities.[23] Banking on these SDG obligations, Kenya can take up and implement a number of measures that can inch it closer to achieving sustainable consumption and production patterns.

3.1. Tackling Food Wastage at Consumer and Production Levels

There is a need to address the challenge of food wastage and loss during harvesting, transportation, storage as well as at the consumption stage in order to ensure that there is enough for local consumption as well as possible sale of the excess as a way of improving the livelihoods of farmers.[24]

Locally produced food and other potential income earners natural resources could undergo local value addition and be exported either within African region markets or out of Africa. This would have a positive effect on the economic wellbeing of all persons starting from the grassroots levels.[25]

3.2.Promoting Environmental Ethics

Environmental ethics is a term used to refer to the moral relationship between the status of the land (from the perspective of the human being) and the use of the land by humans and other living species.[26] Environmental ethics has also been defined as a set of expectations, rules of behaviour, of how we treat the planet's inhabitants, human and nonhuman.[27] Environmental ethics dictate that one should base their behaviour on a set of ethical values that

[23] SDG Goal 12, *Transforming our world: the 2030 Agenda for Sustainable Development.*

[24] Timmermans, A. J. M., J. Ambuko, W. Belik, and Jikun Huang. *Food losses and waste in the context of sustainable food systems*. No. 8. CFS Committee on World Food Security HLPE, 2014; Kimiywe, J. "Food and nutrition security: challenges of post-harvest handling in Kenya." *Proceedings of the Nutrition Society* 74, no. 4 (2015): 487-495; Huho, Julius M. "Reducing Food Loss and Waste through Innovative Food Preservation Technologies Applied by Women in Rural Areas in Kenya." *International Journal of Latest Research in Humanities and Social Science (IJLRHSS) Vol* 3, no. 1 (2020): 76-82.

[25] Muigua, K., Utilizing Africa's Natural Resources to Fight Poverty, available at http://www.kmco.co.ke/attachments/article/121/Utilizing%20Africa's%20Natural%20Resources%20to%20Fight%20Poverty-26th%20March,2014.pdf

[26] Donald L Grebner, Pete Bettinger and Jacek P Siry, *Introduction to Forestry and Natural Resources* (First edition, Academic Press 2013).

[27] Daniel A Vallero, *Paradigms Lost: Learning from Environmental Mistakes, Mishaps, and Misdeeds* (Butterworth-Heinemann 2006) ch 1.

guide our approach toward the other living beings in nature.[28] In addition, it has been argued that since sustainability makes us consider what we do in light of future consequences, good and bad, our contemporary environmental ethic stretches environmental awareness in space and time.[29] Environmental ethicists advocate the need for change in consciousness, attitudes, thoughts, models, beliefs and world view.[30]

As a way of ensuring that the general populace in Kenya is aware of the impact of all their actions on their surroundings, there is a need for promoting an approach to production and consumption that incorporates both anthropocentrism and ecocentrism.[31] Ecocentrism finds inherent (intrinsic) value in all of nature. It takes a much wider view of the world than does anthropocentrism, which sees individual humans and the human species as more valuable than all other organisms.[32]

[28] IV Muralikrishna and Valli Manickam, *Environmental Management: Science and Engineering for Industry* (Butterworth-Heinemann, an imprint of Elsevier 2017) ch 4.

[29] Daniel A Vallero, *Paradigms Lost: Learning from Environmental Mistakes, Mishaps, and Misdeeds* (Butterworth-Heinemann 2006) ch 1.

[30] S Morand and Claire Lajaunie, *Biodiversity and Health: Linking Life, Ecosystems and Societies* (ISTE Press ; Elsevier 2018) ch 12.

[31] Sabine Lenore Müller and Tina-Karen Pusse (eds), *From Ego to Eco: Mapping Shifts from Anthropocentrism to Ecocentrism* (Brill 2018); Muigua, Kariuki. "Achieving Environmental Security in Kenya." *E. Afr. LJ* (2018): 1; 'Why Ecocentrism Is the Key Pathway to Sustainability' (*MAHB*, 4 July 2017) <https://mahb.stanford.edu/blog/statement-ecocentrism/> accessed 8 November 2020; Noel E Boulting and The Society for Philosophy in the Contemporary World, 'Between Anthropocentrism and Ecocentrism': (1995) 2 Philosophy in the Contemporary World 1; Muigua, Kariuki. *Nurturing Our Environment for Sustainable Development*. Glenwood Publishers Limited, 2016; Karataş, Assist Prof Dr Abdullah. "The Role of Environmental Education in Transition from Anthropocentrism to Ecocentrism." *International Journal of Business and Social Science* 7, no. 1 (2016); Jana Rülke and others, 'How Ecocentrism and Anthropocentrism Influence Human–Environment Relationships in a Kenyan Biodiversity Hotspot' (2020) 12 Sustainability 8213.

[32] 'Why Ecocentrism Is the Key Pathway to Sustainability' (*MAHB*, 4 July 2017) <https://mahb.stanford.edu/blog/statement-ecocentrism/> accessed 8 November 2020.

There is therefore a need for environmental education in order to supply the general public with the relevant information and awareness for sustainable development and lifestyles in harmony with nature.

3.3. Investing in Scientific and Technological Capacity

The Constitution obligates the State to recognise the role of science and indigenous technologies in the development of the nation.[33] There is a need for the country to invest in and adopt scientific knowledge especially locally for eliminating unsustainable and harmful practices that adversely affect realization right to clean and healthy environment for all as well as the sustainable development agenda. This may be aimed at achieving, inter alia, use of science and technology in industrial waste management, adoption of green and clean technologies, climate change mitigation measures, food production and preservation measures, among others.[34]

3.4. Addressing Poverty Levels in Kenya

A poverty stricken population is more likely to disregard sustainable production and consumption of environmental resources for lack of resources to explore possible alternatives to get their livelihoods and thus they end up overexploiting environmental resources and lands. It is therefore important for the stakeholders and policymakers to ensure that they support efforts towards addressing poverty levels as a prerequisite in achieving sustainability.

3.5. Pollution Prevention and Control

There is a need for stakeholders to identify opportunities and explore the same in order to reduce the production of wastes and the use of toxic materials, to prevent soil, water, and air pollution and to conserve and reuse resources.[35] The Constitution of Kenya guarantees the right of every person to a clean and healthy environment including the right to have the environment protected for the benefit of present and future generations

[33] Constitution of Kenya, Art. 11(2) (b).

[34] Muigua, K., Utilising Science and Technology for Environmental Management in Kenya, available athttp://kmco.co.ke/wp-content/uploads/2020/04/Utilising-Science-and-Technology-for-Environmental-Management-in-Kenya.pdf

[35] Boubaker Elleuch and others, 'Environmental Sustainability and Pollution Prevention' (2018) 25 Environmental Science and Pollution Research 18223.

through legislative and other measures, particularly those contemplated in Article 69.[36]

Pollution may be as a result of, inter alia, waste by-products emanating from industrialization of our society, the introduction of motorized vehicles, and the explosion of the human population, leading to an exponential growth in the production of goods and services.[37] Combating pollution in all its forms is thus critical if the sustainable development agenda is to be achieved and this calls for concerted efforts from all stakeholders including state organs, private sector and individuals.[38]

3.6. Agricultural Diversification and Diversification of Livelihood Sources in Kenya

Agricultural diversification is considered to be an important mechanism for economic growth. Agricultural diversification can be facilitated by technological breaks-through, by changes in consumer demand or in government policy or in trade arrangements, and by development of irrigation, roads, and other infrastructures.[39] It has been argued that the policy frameworks of government for rural infrastructure transport, irrigation, storage facilities, processing, and providing incentives to the farmers encourages agricultural diversification.[40]

A research targeting Southern Nakuru County on 'Sustainable food systems through diversification and indigenous vegetables' found that one way to

[36] Art. 42; Art. 70(1) of the Constitution states that if a person alleges that a right to a clean and healthy environment recognised and protected under Art. 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter. See the case of Peter K. Waweru vs R, Misc civ application no. 118 of 2004

[37] See Muigua, K., 'Safeguarding the Environment through Effective Pollution Control in Kenya', September 2019, available at http://kmco.co.ke/wp-content/uploads/2019/09/Safeguarding-the-Environment-through-Effective-Pollution-Control-in-Kenya-Kariuki-Muigua-28th-SEPT-2019.pdf

[38] Muigua, K., 'Safeguarding the Environment through Effective Pollution Control in Kenya', 26-27.

[39] 'IV. Agricultural Diversification on Small Farms' <http://www.fao.org/3/ac484e/ac484e06.htm> accessed 8 November 2020.

[40] Donald L Sparks, *Advances in Agronomy. Volume 110 Volume 110* (Elsevier 2011) ch 4 <http://site.ebrary.com/id/10444577> accessed 8 November 2020.

improve sustainability of the local food system is diversification, starting with better integrating indigenous vegetables, into the food system. [41] Overreliance on certain foods in the country such as maize and so the staple grains often leads to communities overexploiting their lands through farming. There is a need for continued campaigns for communities to change their attitudes towards other sources of food and embracing the same.[42] The overreliance on certain foods is also what leads to excessive use of agrochemicals leading to environmental degradation. Thus, diversification of food sources and agricultural diversification may not only ensure that there is food security but also help in environmental conservation and restoration.[43]

It is not only important to promote agricultural diversification but also livelihood diversification, where the latter means farming households engaging in multiple agricultural and nonagricultural activities. Both agricultural and livelihood diversification are ways of managing climate risk.[44] In addition, agricultural diversification can address poverty levels by increasing and stabilizing farmers' incomes and rural employment.[45]

While some authors have conflicting opinion on the full effect of agrochemicals on the environment, there is a need for farmers to turn towards

[41] Molina, P.B., D'Alessandro, C., Dekeyser, K. and Marson, M., "Sustainable food systems through diversification and indigenous vegetables." (2020), 104.

[42] Muigua, K., 'Achieving the Right to Food for Sustainable Development in Kenya,' *Paper Presented at the Public Engagement Forum on the Right to Food Inception Meeting held on 24th July 2018 at the African Population and Health Research Center (APHRC) Campus*< http://kmco.co.ke/wp-content/uploads/2018/08/Achieving-the-Right-to-Food-for-Sustainable-Development-in-Kenya-Presentation-African-Population-and-Health-Research-Center-APHRC-Campus-24th-July-2018.pdf> Accessed 8 November 2020.

[43] Katharina Waha and others, 'Agricultural Diversification as an Important Strategy for Achieving Food Security in Africa' (2018) 24 Global Change Biology 3390.

[44] Clayton Campanhola and Shivaji Pandey, *Sustainable Food and Agriculture: An Integrated Approach* (2019) <https://public.ebookcentral.proquest.com/choice/publicfullrecord.aspx?p=5611463> accessed 8 November 2020.

[45] Chiara Mazzocchi and others, 'The Dimensions of Agricultural Diversification: A Spatial Analysis of Italian Municipalities' (2020) 85 Rural Sociology 316; Cristina Salvioni, Roberto Henke and Francesco Vanni, 'The Impact of Non-Agricultural Diversification on Financial Performance: Evidence from Family Farms in Italy' (2020) 12 Sustainability 486.

compost manure and treat their soils in attempts to reduce agrochemicals inputs for the sake of healthy environment and sustainability purposes.

3.7. Sustainable Public Procurement Practices and Green Economy Investments

It has been suggested that shifting public spending towards more sustainable goods and services can help drive markets in the direction of innovation and sustainability, thereby enabling the transition to a green economy.[46] Kenya's *Public Procurement and Asset Disposal Act, 2015*[47] was enacted to give effect to Article 227 of the Constitution; to provide procedures for efficient public procurement and for assets disposal by public entities; and for connected purposes.[48] The Act provides that public procurement and asset disposal by State organs and public entities shall be guided by, *inter alia*, the following values and principles of the Constitution and relevant legislation—the national values and principles provided for under Article 10; maximisation of value for money; and promotion of local industry, sustainable development and protection of the environment.[49] An accounting officer of a procuring entity is required to prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings. The specific requirements shall include all the procuring entity's technical requirements with respect to the goods, works or services being procured, and the technical requirements shall, where appropriate, inter alia: factor in the socio-economic impact of the item; be environment-friendly; and factor in the cost disposing the item.[50]

Regarding disposal of assets, the Act provides that radioactive or electronic waste shall be disposed of only to persons licensed to handle the respective

[46] UN Environment, 'Sustainable Consumption and Production Policies' (*UNEP - UN Environment Programme*, 2 October 2017) <http://www.unenvironment.org/explore-topics/resource-efficiency/what-we-do/sustainable-consumption-and-production-policies> accessed 7 November 2020.
[47] Public Procurement and Disposal Act, No. 33 of 2015, Laws of Kenya (Revised Edition 2016 [2015]).
[48] Ibid, Preamble.
[49] Ibid, s. 3.
[50] Public Procurement and Disposal Act, s. 60.

waste under section 88 of the Environmental Management and Coordination Act, 1999.[51]

The *Public Procurement and Asset Disposal Regulations, 2020*[52] provides that while the user department shall be submitting the requisition to the head of the procurement function for processing, it shall be accompanied by, *inter alia*, as applicable: environmental and social impact assessment reports.[53] Regulation 193(2) provides that the documents, procedures and approvals required for waste disposal management shall be obtained from the relevant public agencies allowing a procuring entity to dispose those items that are harmful and unfriendly to the environment.[54]

There is a need for the public entities to uphold the foregoing provisions and work towards ensuring that both the processes of procurement of goods and disposal of waste are not only environmentally friendly but are also cost effective and contribute towards achieve the sustainable development agenda.

The public funds expenditure should be geared towards targeted green investments in a bid to develop green economy. A green economy is defined as 'low carbon, resource efficient and socially inclusive, where growth in employment and income are driven by public and private investment into such economic activities, infrastructure and assets that allow reduced carbon emissions and pollution, enhanced energy and resource efficiency, and prevention of the loss of biodiversity and ecosystem services.[55]

[51] Ibid, s. 165(2).
[52] Public Procurement and Asset Disposal Regulations, 2020, *Kenya Gazette Supplement No. 53 (Legislative Supplement No. 37),* Legal Notice No. 69, Laws of Kenya.
[53] *Public Procurement and Asset Disposal Regulations, 2020,* Regulation 71(2)(c).
[54] Ibid, *2020,* Regulation 193(2).
[55] UN Environment, 'Green Economy' (*UNEP - UN Environment Programme*, 23 January 2018) <http://www.unenvironment.org/regions/asia-and-pacific/regional-initiatives/supporting-resource-efficiency/green-economy> accessed 8 November 2020.

3.8. Promoting Gender Equity and Equality

Sustainable Development Goal 5 seeks to achieve gender equality and empower all women and girls. This is because gender equality is not only seen as a fundamental human right, but a necessary foundation for a peaceful, prosperous and sustainable world.[56]

While there has been impressive progress in tackling gender discrimination over the years, there are still many challenges facing women such as: discriminatory laws and social norms which remain pervasive, women continue to be underrepresented at all levels of political leadership, and 1 in 5 women and girls between the ages of 15 and 49 report experiencing physical or sexual violence by an intimate partner within a 12-month period.[57] While these statistics are not specifically for Kenya, it does not mean that Kenya's situation is any better.[58] It has been argued that due to the different roles women and men play in households, the economy, and environmental sustainability in most societies, enhancing gender equality is integral to ensuring a balanced approach to the economic, social and environmental dimensions of sustainable development and to achieving all other SDGs.[59]

Thus, efforts towards promoting sustainable consumption and production patterns in Kenya may not bear the desired results if they do not incorporate gender equality and equity measures.

4. Conclusion

Arguably, Sustainable Consumption and Production can contribute substantially to poverty alleviation and the transition towards low-carbon and green economies.[60] It is considered to be a holistic approach and is about

[56] 'Gender Equality and Women's Empowerment' (*United Nations Sustainable Development*) <https://www.un.org/sustainabledevelopment/gender-equality/> accessed 7 November 2020.
[57] Ibid.
[58] Muigua, K., "Actualising the National Policy on Gender and Development in Kenya."
Journal of cmsd Volume 5(2) (2020).
[59] OECD, *Policy Coherence for Sustainable Development: Fostering an Integrated Policy Agenda* (OECD 2018).
[60] UN Environment, 'Sustainable Consumption and Production Policies' (*UNEP - UN Environment Programme*, 2 October 2017)

systemic change.[61] It is indeed possible to improve production processes and consumption practices to reduce resource consumption, waste generation and emissions across the full life cycle of processes and products in the different sectors of the economy as a way to promote sustainable development agenda. Unless all stakeholders are brought on board and ensuring that there is a societal attitude and behavioural change as far as interactions with the environment are concerned, then realization of truly sustainable development practices remains a mirage. There is a need for a shift to a lifestyle that is geared towards achieving sustainability in all areas of economy. Promoting Sustainable Consumption and Production for Development may take a while to achieve, but it is worth pursuing.

<http://www.unenvironment.org/explore-topics/resource-efficiency/what-we-do/sustainable-consumption-and-production-policies> accessed 7 November 2020.

[61] Ibid.

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'1.4 The Environmental Crisis' <https://www.soas.ac.uk/cedep-demos/000_P500_ESM_K3736-Demo/unit1/page_11.htm> accessed 6 November 2020; 'Sustainable Consumption and Production Global Edition. A Handbook for Policymakers: Sustainable Development Knowledge Platform' <https://sustainabledevelopment.un.org/index.php?page=view&type=400&nr=1951&menu=35> accessed 6 November 2020.

'Gender Equality and Women's Empowerment' (*United Nations Sustainable Development*) <https://www.un.org/sustainabledevelopment/gender-equality/> accessed 7 November 2020.

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Bengtsson, M., Alfredsson, E., Cohen, M., Lorek, S., & Schroeder, P., 'Transforming Systems of Consumption and Production for Achieving the Sustainable Development Goals: Moving beyond Efficiency' (2018) 13 Sustainability Science 1533.

Campanhola, C., & Pandey, S., *Sustainable Food and Agriculture: An Integrated Approach* (2019) <https://public.ebookcentral.proquest.com/choice/publicfullrecord.aspx?p=5611463> accessed 8 November 2020.

Constitution of Kenya, 2010.

Donald L Grebner, Pete Bettinger and Jacek P Siry, *Introduction to Forestry and Natural Resources* (First edition, Academic Press 2013).

Elleuch, B., Bouhamed, F., Elloussaief, M., & Jaghbir, M., 'Environmental Sustainability and Pollution Prevention' (2018) 25 Environmental Science and Pollution Research 18223.

Global Environment Outlook: GEO4: Environment for Development (United Nations Environment Programme [host 2007) 93.

Huho, J.M., "Reducing food loss and waste through innovative food preservation technologies applied by women in rural areas in Kenya." *International Journal of Latest Research in Humanities and Social Science (IJLRHSS) Vol* 3, no. 1 (2020): 76-82.

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Disability Inclusion and World Bank's Kenya Urban Support Program: Analysis of Disability Inclusion in City Board

By: ***Paul Ogendi***

Abstract

Disability inclusion in urban governance is important to ensure efficient and effective service delivery for persons with disabilities. Even though the 2011 Urban Areas and Cities Act provides for the representation of persons with disabilities in the boards, that representation is weak since it is from an individual as opposed to institutional point of view. A proper representation therefore requires that disability associations be recognized under the Act and allowed to nominate a representative to sit in the boards in order to promote ownership, legitimacy and control of the person sitting in the board to represent persons with disabilities in Kenya. Section 13(2) of the 2011 Act should therefore be amended to allow an association representing persons with disability to provide representation in order to strengthen disability inclusion in Kenyan boards. The National Council for Persons With Disabilities should as a matter of strategy take up this matter and force amendments in Parliament in the near future.

1. Introduction

The World Bank (WB) has partnered with Kenya in many development projects since Kenya is one of its members since 3 February 1964.[1] Currently, one of the key projects being implemented through the WB is Urban Development Agenda since 26 July 2017 via the Kenya Urban Support Programme (KUSP). KUSP provides Urban Development Grants (UDG) to 45 counties in Kenya. WB's focus on cities is important because they are seen as key nodes for economic development, competitiveness and

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[1] https://www.worldbank.org/en/about/leadership/members (accessed 9 November 2019).

innovation 'particularly in the context of increasing globalization and mobility of people, information, finance and investment.'[2] Cities are also necessary for the development of knowledge-based new economy by attracting and retaining key knowledge workers and creative classes.[3]

One of the key result indicators of KUSP is the establishment of cities and municipal boards in all the participating 59 urban and municipal areas in Kenya.[4] Focusing on Boards is important in order to improve the quality of governance and management of urban areas and cities, which has been hitherto weak in urban areas leading to among other things the mushrooming of slums.[5] In this context, the problem being addressed is that fragmentation of decision-making is undesirable in urban governance issues and a more centralized system of decision-making may be preferable and moreso in secondary cities which have weaker economies and local governments.[6]

This paper will analyze the issue of disability inclusion in KUSP. In relation to disability inclusion, it is increasingly becoming clear that having one or two persons with disability is not enough. A proper representation of persons with disabilities should be institutionalized and in this regard the standard to be adopted is that allowing for representation from persons with disabilities

[2] Martin Boddy (ed) *Urban transformation and urban governance: Shaping the competitive city of the future* (2003) 1 *The Policy Press*.

[3] Martin Boddy (ed) *Urban transformation and urban governance: Shaping the competitive city of the future* (2003) 1 *The Policy Press*.

[4] The project was approved on 26 July 2017 by WB's Board of Directors and the Legal Agreement with the Government was signed on 14 September 2017.

[5] Warren Smit 'Urban governance in Africa: An overview' *International Development Policy/Revue international de politique de developpement* (October 2018), https://journals.openedition.org/poldev/2637 (accessed 9 November 2019).

[6] Warren Smit 'Urban governance in Africa: An overview' *International Development Policy/Revue international de politique de developpement* (October 2018), https://journals.openedition.org/poldev/2637 (accessed 9 November 2019). Smit argues that 'responsibility for key urban governance issues is often fragmented amongst large numbers of government stakeholders with limited capacities and conflicting interests, and that, in order to overcome these challenges, governance stakeholders need to be brought together in collaborative processes to jointly develop and implement new strategies that are based on a broader range of interests and meet a broader range of needs. As secondary cities in Africa face particularly severe challenges—given their weaker economies and weaker local governments compared to primary cities….'

associations including but not limited to the National Council for Persons with Disabilities (NCPWD) in addition to individual appointments of persons with disabilities to serve in the boards in their own capacity.[7]The following is the structure of the paper: overview of the KUSP project; conceptual framework for disability inclusion; the WB and disability inclusion agenda in practice; the legal imperatives for disability inclusion in Kenya; and strategies for amendments.

2. Overview of the KUSP project

The KUSP programme has several key components. In terms of amount of funding and focus of the project, the KUSP project is a US$ 300milion project aimed at addressing the inability of Kenyan urban centers to spur economic growth and development due to poor management and limited investment.[8] The KUSP project therefore aims at achieving effective urban management in order to harness urbanization dividends to spur sustainable growth in Kenya.[9] The KUSP stated Program Development Objective (PDO) therefore is to 'establish and strengthen urban institutions to deliver improved infrastructure and services in participating counties in Kenya.'[10] The proposed key program results indicators are also stated as follows:[11]

a) Number of urban areas with approved charters, **established boards**, appointed urban managers and a budget vote.
b) Number of urban areas that utilize 50 percent of the budget intended for their urban investments in their budget vote.
c) Score in the APA for achievement of urban planning, infrastructure, and service delivery targets by counties/urban areas, averaged across all urban areas that qualify for the UDG.

[7] http://ncpwd.go.ke/ (accessed 24 November 2019).
[8] Document of the World Bank, 'Program appraisal document on a proposed credit in the amount of US$ 300million to the Republic of Kenya for the Kenya Urban Support Program', (5 July 2017) 1, http://documents.worldbank.org/curated/en/357091501293684377/pdf/Kenya-Urban-PAD-07072017.pdf (accessed 5 November 2019).
[9] Document of the World Bank n 4 above, 2.
[10] Document of the World Bank n 1 above, 7.
[11] As above, 7-8.

The establishment of boards is therefore an important element of the project and it is in fact prioritized under the project in what promises to transform urban governance in Kenya. Indeed, access to the US$300million KUSP fund was tied to the establishment of city and municipal boards and those counties that didn't comply risked not getting a share of the Urban Development Grant (UDG).[12] Consequently, as at 2019, 59 new urban Boards had been established to govern and manage the cities and Urban areas in Kenya even though there is still some challenges in establishing Citizens Forums which are both integral in strengthening the new urban governance regimes in Kenya.[13]

In terms of geographical scope and national development planning, the project is currently being implemented directly in 45 counties (except Nairobi and Mombasa)[14] and in 59 potentially eligible urban areas within those counties. The project is in line with Kenya's Vision 2030[15] and Second Medium Term Plan (MTP2) 2013-17 that 'aims to facilitate a sustainable urbanization process through an integrated urban and regional planning management framework of Kenya urban centers and towns.'[16] KUSP is also

[12] 'World Bank sets tough governance conditions on sh28b grant' *Standard Digital* 9 July 2018, https://www.standardmedia.co.ke/article/2001287267/world-bank-sets-tough-governance-conditions-on-sh28b-grant (accessed 7 November 2019).

[13] Concept note Public Dialogue 'Citizens role in innovating for better quality of life for urban communities in Kenya'(24 May 2019) 2 1st UN Habitat Assembly 27-31 May 2019 Innovation for better lives, https://unhabitat.org/wp-content/uploads/2019/05/Urban-Public-Dialogue-UoN-24-May-2019-17.05.2019.pdf (accessed 7 November 2019).

[14] The reason for excluding Nairobi and Mombasa from KUSP conditional grants is because they are currently beneficiaries of other ongoing Bank supported projects; these include the Kenya Informal Settlement Improvement Project, the Nairobi Metropolitan Services Improvement Project, the National Urban Transport Improvement Project, and the Water Sanitation and Supply Improvement Project. See footnote 11 of the The World Bank Document n 1 above, 7.

[15] http://vision2030.go.ke/project/other-population-urbanisation-and-housing-programmes-and-projects/ (accessed 5 November 2019). Indeed, one of the targets for Vision 2030 is '[t]echnical assistance and support to County Governments in planning, urbanization and infrastructure development.'

[16] http://documents.worldbank.org/curated/en/357091501293684377/Kenya-Urban-Support-Program (accessed 5 November 2019).

listed under the Third Medium Term Plan 2018-2022.[17] Through Kenya Urban Housing Programme (KenUP), the project has been allocated about KES 11.9 billion in the 2019/20 financial year to 'improve urban management, urban infrastructure, and urban service delivery.'[18]

In terms of the lead agency, the Ministry of Transport, Infrastructure, Housing and Urban Development (MTIHUD) is the main implementing state agency for this project in Kenya.[19] Other key partners in this project include UN-HABITAT and Kenya Urban Residents Association (KURA).

3. Conceptual framework for disability inclusion in WB development projects

Disability inclusion in development projects including those funded by the WB can be viewed from different paradigms. In this paper, the proper conceptual paradigm is derived by moving backwards to the time when WB decided that building institutions was important in its projects if it was to achieve the same results as private sector.[20] At the time, many development projects were not having the desired impact especially in the public sector and more successes were being registered in the private sector. At the time,

[17] Republic of Kenya Third Medium Term Plan 2018-2022 'Transforming lives: Advancing socio-economic development through the "Big Four"' (2018) 79, http://vision2030.go.ke/inc/uploads/2019/01/THIRD-MEDIUM-TERM-PLAN-2018-2022.pdf (accessed 7 November 2019).

[18] 'Summary of Uhuru Kenyatta's major projects for FY 2019/20' *Financial Standard*, 7 May 2019, https://www.standardmedia.co.ke/business/article/2001324266/summary-of-uhuru-s-major-projects-for-fy-2019-20 (accessed 5 November 2019).

[19] Document of the World Bank n 1 above, 3. The project is being implemented alongside other three WB funded projects, namely: the Kenya Municipal Program (KMP) (started in 2010); the Kenya Informal Settlements Improvement Project (started in 2011); and the Nairobi Metropolitan Services Improvement Project (Started in 2012).

[20] Jannik Linbaek, Guy Pfeffermann & Neil Gregory *The evolving role of Multilateral Development Banks: History and prospects* (1998) Vol 3(2) *EIB Papers* 71-72. The term 'institutions' refers to the 'rules of the game' - laws, regulations and how they are made and enforced (or not enforced). This includes such important aspects of economic life as enforcement of private contracts by the state, the judiciary, commercial dispute settlement, utilities and banking regulations, and of course, first and foremost the protection of life and property. As above. See footnote 27 at page 72.

the WB realized that the quality of institutions and to be specific the rule of law and corruption affect closely investment outcomes especially in developing countries.[21] The WB therefore continues to underscore the need to have quality institutions if investments, loans or technical assistance are to be successful.[22]

Since institution-building is closely associated with rule of law and corruption. In the context of this paper, the rule of law paradigm appears to be more plausible to pursue to derive a proper conceptual paradigm for disability inclusion. Accordingly, the rule of law has been theorized by classical authors like Aristotle, Montesquieu and Locke to mean, mainly, curbing executive arbitrariness.[23] The need to regulate the exercise of executive authority and curb excesses is critical since it has today been largely accepted that there exists a close connection between a country's legal system and economic development.[24]

The rule of law is therefore defined along the above premise of curbing executive arbitrariness. One author for instance defines the rule of law as 'the degree to which citizens are willing to accept established institutions to make and implement laws and adjudicate disputes, and the presence of "sound political institutions", a strong court system and provisions for orderly succession of power.'[25] This definition focuses mainly on legitimacy of political institutions in terms of what is and what is not acceptable to the citizens. At the centre of the definition is the desire to create 'sound political institutions' and in this regard it can be argued in the context of this paper

[21] Jannik Linbaek, Guy Pfeffermann & Neil Gregory *The evolving role of Multilateral Development Banks: History and prospects* (1998) Vol 3(2) *EIB Papers* 72.
[22] Jannik Linbaek, Guy Pfeffermann & Neil Gregory *The evolving role of Multilateral Development Banks: History and prospects* (1998) Vol 3(2) *EIB Papers* 72.
[23] Alvaro Santos 'The World Bank's uses of the "Rule of Law" promise in economic development' in David M. Trubek and Alvaro Santos *The new law and economic development: A critical appraisal* (2006) 257 *Cambridge University Press*.
[24] Alvaro Santos 'The World Bank's uses of the "Rule of Law" promise in economic development' in David M. Trubek and Alvaro Santos *The new law and economic development: A critical appraisal* (2006) 253 *Cambridge University Press*.
[25] As above, fn 28, pg 72.

that sound political institutions must be inclusive of persons with disabilities otherwise they would reject any other institution put in place.

Another useful definition of rule of law in this paper is a utilitarian one. In this regard, the rule of law is defined as 'a legal order consisting of predictable, enforceable and efficient rules required for a market economy to flourish.'[26] This definition emphasizes on the utility of rule of law in facilitating the growth of market economy. Consequently, in order for the market economy to flourish, this definition observes that rules should possess certain qualities such as *predictability, enforceability and efficiency*. Without such qualities, it is inferred, the market would not flourish or economic growth would be difficult to achieve or sustain. It is because of this reason that the WB has focused mainly on reforming the judiciary of many developing countries. It is argued here that urban areas and cities legislation may be seen as an attempt to introduce efficiency in urban governance and management.

There are also those who are critical about using the generic term 'rule of law' to cover all projects implemented by WB in the domestic legal system of a country. Whitford for instance notes that what is often referred to as rule of law may not necessarily qualify as such and therefore there is need to use adopt other phrases in certain contexts. He particularly notes that other phrases could be used especially when the WB or other development partners are advocating for particular laws.[27] The adoption of urban areas and cities legislation in the country through the KUSP project could qualify to be one such area. It can therefore be argued that the push to establish urban and municipal boards through these legislation is one such area that can be termed as promoting the rule of law by the WB but also promoting law reform to be precise. What is being witnessed in Kenya today through the KUSP programme and specifically through the urban areas and cities legislation is, aptly put, a law reform agenda.

[26] Alvaro Santos 'The World Bank's uses of the "Rule of Law" promise in economic development' in David M. Trubek and Alvaro Santos *The new law and economic development: A critical appraisal* (2006) 253 *Cambridge University Press*.
[27] William C. Whitford 'The rule of Law: New reflections on an old doctrine' (2000) *East African Journal of Peace & Human Rights* 171.

The WB introduced the legal and judicial reforms as a main pillar through its President, James D. Wolfenson. This was done in the context of Comprehensive Development Framework, which is mainly about the Bank's mission to achieve sustainable development or 'fighting poverty for lasting results.'[28] The implementation of legal reforms agenda by WB has happened mainly through sector-adjustment lending and this process usually involves disbursing a loan in tranches with the first tranche usually distributed upon signing of the agreement and fulfilment of certain intended precedent legal conditions.[29] Sector loans are therefore being used to reward a country 'for doing that which it ought to have done and what it probably would have done in its own best interest without receiving the loan.[30] According to Levinson, '[i]f this is the case, then the borrower has not added to its productive capacity. If this is not the case, and the borrower was induced to undertake policy reforms by the temptation of external financing, rather than by conviction, the reforms probably will not last very long.'[31] The KUSP project fits perfectly within this model since access to the urban development money is tied to putting in place of cities and municipal boards and this cannot happen unless certain legislation is passed. In this regard, almost all counties participating in the project have put in place such legislation and are at various stages of implementation.

[28] The World Bank 'Initiatives in Legal and Judicial reforms (2004 edition) 1, http://documents.worldbank.org/curated/en/139831468778813637/pdf/250820040Edition.pdf (accessed 12 November 2019. Accordingly, the programme recognizes that 'poverty cannot be fought and gains cannot be sustained without effective and equitable legal systems.

[29] Jerome Levinson 'Multilateral financing institutions: What form of accountability?" (1992) 8 *American University International Law Review* 50, http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1500&context=auilr (accessed 12 November 2019).

[30] Jerome Levinson 'Multilateral financing institutions: What form of accountability?" (1992) 8 *American University International Law Review* 51, http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1500&context=auilr (accessed 12 November 2019).

[31] Jerome Levinson 'Multilateral financing institutions: What form of accountability?" (1992) 8 *American University International Law Review* 51, http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1500&context=auilr (accessed 12 November 2019).

Lastly, it is crucial to note that the WB is precluded from considering the political complexion of the borrowing member and as such it cannot consider human rights pursuant to its Articles.[32] As a matter of fact, the Articles of Agreement for the International Bank for Reconstruction and Development or WB, does not have the term 'human rights' appearing anywhere in its text.[33] This means that the disability inclusion agenda cannot be championed at the WB using human rights language. This however does not absolve the recipient state from considering human rights issues or bowing to human rights pressure when deciding on disability inclusion. Indeed, this phenomenon appears to be the default position for many multilateral development banks whose developments have not matured synonymously with international law and as such the role of human rights in multilateral lending practices is still nominal.[34] The WB in its vision for sustainable development has however asserted that its activities also support the realization of human rights recognized under UDHR.[35] Of course, this default position is different from the European Bank of Reconstruction and Development (EBRD) whose Agreement's preamble expressly commits to respecting rule of law and human rights thereby allowing the bank to

[32] Jerome Levinson 'Multilateral financing institutions: What form of accountability?" (1992) 8 *American University International Law Review* 56, http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1500&context=auilr (accessed 12 November 2019).

[33] http://pubdocs.worldbank.org/en/722361541184234501/IBRDArticlesOfAgreement-English.pdf (accessed 13 November 2019).

[34] Geneva J. Roman 'Human rights & multilateral development banks: Evaluating recipient records & lending practices' (2008) *Semantic Scholar*, https://pdfs.semanticscholar.org/bf2e/3765182dabf218552762e6f8283060e83cf9.pdf?_ga=2.95328412.1018451603.1573631595-1210375169.1573631595 (accessed 13 November 2019).

[35] *The World Bank Environmental and Social Framework* (2017) 1-2, http://pubdocs.worldbank.org/en/837721522762050108/Environmental-and-Social-Framework.pdf#page=15&zoom=80 (accessed 13 November 2019). In this strategy, the WB Group has set out the corporate goals of ending extreme poverty and promoting shared prosperity in all its partner countries. Securing the long term future of the planet, its people and its resources, ensuring social inclusion, and limiting the economic burdens on future generations will underpin these efforts. The two goals emphasize the importance of economic growth, inclusion and sustainability-including strong concern for equity.

consider such issues in its lending practices.[36] It would have been much more preferable if the Bank would reconsider its stance by directly incorporating human rights in its Article as opposed to the current indirect application of the paradigm.

To conclude this part, disability inclusion in the context of WB project is not human rights but a rule of law issue and specifically a law reform issue aimed at improving efficiency. The key objective in this paradigm is achieving sustainable development. Viewed this way, a Board that has persons with disability is more likely to achieve this. As noted by prince,

> A fundamental goal in the vision of an inclusive city is the prevention and reduction of discrimination that occurs when people are unfairly treated because they are viewed through the dominant culture as having a spoiled identity, because institutional practices disenfranchise them of a voice in politics and policy making, because the environment presents barriers and obstacles to their daily living and active participation in the market economy and civil society.[37]

4. The World Bank and disability inclusion agenda in practice

The WB estimates that about one billion people of 15% of the world's population have some form of disability with the prevalence numbers higher in developing countries.[38]

Whilst there is no obligation on WB to implement disability inclusion as a human right, since 2002, the WB has established a formal commitment to

[36] The Agreement Establishing the European Bank of Reconstruction and Development was signed in Paris on 29 May 1990 and entered into force on 28 March 1991, file:///C:/Users/user/Downloads/basic-documents-2013-english-agreement.pdf (accessed 13 November 2019). The First paragraph of the Premable states as follows: The Contracting Parties are '[c]ommitted to the fundamental principles of multiparty democracy, the rule of law, respect for human rights and market economics.'

[37] Michael J. Prince 'Inclusive city life: Persons with disabilities and the politics of difference' (2008) 28(1) *Disability Studies Quarterly*, http://dsq-sds.org/article/view/65/65 (accessed 15 November 2019).

[38] https://www.worldbank.org/en/topic/disability (accessed 13 November 2019).

addressing disability inclusion in the international development agenda through its Disability Development Team (DDT) within the Social Protection Unit (SPU) of the Bank's Vice President.[39] The bank therefore mainstreams disability inclusion in its projects and between 2006-2010 at least 4% of its projects had mainstreamed disability inclusion.[40]

The Global Partnership for Disability and Development (GPDD) was established in 2002 'to strengthen international cooperation to accelerate the integration of disability issues and considerations into mainstream social and economic development'.[41] The Partnership 'is unprecedented alliance of Disabled People's Organizations (DPOs), government ministries, bilateral and multilateral donors, United Nations (UN) agencies, NGOs, national and international development organizations, and other organizations, committed to promoting economic and social inclusion of people with disabilities in low-income countries.'[42] The activities of the GPDD is funded via the Development Grant Facility and the Multi-Donor Trust Fund administered by the WB.[43]

The WB has also engaged in disability issues in many other areas including: inter-agency collaboration to implement the CRPD; inter-agency partnership with WHO to produce the 2011 World Report on Disability; and the explicit reference to disability in its 2011 Global Monitoring Report.[44]

The WB has specifically integrated the disability inclusion in its New Urban Agenda, which 'specifically commits to promoting measures to facilitate equal access to public spaces, facilities, technology, systems, and services for persons with disabilities in urban and rural areas.'[45] The motivation for

[39] Tobias van Reenen and Helene Combrinck 'International financial institutions and the attainment of the UN Millennium Development Goals in Africa – with specific reference to persons with disabilities' in Ilze Grobbelaar-du Plessis & Tobias van Reenen (eds) *Aspects of disability law in Africa* (2011) 216 *Pretoria University Law Press*.
[40] As above, 216-217.
[41] http://bbi.syr.edu/gpdd/about.html (accessed 7 November 2019).
[42] As above.
[43] Reenen above, 217.
[44] As above, 218.
[45] https://www.worldbank.org/en/topic/disability (accessed 13 November 2019).

disability inclusion is that the built environment is not accessible to persons with disabilities 'from roads and housing; to public buildings and spaces; and to basic urban services such as sanitation and water, health, education, transportation, and emergency response and resilience programmes.'[46] This has in turn entrenched poverty among these category of persons. The WB commitment include commitment 6 on transport and commitment 10 on disability inclusion and accountability framework.[47] The disability inclusion and accountability framework is critical because it is aimed at mainstreaming disability in WB activities and in particular: 'it lays out a road map for (a) including disability in the Bank's policies, operations and analytical work, and (b) building internal capacity for supporting clients in implementing disability-inclusive programs.' [48] Also, the Environmental and Social

[46] 'Disability, accessibility and sustainable urban development', https://www.un.org/disabilities/documents/Disability_and_Urban_development.pdf (accessed 13 November 2019).

[47] https://www.worldbank.org/en/topic/socialdevelopment/brief/world-bank-group-commitments-on-disability-inclusion-development (accessed 13 November 2019). On transport, '*By 2025 all new urban mobility and rail projects supporting public transport services will be inclusive in their designs so as to incorporate key universal access features for people with disability and limited mobility.*
Ensuring that equity considerations, including access to persons with disabilities, continue to remain at the forefront of the Sustainable Mobility for All initiative (SuM4All). Currently under this initiative a Global Roadmap of Action is being developed by over 50+ global actors in transport. Under the Universal Access theme (one of 5 themes) the roadmap will propose actionable recommendations with regard to access for persons with disabilities.
Advocate for enhanced road safety outcomes, given that road crashes are one of the most significant public health issues of the century, causing both death and disability. This work will be led by the Global Road Safety Facility which provides funding, knowledge, policy guidance, and technical assistance and generates research to leverage road safety investments in transport and health operations. New funding from DfiD and DHSC (UK Health Department) has been committed to support a specific research program on disability from road crashes.'
On disability inclusion and accountability framework, the WB commits to promote that framework among its staa as a way to support the WB Group's new Environment and social framework (ESF).

[48] http://documents.worldbank.org/curated/en/437451528442789278/Disability-inclusion-and-accountability-framework (accessed 13 November 2019).

Framework (ESF) is important because of its focus on among others managing social risks projects in order to improve development outcomes.[49] The WB in its vision for sustainable development acknowledges that removing barriers from those who are often excluded in development process including persons with disabilities is critical.

At the UN level, urban development and management is also included as part of the UN Sustainable Development Goals (UN SDGs) under paragraph 34 of the UN resolution 70/1 on *Transforming our world: the 2030 Agenda for Sustainable Development.* [50] This means that urban development and management crucial in addressing poverty in the world and it is therefore likely to dominate development discourse till 2030 and therefore a long term view is needed of the same.

On 25 January 2017, the UN also adopted a Resolution 71/256 on New Urban Agenda, which has mainstreamed disability inclusion throughout its text.[51] Paragraph 48 provides for 'effective participation and collaboration among all relevant stakeholders' including persons with disabilities. Paragraph 148 is also important because it provides for the promotion of 'the strengthening of the capacity of national, subnational and local governments…to work with…persons with disabilities.' The two paragraphs could be used therefore as a basis to include persons with disabilities in cities and municipal boards throughout Kenya.

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[49] http://documents.worldbank.org/curated/en/437451528442789278/Disability-inclusion-and-accountability-framework (accessed 13 November 2019).

[50] Resolution adopted by the General Assembly on 25 September 2015 (21 October 2015), A/Res/70/1). Para 34 states: 'We recognize that sustainable urban development and management are crucial to the quality of life of our people. We will work with local authorities and communities to renew and plan our cities and human settlements so as to foster community cohesion and personal security and to stimulate innovation and employment. We will reduce the negative impacts of urban activities and of chemicals which are hazardous for human health and the environment, including through the environmentally sound management and safe use of chemicals, the reduction and recycling of waste and more efficient use of water and energy. And we will work to minimize the impact of cities on the global climate system. We will also take account of population trends and projections in our national, rural and urban development strategies and policies…'

[51] UN Resolution 17/256 on New Urban Agenda

Different actors are also involved in the disability inclusion in the new urban agenda. The United Nations Department of Economic and Social Affairs (UN DESA), for instance organized a forum on ways forward towards a disability inclusive and accessible new urban agenda on 14 June 2016 in New York.[52]

5. Kenyan legal imperatives for disability inclusion

Disability inclusion is not only a legal imperative in Kenya but also critical in ensuring the success of the project since PWDs represent about 10% of the Kenyan population and are therefore a key stakeholder in development projects. Furthermore, disability inclusion is now integrated under the WB. In this regard, the legislation on cities and municipal boards in Kenya should not only integrate an aspect of disability inclusion if it is to be consistent with the international, constitutional, and legal dictates.

5.1 International law

One of the general principles of the Convention on the Rights of Persons with Disabilities is the '[f]ull and effective participation and inclusion in society' of persons with disabilities.[53] In the context of development Boards, Article 27 of the CRPD on work and employment provides that 'State Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, **inclusive** and accessible to persons with disabilities.'[54] The provisions also provide for the employment of persons with disabilities in the public sector such as the 59 cities and municipal boards.[55] The Committee on the Rights of Persons with Disabilities has interpreted Article 27 as follows: this article recognizes the right of persons with disabilities to work and to gain a living by participation in a labour market and work environment that is open,

[52] https://www.un.org/development/desa/disabilities/forum-disability-inclusive-and-accessible-new-urban-agenda.html (accessed 13 November 2019)
[53] CRPD Article 3(c).
[54] CRPD Article 27(1).
[55] CRPD Article 27(1)(g).

inclusive and accessible….'[56] In this regard, State Parties should report on '[a]ffirmative and effective action measures for the employment of persons with disabilities in the regular labour market.' [57] From the above, international law recognizes the right of persons with disabilities to participate in the society, economic sector, and employment.

5.2 Constitution, 2010

The definition of 'disability' under the Constitution, 2010 'includes any physical, sensory, mental, psychological or other impairment, condition or illness that has, or is perceived by significant sectors of the community to have, a substantial or long-term effect on an individual's ability to carry out ordinary day-to-day activities[.]' Article 54(2) of the Constitution, 2010 also recognizes the progressive implementation of the 'principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities.' From the above, the Constitution appears to be providing for affirmative actions to promote persons with disabilities inclusion in important sectors of the public in elective and appointive bodies.

5.3 Persons with Disability Act No. 14 of 2003

Section 13 of the Act does not impose a 5% quota for the employment of persons with disabilities but it obligates the Council to negotiate with employers on the same.[58] Consequently, as noted by one author, '[i]n the absence of a legal compulsion, there is nothing to authoritatively counter biases that employers generally have against job-seekers with disabilities.'[59] This Act is therefore important because it provides for the framework for achieving the 5% quota not in public opportunities only but also in private

[56] Guidelines on the treaty-specific document to be submitted by State Parties under article 35 of the Convention on the Rights of Persons with Disabilities, CRPD/C/2/3, 15.

[57] As above.

[58] Section 13 of the Persons with Disabilities Act, 2003 provides for reservation of employment as follows: 'The Council shall endeavor to secure the reservation of five percent of all casual, emergency and contractual positions in employment in the public and private sectors for persons with disabilities.'

[59] George O. Otieno Ochich 'Bold and generous or timid faint-hearted? A panoramic assessment of Kenya's Persons with Disabilities Act, 2003' *The Law Society of Kenya* (2008) 98.

businesses and the NCPWD is expressly mandated to take leadership in this regard.

5.4 The County Government Act, 2012

The County Government Act, 2012 is important in this discourse because of devolution. The counties until recently provided for the governance and management or urban areas in Kenya. In order to promote disability inclusion, section 59(3) of the Act requires the public service board to submit a report containing details of persons appointed including persons with disabilities to the county assembly in accordance with its functions and powers under section 59(1)(d).[60] This section provides for the basis for the appointment of persons with disabilities at an individual basis. It does not however provide for the appointment of persons with disabilities at a representative level.

5.5 Urban Areas and Cities Act, 2011

The Urban Areas and Cities Act[61] is '[a]n Act of Parliament to give effect to Article 184 of the Constitution; to provide for the, classification, governance and management of urban areas and cities; to provide for the criteria of establishing urban areas, to provide for the principle of governance and participation of residents and for connected purposes.' The 20011 Act defines the 'board' to mean the 'board of a city or municipality constituted in accordance with section 13 and 14….'[62] Section 3 of the 2011 Act states that the objects and purpose are to establish a legislative framework for:

(a) classification of areas as urban areas or cities;
(b) governance and management of urban areas and cities;
(c) participation by the residents in the governance of urban areas and cities; and
(d) other matters for the attainment of the objects provided for in paragraphs (a) to (c).

[60] Section 59(1)(d) provides that 'the functions of the County Public Service Board shall be, on behalf of the county government, to prepare regular reports for submission to the county assembly on the execution of the functions of the Board.'
[61] No. 13 of 2011.
[62] Section 2.

Urban governance and management is therefore part and parcel of the purpose of the 2011 Act.

5.5.1 Criteria for city, municipal, and town status under the 2011 Act

Under section 5, the criteria for classifying a city has been set out as follows. An urban area may be classified as a city under this Act if the urban area satisfies the following criteria—

(a) has a population of at least five hundred thousand residents according to the final gazetted results of the last population census carried out by an institution authorized under any written law, preceding the application for grant of city status;

(b) has an integrated urban area or city development plan in accordance with this Act;[63]

(c) has demonstrable capacity to generate sufficient revenue to sustain its operation;

(d) has demonstrable good system and records of prudent management;

(e) has the capacity to effectively and efficiently deliver essential services to its residents as provided in the First Schedule;

(f) has institutionalised active participation by its residents in the management of its affairs;

(g) has infrastructural facilities, including but not limited to roads, street lighting, markets and fire stations, and an adequate capacity for disaster management; and

(h) has a capacity for functional and effective waste disposal. Under section 5(2), the 2011 Act provides that an area may also be conferred with the status of special purpose city if it has significant cultural, economic or political importance.

From the above, even though governance and management is not expressly stated in the criteria, the notion of 'capacity to effectively and efficiently deliver essential services' requires that urban centres have in place a proper management and governance system to achieve the same. Otherwise, there is no way service delivery will happen without a proper governance system. Kisumu being one of the cities in Kenya should also have the same in place.

[63] This section was amended in 2019 to include "and other existing laws" after the word "Act".

Lastly, the 2011 Act also stipulates the criteria for establishing municipal centres, towns, and markets in Kenya.[64]

5.5.2 Governance and management of urban areas and cities

Section 11 of the 2011 Act provides for the principles of governance and management of urban areas and cities as follows: The governance and management of urban areas and cities shall be based on the following principles—

(a) recognition and respect for the constitutional status of county governments;

(b) recognition of the principal and agency relationship between the boards of urban areas and cities and their respective county governments including—

[64] Under Section 9(3) of the 2011 Act, the eligibility to be conferred municipal status to a town is as follows: (a) has a population of at least two hundred and fifty thousand residents according to the final gazetted results of the last population census carried out by an institution authorized under any written law, preceding the grant; (b) has an integrated development plan in accordance with this Act; (c) has demonstrable revenue collection or revenue collection potential; (d) has demonstrable capacity to generate sufficient revenue to sustain its operations. (e) has the capacity to effectively and efficiently deliver essential services to its residents as provided in the First Schedule; (f) has institutionalised active participation by its residents in the management of its affairs; (g) has sufficient space for expansion; (h) has infrastructural facilities, including but not limited to street lighting, markets and fire stations; and (i) has a capacity for functional and effective waste disposal.

Section 10(2), of the 2011 Act provides the criteria for granting the status of a town is as follows:

(a) a population of at least ten thousand residents according to the final gazetted results of the latest population census carried out by an institution authorized under any written law, preceding the grant; (b) demonstrable economic, functional and financial viability; (c) the existence of an integrated development plan in accordance with this Act; (d) the capacity to effectively and efficiently deliver essential services to its residents as provided in the First Schedule; and (e) sufficient space for expansion.

Lastly, pursuant to the Urban Areas and Cities (Amendment) Act, 2019, a new section 10A(2) provides for the eligibility criteria for grant of the status of market centre as follows:

(a) An area shall be eligible for the grant of the status of a market centre under this Act if it has (a) a resident population of at least two thousand residents; and (b) an integrated urban area development plan in accordance with this Act and any other existing law.

(i) the carrying out by a board of such functions as may be delegated by the county government;
(ii) financial accountability to the county government; and
(iii) the governance by each board for and on behalf of the county government;
(c) promotion of accountability to the county government and residents of the urban area or city;
(d) institutionalised active participation by its residents in the management of the urban area and city affairs;
(e) efficient and effective service delivery; and
(f) clear assignment of functions.

From this section, it is clear that the Boards and County Governments have a close agency working relationship. The two are not separate and independent but something a kin to two sides of a coin. Without putting their synergies together the achievement of service delivery will be hampered. It is therefore crucial that the two sides develop a framework for proper supervision and collaboration in running the city so that competition is avoided and service delivery is emphasized. Each board should view themselves as working for the county government which means that they are subordinate to local leaders. In the past, there have been notions of hostility between the boards and members of county assemblies at the local level.[65] The fear by MCAs was that the boards would take over their functions and perhaps assist their rivals to gain popularity with the residence. While this may be true for a properly functioning boards and performing board members, it is important to note that the role of MCA is limited to oversight, representation and legislation. This role should not be extended to governance, which ideally should be under the executive function. The board therefore should be understood to be part of the county executive.

Following from the idea that the board is subordinate to the executive wing of the county, Section 12 of the Act deals with the management of cities and municipalities and provides as follows:

[65] Interview by anonymous person, 26 May 2019.

(1) The management of a city and municipality shall be vested in the county government and administered on its behalf by—
(a) a board constituted in accordance with section 13 or 14 of this Act;
(b) a manager appointed pursuant to section 28; and (c) such other staff or officers as a the county public service may determine.
(2) The board of an area granted the status of a city or municipality under this Act shall be a body corporate with perpetual succession and a common seal and shall, in its corporate name, be capable of—
(a) suing and being sued;
(b) taking, purchasing or otherwise acquiring, holding, charging or disposing of movable and immovable property;
(c) borrowing money or making investments;
(d) entering into contracts; and
(e) doing or performing all other acts or things for the proper performance of its functions in accordance with this Act or any other written law which may lawfully be done or performed by a body corporate.
(3) The governance and management of a city county shall be in accordance with the law relating to county governments.
From the above, the relationship of the board and the county is not of equals. The board may be understood as being subordinate to the county system and therefore controlled by it at least politically. It is also crucial to note that the board under section 12(2) has been granted autonomy in that they are established as corporate bodies enjoying certain rights and responsibilities. This is nothing new since many water and sewerage systems have also been corporatized to improve on governance.

5.5.3 Disability inclusion

This 2011 Act is disability friendly including in relation to the composition of the Boards and disability inclusion. Section 13 deals with boards of Cities and provides for the inclusion of persons with disabilities. Section 13(1) provides that: 'A board of a city shall consist of not more than eleven members, six of whom shall be appointed through a competitive process by the county executive committee, [66] with the approval of the county assembly.' In essence, the appointment into Boards is a competitive process

[66] In 2019, the 'county executive committee' was replaced by 'county governer'.

for at least six of the members. In 2019, a new subsection 13(1A) was introduced providing as follows:

(1A) The members of the Board of a city appointed under subsection (1) shall be constituted as follows —
(a) the county executive member for the time being responsible for cities and urban areas or his representative;
(b) six members who shall be competitively appointed by the county governor, with the approval of the county assembly;
(c) four members who shall be nominated by the organization specified under subsection (2) and appointed by the county governor, with the approval of the county assembly;
(d) the Secretary appointed under section 13A, who shall be an ex officio member of the Board.

The other five are nominated from the following categories pursuant to Section 13(2) of the 2011 Act:
(a) an umbrella body representing professional associations in the area;
(b) an association representing the private sector in the area;
(c) a cluster representing registered associations of the informal sector in the area;
(d) a cluster representing registered neighbourhood associations in the area; and
(e) an association of urban areas and cities.'
It is crucial to note that the 2011 Act did not allow for representation by a disability institution but instead focused on informal sector, residents associations, private sector and professional associations. In 2019, this section was however deleted and substituted with the following new subsection:(2) The four members of the board of a city specified under subsection (1) (c), shall be nominated by —

(a) an umbrella body representing professional associations in the area;
(b) an association representing the private sector in the area;
(c) a cluster representing registered associations of the informal sector in the area; and
(d) a cluster representing registered neighbourhood associations in the area.

Substantively, the section remained the same apart from the removal of representation of an association of urban areas and cities that existed previously. Essentially this category may perhaps be represented in the category known as 'a cluster representing registered neighbourhood associations in the area.' It appears that the two serve similar interest. Notwithstanding, it is suggested that a proper amendment would have included a disability institution representation instead.

What has happened instead is that instead of allowing for an institutionalized disability inclusion, the 2011 Act allows for individual disability inclusion. Section 13(3) provides for the representation of persons with disabilities by noting that '[t]he executive committee shall, while appointing members of the board, ensure gender equity, representation of persons with disability, youth and marginalised groups.' This type of disability inclusion is relatively weak since such persons sit on the board in their individual as opposed to their representative capacity and this may hamper the quality of contributions made by him or her especially from a disability point of view. Essentially, the problem that arises is that of ownership of the person by persons with disabilities in Kenya, legitimacy and control of that person by them.

Suffice to note, with regards to the Boards of municipalities, Section 14 of the Act adopts the provisions of section 13 as discussed above but varies the number of members of such boards from 11 to nine. Section 14 therefore provides as follows: 'The provisions of section 13 shall apply with respect to the board of a municipality except that such board shall comprise nine members of whom four shall be appointed and five elected in the prescribed manner.' Section 14 however was amended in 2019 and now expressly provides for the inclusion of persons with disabilities in the municipal board.[67]

[67] The section provides as follows: 14. (1) A board of a municipality shall consist of nine members appointed by the county governor with the approval of the county assembly. (2) The members of the board appointed under subsection (1) shall be constituted as follows— (a) the county executive member for the time being responsible for cities and urban areas or his representative; (b) three members who shall be appointed by the county governor, with the approval of the county assembly; (c) four members who shall be nominated by an association and appointed by the county governor, with the approval of the county assembly; (d) the chief officer responsible for urban development; and (e) the municipal manager appointed under

Lastly, under a new section 13A, the Secretary to the Board of a city is appointed by the public service board. Section 15 of the Act provides that the members of the municipal and cities boards shall hold office for a term of five years, on a part-time basis.

6. Strategy for amending the 2011 Act

From the previous section, it appears that a case has been built for the amendment of Section 13(2) of the 2011 Act in order to include representation of persons with disability associations in the boards in addition to the section that allows for persons with disabilities in their individual capacities to sit on the board. Both sections should indeed appear in the Act unreservedly and without doubt. The challenge at hand therefore is how to achieve the amendment for institutional representation. In this article, the proper strategy to achieve this should be led by persons with disabilities themselves. Therefore, this demands that the NCPWD, since as previously discussed it is already mandated to negotiate for 5% quota for persons with disabilities in employment, take a leadership role through its legal department[68] to propose the amendments to the Kenya Law Reform

section 28 who shall be the secretary of the board and an ex officio member of the board. (3) The four members of the board of a municipality specified under subsection (2) (c), shall be nominated by — (a) an umbrella body representing professional associations in the area; (b) an association representing the private sector in the area; (c) a cluster representing registered associations of the informal sector in the area; and (d) a cluster representing registered neighbourhood associations in the area. (4) The county governor shall, while appointing the members of the board, ensure gender equity, representation of persons with disability, youth and marginalised groups.

[68] See http://ncpwd.go.ke/index.php/legal-advisory-services (accessed 24 November 2019). The Legal Service Department is an in-house service providing unit of the Council. It provides professional legal services to Persons with Disabilities, relevant Government Ministries and Departments, Stakeholders and the General Public and for connected purposes with the aim to enable the Council deliver on its statutory mandate while ensuring compliance to all legislative requirements of the Council and in doing so manages and limits the legal risks of the Council.

The Legal Department serves a number of persons with disabilities and the general public on a walk-in-walk-out basis to protect and promote the interests of Persons with Disabilities. This is in line with the Constitution 2010, Disability Act No.14 of 2003, UN CRPD and other Local, National and International Instruments. The

Commission (KLRC), which has a statutory mandate for law reforms in the country.[69] Since the amendment does not affect a big part of the Act, this can be done through the miscellaneous amendments Act as part of the normal review of legislation in Kenya. Having submitted the amendment to KLRC, the NCPWD should mobilise all its members to pressure Parliament to approve this amendment in Parliament. The amendment should be introduced and sponsored by a disability-friendly member of Parliament who is capable of appreciating the difference between institutional representation (which is missing in the 2011 Act) and individual representation (which is currently provided for in the Act). All in all, all stakeholders should work together to achieve the same and provide necessary support and capacities to the representative if approved and nominated in the future.

7. Conclusion

The WB has integrated disability inclusion in practice in its projects even though its Articles of Agreement do not provide for human rights. In Kenya, disability inclusion has been streamlined in many legal instruments applicable in the country including the Constitution, Disability Act and even international law. In this regard, disability inclusion is expected in public and private life of the Kenyan society. However, it appears that from the above analysis, disability inclusion under the 2011 Urban Areas and Cities Act is relatively weak. Whilst the Act provides for disability inclusion the same is at an individual capacity and not at a representative capacity. This may hamper the quality of contributions made by that person in relation to the governance of cities and boards. Ultimately, it is crucial that the Act be

department provides arbitration advices to persons with disabilities whenever need be.

[69] The Kenya Law Reform Commission (the Commission) is established by the Kenya Law Reform Commission Act, No. 19 of 2013 (the Act). Presidential assent was given on 14 January 2013 and the Act came into force on 25th January 2013. The Commission has a statutory and ongoing role of reviewing all the law of Kenya to ensure that it is modernized, relevant and harmonized with the Constitution of Kenya. Following the promulgation of the Constitution in 2010, the Commission has an additional mandate of preparing new legislation to give effect to the Constitution. The third mandate is found in the County Governments Act, No. 17 of 2012 which requires the Commission to assist the county governments in the development of their laws. This is also a requirement found in the Act. See http://www.klrc.go.ke/index.php/about-klrc (accessed 24 November 2019).

amended to provide for a disability representation via their registered bodies in order to guarantee control, legitimacy and ownership. Section 13(2) of the 2011 Act should therefore be amended to allow an association representing persons with disability to provide representation in order to strengthen disability inclusion in Kenyan boards. Amending the Act, however, will not happen unless the persons with disabilities themselves champion this course and force through the amendments in Parliament.

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Demystifying The Right to A Clean and Healthy Environment in Kenya and how it can be Enforced

By: ***Daniel Mutunga Nzeki*** [*]

Abstract

The Constitution provides in the preamble that the environment is our heritage which should be sustained for the benefit of future generations.[1] *The protection of the environment is, therefore, a matter of utmost national priority because the environment plays an integral role in the foundation of sustainable national growth and development. In addition, the right to a clean and healthy environment is at the heart of every citizen's socio-economic rights as well as their right to life. As such, the violation and or infringement thereof is a matter of utmost concern that must be dealt with urgency and austerity, as stated by Justice Ongote, in Halai Concrete Quarries & 4 others v County Government of Machakos & 4 others; Kenya Power & Lighting Co & another (Interested Parties).*[2]

With a view of making a positive contribution on this debate, this paper underscores the constitutional right to a clean and healthy environment, pursuant to Article 42(a) and (b) of the Constitution of Kenya 2010. This right which has been enunciated in judicial precedence as a fundamental right bestowed on every person as was witnessed in the case of Adrian Kamotho Njenga vs Council of Governors & 3 others,[3] *has been elucidated a lot of debate within the academic circles, the legal fraternity and the public in equal measure.*

As a result, this paper first analyzes different legal definitions with regards the said right, in an attempt to conceptualize it effectively. This will be done through analysis of different constitutional, statutory, and international

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[1] The Preamble, The Constitution of Kenya, 2010.

[2] [2020] eKLR, Environment and Land Petition 19 of 2020 (Formerly High Court Constitutional Petition No. 6 of 2020).

[3] [2020] eKLR, Environment and Land Petition 37 of 2017.

instruments provisions, as well as case laws and writings of highly qualified publicists. The paper will then procced to establish the current status quo of the said right in Kenya, by analyzing the existing legal framework and jurisprudence with regards to the said right. Thirdly, the paper will establish and conceptualize the existing challenges, with regards the full realization of the right to a clean and healthy environment and lastly, recommendations on how best this right can be best realized.

1. Introduction

The right to clean and healthy environment has been recognized as one of the rights under the Chapter 4 of the Constitution, in which the right has been bestowed on every person and has been considered by the courts and eminent authors to be essential for the existence of mankind. In the case of *Adrian Kamotho Njenga vs. Council of Governors & 3 others,*[4] the court opined that Article 42 of the Constitution guarantees every person the right to a clean and healthy environment and to have the environment protected for the benefit of present and future generations through the measures prescribed by Article 69. The right extends to having the obligations relating to the environment under Article 70 fulfilled. It went ahead to state that unlike the other rights in the bill of rights which are guaranteed for enjoyment by individuals during their lifetime, the right to a clean and healthy environment is an entitlement of present and future generations and is to be enjoyed by every person with the obligation to conserve and protect the environment. Further on, in the case of *Cortec Mining Kenya Ltd vs Cabinet Secretary Ministry of Mining & 9 Others,*[5] Mutungi J held that whenever there is real and actual environmental pollution and degradation, with apparent and real adverse effects on flora and fauna, peoples' lives and livelihood, then that is a perfect recipe for a catastrophic time bomb, that will not take so long to explode. It directs us of any luxury of waiting to take action.

As a result, The right has three components; the right itself, the right to have unrestricted access to the courts to seek redress where a person alleges the right to a clean and healthy environment has been infringed or is threatened;

[4] [2020] eKLR, Environment and Land Petition 37 of 2017.
[5] [2015] eKLR, Civil Application 119 of 2015 (Ur 95/2015).

and the right to have the court make any order or give any directions it considers appropriate to either prevent or discontinue the act harmful to the environment, or compel any public officer to take measures to prevent or discontinue the act that is harmful to the environment or award compensation to any victim of a violation of the right to a clean and healthy environment.[6]

The reasons as to why the enhancement of right to a clean and healthy environment is best captured by Alexander Kiss, who argues that *"an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and the development as the breakdown of the fundamental ecologic equilibria is harmful to physical and moral health."*[7] As a matter of fact, this position was relied upon by the African Commission on Human and People's Rights in the case of *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights vs. Nigeria,* [8] where it held that environmental rights recognize the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual, and as a consequence, the state is required under the African Charter to take reasonable measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.

As a result, therefore, this paper concurs in entirety with Justice Munyao Sila, in the case of *Moffat Kamau & 9 Others vs. Actors Kenya Ltd & 9 Others* [9] averred that where the procedures for the protection of the environment are not followed, then an assumption may be drawn that the right to a clean and healthy environment is under threat. This presumption can only be rebutted if proper procedure is followed and the end result is that any undertaking with regards the environment has been given a clean bill of health or its benefits are found to far outweigh the adverse effects to

[6] Ibid, par 19.
[7] Kackar, R. *A Human Right to Environmental Protection: Dream or Reality?* (2013, *Available at SSRN 2295693)*.
[8] Communication No.155/96.
[9] *[2016] eKLR,* Constitutional Petition 13 of 2015.

the environment, as was stated in the case of *Ken Kasinga v Daniel Kiplagat Kirui & 5 others.*[10]

2. Definition and conceptualization of the right to a Clean and healthy environment

The Environmental Management and Coordination Act (EMCA),[11] defines the term environment to include: "*the physical factors of the surroundings of human beings including land, water, atmosphere, climate, sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics and includes both the natural and the built environment."*

The Black's Law Dictionary, 10th edition defines "health" as the quality, state or condition of being sound or whole in body, mind or soul, especially freedom from pain or sickness; or the relative quality or state of one's physical or mental well-being whether good or bad.[12]

Pursuant to Article 42 of the Constitution of Kenya 2010, every person has the right to a clean and healthy environment. This includes the right to protection of the environment for the benefit of the present and future generations, as well as fulfilment of the environmental obligations stipulated under Article 70 of the constitution. [13] Constitutional environmental rights can either refer to a specific aspect of the environment such as ecosystems, biodiversity, natural resources, plant and animal species or the environment holistically.[14] The first step towards the full understanding and conceptualization of this right is to define its parameters, under the law.

In his article, *Reconceptualising the right to Clean and Healthy Environment in Kenya*[15], Dr. Kariuki Muigua argues that there exists a

[10](2014) eKLR, Petition 50 of 2013.
[11] Section 2, The Environmental Management and Coordination Act No. 8 of 1999, Laws of Kenya.
[12] Black's Law Dictionary, 10th edition.
[13] Article 42(a)(b), The Constitution of Kenya 2010.
[14] Daly, Erin. *Constitutional protection for environmental rights: The benefits of environmental process, (2012,* International Journal of Peace Studies) p. 71.
[15] Dr. Kariuki Muigua, *Reconceptualising the right to Clean and Healthy Environment in Kenya,* (2017) p. 5.

problem in the declaration of this right, as it exists in various documents due to two reasons; First, there is no clear definition of this right and secondly, its contents have not been clearly demarcated. As a result of the lack of clarity on the legal parameters of the right to a clean and healthy environment, it, therefore, becomes difficult to determine when the right has been violated.

However, there is a close link between the right to a clean and healthy environment and other constitutionally entrenched rights, and hence the right to a clean and healthy environment can be defined and addressed through paying close attention to the prevailing environmental conditions, and not principally through finding an accurate definition for the said right. In the case of *Joyce Mutindi Muthama & another v Josephat Kyololo Wambua & 2 others*,[16] the court stated that:

> It is trite that the right to own land and the right to a clean and healthy environment cannot be dealt with in isolation from other rights, like the right to a fair hearing, the right not to be discriminated against, the right to a fair administrative action, the right to equal protection and equal benefit of the law, the right to adequate housing, amongst other rights.

Cullet Philippe argues that; "*the right to a clean environment is not a purely individual right; rather, it has a collective facet, belonging equally to such groups as future generations and indigenous peoples whose cultures depend on the environment for their existence and perpetuation.*"[17]
The ESCR Committee in *General Comment No. 14*[18] stated that:

> The right to a clean and healthy environment includes, *inter alia*, preventive measures in respect of occupational accidents and

[16] (2018) eKLR, Environment & Land Petition 206 of 2017.
[17] Cullet, Philippe. *Definition of an environmental right in a human rights context*, (1995, Netherlands Quarterly of Human Rights 13.) p. 25.
[18] 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, available at: https://www.refworld.org/docid/4538838d0.html [accessed 21 October 2020].

> diseases; the requirement to ensure an adequate supply of safe and potable water and basic sanitation; and the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health.

Contrary to what many legal scholars argue that the right to a clean and healthy environment is a third generation right, this paper concurs with Dr. Kariuki Muigua's assertion that it is in fact a fundamental right, for the enjoyment of other rights.[19] In justifying this argument, he argues that when life-sustaining ecosystems are destroyed and there is an exponential increase in environmental pollution, then there is an inhibition of the effective exercise and efficient enjoyment of the other human rights.[20]

From the foregoing, it is imperative that we undertake positive actions to ensure that the environment is protected and conserved, if the right to a clean and healthy environment is to be actualized. This is best captured in the second part of both *the Stockholm Principle 21* [21] and *the Rio Declaration Principle 2,* [22] which collectively establishes a State's responsibility to ensure that activities within its activity or control do not cause damage to the environment of other States or to areas beyond national jurisdiction or control.

Professor Günther Handl argues that this obligation is balanced by the declarations' recognition, in the first part of the respective principles of a State's sovereign right to "exploit" its natural resources according to its "environmental" (Stockholm) and "environmental and developmental" policies (Rio). While at Stockholm, some countries still questioned the

[19] Dr. Kariuki Muigua, *Reconceptualising the right to Clean and Healthy Environment in Kenya,* (2017) p. 6.
[20] J.A. Downs, *A Healthy and Ecologically Balanced Environment: An Argument for A Third Generation Right*, (Duke Journal of Comparative & International Law, Vol. 3, 1993) pp. 351.
[21] Principle 21, The Stockholm Declaration on the Human Environment, 1972.
[22] Principle 2, The 1992 Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (vol. I), 31 ILM 874 (1992).

customary legal nature of the obligation concerned.[23] Today, there is no doubt that this obligation is part of general international law. Thus in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*[24] first, and again more recently in *the Case concerning Pulp Mills on the River Uruguay,*[25] the International Court of Justice expressly endorsed the obligation as a rule of international customary law. Moreover, the Pulp Mills decision clearly confirms that the State's obligation of prevention is one of due diligence.[26]

3. The current status quo regarding the right to a clean and healthy environment; the legal framework vis a vis the actual reality

According to experts at the Constitution Review Commission, Article 42 of the Constitution 2010 was formulated to "facilitate the realization of environmental rights and to ensure effective environmental protection, management and conservation in Kenya."[27] However, in his article, *Reconceptualising the Right to a Clean and Healthy Environment in Kenya: The Need to Move from an Anthropocentric View to a Bicentric View*, Timonah Chore, contends that the right to a clean and healthy environment, as envisaged under Article 42, seems to focus disproportionately on human well-being rather than holistic and intrinsic environmental protection and

[23] Handl G, *The Declaration Of The United Nations Conference On The Human Environment Stockholm, 16 June 1972 & The Rio Declaration On Environment And Development Rio De Janeiro, 14 June 1992* (United Nations Audio Visual Library of International law 2021) https://legal.un.org/avl/ha/dunche/dunche.html accessed 9 June 2021

[24] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ GL No 95, [1996] ICJ Rep 226, ICGJ 205 (ICJ 1996), 8th July 1996, United Nations [UN]; International Court of Justice [ICJ].

[25] Pulp Mills on the River Uruguay, *Argentina v Uruguay*, Order, Provisional Measures, ICJ GL No 135, [2006] ICJ Rep 113, (2006) 45 ILM 1025, ICGJ 2 (ICJ 2006), 13th July 2006, United Nations [UN]; International Court **of** Justice [ICJ].

[26] Handl, Günther. *Declaration of the United Nations conference on the human environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 199, (2012*, United Nations Audiovisual Library of International Law 11).

[27] Constitution of Kenya Review Commission, *Expert review of the draft bill seminar*, 2003, pp. 63-64.

conservation.[28] As a result, the right has not met its expectations as it is shrouded with anthropocentric concerns which create barriers in the effective realization of the right. The concept of anthropocentrism is conceptualized as a human-centered approach towards environmental conservation and protection, [29] which has been criticized by many environmental scholars and commentators for focusing excessively on human well-being, while neglecting intrinsic environmental conservation.[30]

However, from a contextual reading and understanding of Article 42 of the Constitution read together with section 2 of EMCA, it can be concluded that the environment needs to be protected across all spheres (both living and non-living aspects of the environment), in order to realise the maximum realization of the right to a clean and healthy environment. So as to get a practical touch of the current status quo with regards the extent to which this fundamental right is abused, this paper is guided by the facts and the ensuing decision in the case of *Martin Osano Rabera & Another v Municipal Council of Nakuru & 2 Others,*[31]where the court in analyzing violations and infringements on Article 42, stated that:

> …the dumpsite attracts chickens, cows, goats and sheep that are left unattended and when they consume the refuse from the dumpsite they get infected only to be later slaughtered and consumed by the unsuspecting public; flies that get attracted to decomposing refuse fly to homesteads thus spreading diseases like dysentery; that the dumpsite harbours rodents like rats and reptiles like snakes which find their way to people's homes: that the dumpsite emits offensive gases which are toxic and pose the risk of causing respiratory ailments…

[28] Chore, Timonah. *Reconceptualising the Right to a Clean and Healthy Environment in Kenya: The Need to Move from an Anthropocentric View to a Bicentric View,* (2019, *Strathmore L. Rev.* 4) p. 73.
[29] Du Plessis, Alida Anél. *Fulfilment of South Africa's constitutional environmental right in the local government sphere, (2008,* PhD diss., North-West University).
[30] Scholtz W, *The anthropocentric approach to sustainable development in the National Environmental Management Act and the Constitution of South Africa, (2005,* 1 Journal of South African Law).
[31] (2018) eKLR, Petition 53 of 2012.

Additionally, the Court in the case of *The Kenya Association of Manufacturers and 2 Others v Cabinet Secretary of the Ministry of Environment and Natural Resources & 3 Others,*[32] while weighing the economic loss to be suffered by the manufacturers and the infringement of Article 42 caused by the use of plastic bags stated that:

> …in my view, this apprehended loss is to be carefully weighed against the public interest of the over 40 million Kenyans whose right to a clean environment the legal notice seeks to secure. Grant of a conservative order in the circumstances of this dispute would mean that the offensive plastic bags continue to suffocate the environment to the detriment of the Kenyan population, while serving the commercial interests of a section of the plastic bags dealers. In my view, that would offend Kenya's Constitutional and legal framework on protection and management of the environment.

This is a *locus classsicus* case of the effects that plastic bags have on environmental pollution due to the extensive environmental harm and degradation that they cause, and hence affecting the right to clean and healthy environment.

In her final report to the UN Commission on Human Rights,[33] Ksentini, Fatma Zohra, the UN. Special Rapporteur on Human Rights and the Environment recognized that the right to health extends to include protection from natural hazards and freedom from pollution, including the right to adequate sanitation, a position that this paper concurs with. She explained that the term "healthy environment" has been generally interpreted to mean that the environment must be healthy in itself (ecological balance) as well as healthful, which requires that it is conducive to healthy living.

[32] (2017) eKLR, Petition 32 & 35 of 2017 & Judicial Review Application 30 of 2017 (Consolidated) para. 58-59.

[33] Commission on Human Rights, *Final Report of the UN Special Rapporteur on Human Rights and the Environment, Mrs. Zohra Ksentini,* UN Doc. E/CN.4/Sub.2/1994/9 (6 July 1994).

All this analysis so far demonstrates one fundamental concept, that for the right to a clean and healthy environment to be realized, it is imperative that the concept of environmental protection must be considered. Simply put, environmental protection and conservation is a pre-qualifier to the realization of the right to a clean and healthy environment.

4. Challenges facing the realization of a clean and healthy environment in Kenya

In order to protect and conserve the environment, it is prudent that we make a diagnosis of the factors that lead to degradation and pollution of the environment, such that it circumvents and hinders the full realization of the right to a clean and healthy environment. The purpose for making this diagnosis is to enable us to recommend and/or take the proper measures and actions towards the realization of a clean and healthy environment. In that respect, this paper discusses discuss two major challenges: the concept of development at the expense of environmental consciousness and poverty.

i. The concept of development at the expense of environmental consciousness

The environmental legal framework within Kenya describes the legal rules relating to the environment broadly into social, economic, philosophical, and jurisprudential issues raised by attempts to protect, conserve, and reduce the impacts of human activity on the Kenyan environment.[34] This can be divided into two major areas, pollution control and resource conservation.

However, in most instances, we see cases where development-oriented activities seem to take the centre-stage, at the expense of environmental conservation and protection. [35] Collectively, this leads to increase in activities that lead to environmental degradation, such as pollution, permanent damage to nature, soil erosion, global warming leading to

[34] Mwanza, R. *The relationship between the principle of sustainable development and the human right to a clean and healthy environment in Kenya's legal context: An appraisal*, (2020, Environmental Law Review, 22(3)) pp. 184-197.

[35] Spiegel, J., & Maystre, L. Y. *Environmental pollution control and prevention*, (1998, Encyclopedia of Occupational Health and Safety. 4th ed. Geneva: International Labour Office) p. 2.

climate change, loss of biodiversity, release of long term toxins to the environment among other development oriented activities, at the expense of environmental protection and conservation for a clean and healthy environment.[36]

In their book, *The Constitution of Kenya, 2010: An Introductory Commentary,* the authors, Professor P.L.O Lumumba and Luis Franceschi, while quoting Justice J.B Ojwang, argue that:

> The environment is accorded an eminent place in the governance agenda of the Constitution of Kenya 2010. Governance, which is required to be performed as a service to the people, must comply with 'national values and principles' one of which is sustainable development. It is common knowledge that the first principles of sustainable development relate to the basic elements that sustain life: and the conservation of the environment is invariably the first component of this principle. The complexities of the environment, and its vulnerability to inappropriate human activity, render it a sensitive sphere of disputes in respect of which the judicial role is mandatory. A constitution so pre-occupied with safeguards for social welfare has necessarily to accord primacy to the environment and to the judicial role therein.[37]

There has been a quite extensive jurisprudence to this effect. For instance, in the case of *Wangari Maathai v Kenya Times Media Trust,*[38] the petitioner, who was a coordinator of an environmental pressure group (the Greenbelt Movement) sought a temporary injunction to restrain the respondent company from constructing an office complex at the Uhuru public park which could have led to the destruction of the park's ecosystem. However, the court dismissed the applicant's claim on the grounds that the petitioner lacked the *locus standi* to initiate such an action, stating that the law then only allowed the Attorney General to bring a legal action or claim

[36] National Research Council. *Global environmental change: Understanding the human dimensions*, (1991, National Academies Press).
[37] Lumumba, Patrick LO, and Luis G. Franceschi. *The Constitution of Kenya, 2010: an introductory commentary*, (2014, Strathmore University Press) p. 196.
[38] [1989] eKLR, Civil Case 5403 of 1989.

on behalf of the public. Contradicted with jurisprudence from India in the case of *T. Damodhar Rao and Ors. vs The Special Officer, Municipal Corporation, Hyderabad,*[39] the Andhra Pradesh High Court held that even actions that may not directly affect physical health, but that "disturb the environmental balance" have been found to violate the right to life broadly interpreted. Thus, for example, a government's failure to protect a recreational area or park from development was found to violate the right to a clean and healthy environment in the *Damodhar case.* This poses the question, to what extent are the Kenyan courts willing to go, in pursuit of environmental protection and conservation, in the quest to achieve the right to a clean and healthy environment?

In the case of *Peter K. Waweru v Republic,*[40] the court held that any development that jeopardizes life is not sustainable development and ought to be halted. In *Kenya Medical supplies Agency (KEMSA) –v- Mavji Kanji Hirani & 8 Other,*[41] it was held that the courts have a duty to identify and uphold the public interest, alive to the fact that their decisions ought to conduce to the attainment of that which is for the advancement of the public good, and as a result, this paper submits that the Kenyan Courts, must strive to strike a balance between these two equally important but competing interests.

At the international level, in the *Case Concerning the Gabcikovo-Nagymaros Project*,[42] the ICJ considered that Sustainable Development should balance development with environmental concerns. Judge Weeremantry expressed that the principle of sustainable development constitutes a principle which enables the balancing between environmental concerns and development concerns.

This just shows how much there is preference for undertaking of development projects even if it means that the environment is degraded,

[39] AIR 1987 AP 171.
[40] (2004), eKLR (Environment and Land), Mis. Civl Appli.No. 118 of 2004.
[41] (2018) eKLR, Civil Appeal 115 of 2017.
[42] Gabcikovo-Nagymaros Project, *Hungary v Slovakia*, Judgment, Merits, ICJ GL No 92, [1997] ICJ Rep 7, [1997] ICJ Rep 88, (1998) 37 ILM 162, ICGJ 66 (ICJ 1997), 25th September 1997, International Court of Justice [ICJ].

which translates to the violation of the right to a clean and healthy environment, since the environment will have been subjected to conditions that no longer make it neither clean nor healthy.

ii. The challenge of poverty

In its report, *Why a Healthy Environment is Essential to Reducing Poverty*, the Organization for Economic Co-operation and Development contends that poverty reduction, economic growth, and the maintenance of life-supporting "environmental resources" are closely linked and for that reason, this is why reversing environmental degradation is one of the Millennium Development Goals, since most of these goals have strong links with the environment.[43]

Poverty often causes people to put relatively more pressure on the environment which results in larger families (due to among other factors, high death rates and insecurity), improper human waste disposal leading to unhealthy living conditions, more pressure on fragile land to meet their needs, overexploitation of natural resources and more deforestation.[44] According to a report by the World Bank, data collected indicated that poor countries are much more dependent on natural resources as assets than rich countries. The ratio of people to forested land is more than three times higher in low-income than in high income countries, hence putting a lot of pressure to the environment.[45]

According to the World Vision, environmental problems are an added source of misery for the poor. This is premised on the fact that they cause additional suffering among them, since environmental damage leads to increase on the impact of floods and other environmental catastrophes,

[43] OECD, *Why A Healthy Environment Is Essential To Reducing Poverty* (2018) http://Why a Healthy Environment is Essential to Reducing Poverty accessed 9 June 2021.

[44] Niranjan D.B. *The relationship between poverty and the environment,* (*Voices of youth, Unicef for every child). https://www.voicesofyouth.org/blog/relationship-between-poverty-and-environment.*

[45] *World Bank. Poverty and Environment: Understanding Linkages at the Household Level. Environment and Development,* (2007, Washington, DC: World Bank). *https://openknowledge.worldbank.org/handle/10986/6924 License CC BY 3.0 IGO.*

with specific focus to the poor. Soil erosion, land degradation and deforestation on the other hand have a correlative effect on the decline in food production, which along with a shortage of wood for fuel contribute to inflation, hence more and more suffering. Simply put, the worst consequences of environmental deterioration, whether economic, social, or related to mental or physical wellbeing, are experienced to the largest extent by poor people.[46]

This on the overall is a clear indicium that the poverty levels of a given community are directly proportional to the kind of environment in which they live in. A good example is in the informal settlement areas, popularly known as *ghettos*, which is slang for slums, the standard of life is disparaging, since the environment is very unwelcoming, marred with raw sewage and close dumpsites nearby, which are not licensed to be in operation, but exists, nevertheless. This illegal disposal of waste amounts to nuisance as categorized under Section 118 as read with Section 117 of the Public Health Act,[47] which poses a real and imminent health hazard to the public at large, as was espoused in the case of *County Government of Kitui vs. Sonata Kenya Limited & 2 others*.[48]

5. Recommendations towards the realization of the right to a clean and healthy environment

In spite of the fact the right to a clean and healthy environment in Kenya is a constitutionally entrenched right, its meaningful implementation still remains an uphill task. However, this paper contends that despite the many challenges that currently subsist with regards the realization of the right to a clean and healthy environment, several recommendations can be actualized in order to realize the dream of the drafters of the Constitution

[46] World Vision, *Poverty And The Environment* (2006, World Vision) https://www.worldvision.org.nz/getmedia/26362f6f-eb18-47a7-a1dd-a6c33c38bfd7/topic-sheet-poverty_and_the_environment/#:~:text=Environmental%20problems%20cause%20more%20suffering,increase%20the%20risk%20of%20disease.&text=shortages%20of%20wood%20for%20fuel,it%20more%20expensive%20to%20buy.&text=soil%20erosion%20and%20deforestation%20cause%20declining%20crop%20yields. accessed 8 June 2021.

[47] Section 117, Public Health Act, Act No. 12 of 2012.

[48] [2018] eKLR, Environment and Land Petition 2 of 2018.

2010, specifically with regards Article 42. Some of the recommendations are as discussed below.

iii. Observation and implementation of other rights in order to realize the right to a clean and health environment (Indivisibility and interdependence)

From there foregoing, this paper has taken the position that there is an integral link between the right to a healthy environment and other human rights and underscores the fact that all human beings depend on the environment in which we live.[49] Indeed, it may often be easier to address environmental concerns through other human rights than through the as yet not well-defined right to a healthy environment. The deterioration of the environment affects the right to life, health, work and education, among other rights.

This is an indication of the indivisible and interdependent nature of human rights, pursuant to the Bill of rights under chapter four of the Constitution of Kenya 2010.[50] It is, therefore, imperative that the respect for and observance of other rights, up to and including environmental rights will go a long way towards the realization to a clean and healthy environment.

iv. Implementation and Enforcement Mechanisms

The recognition of the right to a healthy and clean environment in the constitution under Article 42, legislations such as the EMCA and other national policy arrangements will not have a real effect in reality, if it is not accompanied by the availability of means to implement the right and adequate mechanisms of enforcement of the said legal framework. Over time, the enforcement mechanisms of the legal framework in Kenya has been found to short fall of the expected outcomes and, hence, there is a dire

[49] Special Rapporteur on human rights and the environment, *About Human Rights And The Environment* https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/AboutHRandEnvironment.aspx accessed 9 June 2021

[50] Chapter Four, The Constitution of Kenya, 2010.

need for a radical change in the implementation and enforcement framework.[51]

Some mechanisms that can be further adopted include: effective spatial planning management systems (the effectiveness would depend on the participatory process of the spatial planning), participatory Environmental Impact Assessment (EIA) as a tool for the government to make environmentally sound decisions and the existence of a public/citizen complaint mechanism that provides the opportunity for citizens to lodge complaints and grievances about the violation/infringement of their rights.[52]

v. Use of National Human Rights Commissions (e.g KNHRC, KHRC), Civil Societies and pressure groups

National Human Rights Commissions can also be utilized for protecting the right to a clean and healthy environment. There have been successful domestic court cases guaranteeing the right to a clean and healthy environment in various countries, courtesy of the pressure put on the government by national human rights bodies, civil society organizations and pressure groups in different countries. For instance, The Supreme Court of Costa Rica in the case of *Carlos Roberto Mejia Chacón v. Municipalidad de Santa Ana* affirmed the right to a clean and healthy environment,[53] The plaintiff (the action was brought by the National Human Rights Commission of Costa Rica and other pressure groups in Costa Rica) brought the action on the grounds that his and his neighbour's right to life and a clean and healthy environment had been violated because a cliff in their neighborhood was being used as a dump. The court ordered that the dump be closed immediately and held that the authorities had not been effective or diligent enough in carrying out their obligation to protect life and the environment. The court stated that:

[51] Onjala Joseph, O. *Managing Water Scarcity in Kenya: Industrial Response to Tariffs and Regulatory Enforcement,* (2002, Unpublished Ph. Dissertation, Department of Environment, Technology and Social Studies, Roskilde University, Denmark).

[52] Module 15: *The Right to A Healthy Environment,* (2020, Hrlibrary.umn.edu. Retrieved 1 November 2020) retrieved, from http://hrlibrary.umn.edu/edumat/IHRIP/circle/modules/module15.htm#_edn6.

[53] Costa Rica Constitutional Chamber of the Supreme Court Vote No. 3705, 30 July 1993.

> life is only possible when it exists in solidarity with nature, which nourishes and sustains us-not only with regard to physical food but also with physical well-being. It constitutes a right which all citizens possess to live in an environment free from contamination.[54]

As a result, therefore, this paper contends that the civil societies in Kenya and other non-governmental stakeholders have a crucial role in the advocacy for the respect for the right to a clean and healthy environment. This is not just with regards to litigations, but diverse positive activities aimed at the pursuance for a clean and healthy environment, through activities such civil education, activism, public interest litigation and being the voices of reason on behalf of the common citizen.

vi. Recourse through courts

Pursuant to Article 70(1) of the Constitution of Kenya 2010, if a person alleges that a right to a clean and healthy environment recognized and protected under Article 42 of the Constitution has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect of the same matter.[55] Just like in many jurisdictions world-over, Kenya has a redress cause through the courts, for those who feel like this right is being or likely to be violated.

Section 3 of EMCA allows any person who alleges that the right to a clean and healthy environment has been or is being infringed or violated to apply to the Environment and Land Court in the public interest. The test of whether an infringement is happening or is likely to occur was enunciated in the case of *Adrian Kamotho Njenga vs. Council of Governors & 3 others,*[56] which was to the effect that a petitioner is not obliged to prove that he or she has suffered loss or damage in his or her application for enforcement of the right to a clean and healthy environment.

[54] Commission on Human Rights, Costa Rica, op. cit., 92.
[55] Article 70(1), The Constitution of Kenya 2010.
[56] [2020] eKLR, Environment and Land Petition 37 of 2017.

This was further enunciated in the case of *Joseph Leboo & 2 others vs. Director Kenya Forest Services & another,*[57] where the court rendered itself that the above position was in fact the applicable position, and still is the position, under the Environmental Coordination and Management Act (EMCA), 1999, which preceded the Constitution of Kenya, 2010*:*

> It can be seen that Section 3(4) above permits any person to institute suit relating to the protection of the environment without the necessity of demonstrating personal loss or injury. Litigation aimed at protecting the environment, cannot be shackled by the narrow application of the locus standi rule, both under the Constitution and statute, and indeed in principle. Any person, without the need of demonstrating personal injury, has the freedom and capacity to institute an action aimed at protecting the environment. The plaintiffs have filed this suit as representatives of the local community and also in their own capacity. The community, of course, has an interest in the preservation and sustainable use of forests. Their very livelihoods depend on the proper management of the forests. Even if they had not demonstrated such interest, that would not have been important, as any person who alleges a violation of any law touching on the environment is free to commence litigation to ensure the protection of such environment. I am therefore not in agreement with any argument that purports to state that the plaintiffs have no locus standi in this suit.[58]

Borrowing from a foreign jurisdiction, in India for instance, the enforcement of the constitutional right to a clean and healthy environment (similar provision as Article 70(1) of the Kenya Constitution 2010) can be seen in the case of *M.C. Mehta v. Union of India*.[59] This case regards pollution by a number of tanneries and the failure of the authorities to take appropriate steps. The petition asked the court to restrain certain industries from discharging trade effluents into the Ganges River. The Supreme Court of India ordered the tanneries to close down unless the trade effluents were

[57] *[2013] eKLR,* Environment and Land Case 273 of 2013.
[58] Ibid.
[59] *Mehta v. Union of India & Ors*, (2006) 3 SCC 399.

subjected to a pre-treatment process by setting up primary treatment plants as approved by the State Pollution Board. The court noted that "closure of tanneries may bring unemployment [and] loss of revenue, but life, health and ecology have greater importance to the people."[60]

It is the position of this paper that an undertaking that seeks to negatively alter environmental balance should be interpreted in line with Article 70 of the Constitution, and as a result, action should be taken to reverse or avert the happening of the undertaking, or if it is already in motion, necessary compensation to be made to that end. This is best seen in the case of *National Environment Management Authority & Another vs Gerick Kenya Limited,*[61] Justice Mutungi held that:

> In this matter we have a situation where we have competing interest. On the one hand we have the public interest where the Community needs protection against potential harm to the environment through contamination or pollution, and on the other hand, we have the defendant's private commercial interest where the defendant wishes to develop the site for commercial gain. Where in a case such as the instant one, the public interest as the public interest is pitied against private interest, the public interest overrides the private interest is for the good of the wider public as opposed to the narrow private interest. The public interest no doubt outweighs the private individual interest.

6. Conclusion

The human constitutional right under Article 42 read with article 71 of the Constitution to a clean healthy environment brings together the environmental dimensions of civil, cultural, economic, political, and social rights, and protects the core elements of the natural environment that enable a life of dignity. Diverse ecosystems and clean water, air, and soils are indispensable for human health and security. The right also protects the civic space for individuals to engage in dialogue on environmental policy.[62]

[60] Ibid, Par 47.
[61] [2016] eKLR, Environment and Land Case 155 of 2015.
[62] The United Nations Human Rights Watch, *The Case for a Right to a Healthy Environment.*. (2020). Retrieved 1 November 2020, from https://www.hrw.org/news/2018/03/01/case-right-healthy-

Without it, government policies would often cater to the commercial interests of the powerful, not the public, and certainly not the politically disenfranchised. Therefore, it is important that this right is advocated for, in order for it to be effectively realized and enjoyed by all citizens, regardless of their social status.

environment#:~:text=The%20human%20right%20to%20a,enable%20a%20life%20of%20dignity.

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Recognising The Intellectual Property in Indeginous Knowledge and Leveraging The Same for Sustainable Development in Kenya

By: ***Kibet Brian****

Abstract

At the crux of this paper will be to show how intellectual property in indigenous knowledge can be protected from predatory exploitation to the detriment of the communities that have exclusively developed them and hence must have absolute property rights in them. A case for the full protection of these rights will be made whilst appreciating the advances that the Kenyan legal framework has made towards that end. The paper contends that whereas significant steps have been taken by the constitution and several other legislations to protect indigenous knowledge for sustainable development, the same remains a mirage.

It begins by giving the rationale for protection of indigenous knowledge as a form of intellectual property. It then proceeds to explore some of the property rights in indigenous knowledge in Kenya that have been expropriated exploitatively. A critical analysis of the legal framework on the protection of indigenous rights is then offered. The nexus between the protection of indigenous knowledge and sustainable development is then drawn and potential legal reforms that will enhance the protection of indigenous knowledge are given. It then concludes.

1. Introduction

Kenya boasts of a "unique culture" that puts it in a strategic position to innovate and generate skills that are critical in the development of the nation.[1] This means the cultural setup of the Kenyan hegemony is a replete

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[1] The National Information Communication and Technology Policy, 2019. Available at https://www.ict.go.ke/wp-content/uploads/2019/12/NATIONAL-ICT-POLICY-2019.pdf accessed on 04/06/2021

with innovators whose innovations drive the Kenyan economy and contribute greatly to the wellbeing of the society by improving the quality of life.

Lest we forget, ours is a history replete with mind blowing innovations of our forefathers which the current generations have inherited from them and are expected to bequeath to the yet to be born generations.[2] Such innovations which mainly take the form of knowhow and skills are called indigenous knowledge.

However, trouble arises in this Eden of sorts, in the sense that since the existing intellectual property rights regimes that exist are mainly concerned with protection of the property rights of individuals and corporations, it paves way for exploitative expropriation of this knowledge owned by our communities.[3]

Indigenous knowledge is a term can be used interchangeably with traditional knowledge and has been defined as 'information that people in a given community, based on experience and adaptation to a local culture and environment, have developed over time and continue to develop'.[4] The definition has been elucidated on and determined to be unlimited to specific a technical field, and may include agricultural, environmental or medical knowledge, and knowledge associated with genetic resources.[5]

[2] Bujo B. The Ethical Dimension of Community: The African Model and the Dialogue between North and South 1998. Paulines Publications Africa.

[3] The National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions, 2009 Available at https://www.wipo.int/edocs/lexdocs/laws/en/ke/ke022en.pdf Accessed on 05/06/2021

[4] Stephen H, Justin F. *Issues and Options for Traditional Knowledge Holders in Protecting Their Intellectual Property*, Concept Foundation, IP Handbook of Best Practices Chapter 16.6 ,Available at Accessed on 05/062021

[5] Swakopmund Protocal on the Protection of Traditional Knowledge and Expressions of Folklore, 2010 Available at https://www.wipo.int/edocs/lexdocs/treaties/en/ap010/trt_ap010.pdf Accessed on 05/06/2021

Sustainable development has been defined as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[6] Recognized as one of the values and principles of governance in the Kenyan constitution,[7] sustainable development, can only be achieved in development that involves the utilization of traditional knowledge if the traditional knowledge is adequately protected from predatory exploitation. Therefore, development can only be sustainable in such a setting if the intellectual property right in traditional knowledge is adequately protected.

The economic benefits derived by some nations from some forms of traditional knowledge are enormous and therefore the existence of traditional knowledge in Kenya presents an opportunity for the nation to benefit financially from them.[8] A good example is the Philippines which got an estimated ten million US Dollars from traditional medicine alone in 2001.[9] This presents a sneak peak of what may hold for the country if its traditional knowledge is well protected and harnessed to achieve sustainable development.

2. Rationale for the Protection of Indigenous Knowledge in Kenya

Property rights have long been conceptualized in a western perspective to denote control over things by a single individual to the exclusion of all others.[10] This presents a quagmire in the African setting where property was held in commons and not solely by individuals.[11] Does such a framework

[6] Brundtland, G.H. (1987) Our Common Future: Report of the World Commission on Environment and Development. Geneva, UN-Dokument A/42/427. (The Brundtland Commission Report.)

[7] Article 10 of Constitution of Kenya, 2010.

[8] Wekundah J, *Why Protect Traditional Knowledge* , African Technology Policy Studies Network Biotechnology Trust Africa, Special Paper Series No. 44 Available at https://atpsnet.org/wp-content/uploads/2017/05/sps44.pdf Accessed on 05/06/2021

[9] World Health Organization, Regional committee of Western Pacific Region on Traditional Medicine, 2001

[10] Jeremy Waldron In Dennis M. Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory*. Blackwell (1996)

[11] Okoth Ogendo H, '*The Tragic African Commons: A Century of expropriation, suppression and submission*' University of Nairobi Law Journal, in Amplifying Local Voices: Striving for Environmental Justice, Centre for International

grant a right to property to the "community" that constitutes the commons? Hegel seemed to be of the view that since an African was "a natural man, in his untamed state" he could not have the wherewithal to develop and maintain a structure that could protect the rights of an individual in complex settings such as property.[12]

Okoth Ogendo tacitly replied to Hegel in his seminal treatise, *The Tragic African Commons*.[13] In this work, Okoth Ogendo debunked the myth that the African person, who was described as a 'completely wild' by Hegel actually had a more advanced property rights regime that vested ownership in the whole community, and was held in trust by the living generations in trust of the future generations. This presents that a sustainable development framework of property rights in the African setting.[14]

As such, the property rights in Traditional knowledge vested in the "whole"[15] community and not the living members alone. Thus, the living generations are obliged to take care of the property rights and defend them from predatory exploitation. The arrival of the colonialists disrupted this otherwise perfect framework and replaced it with an exclusionary system of rights to property.

In this new setting, it was possible for a select group of individuals to connive with parties and craft financial arrangements that would result in

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Environmental Law, et. al.". In: Cent. Afri. J. Pharm.Sci. 5(3): 60-66. Cent. Afri. J. Pharm.Sci. 5(3): 60-66; 2002.

[12]Hegel, Georg W. F, and J Sibree. *The Philosophy of History*. New York: Dover Publications, 1956.

[13] OKOTH PROFOGENDOHASTINGW. ""*The Tragic African Commons: A century of expropriation, suppression, and subversion*, in Amplifying Local Voices: Striving for Environmental Justice, Centre for International Environmental Law, et. al.". In: Cent. Afri. J. Pharm.Sci. 5(3): 60-66. Cent. Afri. J. Pharm.Sci. 5(3): 60-66; 2002.

[14] It is critical to point out that Okoth Ogendo holds that the right to use a particular thing in the African commons is not one where all and sundry have exclusive access but one which access is pegged on belonging to the community that owns the commons and it be used in a specific manner such as grazing, gathering, fishing or hunting.

[15] Whole in this context means all the individuals in the community including the past, current and future generations.

an exploitative use of an asset or knowledge of a community to the benefit of a few or in some instances none at all for the members of the community.[16] In some instances, communities were made to belief that their knowledge was being studied further through intensive research only for it to be expropriated without their knowledge.[17] It is at this point in time that rains began to beat communities that possessed traditional knowledge that was of interest to technological, agricultural and medicinal needs of the modern world.

This creates a basis for the protection of ownership rights of these communities to this knowledge and the need to ensure the entire community benefits from the knowledge they possess and in order for it to benefit the futures generations.

The protection of this *sui generic* property will yield immense economic, social and cultural benefits. Firstly, the communities will be in a position to derive financial benefits from the property in their traditional knowledge which enables them to realize other human rights such as access to food, quality healthcare and reasonable housing. The same would also pave way for the development of an intellectual property rights regime that covers traditional knowledge the same way patents and copyrights protect the rights of inventors and the creators of original forms of expressions respectively.[18]

The protection of Traditional Knowledge also results in a sustainable manner of expropriating and exploiting traditional knowledge. This arises when subsequent generations are in a position to enjoy the benefits of the property rights of their forefathers as opposed to a situation whereby only the living generations benefit and the subsequent ones are left with a

[16] Overton, John. "*War and Economic Underdevelopment? State Exploitation and African Response in Kenya 1914-1918.*" The International Journal of African Historical Studies, vol. 22, no. 2, 1989, pp. 201–221. *JSTOR*, www.jstor.org/stable/220031. Accessed 5 June 2021.
[17] Busienei W, Otswang'o F, and Munyi P. 'National Experiences, Kenya: Enzyme case study in Lake Bogoria' Access Benefit Sharing and Intellectual Property Rights Workshop, September, 2011.
[18] Kariuki F, Ouma S, Ngetich R. '*Property Law'* Strathmore University Press, 2016

reminiscetial memory whereby they see their traditional knowledge being put to commercial use but derive no real benefits from them.

The adequate protection of traditional knowledge will also tame bio piracy and ensure that communities are adequately compensated for the use of their knowledge as well as accord the community recognition as innovators and generators of path breaking knowledge.[19]

3. Cries for Recognition and Justice: Traditional Knowledge that has been utilized exploitatively in Kenya.

An Intellectual Property Rights Regime that is nonresponsive to the *sui generic* needs of property rights in Traditional Knowledge has presented a pitiful situation whereby traditional knowledge is exploited by persons for a fortune and the holders of the property, who in most scenarios are poor communities in the rural areas, do not realize the benefits of the same in any way.[20] This breeds a feeling of discrimination on grounds of poverty and neglect amongst the members of the community. It must be remembered that an infringement to an individual's access to their property rights has been held to an affront to their other rights such as right to water, shelter and housing.[21] This part highlights some of these instances.

Prunus Africana is a tree whose bark has been exploited by many ethnic communities in Kenya for their medicinal purposes. It was used by the Marakwet community of Kenya to control and manage hypertension amongst other ailments.[22] It had also been used for generations in African

[19] Wekundah J, *Why Protect Traditional Knowledge* , African Technology Policy Studies Network Biotechnology Trust Africa, Special Paper Series No. 44 Available at https://atpsnet.org/wp-content/uploads/2017/05/sps44.pdf Accessed on 05/06/2021

[20] Kariuki F, Ouma S, Ngetich R. '*Property Law'* Strathmore University Press, 2016

[21] See the decision in Satrose Ayuma & 11 others V Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 2 Others (2011) EKLR Available at http://kenyalaw.org/caselaw/cases/view/90359/ Accessed on 06/06/2021

[22] Kipkore w, Wanjohi B, Rono H. Kigen G, A study of the medicinal plants used by the Marakwet Community in Kenya, Journal for Ethnobiology and Ethnomedicine, Available at

communities to treat prostate cancer.[23] This knowledge was exploited in the development of medicines that treat benign prostate hyperplasia, and trade in its products in the world has a current market value of around $150 million every year.[24] This led to the exploitation of the tree to near extinction.[25]

Though world has benefitted immensely by the medicinal traditional knowledge of the barks of the tree which was originally held by African communities, most of these communities have neither been adequately compensated for the utilization of their knowledge nor have the big pharmaceutical corporations that have used the same knowledge attempted to recognize the input of these communities to the development of the end products of their traditional knowledge.

A shrub known as *Maytenus buchananii* was known and used by the Digo community, one of the Mijikenda sub tribes of Coastal Kenya, for its medicinal value. The American National Cancer Institute collected the shrub and used it to manufacture a drug for treatment of Pancreatic Cancer

https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3974104/ Accessed on 06/052021

[23] Komakech R,Kang Y, Lee J.H. Omujal F, A Review of the Potential of Phytochemicals from *Prunus africana* (Hook f.) Kalkman Stem Bark for Chemoprevention and Chemotherapy of Prostate Cancer, Available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5327751/ Accessed on 06/06/2021

[24] Terry S. in The exploitation of *Prunus africana* on the island of Bioko, Equatorial Guinea. Available at https://www.researchgate.net/publication/268044578_The_exploitation_of_Prunus_africana_on_the_island_of_Bioko_Equatorial_Guinea Accessed on 06/06/2021.

[25] *Prunus africana* is currently classified by the International Union for the Conservation of Nature (IUCN) as vulnerable and is listed in Appendix II of the Convention on International Trade in Endangered Species of Fauna and Flora (CITES), IUCN 2015

since it contains maytansine.[26] The community did not get any recognition or proceeds from the use of their traditional knowledge without consent.[27]

Extremophiles are an enzyme in bacteria which is industrially used in the fading of denims and whose trade is in the excess of 500 Million US Dollars every year.[28] It was collected from Lake Bogoria by scientists who have since gone ahead to clone it to enhance its efficacy at the industrial level without the input of the local community.[29]

Lake Ruiru in Kenya hosts a microbe called *Actinoplanes sp* which has been used to develop drugs that are used in diabetes management.[30] Its trade in the world market has been estimated to be worth around 278 Million Euros.[31] There is no evidence that the communities around the lake have been compensated or recognized for exploitation of this resource that was derived from a lake that has been conserved and utilized by the neighboring community for ages.

This enumeration is not exhaustive. However, it presents the sad tale of bio piracy of our traditional knowledge by monstrous corporations and

[26] Maytansine is known to exhibit cytotoxicity against many tumor cell lines and may inhibit tumor growth. See generally the uses and definition of Maytansine as defined by National Cancer Institute of the United States. This information is available at https://www.cancer.gov/publications/dictionaries/cancer-drug/def/maytansine Accessed on 06/06/2021.

[27] Magube J.Kameri M., and Mutta D, ' Traditional Knowledge, generic resources and Intellectual Property protection; Towards a new international regime' International Environmental Law Research Center Working Paper, 2001

[28] Wekundah J, *Why Protect Traditional Knowledge* , African Technology Policy Studies Network Biotechnology Trust Africa, Special Paper Series No. 44 Available at https://atpsnet.org/wp-content/uploads/2017/05/sps44.pdf Accessed on 05/06/2021

[29] Heur S, "The Lake Bogoria extremophile; A Case Study.

[30] Third World Network, Biopirates earn millions in profits from African bio-resources, Available at https://www.twn.my/title2/health.info/twninfohealth017.htm Accessed on 06/06/2021

[31]Wekundah J, *Why Protect Traditional Knowledge* , African Technology Policy Studies Network Biotechnology Trust Africa, Special Paper Series No. 44 Available at https://atpsnet.org/wp-content/uploads/2017/05/sps44.pdf Accessed on 05/06/2021

individuals. The financial value of the same has been highlighted to indicate the enormity of the economic loss hence the need to develop strong intellectual property rights regime in the realm of traditional knowledge.

4. The Kenyan Legal Framework on Protection of Traditional Knowledge

Kenya has employed constitutional, statutory and policy frameworks in a bid to protect and preserve the traditional knowledge of its peoples. The endgame of these legal framework can be deduced to be an attempt to actualize the pride the Kenyan People have in their cultural and ethnic diversity which are productions of nations within the Kenyan state and the aspiration to live in it as one indivisible nation where peace and unity reigns.[32]

Kenya's autochthonous Constitution, 2010 recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation. [33] Article 11 (2) of the Constitution obliges the government to recognize the role of science and indigenous technologies protect and to the development of the nation. The state is also obliged to protect and enhance the intellectual property in the indigenous knowledge of the communities of Kenya.[34]

The Constitution also goes ahead to impel parliament to enact a legislation that will "ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage; and recognize and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya".[35] Parliament was supposed to enact this legislation within five years on promulgation of the Constitution of Kenya, 2010.[36]

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[32] A close reading of the preamble of the Kenyan Constitution gives life to this cogitation. The relevant section is the people of Kenya are; **PROUD** of our ethnic, cultural and religious diversity, and determined to live in peace and unity as one indivisible sovereign nation

[33] Article 11 (1) of The Constitution of Kenya,2010

[34] Article 69 (1) (c) of The Constitution of Kenya, 2010

[35] Article 11 (3) of The Constitution of Kenya,2010

[36] The Fifth Schedule of the Constitution of Kenya, 2010. The Kenyan Parliament failed to meet the timeline of five years given to it to enact this legislation. This

The protection of Traditional Knowledge and Cultural expressions Act, 2016 is the main legislation in Kenya that sets out the framework for the protection of indigenous knowledge rights in Kenya. The Act defines traditional knowledge in a broad manner that encompasses the innovations, practices and knowhow of Kenyan communities or knowledge which may be contained in codified languages passed from generation to another in various fields ranging from medicine to agriculture.[37]

The Act places county governments at the center of protection of Traditional Knowledge. The county executive committee member who is in charge of matters relating to culture is mandated to create and maintain a repository that is created from the primary registration of traditional knowledge and cultural expressions within a county. [38] The County government is also expected 'to facilitate the collaboration, access and the sharing of information and data relating to traditional knowledge and cultural expressions between county governments.' [39] This is a very progressive provision which factors in the consideration that individuals of the same ethnic group were separated from one another in the mapping of internal boundaries of districts in the colonial times most of which have been retained to this day and form the county boundaries.

The National Government is tasked with among other things to promote and conserve traditional knowledge in Kenya as well as establish and maintain a Traditional Knowledge Repository at the Kenya Copyright

legislation was passed on 15/03/2015 against a Constitutional deadline of 27/08/2015.

[37] Section 3 of The Traditional Knowledge and Cultural Expressions Act, 2016 defines Traditional Knowledge as; any knowledge- (a) originating from an individual, local or traditional community that is the result of intellectual activity and insight in a traditional context, including know-how, skills, innovations, practices and learning, embodied in the traditional lifestyle of a community; or (b) contained in the codified knowledge systems passed on from one generation to another including agricultural, environmental or medical knowledge, knowledge associated with genetic resources or other components of biological diversity, and know-how of traditional architecture, construction technologies, designs, marks and indications.

[38] Section 4 of Traditional Knowledge and Cultural Expressions Act, 2016

[39] Ibid

Board. [40] The repository contemplated in this provision is the Traditional Knowledge Digital Repository which contains the contain information relating to traditional knowledge and cultural expressions that have been documented and registered by county governments.[41]

The act also provides for the right to protect traditional knowledge that is enjoyed by the owners and holders of traditional knowledge in Kenya.[42] The communities also have exclusive rights to authorize the exploitation of their traditional knowledge and to prevent any person from exploiting their traditional knowledge without their prior informed consent. In addition this, the owners shall have the right to institute legal proceedings against any person who exploits traditional knowledge without the owner's permission.[43] The communities are also entitled to make rules of procedure to guide the process of authorizing individuals to exploit their traditional knowledge.[44]

Kenya has a national policy on Traditional Knowledge. The National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions, 2009[45] is a policy that was conceived crafted to enhance the

[40] Ibid Section 5
[41] Ibid Section 8 (3)
[42] Section 9 of Traditional Knowledge and Cultural Expressions Act, 2016
[43] See generally Section 10 of Traditional Knowledge and Cultural Expressions Act, 2016
[44] Section 10 (3) of Traditional Knowledge and Cultural Expressions Act, 2016
[45] The objectives of this policy are to; (a) Provide a legal and institutional framework to support the integration of various aspects of traditional knowledge, genetic resources and traditional cultural expressions in national development planning and decision making processes. (b) Promote the preservation, protection and development of traditional knowledge, genetic resources and traditional cultural expressions for multiple applications and use. (c) Promote and foster the documentation, use and dissemination of traditional knowledge, genetic resources and traditional cultural expressions with mechanisms to acknowledge, protect and benefit the sources and/or custodians. (d) Promote the protection of traditional knowledge associated with conservation and sustainable use of biological diversity and equitable sharing of accrued benefits. (e) Enhance collaboration and partnership in the generation, access to and utilization of traditional knowledge, genetic resources and traditional cultural expressions.

protection of traditional knowledge in Kenya.[46] The policy identifies its guiding principles to include, confidentiality which denotes a community's right to keep parts of their culture, respect of the traditional knowledge of the communities, prior informed consent to be sought before any activities can be undertaken with regards to traditional knowledge of individuals amongst others.[47] Of great importance to this work is the incorporation of the principle of sustainable development as one of the guiding principles. This affirms that traditional knowledge should be managed in a way that meets the needs of the current and future generations thus the need for its protection.

The policy begins by pointing out that traditional knowledge alongside genetic resources and traditional cultural expressions are relied on by rural communities yet they are not recognized in many national policy and legal frameworks.[48] It also aptly captures the predatory exploitation of traditional knowledge by positing that there are concerns that some of our traditional knowledge has been expropriated and patented by multinationals which conflicts with the values that govern traditional knowledge.[49]

The policy point out that it envisages a Traditional Knowledge protection system that does not just protect the knowledge created in the past and passed from generation to generation but one which preserves and promotes innovation of the same to accelerate national development.[50] This explains why it goes ahead to put out policy statements that are particular to every theme of traditional knowledge.[51]

[46] See generally the goals of The National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions, 2009 Available at https://www.wipo.int/edocs/lexdocs/laws/en/ke/ke022en.pdf Accessed on 05/06/2021

[47] See generally the guiding principles of The National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions, 2009 Available at https://www.wipo.int/edocs/lexdocs/laws/en/ke/ke022en.pdf Accessed on 05/06/2021

[48] Ibid 1.2.1.1

[49] Ibid 3.1.2

[50] Ibid Preamble

[51] The Policy Document gives policy statements that are particular to the several strands of Traditional Knowledge ranging from Agriculture to Medicines and Public Health to Biodiversity Conservation.

The policy also recognizes that the existing Intellectual Property Rights framework does not meet the needs of Traditional Knowledge since they are primarily engineered to meet the private and corporate needs and not the Trans generational needs of Traditional Knowledge which is owned by the present, past and future generations.[52]

Article 2 (6) of The Constitution of Kenya, 2010 provides that any treaty or convention ratified by Kenya forms part of the laws of Kenya. Whereas Kenya is a signatory to several conventions that protect Intellectual Property Rights[53], this work will discuss the Swakopmund Protocol, 2010.[54] This convention is selected since it best captures the spirit that this paper adopts in the senses that the Swakopmund Protocol emphasizes on that legal protection of traditional knowledge must be tailored; "to the specific characteristics of traditional knowledge and expressions of folklore, including their collective or community context, the intergenerational nature of their development, preservation and transmission, their link to a community's cultural and social identity, integrity, beliefs, spirituality and values, and their constantly evolving character within the community concerned".[55] This demonstrates that the protocol captures the traditional knowledge as is in Kenya, in the sense that it is trans generational in nature and therefore has "specific characteristics" which need to be considered when vouching for their protection.

The protocol offers a framework for the registration of traditional knowledge that is shared by two or more communities that happen to be in

[52] Ibid paragraph 4.5.1

[53] Kenya is a signatory to *Convention on Biological Diversity*, 1992, *International Treaty on Plant Genetic Resources for Food and Agriculture*, 2001 all of which form parts of the laws of Kenya.

[54] Swakopmund Protocal on the Protection of Traditional Knowledge and Expressions of Folklore, 2010 Available at https://www.wipo.int/edocs/lexdocs/treaties/en/ap010/trt_ap010.pdf Accessed on 05/06/2021

[55] Preamble of the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore, 2010 Available at https://www.wipo.int/edocs/lexdocs/treaties/en/ap010/trt_ap010.pdf Accessed on 05/06/2021

different countries.[56] The protocol also identifies the beneficiaries of the protection of traditional knowledge as the holders of the traditional knowledge who create, preserve and transmit knowledge in a traditional and intergenerational context.[57] The owners of traditional knowledge have the right to prevent anyone from exploiting their knowledge without their prior informed consent.[58]The protocol also calls for the equitable sharing of the proceeds of the expropriation of the knowledge and the recognition of the knowledge holders.[59]

5. The Nexus between Protection of Indigenous Knowledge and Sustainable Development

Indigenous knowledge and sustainable development are joined at the hip in the sense that the former is owned by the past, present and future generations and is therefore a trans generational asset. The latter is a concept that seeks to preserve the right of future generations to provide for themselves and to enjoy human rights which includes the rights to health, safe environment and in the case of traditional knowledge, a right to culture.[60] Therefore, a framework that protects the property rights in indigenous knowledge implicitly advances the spirit of sustainable development.

The World Bank in 1993, which was an International Year for the World's Indigenous People, sponsored a conference whereby the role of traditional knowledge in contributing to creation of more environmentally and socially sustainable forms of development in the world.[61] From this

[56] Section 5.4 Ibid
[57] Section 6 Ibid
[58] Section7.2 Ibid
[59] See generally sections 9 & 10 of the Swakopmund Protocol.
[60] Kariuki Muigua, Actualising Socio-Economic Rights for Sustainable Development in Kenya, Available at http://kmco.co.ke/wp-content/uploads/2019/02/Actualising-Socio-Economic-Rights-for-Sustainable-Development-in-Kenya-Kariuki-Muigua-9-February-2019.pdf Accessed on 06/06/2021
[61]United Nations International Year of the World's Indigenous Peoples' Conference (1993: World Bank) Traditional knowledge and sustainable development: A conference sponsored by the World Bank's Environment Department and the World Bank Task Force on the International Year of the World's Indigenous People held at the World Bank, Washington, D.C., September 27-28, 1993

conference a framework that guides development in settings where indigenous people live was conceptualized.[62] The tone of the proceedings of the conference reveals that the delegates were more than convinced that development is only sustainable when it protects the indigenous peoples rights to their traditional knowledge.[63]

The concept of sustainable development therefore advances the protection of traditional knowledge as a form of intellectual property rights. This enhances its preservation and protection from predatory exploitation thereupon ensuring that communities that own the intellectual property rights benefit from any proceeds of their utilization. Thus sustainable development practices should be encouraged given that they entrench the protection of intellectual property rights in traditional knowledge.

6. Safeguarding Indigenous Knowledge in Kenya; Potential Legal Reforms

This paper recommends that since The National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions, 2009 puts out that the existing Intellectual Property Framework does not create the aegis for the protection of intellectual property rights in Traditional Knowledge, a framework that seeks to protect the same should be developed. This should be done since traditional knowledge may not meet the tests of some forms of intellectual property rights such as patents which are only extended when the test of novelty is met.[64]

[62] See Appendix 4 of the Report ; Traditional knowledge and sustainable development: proceedings of a conference sponsored by the World Bank's Environment Department and the World Bank Task Force on the International Year of the World's Indigenous People held at the World Bank, Washington, D.C., September 27-28, 1993 / Shelton H. Davis, Katrinka Ebbe, editors; Alicia Hetzner, editorial consultant. Available on https://documents1.worldbank.org/curated/en/517861468766175944/pdf/multi-page.pdf Accessed on 06/06/2021

[63] See generally the proceedings of the conference as contained in the document referenced in footnote 63. A particular emphasis is on the contribution of Jorge Terena in page 35.

[64] Section 22, *Industrial Property Act*, (Cap. 509, Laws of Kenya)

This work also recommends a reevaluation of the Witchcraft Act, which confers on a District commissioner powers to compel an individual who is suspected to practice witchcraft to live in a designated area.[65] This power may be abused in a situation where the District Commissioner is not a local of the area and may be misled by a section of members of the community who no longer want to be seen as holders' of a traditional knowledge which may have some benefits but is viewed as witchcraft given the rise of the influence of Abrahamic religions in Kenya some of which abhor some traditional African religion practices which they may wrongly classified as witchcraft.

This work would recommend the withdrawal of such discretionary power and the replacement of it with a juridical one where the suspected witch is heard and the knowledge they possess independently verified whether it is beneficial or harmful. Thus the provisions of the Witchcraft act as of now seems to fight the protection of property rights in traditional knowledge
This work also recommends the fast tracking of the setting up of the Traditional Knowledge Trust fund[66]. These funds will go a long way in facilitating the collation, registration and protection of traditional knowledge under a new sui generis framework specifically created for that purpose.

7. Conclusion

This paper has provided a basis for the protection of Traditional Knowledge in Kenya and discussed the existing legal framework for the same. It has also offered recommendations on how this legal framework can be enhanced. It also briefly gave examples of traditional knowledge that have been exploitatively utilized to the detriment of the community that have

[65] Section 9 of *Witchcraft Act*, (Cap. 67, Laws of Kenya). This Act of Parliament is yet to be brought into conformity with the new Kenyan Constitution, 2010 which does not provide for an office of a "District Commissioner". This Act can be purposively read to refer to the office of the County Commissioner in the current constitutional dispensation.

[66] See Policy statement number 6 under Section 5.4 of The National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions, 2009 Available at https://www.wipo.int/edocs/lexdocs/laws/en/ke/ke022en.pdf Accessed on 05/06/2021

owned them for generations. It also took cognizance of and highlighted the link that exists between sustainable development and protection of the property rights in traditional knowledge.

The paper argues that time is nigh for the development of frameworks to protect the property rights in traditional knowledge. Doing so would set a good foundation for leveraging traditional knowledge for sustainable development.

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Political Parties' System in Democratization and Good Governance Entrenchment in Post-Colonial Kenya (1963-2021)

By: ***Harry Njuguna Njoroge****

Abstract

Democratization and governance goes back to about 2,500 years, during the periods of the Greek and Roman classical governments. The very fact that democracy has had such a long history of existence, it has created more questions, than producing answers. The Greeks were probably the first people to practice democracy followed by the Romans who used the term republic, but the two (democracy and republic) systems performed similar functions. The hallmark of democracy is characteristic of more than one political (at least two) parties competing in national elections, where the citizenry; belonging to different political parties (political parties' system) has the right of participation in regular, and timely scheduled elections to elect leaders of the choice in both the executive and legislative dockets.

A Political parties' system plays a central role toward the entrenchment and enhancement of democratization and governance processes of a country. Democracy is desirable for political, economic and socio-cultural development, and protection as well as the enjoyment of human rights. States that have championed a political parties' system, for instance, the United States of America and Britain have recorded a high degree in the democratization governance and landscape. However, in some of the states that have undermined a political parties' system, governments have collapsed and in some cases the states have become failed states. For example, Somalia has become a failed state for lack of a political parties' system. Ethiopia is another state with no semblance of a political parties' system, and has been as a result been experiencing political problems like the current Tigray uprisings.

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At the dawn of independence in 1963, Kenya practiced political parties' system, with two dominant parties, KANU and KAD. However, within the first year of independence, KADU dissolved voluntarily, and joined the government. This action by Kadu in effect, contributed a lot in undermining democratization and governance in the country. KPU was formed in 1966 as an opposition, but it was soon proscribed in 1966, again rolling back the gains in democratization and governance. Following the re-introduction in Kenya of a political parties' system 1991, the country has achieved hugely (though not fully) in its democratization and governance space. The citizens are now able to enjoy their inalienable and fundamental rights, as well as the right of participation in government affairs. They are also able to picket and conduct demonstrations. All these accomplishments can be attributed to the critical role that the political parties' system has played toward the enhancement and entrenchment of democratization and governance in the country.

A political parties' system is of crucial importance in perfecting, upholding and safeguarding democratization and governance landscape in state, especially in the young and emerging democracies like Kenya.

Key words: Political Parties, Democratization, good governance

Situating Democratization and Governance Discourses in the Classical and Middle Ages

Despite the historical developments in the international system that took place in the twentieth century, for instance, the world wars, rise and decline of communism and emergence of new powers in Asia especially China and Japan, the rise of democracy at the end of the Cold War as championed by the West remains the single-most momentous phenomenon (Amartya, 1999, p.3).

Democracy has been discussed on and off for about twenty-five hundred years, ample time to provide a neat set of ideas which would be accepted as universal. However, this is not so. The very fact that democracy has such a long history has created more questions, rather than answers. Democracy has meant different things to different people at different times and different places. During long periods in the history of humankind, democracy

disappeared in practice and, remained barely alive as an idea or a memory. Until only two centuries ago, democracy was treated more or less a domain for philosophers to theorize about, than a real political system for people to adopt and practice. Even in the rare cases where "democracy or a "republic" in fact existed, most adults were disenfranchised from participation in political life (Dahl, 1998, pp.2-3).

It was the Greeks, and most probably, the Athenians who came up with the term democracy or demokratia, from the Greek words; *demos* for the people, and *kratos*; to rule (Dahl, 1998 p.11). While in Athens the word *demos* denoted the entire Athenian people, sometime it differentiated only the common people, or even just the poor. The aristocrat class applied the word democracy to disparage or besmirch, as a kind of epithet to show disdain for the common people, who had taken away the aristocrats' previous control of government. Among the Greek democracies, the one of Athens was the most important, the best known then, and presently of incomparable influence on political philosophy, as it stood out later as the extra-ordinary example of citizen participation or participatory democracy. Although some Greek cities joined together to introduce rudimentary representative governments for their leagues, alliances and confederations, not much is known about them, and unfortunately these political formations did not leave behind any justifiable impression on democratic practices or principles. Greek democratic political institutions, as innovative as they were in their period, were ignored or even totally rejected during the development of modern representative democracy (Dahl, 1998, pp. 12 and 13).

Almost at the same period that popular government was introduced in Greece, it also took root in the Italian peninsula in the city of Rome. The Romans, however, decided to describe their system as a "republic," from *res*; thing of affair in Latin, and *publicus*, public; loosely meaning that a republic was the thing that belonged to the people(Dahl, 1998, p.13). The right to participate in governing the Republic was at first limited to the patricians or aristocrats. After much struggle, the common people also referred to as the *plebs* or *plebeians* gained entry into government affairs (Ibid p.13). The right to participate in Rome, just like in Athens and also in

all proceeding democracies and republics until the twentieth century was restricted to men only.

Despite the fact that the Romans were highly innovative, creative and practical citizens on the practice of electing certain important representatives in citizen assemblies, they lacked in developing a functional formula for a representative government, founded on democratically elected leaders. However, the Roman Republic lasted considerably longer than the Athenian democracy, and probably longer than any modern democracy has ever endured. But the Roman republic experienced much difficulties after roughly 130 B.C.E. civil strife, war, militarization, corruption and decline in the strong civic political culture previously manifested by the people. The little that remained of authentic republican practices died with the dictatorship of Julius Caesar. As an aftermath of Caesars' assassination in 44 B.C.E., a republic once governed by citizens became an empire ruled by emperors. With the collapse of the Republic, popular rule entirely vanished in Southern Europe. With the exception of political systems of small, thinly spread tribes, the republic disappeared for nearly a thousand years (Dahl, 1998, pp. 14, 15).

Popular rule in Italy began to appear again in a several cities in northern Italy around 1100C.E. However, this happened just in small city-states, rather than in the expansive regions or countries. Initially, the governing authority in the city-states was entrusted to members of upper class families; the nobles, property (land) owners and such like, but as time moved on, urban dwellers, the lower class in the socio-economic status began to agitate for their right to participate in government. Citizens who would be today be described as the middle class, otherwise referred to as the newly rich (the working class, bankers, the skilled craftsmen organized in guilds, the foot-soldiers commanded by the knights) were not only superior in numbers compared to the powerful upper class, but also had the human agency to organize themselves, and they could threaten violent uprisings, if they so wished, and actualize such violent disorder. Therefore, in various cities, people like these, usually sometimes referred to as *popolo* were granted, though involuntarily, the right to participate in the government of the city. For more than two centuries, these republics thrived in several cities. Cities like Florence and Venice became pace-setter,

emerging as centers of enviable prosperity, exquisite craftsmanship, spectacular art and architecture, remarkable urban design, classic poetry and music.

What later generations called the Middle Ages was replaced by the Renaissance era. After the mid-1300s, the republican governments of some of the major cities unimpressed by the development of democracy, were however gradually forced to surrender to the perennial enemies of popular government. The aftermath of this development was economic decline, corruption oligarchy, war, conquest, capture of power, and authoritarian rule by princes, monarchs or the military. The emergence of a rival power with superior capabilities; the national state or country, saw the incorporation of towns and cities into the larger and more functional state-unit. The city-state form of government was rendered obsolete; glorious as it were. Conspicuously lacking in both the Greeks democracy and Romans republic were the three basic modern government institutions; the executive, legislature and judiciary. Also lacking was the important devolved system of government; a system combining democracy at local levels, and subordinate to the national government, present in contemporary democracies (Dahl, 1998, pp. 16- 17).

Political ideas and practices that were to develop into important elements of contemporary democracy had sprout in Europe by the early eighteenth century. Several states in Europe, notably Scandinavia, Flanders, the Netherlands, Switzerland, and Britain. favored by local conditions and opportunities, the logic of equality encouraged the creation of local assemblies allowing free men to participate in government. These European ideas and practices provided a base on how democratization could be popularized and populated. Earlier, that has been provider proponents of today's democracy borrowed heavily from the plausible historical experiences and popular governments in classical Greece and Italian city-states, which showed that governments accountable to the will of people were not merely illusionary. (Dahl, 1998, pp.22).

Infusing Political Parties in Contemporary Discourse on Democratization and Governance

Democracy is ancient as has been demonstrated by the literature that has been provided hitherto. However, this article concentrates on how political parties have impacted modern democratization and governance. In the contemporary times, it is right to assume that democracy must guarantee virtually every adult individual the right to vote, amongst other freedoms. But since around 1918 or the end of First World War, in every independent democracy or republic that ever existed since then, a good half or more of all the adults had always been disenfranchised. This category of people comprised women, the black race, and slaves, especially in the United States (Dahl, 1998, pp.3-4).

Opposition, competition and participation in a government are key factors of democratization. An important characteristic of a democracy is the continuing responsiveness by a government to the preferences of its citizens, considered as political equals. For a government to continue over a long period to be responsive to the preferences of its people who have attained the voting age, it must afford its mature citizens unrestricted opportunities to: - i) formulate their preferences ii) signify their preferences to their fellow citizens and government by individual and collective action, and iii) have their preferences weighed equally in the conduct of government, without any discrimination, regardless of the content or source of the preferences. These three conditions, though not probably sufficient, are foundational basics for democratization (Dahl, 1971, pp. 1-2).

Bollen defined democracy as "the extent to which the political power of the elite is minimized and that of the non-elite in maximized" (Dahl, 1998, p. 222). In a subsequent substantiation, Bollen argued; "it is the relative power between the elites and non-elites that determines the degree of political democracy. Where the non-elites have minimalist control over the elites, political democracy is low. When the elites are accountable to the non-elites, political democracy is higher" (Ibid, 1998, p. 222). Democracy is determined from the type of information that is used to asses a political regime such as; are there fair electoral laws, equal campaigning opportunities, fair polling, as well as transparent counting of electoral ballot votes. Other considerations for a political system to qualify as a

democracy are whether voters are allowed to endow their representatives with real power, whether minorities enjoy the right to self-determination, self-government and autonomy, or the right fro them to participate through non-formal consensus in decision-making processes (ibid,p.222). Also, another determinant whether a political system can be considered as democratic or not is whether its citizens are free from military domination, foreign powers, totalitarian parties' regimes, economic oligarchies, religious hierarchies, or any other powerful group. Other dimensions of democracy include; the freedom and independence of the media in a country, citizens' freedom to join political parties, trade unions and associations, and other professional bodies of their choice , as well a the right to effective collective bargaining. Another perspective of democracy is the right to the individual's autonomy and equality to opportunities. (Dahl, 1998, pp. 222-223).

The hallmark of a true democracy is an elected executive, and legislature (where two or more political parties compete regularly, and timely), and an independent judiciary, Dahl notes that this condition of democracy has been the norm, rather than the exception in the vast majority of democracies since 1946 (Dahl, 1998, p. 223).

Democracy scale requires one to decide whether constraints on the chief executive in any particular country are near to parity, face significant limitations, or are situated in one of the two possible intermediate categories (Dahl,1998, p. 222). The measure of "freedom" that citizens in a specific political system enjoy can be used to designate democracy. Similarly, democracy is considered as the presence of institutions that enable citizens to choose alternative policies, and leaders, in combination with "institutionalized constraints on the power by the executive" and "the guarantee of civil liberties to all citizens in their daily lives and in acts of political participation" (Dahl, 1998, pp. 222-223). According to Bollen and Jackman, "democracy is always a matter of degree" (Dahl, 1998, p. 224).
The Greeks were the first citizens to practice democracy more than two millennia ago. Slowly, the practice of democracy gained traction in other places such as Rome in Italy and India. However, in the course of time and space, democracy got weakened, and eventually collapsed. It was replaced by radically authoritarian forms of governments. Democracy took some

time to appear in places like the United States, Switzerland, New Zealand, Canada, and the United Kingdom, amongst other nations until the eighteenth century. But, real democratic explosion occurred within the twentieth century, characterized by key factors such as the British Magna Carta (1215), and the French and American revolutions of the eighteenth century, which accelerated the entrenchment of democratization and governance driven by the political parties' system. Democratization was further enhanced by the expansion of franchise to include white women of voting age in Europe and in the United States of America in the nineteenth century. The black race including slaves were not found fit to enjoy the franchise. It was not ingrained as the "normal" thing in government, an entitlement to every person and nation; irrespective of geographical area, political persuasion, color, religion, gender or economic status until the twentieth century (Sen, 1999, p. 1).

The nineteenth century theorists of democracy, considered it normal and natural to differentiate and decide which nation merited democracy, and which ones were not fit for democracy. This way of thinking, experienced a radical shift in the twentieth century. It was then accepted that democracy has universal value, and all people deserve democracy; not for the few. No country has special credentials "fit" for democracy; rather all countries, and citizens irrespective of their geographical area, color, gender, age, language, religion, culture and other features automatically by their own right qualify for practice and enjoyment of democracy. Democracy is universal; it is not a preserve for some and beyond others. It should be a requirement for every nation to embrace democratic principles. Any authoritarian government that oppress and suppress its citizens should be dethroned. Political parties as key drivers of political change play the critical role in the removal of dictators, tyrants, despotic and authoritarian rulers and illegal regimes from power. Political parties also play an important part toward the entrenchment, growth and consolidation of democratic practice and good governance. They also play a transformational role in the transition from other types of government to democracy (Sen, 1999).

It is unreasonable if not an absolute absurdity to think of modern democracy without a competitive political parties 'system Political parties function as

the connecting link between citizens and their government. If the connection holding together the people and government breaks, the political polity has no chance of survival, but will die and decay. Citizens have no hope for future, except with the presence of robust competitive political parties' system. Political parties act both as the drivers as well as agents in reinforcement of democratization and governance (Schattschneider, Encyclopedia.com).

Political parties have organized themselves and removed from power authoritarian, tyrants and despotic rulers. For example, a combination of the Democratic Party (DP) of Mwai Kibaki, National Alliance Party of Kenya (NAK), belonging to Charity Ngilu, and Ford Kenya Party of Michael Wamalwa Kijana (2002) joined forces and defeated the ruling KANU party's candidate; Uhuru Kenyatta. KANU had been in power since independence in 1963. In the same in December 2018, in the Democratic Republic of Congo (DRC), political parties came together, elected the opposition party's candidate Felix Tshisekedi, defeating president Joseph Kabila's choice candidate (Linz, 1926, pp. 51-69).

Political parties have been key to political transformation from authoritarian rule to democratic system. Political parties as engine of change perform several roles necessary to functional democratic systems. They combine interests from diverse groups, and translate societal expressions into popular public policy. Political parties act both as channels of expression as well as tools of representation. Authoritarian rulers have been removed from office through party competition. Political parties serve as channels by which different groups are enabled to pursue their interests in an orderly, peaceful, and systematic manner, in the concept within a political system (Kuenzi and Lambright, 2001, p. 432).

In the early history of democracy conceptualization, political parties were dismissed as potentially undesirable divisive elements, which created avenues for people to destabilize and bring down governments. However, in the course of space of time this view was overturned, People realized that, by way of expressing different views, and the citizens having dissenting voices was not really bad. Indeed, it was accepted that healthy dissention and debate was most desirable for democratization. It must be

appreciated that political parties in a democracy have no intention to harm governments, but rather to promote the democratic values and principles. In this role political parties struggle for the rights of the citizens, including participation in government. In fact, where governments are not ready to practice democracy and suppress the citizens, and are adamant to remain in power through hook or crook, political parties have the absolute right to bring down such governments through agitation, uprisings or revolutions. (Kuenzi, and Lambright, 2001, pp. 432-439).

As early as the eighteenth century onwards, the idea of democracy has been accepted as the norm, rather than the option in many countries of the world including, the United States, Western Europe; France, Germany, Great Britain, Norway, Japan, India among others. Other countries which have adapted democratic system of government are in the Middle East; Israel, Lebanon, Jordan and Kuwait, and in sub-Sahara Africa; such as Ghana, Nigeria, South Africa, Uganda, Tanzania and Kenya (Dahl 1998, p. 30).

It is clear that where a robust political parties' system reigns, conversely there is healthy democracy and good governance. In such a political dispensation, the citizens are able to participate in government. They are able to elect leaders of their choice into office and/or remove them from office when their term expires, or when the people find it necessary to eject them out of office because of misrule or non-accountability. The citizens can demand representation, and are able to question their leaders on how they conduct governance. The citizens must have the right to demand how the government spends the taxes levied. They can voice their preferences, share their preferences with their fellow citizens, and demand equity on resources allocation and equal opportunities in education, employment and government positions. The citizens will be able to demand for inalienable rights to life and liberty, and fundamental rights of the individual including the freedom of movement, speech, freedom of the media, association and participation in government and the likes. This article attempts to underscore the relationship between the political parties' system practice, and the democratization and governance process in Kenya, and the central role that the political parties Kenya have played; at times under very difficult conditions to deepen democracy and governance in the country.

The role of political parties' system towards democratization and governance entrenchment in post-colonial Kenya (1963-2021)

The Berlin Conference of 1884-1885 set the stage for the rule of domination and suppression of the peoples and the occupation of the Africa continent by Western European powers. The "White supremacists" comprising of Great Britain, France, Germany, Portugal and Belgium came together, partitioned and mapped the continent, in what came to be popularly known as the "Scramble for Africa (Karari, 2018, p.1)." These colonial powers created artificial arbitrary boundaries that separated close relatives, groups, whole communities and societies, and placed them in different territorial locations (ibid, 2018, p.1). Kenya became a protectorate of the British East African Company in 1895, and was later declared a full British colony in 1920. Kenya remained a subject of Britain until independence in 1963, when it attained independence from the British colonial rule (Gertzel,1970, p.1). Like many other former British colonial colonies around the globe, the Kenyan black population was subjected to a most brutal, horrendous atrocities, and cruel inhumane mundus operandi. The colonialists used fist-iron and the harshest methods on earth of subjugation to rule the original (natives) population and owners of the Kenyan land. The so-called natives or tribes were oppressed, humiliated, and subdued. They were beaten, abused, flogged, and forced to provide labor pay on the white settlers' farm-estates, particularly at the "White Highlands," tea, maize, wheat, barley, and pyrethrum in the Rift valley region, and coffee, tea and sisal farms in the Central Kenya region at very low wages. These natives had no recourse to form trade unions to negotiate for commensurate pay or fight for their rights. The British also applied Land Ordinances to uproot the indigenous people from their good fertile lands, and consigned them to poor marginal unproductive peripheral areas, referred to as the African "reserves." The Africans were forced to pay taxes without representation, and were also restricted to a "Pass" or "Kipande" system (Karari, 2018, p.1). The whites introduced the locals to their European Christian religion, and condemned the indigenous religions as primitive and satanic faiths. The British further created, and caused ethnic strife and animosity (divide and rule tactics) against different African communities, and tortured citizens to make it easy for them to conquer and rule. When the Africans began to agitate for political self-determination, the whites declared a state of emergence (1952) to halt the liberation struggle. The British applied military domination, and

police brutalities, detention in concentration camps where individuals were forced to perform forced labor. There were illegal and extra-judicial executions of Mau Mau freedom fighters. Following the imposition of emergence, citizens were involuntary removed from their natural habitat and domiciled in mass concentration villages. Their natural way of living was disrupted, curfew was imposed, and men and women were compelled to perform hard labor. Women were subjected to all manner of humiliation; violation of human rights, and rape amongst other atrocious ordeals. (Karari, 2018, p.1).

Kenya is an abundantly, multifaceted, and racial community, comprising an assortment of people from a varied range of African communities, and incorporating two major immigrant peoples of Asian and Caucasians. The different people regarded as Kenyans today have existed together in this particular geographical habitat for over a long time, and in ever-changing cultural, economic, and political surroundings. Kenyans have in the last 100 years or so, struggled to coexist, albeit, with each ethnic community aiming to gain over the other/s in matters of cultural, economic and political postures. It has been a case of survival, and self-help to satisfy, secure and protect each ethnic group's interests in the true spirit of realism, as espoused in the international relations theory. (Nangulu-Ayuku, 2007, p. 127).

Kenya has been the home of roughly 43 heterogeneous ethnic communities. Also not lacking in the country, is a proliferation of impulsive politicians, a powerful and sophisticated elite representing a combination of diverse, and often conflictual groups, institutions, and interests spread across a sweeping and expansive geographical space. During both pre-colonial and colonial periods, Kenya was not known of having ever practiced a centralized, or democratic political system with a hierarchical governance or bureaucratic order. But, this does not imply that Kenya did not have a political system of its own type, however primitive during pre- colonial period, or authoritarian during the colonial era (Nangulu-Ayuku, 2007, p. 128).

Kenya gained internal independence from Her Majesty's Queen Elizabeth the II, of England (British rule) government on June 1, 1963, after a bitter and bloody struggle, that left many nationalists dead, other maimed, and

wide-spread poverty spanning over several decades. The indigenous Kenyans endured misrule, atrocities, and capital exploitation during these dark years of brutal British colonial domination. A year later; 1964, Kenyan nationalists founded a Republic with an executive president, and the other two arms of government; the legislature and the judiciary, run by indigenous people. The birth of the Kenyan republic was viewed as a systematic part of a process of moving in the direction towards total independence (Gertzel, 1970, p. 1). However, full independence did not in any way suggest an absolute total break with its former colonial masters. For example, Kenya was not fully endowed with human capital, and required human capacity development nurtured at British universities and learning institutions, supported by British. Kenya also required financial capital from Britain to run government programs that had earlier benefited from the queen's government. Kenya further needed knowledge on how to govern, and the British government had the necessary experience; such as political parties' practice. The patterns of political and governance organization since Kenya's independence can be well understood only against the backdrop of post-independence needs, and capabilities, but also in regard of the legacies left behind by the colonial powers, such as respect for inalienable rights; life and liberty, and individual's fundamental rights; freedom of speech, movement, association, religion, press freedom, human rights; right against torture, right to participation, and regard to the constitution and the rule of law, and the importance of political parties' system as a basis for democratization and governance amongst other heritages (Gertzel, 1970,pp. 1-2).

African political parties had been prohibited in Kenya during the colonial period, particularly in the aftermath of the declaration of emergence in 1953, but the ban was lifted the ban by 1955, but only at a district level, and outside the Central province (Central region). The colonial government was convinced that the District Associations would serve as convenient agencies to the then African nominated members of the Legislative Council (Legco), and at the same time provide a stabilizing mechanism of "moderate" African public opinion (Gertzel, 1970, p. 8).

Since the time of independence in 1963, Kenya has not had what can truly be described as political parties, but, rather electoral parties. A political

party should have characteristics such as; political ideology and culture. A political party also should have acceptance over an expansive geographical area, or by a great number of people. Furthermore, a political party must also enjoy longevity of time. These requirements are lacking in Kenya's political establishment, except maybe for KANU, which has existed since independence. But even for KANU most of the times, mainly in the 1980 and 1990s lacked in tolerance and inclusiveness. The elite use these electoral parties just as convenient vehicles to land them into parliament or at a position of power, like the presidency. The moment the elite land into the intended political destination, these political parties lose both in value and relevance. The serving political outfits either die, or they are abandoned mid-way in the course of a parliamentary life-term. The elites wait for the next political race, when the hastily cobble up new electoral parties as machines to get them where they intend to go, that is; gain political power. At dawn of independence (1963), Kenya had two political parties; the Kenya African National Union (KANU) and the Kenya African Democratic Union (KADU). Soon thereafter within the first year of independence through manipulation, cajoling and bribery, KADU voluntarily dissolved, joined the ruling KANU party. Henceforth, Kenya became a de facto one-party state in December 1964, thus in effect undermining the growth and consolidation of a political parties' system in the country. (Gertzel, 1970 pp. 34, 54). Jaramogi Odinga, then KANU party vice president, having experienced numerous tribulations in the single party rule resigned on April 14, 1966 from the party and government position, and founded an opposition party; the Kenya People's Union (KPU) (Gertzel 1970, pp 73).

This action can be viewed as a effort in the res-establishment of a political parties' system in Kenya. Thirty members from KANU, including two ministers; Achieng Oneko, minister for Information, Broadcasting and Tourism and Okelo Odongo Assistant Minister for Finance, ditched the ruling KANU party, and trouped with Odinga to KPU. The newly formed party was registered and recognized as the party of opposition on April 28, 1966(Gertzel, 1970, p.73). However, it did not find it easy to operate, and a lot of road blocks were placed on its way by the government. Sadly, that same afternoon that KPU's status were recognized, the government introduced and passed a new constitutional amendment that required the opposition members to resign from their parliamentary seats, and seek fresh

mandate as people's representatives (Gertzel 1970, p, 76). The Little general election was held in June 1966. This was the foremost election since the 1963 general election that saw KANU government into power. The government applied its full machinery, tough and unorthodox means during the mini-polls (Gertzel 1970, p, 78 and 80). that saw the new party return poor results compared to those posted by the KANU party. KANU scooped eight out of the ten Senate and twelve of the nineteen House seats. KPU won a sum total of nine seats in parliament (two in Senate, and seven in the House). However, this election marked a spectacular success in the political parties' system come-back and the democratization schema in Kenya. The formation of KPU was a direct challenge to Kenyatta and KANU and offered Kenyans the hope in future of an alternative government, with equally alternative leaders. (Gertzel, 1970, p. 89).

The policy issues of debate during the election campaign highlighted allegations of tribe bias in government allocation of resources, police on land, nationalization and social services as well as foreign policy. The debate also raised the legality of constitutional amendment, and suggested that the constitution had been manipulated by the government for its own advantage. The constitutional issue was however down-played in the broader policy debate, mainly because KANU's counter accusation that the opposition itself had in its policy proposals disregarded the guarantees of the individual's right to own property provided by the constitution (Gertzel 1970, p.84). KPU's Interim Manifesto Unveiled on the eve of the party's nomination day embodied the radical demand for the guarantee of individual's rights and political association provided for in the constitution. In its appeal, the manifesto dealt with socialism, African tradition, land, agriculture, employment policies, the civil service, corruption and education. The party condemned government for pursuing capitalist policies which were developing a class of rich people, while the great majority lived in poverty (Gertzel 1970, p.84). KPU leaders challenged government policies, which encouraged class formations, and the dangers posed by such policies. For example, the leaders cited a decision by the government to give free education to students in higher classes (forms five and six of secondary school), while those in lower classes were supposed to pay for their education. The KPU politicians viewed the program as discriminatory endowment to a "few" against the "majority". Such a

skewed policy would place in future give the "few" undue advantage over the "majority", especially when it came to job opportunities, political power, as well as wealth accumulation. This situation would be perpetuated to the future generations and to perpetuity. The halves will continue to have, while the have-nots will be condemned to a life of exclusion (Gertzel, 1970, p.74).

KPU promised if it formed a government to introduce policies consistent with democracy and socialism, such as distribution of free land to the neediest, either by expropriation or through lad consolidation, as well as restricting land ownership to Kenyan citizens. The party manifesto also promised the introduction of free primary education as well as increased technical education and improved conditions for teachers (Gertzel, 1970, pp.84-85).

According to Gertzel, the founding of KPU constituted a significant watershed in independent Kenya politics. It marked the return of political pluralism. It offered a direct challenge not only Kanu but also to president Kenyatta. It also opened up the possibility of a new type of inter-party debate in which economics took a significant prominence than personal idiosyncrasies or tribal loyalty. Faced with a new opposition party the KANU government behaved and acted as several African governments have done. It challenged the legitimacy of opposition and constrained the political field within which KPU might operate. As the landscape within which political debate could take place was strictly narrowed, members of both parties found it difficult to publicly air dissent. As a result, parliament continued to occupy an important role as a platform for public debate. Its members contend to use it to popularize all the major political matters (Gertzel, 1970, p.144).

The KANU regime applied draconian tactics to frustrate, disrupt and impede the functionality of the KPU. KANU had spelt out adequate hints of the dirty methods the party would adopt towards any KPU candidates returned to parliament. President Kenyatta at a major rally during the min-polls employed a traditional Kikuyu curse to relegate the Opposition to extinction (Gertzel, 1970, p.144). A KANU statement dispatched a short moment before the polls results were made public declared that Kenya

would remain a de facto one party state even though a "handful of political rejects" had abandoned Kanu to form a splinter group. Tom Mboya, a cabinet minister, shortly after the results jubilantly declared that the Opposition because of their small numbers might not be recognized (Gertzel, 1970, p.144).

The existence of KPU was considered by the government as untenable, and on October 30, 1969, the party was banned. This drastic action by the government essentially transformed Kenya into a de facto one-party state, and effectively put the political parties' system again into limbo. It eroded the democratization and governance gains (though pretty moderate), which had been achieved during KPU's short period of existence (Wikipedia, free encyclopedia, Kenya People's Union).

The latter part of Jomo Kenyatta's rule (1969-1978), and the early years of Moi's regimes (1978-1981) were regrettable detrimental periods on the political parties' system progress, and a draw-back to the democratization and governance process in the Kenya. Several citizens lost lives, under mysterious circumstances, some of which being believed to have been sponsored by the government. Other citizens considered as government detractors were detained by the government without due process of law. Many more others were tortured, and maimed by government agencies. Jaramogi Odinga was arrested and kept under house arrest for two years from 1969 to 1971 without charge or trial, and again from 1983 (after the failed coup) to 1988 (Amnesty International,1991, p.1). Tom Joseph Mboya; a cabinet minister for Economic Planning and Development was assassinated on July 5, 1969 on Government Road (Moi Avenue) in Nairobi. James Mwangi Kariuki; popularly known as "J.M." an assistant minister in the government was murdered on March 2, 1975, and his dead body found a few days later, hidden in a thicket in Ngong area of Kajiado district. The involvement of government security agencies; the police was highly suspect in the assistant minister's killing. Foreign Affairs minister, John Robert Ouko was also murdered on the night of 12/13 February 1980. His mutilated body was discovered by a herds-boy in his Koru farm, in Muhoroni of Kisumu district. The government could not be absolved from Ouko's death. But, the era between 1982 upto 1991 was the darkest moment

in Kenya's political multi-parties' system history, and grievously dented the democratization and governance process (Adar and Munyae, p 2).

When Jaramogi and George Anyona attempted to register an opposition political party in 1982, president Moi reacted mercilessly, and explicitly set Kenya into a de jure one- party state roller coaster. Moi, and the KANU government criminalized competitive politics, and any criticism targeting of his rule. Throughout the 1980s and 1990s, the security forces, especially the police agencies were used to harass, intimidate, subvert, and suppress any censure directed at him or his regime. To ensure his hold to power, the president methodically usurped power of the legislature, judiciary, and other governance institutions, to the extent that the principle of separation of powers was obliterated and rendered nugatory. Within a brief moment later, after releasing political detainees, Moi hastily pushed through a bill (Section 2A) in parliament which gave him emergency powers for the first time in the country's post-colonial history. The bill introduced into the floor of parliament by the then Minister for Constitutional Affairs Mr. Charles Njonjo and seconded by the then vice president Mwai Kibaki, prohibited politics of dissent and opposition. Ironically, both Njonjo and Kibaki became casualties of the same bill that they brought to parliament. The president equated criticism and censure to his policies and rule to insecurity and instability, which would not be tolerated by the government (Adar and Munyae, p.2).

Kenyans experienced the worst form of human rights violations during the 1989 upto 1991 period. President Moi accused advocates of multi-party politics of subversion, which gave him the political "moral" excuse to haul into detention a new generation of political liberators that championed democratization and good governance. These people were regarded by the KANU regime as dissidents, saboteurs, and worst enemies of the state. Several champions of multi-party democracy, including lawyers Dr. John Khaminwa, Gitobu Imanyara, and politicians Kenneth Njindo Matiba, Charles Rubia and Koigi wa Wamwere alongside many others were arrested and condemned to languish in detention for long periods before being released, following local and international pressure. Others were made to endure and suffer intolerable inhuman conditions in filthy cells, such as the notorious Nyayo House torture chambers in Nairobi, and Kamiti

and Naivasha maximum prisons. These victims included; Raila Amolo Odinga, Wanyiri Kihoro, Prof. Ngotho Kariuki, Gacheche wa Miano alongside several others. Gibson Kamau Kuria, Kiraitu Murungi fled to the United States to escape Moi's wrath. University dons such as Maina wa Kinyati, Ngugi wa Thiongo, Miceere Mugo, Mukaru Nganga, Kimani Gecau abandoned lucrative teaching careers and fled to exile. Civil society groups agitating for greater space of freedom and political participation were also curtailed from their operations during this era of purging of what was branded disloyal elements Political meetings, picketing or street demonstrations were not permitted except for the ruling party KANU (Adar and Munyae, p. 7).

This harassment waged upon democratization and governance liberation heroes by the government machine, however, neither dampened nor killed the people's struggle for the restoration of democracy and human rights. Seeing that the determination of these diehards would not be deterred, and considering that these advocates had already infiltrated some people within the KANU ranks, the regime went a notch higher, and increasingly began to suppress dissenting voices within the party itself. The oppression and purging by the KANU supremos of its own members suspected of disloyalty to the party and the government, particularly in the 1990s served as a catalyst for them to combine forces with opposition in the orchestration scheme for restoration of democracy in and outside the party. The heightened clamor for democratization and governance caused unrest to Moi, and KANU. The international community and Kenya's development partners threatened to isolate the government, and treat Kenya as a pariah state. Having run out of options, president Moi in the 1991 caved in under international and domestic pressure and allowed for the repeal of Section 2A, amendment of the Kenyan Constitution paving the way for a return to multi-partism. The concerted efforts for the promotion of democratization and governance by a combination of political elites, the masses, the civil society, and different faiths groups, plus both international and local institutions of political goodwill were not in vain, and proved to quite effective. The hard road and difficult struggle of the 1980s upto 1990s referred to as the "second liberation" saw a rebirth of a political parties' system in Kenya (Bannon, 2001, p.8).

Democratization and good governance is now an accepted phenomenon in Kenya as an important aspect of political development. The agitation by political parties for multi-party system in the 1980s-1990s is a major accomplishment towards democratization and governance process. The drive towards this goal was reinforced by national rather than sectarian, ethnic or other interests. The opposition parties were galvanized by the need of entrenching democratization and good governance in the country, more so following the repeal of Section 2A of the constitution (Friedrich Ebert Stiftung, 2010, p. 22).

In the aftermath of these successes, political parties now working as independent functionaries started to fight each other in the struggle for power, which unfortunately culminated into a polarized political cacophony that was determined by individualistic, ethnic and regional interests. Eventually, political parties fragmented into small units, instead of solidifying alliances to push for grandeur democratic reforms. For example, the Forum for Democracy (FORD) party which was viewed as the forerunner in the "Second liberation" struggle split into FORD-Kenya and FORD-Asili. Other opposition parties such as the Safina, Kenya National Congress, National Development Party (NDP), Liberal Democratic Party (LDP), Kenya Democratic Alliance (KENDA), Kenya Social Congress, and the Democratic Party (DP) appeared into the already crowded political landscape (Friedrich Ebert Stiftung, 2010, p. 22).

After KANU won the 1992 presidential and parliamentary general elections, which was contested in the corridors of justice, but withheld by the courts, a parliamentary parties formed the Inter-Parties Parliamentary Group (IPPG), in an attempt to review electoral laws and procedures among other legal reforms. During the 2002 general elections, an alliance of opposition political parties under the National Rainbow Coalition (NARC) succeeded in removing KANU from power. However, the winning alliance failed to introduce the desired long lasting changes into the country's political system. (Friedrich Ebert Stiftung, 2010, p. 23).

The removal of KANU from power; a party which had ruled the country with an iron-hand from 1963-2002 clearly demonstrates the central role played by political parties to restore a political parties' system in Kenya.

Political parties in the country have thereafter pushed for the repeal, amendment several existing laws, and enactment of new laws in parliament to address the concerns and interests of the citizenry. Political parties agitated for a new constitution, which was promulgated in the country in 2010. They also agitated for a devolved government. However, political parties have served as both enablers and impediments of political changes in Kenya, as their quest for personal, group, societal or own party power and influence, has sadly placed national interests and concerns on the altar of sacrifice. Kenyan political parties portray functional weaknesses, characterized by patrimonialism, ethnic allegiances and political insecurity (Friedrich Ebert Stiftung, 2010, p. 24).

The robust political participation of 2002 in Kenya charted an unprecedented democratization space in the country. Ahead of the 2007 general elections, more than 300 political parties had been registered. Out of these registered political parties at least 117 of them presented candidates for presidential, parliamentary and local government posts. The enforcement of the Political Parties Act of 2007 saw this large number of political parties decline to only 47 by March 2010. Nevertheless, this figure is quite high for a country like Kenya (African Democracy Encyclopedia). An alliance of opposition parties; the DP of Mwai Kibaki, Ford Kenya of Kijana Wamalwa, and NARC of Charity Ngilu during the 2002 presidential and general election sponsored Mwai Kibaki as their choice candidate for the presidency against the KANU's Uhuru Kenyatta. Kibaki scooped victory to become the third president of republic of Kenya, after Moi and Jomo Kenyatta respectively. Out of the total 210 parliamentary seats, KANU garnered just about 70 seats, while the rest; majority seats were captured by the league of the alliance. Kibaki vied again for the top post in the 2007 on the Party for National Unity (PNU) ticket, and defeated Raila Odinga of the Orange Democratic Movement (ODM) party. Kibaki's win was contested in court, but the court ruling confirmed Kibaki in the presidency. This decision created a lot of political heat that culminated with the 2007/8 political elections violence (PEV). The country was at the brink of precipice. The African Union (AU) attempted to mediated the conflict, but failed. The mediation team was headed by the former United Nations Secretary General Kofi Annan leading a group of eminent leaders from Africa; Gracia Machel, and Benjamin Mkapa of Tanzania, among

others, managed to strike a power-sharing deal between the warring parties. A Government of National Unity (GNU), was brokered to accommodate both groups. The mayhem and ethnic strife that had captured the country following the elections stopped, and there was restoration of peace and security in the country (Juma, 2009).

Political parties, at this same period, managed to push for the writing and promulgation of the 2010 Constitution to replace the independence constitution which had been subjected to numerous changes and amendments, which were deemed as political machinations to suit the whims and interests of certain political individuals. Sadly, these changes and alterations effectively served to attack and diminish democratic principles and values. 2010 was a watershed moment for the political parties to rectify past gaffes and misadventure on law committed by both Jomo Kenyatta and Moi. The political parties ensured that there was citizen's participation in the writing of the new constitution. The constitution draft was subjected to a referendum where the ordinary citizens gave their contribution (Kenya Constitution, 2010, p.1).

The 2013 general elections favored Uhuru Kenyatta, who had vied for the presidency under the Jubilee Alliance Party to become the Republic's fourth president. Raila Odinga of ODM, who had also vied for the presidency faulted the outcomes and petitioned the results in court. Raila Odinga, however, lost the court case at the Supreme Court of Kenya, and accepted the verdict. Both Uhuru Kenyatta under Jubilee, and Raila Odinga on the National Super Alliance (NASA) ticket faced each other again in 2017 for the presidency. Uhuru Kenyatta beat Raila Odinga in the race; a success which was challenged by Raila in the corridors of justice. The Supreme Court of Kenya annulled the elections' results for lack of transparency among other grounds, and ordered for a repeat of the elections afresh. This landmark court ruling was viewed as milestone in political parties' accomplishments of democracy (Supreme Court of Kenya Ruling 2017).

Raila Odinga refused to participate in the repeat elections, arguing that victory had been stolen from him, and instead of the Supreme Court should have declared him the outright winner. For him and his followers, the repeat

elections were unconstitutional. However, Uhuru Kenyatta participated in the repeat elections, and after the votes' tallying he was declared the winner, and sworn in as the Republic's president for a second and final term. This action infuriated Raila and the NASA followers, and street demonstrations in Nairobi ensued. Raila Odinga was sworn-in (unofficially) as the "people's president." The political environment became such toxic that it almost rendered the country ungovernable (Kenya Media, November, 2017).

A political volatility in the aftermath of the two swearing events; Kenyatta as the republic's president and Raila as the people's president was redressed through the March 9, 2018 epic hand-shake between President Uhuru and opposition leader Raila Odinga. The two leaders agreed to work together, and further agreed for formulate the Building Bridges Initiative (BBI) bill in parliament, that would allow a public referendum to be conducted, and reform the constitution to tackle a myriad of issues that have been viewed as a hindrance towards participation, equality and inclusion in government for all citizens as well as democratization and good governance in the country (Kenyan media, November, 2017). The hand-shake which was opposed and supported by people from different divides in equal measure breathed a sigh of relief, and hope for the future. The ethnic animosity that previously prevailed in the country abated tremendously. The BBI process is on course, and its outcome is yet to be discerned (Kenyan media) In May 2021, the High Court of Kenya declared the BBI process and the Constitutional Amendment Act 2020 as null and void. Interested parties have filed appeals in the Court Appeal contesting the ruling of the High Court (Kenyan media, November, 2017).

Conclusion

Political parties play a central role in the democratization and governance process, and Kenya has made a crucial accomplishment towards this goal. When political parties in Kenya have been active, there has been a co-relational up-swing in democratization and good governance. On the other hand, when political parties have been depressed either by choice, compromises, suppression, coercion and intimidation, democratization and good governance has suffered. At independence when KANU and KADU competed politically, there was an air of democratic growth. When KADU

crossed the floor in parliament, joining KANU, and later the KANU government declared Kenya a de facto one party-state, democratization and governance faced a sharp threat. During the 1980s when opposition was absent, democratization and good governance were at the lowest ebb. From 1982 when Moi's regime introduced a de jure single-party system, democratization and governance took a nosedive and was completely sabotaged. However, come the repeal of Section 2(A) of the constitution, Kenya experienced a proliferation of several political parties in the country, evidently; demonstration political parties had a fundamental role in the enhancement of democratization and governance.

The political parties' system has a vital role to play in the democratization and governance process in every country and Kenya is no exception. Countries with powerful political parties have made great strides in development as compared to those countries who suppress political parties' system. In democratic states the citizens enjoy happiness, the inalienable rights to life and liberty, alongside other fundamental rights such as freedom from torture, freedom of movement and conscience, freedom of speech and the media, the freedom to human rights and the freedom of political participation amongst other freedoms.

In Kenya, during periods of unrestricted political parties' formations, particularly from 1991 to present day, people have enjoyed fundamental freedoms, though at times not in full. Political parties have pressurized the government to ensure that the citizenry are not constrained from enjoyment of inherent rights and freedoms. However, during periods of the single party system (1969-1991) many people were detained without trial, or on trumped-up charges, tortured, and several of them lost their lives (disappeared or killed) in unexplained circumstances. Although the different political regimes of Jomo Kenyatta and Moi promised that "no stone will be left unturned" to unearth the perpetrators of such heinous crimes, to date no one has been caught and tried in a court of law for committing such dreadful crimes some of which have been horrendous and very cruel. During the same era, people were not allowed to participate in government conduct. The citizens were not permitted to elect leaders of the own choice. For example, during the queue (mlolongo) system of voting of 1988, an individual with the longest line of persons could lose to a person

with a shorter line of people, there was no transparency in votes tallying, powerful individuals in the government were involved in high corruption, where the government lost colossal resources, but no one could raise a finger for fear of reprisals.

The government of Kenya should appreciate that there is nothing to gain by stifling a political parties' system, but everything to gain and as such it should encourage and promote political pluralism. History has demonstrated beyond doubt, that the major champions of political parties' system, like the United States, Britain, the Nordic states of Denmark, Norway, and Sweden, Switzerland, France and Germany, Canada and Australia are the most progressive states globally in terms of political, economic and social-cultural affairs. The Kenyan government should empower the parties through state funding. The political parties not in the government should be a loyal opposition, and they realize that they are the alternative government or government in waiting. Opposition parties in the country should resist undue dalliance with the government, and refrain from any attempts to lure them to conduct themselves in a manner that would undermine their functionality in the furtherance of democratic practices and the rules of good governance.

So far, it cannot be claimed that Kenya has since independence had what can be termed as perfect political parties, with the exception of KANU. Maybe, it can be argued that what has been there could be described as political pluralism. A political party must have some specific characteristics; such as; it should cover a big political space, must have been there for a long period, and must have an ideology and cultural specifics. Most of the political parties in Kenya are based on ethnic or regional considerations, and lack the perfection of a political party. Hardly do these political parties last a full parliamentary term. They wither during the course of parliament's life term. New political parties' outfits are hurriedly cobbled up as political machines to land politicians into the next parliament. Kenyan political parties must adapt these attributes to be considered as fully-fledged political parties. Otherwise, they are not yet there.

Old democracies have at least two dominant political parties that have been there for generations, and have served their people and government well.

For example, the United States has had the Republican and the Democratic political parties since the country's independence in 1763. Great Britain has had the Labour and the Conservative parties which have served their people quite adequately. Both the US and Great Britain political parties meet the criteria of a countrywide outreach, longevity requirement, ideology and culture. The political parties' system in Kenya should aspire to achieve these criteria. In addition, democratic principles and good governance are universal, and Kenya should emulate political parties that have existed and thrived before them. As the old adage goes, "Rome was not built in a day," Kenya is on track of perfecting a political parties' system which would in turn enhance democratization and good governance issues. Arguably, Kenya political parties' system has made major inroads in democratization and good governance, but the ideal objective should be the ultimate consolidation of democracy.

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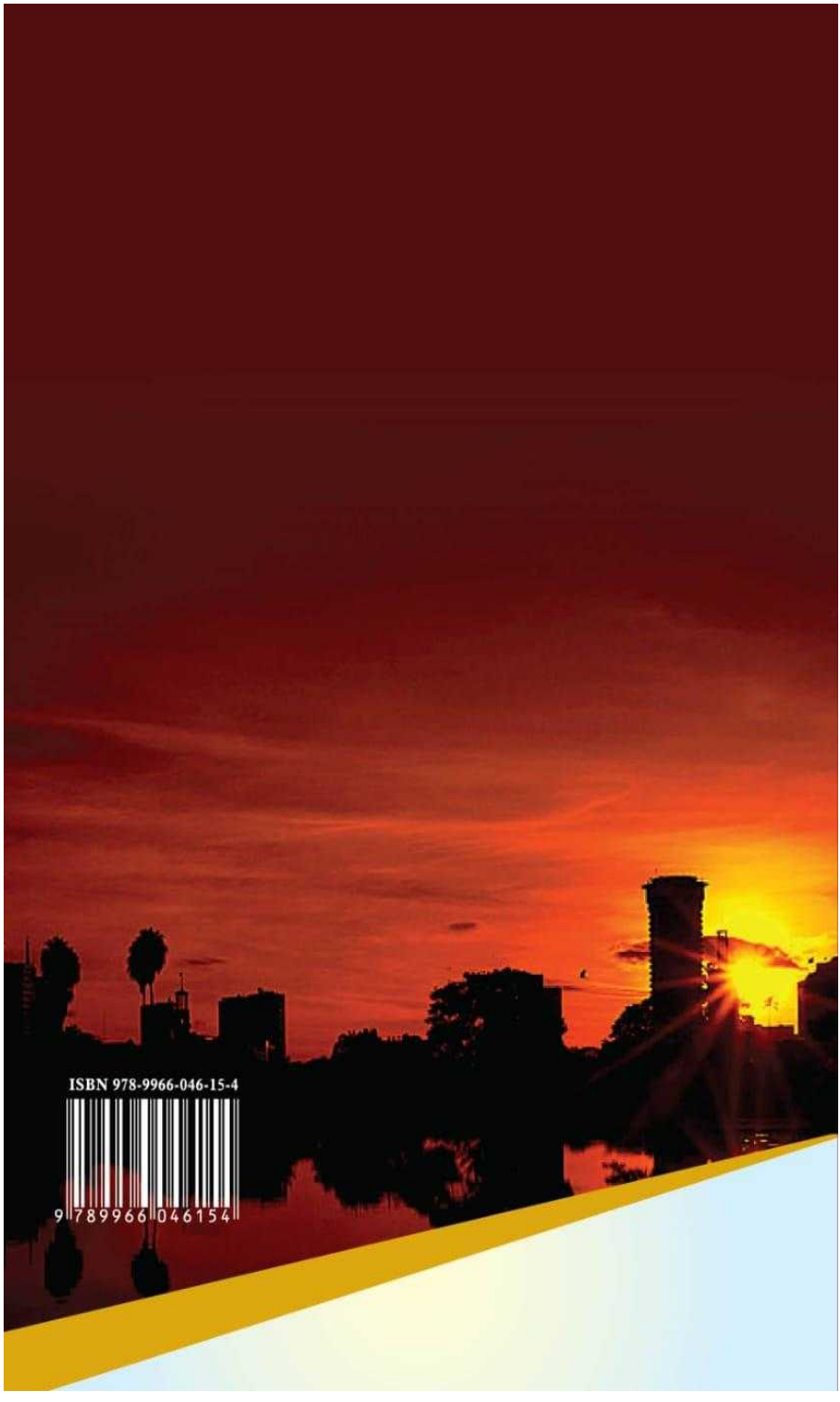
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