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Editor's Note

I am delighted to welcome you to the latest issue of the *Journal of Conflict Management and Sustainable Develop*ment, Volume.7, No.1.

This publication offers the reader a deeper understanding and analysis of issues touching on pertinent themes on Conflict Management and Sustainable Development.

Sustainable Development has been globally accepted as one of the blueprints of development. In Kenya, it is enshrined as one of the national values and principles of governance under article 10 of the Constitution. Sustainable Development Goal 16 seeks to promote peaceful and inclusive societies. The themes covered in this volume are expected to trigger political, economic, social, technological, environmental and legal responses towards achieving the ideals of Sustainable Development and promoting peace and social justice.

The Journal has continued to witness immense growth since its launch. It now commands a wide global audience. It is a valuable resource for scholars, authors, readers, students, policy makers and everyone interested in broadening their understanding in the areas of conflict management and sustainable development.

The Journal is peer reviewed and refereed so as to ensure the highest quality of academic standards and credibility of information.

This volume captures relevant and pertinent topics on Conflict Management and Sustainable Development including *Sustainable Development Goals and Social Justice in Kenya; Giving Natural Resources a Legal Personality: A Kenyan Perspective; Internship: A Bridge to Employment or a Trap to a Disguised Employment Relationship; The Protection of the Environment during Armed Conflict; Leaving no One Behind: A Case for The Ending of Digital Exclusion of Women for Sustainable Development in Kenya; East Africa Community's' Response to Burundi Crisis: A Case for Formulation of An Intervention Policy; The First Liberian Civil War (1989-1997): The Ethnic Identity Contingency during the Violent Conflict; Rethinking The*

National Legal Aid Service; A Critical Analysis of the Human Rights Approach in Environmental Management in Kenya; (Re) Defining Environmental Justice: Perspectives and Challenges; Towards Legal Recognition and Protection of Environmentally Displaced Persons Under Refugee Law.

The Editorial Team is committed towards developing and refining the content of the Journal to enhance its quality, scope and diversity. We welcome feedback and suggestions from our readers on how to continue improving the Journal.

I wish to thank the contributing authors, editorial team, reviewers and all those who have made this publication possible.

The Journal is available online at https://journalofcmsd.net

The Editorial Team welcomes submissions of papers, commentaries, case reviews and book reviews on the themes of Conflict Management and Sustainable Development or other related fields of knowledge to be considered 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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Editor, Nairobi,
August, 2021.

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Internship: A Bridge to Employment or a Trap to a Disguised Employment Relationship?

By: ***Johana Kambo Gathongo****

Abstract

Internship can be and should be a vital part of the switch from edification to the workplace. This article however questions the extent to which internships are used to serve as a transition between education and employment. Though considered valuable to the host institution, many interns face high levels of job uncertainty. One key contributing factor is the existence of disguised forms of employment in the Kenyan labour market. This occurs when the true legal status of a person who is an employee is disguised in a way that hides his or her true legal status or gives it an appearance of a different legal nature. Arguably, interns have fallen victims. The current internship arrangement in Kenya poses several thorny employment law questions particularly the legal status of the intern. Arguably, the existing internship arrangement permits dishonest host institutions to take advantage of the arguably weak monitoring and enforcement system of the employment laws resulting in intern exploitation. The analysis done in this article reveals that interns are possibly employees and should thus be afforded full protection embedded under Article 41 of the Constitution as well as the Employment Act, 2007 including job security, fair remuneration and reasonable working conditions The article emphasises that the National Employment Authority and other relevant authorities should seek to perform their mandate effectively by monitoring all placements of interns to ensure that they are not exploited or their rights violated by host institutions in which they are undertaking their internship.

1. Introduction

Over the years, the labour market has undergone colossal changes. The current world of work presents numerous types of employment relationships that are purported to be different from full-time employment. One such

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relation is the increasingly widespread phenomenon of internship.[1] The rising utilisation of interns in the Kenyan labour market performing the same or significantly similar work performed by full-time employees in host institutions is troubling. The increase has led to the exploitation and vulnerability of interns in workplaces. On many occasions, their vulnerability is connected to the argument that there exists no employment relationship between the host institution and the intern. This results in decreased protections of their employment as well the underpayment of salaries of interns in instances where they perform the same or similar work or work of equal value to that performed by full-time employees. This is because the scope of the law is narrowly interpreted and the employment relationship is camouflaged to hide the interns' true legal status.

2. Disguised form employment relationship

It is, unfortunately, a common practice that employers attempt to disguise the employment relationship purely to avoid or circumvent their statutory duties under the employment laws, particularly the payment of minimum wage and benefits. In the Kenyan Labour market and the world over, disguised forms of employment are a significant reality. In *Laban Awando Kanyo v Susan Larsen t/an Utamaduni Craft Centre*,[2] the Employment and Labour Relations Court observed that "the problems employees face in unearthing the legal personalities of their employer who disguise, mutate and metamorphosis their identity."[3] The court further opined that

> *a "disguised employment lends an appearance that is different from the underlying reality, with the intention of nullifying or weakening the protection afforded to workers by law."*

[1] According to the Oxford Dictionary, an internship is defined to mean “a period of time during which a student or new graduate gets practical experience in a job.” The PSC Guidelines on Management of the Public Service Internship Programme define internship as “a programme established to provide unemployed graduates with opportunities for hands-on training for skills acquisition to enhance future employability and fulfill the legal requirement for professional registration.”
[2] [2013] eKLR, Industrial Court at Nairobi Cause Number 259 of 2012.
[3] *Laban Awando Kanyo v Susan Larsen t/an Utamaduni Craft Centre* [2013] eKLR para 20.

Under the Employment Relationship Recommendation [4] of the ILO a "disguised employment" employment relationship happens when an employer treats a person as other than an employee in a way that conceals the person's true legal status as an employee. It is therefore trite that one looks beyond the legal construction of the contract entered into between an intern and relevant host institution to determine the true nature of the employment relationship.[5]

3. Legal Framework

3.1 Interns Constitutional right to fair labour practice

In 2010, Kenya adopted a new Constitution[6] with a more extensive Bill of Rights, including employment rights. [7] In the workplace context, the foundational values that strengthen a sound employment relationship are those which uphold fairness and equality. Currently, the Constitution widely casts its net of protection, as is evident from the wording used in section 41, which guarantees all employees the right to fair labour practices.[8] Arguably, this right remains one of if not the most vital employment right under the 2010 Constitution given its all-inclusive nature and the fulcrum upon which the workplace relationship are determined. The expansive terms used in Article 41 (1) not only reveal the scope of the right to fair labour practice but also reveals those who the right seeks to protect; that is 'every person'. The wide interpretation of the phrase 'every person' is a clear indication that the scope of protection is broad enough to cover employment arrangements besides the traditional employer-employee relationship. That is to say, 'every person' includes natural and juristic persons. Accordingly, 'every person' who falls victim to an unfair labour practice is protected by the provisions of the Constitution, including interns. Read in its proper context, even those who the Employment Act explicitly excludes from its scope of application may rely on Article 41 (1) of the Constitution for appropriate relief.[9]

[4] R198 Employment Relationship Recommendation of 2006.
[5] *South African Broadcasting Corporation v McKenzie* [1998] ZALAC para 13.
[6] The Constitution of the Republic of Kenya, 2010.
[7] Article 41 of the Constitution.
[8] *Peter Wambugu Kariuki & 16 Others v Kenya Agricultural Research Institute* [2013] eKLR
[9] See s 3 (2) of the Employment Act, 2007 for the list of category of employee excluded included.

3.2 Employment Act: Are 'interns' disguised employees?

The Kenyan employment legislation and particularly the Employment Act was drafted in a way that only cares for employees in the traditional full-time employment relationship.[10] As a result, it remains inadequate in protecting persons engaged in new forms of non-standard employment particularly internship work arrangements. Currently, there is no direct reference to internship arrangements that exist under the Employment Act. The Employment Act does not define who an intern is even though as will be noted below, Policies such as the Internship Policy and Guidelines list the Employment Act as one legislation forming part of its Legal and Policy Framework. The question that remains is; does the meaning of "employee" as provided for in the Employment Act include interns? The answer to this question is central in determining whether indeed interns should be categorised as employees and therefore entitled to the same rights and protection given to full-time employees in the host institution.

Under the Employment Act, an employee is defined to mean "a person employed for wages or a salary…"[11] Notably, the definition is confined to the very important element of a contract this is a requirement. Furthermore, central to the definition lies a relationship in which an individual, regardless of the nature of employment, commits to work or render services for another (host institution) in return for remuneration. Since the Employment Act does not exclusively exclude interns, the wide scope of the definition of employee, particularly the use of the term "a person", means interns fall within the realm of the definition. For that reason, interns have full rights and protections afforded to other full-time employees in the host institution. Notably, the Employment Act lists the class of persons who are specifically excluded from its scope of application, and certainly, interns are not one of them.[12] As noted above, the spirit under the Internship Policy and Guidelines for the Public Service is that it seeks to incorporate the application of the

[10] According to the Preamble of the Employment Act, the Act seeks to declare and define the fundamental rights of employees, to provide basic conditions of employment of employees

[11] Section 2 of the Employment Act.

[12] The Employment Act excludes (a) the armed forces (b) the Kenya Police, the Kenya Prisons Service or the Administration Police Force, (c) the National Youth Service and (d) an employer and the employer's dependants where the dependants are the only employees in a family undertaking.

Employment Act within its legal framework.[13] Besides, the Employment Act defines an employee to include an apprentice. Though Employment Act does not specifically define 'an apprentice', the Industrial Training Act provides clarity insofar as the term intern is concerned.

3.3 The Industrial Training Act (ITA)[14]

The above legislation defines an "apprentice" to include:

> *"a person who is bound by a written contract to serve an employer for such period as the Board shall determine with a view to acquiring knowledge, including theory and practice, of a trade in which the employer is reciprocally bound to instruct that person."*[15]

In terms of the above definition, the relationship between the parties is circumscribed to the elements right to supervise, control or instruct which are key in establishing the presence of an employment relationship. As will be seen below, these elements are usually the same as the ones incorporated in the intern contractual agreement.[16]

3.4 Interns legal status under the National Employment Authority Act (NEAA)[17]

The NEAA was enacted to provide amongst others, for a comprehensive institutional framework for employment management and to enhance access to employment for youth.[18] It also seeks to provide a database of all Kenyans seeking employment and a framework to facilitate increased employment in government, parastatals as well as the private sector.

Worth noting is that under the NEAA, an employee is defined to mean "a person employed for wages or a salary and includes an intern." This

[13] See item 1.6 of the Internship Policy and Guidelines for the Public Service p.5.
[14] Cap 237 of 1960.
[15] Section 2 of the ITA. The Board in this case refers to the National Industrial Training Board.
[16] Appendix IV item 6 of the Internship Policy and Guidelines for the Public Service, 2016 at p36.
[17] The National Employment Authority Act 3 of 2016.
[18] See the Preamble of the NEAA.

definition is largely similar to the one provided under the Employment Act except that, the NEAA specifically includes an 'intern' in its definition of employee.

Further, this legislation unlike the Employment Act defines a contract of service[19] to include an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, including a contract of internship. Therefore, this legislation seeks to treat and afford interns equal rights as full-time employees with the view to protect them from employment manipulations and exploitation through disguised employment relationships.

3.5 Interns under the Public Service Internship programme (PSIP) and Policy and Guidelines: An analysis of the contractual agreement between intern and the host institution

The persistent high levels of unemployment post-graduation have been a source of concern for the Kenyan government and policymakers alike. In 2020 alone, the estimated youth unemployment rates in Kenya stood at 7.27 percent.[20] The statistic indicates that youth unemployment for people under 25 years is at worryingly high levels. Currently, the figure stands at about 7.3 percent.[21] According to the Public Service Commission (PSC) the key contributing factor to the status quo is the lack of work-based experience among the graduates.[22] Therefore, in an attempt to mitigate the foregoing situation, the Constitution compels the government, through the relevant departments to take reasonable measures to ensure the youth have access to training and employment opportunities. [23] In line with the spirit of discharging its functions and mandates, the PSC is guided by amongst others,

[19] But the Employment Act completely omits the inclusion of internship in its definition of a "contract of service."
[20] Available at https://www.statista.com/statistics/812147/youth-unemployment-rate-in-kenya/. Accessed on 4 May 2021,
[21] Available at https://data.worldbank.org/indicator/SL.UEM.1524.ZS?locations=KE Accessed on 4 May 2021,
[22] Internship Policy and Guidelines for the Public Service May, 2016 p1.
[23] Article 55 of the Constitution, 2010 read with Arts 234, 155(3)(a), 158(2)(3) and (4), 171(2), 230(2)(b) and 236 of the Kenyan Constitution, 2010 outlines in peremptory terms the mandates of the PSC.

the Internship Policy and Guidelines, as well as Guidelines on Management of the Public Service Internship Programme, were developed in 2016 and 2019 respectively with the view to possibly create an avenue for unemployed graduates to gain work experience and enable them to have a competitive edge in their job search.[24] The Policy and Guidelines were also developed.[25] Although the Policy is drawn up for all good intent and purposes, this article observes that there exist potential problems as far as interns' legal status is concerned. The Policy is also arguably at variance with other equally important legislation such as the Constitution of Kenya, 2010, National Employment Authority Act[26], and the spirit embodied in the Employment Act as discussed below.

As stated by the PSC, the Policy and Guidelines are drawn in compliance with the relevant International Conventions and other domestic legislation, including the Constitution, Employment Act, and Labour Relations Act,[27] with the view to enhance future employability and fulfill the legal requirement for professional registration. [28] Specifically, the PSC has designed a contractual agreement issued to all interns' *mutatis mutandis* and has also developed the rules and procedures for recruiting and selecting applicants who qualify to participate in internship programmes. Upon posting an intern to a selected institution, the institution hosting the intern is then required to design and supervise whatever duties an intern is required to carry out and for making sure that an intern adheres to the host's internal policies an institution's policies and procedures.

According to the Policy, an intern is defined to mean unemployed person, usually a graduate, with relevant qualifications who has entered into a contract with a government institution for a period of between three and twelve months with the intent of acquiring relevant work experience for

[24] PSC, Guidelines on Management of the Public Service Internship Programme. P2.
[25] Internship Policy and Guidelines for the Public Service of 2016.
[26] National Employment Authority Act 3 of 2016.
[27] Labour Relations Act, 2007. See section 1.6 of the Internship Policy and Guidelines for the Public Service.
[28] Internship Policy and Guidelines for the Public Service May, 2016.

registration with respective professional bodies and/or to increase chances of employability.[29]

The PSC has developed a standard template containing the terms and conditions of the agreement between the host institution and an intern. The agreement is phrased in mandatory terms[30] which means that compliance is imperative in terms of the rules of statutory interpretation. Failure to comply with a peremptory provision would leave the ensuing act null and void. In *Messenger of the Magistrate's Court, Durban v Pillay*,[31] the South African court held that the use of words such as "shall" or "must" with affirmative character indicates that compliance with the provision is peremptory.[32]

4 Determining whether or not a person is an employee

Traditionally, it is understood that individuals who go work for and subordinate themselves to an employer are employees. It is through the employment relationship, however, defined that reciprocal rights and duties are created between the two or more parties to a contractual agreement. It also remains the main determinant through which employees may claim the employment rights and benefits linked to employment as well as social assistance and security.[33]

Looking beyond the statutory definitions, various tests have been developed over the years by our courts in evaluating who an employee is. Courts have applied these tests specifically to distinguish between an employee and independent contractor and consultants. Be that as it may, it is shown here below that a legal analogy may be drawn from these tests and can be applied

[29] Internship Policy and Guidelines for the Public Service p. (xvii).
[30] Appendix Iv - Terms and Conditions of Internship Agreement p39.
[31] (1952) 3 SA 678 (A). See also *Bezuidenhoustv AA Mutual Insurance Association Ltd* (1978) 1 SA 703 (A) and *S v Takaendesa*(1972) 4 SA 72 (RAD) 78C-D.
[32] Botha C, *Statutory Interpretation: An Introduction for Students* (Juta. Cape Town 2012) 178.
[33]Available at https://ilo.org/ifpdial/areas-of-work/labour-law/WCMS_CON_TXT_IFPDIAL_EMPREL_EN/lang--en/index.htm (accessed on 4 April 2021).

in the case of interns. In *Christine Adot Lopeyio v Wydiffe Mwathi/tereNRB*[34] and *Charles Juma Oleng v M/S Auto Garage Ltd & Another*[35] the court set out various tests to determine the character of an employer-employee relationship. They include the following:

i. The control and supervision tests.
ii. The integration test whereby the employee is made part of the institution and his or her work forms an integral part of the institution.
iii. The economic or business reality teats.

4.1 Presence of the element of supervision and control exercised by the host institution to the intern: A strong indication of the existence of an employment relationship

The element of control and supervision, (determination of what should be done and how) is one of the most important tests in determining whether or not an employment relationship exists. In Stanley *Mungai Muchai v National Oil Corporation of Kenya*,[36] the court held that the element of control exists where an employee is subject to the command of the employer as far as his or her performance is concerned. In practice, an employee is usually subject to the employer's right of control, supervision, and command. The greater degree of supervision and control is indicative of an employment relationship. In *Ready Mix Concrete (South East) Ltd versus Minister of Pensions and National Insurance*,[37] the court held that a contract of service and therefore an employment relationship exists where one agrees to provide work for a wage and during the performance of work the person is under the control of the master. Thus, the control test focuses on the extent to which the employer has control over an individual worker, including the extent to which a person is subject to the command of another as to how he shall do his work. In the employment context, if one is free to report and leave as he

[34] ELRC Cause No. 1688 of 2012 [2013] eKLR. See also *Jimnah Muchiri v Agricultural Society of Kenya* [2019] eKLR.
[35] *Charles juma Oleng v M/S Auto Garage Ltd & Another* [2014] eKLR.
[36] *Mungai Muchai v National Oil Corporation of Kenya* (2012) eKLR.
[37] *Ready Mix Concrete (South East) Ltd v Minister of Pensions and National Insurance*, 1968 2 QB. See also the legal analogy in *Kenya Hotels & Allied Workers Union v Alfajiri Villas (Magufa)* Ltd [2014] eKLR and also in the case of *Fredrick Byakika v Mutiso Menezes International Limited* [2016] eKLR.

or she pleases, then one is unlikely to be considered as an employee. By contrast, if one is required to keep specific hours of work, complete a certain number of days or weeks and carry out specific tasks, especially if one penalised for failing to deliver the tasks assigned on time or to the necessary standard, then one is likely to be regarded as an employee.

For instance, according to the Guidelines on Management of the Public Service Internship Programme provided by PSC, an intern must be assigned a supervisor to oversee his or her work. According to the agreement, the supervisor is required to set targets for the intern and to conduct performance appraisals of the intern regularly in line with the job description and the agreement.[38] In fact, to control the intern, the host institution would require an intern, like any other full-time employee in the institution, to clock in before getting into their offices in the morning and clock out when they leave their offices in the evening for home. Failure to comply with that, the intern may be subjected to a disciplinary process of the host institution. In fact, in *Simmons v Heath Laudry Company*,[39] it was stated that the greater the direct control of the employee by the employer, the stronger the ground for holding it to be a contract of service. This article argues that the employer's right to instruct or direct an intern to do certain things and then to supervise how those things are done remains a very significant indicator of the existence of an employment relationship between the two parties. The degree of control is of the nature that 'interns' is taken as an employee of the host institution similar to the reasoning in the case of *Everret Aviation Limited v Kenya Revenue Authority*.[40]

4.2 Element of integration into the host institution: A strong indication of the presence of the employer-employee relationship

It is accepted jurisprudence that one of the common law tests used for determining the status of employees is the integration test.[41] Forming the

[38] Appendix IV item 6 at p36
[39] *Simmons v Heath Laudry Company* [1910].
[40] *Everret Aviation Limited v Kenya Revenue Authority* [2013] eKLR.
[41] *Jimnah Muchiri v Agricultural Society of Kenya* [2019] eKLR and *Adot Lopeyio v Wydiffe Mwathi/tereNRB* ELRC [2013] eKLR. See also *Colonial Mutual Life Assurance Society Ltd v MacDonald* (1931) AD 412 435. Also see *Smit v Workmen's Compensation Commissioner* (1979) 1 SA 51 (A) 53D, *SABC v McKenzie* (1999) 20 ILJ (LAC) 589D-E, *R v AMCA Services Ltd* 1959 4 SA 207 (A) 212H.

basis of the test, which is fundamentally an analytical tool, is the extent to which an individual is employed as an integral part of the business. In other words, the integration test concerns how an individual is subject to the host institution's policies including the employer's possibility to inflict disciplinary sanction. In the workplace, this occurs for instance, where the individual is subject to the rules and procedures of the employer rather than their own command (such as independent contractors). An analysis of the interns' agreement reveals a clear indication that an intern besides being under the control and direction of the supervisor, he or she is also subjected to the rules and procedures of the host institution rather than personal command.[42]

The provision in the agreement requiring the host institution to train and induct an intern in the host institution's methods or other aspects of its business is generally an indication of the spirit of integration into the host institution and therefore leads to an existing employment relationship. Further, the agreement requires the host institution to provide an intern with all relevant and available information and access to relevant equipment and protective gear necessary to perform his or her duties.[43] Besides an element of integration exist between the two parties given that the supervisor is required to appraise an intern based on the existing performance management framework and/or assessment guidelines of the host institution, a practice which is usually done for employer's full-time employees.[44]

According to *Halsbury's Laws of England,*[45] there exists no single test for determining whether or not an individual is an employee. Whether an individual is integrated into the organisation remains only one of the relevant tests to be considered. Additional factors relevant in a particular case may, in addition to control and integration include the method of payment, any

[42] *Everret Aviation Limited v Kenya Revenue Authority* (Through the Commissioner of Domestic Taxes) [2013] eKLR. See also the court's observation in *Vitalis Oliewo K'omudho v AAR Health Services Ltd* [2016] eKLR.
[43] The aim is to enable the intern like any other new member of staff is acquainted with and adapt to the new environment and the host's system. Usually, the Human Resource Policy and Procedures Manual of the host institution would provide guidelines on how the induction should take place.
[44] Section17 of the Internship Policy and Guidelines for the Public Service, 2016.
[45] Volume one of the 4th edition.

obligation to work only for that employer, stipulations as to hours of work, overtime, leave days, arrangements for payment of income tax, and national insurance contribution, how the contract may be terminated and who ultimately, bears the risk of loss and the chance of profit. All these are factors manifestly present in the agreement between the host institution and intern and therefore a clear indication of the existence of a contract of service.

4.3 Working hours and remuneration

The working hours and remuneration aspect form an essential aspect of a contract of service. The two factors are also key distinguishing features in determining the true nature of the working relationship between an intern and the host institution. Traditionally, an employer has total control over an individual's hours of work and remuneration. The fact that an intern receives fixed monthly payments at regular intervals which is made irrespective of the output or result is a strong indication of the existence of an employment relationship. This type of payment regime would generally be present in cases of an employer-employee relationship. The court noted in *Gilbert Sule Otieno v Seventh Day Adventist Church (East Africa) Ltd*[46] that "an essential factor which constitutes the fundamental right or basic conditions and terms of employment of an employee include entitlement to a wage or salary." In the context of interns, the employer must pay an intern a monthly salary although erroneously disguised as a 'stipend', as stipulated in the Government guidelines issued from time to time.[47]

As far as the regulation of working hours is concerned, the PSC service agreement stipulates that the intern is required to report for work daily for eight hours. He or she like any other employee is required to observe punctuality. This means generally that the normal hours of work for interns are the same as those of full-time employees in the host institution i.e. fourty hours per week. They are therefore not free to work their own hours nor at liberty to work for more than one institution at the same time. According to the agreement, the "working hours of interns shall adhere to the normal government working hours as prescribed in the Public Service Human Resource Policies and Procedures Manual or as prescribed by the relevant

[46] *Gilbert Sule Otieno v Seventh Day Adventist Church (East Africa) Ltd* [2014] eKLR.
[47] Appendix IV of the Internship Policy and Guidelines for the Public Service p35.

regulatory body.[48] This is usually 40 hours of work per week from Monday to Friday and therefore the same as that which is regulated under the Labour Institution Act. Accordingly, interns work for the same set working hours as full-time employees in host institutions and therefore a strong indication of integration and the existence of employment relationships.

4.4 Discipline

The existence of the institution policies and procedures applicable to the intern, and the resulting discipline for any violations of those rules, demonstrates a level of integration and control commensurate with an employment relationship.

According to most internship agreements including the one provided by and attached to the PSC Internship Policy and Guidelines for the Public Service, the intern is expected to comply with all relevant host institution's policies during his or her employment"[49] as well as faithfully and diligently devote his or her time only to the services of the host institution.[50] Like in any employment relationship where parties agree to be bound by specific rights and duties, the interns also have stipulated contractual rights and duties and where they fall short of the expectation, they may be subjected to disciplinary processes in terms of the provisions of the Employment Act and policies of the host institution.[51]

In the light of the above, there remains a strong indication of integration into the host institution and indeed the existence of an employment relationship between the host institution and an intern.

4.5 Benefits and statutory deductions

Usually, in practice, interns are subject to usual benefits and statutory deductions which are usually applicable to employees in host institutions. The inclusion in the agreement of provision for benefits such as weekly rest

[48] Internship Policy and Guidelines for the Public Service, 2016 p26
[49] Internship Policy and Guidelines for the Public Service, 2016 p28. See also Appendix IV p37.
[50] Appendix IV of the Internship Policy and Guidelines for the Public Service, item 9, pg36 and 37.
[51] of the Internship Policy and Guidelines for the Public Service p28.

periods and annual leave, sick leave, compassionate leave[52], and subsistence allowance when out of the station is indicative of the existence of an employment relationship. [53] Interns are also required to have medical insurance coverage by the National Hospital Insurance Fund (NHIF).

4.6 Equipment and tools of trade or work equipment

Generally, where tools and equipment for work are provided by the employer, an employer-employee relationship is deemed to exist but where an individual provides his or her own tools and equipment to perform the work, a contract for work is deemed to exist. In the context of interns, the host institution is obliged to provide the intern with tools and equipment to perform his or her job. And in terms of the PSC Internship Policy and Guidelines for the Public Service, the intern is required at the end of the internship period to account for tools and equipment issued to him or her.[54]

5 Duration of the internship

Ordinarily, a true internship endures for a short duration of about one or two weeks. Accordingly, it is unlikely that such internships would trigger an employment relationship. Notably, the PSC Internship Policy and Guidelines for the Public Service stipulate that an intern is to be engaged for a period between three and twelve months. Most host institutions are at liberty to extend the internship for more than twelve months. Important is to emphasise that an internship that extends for more than one year is likely to create an interpretation that an employer is using an intern by disguising the true relationship to avoid or circumvent his statutory obligations. A closer look at the internship policy as well as the internship agreement reveals this very concern.

6 International context: International Labour Standards[55]

The Kenyan Constitution encourages an international and foreign law-friendly approach by declaring that conventions and recommendations are a

[52] Section 16 as well as Appendix IV - Terms and Conditions of Internship Agreement p28.
[53] Internship Policy and Guidelines for the Public Service, 2016 p17.
[54] Internship Policy and Guidelines for the Public Service, 2016. P27.
[55] International labour standards are legal instruments drawn up by the ILO's constituents (governments, employers and workers) and setting out basic principles and rights at work.

major source of law in Kenya.[56] Although, there exist several international labour standards seeking to empower young people,[57] Jeannet-Milanovic observes that, "[t]here are no legal instruments adopted by the ILO to explicitly guide the regulation of internships or traineeships".[58] But Creighton and McCrystal opine that the eight ILO core Conventions, which Kenya is a signatory to some, generally apply to all 'workers':

> that is, they apply irrespective of the kind of contractual arrangement (if any) under which individuals are engaged and, with very limited exceptions, irrespective of the sector of the economy in which they work.[59]

Kenya is a member of the ILO. Notably, in 2006 the ILO adopted the Employment Relations Recommendation.[60] The Recommendation albeit not of the binding force of a Convention enjoins member states to provide guidelines to member states to:

> *"combat disguised employment relationships in the context of, for example, other relationships that may include the use of other forms of contractual arrangements that hide the true legal status, noting that a disguised employment relationship occurs when the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee, and that situations can arise where contractual arrangements have the effect of depriving workers of the protection they are due."*[61]

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[56] Article 2 (6) of the Constitution.
[57] See, for example, the list of labour standards relevant to youth employment at www.ilo.org/global/topics/youth-employment/standards/lang--en/index.htm (accessed 2 April 2021).
[58] Jeannet-Milanovic, O'Higgins, Rosin, 2017. "Contractual arrangements for young workers" in N. O'Higgins, Rising to the youth employment challenge: New evidence on key policy issues, ch 6 (Geneva, International Labour Office).
[59] Creighton, McCrystal, 2016. "Who is a worker in international law?" Comparative Labour Law and Policy Journal, 37(3): 691–725.
[60] Recommendation concerning the employment relationship, 2006 (adopted 15 June 2006).
[61] Article 4(a), (b) and art 5 of Employment Relations Recommendation, 2006.

ILO Recommendation 198 further recommends that an employment relationship should be determined:

> *"primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterised in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties."*

Further, the Recommendation states that

> *"when facilitating the determination of the existence of an employment relationship, member states should provide for a legal presumption that an employment relationship exists, where one or more relevant indicators are present.*[62] *These indicators include the fact that the work is carried out according to the instructions and under the control of another party, involves the integration of the worker in the organisation, is performed solely for the benefit of another person, and must be carried out personally by the worker. The indicators referred to in the Recommendation 2006 reflect the similar tests developed by Labour Courts in South Africa."*[63]

7 How the South African Labour Relations Act, 1995 and the Labour Court practice protects the rights of interns

The use of internships programmes in Kenya and the keen interest that is given to them by the Kenyan government state agencies has been on the rise in recent times. But the country lacks proper guidance from case law and legislation for effective implementation. Nonetheless, this article observes that the Employment and Labour Relations Court is duty-bound to develop jurisprudence in this area of law. Accordingly, Kenya can draw significant lessons from the practice in other countries.[64] This article considers the South

[62] Article 13 (a) and (b) of Employment Relations Recommendation, 2006.
[63] Grogan J *Workplace Law* (2013) Juta Kenwyn.
[64] Article 2 (5) of the Constitution states that the general rules of international law shall form part of the law of Kenya.

African legal framework in South Africa where it is noted that the determination of whether or not an intern falls within the definition of 'employee' is by and large left to the court. In doing so, the Labour Court, the Commission for Conciliation, Mediation and Arbitration (CCMA), and the Bargaining Councils are obliged to have regard to the true nature of the relationship between the parties. This involves an investigation of the true realities of the relationship between the parties, irrespective of how the parties have chosen to describe or title their work relationship in the contract. In other words, courts endeavor to look above and beyond the form of the contract between the intern and the host institution to establish whether there is an attempt by the employer to disguise the true nature of the working relationship as well as to circumvent the regulatory obligations.

There have been instances where interns were found to be employees, based on the all-encompassing definitions of 'employee' in section 213 of the LRA[65] and section 1 of the BCEA[66] which include 'any person' or 'any 'other person' who in any manner assists in carrying on or conducting the business of an employer. For instance, in *Andreanis v the Department of Health*[67] Ms. Andreanis had been appointed as an intern by the Department of Health. Four years later she was told to vacate her post as her internship period had come to an end. She claimed that the hospital had unfairly terminated her employment on the basis that she was an employee. She further argued that the end of her internship was immaterial to her employment status. Conversely, the employer argued that Ms Andreanis was an intern and therefore not an employee. Additionally, the employer opined that in any case, Ms Andreanis had not been dismissed given that her appointment had expired automatically when her internship period expired. At the CCMA, the arbitrator found that Ms Andreanis was indeed an employee as defined in section 213 of the LRA and in terms of all but one of the seven presumptions

[65] Labour Relations Act 66 of 1995 (LRA).
[66] Basic Conditions of Employment Act 75 of 1997 (BCEA). In both the LRA and the BCEA an 'employee' is defined to mean "any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration and "any other person who in any manner assists in carrying on or conducting the business of an employer." In fact, in South Africa, interns are paid in terms of the BCEA in order to empower recent graduates economically as well as eliminate pay discrimination.
[67] (2006) 5 BALR 461. See also *Mashaba v Cuzen & Woods* (1998) 19 ICJ 1486.

contained in section 200A of the LRA. Further, the CCMA revealed that the Department of Health had been attempting to disguise or hide behind her internship. Her dismissal was found to be unfair and she was reinstated with full back pay.

Similarly, in *South African Broadcasting Corporation* v *McKenzie*,[68] the South African Labour Appeal Court emphasised that the true legal relationship between the parties must be inferred from the realities of the relationship between them and not merely from the way the parties chose to describe it. For that reason, the court has to give effect to what the reality of the relationship between the parties and not what it purports to be. Similar analogy could be drawn from *Dewhurst v CitySprint UK Ltd*[69] where the Central London Employment Tribunal held that it matters not how many times an employer proclaims that he is engaging a person not as an employee if he then imposes requirements on that person which are the obligations of an employee and the person goes along with them. In that case, the true nature of the contractual relationship is that of employer and employee. This is supported by the list of rebuttable presumptions contained in section 200A of the LRA as well as section 83A of the BCEA. The presumptions are similar to those which are contained in the Employment Relations Recommendation. These presumptions are founded on the dominant impression gained from considering all relevant factors that emerge from an examination of the realities of the parties' work relationships. The presumptions state that, except where the contrary is proved, if a person is engaged to work or provide services to any other person, he or she is presumed, irrespective of the form of the contractual agreement, to be an employee should any one or more of the following circumstances be shown or proved to exist. The aggrieved party would need to show that he or she is subject to the control and direction of the employer and in this case the host organisation particularly with regards to the hours of work. The aggrieved party would also need to demonstrate that he or she has been integrated or has been made 'part' of the host institution or workplace in addition to the provision of tools of trade or work equipment. The general effect of sections 213 of the LRA and 200A as is that everyone who works is an employee

[68] [1998] ZALAC 13.
[69] ET/220512/2016.

unless they are independent of the person to whom they are providing services.

Further, the South African Department of Labour has made remarkable progress in regulating the rights of interns. In doing so, the country has developed a Code of Good Practice for Employment and Conditions of Work for EPWP and Ministerial Determination to safeguard the effective implementation of the programme.[70] According to the Code, interns are afforded the full protection of the BCEA and the LRA like any employee. This is because as noted in *Andreanis v the Department of Health* above, interns satisfy the broad definition of 'employee' and also because they receive a stipend for their work, besides assisting the host institution in carrying out its core mandate. This is paid monthly and is not be less than the minimum wage. The standard working hours as is customary in the relevant employment and are capped at to 40 hours per week.[71]

Conclusion

Disguised employment relationships through internship programmes have arguably become an increasingly common feature in the labour market. The pertinent question argued in this article concerns the legal status of the intern in Kenya and whether an internship is indeed a rite of passage to a job or a trap to a disguised employment relationship. While interns are usually new to the host institution and perhaps learning the ropes, it is important to highlight that they perform many of the same or substantially similar tasks as fellow full-time employees. True internship arrangement seeks to provide an intern with a chance to experience the real world of work. Hence, this article notes that it would be ill-advised to entirely prohibit the practice of internship. But the converse is also true, particularly where unscrupulous host institutions label the contract or use terms such as 'internship contract' with the view to disguise the true nature of work relationship and to secure cheap labour. When this happens, then questions must be raised and the intern should have the right to invoke article 41 of the Constitution and claim protection. Important is to remember that in *Kennedy kimani mburu & Another v Kibe Muigai Holding Limited*,[72] and *Maurice Oduor Okech* v

[70] Available at www.epwp.gov.za/ (accessed 27 January 2020).
[71] Department of Labour, 2011.
[72] *Kennedy Kimani Mburu & Another v Kibe Muigai Holding Limited* [2014] eKLR.

Chequered Flag Limited,[73] the court opined that in considering whether or not an employment relationship exists, the court is expected to look beyond the mere language used by the parties in the face of the contact. The court will endeavour to inquire into the entire spectrum of facts and the true tenets of it to establish whether an employer-employee relationship as defined in the Employment Act exists. This is because in practice the disparity between what is presented on the face of the intern's contractual agreements and the reality of the work performed by the intern would reveal a disguised employment relationship.

Recommendation

Legislative intervention can and usually does play a significant role in eliminating lacunas or ambiguity in the law. As noted above, the inconsistencies that currently exist in the definitions of 'employee' as well as 'contract of service' under the National Employment Authority Act and the Employment Act are regrettable. This inconsistency does not bring certainty and equally does assist the host institutions in effectively implementing legally compliant and commercially sound internship programs. Perhaps the time has come for the legislature to revisit and reconcile the two definitions to introduce an appropriate definition with the view to eliminate possible disguised employment through internship arrangements. This article recommends that the definition of 'employee' should be amended to introduce a definition that is broad in its interpretation for compliance with the right to fair labour practice entrenched in Article 41 of the Constitution. As a result, an amendment to the definition that includes a phrase similar to that which is contained under the LRA of South Africa i.e. '*and any other person, who in any manner, assists in carrying on or conducting the business of an employer* are recommended.

Further, this article recommends that policymakers should seek to develop effective policies that ensure equal treatment among workers regardless of their contractual arrangement. Hence, the policymaker should adopt what this article term as 'rebuttable presumption'. In other words, presumptions that are made in law, that is, presume that person to be an employee until it can be proved that the person is not an employee. So, where a person is

[73] (2013) eKLR.

erroneously engaged as an intern when the person's true nature of work performed is that of an employee, the person should have a right to approach the Employment and Labour Relations Court for a declaration that he or she is an employee. Then if it is objectively found that an employment relationship exists, the person should be entitled to the minimum wage and basic entitlements and protections as set out in the employment legislation.

Currently, most internship agreements including the PSC Internship Policy and Guidelines insist that the internship shall be non-remunerative save that interns will receive a stipend. This has left the vulnerable interns underpaid and without critical job security and protection ordinary extended to full-time employees. Many have been subjected to decades of abuse in complete violation and disregard of their constitutional right to fair labour practice as they are erroneously classified as 'interns' while in reality, the true nature of work performed by them is the same as that which is performed by full-time employees in the host institution. In terms of the Employment Act, it would amount to unfair discrimination if an employer fails to pay his workers' equal remuneration for work of equal value.[74] Hence, this article observes that there is a need to revisit the employment policies and guidelines to align them with the ever-changing forms of work relationships in the Kenyan labour market. Although not all jobs need to be standard, regulations, and policies are needed to ensure that all jobs are 'decent', including internships, that work delivers a fair income and job security amongst others. Accordingly, this study recommends an urgent review of the current practice of host-intern relationships to put an end to what could likely be regarded as employment relationships in disguise.

In addition, although the relationship between the intern and host institution is usually characterised as 'internship agreement', it is clear that the use of terms and phrases such as 'the intern is expected to comply with all relevant host institution's policies during his or her employment, unemployed graduates', 'right to discipline', annual leave, the use of employee and intern interchangeably in the agreement leads to an interpretation that an individual is an employee rather than an intern and consequently a disguised employment relationship. The use of the terms also shows the presence of

[74] Section 5 (5) of Employment Act.

important factors used by courts to test the presence of an employment relationship such as the element of integration into the host institution, control, and supervision amongst others. Therefore, miscategorising of interns as people in training rather than employees could result in the interns being deemed employees as well as attract fines and lawsuits against the host institution. This article observes that institutions hosting interns should trade cautiously as there are great legal implications if they fail to provide statutorily imposed protections to individuals that they thought were interns but who are in law, employees. The National Employment Authority should also effectively exercise its core mandate of monitoring all placements of interns to ensure that they are not exploited or their rights violated by any host institution in which they are undertaking their internship.

On the whole, based on the application of the tests discussed above, there is a sufficient legal analogy to show that interns should be considered as employees for the purposes of the Employment Act. Notably, it is the host institutions that exercise the power of employ and dismiss an intern, to pay an intern's 'salary', has the power to discipline the intern and through the contractual agreement, retained the power to control the intern with respect to the means and method by which his work was to be accomplished. Similarly, the intern depends entirely on the host institution for 'salary' and allowances. Accordingly, the definitions of employee under the Employment Act 2007, fit the relationship between the two parties as an employment contract. Above all, regard must be given to the application of principles of fairness and particularly, the fair labour practice entrenched in Article 41 of the Constitution.

Sustainable Development Goals and Social Justice in Kenya

By: ***Kariuki Muigua****

Abstract

While the sustainable development goals are concerned with striking a balance between economic development, environmental protection and conservation, on the other hand, it is also concerned with achievement of human rights and improving the social well-being of all groups of people. This is where the social justice concept comes in; it is only through promoting social, economic and environmental sustainability that the 2030 Agenda on Sustainable Development Goals (SDGs) will truly be achieved. This paper makes a case for promotion of social justice in Kenya as a step towards achieving the sustainable development agenda.

1. Introduction

The three-pillar conception of (social, economic and environmental) sustainability, commonly represented by three intersecting circles with overall sustainability at the centre, is arguably one of the best demonstrations of the place of social justice in the realisation of an all-inclusive sustainable development agenda.[1] However, it has been argued that:

> *The historical but artificial separation of the human rights domain from the economic and social domains led to undesired development outcomes and therefore requires focus of priority policy action on addressing inequity and inequality. Consequently:*
>
> > *"To support the concept of social justice is to argue for a reconciliation of these priorities within the context of a broader social perspective in which individuals endowed with rights and freedoms operate within the framework of*

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[1] Ben Purvis, Yong Mao and Darren Robinson, 'Three Pillars of Sustainability: In Search of Conceptual Origins' (2019) 14 Sustainability Science 681.

> *the duties and responsibilities attached to living in society." (United Nations, 2006, p. 13)*[2]

It is thus worth pointing out that all the three dimensions of sustainability must be addressed together to attain the most sustainable outcome possible.[3] Kenya, like many other countries around the world has committed itself to work towards achieving sustainable development goals and in the process transform the lives of its people.[4]

The desire of a socially just society in Kenya was well captured in the Supreme Court case of *In the Matter of the Speaker of the Senate & another [2013] eKLR*,[5] where the Court stated as follows:

> *[51] Kenya's Constitution of 2010 is a transformative charter. Unlike the conventional "liberal" Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today's Constitution is to institute social change and reform, through values such as social justice, equality, devolution, human rights, rule of law, freedom and democracy. This is clear right from the preambular clause which premises the new Constitution on – "RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law."*
>
> *And the principle is fleshed out in Article 10 of the Constitution, which specifies the "national values and principles of governance", and more particularly in Chapter Four (Articles 19-59) on the Bill of*

[2] Sumpf D, 'A Review of the Relationship Between Corruption and Social Justice' (Social Science Research Network 2015) SSRN Scholarly Paper ID 2744590 <https://papers.ssrn.com/abstract=2744590> accessed 6 February 2021, 2.
[3] 'What Is Social Sustainability? | Definition of Social Sustainability | ADEC ESG Solutions' <https://www.esg.adec-innovations.com/about-us/faqs/what-is-social-sustainability/> accessed 5 February 2021.
[4] 'Sustainable Development Goals | UNDP in Kenya' (*UNDP*) <https://www.ke.undp.org/content/kenya/en/home/sustainable-development-goals.html> accessed 6 February 2021.
[5] *In the Matter of the Speaker of the Senate & another [2013] eKLR*, Advisory Opinion Reference 2 of 2013.

Rights, and Chapter Eleven (Articles 174-200) on devolved government.

Similarly, in *Centre for Rights Education & Awareness (CREAW) v Attorney General & another [2015] eKLR*[6], the High Court of Kenya at Nairobi observed that:

1. *The Constitution of Kenya has been described as one of the most progressive in the world.* ***It envisions a society based on the rule of law, non-discrimination and social justice****. (Emphasis added)At its core is the belief that there can only be real progress in society if all citizens participate fully in their governance, and that all, male and female, persons with disabilities and all hitherto marginalized and excluded groups get a chance at the table.*

Despite such pronouncements by courts, strong constitutional and statutory provisions as well as positive steps taken by the State in creating a socially just society in Kenya, the country is arguably still very far from achieving the ideals of social justice, namely, inter alia: equality, equity, inclusiveness and fairness, among others.

2. Social Justice: Meaning and Concepts

Social justice has been defined as an aspect of distributive justice that seeks to achieve fair distribution of benefits among the members of various associations.[7]

Notably, while some authors consider social justice equivalent to 'distributive justice', others differentiate it from both general justice and distributive justice where social justice is seen as a unique type of justice characterized by a focus on the 'common good' and the individual's obligation and right to make a contribution to that (hence, sometimes called

[6] Centre for Rights Education & Awareness (CREAW) v Attorney General & another [2015] eKLR, Petition 182 of 2015.
[7] David Miller, 'Distributive Justice: What the People Think' (1992) 102 Ethics 555.

'contributive' justice) while acknowledging the role of the state and civil society to remove barriers that prevent individuals from so doing.[8]

While advocating for social justice, some of the earliest scholars commenting on the subject have asserted that:

> 'Society should treat all *equally* well who have *deserved* equally well of it, that is, who have deserved equally well absolutely. This is the highest abstract standard of social and distributive justice; towards which *all institutions*, and the efforts of all virtuous citizens, *should be made in the utmost degree to converge'.* [9] [Emphasis added]

Social justice is based on several principles including equality and fairness. It has been argued that social justice should be based on three biologically-grounded fairness principles which, must be combined and balanced in order to achieve a society that is fair to everyone. The three fairness principles are *equality, equity, and reciprocity*, derived from the emerging, multi-disciplinary science of human nature and the mounting evidence that a sense of fairness is an evolved and distinctively human behavioral trait.[10]

For instance, in the case of I*n the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR*[11], the Supreme Court of Kenya, while rendering its advisory opinion on the one-third gender rule, stated, *inter alia*:

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[8] Weigert KM, 'Social Justice: Historical and Theoretical Considerations' in James D Wright (ed), *International Encyclopedia of the Social & Behavioral Sciences (Second Edition)* (Elsevier 2015) <https://www.sciencedirect.com/science/article/pii/B9780080970868320815> accessed 6 February 2021.

[9] 'Utilitarianism by John Stuart Mill' <https://www.utilitarianism.com/mill5.htm> accessed 6 February 2021.

[10] Corning P, 'Equality, Equity, and Reciprocity: The Three Pillars of Social Justice | Institute for the Study of Complex Systems' <https://complexsystems.org/publications/equality-equity-and-reciprocity-the-three-pillars-of-social-justice/> accessed 6 February 2021.

[11] *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012]* eKLR, Advisory Opinions Application 2 of 2012.

> *1.6 I believe the immediate implementation of the two-thirds gender principle is reinforced by values of patriotism, equity, social justice, human rights, inclusiveness, equality and protection of the marginalized (Emphasis added). Such values would be subverted by an interpretation of the provisions that accepts progressive realization of this principle.*

The United Nations has defined social Justice as "the fair and compassionate distribution of the fruits of economic growth."[12]

Social justice is also viewed as the extension of principles, enshrined in [our] Constitution, of human dignity, equity, and freedom to participate in all of the political, socio-economic and cultural spheres of society.[13] Indeed, it has also been argued that the legal needs of low-income persons are basic to their survival and ability to thrive. As such, fundamental legal rights need to been forced as they relate to such basic necessities as nutrition, health, shelter, income, education, and protection from violent physical abuse, to uphold the foundational tenets of social justice.[14]

According to the Center for Economic and Social Justice, "Social justice encompasses economic justice. Social justice is the virtue which guides us in creating those organized human interactions we call institutions. In turn, social institutions, when justly organized, provide us with access to what is good for the person, both individually and in our associations with others. Social justice also imposes on each of us a personal responsibility to work with others to design and continually perfect our institutions as tools for personal and social development."[15]

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[12] Sumpf D, 'A Review of the Relationship between Corruption and Social Justice' (Social Science Research Network 2015) SSRN Scholarly Paper ID 2744590 <https://papers.ssrn.com/abstract=2744590> accessed 6 February 2021.
[13] Dexter, P. "Social cohesion and social justice in South Africa." *Report prepared for the Department of Arts and Culture by the Human Sciences Research Council* (2004), i.
[14] Tyner A, 'Planting People, Growing Justice: The Three Pillars of New Social Justice Lawyering' (2013) 10 Hastings Race and Poverty Law Journal 219, 220.
[15] 'Defining Economic Justice and Social Justice | Center for Economic & Social Justice' (28 May 2012) <https://www.cesj.org/learn/definitions/defining-economic-justice-and-social-justice/> accessed 6 February 2021.

It has been observed that while formal definitions for social justice vary in wording, they all encompass: Equal rights; Equal opportunity; and Equal treatment.[16]

Also worth pointing is the assertion that the principles of social justice are of three general types: procedural, redistributive/compensatory, and distributive whereby principles pertaining to procedural justice concern the fairness of the process for determining what is just, independent of the outcome; principles pertaining to redistributive/compensatory justice are concerned with the determination of punishment and compensation for wrongs, injuries, and losses; and the principles that are concerned with the just allocation of limited benefits and resources pertain to distributive justice.[17]

While the discussion in this paper is mainly concerned with the procedural justice and distributive justice, as these two have a closer relationship with the Sustainable Development Goals (SDGs), all the three aspects certainly have a bearing on SDGS, as captured under SDG Goal 16 which seeks to*: Promote Peaceful And Inclusive Societies For Sustainable Development, Provide Access To Justice For All And Build Effective, Accountable And Inclusive Institutions At All Levels; SDG Goal 6 seeks to: Ensure Availability And Sustainable Management Of Water And Sanitation For All; SDG Goal 7 seeks to: Ensure Access To Affordable, Reliable, Sustainable And Modern Energy For All; and SDG Goal 10 seeks to Reduce Inequality Within And Among Countries*, among others.

Form the foregoing meaning and concepts of 'social justice', sustainable development debates should be informed by the desire to ensure the creation of a just and conducive living environment where all persons get to satisfy all their basic needs but also get to fulfil their self-actualization dreams.

[16] TSDF, 'What Is Social Justice?' (*The San Diego Foundation*, 24 March 2016) <https://www.sdfoundation.org/news-events/sdf-news/what-is-social-justice/> accessed 26 January 2021.
[17] Almgren G, 'A Primer on Theories of Social Justice and Defining the Problem of Health Care', *Health Care Politics, Policy, and Services* (Springer Publishing Company 2017) <https://connect.springerpub.com/content/book/978-0-8261-6898-6/chapter/ch01>, 2.

3. Social Justice and the Law: International and National Legal Frameworks

3.1. International and Regional Legal Frameworks on Social Justice

Justice is a universally accepted principle that has been enshrined in various international legal instruments including the Charter of the United Nations which seeks among other things *'to establish conditions under which justice and respect for obligations arising under international law can be maintained.'*[18]

Further, the *Universal Declaration of Human Rights* recognises the inherent dignity and the equal and inalienable rights of all members of the human family as the foundation of freedom, *justice* and peace in the world.[19] The *International Covenant on Economic, Social and Cultural Rights* [20] recognises in its preamble that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.

The *International Covenant on Civil and Political Rights*[21] recognizes in its preamble that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.

[18] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.
[19] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).
[20] United Nations, International Covenant on Economic, Social and Cultural Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966
entry into force 3 January 1976, in accordance with article 27.
[21] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

The *African Charter on Human and Peoples' Rights*[22] (Banjul Charter) reaffirms in its preamble the pledge African States members of the African Union solemnly made in Article 2 of the said Charter to eradicate all forms of colonialism from Africa, to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.

4. Domestic Legal Frameworks: Kenya

The Preamble to the Constitution of Kenya 2010 recognises the aspirations of all Kenyans for a government based on the essential values of human rights, equality, democracy, *social justice* and the rule of law (Emphasis added).

Article 4(2) of the Constitution provides that the Republic of Kenya is ***a multi-party democratic State founded on the national values and principles of governance referred to in Article 10***. These values and principles of governance include; (*a*) ***patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people***; (*b*) ***human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized*** (Emphasis added).

The Constitution of Kenya 2010 also provides that the national values and principles of governance which include the rule of law, human dignity, equity, *social justice*, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised are binding on all State organs, State officers, public officers and all persons whenever any of them applies, or interprets, the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions[23] (Emphasis added).

Also notable is Article 19 (2) of the Constitution which provides that the purpose of recognising and protecting human rights and fundamental

[22] Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).
[23] Article 10, Constitution of Kenya 2010.

freedoms is to preserve the dignity of the individuals and communities and to promote social justice and the realization of the potential of all human beings.

Further, article 48 of the Constitution enshrines the right of access to justice and mandates the state to ensure access to justice for all persons in Kenya.[24]

5. Sustainable Development Goals (SDGs) and Social Justice

Sustainable Development Goals (SDGs) were adopted by all United Nations Member States in 2015 as a universal call to action to end poverty, protect the planet and ensure that all people enjoy peace and prosperity by 2030.[25] The 17 SDGs are integrated and interconnected and acknowledge that action in one area will affect outcomes in others, and that development must balance social, economic and environmental sustainability.[26] The SDGs represent a global vision for development which necessitate members to undertake necessary legislative, political, economic, technological, social and environmental interventions towards their attainment.[27]

Most of the SDGs are geared towards social justice and seek to achieve the following: end extreme poverty (SDG No.1); end hunger and achieve food security (SDG No.2); ensure healthy lives and promote well-being for all (SDG No.3); ensure quality education (SDG No.4); achieve gender equality

[24] In the case of Thomas Alugha Ndegwa v Republic [2016] eKLR, Criminal Appeal (Application) 2 of 2014, the Court of Appeal at Nairobi elaborated on the content of social justice as provided under Article 10 as follows:

> *3. While these two provisions, and more so Article 50(2)(h), are specific on legal aid, there are many other provisions of the Constitution that are relevant to the concept of legal aid. These include the value of social justice under Article 10; provisions on equality before the law under Article 27; provisions on protection of marginalised and vulnerable persons and the requirement under Article 159 that justice shall be done to all irrespective of status. The overarching notion to be derived from these provisions is that it is difficult to achieve justice where one party has to compete with the elaborate machinery and resources available to the opposite party.*

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

[26] 'Sustainable Development Goals' (*UNDP*) <https://www.undp.org/content/oslo-governance-centre/en/home/sustainable-development-goals.html> accessed 6 February 2021.

[27] Ibid.

(SDG No.5); ensure availability of clean water and sanitation (SDG No.6); ensure access to affordable and clean energy (SDG No.7); decent work for all and economic growth (SDG No.8); reduce inequalities within and among countries (SDG No.10); ensure responsible consumption and production (SDG No.12), combat climate change (SDG No.130 and achieve peace, justice and strong institutions (SDG No.16).[28]

6. Achieving Social Justice in Kenya: Challenges

Despite the ambitious plan set forward by the SDGs, the situation in Kenya is still wanting. Social injustices are still widespread. Economic disparities between the poor and the rich mean that one class of people can afford all the luxuries life has to offer while the other struggles to meet even the basic human needs.[29] Consequently, as a result of extreme poverty a good population of Kenya cannot access quality and adequate food; health services; quality education; clean water and sanitation and affordable and clean energy.[30] There has been an increasing inequality gap in Kenya despite the reports on any economic development in the country, implying that the 'fruits' of such development do not impact everyone in the same way, with the poor becoming poorer, devoid of access to basic resources and inability to meaningfully participate in national development agenda.[31]

Further, gender disparities are still evident especially in the political and economic arena and despite the attempt by framers of the constitution to cure this ill, the country's attempts towards gender equality has been futile.[32]

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

[29] 'Kenya: Extreme Inequality in Numbers | Oxfam International' <https://www.oxfam.org/en/kenya-extreme-inequality-numbers> accessed 6 February 2021.

[30] 'Water, Sanitation and Hygiene | UNICEF Kenya' <https://www.unicef.org/kenya/water-sanitation-and-hygiene> accessed 6 February 2021.

[31] 'Kenya: Extreme Inequality in Numbers | Oxfam International' https://www.oxfam.org/en/kenya-extreme-inequality-numbers accessed 6 February 2021.

[32] Cf. Hydrant (http://www.hydrant.co.uk) S designed and built by, 'Blog: Kenya's Milestones in Accelerating Gender Equality and Women's Empowerment' (*The Commonwealth*, 20 September 2019) <https://thecommonwealth.org/media/news/opinion-kenya-milestones-accelerating-gender-equality-and-womens-empowerment> accessed 6 February

In addition, social injustices are evident in the employment sector where most youths and persons with disabilities in Kenya are often overlooked in employment opportunities.[33]

Environmental pollution is still widespread as evidenced by pollution of water sources, poor solid waste management and industrial pollution which creates climate change concerns.[34]

In summary, the World Bank notes that while Kenya has made significant political, structural and economic reforms that have largely driven sustained economic growth, social development and political gains over the past decade, its key development challenges still include poverty, inequality, climate change, continued weak private sector investment and the vulnerability of the economy to internal and external shocks.[35]

2021; 'Progress towards Gender Equality under Threat, World Leaders Warn as General Assembly Marks Twenty-Fifth Anniversary of Landmark Women's Rights Conference - World' (*ReliefWeb*) <https://reliefweb.int/report/world/progress-towards-gender-equality-under-threat-world-leaders-warn-general-assembly-marks> accessed 6 February 2021; 'Has COVID-19 Pushed Women in Politics off Kenya's Agenda? | Inter Press Service' <http://www.ipsnews.net/2020/07/has-covid-19-pushed-women-in-politics-off-kenyas-agenda/> accessed 6 February 2021; 'Virus Exacerbating Global Inequality, Hunger - FNArena' <https://www.fnarena.com/index.php/2020/10/26/virus-exacerbating-global-inequality-hunger/> accessed 6 February 2021.

[33] Opoku MP and others, 'Access to Employment in Kenya: The Voices of Persons with Disabilities' (2017) 16 International Journal on Disability and Human Development 77; 'Youth With Disabilities | United Nations For Youth' (8 June 2015) <https://www.un.org/development/desa/youth/youth-with-disabilities.html/> accessed 6 February 2021.

[34] Ferronato N and Torretta V, 'Waste Mismanagement in Developing Countries: A Review of Global Issues' (2019) 16 International Journal of Environmental Research and Public Health <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6466021/> accessed 6 February 2021.

[35] 'Overview' (*World Bank*) <https://www.worldbank.org/en/country/kenya/overview> accessed 6 February 2021; 'World Report 2018: Rights Trends in Kenya' (Human Rights Watch, 21 December 2017) <https://www.hrw.org/world-report/2018/country-chapters/kenya> accessed 6 February 2021.

This state of affairs has resulted in social injustices in Kenya and does not fit within the ideal of the Sustainable Development Goals to end poverty, protect the planet and ensure that all people enjoy peace and prosperity by 2030.

7. Attaining Sustainable Development Goals for Social Justice in Kenya

There is need for political, economic, legal, social and technological interventions in order to hasten achievement of SDGs in Kenya whilst promoting social justice. Some of these interventions can include:

a) Integrating the SDGs into Kenya's vision and plans.[36]

The Agenda 2030 on Sustainable Development Goals covers many aspects of development and as such, Kenya should continually review and align its development plans with the SDGs agenda in order to ensure that it is not left behind by the rest of the world.

b) Sound planning and resource allocation by the government to key sectors such as education, health, energy and agriculture.[37]

The available resources should be strategically distributed in order to win the fight against poverty, inequality, bad governance, the skills gap between market requirements and the education curriculum, climate change, and low investment and low firm productivity, among others.[38]

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[36] Republic of Kenya, *Implementation of the Agenda 2030 For Sustainable Development in Kenya, June, 2017*, <https://sustainabledevelopment.un.org/content/documents/15689Kenya.pdf> accessed 6 February 2021; 'Kenya: Sustainable Development Knowledge Platform' <https://sustainabledevelopment.un.org/memberstates/kenya> accessed 6 February 2021.

[37] Republic of Kenya, *Sessional paper No. 10 of 2012 On Kenya Vision 2030*, < https://espas.secure.europarl.europa.eu/orbis/sites/default/files/generated/document/en/KENYA2030.pdf> accessed 6 February 2021; United Nations, *Sustainable Development in Kenya: Stocktaking in the run up to Rio+20*, Nairobi Kenya, 2012< https://sustainabledevelopment.un.org/content/documents/985kenya.pdf> accessed 6 February 2021.

[38] Arias, Omar, David K. Evans, and Indhira Santos. *The skills balancing act in Sub-Saharan Africa: Investing in skills for productivity, inclusivity, and adaptability*. World Bank Publications, 2019 <http://documents1.worldbank.org/curated/en/558991560840574354/pdf/The-Skills-Balancing-Act-in-Sub-Saharan-Africa-Investing-in-Skills-for-Productivity-Inclusivity-and-Adaptability.pdf> accessed 6 February 2021; 'How to Fix Economic Inequality?' (*PIIE*, 17 November 2020) <https://www.piie.com/microsites/how-fix-

c) Financial accountability and transparency in government to prevent wastage of resources which can be channeled towards social justice programmes.[39]

It has been argued that 'as the notions of fairness and trust permeate procedural rules (for example, democracy), their administration (for instance, no bias) and income distribution (such as, unskewed and relatively equal), corruption evidently undermines justice, as it is neither functional for economic efficiency nor human development due to the negative externalities corrupt practices create.[40] In addition, in an uncertain institutional environment of the public sector, private actors (firms, individuals, non-state actors, etc.) might take-over functions of the state and control access to services where their distribution may not be based on fairness or equity, but on group-membership or any deliberate criteria to differentiate.[41] As a result, social justice outcomes over time will be negative.[42] As such, there is a need for the government to remain steadfast in not only provision of basic services but also fighting corruption.[43] This is

economic-inequality> accessed 6 February 2021; 'Nine strategies to reduce inequality' (*A-id*, 8 November 2016) <https://www.a-id.org/2016/11/08/nine-strategies-to-reduce-inequality/> accessed 6 February 2021; Nam, Chang Woon. "World Economic Outlook for 2020 and 2021." In *CESifo Forum*, vol. 21, no. 02, pp. 58-59. München: ifo Institut-Leibniz-Institut für Wirtschaftsforschung an der Universität München, 2020.

[39] 'Combating Corruption' <https://www.worldbank.org/en/topic/governance/brief/anti-corruption> accessed 6 February 2021; Adams, Dawda, Kweku Adams, Subhan Ullah, and Farid Ullah. "Globalisation, governance, accountability and the natural resource 'curse': Implications for socio-economic growth of oil-rich developing countries." *Resources Policy* 61 (2019): 128-140; *Read 'Democratization in Africa: African Views, African Voices' at NAP.Edu* <https://www.nap.edu/read/2041/chapter/5> accessed 6 February 2021; Brechenmacher TC Saskia and Brechenmacher TC Saskia, 'Accountability, Transparency, Participation, and Inclusion: A New Development Consensus?' (*Carnegie Endowment for International Peace*) <https://carnegieendowment.org/2014/10/20/accountability-transparency-participation-and-inclusion-new-development-consensus-pub-56968> accessed 6 February 2021.

[40] Sumpf D, 'A Review of the Relationship between Corruption and Social Justice' (Social Science Research Network 2015) SSRN Scholarly Paper ID 2744590 <https://papers.ssrn.com/abstract=2744590> accessed 6 February 2021, 3.

[41] Ibid, 3.

[42] Ibid, 9.

[43] 'The Fight Against Corruption in Kenya…Yet Another Chapter' <https://cytonn.com/topicals/the-fight-against-corruption-in-kenyayet-another-

especially important considering that the country has been borrowing heavily and these funds should be made to count as far as transforming the citizens' lives is concerned.[44]

d) Empowering the youth, persons with disabilities and other marginalised groups through equal opportunities in employment and other sectors of the economy.[45]

It has rightly been pointed out that poverty and inequality are exacerbated by unemployment.[46] Poverty also creates a barrier to accessing the legal system and to exercising political power.[47] Unless these groups of persons are empowered to through giving them stable sources of income, addressing poverty in the country will remain a mirage.

e) Creating a conducive economic environment that will encourage entrepreneurship and job creation through measures such as tax waivers and financial support for startups, youth and women economic groups.[48]

There is a need for economic empowerment programs for empowering women and marginalised individuals to overcome social injustice through

chapter> accessed 6 February 2021; 'Role of Parliaments in Fighting Corruption' <https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=8861&lang=EN> accessed 6 February 2021; Alfada, Anisah. "The destructive effect of corruption on economic growth in Indonesia: A threshold model." *Heliyon* 5, no. 10 (2019): e02649.

[44] 'China Says Its Ready to Help Kenya Deal with Its Debt Challenges' <https://finance.yahoo.com/news/china-says-ready-help-kenya-155118368.html> accessed 6 February 2021.

[45] Ver Medalla, Donie, and Bella Marie Medalla. "Empowering persons with disabilities through training and employment: A case study." In *International Forum Journal*, vol. 21, no. 1, pp. 150-172. 2018; Rua, Gustavo. "Helping Families: One Step at a Time." (2020); Ramely, Aslinda, Yarina Ahmad, and Nor Hafizah Mohamed Harith. "Social Inclusion Of Malaysian Elderly In Labour Market: The Enthusiasm Culture To Be Productive Or Just Desperate For Money?." (2035).

[46] Jayanathan Govender and Jayanathan Govender, 'Social Justice in South Africa' (2016) 16 Civitas - Revista de Ciências Sociais 237.

[47] Tyner A, 'Planting People, Growing Justice: The Three Pillars of New Social Justice Lawyering' (2013) 10 Hastings Race and Poverty Law Journal 219, 220.

[48] Oladimeji, Moruff Sanjo, Augusta Thereza Ebodaghe, and Peter Babatunde Shobayo. "Effect of globalization on small and medium enterprises (smes) performance in Nigeria." *International Journal of Entrepreneurial Knowledge* 5, no. 2 (2017): 56-65.

economic capacity building.[49] The government should put in place incentives that will encourage women and marginalised individuals to set up and flourish in business thus creating job opportunities for many more individuals.

f) Improving the representation of youths, women and persons with disabilities in political positions through necessary legal and policy measures.[50]

The social disparities especially between men and women was greatly exposed by the Covid-19 pandemic where it was reported that in 13 out of 17 countries surveyed since the outbreak, women reported more emotional stress and mental health challenges compared to men, including higher gender-based violence, fewer sexual and reproductive services, greater economic impact and increased household burdens. Notably, the 17 countries surveyed were France, Germany, the UK, US, Canada, Japan, Australia, New Zealand, India, Mexico, China, Colombia, Switzerland, South Africa, Argentina, *Kenya* and Tunisia.[51]

There is a need for the state to continually adopt and put in place measures that will address the social inequalities and inequities that exist among the different groups for inclusive social development.

[49] 'Social Justice and Peace for Marginalized Women in Kenya | ASEC-SLDI News' (*ASEC-SLDI*) <http://asec-sldi.org/news/success/social-justice-peace-kenya/> accessed 6 February 2021.

[50] 'Realising the Inclusion of Youth with Disabilities in Political and Public Life in Kenya [2016] ADRY 3' <http://www.saflii.org/za/journals/ADRY/2016/3.html> accessed 6 February 2021; Editor, 'Political Participation of Women with Disabilities' (*International Knowledge Network of Women in Politics*, 13 June 2019) <https://www.iknowpolitics.org/en/discuss/e-discussions/political-participation-women-disabilities> accessed 6 February 2021.

[51] 'Aiming for a Gender-Equal World' (*Cosmos Magazine*, 29 January 2021) <https://cosmosmagazine.com/people/society/aiming-for-a-gender-equal-world/> accessed 6 February 2021; see also 'The Changes and Challenges to Justice in the Time of COVID-19' (*UNDP*) <https://www.undp.org/content/undp/en/home/blog/2020/the-changes-and-challenges-to-justice-in-the-time-of-covid-19.html> accessed 6 February 2021.

g) Fast tracking the country's journey towards renewable energy and electrification programme towards promoting access to clean and affordable energy.[52]

In order to reduce the cost of energy and also move closer towards combating climate change, there is a need for the government to encourage investment in cleaner and affordable alternative sources of energy in the country.[53]

h) Working together with the global community towards achieving common goals such as combating climate change and reducing inequality among countries.[54]

It is acknowledged that Kenya cannot achieve some of the SDGs without working closely with other international players either due to funding challenges or simply lack of expertise in certain areas, hence the need to strategically pick cooperation partners in its efforts towards achieving sustainable development goals.[55]

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[52] Energy Sector Management Assistance Program. "The State of Access to Modern Energy Cooking Services." (2020); Herrero, Carmen, José Pineda, Antonio Villar, and Eduardo Zambrano. "Tracking progress towards accessible, green and efficient energy: The Inclusive Green Energy index." *Applied Energy* 279 (2020): 115691.

[53] 'Goal 7: Affordable and Clean Energy | UNDP' <https://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-7-affordable-and-clean-energy.html> accessed 6 February 2021; July 26 and Alum 2016 Noah Long Kevin Steinberger-, 'Renewable Energy Is Key to Fighting Climate Change' (*NRDC*) <https://www.nrdc.org/experts/noah-long/renewable-energy-key-fighting-climate-change> accessed 6 February 2021; Environment UN, 'GOAL 7: Affordable and Clean Energy' (*UNEP - UN Environment Programme*, 2 October 2017) <http://www.unenvironment.org/explore-topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-7> accessed 6 February 2021; Owusu PA and Asumadu-Sarkodie S, 'A Review of Renewable Energy Sources, Sustainability Issues and Climate Change Mitigation' (2016) 3 Cogent Engineering 1167990; 'Bill Gates: This Is What We Need to Do to Tackle Climate Change' (*World Economic Forum*) <https://www.weforum.org/agenda/2019/05/a-critical-step-to-reduce-climate-change/> accessed 6 February 2021.

[54] Martin, 'Reduce Inequality within and among Countries' (*United Nations Sustainable Development*) <https://www.un.org/sustainabledevelopment/inequality/> accessed 6 February 2021.

[55] 'Universality and the SDGs: A Business Perspective' (*Sustainable Development Goals Fund*, 7 November 2016) <https://www.sdgfund.org/universality-and-sdgs> accessed 6 February 2021; 'Kenya .:. Sustainable Development Knowledge Platform' <https://sustainabledevelopment.un.org/memberstates/kenya> accessed 6

i) Strengthening and Supporting Institutions Such as the Judiciary In Order To Achieve the Right of Access to Justice.[56]

Article 20(4) (a) of the Constitution of Kenya provides that the court, in interpreting the Bill of Rights, should promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom. In addition, Article 21 (3) requires the court to address the needs of the vulnerable groups within the society, including women, older members of society, persons with disability, children, youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities.

In ensuring equality and non-discrimination, Article 27 (6) obligates the State to give full effect to the realization of the right to equality and freedom from discrimination by taking legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

Kenyan courts have also clearly expressed themselves on the place of social justice and access to justice generally. For instance, in the case of *Kenya Bus Service Ltd & Another V Minister For Transport & 2 others [2012] eKLR*[57], the Court stated as follows:

> *8.* ***By incorporating the right of access to justice, the Constitution requires us to look beyond the dry letter of the law****. The right of access to justice is a reaction to and a protection against legal formalism and dogmatism. (See "Law and Practical Programme for Reforms" (1992) 109 SALJ 22)Article 48 must be located within the Constitutional imperative that recognises as the Bill of Rights as the framework for social, economic and cultural policies.* ***Without***

February 2021; 'Sustainable Development Goals | UNDP in Kenya' (*UNDP*) <https://www.ke.undp.org/content/kenya/en/home/sustainable-development-goals.html> accessed 6 February 2021.

[56] 'Access to Justice - United Nations and the Rule of Law' <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/> accessed 6 February 2021.

[57] Kenya Bus Service Ltd & another V Minister For Transport & 2 others [2012] eKLR, Civil Suit 504 of 2008.

> ***access to justice the objects of the Constitution which is to build a society founded upon the rule of law, dignity, social justice and democracy cannot be realised for it is within the legal processes that the rights and fundamental freedoms are realised****. Article 48 therefore invites the court to consider the conditions which clog and fetter the right of persons to seek the assistance of courts of law. (Emphasis added)*

Lawyers have also been challenged- that in order to accomplish meaningful social change, they must also move beyond their traditional role as mediaries between clients and the justice system and work collaboratively with marginalized communities.[58] To this end, lawyers should stand as leaders to help underprivileged people obtain the basic necessities of life and dignity through three pillars of new social justice lawyering: social justice lawyering, leadership, and public policy advocacy.[59] This is because lawyers in particular are trained with the tools needed to critically analyze law and policies, problem solve around complex social issues, and use writing as a form of advocacy.[60] These social justice lawyering roles and pillars are summarized as follows:

> *The first pillar, social justice lawyering, focuses on using the law as a tool to dismantle systems of oppression and create equal access to justice. The second pillar challenges lawyers to develop their leadership skills and strengthen the leadership capacity of others. Within the leadership capacity, lawyers can aid in empowering others. This moves beyond serving a particular client to acknowledging that each person can serve as an invaluable contributor in the process of social change. Lawyers are challenged to explore the question: "Do you grow the people whom you lead?" Finally, the third pillar is the foundation of systems change and policy reform. Public policy advocacy focuses on working with communities to organize and mobilize around social justice issues impacting their daily lives. This type of advocacy cultivates the*

[58] Gonzalez, Thalia. "Root to rise: mindful lawyering for social justice." *NYU Rev. L. & Soc. Change* 41 (2017): 91.
[59] Tyner A, 'Planting People, Growing Justice: The Three Pillars of New Social Justice Lawyering' (2013) 10 Hastings Race and Poverty Law Journal 219.
[60] Ibid, 219.

transformational power of collective engagement with the goal in mind of fostering equitable policies. By applying the principles of "new social justice lawyering" lawyers can collaborate with marginalized communities to realize a vision of justice and equity.[61]

j) Meaningful Participation of the Media and Learning Institutions in combating Social Injustice[62]

While learning institutions play an important role in providing education which is a very relevant tool in economic, social and political empowerment of communities through future job opportunities, alleviating poverty and enabling public participation in governance, they can also be very useful in changing attitudes in the society.[63] This is however not to say that other members of the society and institutions should sit back; the country's transformation agenda should be a concerted effort from all.[64]

It has rightly been pointed out that the active and meaningful participation of citizens in public affairs is the distinguishing feature of democratic societies, which are judged by the extent to which governments open up to

[61] Ibid, 263-264.
[62] Jansen SC, 'Introduction: Media, Democracy, Human Rights, and Social Justice' in Sue Curry Jansen, Jefferson Pooley and Lora Taub-Pervizpour (eds), *Media and Social Justice* (Palgrave Macmillan US 2011) <https://doi.org/10.1057/9780230119796_1> accessed 6 February 2021; Wilson-Strydom M, 'University Access and Theories of Social Justice: Contributions of the Capabilities Approach' (2015) 69 Higher Education 143; '(PDF) Civic Engagement, Social Justice, and Media Literacy' <https://www.researchgate.net/publication/339692611_Civic_Engagement_Social_Justice_and_Media_Literacy> accessed 6 February 2021.
[63] 'Opinion | Social Justice, Austerity, and the Humanities Death Spiral' (*CHE*, 2 February 2021) <https://www.chronicle.com/article/social-justice-austerity-and-the-humanities-death-spiral> accessed 6 February 2021.
[64] Mutunga W, 'WILLY MUTUNGA - Memo to Upper Deck People: Fight for the 2010 Constitution or Perish | The Elephant' (5 February 2021) <https://www.theelephant.info/op-eds/2021/02/05/memo-to-upper-deck-people-support-the-constitution-or-perish/> accessed 6 February 2021; '7 African Musicians Whose Music Stands Up Against Injustice & Inequality' (*Global Citizen*) <https://www.globalcitizen.org/en/content/african-musicians-music-fight-inequality-injustice/> accessed 6 February 2021; Knight B, 'African Radicals Must Realise the Importance of Pan-Africanism' <https://www.aljazeera.com/opinions/2021/2/2/african-radicals-must-realise-the-importance-of-pan-africanism> accessed 6 February 2021.

citizen involvement in public affairs and the space they give for citizens to hold the government accountable.[65]

k) Supporting county governments through adequate budgetary allocation and timely release of funds to enable them discharge their mandate under the Constitution.[66]

There is a need for timely release of adequate funds to the concerned organs and departments in both the national and county governments' level in order to support the fulfilment of the state obligations towards realisation of socio-economic rights in the country.

In *John Kabui Mwai & 3 Others V Kenya National Examination Council & 2 Others [2011] eKLR*[67], a Three-Judge High Court Bench stated as follows:

> *In our view, the inclusion of economic, social and cultural rights in the Constitution is aimed at advancing the socio-economic needs of the people of Kenya, including those who are poor, in order to uplift their human dignity. The protection of these rights is an indication of the fact that the Constitution's transformative agenda looks beyond merely guaranteeing abstract equality. There is a commitment to transform Kenya from a society based on socio-economic deprivation to one based on equal and equitable distribution of resources. This is borne out by Articles 6(3) and 10 (2) (b).*
>
> *The realisation of socio-economic rights means the realization of the conditions of the poor and less advantaged and the beginning of a generation that is free from socio-economic need. One of the obstacles to the realisation of this objective, however, is limited*

[65] 'Kenya: Democracy and Political Participation' <https://www.opensocietyfoundations.org/publications/kenya-democracy-and-political-participation> accessed 6 February 2021.
[66] *County Assembly of Machakos v Governor, Machakos County & 4 others [2019] eKLR, Petition 17 of 2017*; Mohamed, Mohamed Musa. "Resource allocation: experiences and challenges in County Governments." PhD diss., Strathmore University, 2018.
[67] John Kabui Mwai & 3 Others v Kenya National Examination Council & 2 Others [2011] eKLR, Petition 15 of 2011.

> *financial resources on the part of the Government. The available resources are not adequate to facilitate the immediate provision of socio-economic goods and services to everyone on demand as individual rights. There has to be a holistic approach to providing socio-economic goods and services that focus beyond the individual.*
>
> *Socio-economic rights are by their very nature ideologically loaded. The realisation of these rights involves the making of ideological challenges which, among others, impact on the nature of the country's economic system.* ***This is because these rights engender positive obligations and have budgetary implications which require making political choices****. In our view, a public body should be given appropriate leeway in determining the best way of meeting its constitutional obligations (Emphasis added).*

Through these and many other measures, Kenya will fast -track the attainment of Sustainable Development Goals and achieve the ideal of a society that is just and founded on the principles of equality and fairness.

9. Conclusion

Some scholars have rightly pointed out that social justice in theory and practice is part of the general evolution of justice in human civilizations, which is a part of the ongoing struggles against the repression of any people and on behalf of the liberation of all people.[68]

It has been observed that the aspiration for social justice, through which every working man and woman can claim freely and on the basis of equality of opportunity their fair share of the wealth that they have helped to generate, has always been great.[69]

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[68] Barak G, 'Social Justice and Social Inequalities' in James D Wright (ed), *International Encyclopedia of the Social & Behavioral Sciences (Second Edition)* (Elsevier 2015) <https://www.sciencedirect.com/science/article/pii/B9780080970868450853> accessed 6 February 2021.

[69] 'The Need for Social Justice' <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/need-for-social-justice/lang--en/index.htm> accessed 6 February 2021.

Notably, while the term social justice has many uses and interpretations, but in its most basic and universal sense, social justice is a philosophical construct—in essence, a political theory or system of thought used to determine what mutual obligations flow between the individual and society.[70] While discussed in the context of sustainable development goals, the 2030 Agenda on Sustainable Development Goals spells out obligations for states but also requires the meaningful participation of citizens in meeting the goals thereof.[71] The concept of social justice requires that the citizens should not only be treated equally and equitably in access and use of resources but also getting affair opportunity to play their part in development agenda.

The stakeholders in Kenya should ensure that even as they strive towards realisation of the SDGs, social justice as envisaged in the Constitution of Kenya should actively be pursued as a means towards an end-achieving sustainable development goals.

[70] Almgren G, 'A Primer on Theories of Social Justice and Defining the Problem of Health Care', *Health Care Politics, Policy, and Services* (Springer Publishing Company 2017) <https://connect.springerpub.com/content/book/978-0-8261-6898-6/chapter/ch01>

[71] See SDG Goal which seeks to Promote Peaceful and Inclusive Societies for Sustainable Development, Provide Access to Justice for All and Build Effective, Accountable and Inclusive Institutions At All Levels.

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The Protection of the Environment during Armed Conflict

*By: **Kenneth Wyne Mutuma*** [*]

Introduction

War has effects. The effects of warfare today go beyond the suffering of humans, their displacement or the destruction of infrastructure. The far-reaching effects of warfare get to the environment either directly or indirectly. The environment is gradually being realized as a victim in situations of armed conflicts. A look into the conflict affected areas tells the narrative of water resources contamination, air pollution, deforestation, oil pollution and soil poisoning as part of the effects that armed conflict has on the environment. Environmental damage because of conflicts can either occur directly where the military actions such as use of high explosive munitions or dangerous chemical substances that impact negatively on the environment. Indirectly, military actions and their expenditure can happen at the expense of environmental and natural resource management. Further, the instability because of conflicts means disregard for the policies and institutions put in place at the domestic levels to protect the environment.

This article aims to examine the status of the existing laws that seek to protect the environment during armed conflict with a special focus on Africa. Generally, the environment has been afforded some protection at the international level with international humanitarian law (IHL) treaties providing for the protection of the environment during armed conflict. Similarly international environmental law (IEL) which is a body of international law that specifically caters for issues of the environment contains provisions that apply during situations of armed conflict. Africa, being a region that is richly endowed with natural resources has equally put in place measures that are particular to Africa in terms of protecting the environment during armed conflicts. The article will therefore first discuss the impact that war has had on the environment over the years by looking at the various periods of war and the effects they have left on the environment. It will then consider the response that the law has had on issues of environmental destructions during situations of armed conflicts, looking at both IHL and IEL. Lastly, the article will endeavor to elaborate the situation

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in Africa and look at the measures that are specific to the African situation and the framework laid out to ensure environmental protection during times of armed conflict in Africa.

The Impact of War on the Environment

Environmental destruction during the periods of war has been evident since time immemorial. More particularly, the effects that warfare has on the environment have persisted for many years even after the end of the conflict when order and peace has been restored in the once conflicted areas. History shows that wars have been eminent over the years given the nature of man and examples of wars such as the Seven Year War in the 18th Century have left the environment damaged*. The First World War which is considered the greatest war ever witnessed not only affected the people but the environment was similarly damaged*. With the advent of new technologies, the First World War utilized weapons such as the machine guns, chemical weapons and artillery shells that had adverse effects on the environment.[1] For instance, the battlefield used for the Battle of Verdun in France during World War I was and is still rendered inhabitable up to date, this being more than a century later. This is because of the use of artillery shells which contained poisonous gases that left the area contaminated, together with the unexploded ordinances that still litter the area. Such is an indication of how far warfare can affect the environment.

The Second World War also saw environmental damage starting from the pollution witnessed during the Pearl Harbor incident that left the environment heavily damaged*. The oil leakage from the ships that destroyed the aquatic habitats and the toxins released to the environment as a result of the ashes from the battles was an indication of just how much warfare could negatively impact on the environment*. Notably also is the atomic bombing of Hiroshima and Nagasaki which happened in 1945 towards the end of World War II*. As much as it is argued that the only way to get Japan to surrender was through the demonstration of total destruction, the effects it had on the environment were devastating and life changing. Everything was decimated on the areas where the bombs were dropped and

[1]P. Souvent, and S. Pirc, "Pollution caused by metallic fragments introduced into soils because of World War I
Activities," Environmental Geology 40, no. 3 (January 2001): 317.

this had the potential of rendering the whole place as a waste field that could be considered inhabitable.[2] It has taken years to rebuild the two cities to the point that they could regarded as safe. Even after the end of the Second World War, there have been wars that have greatly destroyed the environment. The Vietnam War for instance was a long and divisive conflict that had one of the most shocking effects on the environment because of the military choices made by the parties in the conflict*. The use of Agent Orange, which is a toxic herbicide, by the USA Army on the Vietnamese forest led to its total destruction, massive soil erosion and further annihilation of animal habitats*. The Vietnam War therefore presented a unique situation where the public became aware of just how much military actions could impact on the environment. This was particularly a lively discussion as it occurred during a period where there was a key rise in environmental awareness.

At the end of the 20th Century, the Persian Gulf War also saw the massive destruction of over 600 oil wells by the Iraqi army led to extensive pollution, resulting to what is considered the largest oil spill in history. [3] The devastating effects of the oil spill are considered to be the largest act of ecological terrorism because of the harmful pollutants it left in the water, land and air.[4] During this period, Africa also saw significant damage to the environment because of wars especially it being a period of liberation for many countries after years of colonization. Particularly, the Rwandan genocide that happened in 1994 had adverse effects on the environment. Rwanda which is a biological hotspot endowed with great and diverse biodiversity had environmental damage both during and after the genocide. The complexities of the genocide saw deforestation of the forest covers, soil erosion and even wetlands destroyed because of misuse.

[2] Masao Tomonaga, 'The Atomic Bombing of Hiroshima and Nagasaki: A Summary of the Human Consequences, 1945-2018, and Lessons for Homo sapiens to End the Nuclear Weapon Age', 2019. Available at: https://doi.org/10.1080/25751654.2019.1681226

[3] T. M. Hawley, Against The Fires of Hell: The Environmental Disaster of the Gulf War (Harcourt Brace Jovanovich, 1992)

[4] J. Michel, Gulf War Oil Spill' in Oil Spill Science and Technology, Gulf Professional Publishing, 2010, p.1127.

In the past decades, Africa has witnessed many conflicts, some stretching over a long periods of time such as the civil war in the DRC, South Sudan and Somalia*. The environmental impacts of the war coupled up with climate change variability in the areas have caused long term damage to the environment. Deforestation, loss of wildlife and biodiversity are just some of the impacts of the conflicts in these areas*. This may be an indication that there is still a long way to go before the actualization of the protection of the environment during armed conflicts. Africa's situation when it comes to environmental damage because of armed conflict is therefore similar to what has been experienced in other parts of the world. However what makes the situation in Africa different is the shape of war in Africa. Most wars in Africa take the form of non-international armed conflict with effects that are more localized*. For instance, The Democratic Republic of Congo has been hit with great waves of violence and rebellions for many years that have been triggered by the available natural resources. DRC is arguably amongst the richest countries on earth in terms of the natural resources found within its territory, but this has also proved to be a curse because of the political instability it has caused in the country.[5] Nigeria similarly has experienced situations of armed conflicts because of the negative effects of oil extraction and this has seen violent clashes between ethnic groups in the region and the Federal Government together with other multinational oil corporations.[6] The effects from the armed conflicts have not only affected the people from the areas but also the environment.

The funding of the wars, either by the armed groups or the state has also often relied on the over-exploitation or misusing of the available natural resources.[7] Evidence from the conflict in Sudan indicates that the environment was negatively affected by the scorched earth strategies that were employed as the methods of warfare. The Darfur conflict left many areas in Sudan affected by the landmines and further unexploded ordnances

[5] UNEP, 'The Democratic Republic of the Congo Post-Conflict Environmental Assessment: Synthesis for Policy Makers' (2011).
[6] Kenneth Omeje, 'Oil Conflict and Accumulation Politics in Nigeria' ECSP Report from Africa Population, Health, Environment, and Conflict Issue 12, (2008)
[7]Berman N., Couttenier M., and Thoenig M., 'This Mine is Mine! How Minerals fuel Conflicts in Africa' (2017) 107 American Economic Review 1564, 1610.

were left abandoned in such areas.[8] In the same way, countries such as Angola because of the use of landmines have been left with cases of deforestation and massive loss of wildlife.[9] Therefore, the environment in many situations of armed conflict is left as the unintended victim. This has therefore been the reality of warfare for a very long time. When war comes to an end, the casualties have always been counted in terms of those who are dead, the wounded civilians or the wounded soldiers, destroyed infrastructure, lost livelihoods and the wrecked cities.[10] The environment in most times is then left as the unpublicized victim of war given the anthropocentric view adopted in war when it comes to the environment*. In most times it is the people's safety and security that always came to the front in times of armed conflicts and even after the conflict is all over. Therefore as long as the destruction of the environment bears no effect on the population, it could be considered negligible and scant attention will be given to it.[11] This is compounded by the fact that most environmental damage caused by human activities can be hard to decipher because of the infinite nature of the environment and how it responds to certain actions. Determining the extent of the impacts of warfare on the environment and further the period in which these effects will last is similarly hard to determine. However, in recent times the importance of the environment and the key role it plays in human survival is being realized and with it, more attention is moving towards environmental damage caused by warfare. With this attention, the law continues to evolve to actually cater for the environment and ensure that damaged caused on the environment is limited. It is therefore important to examine how IHL, the *lex specialis* in armed conflicts has developed over the years to ensure protection of the environment.

[8] UNEP, 'Conflict and the Environment: Sudan Post-Conflict Environmental Assessment' (2007). https://postconflict.unep.ch/publications/UNEP_Sudan.pdf.
[9]UNEP, 'Africa Environmental Outlook 2: Our Environment, Our Wealth' (2006) 395
https://www.unep.org/dewa/Africa/publications/AEO-2/content/203.htm.
[10]Jahidul Islam, The Protection of Environment during Armed Conflict: A Review of International Humanitarian Law (IHL), 2019.
[11] Michael N. Schmitt, 'Green war: an assessment of the environmental law of international armed conflict', in Yale Journal of International Law, Vol. 22, No. 1, 1997.

IHL and the Protection of the Environment

IHL seeks to limit the effects of war on civilians, and by extension the effects that are felt by civilians due to the ravages of war on the environment*. Over the years there have been campaigns to raise awareness on the protection of the environment amidst the pressing issues of climate change. This has cast a light especially on protection of the environment during times of armed conflict and why it is vital. For various humanitarian reasons, it is important that we realize how and where armed conflict is impacting the environment. The environment arguably plays a significant role in the attainment of various humanitarian efforts so much so that its protection is to be considered at all times. Central to it all is that environment gives life, and because humanitarian aim is to ensure the survival of the people both during and after the conflict, the environment also needs to be afforded similar protection. Also the protection of the special groups during war such as the wounded is dependent on the environment. Activities of relocating and setting up these people require that the environment is safe and habitable and thus it is pertinent that the environment is protected. Similarly, the environment and natural resources plays a key role in the post-conflict peace building as it gives the people a chance at rebuilding their lives. If the environment and the natural resources are destroyed during armed conflicts, the peace building process becomes almost impossible. This is because people are put back into conflicts for the reason of the competition over the scarcely available resources. This is particularly true for a country such as the Democratic Republic of Congo where the area is still faced with conflicts because of the competition for control over the natural resources in such a mineral-rich country.

IHL has had treaty provisions together with customary international humanitarian law that provide for the protection of the environment during situations of armed conflicts. However, for many years protection that was afforded to the environment by IHL was greatly coincidental and indirect*. This protection was mainly through provisions that regulate the means and methods of warfare and similarly those that have aimed to limit the impacts of warfare on civilian objects and their properties.[12] The 1907 Hague Convention makes a provision under its Article 22 that the employment of

[12]Dinstein, Y. The Conduct of Hostilities under the Law of International Armed Conflict (3rd edn, Cambridge University Press, 2016).

means and methods of warfare is in fact not unlimited. This Article is read with the Martens Clause which is provided for in its preamble, and as such, the two provisions have been interpreted to afford the environment some protection during armed conflicts*. There were also early treaties such as Treaty of Versailles of 1919 and the Geneva Protocol of 1925 that dealt with poisonous gases*. This was at a particular time where new technologies introduced the use of chemical and biological weapons that were used in the World War. Inferably, by these treaties prohibiting the use of such weapons that had the potential to harm the people, the environment was also protected from harm that could be caused by such weapons. Thereafter, the Geneva Convention IV of 1949 which specifically caters to the protection of civilians and property during armed conflict and occupation dictates that it will constitute a grave breach of international humanitarian law when there is excessive destruction and appropriation of property which is not justified by military necessity.[13]Further the Convention provides that "any destruction by the Occupying Power of real or personal property belonging individually or collectively to individuals, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations." [14] These two provisions therefore mean that any destruction of civilian properties, which includes the environment, will be deemed unlawful unless justified by military necessity.

The environment was however given special attention in the 1970s with the adoption of two international instruments that for the first time *explicitly* made mention of the environment; The ENMOD Convention and Additional Protocol I*. After the international outcry because of the Vietnam War, the adoption of these instruments proved to be a directional development in the Law of Wars finally incorporating the environment. [15] The Additional Protocol I under Article 35(3) contains a prohibition of the employment of means and methods of warfare that are expected to cause 'widespread, long-term and severe' damage to the environment.[16] This means that as much as

[13]Geneva Convention IV, Article 147.
[14] Ibid, Article 53.
[15] Walter Sharp, 'The Effective Deterrence of Environmental Damage during Armed Conflict: A Case Analysis of the Persian Gulf War', 37 Mil. L. Rev. 1 (1992).
[16] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of

the parties' right to choose the means and methods of warfare is unlimited, they should ensure that the means and methods they employ do not cause damage to the environment. Similarly, a reading of Article 55 of the Protocol affords the environment the same protection that is given to civilian properties. It prohibits environmental damage to the extent that it is prejudicial to human health and survival of the population and dictates that the environment should not be attacked as a way of reprisal. The inclusion of the specific provisions that protect the environment in the Protocol was at a time when the effects military operations on the environment had drawn attention and there was a rise in environmental awareness after the witnessing of the effects of Vietnam War. It was therefore important that there was an inclusion of environmental debates in the discussions that led to the Protocol. This was the first time in very many years that the environment had particular provisions that explicitly mentioned its protection.[17] However, there have been many contentions that surround the application of the two provisions. They both provide that the damage to the environment has to be 'widespread, long-term and severe' for the act to amount to a violation under IHL. The use of the conjunctive 'and' implies that all the three requirements have to be fulfilled. This has been argued to have created a very high threshold as to what acts will amount to a violation of IHL. The final report by The Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia stated that this threshold was so high that it was indeed difficult to find a violation of environmental damage.[18] Similarly, the threshold led to serious debates of whether the environmental damage caused during the Gulf War indeed crossed the threshold and warranted accountability of the Iraqi army.

It therefore seems very impossible that conventional warfare will ever reach the threshold set by the three conditions.[19] Further, uncertainty surround the application of the provisions as the Protocol does not define the terms

Victims of International Armed Conflicts (Protocol I) of 8 June 1977.

[17] Anthony A., Handbook of International Law. Cambridge University Press, Cambridge, 2005.

[18] ICJ Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Rep of Yugoslavia (13 June 2000).

[19] Schmitt M. N., 'War and the Environment: Fault Lines in the Perspective Landscape', AVR 37 (1999). Pg. 44

widespread, long-term or severe.[20] The ambiguity caused coupled up with the set out threshold only serves to limit the effectiveness of the two Articles in protecting the environment.[21]

The ENMOD Convention on the other hand prohibits the modification of the environment in ways that can cause 'widespread, long-term or severe damage' to the environment.[22] This convention came to be after the backdrop of the Vietnam War where the USA army had employed the use of Agent Orange to eliminate the forest cover used by the Vietnamese. Therefore such modification of the environment that translated to extensive damage on the environment and health hazards on the people had to be prohibited. Article 3 of ENMOD Convention however reads that not all forms of environmental modification techniques are forbidden. It is only military and hostile use of the environment that is forbidden.[23] If the use of such modification is peaceful then it would not warrant the application of the ENMOD Convention. The Convention focuses on using the environment as a weapon that results into great destruction.[24] This should be a deliberate act by the military officers to indeed cause the havoc because mere collateral is not included. The application of the ENMOD Convention has therefore been seen to condone manipulation of the environment that is only low-level. This is because, given that the act has to result in a widespread, long-term or severe damage, if doesn't not result into such, they it would not fall under the ambits of the Convention.[25]

Unlike the Additional Protocol I, ENMOD has attempted to define the meaning of 'widespread, long-term and severe'. The term widespread refers

[20] Lijnzaad, L. and Tanja, G. (1993). "Protection of the environment in times of armed conflict: The Iraq-Kuwait War." Netherlands International Law Review, Vol. 40, p. 180.
[21] Phoebe Okowa, 'Natural Resources in Situation of Armed Conflict: Is There a Coherent Framework for Protection?' (2007) 9 International Community Law Review 250.
[22] Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD), 10 December 1976, 1108 UNTS 151, Art. 1.
[23] Ibid, Article 3, Para 1.
[24] Ibid, Article 2
[25] Westing A.H., ''Environmental Warfare: A Technical, Legal and Policy Appraisal.'' Environmental Law 15, 1984. Pg. 663

to an area on the scale of several hundred square kilometers; while long lasting is a period or months leading up to seasons.[26] Severe has been taken to mean causing significant harm to human life or natural and economic resources.[27] The Protocol has given no definition of the terms and for a long time the interpretation has been in regards to limiting only the unconventional warfare. As much as it is argued that the definitions of the ENMOD Convention can be used to give meaning to the Protocol, the ENMOD Convention provides that its provisions will not be prejudicial to the interpretation of other agreements. Over the years, after its adoption, there has not been any occurrence of environmental modification technique that calls for the application of the ENMOD Convention. This can be taken to be a success of the Convention in prohibiting such acts.

The 1998 Rome Statute of the International Criminal Court also provides under its Article 8 that "intentionally launching an attack in the knowledge that such an attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be excessive in relation to concrete and direct overall military advantage anticipated." [28] The provision is quite similar to what is provided by The Additional Protocol I, other than requiring that for the act to amount to a war crime, there must be intent and knowledge. The knowledge and intent will form part of the mens rea required to find an individual responsible for the action.[29] Further, the Rome Statute provides that as much as the act can lead to widespread, long-term and severe damage, the damage is added as an element to the proportionality equation.

Customary International Humanitarian Law and Soft Law

Customary international humanitarian law importantly fills the gaps left by treaty laws*. CIHL constitutes principles of international humanitarian law

[26] Understanding annexed to the text of ENMOD, contained in the report of the UN Committee of the
Conference on Disarmament to the General Assembly, Official Records of the General Assembly, 31st
Session, Supplement No. 27 (A/31/27).
[27] Ibid.
[28] Rome Statute of the International Criminal Court (ICC) of 17 July 1998, A/CONF.138/9, Article 8 Para 2.
[29] Bassouni, M.C., "International crimes: Jus cogens and obligatio erga omnes." Law and Contemporary Problems, Vol. 59, 1996.

which include the principle of distinction, military necessity, proportionality and humanity*. These principles guide on what is considered lawful and what is unlawful during times of armed conflict and apply to every state. Therefore, environmental destruction that results from the non-application of these principles is regarded to be a violation under international humanitarian law. In regards to the environment, the Martens Clause has also played an important role in its application because for a long time IHL had no provision on the environment.[30] The ICJ has found that the applicability of the Martens Clause is of a customary nature and thus forms part of customary international humanitarian law.[31] Further, the Martens Clause has importantly been included as Rule 16 under the 1994 Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict. Apart from the principles of IHL, grave breaches have also been identified to form an integral part of customary IHL. Certain provisions from the Geneva Conventions together with the Additional Protocols have been accepted to form part of customary IHL because of the general state practice witnessed and their inclusion in national legislations and the military manuals of many states. The acts of "extensive destruction of property, not justified by military necessity and carried out unlawfully and wantonly," and the "launching of an indiscriminate attack affecting civilian objects in the knowledge that such attack will cause excessive damage to civilian objects," form part of the core customary IHL.[32]

In 1994 the ICRC came up with the Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict following the resolution of the UN General Assembly in 1992 and an International Conference on the Protection of War Victims in 1993*. The Guidelines provided a summary of the existing international rules that protected the environment which were to be respected and applied by all members of the armed forces. Importantly, it reiterated the provisions of the Additional Protocol I that prohibits attacks that lead to widespread, long-

[30] Rupert T., "The Martens Clause and the laws of armed conflict." International Review of the Red Cross, Vol. 317, 1997.p. 125.
[31] ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996, Para 84.
[32] Jean-Marie Henckaerts and Louise Doswald-Beck, 'Customary International Humanitarian Law', International Committee of the Red Cross and Cambridge University Press, Cambridge, 2005.

term and sever damage of the environment making such provisions customary in nature. More recently, in 2020, the ICRC updated the 1994 guidelines on environmental protection to come up with 32 rules and recommendations that evidently reflect the development that has been witnessed in international law ever since 1994.[33] The update was necessitated by the ICRC need to contribute in a practical way to the promotion of respect for environmental protection during armed conflicts. The rules and recommendations guide on the means and methods of warfare and the conduct of hostilities with regard to the environment and include concise commentaries.

The updated guidelines seek to bind all parties who take part in armed conflicts as well as those in a position to influence the course of the armed conflict. Significantly, the updated guidelines have shed light on the uncertainties that surround the application of Article 35(3) and 55 of the Additional Protocol I. The Commentary under paragraph 47 establishes that the rule prohibiting the means and methods of warfare that are intended to cause widespread, long-term and severe damage to the environment is customary in nature. Additionally, the confusion that surrounds definition of the terms widespread, long term and severe has also been addressed. The guidelines under paragraph 60 gives that since the only definition of the term widespread is provided under the ENMOD Convention, to mean a scale of several hundred square kilometers, then this should be the minimum basis that guides the definition of the term in determining the damage. Further paragraph 66 gives a very clear understanding to what is meant by long-term. The commentary provides that when assessing the issues of long-term, consideration should be given to not only the direct effects but also the reverberating effects. The recommendation is that the understanding of the term should be informed by touchstones such as how far the damage costs can persist and not just the thirty years mark. In regards to the term Severe, paragraph 72 provides that it is a recommendation that since ENMOD Convention gives a comprehensive definition of the term; this should serve

[33] ICRC Updated Guidelines on the Protection of the Natural Environment in Armed Conflict: Rules and Recommendations Relating to the Protection of the Natural Environment under International Humanitarian Law, with Commentary, 2020.

as the minimum basis for the development of a clear definition at the moment.

The guideline has also significantly provided a clear understanding of the application of the principles of IHL.[34] With no definition of important terms such as what is meant by 'excessive' or 'military advantage', an edge has been given to military commanders to apply what they think is correct over the years. For instance the application of the principle of proportionality has come under so much debate because of the imprecise methods of its application.[35] The updated guidelines therefore attempt to at least offer some clarity on what should guide the actors in armed conflict in the application of the principles in order to ensure the protection of the environment. The guidelines also give some key recommendations, which if adopted by states can guarantee the protection of the environment.[36] They call on to states to disseminate the rules of IHL by including the rules provided in the guidelines in their national legislations, military manuals and in military education and training of the military officers. States are also challenged to adopt and implement measures that increase their understanding of the effects of armed conflict on the environment. They are also called on to identify and designate areas of environmental significance as demilitarized zones. This is a particularly important provision and is also included in the draft guidelines of the ILC under paragraph 4 because it serves to ensure that such demilitarized areas can never be subject to military attacks.[37] If taken up by states, then protection of such parts of the environment can be guaranteed.

Lastly it is ICRC's recommendation that states should actively exchange examples and good practices of measures that can be taken to comply with the rules of IHL on protecting the environment.

[34] Ibid, Rule 5-8
[35] Ibid, Paragraph 117 and 122.
[36] Ibid, Paragraph 14.
[37] International Law Commission, Draft Principles on the Protection of the Environment in Relation to Armed Conflict (2019), reproduced in UN General Assembly, Report of the International Law Commission: Seventy-first session (29 April–7 June and 8 July–9 August 2019), UN Doc. A/74/10, UN, New York, 2019, Chap. VI. Protection of the environment in relation to armed conflicts, pp. 209–296.

The ILC has prepared draft guidelines at the same time as the ICRC updated guidelines, which in certain instances offer a broader scope when it comes to environmental protection during armed conflict situations.[38] For example, they include how other bodies of law actually complement IHL in the protection of the environment. Importantly, the draft principles have measures that can be taken before during and after the armed conflict in order to safeguard the environment. All in all, a combined reading of the updated guidelines by ICRC and the draft guidelines by the ILC enhance environmental protection during war and provide a framework that ensures protection in this regard. As a supplement to the treaties and CIHL, such soft law remains useful in informing and elaborating on the ever changing situations of armed conflicts. They also create an avenue that allows for the better implementation and enforcement of the existing laws.[39] This is clear when one looks at the role that UNGA and UNSC resolutions have played in the context of many of the changing circumstances of armed conflict.

International Environmental Law and Armed Conflict

Under international environmental law, there is no specific instrument that provides for the protection of the environment during armed conflict, but relevant provisions that can apply to such situations are found scattered all across the existing international environmental law instruments. The International Environment Law framework comprises of multilateral environmental agreements (MEAs), the guiding principles of IEL and customary international environmental law and other soft laws that either afford direct or indirect protection during armed conflicts. Generally, the application of the MEAs is expected to continue during and after the armed conflict. The draft articles of the International Law Commission of 2008 make mention of the fact that the application of treaties doesn't necessarily come to a halt or is terminated during armed conflict.[40] It further provides that the application of the treaties during armed conflict will greatly rely on the nature of the particular case at hand, the specific provisions of the treaty and further, the nature of the conflict and the effect it has on the treaty application. This means that the application of the various MEAs will be

[38] Ibid.
[39] Kessing P. V., 'The Use of Soft Law in Regulating Armed Conflict; From Jus in Bello to 'Soft Law in Bello', Oxford University Press. Pg.129.
[40] International Law Commission, Effects of Armed Conflicts on Treaties, UN Doc. A/CN.4/L.727/Rev.1, 6 June 2008 Article 3.

considered on a case to case basis. The MEAs either have specific provisions that directly or indirectly allows for the application of the provisions to continue even during armed conflicts while some provide for their termination or suspension. Many of them do not mention anything about their application during armed conflict.

The World Heritage Convention for one takes notice under its preamble that cultural heritage and the natural heritage are increasingly threatened with destruction not only by decay but by other social conditions which does include armed conflicts.[41] Further, it acknowledges that armed conflict can be a threat to the cultural and natural heritage and therefore the Committee keeps a world heritage list for properties that are threatened by these serious of specific dangers.[42] The United Nations Convention on the Law of the Sea (UNCLOS) also protects the environment and indirectly allows for its application at all times including during armed conflicts. [43] Several provisions of UNCLOS are focused on the protection and prevention of the pollution of the marine environment and prohibit states from carrying out activities that have the potential of polluting the marine environment.[44] Further, the coastal states have the right to create laws and regulations against pollution of the seas and also enforcement rights against those who violate such laws. The applicability of the UNCLOS even during armed conflict has been subject to various debates but the argument for its application during armed conflict is inferred from Article 236 that requires vessels to always comply with the rules against marine pollution.[45] Another notable MEA would be the Ramsar Convention that deals with wetlands as a waterfowl habitat.[46] Article 2 of the Ramsar Convention allows states to enlist at least one of the wetlands found in its territory to a List of Wetlands of International Importance. Although the Convention is not explicit in mentioning armed conflicts, it can be inferred from it provision that gives

[41]World Heritage Convention, Preamble, Para 1 and 7
[42] Ibid, Article 11.
[43] United Nations Convention on the Law of the Sea (UNCLOS), 10 December 1982, 1833 UNTS 3.
[44] Ibid, Article 192, 194, 207, 208 and 212.
[45] Michael N. Schmitt, 'Green war: an assessment of the environmental law of international armed conflict', in Yale Journal of International Law, Vol. 22, No. 1, 1997, pp. 47–49.
[46] Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention) (1971).

right to the contracting states to take measures such as restricting boundaries of the listed wetlands in cases of national security.[47] Issues of national security have therefore been taken to even include situations of armed conflicts.

On the other hand there are MEAs that have provisions that directly relate to situations of armed conflict. For instance The Revised African Convention on the Conservation of Nature and Natural Resources of 2003, which is a significant instrument for the protection of the environment and natural resources in Africa specifically, includes a provision that is on protection of the environment during military and hostile activities.[48] Similarly, the Sao Remo Manual that relates to armed conflict at sea, prohibits damage caused to the environment unless justified by military necessity and not carried out in a wantonly manner.[49] There then exists a lot of MEAs that are silent on their application during armed conflict. Examples include the Convention on Biological Diversity (1992), the UN Convention to Combat Desertification (1994), Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (1973); and the Convention on the Conservation of Migratory Species of Wild Animals (1979)*. The lack of mention of their application during times of armed conflicts only gives a rise to imprecisions on how parties to an armed conflict proceed especially in regards to the sites that are protected under the various MEAs.

Customary International Environmental Law

One of the most established customary IEL is the prohibition against trans-boundary pollution which is guided by the general principle of 'sic utere tuo ut alienum non laedus' that obligates states not to make use of property in ways that would injure the property of others. The Principles of IEL such as the precautionary principle, polluter pays principle, prevention principle and the principle of good neighborliness and cooperation, just to name a few of the relevant principles. However the status of these principles as customary has been subject to various debates and since the area of IEL is fairly new

[47] Ibid, Article 4
[48] Revised African Convention on the Conservation of Nature and Natural Resources. (Adopted 11 July 2003, entered into force 23 July 2016) 7782 AU Treaties 0029, Article XV.
[49] San Remo Manual on International Law Applicable to Armed Conflict at Sea, Article 34.

and greatly dynamic, this has not been settled. Several instruments under IEL therefore contain these principles whose application can serve to protect the environment even during armed conflict.

The Stockholm Declaration for instance has two important principles that can serve to apply during armed conflict.[50] Principle 21 obligates states to ensure that their exploitation and use of the environment in their jurisdiction does not affect and cause damage to the environment of other states outside its jurisdiction. Further principle 26 can be taken to directly refer to armed conflicts as it relates to the use of nuclear weapons and bans the use of such weapons as they are highly likely to affect man and his environment. Similarly, the World Charter for Nature, although not binding is an international instrument that articulates principles that apply under IEL.[51] Principle 5 which is contained in the World Charter for Nature recognizes that nature should be secured from degradation caused by warfare or other hostile activities. This is for reasons that the survival of human being is greatly dependent on the environment and thus every state is called to respect the principles of the Charter. Principle 20 specifically provides that military activities that are damaging to the environment should be avoided.

The Rio Declaration, although not a binding instrument, also provides for environmental principles that relate to situations of armed conflict.[52] Its Principle 23 provides that the environment and natural resources of people under oppression, domination and occupation shall be protected. Further, Principle 24 acknowledges that warfare is inherently destructive and obligates states to respect and adhere to international laws that protect the environment during armed conflict. The non-binding nature of these principles means that there are doubts in their application even when they have great potential in the protection of the environment. Therefore, International Environmental Law as a corpus of international law offers some great potential to the protection of the environment during armed

[50] Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration),
16 June 1972, UN Doc. A/CONF.48/14/Rev. 1 (1973).
[51] UN General Assembly resolution 37/7, 28 October 1982, World Charter for Nature, UN Doc. A/RES/37/7.
[52] Rio Declaration on Environment and Development, 13 June 1992, UN Doc. A/CONF.151/26, Vol. I.

conflict. Where the international humanitarian law framework law has left a gap, IEL, though limited, has some provisions that continue to protect the environment in times of warfare. However the question of when and how the provisions of IEL continue to apply during armed conflict is an issue that is still unclear and this requires some special consideration to be taken. The practicality and introduction of IEL to situations of armed conflict is greatly attainable and would offer better protection to the environment than leaving it all to the application of the Laws of Wars to protect the environment.

Looking to the Regional Framework

Regional laws in Africa that apply to situations of armed conflict have proven useful in filling the gaps left by both international humanitarian law and international environment law in respect to Africa. They specifically provide a stronger and more direct protection especially in regards to the environment. The existing regional laws recognize the nature of armed conflicts in Africa and aim to ensure that the provisions in their application can suit the circumstances. The Revised African Convention on the Conservation of Nature and Natural Resources is a particularly important instrument when it comes to the protection of the environment during and even after armed conflict in Africa. Furthermore, regional economic blocs in Africa have also attempted to have provisions that similarly protect the environment.

The effects of armed conflicts particularly to the environment and natural resources have been acknowledged in several African instruments. The Constitutive Act of the African Union which is a declaration of African leaders to uphold and promote unity and cooperation among the people of Africa recognizes in its preamble the effects that conflict can have on the socio-economic development of African states.[53] Similarly, the Action Plan for the Environment Initiative of NEPAD takes into consideration the long term approach towards environmental stability and recognizes that armed conflict in Africa poses a serious challenge in the protection of the environment and natural resources.[54] They indicate that there has been a

[53] Organization of the African Union, Constitutive Act of the African Union, 1 July 2000. Para 8

[54] NEPAD 'Action Plan of the Environment Initiative' (2003) Para 133. http://www.africa-platform.org/sites/default/files/resources/9._vincent_oparah_nepad.pdf.

significant realization on the importance on the environment and the requirement to provide for its protection.

The Revised African Convention on the Conservation of Nature and Natural Resources is therefore the comprehensive treaty that offers prospects of environmental protection and provides particular protection before, during and even after the armed conflict*. This convention was originally adopted in the year 1968 by the OAU and came into force in 1969*. It was the first multilateral instrument in Africa that specifically catered for the regulation and protection of the environment. Its adoption was highly necessitated by the need of African states to govern themselves and more so in regards to their natural resources after the colonial period. As the Convention allowed for the revision of the convention in part or in whole through requests by the states[55], the OAU in 1999 called for its revision considering the development witnessed in environmental protection. A revised convention was therefore adopted during a heads of states summit in Mozambique, in July 2003 after through revision by experts.

The 2003 revised AU Convention therefore aims to ensure a comprehensive environmental regime that governs the conservation of the natural resources in Africa.[56] Its preamble recognizes that Africa is richly endowed with natural resources and that its conservation is a common concern for all mankind and that the conservation of the African environment is the primary concern of all Africans.[57] This provision in the preamble therefore guides the interpretation of the other provisions of the Convention. It is quite similar to the provisions of other international environment instruments that acknowledge the protection of the environment is an issue that concerns all humankind. As much as the Convention is in light of environmental protection generally, it makes a special mention of environmental protection in times of warfare. Article 15 relates to protection afforded to the environment during military and hostile activities. It reads that:[58]

[55] Article 24
[56] Revised African Convention on the Conservation of Nature and Natural Resources.(adopted 11 July 2003, entered into force 23 July 2016) 7782 AU Treaties 0029.
[57] Ibid, paragraph 1 and 4.
[58] Ibid, Article 15.

> *(1)Parties shall (a) take every practical measure, during periods of armed conflict, to protect the environment against harm; (b) refrain from employing or threatening to employ methods or means of combat which are intended or may be expected to cause widespread, long-term, or severe harm to the environment and to ensure that such means and methods of warfare are not developed, produced, tested or transferred; (c) refrain from using the destruction or modification of the environment as a means of combat reprisal; (d) undertake to restore and rehabilitate areas damaged in the course of armed conflicts.*
> *(2)The Parties shall cooperate to establish and further develop and implement rules and measures to protect the environment during armed conflicts.*

This is a significant provision for the direct protection it affords the environment in situations of armed conflict and the acknowledgement of the intrinsic value of the environment. It utilizes similar words as those of the Additional Protocol I and the ENMOD Convention such as widespread, long-term and even severe. Similar to Article 55 of the Additional Protocol I, the provision also requires every signing state to take 'every practical measure' to safe guard the environment. It however does not give explanation to the care that is to be given to the environment by the states. Importantly, Article 15 does not distinguish between international armed conflict and non-international armed conflict and thus its application is taken to apply to any situation of armed conflict. This is vital because, as discussed the shape of armed conflicts in Africa is non-international in nature and in most times the environment lacks adequate protection from the international instruments unless such rules are of a customary nature. The convention therefore fills the gap left by the International laws in respect to non-international armed conflict which has always been difficult to regulate.

Noteworthy, a reading of Article 15 also indicates that it gives a lower threshold in regards to the environmental damage as compared to the Additional Protocol I. it makes use of the disjunctive 'or' to mean that only one of the three conditions of either widespread, long-term or severe needs to be fulfilled before the military act is found to be in violation of the rules set out. The need for the fulfillment of just one of the three condition afford

better protection to the environment because then it applies to the environmental damages in Africa that are substantially significant but do not fulfill the requirements of Additional Protocol I. This becomes necessary because the destruction of the environment in Africa is always localized and as much as it greatly affects the population in such areas, it hardly gains international attention. The Convention further makes a special provision that has not been included in many other instruments before in regards to environmental protection. It requires that parties should undertake to restore and rehabilitate the areas that have been affected through the armed conflict. The responsibility imposed even after the armed conflict gives a higher standard of protection to the environment. States are therefore required to address the environmental damage caused by their actions during armed conflicts and this serves as a preemptive factor. The provision acts to guide military officers from making the environment a military objective and also serves as an enforcement mechanism because of the obligation they would have in restoring the environment to its previous safe state.[59]

The Contacting states have also been called on to establish national mechanisms to ensure the implementation of the provisions that seek to protect the environment, especially during armed conflict. This is critical in the dissemination of such rules to the national level to aid in direct protection of the environment. It is recognition that most of those African countries that have and are still experiencing armed conflicts lack a regulation framework that protects the environment and thus it is essential that they take up this obligation to include such rules in their domestic laws. Further Article 39 of the revised AU Convention provides that state parties are not allowed to make any reservation to the provisions of the Convention. It becomes an important provision that makes sure the parties to the Convention are aware that in signing and ratifying the Convention, the bind themselves to protection of the environment even in situations of armed conflict.

The Convention therefore bears a great potential in ensuring environmental protection and especially during armed conflict if it is implemented correctly. However it still lacks an institutional mechanism in place that can effectively monitor its implementation and the enforcement of the

[59] Humle Karen, 'Taking Care to Protect the Environment against Damage: A Meaningless Obligation?' (2010) 92 International Review of the Red Cross.

provisions. The Secretariat is the provided institution[60] but the status of its establishment is still not clear. The Chairperson of the African Union then undertakes the Secretariat's role on an interim basis until the Secretariat comes into place. It is vital that there exist a functional institutional mechanism if the implementation of the provisions of the Convention is to be achieved.

The Maputo Protocol also caters to environmental protection during armed conflict.[61] It's Article 28D gives an explanation of war crimes to include, "including attacks that are launched with knowledge that it will cause 'widespread, long-term and severe damage to the natural environment …".

It gives a similar provision as that contained in the Additional Protocol I and from that it follows that the shortcomings of the Protocol are also associated with the Maputo Protocol when it comes to environmental protection during armed conflict. The high threshold set out means that most armed conflicts that happen in Africa can hardly fall under the ambits of the Maputo Protocol. Also, its applicability to only situations of international armed conflicts makes it less effective in the application in most African Scenarios where many of the conflicts are internal in nature. However the Maputo Protocol has also provided a definition of what is meant by illicit exploitation if natural resources that apply to situations of peace and even during armed conflicts. This definition serves to clearly illustrate the violation that would amount to a crime.[62] In the prosecution of environmental crimes, the Maputo Protocol specifically provides for the criminal liability of individuals and further the liability of corporates.[63] The corporate responsibility recognizes that during armed conflicts, there are many contributors to the warfare and it is critical that everyone who takes part is bound by the rules set out. Furthermore, the Maputo Protocol provides for the fining and forfeiture in cases of liability with the aim of deterring such violations.[64] The challenge that then remains before the actualization of the provisions of the Maputo Protocol is that it is not yet in force. The required number of states that have

[60]The Revised African Convention, Article XXVII.
[61] Protocol on the Statute of the African Court of Justice and Human Rights (adopted 1 July 2008) 36396 AU Treaties 0035 (Malabo Protocol).
[62] Ibid, Article 28L.
[63] Ibid, Article 46C.
[64] Ibid, Article 43A, 46J.

signed has not yet been achieved, without any ratification yet. Though limited, the Protocol has potential to protect the environment during armed conflict in Africa when it comes into force.

Sub-Regional Instruments

The regional economic blocs have also attempted to come up with regulations that guide environmental protection during armed conflicts. For instance, ECOWAS which is a West African regional bloc has the Protocol on Conflict Prevention, Management and Peacekeeping. This Protocol even though limited in the protection of the environment, it still provides for the duty to rehabilitate the damaged environment.[65] The Southern African Development Community (SADC) Security or Protocol on Politics, Defense and Security Cooperation is also an instrument that can be invoked by the Southern Africa bloc during armed conflict to protect the environment.[66] The East Africa Community on the other hand has a protocol that specifically caters to the environment and natural resources and especially during armed conflict. The Protocol on the Environment and Natural Resources is an echo of the revised African Union Convention on the Conservation of Nature and Natural Resources. It obligates the states similarly as the revised AU Convention and as such, the parties should ensure environmental protection during armed conflict by desisting from the use of means and methods of warfare that would have a widespread, long-term or severe damage to the environment.[67] The parties are further required to also take up measures of restoration and rehabilitation of the damaged environment because of armed conflicts.[68] Likewise, the state parties are required to establish national mechanisms for the implementation and enforcement of these provisions.

[65] Article 3(j) of the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security ('the Mechanism') of the ECOWAS Conflict Prevention Framework, http://www.ecowas.int/publications/en/framework/ECPF_final.pdf .

[66] Southern African Development Community Protocol on Politics, Defense and Security Cooperation (adopted 14 August 2001, entered into force 2 March 2004) SADC 3613/5213/8367.

[67] Protocol on the Environment and Natural Resources Management established through Article 151(1) of the East African Community Treaty, Article 33. https://www.eac.int/environment/natural-resources-management/protocol-on-environment-and-natural-resource-management.

[68] Ibid.

Kenya, Tanzania and Uganda are the only countries that have signed the protocol, with Tanzania yet to ratify. As the East African Community has seen the inclusion of other countries over the years, countries such as Rwanda and Burundi are yet to sign the protocol and the Protocol is yet to come into force and apply to the whole East African Community. However having signed the Protocol, countries such as Kenya and Uganda are required by the Vienna Convention on the Law of Treaties to act in good faith and desist from acts that go against the provisions of the signed Protocol even though it is not yet on force.[69] The major hindrance to the application of these sub regional instruments is that they lack the binding force on the states. There are very few treaties that have a binding force and relate to the protection of the environment during armed conflict. The International Conference on the Great Lakes Protocol to the Pact of Security, Stability and Development for one is instrument that purposefully binds the eleven contracting state parties of the Great Lakes Region.[70] It specifically prohibits the illegal exploitation of natural resources in a region that is greatly endowed with natural resources. Other treaties therefore await the signing and ratification of states before they can fully come into force. Another challenge that persists is that the countries lack domestic frameworks that serve to ensure the implantation of the regional instruments at a domestic level even though this is an obligation reiterated in most of the instruments.

Administrative and Enforcement Measures under the Regional Framework

The original Convention on Conservation of Nature and Natural Resources greatly failed to provide for an administrative, legal and institutional framework for the implementation of its provision. However the revised Convention with the aim of establishing a comprehensive framework provides for a modern institutional arrangement that will ensure the implementation and enforcement of the provisions of the Convention. It introduces the Secretariat, A Conference of Parties, and further, financial mechanism and techniques for reporting that will attain the aim of

[69] VCLT, Article 8.

[70] The Pact on Security, Stability and Development in the Great Lakes Region (adopted
December 2006, entered into force June 2008) 46 ILM 173. Its contracting member states include Angola, Kenya, Uganda, Sudan, Zambia, Rwanda, Central African Republic, Burundi and Congo.

implementation. The Conference of Parties (COP) is the decision-making body of the Convention. It is charged with the responsibilities that range from receiving information and reports from the Secretariat or state parties to making recommendation especially on matters related to the implementation of the Convention.[71] The COP also has the power to establish subsidiary bodies that are necessary for the implementation of the Convention. As the Convention does not mention any of these subsidiary bodies, the COP has discretion to establish them as they see fit. They are also charged with consideration of any other action that speaks to the achievement of the purpose of the Convention and also they consider and adopt additional amendments to the Convention.[72] The Secretariat on the other hand has been charged with the responsibility to execute the decisions of the Conference of the Parties.[73] The Secretariat is also responsible for ensuring that there is dissemination of laws and reports that guide on the implementation of the Convention. it is also the duty of the Secretariat to administer the budget of the convention among other obligations that aim to ensure the full implementation of the Convention. However for reasons that the Secretariat is yet to be established, the Chairperson of the African Union is in charge on an interim basis to see to the implementation of the Convention.[74]

The revised AU Convention recognizes that central importance of financing to the achievement of the purpose of the Convention.[75] The contracting state parties according to their different capability are required to ensure that there are available financial resources for the implementation of the Convention. Therefore there are arrangements for the contributions from the state parties, contributions from the AU and from other institutions that go into the budget of the Convention to facilitate its implementation. Importantly, the revised Convention provides an avenue for the settlement of disputes. It gives a first chance to the state parties to settle disputes through direct agreements reached by the parties or through the good offices of a third party. If this

[71] Revised African Convention on the Conservation of Nature and Natural Resources. (Adopted 11 July 2003, entered into force 23 July 2016) 7782 AU Treaties 0029, Article XXVI, Para 5.
[72] Ibid.
[73] Ibid, Article XXVII.
[74] Ibid, Article XLI.
[75] Ibid, Article XXVII

proves to be impossible, then it may be brought before the Court of Justice of the African Union.[76] The effectiveness of the court as an institutional mechanism for the implementation of the Convention and especially in regards to the environment during armed conflict has greatly been curtailed by the wait to merge the existing courts of the AU. The Maputo Protocol which envisages establishing the African Court of Justice and Human and Peoples' Rights is not yet in force and this means that the court is yet to be established. The establishment of this court however bears great potential as an institutional mechanism for the protection of the environment most especially during armed conflict. The court will create three chambers; a general affairs chamber, a human rights chamber and an international crimes chamber. This will create an avenue that can particularly deal with the environmental crimes especially in regards to the illegal exploitation, whether in times of peace or during situations of armed conflict in Africa.

Apart from the court, a look at the African Commission on Human and Peoples' Rights which is a quasi-judicial body under the AU also indicates that it has played a noticeable part albeit limited in furthering the protection afforded to the environment most especially during armed conflict. The jurisprudence from the interpretation of the existing laws laid out by the Commission contributes significantly to better protection of environment. In Communication 155/96: Social and Economic Rights Action Centre (SERAC) and Center for Economic and Social Rights (CESR) vs. Nigeria addressed the environmental destruction caused by the military government of Nigeria over the oil conflicts in the area. It was the holding of the Commission that Nigeria was in violation of the provisions of the African Charter and appealed to the government of Nigeria to ensure the protection of the environment by stopping the attacks on the areas and ensuring adequate compensation to those affected because of the violations. Similarly in Communication 279/03-296/05: Sudan Human Rights Organization (SHRO) & Centre on Housing Rights and Evictions (COHRE) v Sudan, the Commission acknowledged that the effects of Darfur conflict in Sudan affected the environment and in effect, it also affected the populations' right to health.[77] The Commission's holding therefore required Sudan to

[76] Ibid, Article XXX
[77] Sudan Human Rights Organization & Centre on Housing Rights and Evictions (COHRE) v Sudan (Communication 279/03-296/05) ACHPR 45.

rehabilitate the damaged areas in Darfur in order to provide a safe environment for the population. As much as the Commission pronounces itself on matters that relate to human rights violation, its holdings also have a bearing on environmental protection during armed conflict because of the link it has on the survival of the population.

The East African Community also provides a similar framework as that of the African Union in relation to the implementation of the Protocol on Conservation of the Environment and Natural Resources. Article 40 gives a framework for dispute settlement by first allowing for settlement through negotiations between the parties and if no agreement is reached, the matter can be brought before the East African Court of Justice, whose decisions will be final.[78] This means that the court has jurisdiction over matters of environment destruction during armed conflicts as this is an issue articulated under the Protocol. Africa as a continent has therefore made considerable effort to ensure that the environment remains to be protected even during times of armed conflict. As a region that is greatly endowed with natural resources, African states have realized that the environment and its resources play an important part in the social and economic development of the region and thus its protection is necessary at all times.

Conclusion

The discussion from this article indicates the importance of protecting the environment and most especially during times of armed conflict. The article has illustrated just how much war can impact on the environment. By looking at the different wars that have taken place it can be concluded that the environment has always been the silent victim of warfare with little attention afforded to it by the laws in place. The article has explained in section two the legal framework regarding the protection of the environment and how it has evolved over the years with the aim of safeguarding the environment. It is clear that IHL greatly attempts to protect the environment during armed conflict but because this is an area of law that is greatly dynamic and it keeps developing, IHL falls short in the protection of the environment. The article has also taken a look into IEL which is the main body of international law that concerns itself with the environment in an attempt to find provisions that

[78] Protocol on the Environment and Natural Resources Management established through Article 151(1) of the East African Community Treaty, Article 40.

ensure the environment is still protected during armed conflicts. IEL generally protects the environment during times of peace. It however has very few provisions that show the applicability of IEL as a body of laws during armed conflict. It is probably from the gaps evident in the IHL and IEL framework that Africa as a continent has created its own framework that specifically caters to the situations witnessed in regionally. The regional approach seems to fill the gaps left by the UN instruments and serves to protect the environment and natural resources in Africa more efficiently. The problem that remains is setting up institutional mechanisms that are effective in order to ensure the full implementation and enforcement of the provisions of the existing laws. Africa truly has the potential to see the protection of the environment during armed conflicts, but only if the African states can fully realize the importance of taking such steps. It is not enough to sign and ratify the relevant instruments that protect the environment and natural resources. This would mean total cooperation and inclusion of the rules regarding the environment in every aspect of their dealing to ensure its protection.

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The First Liberian Civil War (1989-1997): The Ethnic Identity Contingency during the Violent Conflict

By: ***Harry Njuguna Njoroge****

Abstract

The dynamics of the Liberian first civil war (1989 - 1997) can be traced back to the historiography of Liberia, when ex-slaves from the United States of America (U.S.A.) were shipped to Liberia around 1822. Liberia remained under the U.S. government sovereignty until the Liberia-Americos declared their independence in 1847. But the indigenous people remained under the Liberia-Americo subjugation and domination. This created heightened antagonism between the new political elites and the indigenous population. Master Sergeant Samuel Doe, of indigenous stock, obtained power from the Liberia-Americo rulers through a military coup (1980), but failed to attend to the ethnicity problem that persisted in the country. Doe continued with the system of exclusion, repression, as well as oppression against Liberian communities outside his Krahn ethnic group. This management or mismanagement of politics in Liberia elicited much fury, disgruntlement and resentment from the marginalized ethnic groups, who identified and pushed Charles Taylor to start the first Liberian civil war (1989-1996) to scuttle Doe's system of exclusivism, marginalization and discrimination based on ethnic identity. This study aims to show how ethnic identity and ethnic mobilization shaped the First Liberian War. It is clearly demonstrated that Ethnic Identity card played a salient role during the first Liberian violent conflict and subsequent wars.

Key words: The first Liberian Civil War, Ethnic Identity, Ethnic Mobilization, Violent Conflicts,

Introduction

Ethnic identity is a source of both violence and cooperation in all societies. Conflicts erupt and escalate when they are ignited by political power struggles and human grievances, and are reinforced by complicated political alliances, in which ethnic division and affiliations are key variables. The

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post-cold War global society is characterized by a rise in the scope and intensity of conflicts marked by violent and devastating ethnic rivalries and outcomes (Morgan & Kadivar,1995, p. 1). The former Yugoslavia, Somalia, South Sudan, South Africa, Sierra Leone and Liberia are some of the notable cases. To a greater or lesser degree, many of these interethnic rivalry situations that have either died or are still ongoing have antecedents involving colonial rule or a foreign group. While this historiography is probably a significant contributory factor to several of the varied internal political, economic, and social issues, the roots of such violent conflicts are shaped by actions and policies formulated during colonial rule (ibid 1995, p, 1).

In most cases, ethnopolitical situations arise out of politico-economic crises of the state and patterns on ethnic domination. Somehow, the eruption of ethnic clashes is predetermined and is neither fully anticipated nor completely intended by the actors. Unequal or competitive relations between ethnic groups assist to shape a society's state and ethnic structures thereby impacting the domestic narrative from which wars take place (ibid 1995, p, 1).

Certain forms of violent conflicts ensue out of perception of vertical political and economic dualism, where one ethnic group monopolizes privileges in a country. When conflicts erupt arising from ethnic inequalities, manifesting violence between the groups that monopolize most economic and political opportunities and those who are marginalized, the contestation takes the shape of who should exercise ultimate authority. The explosion of interethnic bloodletting has to do with power and control, and the focus on, and consciousness of these fuel ethnic violence and bloodshed (ibid 1995, p, 1).

Contextualizing armed Conflicts in Africa in post-World War

The internal violent conflicts in Africa in the post-Cold War period can be blamed on, and not limited the end of the Cold War game. Other contingencies responsible for violent internal conflicts comprise; ethnic and group identity, racial prejudices, political, economic, resource' grievances, self-determination, and poverty amongst other variables. The end of Cold-War marked the end of the global tapestry of suppressing, containing and managing the under-currents of violent conflicts in respective geopolitical areas of influence by the super powers. It left Africa exposed to the vagaries of mercenaries' maneuvers, and a ready market for weapons of destruction. (Olatude, and Ade, 2012, p.188).

Violent conflicts, however, do not occur per chance. As a matter of fact, the appearance of such violent conflicts is the reality of deep roots in the historiographies, and long-term disruptive political, economic inequalities, social-cultural disruptions, exclusivist, marginalization, racial segregation, and discriminative tendencies, that tend to target some particular ethnic community, or a minority group, within a state (Olatude, and Ade, 2012, p.188).

This study aims to demonstrate how the ethnic identity narrative in Liberia shaped the First Liberian Civil war.

Situating the Liberian State Historiography

Liberia is located within the West African coastline. It shares borders with Sierra Leone to the west, the Guinea Republic to the north, Cote d'I'voire to the east, and the Atlantic Ocean to the south. Liberia is a natural resources rich country, and is endowed with enormous iron ore deposits of global significance, alluvial gold and diamonds, as well as forest resources, resources which have come to be a curse for its citizens (Olatude and Ade, 2012, p.189).

The Liberian state was founded by originally freed slaves from the United States of America. The first shipload arrived in Liberia in 1822. This new settler group, running to about 40,000, (Outram, 1999, p. 163). The justification for the establishment of Liberia was determined by dynamics that had nothing to do with considerations of the original Liberia inhabitants. The dynamics fit within the context of the highly explosive economic development experienced in the United States in the late 18th and 19th centuries, rendering the earlier labor-intensive economic approach unprofitable and untenable. (Olatude and Ade, 2012, p.189). Slave labor in the U.S. had become increasingly archaic form of economic investment. Abolitionists pushed for disbandment of slavery to set men free to enter the open labor market system. (Ibid, 2012, p.189).

The first fleet of freed slaves landed in present day Liberia in January 1822, after a supposedly negotiated purchase of the Cape Mesurado area (Monrovia) by the leaders of the expedition, and the local chiefs (Olatude and Ade, 2012, p.189). The new comers; who came to be known as "Americo-Liberians" or "Americos," proclaimed the Republic of Liberia in 1847. The declaration created intra-settler conflicts, which festered until 1871, when they were resolved by the True Whig Party, that ruled Liberia up to 1980. This regime was ousted from power through a military coup

(1980), thus marking the end of the "First Republic" of Liberia (Outram, 1999, pp.163-164).

The constitution of the Liberian Republic was modeled on the USA constitution, However, the democratic rights contained in the American constitution were not transferred to the Liberian indigenous populations. The democratic rights remained a privilege of the Liberia-Americos. For example, the indigenous Liberians were curtailed from the enjoyment of fundamental liberties and rights, such as the freedom of citizenship, which was not granted to them until 1904. Also, they were disallowed the right of political participation, and the freedom to elect their representatives in government until 1946, amongst other freedoms (Outram, 1999, p.164).

Formal grant to citizenship for the indigenous people came with the inauguration of a policy of "indirect rule" by the Americo elites, which was superseded by a policy of "unification" in 1944 during the beginning William Tubman's presidency. The unification policy viewed as the "policy of integration" from 1964, censured the divisions between the Americos and the indigenes. However, this policy which was intended to integrate the indigenes legally, politically and economically in Liberia was ineffective (ibid,1999, p.164).

President Tubman was replaced as president following his death in 1971 by vice president William Tolbert. Tolbert stayed in office until 1980, when he was ousted from office via military coup by Master Sergeant Samuel Doe; an indigene. A supposedly civilian government, the Second Republic" was formally launched in January 1986. A revised, yet equally non-effective constitution based on the US system of government continued to be operational. President Doe was removed from power in 1990 through a revolt. He was faulted for both of his individual as well as government's failure to actualize promises made to the people. He was captured and killed in the capital city, Monrovia by Prince Johnson forces; the Independent National Patriotic Front of Liberia (INDFL). Following Doe's death, Charles Taylor became the fourth President of the Liberian Republic in 1990 (ibid, 1999, p. 164).

Situating the Liberian First Civil War - 1989-1997

It has been adduced that the First Liberia civil war was shaped by two root causes. First; the multidimensional crisis of underdevelopment persistent in the country since independence (1847) to the Samuel Doe military coup (1980), and the failure of both the post-military coup, and civilian governments to offer viable leadership to solve these problems (Kieh, 2016,

p. 209). Various governments in Liberia since 1847 to 1980 failed to build national integration programmes between the new-comer settlers, and the indigenous communities. Furthermore, the succeeding governments failed enhance economic development to benefit of all citizens. The government also failed in efforts to promote social welfare, equal opportunities, democracy and good governance, and the rule of law. Therefore, these shortcomings and crises underpinned the reason for a military in April 1980. The coup champions committed to liberate Liberia democratically, introduce good governance, and promote economic development (which did not happen anyway) (ibid, 2016, p. 209).

The second root cause of the 1989-1996 First Civil war was constituted by poor performance of the Doe regime during both the military (1980-86) and civilian (1986-90) periods. During the military era, the system committed serious political mistakes, such as exclusion and marginalization of some ethnic groups, unequal distribution of goods and services, human rights violations, abuse of citizens' freedoms including; muzzling of the media, curtailment of the freedoms of association, and speech etc. The US–based Committee for Human Rights accused the Doe government of a "promise betrayal" (ibid, 2016, p. 209).

The economic landscape, social welfare space, and the material conditions took a deteriorating surge, and failed to show the slightest sign of growth. Even after Doe became Liberia's supposedly, "democratic" president, following the controversial 1986 election, the system lacked the zeal to entrench democratization and good governance in Liberia. The system also unable to reduce wide-spread poverty that caused untold suffering of Liberian people. The resulting crises of underdevelopment provided a rich fodder for the First Civil war to unfold (Kieh, 2016, p. 209).

Organized violent conflicts in Liberia prior to 1980s were largely influenced, and energized by an overarching complex of differences, such as economic inequalities, cultural differences and status inequalities between the Americo-Liberian elite and the indigenous Liberian population. These persistent inequalities, inconsistencies and social differences worked as catalysts for ethnic mobilization, violent conflicts formations, and revolt against different governments. The structure of political, economic, and status inequality in Liberia was based on the effective monopolization of the commanding heights of the state apparatus by the Americos elite (Outram, 2012, p.165) It was the control of the state machinery that empowered the Americo elite to illegally appropriate land and exploit labor. It was also through the state that the revenues accrued from the surpluses of the modern

minerals and plantation sectors were stolen by the ruling class. Worse still, it was through the state machinery that the resources for development aid could be diverted to wrong places. Furthermore, it was largely through the state that education, accession to "civilized" cultural status and admission to membership of the Americo elite could be acquired (Outram, 2012, p.165). The overarching political culture of marginalization, exclusivism, discrimination and authoritarianism in Liberia further complicated the inherent weaknesses to the violent conflict management approach. The absence of a tradition of democracy and accountability, combined with the patron-client structure of political, economic and social relationships, and possibly the pre-republican historical legacies of both the settlers and natives led to the development of a political culture among the Americo elite and its agents, characterized by authoritarianism, injustices, exclusivism, violations of human or legal rights of the indigenous groups, predation, bribery and corruption (Outram, 1999, p. 166). This culture was exhibited in a long history of Americo disregard for and humiliation of the indigenous people, both as individuals, and represented by traditional leaders which continued despite the policy of national unification. The culture produced deep and irreconcilable resentments against the state apparatus. This, therefore made a mockery to the Americo claim of a "civilizing mission," and raised the question of the legitimacy of the Liberia's state (Outram, 1999, p. 166).

The Fist Civil war conflict actors including; Sergeant Doe and his the forces, several civilian-based militias such as the National Patriotic Front of Liberia (NPFL), the Independent National Patriotic Front of Liberia (INPFL), the Liberian Peace Council (LPC), the Liberation Movement of Liberia for Democracy(ULIMO-J) led by Johnson, the United Liberation Movement of Liberia for democracy(ULIMO-K);belonging to Kromah, and the Lofa Defence Force committed repulsive, and senseless crimes against civilians; such murders orgies , maiming, rape, torture, plunder and looting amongst several other criminal acts against humanity (Kieh, 2016, p. 210). Collectively, different ethnic warlords' militias conscripted into war, and marshaled fifteen thousand child soldiers; as young as nine-year-olds to commit heinous crimes against innocent, and unarmed civilians, including women, children and elderly persons. (Kieh, 2016, p. 210).

The First Civilian war, claimed the lives of about 250,000 civilians. Another one million persons were internally displaced, and about 850,000 people sought refuge in the neighboring countries, including Cote d'I'voire, Guinea, Sierra Leone, Ghana, Nigeria. Several others sought refuge abroad in the United States of America (Kieh, 2016, p. 211).

During the reign of Doe, different ethnic groups had developed a dreadful hostile relationship, which was further transferred to his government. Lack in support by the majority of the Liberians, forced Doe to turn to his ethnic Krahn group as his only political cleavage. Doe framed the power struggle between him and his main rival; General Thomas Quiwonkpa; a member of the Gio/Mano ethnic group, as a struggle between two ethnic groups, rather than a political rivalry between two personalities (Kieh, 2016, p. 211). In a typical case of scapegoating in 1985, Doe accused the Gio/Mano ethnic groups for his regime's poor performance. He blamed them of harboring treasonous ambitions following an aborted coup led by General Quiwonkpa; a former advisor to Doe, and a leader who assisted Doe rise to power (Kieh, 2016, p. 211).

Locating Ethnic Identity and Tribal Mobilization context within the Liberian First Civil War (1989-1996)

The preamble of the 1847 constitution, stating "We the people of the Republic of Liberia were originally the inhabitants of the United States of North America…." (Liberia, 1839) … confirmed the emergent segregated society. Citizenship was restricted to only those of the settler breed to the exclusion of the original inhabitants, and rightful owners of the land and state of Liberia. Worse still, the constitution ignored provision in regard to the government of the indigenous communities, but left all that to be determined by the government of the Americo-Liberians. In effect, the new comers' government never perceived the indigenes to have a past worth of inclusion in the corpus of Liberian history (Olatude and Ade, 2012, p. 190). In place of a common Liberian identity, an internal colonialism model was fashioned, in which the dominant minority core exploited the majority periphery and used its political and economic strength to maintain its superiority, and subjugation of the indigenous population (ibid, 2012, p. `190).

The indigenes were segregated and treated as a subordinate, and inferior crop of people. The indigenes were treated to humiliation, excluded and discriminated through a hardened policy of habit of mind (Olatude and Ade, 2012, p. 190). The caste system nurtured and promoted ethnic animosity among the Liberia people. The colony government enacted a law which placed indigenous African children who came to live in the colony in servitude (Olatude and Ade, 2012, p. 190). (Olatude and Ade, 2012, p. 190). The law prohibited the native youth under the age of eighteen from living in the families of the colonialist without being bonded for a specified term of years, according to the stipulation of the rules prescribed in an Act of apprentices (Olatude and Ade, 2012, p. 190)..On Independence Day (July 26, 1870) speech to the Common Council, in Monrovia, Alexander

Cromwell lambasted Americos-Liberian elites, and called upon the government to respect and assimilate the indigenous groups into the Liberian society (Olatude and Ade, 2012, p. 190).

Ethnic identity, and by extension the exclusion from political participation, inequality, poverty, exploitation, discrimination and violation of human rights, and civil liberties to particular ethnic groups (Gio and Mano) by the Doe regimes, and his Krahn tribe significantly caused the eruption of violent conflicts and subsequent ethnic mobilization, leading to the start and sustenance of the First Liberian War (Call, 2010, p. 348). After its founding in 1847, Liberia was ruled by Americo-Liberians comprising only 5 percent of the total population. These elites dominated and oppressed the roughly 16 main "up-country" (comprising 95 per cent of the population) groups, most of whom who had been separated by borders from their clansmen in neighboring Guinea, Sierra Leone, and Cote d'Ivoire (ibid, 2010, p. 348). Indigenous tribes were disenfranchised and could not participate in government affairs for over a hundred years from 1847, until they were granted the right of franchise in 1964 (ibid, 2010, p. 348).

The 1985 fake democratic elections called by Doe turned out to deeply compromised, and were highly contested. There were claims galore of voting irregularities, such as, rampant rigging, voter intimidation, threats, and coercion, bringing the whole exercise into disrepute. Doe's regime was considered to have perfected the order of things; promoting inequality in all sectors of life, undermining political and socio-economic structures, and scaling up the already existing widespread poverty rate, particularly among ethnic groups regarded by the regime as politically incorrect - not belonging to either the Krahn or the Mandingo ethnic stock (Call, 2010, p349).

The Gio and Mano, making up about 15 per cent of Liberian population were subjected to injustices, such as unequal opportunities to employment, land ownership, and violation of human rights; all incidents that played key role in ethnic identity recognition and ethnic mobilization in the arrangement to depose Doe from the perch of power (Call, 2010, p. 349). In the aftermath of the 1985 failed attempted coup, Doe's Krahn, then domineering the military ranks, and other security apparatus went a pitch higher molesting and hunting down people belonging to the Gio and Mano ethnic groups., and killed at least 3,000 Gios and Manos. The government also adopted a systematic exploitation and plunder approach, targeting ethnic groups viewed to be anti -system; "them" against "us" (Call, 2010, p. 349). Doe's regime committed grievous crimes against humanity, such as killing unarmed civilians (children, women and the elderly), rapes, torture, and

kidnapping, contrary to the international humanitarian law code. The regime was also involved in mass looting, and did not care to protect and secure private property rights, particularly for ethnic groups unjustifiably labeled as enemies of the state. All these illicit atrocities, combined with utter erosion of democracy during Doe's regime significantly contributed toward the manufacture of the Liberian First Civil war (1989-1997**),** and the consequent aftermath (Call, 2010, p. 349).

There was no fundamental transformation on either political, economic or social order in Liberia during Doe's rule to disclaim the popular street slogan of the day in Liberia: "same taxi, different driver" (Outram, 1999, pp. 167). Instead, Doe got consumed by the violent conflict ill-conceived template of previous regimes, in an increasingly desperate fiscal context; during a progressively tense political climate marked from 1985 onwards by several perceived and actual coup attempts. The only significant change manifested in conflict administration was Doe's creation of a power base contemplated on ethnic solidarity between himself and his own Krahn tribe. (Outram, 1999, pp. 167).

The 1985 coup attempt by Thomas Quiwonkpa, a Gio, caused the Gio and the closely related Mano ethnic groups to be associated with the coup attempt. They were held accountable for Quiwonkpa's action, and punished in various ways by government agents. Ethnic identities apparently became significantly salient marked by intense hostilities pitting especially the Krahn on the one hand and the Gio and the Mano on the other, The Mandingo people, associated closely with the state because of their long-standing history of cooperation with the Americo elite, also came to realize the salience of ethnic identity as others groups branded them with disdain as collaborators of the Krahn oppressors.

The Liberia state of 1980 and before was marked by a complexity of differences and inequalities between the Americos and the indigenes. After 1980, clear ethnic differences among the indigenous population were not uncommon. These grievances can be said to have partly contributed to the invention of the 1986 internal civil war (Outram, 1999, p. 168). However, as a matter of fact, these conflicts had all along been there for well over a century, but aptly and successfully manipulated by state apparatus until the 1980 coup. Unfortunately, by time of eruption of the military coup, the state machinery had lost agency, and therefore militating the emergence of the coup d'état and the following civil wars. (Outram, 1999, p. 168).

The success of the April 1980 coup d'état by non-commissioned officers commandeered by Sergeant Samuel Doe brought to the imminent end of the Liberia-Americo rule. (Conteh-Morgan& Kadivar, 1995, p. 9). A few days (10) after Doe's takeover, the People's Redemption Council (PRC), with Doe at the head decreed the summary execution of thirteen top ranking officials of the immediate former regime at a public square in Monrovia. Many Liberians of native origin celebrated this dastardly act by Doe and his compatriots (Conteh-Morgan& Kadivar, 1995, p. 9). Contrary to the popular belief that 1980 coup d'état would bring greater fortunes to the indigenes, instead it undermined solidarity of indigenous ethnic communities (Conteh-Morgan& Kadivar, 1995, p. 9).

The PRC, the "guardian of the revolution", and Doe, self-proclaimed "liberator" did not honor pledges made to the Liberians, and the international community. In order to consolidate power and secure his position, Doe hastily placed members of his small ethnic community, the Krahn in positions of authority to the exclusion, marginalization and exploitation of other ethnic groups (Conteh-Morgan& Kadivar, 1995, p. 9). Doe, his lieutenants, and cronies nearly all, from his Krahn tribe used state power to unfairly amass wealth, to the chagrin and disillusionment of other ethnic groups. (Conteh-Morgan& Kadivar, 1995, p. 9).

Onset of the 1986 Liberian First Civil War

The onset of the 1986 Liberian Civil war was kindled by the November 1985 attempted coup by General Thomas Quiwonkpa of the Gio ethnic group. The hyped expectations of 1980 faded slowly into utter despair. Doe literally dashed away hopes of a better politically, economically and socially managed state of Liberia. Heightened favoritism extended to the Krahn on the one hand, and the exclusivism approach visited on other ethnic groups on the other hand aggravated ethnic tensions, and exposed the under-belly of Doe's regime (Conteh-Morgan& Kadivar, 1995, pp. 9&10). By 1985, the Krahn had disproportionately dominated the entire government sector, and other channels of opportunity. This translated into marginalization of certain communities, erosion of democratic rights, as well as infusion of political, and socio-economic inequalities alongside other opportunities (Conteh-Morgan& Kadivar, 1995, p. 10).

The extreme levels of political and economic repression coupled with increasing Krahn nepotism seriously exacerbated ethnic frustrations tensions, and widened the social rift among the indigenous peoples; a phenomenon that had been long kept concealed by Americo-Liberian hegemony (Conteh-Morgan& Kadivar, 1995, p. 10). The 1980 coup had just

exchanged ethnic domination by one group (Liberia-Americo versus local populations) for ethnic domination (Krahn against others) by another. The grievances and concerns of ethnicity remained the same, and had even worsened in many ways (Conteh-Morgan& Kadivar, 1995, p. 10).

The frustrations and atrocities perpetrated by Doe and his minority ethnic group; the Krahn upon other ethnic communities provoked General Thomas Quiwonkpa to stage a coup d'état on the Doe regime in November 1985. The coup was however, foiled by Doe forces, yet it sparked the Liberian First Civil war, that began in earnest in1986. Spontaneously the Krahn tribe went on enraged rampage hunting and butchering members of the Gio and Mano tribes, resulting in senseless bloodletting in Liberia (New Yok Times, 1985).

The Charles Taylor Moment

Exile groups in Ghana and Cote d'Ivoire harbored plans to oust Doe from power. They identified, and effectively recruited Charles Taylor, a disaffected former member of the Doe regime to lead them in the execution of the onerous task (Outram, 1999, p. 167). The first target by Taylor's NPFL force consisting between 90 and 167-men including Prince Johnson, was government officials and soldiers, as well as some Mandingo individuals suspected of being informants to the Doe regime (Young, Feb., 2008, p. 9). Taylor on New Year's Eve was announced on the BBC broadcast radio as claiming NPFL's responsibility for launching the attack, and confirmed that NPFL's forces had entered Monrovia capital (Young, Feb., 2008, p. 9). Doe hit back with equal force, and this marked the beginning of a steady stream of murders characterized by the appearance of headless corpses in the morning" (ibid, Feb., 2008, p. 9). The government forces outfit; the Armed Forces of Liberia (AFL), rounded up hundreds of Gio and Mano civilians during the following two months in Monrovia, suspecting them by reason of ethnic origin alone of being potential (NPFL) enemies (ibid, Feb., 2008, p. 9). Doe's scorched-earth tactics culminated with thousands of deaths and over 30,000 refugees (ibid, Feb., 2008.

Taylor and his NPFL wing unleashed the initial attack from Nimba County, an area inhabited by the Gio and Mano ethnic groups. This violent conflict by 1990 assumed a "near genocidal" character, and by May, Taylor forces invested Monrovia and victory was without doubt. It took the efforts of Economic Organization of West Africa States (ECOWAS) to scuttle Taylor's coveted prize (Outram, 1999, p. 167). The ECOWAS Cease-fire monitoring ECOMOG group's forces, numbering between 4000 and 19000 stalled Taylor's forward match, and surrounded Monrovia, therefore preserving the remnants of the collapsed Liberia. (Outram, 1999, p. 168).

An ineffectual diplomatic initiative to negotiate a peace deal dragged over the next six years. The complex political, military, and economic undercurrents exacerbated a prolonged humanitarian crisis. (Outram, 1999, p. 167). By end of 1990, Liberia was but a pale shadow of its former -self. Even after the installation of the Interim Government of National Unity (IGNU) on April 20, 1991, (INGU) could not perform any of the 'empirical' functions of the state outside the enclave of Monrovia (Outram, 1999, p. 168).

Taylor, received a lot of tributes and admiration from the Gio and Mano ethnic communities for rescuing them from the humiliation, exploitation, marginalization and discrimination they had endured under the Doe government (ibid, Feb., 2008, p. 9). The Gio tribe, particularly of Nimba County joined the NPFL in large numbers and attacked the Krahn tribe, whom they considered, no matter how unjustly, collectively and individually responsible for Doe's misrule. The Gio and Mano also attacked the Mandingo ethnic group for their role as collaborators in the perpetration of crimes upon them (ibid, Feb., 2008, p. 10).

Brutality from both the NPFL and AFL sides was openly demonstrated during 1990. In July, 1990, NPFL slaughtered 500 Mandingos in Lofa county, and the AFL not to be left behind killed 600 displaced citizens, mainly of the Gio and Mano ethnic groups sheltered at St. Peter's Lutheran Church in Monrovia. The NPFL was notorious for testing people not able to speak Gio or Mano lingua franc. Those who failed to speak either of the languages were committed to instant death (ibid, Feb., 2008, p. 10).

By summer 1990 Taylor controlled 90 per cent of Liberia, nearly the whole of Liberia, except the enclave of Monrovia which had been surrounded, and secured by the Anglophone wing of the Economic Community of West African States Monitoring Group (ECOMOG) force, in a bid to buttress the Doe regime, so as to stabilize the capital, as well-wishers and people of goodwill arranged for a cease -fire. Although the Anglophone group of the ECOWAS claimed to be non-partisan, the underlying motive was to undermine the support of Francophone Cote d'Ivoire and Burkina Faso to the NPFL wing (ibid, Feb., 2008, pp. 10 and 11).

The AFL in full realization that it had no chance of securing a victory in conflict agreed to cooperate and work with ECOMOG, as the Independent National Patriotic Front (INPFL), (a splinter wing from NPFL) led by Prince Johnson, had done earlier. (Ibid, Feb., 2008, p. 11). During the ECOMOG stand-off with the NPFL, the INPFL was allowed to stay in the areas of

Monrovia already under ECOMOG's control, and remain armed. In an unclear circumstance on September 9, 1990, Doe while unarmed made a visit to the ECOMOG headquarters in Monrovia., Doe and his entourage of 75 were attacked by INPFL armed soldiers. Doe's body guards were gunned down. Doe was kidnapped and later on a video was circulated in the media of him being tortured, Eventually, he was eliminated as Prince Johnson watched (ibid, Feb., 2008, p. 11). Taylor was cajoled and entered into a ceasefire agreement in Novemder1990, An Interim Government of National Unity (IGNU) was formally inaugurated in Monrovia, and Amos Sawyer, a Liberian Scholar, who had been coaxed by Doe earlier to draft his constitution sworn in as the new president of Liberia on April 20, 1991 (ibid, Feb., 2008, p. 11).

By the end of 1990, Liberian state was but a pale shadow of its former-self. Even with the installation of the Interim Government of National Unity (IGNU), it came short in performance of the "empirical" duties of the state outside the Monrovia enclave (Outram, 1999, p. 167). IGNU was wholly dependent on ECOMOG for external and internal security. The legislature hardly functioned, and the judiciary missed the little relevance it had previously. IGNU collected taxes only from the Maritime Programme; the sea and airport, and the provision of government services were effectively conducted by UN agencies, the European Union, and donor governments, as well as international and national non-governmental organizations NGOs (Outram, 1999, p. 167).

The IGNU and its successors; the Liberation National Transitional Governments (LNTG) I and II had only an unclear juridical role among international "community of states". For example, the EU refused to accord formal diplomatic recognition to both LNTG-l and LNTG-ll. The European Union community effectively down-graded the Monrovia diplomatic status from "Embassy" to a "Mission," However, IGNU and the successors LNTGs continued to carry out issuance of passports and visas, present and receive diplomatic credentials of diplomats, and also continued to hold its seat at the U.N. (Outram, 1999, p. 167).

Road to Peace in the Liberian

The Liberian peace process was long and tortuous Journey. It did not take less than eleven (11) peace accords between 1990 and 1996 period (Call, 2010, p.350). Peace initiative started in the *e*arly period of the war, and the ECOWAS facilitated the platform for the negotiations. The regional body sponsored 3,000 troops under the auspices of ECOMOG. The deployment reflected ambivalence among the hegemonic powers, the UN, African states took a lackluster attitude in resolving problems in their continent. ECOMOG

gradually became an interested actor to the conflict, and gave support to forces feuding with the Taylor's side. This conduct by ECOMOG reflected Nigeria's antipathy toward Taylor's NPFL. However, by 1995, in a crucial paradigm shift, the Nigerian government accepted the Ghanaian position of the need to accommodate Taylor and his forces as part of a peace settlement (C all, 2010, p.350).

The peace agreement that ended the war was signed after a rapprochement between Taylor and Nigeria (an influential regional power broker) in June 1995. The Abuja accord was signed in August, and a cease-fire launched in the Fall of that year. Liberian wars were brought to an end through the "Abuja-II peace agreement of August 1996. Presidential and legislative elections were conducted in July 1997, and Taylor snatched victory with a 75.3 per cent majority win. The election process, monitored by international observers, including U. S. president Jimmy Carter were declared to be free and fair (Call, 2010, p.350). Taylor, by far the most powerful of the warlords, was in a position to continue the war should he have lost. This at least, justifies the bizarre election slogan of Taylor's electoral machine; the National Patriotic Front of Liberia: "He killed my Ma, he killed my Pa, but I will vote for him" (Outram, 1999, pp. 168&169).

Conclusion

The eruption and continued participation in violent conflicts in post- Cold War Africa can be traced back, and not limited, to colonial legacy, political, economic, socio-cultural, resource grievances, and ethnic identity contingences. The colonial powers used a divide and rule policy in the colonies, that left the local populations sharply disaggregated. The colonialists also entrenched a form of inequalities among different groups that induced disenchantments, disillusionment and deeply-seated hostilities amongst different communities.

During the Liberian violent conflict of 1986-1990, the ethnic identity card played key role in the formulation and the continued sustenance of the crisis. Beginning with the Liberia-Americo regime, the repressive regime oppressed, marginalized and discriminated against the indigenous people. For example, the local community was disallowed participation in government., was also denied voting rights, and opportunities among other fundamental rights in their own country. This brewed distrust and animosity from the indigenes, directed to the ruling elite and their settler community. These long-term injustices meted on the indigenous populations ultimately fermented the coup d'état of 1980, by a handful (17) of non-commissioned officers led by Sergeant Samuel Doe.

The Doe regime proved no better than the one of his predecessors. As a matter of fact, it was even worse, in the sense, that this time the hatred amongst local communities hardened based on ethnic identity contingency. Doe's Krahn ethnic group was unjustifiably placed at the top of all other local ethnic groups. They dominated the military, and government security agencies, held nearly all cabinet posts in the government, and other important positions in government, Doe also favored the Mandingo ethnic community, who were his allies, and induced some of its members with government plum jobs and land gifts. On the other hand, the Gio and Mano ethnic groups were marginalized, excluded, discriminated and denied opportunities by the Doe regime, forcing them to enter into an ethnic violent conflict, and the ultimate overthrow and murder of Doe.

Ethnic identity and recognition are crucial for peace and security in any country. When an ethnic group perceives rightly or wrongly that its rights to existence are under threat, it is bound to react in a way that shall cause eruption of violent conflicts or wars, and their sustenance as it happened in Liberia in the First Civil war of 1986-1992, and subsequent violent conflicts in that country.

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(Re) Defining Environmental Justice: Perspectives and Challenges

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Abstract

The concept of Environmental Justice (EJ) is still one that conjures many images of what EJ may actually mean. Environmental Justice seems to mean different things for different people. In spite of a commonly recognized definition, defining it in that sense only may not resonate with many as plainly as it sounds.

Many factors may add to or diminish the commonly known definitions. The Paper attempts to look at the definition of Environmental Justice from various angles to bring out the different perceptions around EJ.

Part A highlights the beginning of modern or contemporary EJ movement as we know it and the reasons EJ came into prominence. Part B will show the growth of the concept of EJ as a movement and the perceptions challenging the common definition of EJ. Part C adds EJ from an African perspective, as there is little mention of EJ from an African community's concerns about the environment in general. Part D points out the emerging challenges the indulgence of EJ may encounter in the face of rapid globalization, climate change and currently, during the global pandemic. The article concludes by suggesting that circumstances can best be the determinant of what EJ would entail in a particular situation.

A. The Definition And Background of Environmental Justice

According to the US Environmental Protection Agency, Environmental Justice is *'the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, policies and regulations*[1] *.'*

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[1] https://www.epa.gov/environmentaljustice#:~:text=Environmental%20justice%20is%20the%20fair,laws%2C%20regulations%2C%20and%20policies.

Environmental Justice (EJ) still has various definitions depending on what would be the demands of justice at the time. Such definitions include: the equitable distribution of environmental risks and benefits[2]; fair and meaningful participation in environmental decision making[3]; the recognition of a community's ways of life, local knowledge and cultural difference; and the capability of the communities and individuals to function and flourish in society;[4] the distribution of social goods;[5] and the right to environment information access, participation and access to justice[6].

In the social sciences, EJ is a collection of theories on environmental law, environmental policy and planning on sustainable development and political ecology.[7]

B. The Growth of Environmental Justice: Concept, Perceptions and Definition Challenges

a. Growth

Environmental protection has been with mankind in various forms at community level. For instance, in Africa each community had a set of rules, customs and proverbs regarding environmental conservation and inequalities were somehow addressed through family and clan land priviledge allocations [8] . Earlier forms of Environmental Justice manifested through community or national environmental protection

[2]Schlosberg, David, *Defining Environmental Justice: Theories, Movements, and Nature*,(2007) Oxford University Press
[3] ibid
[4] ibid
[5] ibid
[6] R. Ako, 'Resource Exploitation and Environmental Justice: the Nigerian Experience,' in F.N. Botchway (ed), Natural Resource Investment and Africa's Development, (2011), Cheltenham, UK: Edward Elgar Publishing, pp. 74-76.
[7]Miller, G. Tyler, Jr. *Environmental Science: Working With the Earth*, (2003), (9th ed.),Pacific Grove, California: Brooks/Cole. p. G5. ISBN 0-534-42039-7.
[8] Gathogo, Julius. (2013). Environmental management and African indigenous resources: echoes from Mutira Mission, Kenya (1912-2012). *Studia Historiae Ecclesiasticae*, *39*(2), 33-56. Retrieved August 01, 2021, from http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1017-04992013000200004&lng=en&tlng=en.

initiatives where restrictions were made against unlawful utilization of land resources by persons within or without those communities and offenders were punished[9]. In Asia, local ecological knowledge and management of indigenous species ensured food security, cure for illnesses and conservation of biodiversity and local habitats[10].

Contemporary Environmental Justice (EJ) movement is thought to have been sparked during the Civil Rights Movement between the 1960s and 1980s by people of colour in the United States protesting the exposure to public health dangers within their neighbourhoods.[11]

Major complaints included the planning of and location of landfills, industrial and waste disposal facilities around neighbourhoods of coloured people in the US. This was considered environmental racism.

In Europe, the same concerns affected people of a lower income group, thus, economic class racism. In the industrial and post industrialization ages, developing countries have had to grapple with effects of pollution and other occupational health hazards due to the location of industries near residential neighbourhoods, and populations migrating from safer and distant neighbourhoods to find work in the industrial estates[12]. The persuasion that the economic benefit derived from the jobs offered could

[9] Yoseph Maru, Aster Gebrekirstos & Getahun Haile | Fatih Yildiz (Reviewing editor) (2020) Indigenous ways of environmental protection in Gedeo community, Southern Ethiopia: A socio-ecological perspective, Cogent Food & Agriculture, 6:1, DOI: 10.1080/23311932.2020.1766732

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[12] Rafaelli Virginia, Environmental Racism in Europe: Protecting The Roma People's Right To A Healthy Environment, Geneva Centre for Security Policy; https://www.linkedin.com/pulse/environmental-racism-europe-protecting-roma-peoples-right-raffaeli?trk=public_profile_article_view

take care of their personal and family health needs left victims in a difficult position as they needed the jobs for their livelihood.

It should be noted that the need for EJ has been perceived and expressed through different nuances; i.e., violations against people of colour or racism (US), economic class rights (Europe), and anti-colonial property rights and natural resources conflicts or resource justice (Developing Countries and Africa where monopoly of management of natural resources is vested in a few politically connected people)[13]. Modern EJ is changing face to accommodate growing challenges such as climate change factors bringing about climate migrants, pandemic impacts, and increasing trans-boundary pollution. Protection of cultural rights[14] is also a latter inclusion.

Generally, reasons for the rise of EJ include environmental discrimination, environmental racism, environmental colonization, and environmental xenophobia by groups of people who feel superior over their victims as far as sharing of environmental burdens is concerned.[15]

Some of the modern developments in the growth of EJ include the articulation of 17 Principles of Environmental Justice during the 1990 multinational People of Colour Environmental Summit (US)[16]. The document captured the essence of non-discrimination, inclusivity and public participation, respect for minority rights, rule of law and fairness in distribution of social goods and responsibilities.

In Europe, there was growing dissent about the manifestation of environmental injustice within masses of lower income groups. This was an economic class issue; it was felt that neighbourhoods of people who

[13] Muigua Kariuki & Kariuki Francis, Towards Environmental Justice in Kenya, (2017) Journalofcmsd Volume 1(1): https://journalofcmsd.net/wp-content/uploads/2017/09/Towards-Environmental-Justice-in-Kenya-28th.pdf
[14] *Endorois* case at the African Court of Human and People's Rights
[15] Schlosberg, David. (2007) *Defining Environmental Justice: Theories, Movements, and Nature*. Oxford University Press.
[16] Drafted and adopted in 1991 at the National People of Color Environmental Leadership Summit, Environmental Working Group (EWG); https://www.ewg.org/news-insights/news/17-principles-environmental-justice

earned a higher income had better access to clean and adequate amounts of clean water, had more green spaces, had better food choices and had a say in how by-laws would control waste location and management.[17] In recent global climate change occurrences, high income groups are least adversely affected compared with people in low income neighbourhoods who become victims of the unjust choices earlier made by their affluent counterparts, as the more affluent neighbourhoods would have invested in stronger and more resilient infrastructural development[18].

Modern EJ is demonstrated in three strands as follows:
Distributive Justice – this concerns the distribution of social goods and responsibilities among a group of environmental goods consumers; *Procedural Justice* – it concerns fairness in the process of the decision outcomes in the dispensing of goods, services and justice actions; and *Interactional Justice* – the way decisions and processes are communicated to recipients of these decisions.

b. Perception

Looking at the few environmental management styles available, it may help to inform the perceptions EJ will endure.

For starters, the general political view is that the concept of Environmental Justice is a social movement driven by a small group of people whose social concerns need not warrant special attention beyond the generic justice solutions[19]. Nothing can be further from the truth, as the environment is the base for which all living occurs and its place cannot be downplayed. Environmental concerns can therefore not be relegated to planning's afterthought.

[17]Bullard R, *Confronting Environmental Racism in 21st Century (2001),A Paper Prepared for the United Nations Research Institute on Racism and Social Development (UNRISD) Conference on Racism and Public Policy, September 2001, Durban, South Africa*
[18] ibid
[19] Benedicte Bull and Mariel Aguilar-Støen, Changing Elites, Institutions and Environmental Governance; https://core.ac.uk/download/pdf/81074722.pdf

Eco-centric management style

Many governments prefer to use the 'Command and Control' Management (CCM) approach to strictly protect the environment.. Laws, rules and regulations are made without the full participation of other users of the environment, and come with heavy penalties for breach of the law. Whereas the penalization of environmental damage is a worthy idea, in this case the decisions on fines and penalties are made without proper public participation and are politically influenced[20]. Opponents of the eco-centric approach would view the CCM as a tool for favouring certain groups, e.g. higher income groups whose socio-economic needs are already met and propose a strong protectionist agenda[21]. To the opponents EJ therefore means an authoritarian protection of flora and fauna and other environmental sectors without regard to the diverse environmental utilization dynamics such as political, economic and social and cultural sensitivities[22]. Supporters of the anthropogenic management approach may tend to see Eco-centric management as a reserve of a few and an elitist venture done for their social amusement.[23]

The eco-centric apologists will on the other hand argue that it is important to protect the environment solely for the environment's sake and tenaciously counter novel exploitation projects. *. The initial proposal in the 1972 United Nations Human and Development Conference ("*Stockholm Declaration"*) for pure environmental protection was seen

[20] Rice University, Principles of Economics, Environmental Protection and Negative Externalities, Chapter 12, Open Stax; https://opentextbc.ca/principlesofeconomics/chapter/12-2-command-and-control-regulation/

[21] Robert A. Huber (2020) The role of populist attitudes in explaining climate change skepticism and support for environmental protection, Environmental Politics, 29:6, 959-982, DOI: 10.1080/09644016.2019.1708186

22 James McCarthy (2019) Authoritarianism, Populism, and the Environment: Comparative Experiences, Insights, and Perspectives, Annals of the American Association of Geographers, 109:2, 301-313, DOI: 10.1080/24694452.2018.1554393

23 Robert A. Huber (2020) The role of populist attitudes in explaining climate change skepticism and support for environmental protection, Environmental Politics, 29:6, 959-982, DOI: 10.1080/09644016.2019.1708186

by developing countries as too protectionist to meet their economic developments when vast minerals resources existed in their nations which would help to meet their needs as well as regard environmental protection concerns*. To the ecocentric believer, EJ should be purely protectionist.

Anthropogenic management style

Secondly, to the anthropogenic who favours the exploitation of the environment exploitation, man and his needs are placed at the centre of the environment[24]*. If man is affected by the negative actions of man or natural catastrophes, then there is need to protect the environment more. Man works the environment for his benefit. This group attracts both low income earners who seek economic development from environmental goods, and pure capitalists who feel the environment is to be fully exploited; the economic benefits would over-ride the effects of degradation, and even help to remedy them. To this group of people EJ should foster economic development.

However, groups from lower economic classes would prefer a mixture of anthropogenic and an eco-centric approach for the utilization of the environment for economic development to meet their socio-economic needs, but also place environmental protection as a priority since they understand that the environment is crucial for survival. The debate between the anthropogenic and eco-centric approaches was brought to the fore during the 1972 United Nations Human and Development Conference ("*Stockholm Declaration"*) discussions[25].

Anthropocentric management style

Seeing the degradation of the environment in the post-industrial age which focused on satisfying the capitalist's development appetite, a third category of people proposed a more integrated and participatory approach combining environmental protection, cultural significance and economic interests to arrive at an anthropocentric approach. This would be a balance

[24] Principle 1 of the Rio Declaration (UN Conference on Environment and Development/ "Earth Summit')

[25] Shastri, Satish C. "Environmental Ethics Anthropocentric To Eco-Centric Approach: A Paradigm Shift." *Journal of the Indian Law Institute* 55, no. 4 (2013): 522-30. Accessed August 1, 2021. http://www.jstor.org/stable/43953654.https://www.jstor.org/stable/43953654

between economic development and social development. The 1992 United Nations Conference on Environment and Development *("Rio Declaration")* settled on this anthropocentric approach where developing countries pledged to protect the environment alongside economic development[26]. Subsequent developments in this area culminated in the 2002 World Summit of Sustainable Development (WSSD) in Johannesburg which called for sustainability in every aspect of development. This is the concept behind Sustainable Development Goals which is now a global phenomenon. EJ in this context would imply sustainable economic development.

Environmental Elitism

Another common perception is that environmentalism is elitist[27]. Either its supporters are from upper and middle income classes or the decisions made thereof favour elitist groups and disenfranchise lower income groups or marginalized groups of people around the world.[28]

Sustainable Development (SD)

Sustainable Development has been embraced in recent years as the social aspect of EJ at the international level[29] and as a contemporary EJ movement. Sustainable Development inculcates other components of justice such as rights-based justice; inter and intra generational equity, access to environmental information, access to justice, fair administrative action, and public participation to include interested persons and institutions in the public and the private realms.The notion of environmental rights as human rights, a recent paradigm shift, is also premised on the socio-economic ideals of Sustainable Development[30].

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[26] Principles 1 and 6 of the Rio Declaration ('Earth Summit',1992)

[27] Robert A. Huber (2020) The role of populist attitudes in explaining climate change skepticism and support for environmental protection, Environmental Politics, 29:6, 959-982, DOI: 10.1080/09644016.2019.1708186

[28]Morrison, Denton, *Environmentalism and elitism: a conceptual and empirical analysis*, (September 1986), *Environmental Management*. New York. 10 (5): 581–589.

[29] The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)

[30] Emily Fisher, Sustainable Development and Environmental Justice: Same Planet, Different Worlds?, available at

Interestingly, even Sustainable Development as a contemporary EJ movement faces challenges of interpretation, context and practicability[31]. Under Sustainable Development every region is allowed to provide its own solutions, yet the reality remains that the definitions, concepts and structures therein are still dictated from a global plane. Does this attempt to suggest that sustainability is a new concept for existing communities?

In the 2012 World Summit on Sustainable Development (WSSD) in Johannesburg, EJ was impliedly linked to Sustainable Development's three-pronged action points as a) environmental and natural resource conservation, b) economic growth and equity, and c) social development.[32] The complexities in understanding sustainability in the context of development and ensuring fairness for all is a major paradox, and SD may well be considered as discriminatory*;'* social and environmental conservation rules are created to favour a few while the rest bear the ecological burdens.[33]

Based on the foregoing, it is plain to see that EJ is subjected to various perceptions depending on the circumstances. This affects how it is responded to.

Additional varying expectations of what EJ also include:
To the climate refugee, EJ means an environmentally safe place to live. To the populations deprived of food due to effects of discrimination in environmental ecosystem privileges such as clean water, stable water towers, organic food choices and non polluted neighbourhood (food discrimination), EJ means safe food choices.[34]

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https://environs.law.ucdavis.edu/volumes/26/2/fisher.pdf
[31] ibid
[32] Emily Fisher, Sustainable Development and Environmental Justice: Same Planet, Different Worlds?, available at https://environs.law.ucdavis.edu/volumes/26/2/fisher.pdf;
[33]ibid
[34] Oxfam America. Food Justice: Fixing Our Broken Food System, https://www.youtube.com/watch?v=xA6p0w2Xoqg, accessed 12/04/20121; Malik Yankini, Food, Race and Justice, TEDXMuskegon, https://www.youtube.com/watch?v=miukaKDL-Cs; accessed 12/04/2021; also on University of California Television, Food Justice: Economics, Ethics and

To the 'elite' ecocentric protectionist, EJ is an equal sharing of environmental burdens and responsibilities. To indigenous communities, EJ means the recognition of their cultural and economic rights. To communities seeking resource justice, resource injustice is environmental damage and degradation from drilling or mining activities, poor labour practices and hazardous working conditions around extraction points, elite capture of mined resources and profits thereof through corrupt means, even patenting local genetic resources for commercialization under their terms while ignoring the communities at source. EJ would mean fair labour practices, equitable benefit sharing of genetic and extracted mineral resources, reasonable compensation for displacement from land, and conferring the management, financial capital and technologies in the hands of the local communities as equal partners with the investors in the sector concerned.[35]

C. Environmental Justice: The African Situation and Perspectives

EJ was not a new concept in Africa. 'Fairness and meaningful' participation of environmental goods and services was interpreted according to the dictates of the religion and culture of that particular community[36].

In Africa, the environment was the basis of a society's identity, livelihood, religious and cultural expression. Every aspect of life revolved around the environment; worship of deities, rites of passage, geographical location, livelihood - whether agricultural, animal husbandry, fishing, hunting and gathering, among other activities.Therefore, environmental safeguards were expressed through strict religious rules and taboos, demonstrating the central place of the environment to life.

Access; available on https://www.youtube.com/watch?v=fIPGWnlHgqU, accessed 12/04/2021

[35]Heinrich Böll Foundation, *Resource Politics for a Fair Future*, Berlin 2014; also Wolfgang Sachs, Tilman Santarius, *Fair Future: Limited Resources and Global Justice*, Zed Books, London & New York, 2007

[36] *Merle Sowman* & *Rachel Wynberg* *(eds).* Governance for Justice and Environmental Sustainability Lessons across Natural Resource Sectors in Sub-Saharan Africa (2014)1st ed. https://www.routledge.com/Governance-for-Justice-and-Environmental-Sustainability-Lessons-across/Sowman Wynberg/p/book/9781138680067#:~:text=ISBN%209781138680067,2016%20by%20Routledge

EJ custodians were the community's gatekeepers who designed and enforced the rules of law, morality, social order and cohesion[37]. Ecological responsibilities were allocated and assigned according to the community's social strata. This ensured that every member of the society participated in environmental protection with the knowledge that environmental goods were to be protected for the good of all.

However, African communities viewedand perceived climate change differently[38]*. Climate change bore both natural and man-made factors. They seemed to be aware of natural, periodic events in history which could not be attributed to anything in particular, and took precaution in appeasing the deities in order to avert environmental crises such as drought, floods and landslides in future. Where man made activities such as over-use of natural resources contributed to the degradation of the environment the gatekeepers applied rules to minimize the impact of such activities. They prescribed rules for grazing, re-stocking and replenishing of animal and plant species. Thus, EJ in ancient times was the fair distribution of ecological goods and burdens with the involvement of the whole community.

For instance under article 40 of the Constitution of Kenya, Intellectual Property rights to Traditional Knowledge has not been significantly embraced to benefit local communities much[39]. On Natural Resource Management, there is a rich resource of traditional knowledge of indigenous species of plants and animals. Local communities were aware of these resources and had norms which endorsed a communal system of conservation of not only these species, but conservation of the environment as well.They were hands-on on the preservation of many unique plant and animal species. An EJ concern today would be the

[37] EJ was not a new concept in Africa. 'Fairness and meaningful' participation of environmental goods and services was interpreted according to the dictates of the religion and culture of that particular

[38] Many African communities have folklores on periodic erratic weather patterns such as drought, attributed to supernatural occurrences needing appeasing of deities

[39] Muigua Kariuki & Kariuki Francis, Towards Environmental Justice in Kenya, (2017) Journalofcmsd Volume 1(1): https://journalofcmsd.net/wp-content/uploads/2017/09/Towards-Environmental-Justice-in-Kenya-28th.pdf

skewed appropriation provisions in the UN Convention on Biodiversity which emphasizss the sharing of the indigenous information with international partners freely yet the partners still hold the monopoly to technological transfer regarding value addition and subsequently, intellectual property rights to the same. The developing world needs an equitable benefit sharing formula for EJ under traditional knowledge.

Currently, Africa is recognized as being the lowest contributor of green house gas emissions to the total global emissions (at 0.6%).[40]It follows then that modern EJ is viewed with some skepticism as African communities are forced to bear some environmental burdens for which they are not responsible.[41] Market interventions such as carbon trading do not seem to help to alleviate poverty much in Africa and help Africa to stop the emissions overseas.

In modern times, it is a balancing act between exploitation of natural resources and environmental protection in developing nations in Africa, who are catching up with emerging technologies for economic development and at the same time grappling with climate change. The realities of man-made effects of climate change come closer yet economic development must happen with limited technological and economical capacity.

In spite of the establishment of Extractive Industry Transparency Initiative (*EITI*) in 2003 with the goal of strengthening governance by increasing transparency over revenues from the oil, gas, and mining sectors, encouraging international best practices in the different levels of implementation, and also encouraging players to disclose information about their earnings from natural resources[42], a lot of this is yet to be

[40]UN

[41]Emelie Charity, Environmental Justice Reality or Myth in Africa? 12 June 2019, SSRN; available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3394150, accessed 12/3/2021

[42] http://www.osisa.org/other/global/existing-legal-and-institutional-framework accessed 17/03/2021

realized in Africa[43]. The Movement of the Survival of *Ogoni* People (MOSO) in 1990 in Nigeria against the Nigerian government and Shell Company, seeking autonomy of oil resources refers. In Kenya, protests by the local Turkana community in the northern region, against exclusion by the government and Tullow Oil Company in jobs allocation and infrastructural development also demonstrate this laxity for pure transparency[44].

Industrialization standards, information and technology sharing are also dictated by foreign entities from developed countries. Arbitration for environmental disputes with foreign entities are perceived as better done in international tribunals and courts*. EJ for the continent would in this regard entail climate justice from a victim's position and the international regard for domestic arbitration.

Notwithstanding the external environmental influences that put Africa in a tough situation, the economically evolving Africa is also beginning to suffer the shocks of degradation and cultural differences in development similar to those of developed countries, such as gender, social and economic disparities in the allocation of environmental goods and priviledges.[45] In the area of natural resource management, Governance is a key mechanism of enforcing environmental justice. On *Climate Change*, change in climatic patterns has exposed ill-preparedness in mitigating the same; floods, landslides, famine, pollution of wetlands, deforestation and injuries or damages from open cast mining are common place. In spite of the numerous EIA requirements, Investors in economic activities like mining are not held responsible for the social and

[43] Mugyenyi, O., et.al. (2010). Equitable Sharing of the Treasures of Oil and Gas in a Transparent and Environmentally Sustainable Manner: A Synthesis Report of the Proceedings of the Parliamentary Symposium on Oil and Gas Development in Uganda.ACODE Policy Dialogue Series, No. 15, 2010. Kampala.

[44] Hesboun Etyang, *No oil will leave Turkana without security and jobs, protesters say*, *The Star*, 27 June 2018 - 18:00; https://www.the-star.co.ke/news/2018-06-27-no-oil-will-leave-turkana-without-security-and-jobs-protesters-say/

[45] Friedrich-Ebert-Stiftung, Regional Disparities and Marginalisation in Kenya (2012); Elite PrePress Ltd: Nairobi, ISBN No: 9966-957-68-5; available at https://library.fes.de/pdf-files/bueros/kenia/09859.pdf

environmental degradation resulting. Poor labour practices are also common.

Nevertheless, there has been a suggestion for eco-collective responsibility theory –an EJ model which is customized to the African community set up where priviledges and responsibilities are shared in mutual co-operation and dependence to promote the common good of the people and the environment for present and future generations.[46] Nature and human living were one centralized by the existence of a deity who oversaw the aspects of the living as well as the dead. Communalism within African groups recognized all players in an inter-related way, binding members towards care, reciprocity and responsibility towards one another and nature came with penalties and heavy fines for offenses to deter ill behavior. [47]

D. Emerging Environmental Challenges and Some Critiques Within The Concept of Environmental Justice

As seen earlier, Environmental Justice means different things to different communities. Questions abound as to what EJ really constitutes. The list of emerging challenges to the concept of EJ is not exhaustive, but this section will highlight some of the major concerns mentionedin EJ discussions at the domestic and international levels.

a) Environmental Justice as a Social Movement

As mentioned earlier, EJ is considered in some circles a social movement that does not require too much input from pure economic growth enthusiasts who argue that if the economy is strong enough, all other social and political needs will be met.This argument is used to persuade communities living around industrial facilities and related utilities to accept the attendant pollution and waste emission from these facilities as

[46] Ssebunya, Margaret & Morgan, Stephen &Okyere-Manu, Beatrice.(2019). chapter 12. 10.1007/978-3-030-18807-8; https://www.researchgate.net/publication/334635326_chapter_12, accessed 12/3/2021

[47]Ibid; also Okoth-Ogendo HWO, The Nature of Land Rights Under Indigenous Land Law in Africa: In Power, Land and Custom; controversies generated by South African Communal Land Act (2008), eds., A Claassens, B. Cousins, 95-108, Cape Town: UCT Press

a lower price for their economic development which could cater for any related health consequences.

Further and over time, some EJ movements are perceived as too radical and isolated from the living realitiesof the other sectors of the society such as:

Other social perceptions of EJ include:

Eco-fascism; Eco-nationalism; Eco-terrorism; Eco-authoritarianism; Radical Environmentalism; Red-Green-Brown Alliance;

b) Property Rights

The concept of property rights may determine the shape EJ could take in a particular situation. There are arguments about whether having pure private property rights is detrimental or not to environmental protection. If detrimental due to strict rules against trespass and unfettered land abuse rights and the *'zenith'* and *'nadir'* ownership in the land and the atmosphere, the quest for EJ will demand open access to the private property to regulate and demand for a more profitable (environmental friendly) use of the land.

The perception around public land is viewed through the '*Tragedy of the Commons'*[48] lenses where it is thought property rights given access to all may most not likely belong to anyone in particular, and therefore, nobody takes responsibility for its proper upkeep. The opposite view in "*The Tragedy of Uncommons'*"[49] also attracts government land use regulation, including compulsory acquisition for the public interest. Without proper constitutional and regulatory safeguards, victims of the government's actions may suffer and further environmental degradation may occur. Both sides if not well managed call for EJ.

[48]Garett Hardin (1968)

[49] Jonathan B. Wiener, The Tragedy of the Uncommons: On the Politics of Apocalypse; https://doi.org/10.1111/1758-5899.12319

c) Climate Change

Rapid tectonic and atmospheric changes in the earth's stratosphere from pollution and industrial activities, over-exploitation of some natural resources, human wildlife conflict due to population migration changes, etc., are thought to have depleted the ozone layer[50], rising surface temperatures causing negative changes in ecological patterns in the oceans and other wetlands,

Whereas the whole earth is affected by these dynamic weather change patterns, the issue of climate action is not devoid of criticism from some quarters. There is increasing dissenting voices against climate justice, as being climate and racial injustice. It is commonly felt by developing countries that the biggest polluters of the environment, largely developed countries of the north are either not doing enough to combat climate change or have cleverly calculated mitigation measures which allow them to pollute the environment as developing countries become helpless victims of that pollution, yet hold all countries to equal responsibility in reducing climate change effects. The Principle of Common But Differentiated Responsibilities and Capabilities has not made much to ease these tensions since under International Environmental Law agreements task developed countries to transfer information on scientific research, technology transfer and skills capacity to less developed nations. Information and technology monopoly still vests in developed countries.

As stated earlier, the gains on the United Nations Convention on Biological Diversity (CBD) regarding shared benefits and Intellectual Property (IP) rights still are skewed to favour the stronger economies of the north who possess huge financial and technical capacity and seem more competent during trade and other environmental protection agreements*. Effectively, climate action becomes climate injustice for the less able nations.

d) Globalization and Cultural Dimensions

Under globalization, it is anticipated that the world will share common communication and transactional facilities. However, and naturally, each

[50] International Science Agency

culture is geo-positioned to nurture the environment surrounding it and utilize its goods in a specific way. Contextualization of environmental actions has helped to perform environmental responsibilities in ways that benefit the common good. Regional MEAs seem effective in capturing pertinent environmental issues relevant to that particular constituency and well demonstrates this point[51].

Demands have arisen from indigenous communities and cultural groups for the recognition of their environmental and socio-economic rights while other groups expropriate environmental goods. These groups have felt that the geopolitics of the north or the domestic political dynamics have failed to capture their economic and cultural interests when international [52]negotiations happen. For instance, uranium nuclear, and oil and gas drilling activities in North Alaska was likely to adversely affect Native Americans more than any other people group in Alaska.[53]

e) Catastrophes such as global Pandemics

Hurricanes, typhoons, tornadoes, tsunamis, volcanic eruptions, floods, landslides, earthquakes, drought to name a few, are occurrences that place a huge burden on the administrative agencies dealing with any of these disasters. Currently, the world is struggling with containing the impact of Covid-19 virus on the global and domestic economies and politics. In these instances, matters of EJ are left on the periphery as countries are set on seeking economic recovery. Whereas climate litigation is increasing, there are complex questions regarding who would be held responsible for the environmental violations, and how would compensation be worked out? There exists an opportunity here to grow pandemic-related environmental justice jurisprudence to answer the many questions raised in the climate and environmental degradation claims.

[51] Sand, Peter. (2016). The Effectiveness of Multilateral Environmental Agreements: Theory and Practice; https://www.researchgate.net/publication/311717128_The_Effectiveness_of_Multilateral_Environmental_Agreements_Theory_and_Practice

[52]University of Michigan News, *Targeting minority, low-income neighborhoods for hazardous waste sites*, 2016-01-19, accessed 10/5/2021

[53]ibid

E. Conclusion.

The concept of Environmental Justice is a noble one, worth expanding and utilizing it to the fullest. Notwithstanding its good intentions, it has been argued in many quarters that Environmental Justice is still injustice is some quarters, and can only be justice if coupled with equity, better governance and consistent public participation and information sharing with all the parties concerned for acceptable solutions.

It seems a challenge for now to get a unanimous agreement on what EJ really means for the different groups of people seeking EJ, but whatever portends as justice for the environmental cause and respects the rights of people and the environment equitably, let it stand.

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Giving Natural Resources a Legal Personality: A Kenyan Perspective

By: ***Kariuki Muigua****

Abstract

This paper offers a critique of the current approach in natural resources management in both international and national laws which is mostly anthropocentric. The argument is that while the Earth Charter recognises nature and the need for environmental conservation, the same document also ties this with human rights and human needs, thus implying that the main reason for respect for the environment and Mother Nature is to be able to meet and fulfil the needs of the humankind. In addition, while some jurisdictions have taken the bold step of vesting nature with a legal personality and consequently rights based on its intrinsic nature, the practice has been to conserve the environment and natural resources guided by the sustainable development agenda which is largely anthropocentric, that is, putting the human being and the satisfaction of all their needs at the centre of these efforts. The paper examines the idea of giving natural resources a legal personality and relates this to the Kenyan context. It advocates for an approach that strikes a balance between ecocentrism/biocentrism and anthropocentrism approaches in environmental and natural resources management and conservation in Kenya.

1. Introduction

The Constitution of Kenya 2010 defines "natural resources" to mean the physical non-human factors and components, whether renewable or non-renewable, including

(a)sunlight;

(b)surface and groundwater;

(c)forests, biodiversity and genetic resources; and

(d)rocks, minerals, fossil fuels and other sources of energy.[1]

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Under Kenya's *Environmental Management and Coordination Act*[2], natural resources include resources of the air, land, water, animals, and plants including their aesthetic qualities.[3]

Thus, natural resources include all aspects of the environment which are not man-made and are of value to human beings such as forests, minerals, oceans, freshwater, soil and air.[4] Natural resources are classified as either renewable or non-renewable; *renewable resources* are those that can be replenished at about the same rate as they are used, while non-renewable resources are those that are depleted faster than they can regenerate.[5]

In 2011, Bolivia passed the world's first laws granting all nature equal rights to humans which included, inter alia: the right to life and to exist; the right to continue vital cycles and processes free from human alteration; the right to pure water and clean air; the right to balance; the right not to be polluted; and the right to not have cellular structure modified or genetically altered.[6] Notably, the proposal for the 'rights of nature' is credited to have initially developed in North America and Europe in the mid-twentieth century, and was built on a platform of ideas, including those of Leopold and proponents of animal rights such as Peter Singer, Tom Regan and Jeremy Bentham.[7]

The *Earth Charter*, which comes closest to acknowledging the intrinsic value of Mother Nature, is a declaration of fundamental ethical principles for building a just, sustainable and peaceful global society in the 21st century. It seeks to inspire in all people a new sense of global

[1] Article 260, Constitution of Kenya 2010.
[2] *Environmental Management and Coordination Act*, No. 8 of 1999, Laws of Kenya.
[3] S. 2, Act No. 8 of 1999.
[4] Devlin, R. & Grafton R, *Economic Rights and Environmental Wrongs: Property Rights for the Common Good*, (Edward Elgar Publishing, 1998).
[5] Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya,* Glenwood Publishers, Nairobi, 2015.
[6] 'Bolivia Enshrines Natural World's Rights with Equal Status for Mother Earth' (*the Guardian*, 10 April 2011) <http://www.theguardian.com/environment/2011/apr/10/bolivia-enshrines-natural-worlds-rights> accessed 10 November 2020.
[7] Sólon, Pablo. "The rights of mother earth." *Democratic Marxism Series* (2018): 107, 114.

interdependence and shared responsibility for the well-being of the whole human family, the greater community of life, and future generations.[8] It does not therefore offer an approach purely informed by the need to protect the nature as it is but by the need to ensure its continued supply of resources for the sake of human beings.

Conspicuously, anthropocentrism is deeply embedded in modern society, where human beings are treated as the central and most important entity in the world; superior to non-human life because they are the only ones that have consciousness, values and moral status. In this context, nature is seen as something separate from humans; it exists for the survival and development of human societies; it is the 'environment' of humans and a set of resources that can be exploited for their benefit.[9]

This paper challenges the current approaches, both international and national, to environmental and natural resources management which are largely based on an anthropocentric lens, that is, taking care of nature as a means to an end which is meeting the basic needs of the human beings and not necessarily for the sake of the nature itself and the other organisms that rely on it.

2. Legal Status of Natural Resources Management: International and National Approaches

While the international law is generally concerned with provision of guidelines and principles on management of environmental and natural resources by state parties as well as governance of the common areas such as seas and oceans, the international legal regime of natural resources has in several instruments affirmed the sovereignty of a state over the natural resources found within its territory.[10] Notably, these legal instruments

[8] 'Earth Charter' (*Charter for Compassion*) <https://secure.charterforcompassion.org/350-org/earth-charter> accessed 11 November 2020.

[9] Sólon, Pablo. "The rights of mother earth." *Democratic Marxism Series* (2018): 107, 107.

[10] Schrijver, Nicolaas. "Self-determination of peoples and sovereignty over natural wealth and resources." (2013): 95-102; Gümplová, Petra. "Sovereignty over natural resources–A normative reinterpretation." *Global Constitutionalism* 9, no. 1 (2020): 7-37; United Nations General Assembly, *Resolution 1803*

affirm the countries' legal right to exploit the resources as they wish with occasional guiding principles such as the principles of sustainable development meant to remind these countries to conserve the resources for the sake of future generations in those territories.[11]

It has now become common for the most recent constitutions around the world to provide for norms concerning the environmental protection as a consequence to the increased attention over the past years towards ecological hardship. [12] However, these constitutional reforms which embrace strengthened proper rights of nature and similarly of ethnic rights also grant the State the right to exploit and commercialize natural resources and extractivism has increased.[13] Indeed, it has rightly been pointed out that 'while the environmental dimension is incorporated into some constitutions, it appears purely in terms of the interest or usefulness that nature represents for people. The requirement of a 'healthy environment' does imply certain levels of quality, but not for living species or the integrity of the ecosystems, rather as an indispensable factor in ensuring human health.[14]

It has been observed that natural resources law focuses mostly on extraction and primary production of goods and services, that is, consumption while environmental law focuses on secondary processing, transportation, manufacturing, and disposal, that is, it is more about the

(XVII),1962; 'Indigenous Peoples Permanent Sovereignty Over Natural Resources | Australian Human Rights Commission' <https://humanrights.gov.au/about/news/speeches/indigenous-peoples-permanent-sovereignty-over-natural-resources> accessed 11 November 2020.

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

[12] Rebecca Romanò, 'Can Nature Be Entitled to Constitutional Rights? A Historical Overview and the Innovative Approach of Bolivia and Ecuador.'

[13] Rickard Lalander, 'Rights of Nature and the Indigenous Peoples in Bolivia and Ecuador: A Straitjacket for Progressive Development Politics?' (2014) 3 Iberoamerican Journal of Development Studies 148.

[14] 'The Political Ecology of Nature in the Bolivian and Ecuadorian Constitutions – Rosa Luxemburg Foundation' <https://www.rosalux.org.ec/en/the-political-ecology-of-nature-in-the-bolivian-and-ecuadorian-constitutions/> accessed 10 November 2020.

unwanted side effects of consumption.[15] Natural resources law is dominated by a "resource-ist," utilitarian approach rather than by a naturalist intrinsic value approach.[16]

The 2010 Constitution of Kenya includes provisions related to land, environment and natural resource management, and envisages development of new laws, policies, guidelines and other enabling legal instruments relating to different yet related sectors at the national and county levels.[17] The enactment and implementation of these laws is to be guided by the national values and principles of governance which include: patriotism, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development.[18] Again, these values and principles are largely anthropocentric and have little or nothing to do with respecting nature for its own intrinsic value.

There are three main approaches to environmental ethics depending on how people think about and interact with their environment which are: anthropocentrism; ecocentrism and biocentrism. Anthropocentrism is a combination of egoistic and socialturistic values, held by those who emphasize the consequences of environmental deterioration for oneself and for human beings in general; a human-centered approach, meaning that human beings are the most important life forms; they consume natural resources to fulfil their own needs, hoping to develop the environment they most desire.[19] Thus, under this approach, nature is valued for its convenience, and therefore it should be protected for the purpose of maintaining an appropriate quality of life for human beings.[20]

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[15] Fischman, Robert L. "What Is Natural Resources Law?" *78 University of Colorado Law Review 717 (2007)* (2007), 731.
[16] Ibid, 733.
[17] Constitution of Kenya 2010, Chapter Five.
[18] Art.10 (2), Constitution of Kenya.
[19] Surmeli, Hikmet, and Mehpare Saka. "Preservice teachers' anthropocentric, biocentric, and ecocentric environmental ethics approaches." *International Journal of Academic Research* 5, no. 5 (2013): 159-163.
[20] Ibid.

Ecocentrism is the broadest term for worldviews that recognize intrinsic value in all lifeforms and ecosystems themselves, including their abiotic components.[21] Ecocentrism goes beyond biocentrism (ethics that sees inherent value to all *living* things) by including environmental systems as wholes, and their abiotic aspects. It also goes beyond zoocentrism (seeing value in animals) on account of explicitly including flora and the ecological contexts for organisms.[22] Some scholars see ecocentrism as the umbrella that includes biocentrism and zoocentrism, because all three of these worldviews value the non-human, with ecocentrism having the widest vision.[23]

Thus, while anthropocentric concerns for the environment are narrowly aimed at preserving the welfare of humans, biocentric and ecocentric concerns are oriented toward protecting non-human organisms and nature as a whole.[24]

3. Management and Governance of Natural Resources in Kenya: Challenges in Approaches

The management and governance of natural resources in Kenya is largely governed by the various values attached to these resources, including: economic, social or cultural, where; economically, natural resources are not only a source of food and raw materials but are also a source of income for individuals and the State; socially, natural resources like water bodies play recreational role amongst others, they also contribute to the improvement of the quality of life of individuals; and culturally, different Kenyan communities attach importance to some natural resources that may be revered as shrines, dwelling places for ancestors and sacred sites where rites of passage and other cultural celebrations take place.[25]

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[21] Washington, Haydn, Bron Taylor, Helen Kopnina, Paul Cryer, and John J. Piccolo. "Why ecocentrism is the key pathway to sustainability." *The Ecological Citizen* 1, no. 1 (2017): 35-41, 35.

[22] Ibid, 35.

[23] Ibid, 35.

[24] Joshua Rottman, 'Breaking down Biocentrism: Two Distinct Forms of Moral Concern for Nature' (2014) 5 Frontiers in Psychology <https://www.frontiersin.org/articles/10.3389/fpsyg.2014.00905/full> accessed 11 November 2020.

[25] See Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya,* Glenwood Publishers, Nairobi, 2015.

The Constitution of Kenya outlines the obligations of the State in relation to the environment and natural resources as follows: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity; establish systems of environmental impact assessment, environmental audit and monitoring of the environment; eliminate processes and activities that are likely to endanger the environment; and utilise the environment and natural resources for the benefit of the people of Kenya.[26] The Constitution also obligates every person to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.[27]

Notably, while these obligations are geared towards conservation measures, they lean towards an anthropocentric approach but have little to do with an ecocentric or biocentric approach. They seek to preserve and conserve environmental and natural resources for the sake of human needs. The law on environment and natural resources management and governance in Kenya thus takes the same approach taken by many other jurisdictions around the world where these resources are taken care of for as long as they can meet and satisfy the economic and social needs of the human race.[28] This is also affirmed in the Constitution's guarantee on the right of every person to a clean and healthy environment, which includes the right- to have the environment protected for the benefit of present and future generations, through legislative and other measures, particularly those contemplated in Article 69; and to have obligations relating to the environment fulfilled under Article 70.[29] While the law has evolved from

[26] Constitution of Kenya, 2010, Article 69(1).
[27] Ibid, Article 69(2).
[28] Ochola, Washington Odongo, Pascal C. Sanginga, and Isaac Bekalo, eds. *Managing natural resources for development in Africa: A resource book*. IDRC, 2010.
[29] Constitution of Kenya, 2010, Article 42.

the case of *Maathai v Kenya Times Media Trust Ltd*[30], where the Court ruled that a person must have *locus standi* before they can bring a petition before court for environmental damage, to a situation where one does not need to prove *locus standi*[31], the Constitution still provides that if a person alleges that *a right to a clean and healthy environment recognised and protected under Article 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 (emphasis added).[32] The implication is that these provisions were coined along anthropocentric approach to conservation, that is, a clean and healthy environment should be maintained for the sake of enjoyment by human beings and not necessarily for its intrinsic value or for the benefit of the other non-human living and non-living things.

It is clear that inasmuch as there has been progress towards protection and conservation of environmental and natural resources in Kenya, the law still largely leans towards taking an anthropocentric approach, at least practically. While the Constitution acknowledges that the environment is the heritage of the people of Kenya, the same makes it clear that the same is to be respected and the determination is to sustain it for the benefit of future generations.[33]

This is the approach that also mainly informs the sustainable development agenda, where these resources are to be conserved and utilized for the sake of meeting the needs of the current generation and future generations.[34]

4. Giving Natural Resources a Legal Personality: Prospects and Challenges

Environmental law commentators have argued that while so much have been done both internationally and within countries to put in place laws

[30] *Maathai v Kenya Times Media Trust Ltd*, Civil Case No 5403 of 1989.
[31] See sec. 3, *Environmental Management and Coordination Act*, No. 8 of 1999, Laws of Kenya; see also Article 70 (3), Constitution of Kenya 2010.
[32] Constitution of Kenya 2010, Art. 70(1).
[33] Ibid, Preamble.
[34] Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi, 2016

to avert environmental degradation, scientific evidence indicates that the global environmental crisis is accelerating and that environmental laws have not been able to reverse the trend.[35] The trend is well summarized in the following quote:

> *"human activities are significantly influencing Earth's environment in many ways in addition to greenhouse gas emissions and climate change.*
>
> *Anthropogenic changes to Earth's land surface, oceans, coasts and atmosphere and to biological diversity, the water cycle and biogeochemical cycles are clearly identifiable beyond natural variability. They are equal to some of the great forces of nature in their extent and impact. Many are accelerating. Global change is real and is happening now."*[36]

It is further noted that this global change cannot be understood in terms of a simple cause and effect model since the human-driven changes cause multiple effects that cascade through the Earth system in complex ways, and these effects interact with one another and with local and regional-scale changes in multidimensional patterns that are challenging to understand and even more difficult to predict.[37]

As a result of this deficiency, a movement to recognize nature as a rights holder argues that existing laws regulate, rather than stop, the destruction of the natural world, and instead of incrementally reforming such laws, a growing number of jurisdictions around the world have recognized rights for nature.[38]

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[35] Guillaume Chapron, Yaffa Epstein, José Vicente López-Bao, 'A rights revolution for nature,' Science, 1; See also Rodgers Jr, William H. "Improving Laws, Declining World: The Tort of Contamination." *Valparaiso University Law Review* 38, no. 4 (2011): 1249-1261.

[36] Sólon, Pablo. "The rights of mother earth." *Democratic Marxism Series* (2018): 107, 110.

[37] Ibid, 110.

[38] Guillaume Chapron, Yaffa Epstein, José Vicente López-Bao, 'A rights revolution for nature,' Science, 1.

Rights for collectives, rights for animals, and rights of nature have been grounded in the interest theory of rights.[39] Since according to the interest theory of rights, a person or other entity has a right if and only if they are capable of having rights, and some aspect of their interest or well-being is "a sufficient reason for holding some other person(s) to be under a duty", some interests of nature that have been argued to be sufficient to produce rights include existence, habitat, and fulfilling ecological roles.[40] However, while the interest theory itself does not resolve whether nature is capable of having rights, some commentators have suggested that entities that have value for their own sake, rather than for the value they provide others, can have rights, and accordingly, rights-of-nature advocates make a moral assertion that nature does have this intrinsic value.[41]

Other rights arguments stem from religion or spirituality, as was the case in New Zealand's recognition of the Whanganui River and surrounding area as the legal person Te Awa Tupua which arose out of a treaty settlement with a Maori tribe and that tribe's spiritual connection to the river.[42] This also informed the decision of the the Andean countries of Ecuador and Bolivia, where indigenous worldviews that prioritise harmony with nature over economic development have been enshrined in law.[43] The ideals encapsulated in the concept of *Buen Vivir* ("good way of living") and the recognition of the rights of Mother Nature draw from ancient Andean indigenous traditions that pre-date the Spanish colonial era.[44] The "good way of living" (or *Buen Vivir* in Spanish) is rooted in the cosmovision of the Quechua peoples of the Andes, of "sumac kawsay", a kichwa term which denotes the fullness of life, rooted in community and harmony with other people and nature.[45]

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[39] Ibid.
[40] Ibid.
[41] Guillaume Chapron, Yaffa Epstein, José Vicente López-Bao, 'A rights revolution for nature,' Science, 1.
[42] Ibid.
[43] 'Buen Vivir: The Rights of Nature in Bolivia and Ecuador' <https://www.rapidtransition.org/stories/the-rights-of-nature-in-bolivia-and-ecuador/> accessed 10 November 2020.
[44] Ibid.
[45] Ibid.

Notably, even among most African traditional societies, land belonged first to God, and then to the clan or sub-clan and its access and use is controlled by elders, and everyone was under obligation to care for the environment, water and pastures.[46] However, the creation of modern institutions for natural resources management has undermined the effectiveness of traditional institutions, yet in most areas it is still traditional institutions that are found on the ground.[47]

The Bolivian Constitution of 2009 recognises Buen Vivir as a principle to guide state action.[48] Bolivia's 2011 Law of Mother Nature was the first national-level legislation in the world to bestow rights to the natural world.[49]

Unlike the anthropocentric approach to conservation in which nature is valued for the utility or the benefits it provides (conventionally as use or exchange value), biocentrism, which is a narrower aspect of ecocentrism, defends the intrinsic values of nature as independent of the value of the non-human world for human uses and purposes.[50]

There is a need for the stakeholders in the environmental and natural resource governance and management sector in Kenya to consider moving away from the anthropocentric approach only and embrace an ecocentric approach for the sake of all living and non-living organisms that rely on the nature for their wellbeing.[51] It is in such an approach that

[46] International Union for Conservation of Nature, 'Local rules and customary regulations on natural resource management in Lower Tana catchment, Kenya,' *Building Drought Resilience Project*, April, 2013, 2.
[47] Ibid, 4.
[48] 'Buen Vivir: The Rights of Nature in Bolivia and Ecuador' <https://www.rapidtransition.org/stories/the-rights-of-nature-in-bolivia-and-ecuador/> accessed 10 November 2020.
[49] Ibid.
[50] 'The Political Ecology of Nature in the Bolivian and Ecuadorian Constitutions – Rosa Luxemburg Foundation' <https://www.rosalux.org.ec/en/the-political-ecology-of-nature-in-the-bolivian-and-ecuadorian-constitutions/> accessed 10 November 2020.
[51] Muigua, K., **'**The Neglected Link: Safeguarding Pollinators for Sustainable Development in Kenya,' *Journal of Conflict Management and Sustainable Development*, Volume 1, No 2, (2017).

human needs will also be met through natural resources exploitation, as a by-product and not necessarily as an end in itself.

The Constitutional provisions on land and environment which recognize environment as an important part of humanity are not enough; there may be a need to consider granting nature some rights that should exist independently of its usefulness in meeting human needs.

Granting nature a legal personality, however, does not automatically guarantee efficiency in environmental conservation and protection. Some authors have argued that despite Ecuador and Bolivia granting nature a legal personality, they are yet to achieve the expected ideal experience as far as environmental conservation and natural resources protection are concerned.

4.1. Place of Human Beings in the Biodiversity Conservation Debate

It is now an established fact that human civilization has had a huge negative impact on biodiversity, particularly since the industrial revolution through such activities as overfishing and hunting, the destruction of habitats through agriculture and urban sprawl, the use of pesticides and herbicides, and the release of other toxic compounds into the environment.[52] While some organisms have been able to adapt to the changing environmental conditions, the impact of mankind on biodiversity has clearly been detrimental to many animals, plants and the natural environment in general.[53]

The anthropocentric approach which places man at the centre of nature and his environmental surroundings has all the more contributed to this wanton destruction of nature as man seeks to meet his needs using environmental and natural resources despite the negative effects left on

[52] Philip Hunter, 'The Human Impact on Biological Diversity. How Species Adapt to Urban Challenges Sheds Light on Evolution and Provides Clues about Conservation' (2007) 8 EMBO Reports 316; Anastasia A Kokovkina, 'Ecological Crisis and Global Responsibility Ethics', *Proceedings of the XXIII World Congress of Philosophy* (2018).
[53] Ibid.

the environment.[54] This is attributable to the fact that anthropocentrism regards humans as separate from and superior to nature and holds that human life has intrinsic value while other entities (including animals, plants, mineral resources, and so on) are resources that may justifiably be exploited for the benefit of humankind.[55] Anthropocentrism is heavily reflected in the sustainable development debate as first captured in the *Report of the World Commission on Environment and Development: Our Common Future*[56] which stated, *inter alia*:

> *This Commission believes that people can build a future that is more prosperous, more just, and more secure. Our report, Our Common Future, is not a prediction of ever increasing environmental decay, poverty, and hardship in an ever more polluted world among ever decreasing resources. We see instead the possibility for a new era of economic growth, one that must be based on policies that sustain and expand the environmental resource base. And we believe such growth to be absolutely essential to relieve the great poverty that is deepening in much of the developing world.*[57]

Despite this conflict between humans and the nature, it is an open secret that human beings need the nature to meet most if not all of their basic needs.[58] It is for this reason that some commentators have challenged the

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[54] Richard A Gray, 'Ecology and Ethics: Is There a Duty to Nature?' (1994) 22 Reference Services Review 57; Berfin Kart, 'Ethical Responsibility of Man for Ecological Problems in Context of HPP (Hydroelectrical Power Plant)'.

[55] 'Anthropocentrism | Philosophy' (*Encyclopedia Britannica*) <https://www.britannica.com/topic/anthropocentrism> accessed 13 November 2020.

[56] World Commission on Environment and Development (ed), *Our Common Future* (Oxford University Press 1987).

[57] World Commission on Environment and Development (ed), *Our Common Future*, para. 3.

[58] Richard Wilk, 'Consumption, Human Needs, and Global Environmental Change' (2002) 12 Global environmental change 5; David Kaimowitz and Douglas Sheil, 'Conserving What and for Whom? Why Conservation Should Help Meet Basic Human Needs in the Tropics' (2007) 39 Biotropica 567; Bjørn P Kaltenborn, John DC Linnell and Erik Gómez-Baggethun, 'Can Cultural Ecosystem Services Contribute to Satisfying Basic Human Needs? A Case Study from the Lofoten Archipelago, Northern Norway' (2020) 120 Applied

possibility of adopting an exclusively ecocentric approach to environmental conservation and natural resources management due to the arguably complicated relationship between human beings and their environment.[59]

To demonstrate the complicated relationship that different cultures and groups of people have with the environment, some authors have argued that since there are different approaches to this relationship or views, disagreement, competition and even conflict between rival individuals and groups is not a social aberration but, on the contrary, an essential characteristic of society's uncertain relationship with its environment.[60] This may be used to explain the often witnessed conflict between government agencies seeking to 'uproot' communities from what they consider to be their homes for conservation purposes, as evidenced by the Mau forest evictions in Kenya.[61] The proponents of the argument seeking

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Geography 102229; Farhan Ali, Shaoan Huang and Roland Cheo, 'Climatic Impacts on Basic Human Needs in the United States of America: A Panel Data Analysis' (2020) 12 Sustainability 1508; Juan Angel Chica Urzola and Vanessa Benavides Miranda, 'Sustainable Development, Human Needs, Well-Being and Energy' (2018) 5 International Journal of Innovation and Research in Education Sciences-IJIRES 52; Jona Razzaque, 'Human Rights and the Environment: The National Experience in South Asia and Africa'; Elisa Lanzi and others, 'Developing Pathways to Sustainability: Fulfilling Human Needs and Aspirations While Maintaining Human Life Support Systems'.

[59] See Stephen Gough, William Scott and Andrew Stables, 'Beyond O'Riordan: Balancing Anthropocentrism and Ecocentrism' (2000) 9 International Research in Geographical and Environmental Education 36.

[60] Ibid.

[61] 'Mau Forest Evictions Leave Ogiek Homeless' <http://www.culturalsurvival.org/news/mau-forest-evictions-leave-ogiek-homeless> accessed 16 November 2020; 'Ministry of Environment and Forestry » Blog Archive » Second Phase of Mau Evictions to Kick off Soon' <http://www.environment.go.ke/?p=6844> accessed 16 November 2020; 'Kenya Forest Service Evicts 300 Ogiek Families from Their Homes in the Mau Forest. Despite the African Court on Human and Peoples' Rights 2017 Ruling That the Ogiek Should Not Be Evicted | REDD-Monitor' <https://redd-monitor.org/2020/07/16/kenya-forest-service-evicts-300-ogiek-families-from-their-homes-in-the-mau-forest-despite-the-african-court-on-human-and-peoples-rights-2017-ruling-that-the-ogiek-should-not-be-evicted/> accessed 16 November 2020; https://www.the-star.co.ke/authors/gilbertkoech, 'Environment CS Stops Eastern Mau Forest Evictions' (*The Star*) <https://www.the-

to strike a balance between anthropocentrism and ecocentrism approaches to environmental challenges suggest if the governing institutions would be willing to entertain all the views, the reward for tolerating a degree of apparent internal inconsistency is the discovery of synergies between opposed views.[62] To them, under conditions of uncertainty, legitimacy should be extended to all possible perspectives on human-nature relationships as a way of ensuring that there is an acknowledgment of the role of institutions' and actors' "social involvements".[63] This is perhaps the part where conflict management would come in handy, using more of the collaborative approaches such as negotiation, mediation and conciliation, among others.[64]

Regarding the debate to accord nature a legal personality status, some of the earliest proponents have rightly observed that:

> *"The fact is, that each time there is a movement to confer rights onto some new "entity," the proposal is bound to sound odd or frightening or laughable. This is partly because until the rightless thing receives its rights, we cannot see it as anything but a thing for the use of "us"-those who are holding rights at the time."*[65]

The above was meant to elicit a debate toward considering human beings and the law in general giving legal rights to forests, oceans, rivers and other so-called "natural objects"· in the environment-indeed, to the natural environment as a whole.[66] The suggestion was that we should have a system in which, when a friend of a natural object perceives it to

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star.co.ke/counties/rift-valley/2020-07-23-environment-cs-stops-eastern-mau-forest-evictions/> accessed 16 November 2020.

[62] Stephen Gough, William Scott and Andrew Stables, 'Beyond O'Riordan: Balancing Anthropocentrism and Ecocentrism' (2000) 9 International Research in Geographical and Environmental Education 36.

[63] Ibid.

[64] See Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya,* Glenwood Publishers, Nairobi, 2015, chapt. 16; Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya,* Glenwood Publishers, Nairobi, 2015.

[65] Stone, Christopher D. "Should Trees Have Standing? Towards Legal Rights for Natural Objects." Southern California Law Review 45 (1972): 450-501, 455.

[66] Ibid, 456.

be endangered, he or she can apply to a court for the creation of a guardianship.[67] In such a system, it was suggested, the law would have provisions which could provide for guardianship both in the instance of public natural objects and also, perhaps with slightly different standards, in the instance of natural objects on "private" land, effectively securing an effective voice for the environment.[68]

Coming back to the Kenyan scenario, the Constitution of Kenya 2010 defines a 'person' to 'include a company, association or other body of persons whether incorporated or unincorporated'. [69] Notably, this recognition comes with rights and responsibilities. While the Constitution and the relevant statutes may not outline 'responsibilities' for the environment and all it entails (for what other responsibilit4ies or duties should we place on the environment while we already view it as the source of our livelihoods?), we may consider granting the same a legal personality for purposes of protecting it for its intrinsic value, away from the basis of taking care of it for the goods and services that we get from it as human beings. This constitutional provision may therefore need to be expanded in light of granting nature a 'legal personality' as was done in Ecuador and Bolivia, for the sake of protecting the environment for its intrinsic value in the ecosystem and not necessarily for the sake of the benefits that accrue to the human beings. The recognition the 'legal standing' and 'independent voice' of a major river on NZ's North Island (Whanganui River represents a noteworthy milestone in a broader movement towards the legal recognition of the rights of nature.[70] There is the case of the Río Atrato in Colombia, recognised as a legal person by the domestic Constitutional Court in November 2016, in a decision not released publicly until May 2017. [71] According to the Colombian

[67] Ibid, 466.
[68] Ibid, 465, 470.
[69] Article 260, Constitution of Kenya, 2010.
[70] Good, Meg. "The river as a legal person: evaluating nature rights-based approaches to environmental protection in Australia." *National Environmental Law Review* 1 (2013): 34.
[71] Elizabeth Macpherson and Felipe Clavijo Ospina, 'The Pluralism of River Rights in Aotearoa, New Zealand and Colombia' (SocArXiv 2020) <https://osf.io/preprints/socarxiv/rdh4x/> accessed 16 November 2020; 'Colombia's Constitutional Court Grants Rights to the Atrato River and Orders the Government to Clean up Its Waters' (*Mongabay Environmental News*, 22

Constitutional Court, the Atrato River needs better care and is "subject to the rights that implicate its protection, conservation, maintenance and in this specific case, restoration." The Court also called out the state on its neglectful behaviour and ordered that the river be cleaned up. [72] Commenting on the place of human beings in nature, the Colombian Constitutional Court stated as follows:

> 5.9. Finally, *the ecocentric approach starts from a basic premise according to which the land does not belong to man and, on the contrary, assumes that man is part of the earth, like any other species* [86]. According to this interpretation, *the human species is just one more event in a long evolutionary chain that has lasted for billions of years and therefore is not in any way the owner of other species, biodiversity, or resources, or the fate of the planet*. Consequently, this theory conceives nature as a real subject of rights that must be recognized by the States and exercised under the protection of its legal representatives, such as, for example, [namely] by the communities that inhabit nature or that have a special relationship with it (emphasis added).[73]

The court's sentiments in the above case affirms the position that an anthropocentric approach to relating with the environment makes the humans forget that they are not really lords over every other aspect of the environment and their actions should reflect this.

The Court also commented on what they identified as bio-cultural rights and the special relationship that exists between a community's culture and the environment and had the following to say:

May 2017) <https://news.mongabay.com/2017/05/colombias-constitutional-court-grants-rights-to-the-atrato-river-and-orders-the-government-to-clean-up-its-waters/> accessed 16 November 2020.

[72] 'Colombia's Constitutional Court Grants Rights to the Atrato River and Orders the Government to Clean up Its Waters' (*Mongabay Environmental News*, 22 May 2017) <https://news.mongabay.com/2017/05/colombias-constitutional-court-grants-rights-to-the-atrato-river-and-orders-the-government-to-clean-up-its-waters/> accessed 16 November 2020.

[73] Judgment T-622/16 (The Atrato River Case), Constitutional Court of Colombia (2016), para. 5.9.

> 5.11. The first thing that must be pointed out is that so-called *biocultural rights, in their simplest definition, refer to the rights that ethnic communities have to administer and exercise autonomous guardianship over their territories --according to their own laws and customs --and the natural resources that make up their habitat, where their culture, their traditions and their way of life are developed based on the special relationship they have with the environment and biodiversity*. These *rights result from the recognition of the deep and intrinsic connection that exists between nature, its resources, and the culture of the ethnic and indigenous communities that inhabit them, which are interdependent with each other and cannot be understood in isolation. The central elements of this approach establish an intrinsic link between nature and culture, and the diversity of the human species as part of nature and manifestation of multiple life forms*. From this perspective, the conservation of biodiversity necessarily leads to the preservation and protection of the ways of life and cultures that interact with it. In a country as rich in environmental aspects as Colombia, which is considered fifth among the seventeen most mega-biodiverse countries in the world, and which has natural forests and paramos in about 53% of its territory --which provides water to 70% of the national population --and in which there are more than 54,871 animal and plant species, 341 different types of ecosystems, and 32 terrestrial biomes [92], and including important ancestral cultures. The protection and preservation of cultural diversity is essential to the conservation and sustainable use of biological diversity and vice versa (emphasis added).[74]

Regarding the above two instances (Colombia and New Zealand), it has also been noted that "recognizing that the river is a person is an attempt to accommodate diverse legal and cultural interests in the river, in order to establish a new collaborative relationship between the state and river communities. Whether either model results in improved river outcomes, or increased indigenous or community jurisdiction to govern, turns not on the fiction that the river is a person but on the surrounding institutional

[74] Ibid, para. 5.11.

framework, which has been carefully designed to engender enforceability".[75]

It is therefore worth considering extending the same treatment to the natural resources and the environment in Kenya and also recognise the special relationship between nature and human beings especially among the indigenous communities and those who interact with certain aspects of the environment on a day to day basis. It is not enough for the Constitution of Kenya to place what seems like a secondary duty on every persons to merely 'cooperate' with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.[76] There is a need for active involvement of communities in these efforts. In some instances, they could even elect amongst themselves who would act like the 'legal guardians' of certain resources or natural features on behalf of the community and country in general. Article 11 of the Constitution on culture should be positively implemented and extended to utilize unique communities' cultural and traditional ecological knowledge to achieve conservation and sustainability.[77]

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[75] Elizabeth Macpherson and Felipe Clavijo Ospina, 'The Pluralism of River Rights in Aotearoa, New Zealand and Colombia' (SocArXiv 2020) <https://osf.io/preprints/socarxiv/rdh4x/> accessed 16 November 2020.

[76] Article 69(2), Constitution of Kenya 2010.

[77] 11. Culture

(1) This Constitution recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.

(2) The State shall--

(a) promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage;

(b) recognise the role of science and indigenous technologies in the development of the nation; and

(c) promote the intellectual property rights of the people of Kenya.

(3) Parliament shall enact legislation to--

(a) ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage; and

(b) recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.

The argument for "personifying" the environment would allow the law to view the guardian of the natural object as the guardian of unborn generations, as well as of the otherwise unrepresented, but distantly injured, contemporary humans.[78]

It is, however, acknowledged that legal person models are certainly context-specific, but further comparative studies of the Colombian and New Zealand models is needed to examine if and how legal personality improves river governance and state-community relationships, not just for future generations but for the entire human species.[79]

5. Conclusion

As rightly pointed out, whether nature has moral rights is likely to remain debated, but nature clearly can have legal rights, and does so in jurisdictions that have recognized, granted, or enacted them.[80]

Arguably, rights of nature may offer benefits lacking in other types of legal protection for the environment, and these nature rights can lead to a remedy when regulations fail to correct injustices.[81] This is because, majority or all of conservation laws only seek to protect the nature from destruction but do not expressly grant nature the right to exist on their own, so that if these conservation laws were to be repealed, there would be no incentive to protect the nature from destruction or overexploitation. Arguably, nature should be treated as the possessor of intrinsic values and these values are proper to the environment itself and do not depend on its usefulness or appropriation by human beings; they represent the intrinsic value of living beings and their physical underpinning.[82] The implications of this ecocentric/biocentric approach would be at least on three levels: ethical, legitimizing a debate on the values the non-human

[78] Stone, Christopher D., *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 475.
[79] Ibid, 30.
[80] Guillaume Chapron, Yaffa Epstein, José Vicente López-Bao, 'A rights revolution for nature,' Science, 1.
[81] Ibid, 2.
[82] 'The Political Ecology of Nature in the Bolivian and Ecuadorian Constitutions – Rosa Luxemburg Foundation' <https://www.rosalux.org.ec/en/the-political-ecology-of-nature-in-the-bolivian-and-ecuadorian-constitutions/> accessed 10 November 2020.

environment encompasses; moral, from which obligations such as ensuring the preservation of biodiversity are derived; and political, expressed in aspects that range from Constitutional authority to the elaboration of a new legal framework.[83]

An anthropocentric approach does not afford proper protection of natural resources as it leans towards ensuring that these resources are taken care of as a means towards satisfying the needs of humankind as opposed to protecting them from destruction based on their own intrinsic value. It is time for stakeholders to reconsider the approach taken in coming up with environmental and natural resources laws in Kenya. An ecocentric approach which would enable nature to be granted legal personality would possibly achieve better results in conserving the environmental resources. It is for this reason that there arises a need for taking an approach that strikes a balance between anthropocentrism and ecocentrism in efforts geared towards addressing the continuing environmental uncertainty in Kenya.[84] The conservation and protection of environmental and natural resources should be based on the recognition of the intrinsic values of the resources and the whole ecological system and not merely as part of securing human needs that rely on these resources for satisfaction. It is the high time that human beings recognised that they are merely a part of the larger natural system and not the fulcrum around which the system revolves as the current human beings mentality seems to suggest, at least through their actions.

[83] Ibid.

[84] Stephen Gough, William Scott and Andrew Stables, 'Beyond O'Riordan: Balancing Anthropocentrism and Ecocentrism' (2000) 9 International Research in Geographical and Environmental Education 36.

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Leaving no One Behind: A Case for the Ending of Digital Exclusion of Women for Sustainable Development in Kenya

By: ***Kibet Brian****

Abstract

Women play a critical role in the social, economic and political development of any nation. Thus, the voice and active involvement of women in all development discourses and possible panaceas to issues that bedevil the human race is paramount if their benefits are to be felt by all members of the society. Currently, social norms as well as gender inequity have led to a phenomenon where women have been excluded from the economic progress that the digital age in which we live in has yielded. This is a result of the exclusion of women from access to training on digital skills and from influencing the policies and legislations that guide Science Technology and Innovation. The policies in place do not respond to the specific needs of women that would enable them to capitalize on the infinite opportunities the digital age holds for their development activities. The result is a population that is digitally excluded.

Given that women constitute 50.3 percent of Kenyan population, according to the Kenyan Population and Housing Census Report 2019, they form the majority of the population; this work will argue that the country will only realize meaningful development that is sustainable in technology and innovation if it successfully ends the digital exclusion of women. As such, tapping the skills of women in the digital space will have a big impact in the development discourse of the nation making it more competitive in the trade dynamics of the world through its diverse and skilled human capital and resulting in more egalitarian societies within its borders and where communities enjoy a prosperous and high quality life.

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The opportunities the country can unlock for itself if it allows women into the mainstream digital discourses include; a) It leverages on the digital skills that women possess opening room for their innovation which may be groundbreaking, b) It addresses digital inequity allowing women to increase the role they play in the society through higher incomes and more productivity at the workplaces since most job opportunities currently have a digital component c) It offers women an opportunity to lead change on issues that affect them. All this can only be if the digital divide between women and the rest of the population is bridged.

It also contends that a human rights perspective view of the digital exclusion of women puts it in the same category as the now frowned upon concepts of racial segregation and other discriminatory practices. Additionally, studies have shown that women and men possess the same intellectual and innovative capacities and hence the current digital exclusion that is witnessed is not a natural one but an artificial one created by gender inequalities in the human society.

Against this backdrop, the work will strongly advocate for the bridging of the gender digital divide; the need to ensure active and meaningful participation of women in digital arena as well as the need to craft policies and legislations on the digital field that meet the specific needs of women and girls.

Key words; *Gender Digital Divide, Sustainable Development, Information Communication Technologies, Kenya*.

1. Introduction

The digital revolution is currently underway and with it will come opportunities for low and middle-income countries to diversify their economies, create new jobs, transform agriculture, and improve health and education.[1] However, a significant part of the population risks being

[1] Pathways for Prosperity Commission. (2019). The Digital Roadmap: how developing countries can get ahead. Final report of the Pathways for Prosperity Commission. Oxford, UK. Available at https://pathwayscommission.bsg.ox.ac.uk/sites/default/files/2019-11/the_digital_roadmap.pdf Accessed on 13/06/2021

left behind and may wake to a completely changed world where they will not be in a position to effectively access employment opportunities and other benefits the digital spaces may hold.[2] This is the danger women across the world face because of the gender digital divide.

Women have less income, education, time, mobility, and face religious and cultural constraints that restrict their access to, and use of, technology.[3] This results in inequitable access to digital resources, a phenomenon that has been christened the 'digital divide'.[4] The digital divide has been defined as the disparity between individuals and/or communities who can use electronic information and communication tools, such as the internet, to better the quality of their lives and those who cannot.[5]

This gender digital divide has been defined as the inequalities between men and women in the intensity of use of computer and internet connection as well as in the participation in the basic uses of the internet.[6] The United Nations has opined that women are not spectators in development but actors just like men and therefore women's participation in the digital spaces is not merely a question of justice and human rights but also a question of economic calculation, because ignoring half of humanity would not make it possible to achieve the desired sustainable

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[2] Ibid

[3] Ponge, Awuor. (2016). 'Bridging the Gender Digital Divide: Challenges in Access and Utilisation of ICTs for Development at the Devolved Level.' International Journal of Innovative Research and Development (IJIRD). 5(7):328–339 Available at https://www.researchgate.net/publication/305703050_Ponge_Awuor_2016_'Bridging_the_Gender_Digital_Divide_Challenges_in_Access_and_Utilisation_of_ICTs_for_Development_at_the_Devolved_Level'_International_Journal_of_Innovative_Research_and_Development_IJ Accessed on 14/06/2021

[4] Wambugu N. M, A Framework Towards Digital Inclusion: A case Study of Kiambu County, Kenya; A research Project submitted to the School of Computing and Informatics in partial fulfillment of the requirement for the award of Masters of Science in Information Systems of the University of Nairobi.June, 2016

[5] Salinas, R. *Addressing the digital divide through collective development*, 2003

[6] Castaño, C.; Martín, J.; Martinez, J.L. La brecha digital de género en España y Europa: Medición con indicadores compuestos. *Reis* 2011, *136*, 127–140

development.[7] As thus, bridging the digital gender divide is critical if sustainable development is to be achieved.

E-inclusion is a term that has gained prominence in the recent past when calls for bridging the digital divide gained prominence. It denotes the expanding the benefits of Information Communication and Technology to the overall population. Its endgame is to set policies and activities leading to "e-inclusive society" where every person has equal opportunities to participate, including those people who are physically, mentally, socially or economically disadvantaged and women.[8] E-inclusion is the concept this paper seeks to build on.

In an attempt to critically analyze the legal approaches taken to bridge the digital divide in Kenya, this paper conducted a desktop review of the National Information Communication Technology Policy of 2019, The National Policy on Gender and Development of 2019 and The Kenya Vision 2030 which are the policies that are in place to guide the bridging the digital divide. It also took an in depth research in the Laws of Kenya Database (As availed by the National Council for Law Reporting – known by its brand name Kenya Law) to find any statute that addresses itself to the gender digital divide.

The evaluation also took into consideration a variety of scholarly articles. Peer reviewed articles from reputable journals were considered. Theses and dissertations on the digital divide were also considered. These papers were analyzed for recurring themes and patterns which form the substance of this work.

[7] Report of the United Nations High Commissioner for Human Rights, Promotion, protection and enjoyment of human rights on the Internet: ways to bridge the gender digital divide from a human rights perspective, Available at https://undocs.org/A/HRC/35/9 Accessed on 13/06/2021

[8] Lech W. Zacher (Kozminski University, Poland), Handbook of Research on E-Government Readiness for Information and Service Exchange: Utilizing Progressive Information Communication Technologies, 2010 Available at https://www.igi-global.com/chapter/sociocultural-context-government-readiness/36472 Accessed on 14/06/2021

This work begins by discussing the causes and effects of the gender digital divide. It then gives the opportunities that have presented themselves and indicate that the time is nigh for the bridging of the gap that the gender digital divide has created. It then proceeds to give the way in which this research was conducted. It goes ahead to show how the Kenyan legal framework addresses itself to this discriminatory phenomenon. Subsequently, it enumerates the immense benefits that bridging the digital divide would yield. The gaps in the legal framework are subsequently highlighted and the nexus between bridging the digital divide and sustainable development developed. Eventually, possible legal, policy and statutory reforms that would aid in bridging the gender digital divide are put forward. It then concludes.

2. The Gender Digital Divide Overview: Causes, Effects and Opportunities

Poverty and digital illiteracy are leaving women behind as the global workforce increasingly adopts digital tools and other technologies in the core aspects of the working environment.[9] The United Nations has raised concerns that the digital divide risks becoming the new face of inequality in the world.[10] This is because the gender digital divide has resulted in a phenomenon whereby in 2017, the proportion of women who had access to the internet was lower by 12 percent compared to men.[11] This makes the digital space a "man's world".[12]

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[9] Taylor L, As technology advances, women are left behind in gender digital divide, Reuters 2018, Retrieved from https://www.reuters.com/article/us-britain-women-digital-idUSKBN1K02NT Accessed on 11/06/2021

[10] United Nations, Digital Divide 'a Matter of Life and Death' amid COVID-19 Crisis, Secretary-General Warns Virtual Meeting, Stressing Universal Connectivity Key for Health, Development, https://www.un.org/press/en/2020/sgsm20118.doc.htm Accessed on 13/06/2021

[11] Bridging the Gender Gap: Mobile Access and Usage in Low and Middle Income Countries. GSMA,2015, https://www.gsma.com/mobilefordevelopment/wp-content/uploads/2016/02/Connected-Women-Gender-Gap Accessed on 11/06/2021

[12] Robin J., John V., and Darrell M., The 2017 Brookings Financial and Digital Inclusion Project Report, Building a secure and inclusive global financial ecosystem Available at https://www.brookings.edu/research/the-2017-brookings-financial-and-digital-inclusion-project-report/ Accessed on 11/06/2021

The G20 has identified poverty and sociocultural norms that affect the access of girls and women as the main cause of the gender digital divide in the world.[13] According to them, "Socio-cultural norms fuel gender stereotypes concerning the use of technologies, and these stereotypes are often reinforced in girls' closest environment, their families".[14] This makes it hard for women and girls to cogitate on prospects of gaining digital literacy and immense opportunities such would yield to them.

Such cultural stereotypes that contribute to the gender digital divide arise where from a very young age in schools, men are described as "heads of the family" and "breadwinners" to imply those who provide while women described as "housewives" who support the home.[15] The effect is a gender stratified work space with a reduced number of women in science and digital studies oriented fields.[16]

Research by the World Wide Web Foundation suggests that women are nearly 50% less likely to access the Internet in poor, urban communities in low and middle-income countries.[17] This presents that geographical factors such as urbanization affect the ability of individuals to access technological resources. Though in such a setting, this would affect both men and women, women are at a more disadvantaged position particularly in instances where power inequalities exist between women and men.[18]

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[13] Sorgner A., Judith M. & Urvashi A.(Tandem Research) Bridging the Gender Digital Gap July 17, 2018 | Last updated: December 10, 2020 Available at https://www.g20-insights.org/policy_briefs/bridging-the-gender-digital-gap/ Accessed on 11/06/2021

[14] Ibid

[15] Dehghan, H. and Rahiminezhad, V., 2010. ICT and gender gender digital divide in IRAN. *INTED2010 Proceedings*, pp.2820-2824. Accessed on 11/06/2021

[16] Ibid

[17] World Wide Web Foundation, 'Women's Rights Online: Translating Access Into Empowerment' (2015), available at https://webfoundation.org/research/womens-rights-online-2015/ Accessed on 11/06/2021

[18] M. Zarrehparvar, 'Women's human rights in the information society', in R. F. Jorgensen (ed.), *Human Rights in the Global Information Society* (MIT Press, Cambridge, 2006)

Even in instances where access has been achieved, the gender digital divide rears its head in instances where hostile online environments exist in which conservative gender roles and negative gender stereotypes are perpetuated.[19] In these settings, women are "othered" and made to feel that their input in online discourses is unwelcome given their traditional roles as home makers. This is particularly prevalent in political discussions.[20] This inhibits the effective use of internet resources by women. This meets the test of the signs of the gender digital divide which has been defined to mean "the gap between individuals, households, businesses and geographic areas at different socio-economic levels with regard both to their opportunities to access information and communication technologies and to their use of the Internet for a wide variety of activities".[21]

Women are also confronted with a significant obstacle in their use of technological resources and particularly the internet when content relevant to them is restricted or the same is not available.[22] This is best seen in instances where sites that offer sexual and reproductive content are restricted.[23] This makes women less likely to invest their money and time in the internet since it does not contain the kind of information they

[19] N. Shephard, 'Big Data and Sexual Surveillance', Association for Progressive Communications (2016), available at https://www.apc.org/sites/default/files/BigDataSexualSurveillance_0.pdf Accessed on 11/06/2021

[20] E. Hunt, 'Julia Gillard Says Online Abuse Deters Women from Political Careers', The Guardian (12 October 2016), Available at https://www.theguardian.com/world/2016/oct/12/julia-gillard-says-online-abuse-deters-women-from-political-careers Accessed on 11/06/2021

[21] OECD. (2001). Understanding the gender digital divide. Paris: OECD, Available at http://www.oecd.org/dataoecd/38/57/1888451.pdf Accessed on 10/06/2021

[22] European Parliament, 'Information and Communication Technologies and Human Rights' (2010), available at www.europarl.europa.eu/RegData/etudes/etudes/join/2010/410207/EXPO-DROI_ET%282010%29410207_EN.pdf Accessed on 10/06/2021

[23] D. B. Holt, 'LGBTIQ Teens-Plugged in and Unfiltered: How Internet Filtering Impairs Construction of Online Communities, Identity Formation, and Access to Health Information', in: Greenblatt (ed.), *Serving LGBTIQ library and archives users: essays on outreach, service, collections and access*, (McFarland Publishers, 2010)

want to access.[24] This exacerbates the gender digital divide by increasing the gap between men and women in the use of internet resources.

Women form a huge proportion of the workforce in rural economies globally.[25] These rural economies, which as we have seen employ predominantly women, record a lower awareness and utilization of internet resources.[26] A study by the International Labor Organization found out that rural economies derive their labor from predominantly women making the women in rural areas more likely to be employed than their urban counterparts.[27] Therefore, when rural economies leverage on and exploit digital resources the benefits to women will be immense.

It has been argued that bridging the gender digital divide through ensuring access to all strata of the society is key in eliminating all existing inequalities that may exist in a given society given that in that most dominant functions in the society depend on digital avenues to function.[28] As thus, the bridging of the gender digital divide will place women at a position where they can play a more centralized role in many spheres of the human society.

The gender digital divide has a multifaceted effect on the rights of women. It has a profound impact on the rights of women to amongst others; Education, job opportunities, communication, politics, consumer satisfaction, health Information, community Involvement, government,

[24] Supra note 17

[25] Report of the United Nations High Commissioner for Human Rights, Promotion, protection and enjoyment of human rights on the Internet: ways to bridge the gender digital divide from a human rights perspective, Available at https://undocs.org/A/HRC/35/9 Accessed on 13/06/2021

[26] Smallbone, D., & North, D. (1999). Innovation and new technology in rural small and medium sized enterprises: some policy issues. *Environment and Planning C: Government and Policy*, *17*(5), 549-566

[27] International Labour Organization, Department of Statistics, February 2011, Rural Anlysis visuals available on http://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/projectdocumentation/wcms_153116.pdf Accessed on 10/06/2021

[28] Castells, M. (1996). *The rise of the network society*. Malden, Mass: Blackwell Publishers

and emergency information.[29] The digital space contains numerous online resources which can have a big impact in the dissemination of knowledge that can improve the quality of life of women across the globe.[30] The inequitable access to this reservoir of knowledge disadvantages women in access to employment opportunities.[31] This directly puts into jeopardy the right of women to access goods and services because they cannot access employment in the modern world where digital skills are prerequisites for most employment opportunities.[32]

The existence of the gender digital divide has also impacted on the possibility of women engaging in: governance through involvement in policy-making where view are sought from the people virtually; promotion of sanitation standards and increase health care provisions whereby a lot of information on health are currently found online; promotion of E-farming where farmers access support and training on current and diverse farming trends using ICT and mobile platforms; helping of establishment of a global community where people can share ideas and opinions and the promotion of local talents and job creation.[33] In light of the above, the gender digital divide has gained international attention as an emerging issue that inhibits the protection and promotion of human rights across the world and that potential ways to end the same needs to be urgently implemented.[34] There is also a global awareness that the gender digital divide exists and that it affects the contribution of women in the social, political and economic aspects of life hence the need

[29] Carmen Steele, The Impacts of Gender digital divide**,** Available at http://www.digitaldividecouncil.com/the-impacts-of-digital-divide/ Accessed on 10/06/2021

[30] Supra note 25

[31] Ibid

[32] Women and the Web Bridging the Internet gap and creating new global opportunities in low and middle-income countries, Intel Corporation,2012, Available at https://www.intel.com/content/dam/www/public/us/en/documents/pdf/women-and-the-web.pdf Accessed on 10/06/2021

[33] Supra note 4

[34]United Nations News, 2021, Don't let the gender digital divide become 'the new face of inequality': UN deputy chief, Available at https://news.un.org/en/story/2021/04/1090712 Accessed on 11/06/2021

for the same to be addressed.[35] Extensive research has also been done to seek and find answers for bridging the gender gaps in access to technology resources and how governments should respond to the gender digital divide.[36] This indicates that the time to end the gender digital divide is now since there exists a global public and institutional support for the bridging of the gender digital divide.

3. The Kenyan Legal Framework Approaches to Bridging the Gender digital divide

Kenya has adopted a policy based approach in its attempt to bridge the digital divide in the country. This section examines the policy documents; The National Information Communication Technology Policy of 2019, The National Policy on Gender and Development of 2019 and The Kenya Vision 2030 as the primary documents that guide the approaches on bridging the digital divide in Kenya. It also offers a constitutional basis for the bridging of the gender digital divide.

The Constitution of Kenya 2010 sets the tone for the bridging of the gender digital divide by firstly, enunciating the principles of equality, inclusiveness and equity as the principles and values of governance in Kenya in Article 10.[37] The effect of this provision is to place the inclusion of all persons in the Kenyan society in the spaces where social and economic aspects of life are discussed and carried out. Such a space is the digital world. The constitution goes ahead in Article 27 to provide that men and women should have an equal opportunity to access the opportunities in the social, economic and political spheres. This means

[35] Report of the United Nations High Commissioner for Human Rights, Promotion, protection and enjoyment of human rights on the Internet: ways to bridge the gender digital divide from a human rights perspective, Available at https://undocs.org/A/HRC/35/9 Accessed on 13/06/2021

[36] Pathways for Prosperity Commission. (2019). The Digital Roadmap: how developing countries can get ahead. Final report of the Pathways for Prosperity Commission. Oxford, UK. Available at https://pathwayscommission.bsg.ox.ac.uk/sites/default/files/2019-11/the_digital_roadmap.pdf Accessed on 13/06/2021

[37] The Constitution of Kenya, 2010. Available at http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010 Accessed on 28/07/2021

that no gender should appear to have monopolized any opportunities that may exist.

The National Information Communication and Technology (ICT) policy, 2019 has its mission as to "To facilitate universal access to ICT infrastructure and services all over the country".[38] The concept of universal access is to ensure that both women and men have access to the ICT technologies equally. This is the ideal that is pursued by this paper. The policy also mentions the acceleration of human development and bridging the digital divide as its guiding principles but does not go ahead to clearly outline policy measures that will effectively bridge the digital divide and bring more women to the center of the digital space.

The National Policy on Gender and Development, 2019 points put that whereas progressive provisions on bringing to end gender discrimination have been made, women still face a challenge to access some resources in the Kenyan society.[39] Such a resource is the digital resources. The policy therefore endeavors to "address the variety of manifestations of gender discrimination and inequality" in the Kenyan society by firstly, increasing the capacity in build in the society in order to transform traditional, cultural and social attitudes to enable the participation of women in science and technology to increase access to opportunities in ICT and secondly by encouraging women to participate in mathematics, science and technology as fields of study. The policy also advances that there should be identification, promotion and documentation of "good practices and lessons learned" to bridge the gender divide in the use of ICT resources.[40] However, it does not offer any tangible possible solutions to bridging the gender digital divide.

[38] National Information Communication and Technology (ICT) policy, 2019, Available at https://www.ict.go.ke/wp-content/uploads/2019/12/NATIONAL-ICT-POLICY-2019.pdf Accessed on 28/07/2021

[39] National Policy on Gender and Development, 2019 Available at http://psyg.go.ke/wp-content/uploads/2019/12/NATIONAL-POLICY-ON-GENDER-AND-DEVELOPMENT.pdf Accessed on 28/07/2021

[40] Ibid

The Kenya Vision, 2030 which is Kenya's, development blueprint aims to develop the country into middle level income country providing a high quality of life to all its citizens in a clean and secure environment by the year 2030. It identifies Information Communication and Technology as one of the enablers of the vision.[41] However it does not directly offer guidance on how the gender digital divide is to be overcome by 2030 but does so tacitly by calling for the enactment of the ICT bill which is poised to repeal the Film and Stage plays Act.[42]

Unfortunately, this ICT bill is yet to be enacted by parliament. Given that there exists no statutory framework in Kenya that lucidly provides for how the gender digital divide will be overcome, this paper envisages that this would be the most appropriate legislation that would offer a substantive guidance on the same. It would take into account the *sui generic* needs of women that would bring them on board and thus putting to an end the digital divide in Kenya. It would also bring to life the policy statements on the digital divide as discussed above.

4. Merits of Bridging the Gender digital divide in Kenya

The bridging of the digital divide will result in countless benefits. A research by the Organization for Economic Cooperation and Development found that the closing of the gender digital divide will offer a 'leapfrog' opportunity for women and their families since women will be in a position to earn additional income through increased employment opportunities resulting in the well-being of the society as a whole.[43] Given that the internet currently holds lots of information on health and sanitation, access by women is critical if they are to benefit from such knowledge resulting in a higher quality of life and a reduction of incidences of some diseases.

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[41] The Kenya Vision, 2030. More information on the vision is available at https://vision2030.go.ke/ Accessed on 28/07/2021

[42] Film and Stage lays Act Cap. 222 Available at http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20222 Accessed on 28/07/2021

[43] OECD. (2001). Understanding the gender digital divide. Paris: OECD, Available at http://www.oecd.org/dataoecd/38/57/1888451.pdf Accessed on 10/06/2021

Women provide over 43 per cent of agricultural labor in the world.[44] This percentage rises to almost fifty percent in Africa.[45] This is a considerable percentage of the labor force that could put to use the e-farming technologies resulting in higher yields in crop and livestock production. This translates to a food secure nation. However they can only leverage on the same if they are guaranteed an equal access to internet resources like their male counterparts.

Bridging the digital divide will also result in the enactment of statutes and development of policies that are responsive to the *sui generic* needs of women. Currently, public participation on governance and insights from the public on projects are sought and ought to be delivered in a digital format. The digital divide creates an artificial wall that blocks the submission of views from a considerable number of women resulting in legislations, projects and policies that do not correspond to the wishes of women, who as we have seen constitute the majority of the population. The bridging of the digital divide will remedy this unfortunate situation. The bridging of the digital divide will also help the nation attain its obligations to end discrimination of some persons on gender under the international human rights law.[46] It will also enable young girls to access educational content available on the internet thus facilitating their right to an education.

[44] Food and Agriculture Organization, The role of women in agriculture, 2011 Available at http://www.fao.org/3/am307e/am307e00.pdf Accessed on 13/06/2021

[45] Christiaensen, Luc; Demery, Lionel. 2018. Agriculture in Africa : Telling Myths from Facts. Directions in Development—Agriculture and Rural Development;. Washington, DC: World Bank. Available at https://openknowledge.worldbank.org/handle/10986/28543 Accessed on 13/06/2021

[46]United Nations, Digital Divide 'a Matter of Life and Death' amid COVID-19 Crisis, Secretary-General Warns Virtual Meeting, Stressing Universal Connectivity Key for Health, Development, https://www.un.org/press/en/2020/sgsm20118.doc.htm Accessed on 13/06/2021

5. The Link between Bridging the gender digital divide and Sustainable Development Goals

Sustainable development goals which are also referred to as the global goals refers to a set of goals adopted by the United Nations in 2015 as a universal call to action to end poverty, protect the planet, and ensure that by 2030 all people enjoy peace and prosperity in the world.[47] One of the goals they seek to achieve is to end the discrimination of women and girls across the globe.[48]

Goal number five of the Sustainable Development goals is gender equality.[49] The endgame of this goal is to bring onboard women and girls into the spaces that influence decision making in the social, economic and political arenas since it's proven that empowering women and girls helps economic growth and development.[50] The goal sets out targets for the achievement of this goal of which three can only be attained if the digital divide is bridged.

The targets are; Ensure women's full and effective participation and equal opportunities for leadership at all levels of decision making in political, economic and public life, Enhance the use of enabling technology, in particular information and communications technology, to promote the empowerment of women and to Adopt and strengthen sound policies and enforceable legislation for the promotion of gender equality and the empowerment of all women and girls at all levels.[51]

The United Nations has pointed out that the existence of the gender digital divide because of lack of access and inappropriate use of technologies slows down the attainment of sustainable development. This is brought to the fore given the central role currently played by technologies in the production, distribution and consumption of goods and services the world

[47] United Nations, Department of Social and Economic Affairs, Information Page, Available at https://sdgs.un.org/goals Accessed on 13/06/2021
[48] Ibid
[49] Sustainable Develiopment Goal Number five is Gender Equality. More information on the goal is available at https://unric.org/en/sdg-5/ Accessed on 28/07/2021
[50] Ibid
[51] Ibid

over. This means that access to digital technology is one of the basics that enable one to enjoy the benefits envisioned by the sustainable development goals. Therefore, access to Information Communication Technologies is critical in the achievement of the sustainable development goals.

The endgame of the sustainable development goals is to ensure that any development that occurs is; development that meets the needs of the present without compromising the ability of future generations to meet their own needs.[52] As discussed, this can only be attained through the closing of the gap in the access of digital resources between women and men. It is noteworthy that the Kenyan constitution recognizes sustainable development as one of the values and principles of governance in Article 10 hence any actions that are taken by the government to bridge the digital divide brings to life this value that is imbued by the constitution.

6. Bridging the Gender digital divide in Kenya: Potential Reforms

Parliament should fast track the enactment of the Information Communication and Technology Bill as contemplated by the Kenya vision 2030. This work prospects that this statute will bring to life the constitutional right to freedom from discrimination based on gender in the digital divide. It will also provide for the ways in which Kenya would close the gap on the digital divide. It also offers an opportunity for e-inclusion of women as it would guide and bind government agencies to ensure women are involved in any technological access programs they are involved in.

A standalone policy on the digital divide needs to be developed so that it can offer a framework for the inclusion of women in the digital space. Perhaps this policy will demystify what the National Policy on Gender and Development, 2019 envisioned by calling for the 'Identification, promotion and documentation of good practices and lessons learned to bridge the gender divide in the use of ICT'. This new policy would

[52] Brundtland, G.H. (1987) Our Common Future: Report of the World Commission on Environment and Development. Geneva, UN-Document A/42/427. (The Brundtland Commission Report.)

underscore the importance of the same and offer concrete steps on how to bridge the gender digital divide.

This study recommends that academia and particularly in the legal field needs to research more on the gender digital divide and potential legal solutions to it in the African setting. This is because there exist very few theses and dissertations that explore the gendered digital divide from Kenyan law schools. Arguably most of those that exist are authored by non-Africans in non-African contexts and thereby apply in the western settings. This inadequacy of academic treatises hampers the steps that can be taken to address the digital divide since there is a limited scope of ideas that can help to bridge the digital divide and even where they exist, they have been curated for western scenarios.

The private sector also needs to come in and provide women particularly in rural settings with on-the-job training and apprenticeship programs that would contribute to skills upgrading across the economy. This is because the private sector is known to be an active player in the digital space and hence should play a critical role in ensuring the broadening of access to digital spaces by all in the society.

7. Conclusion

This paper has discussed the causes, effects and opportunities for action of the gender digital divide. It has broadly examined the legal framework that seeks to bridge this digital divide gap and highlighted the weaknesses in the legal framework. It has gone ahead to recommend possible reforms to the legal framework. It has also informed itself that sustainable development can only be attained if the gender digital divide is bridged and therefore calls on all nations to consider developing methodologies of bridging the gender digital divide.

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East Africa Community's' Response to Burundi Crisis: A Case for Formulation of an Intervention Policy

By: ***Henry Kinyanjui Murigi****

This paper is centred on the view that the East Africa community (EAC) has the framework for states to collectively agree on when to intervene in the domestic affairs of another state while ensuring that intervening states remain neutral toward competing domestic powers in the subject state. This paper considers Burundi to offer context and proposes various types of intervention and possible prevention. The paper is addressed to the East Africa Community (EAC) and more specifically East Africa Legislative Assembly and Summit. The paper considers the applicability of the provision of the treaty on the East Africa Community on peace and security. The paper proposes that states should enhance peaceful coexistence by adopting a policy on intervention when the situations demand. Drawing from the conflict in Burundi and the response of the EAC, the paper proffers recommendation that could be employed to enhance peace and security in Community.

Introduction

The East Africa Community treaty governs the behavior of states in matters Customs Union, Common Markets and Monetary Union Community as contained in Article 5 of the East Africa Community Treaty[1]. It is anticipated that these three aspects will produce a united federation of East Africa. Under these three aspects it is hoped that the EAC will achieve political union by way of a federation. The political union is anticipated to promote peaceful coexistence between the countries. Article 6 of the treaty provides for the fundamental principles that are to guide the transactions of the Community. These fundamental principles that govern the achievement of the objectives of the Community by the Partner States shall include: first, mutual trust,

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[1] The treaty generally captures the specific objectives on how to deal with the relations of States within the Community

political will, and sovereign equality. Second, peaceful co-existence and good neighborliness and third peaceful settlement of dispute. There are no direct policies that have been formulated to ensure that these principles are given effect.

With the foregoing in mind, there has been a crisis in Burundi that has not been addressed adequately. The East Africa Community (EAC) has arguably been silent on this issue. There has been very little effective resolution of the peace and security situation in Burundi. At the moment the perception is that violence and hostilities have ceased in Burundi. However, the systemic problems still persist. The role of regional organizations such as EAC is to ensure integration within the region. Integration contributes greatly to peace and security of a region. What becomes clear when integration is achieved is that there will be peaceful coexistence. It is not clear what is meant by peaceful coexistence. This is because there is also very little agreement on the breadth and strands of peace. This is irrespective of whether the consideration is based on (Galtung 1977) or (Boulding, 1978) peace models. The idea of this paper is to propose an interventionist approach to avert a crisis or relapse into violence. The assumption is that the ideals of the EAC treaty are not merely statements of good intent with no actual effort to realize them. The interventionist model should be placed in the legislation of EAC and passed by the states to avert a crisis in light of the Burundi and Rwandan history.

Brief History

The East African Community (EAC) is regional intergovernmental organization comprised of six (6) States in the African Great Lakes region in Eastern Africa. The States are Kenya, Rwanda, Burundi, South Sudan, Tanzania, and Uganda. President Paul Kagame of Rwanda is the current Chairman of EAC heads of state. The organization was founded in 1967 (Mugomba, 1978). However, there was a momentary collapse of the organization in 1977, and pursuant to renewed and continuous efforts of the Presidents of Kenya, Uganda and Tanzania it was revived in 2000 (Mugomba, 1978). Burundi and Rwanda later joined the federation after it became apparent that there was a need to

foster a regional cooperation. According to (Sullivan 2005) Burundi has been ravaged by a history violent outbreak, often consisting of Hutu rebel attacks followed reaction of the Tutsi military forces (1965, 1972, 1988, and 1993). He argues that such outbreak took place in the 1972 genocide, an important and reference point for Burundians in which between 2,000 and 200,000 Hutu were killed, while another Hutu fled the country. He contends that another outbreak of violence in 1988, fuelled largely by rumours showing tendencies of a 'new 1972', which led to the killing of several hundred Tutsi by Hutu in response the killing of as many as 20,000 Hutu by the Tutsi.

This violence brought great international pressure to bear on President of Burundi, who had just risen to power in a bloodless political struggle. President Buyoya responded with extensive reforms, which culminated in legislative and presidential elections in 1993, for which registered voters turned out. President Buyoya accepted the results peacefully and the initial transition smoothly, despite student protests and two little-supported attempts shortly before the election by extremists in the Tutsi-military. With this history in mind, and subsequent developments in states such as Uganda, Rwanda, Kenya and Tanzania it is apparent that peace and stability is integral to the integration process. It must be addressed through mechanism such as intervention by the community. There is no policy framework that can be used to show the intent of EAC to bring about peaceful coexistence. On 20th May, 2017, the EAC Heads of State adopted the Political Confederation as a transitional model that would eventually lead to the East African Political Federation.[2]

Existing Policy Gap

As stated in EAC's founding Treaty, Article 5(1), the objective of the Community is to develop policies and programs aimed at "widening and deepening cooperation among Partner States in political, economic, social and cultural fields, research and technology, defense, security and legal and judicial affairs for mutual benefit". The goal thus is to ensure that public goods are achieved which cannot be provided by individual member states. Organizations like COMESA, SADC and ECOWAS do

[2] Information gathered from https://www.eac.int/political-federation

not have a provision for political union in their founding treaties yet they are more advanced in their strategies and operations and have a broader appreciation of security. To foster these deeper commitment and cooperation, there a clear need for the EAC to come up with a policy framework that touches on the integration process. The policy should ensure that there is peace and security with the states in the Region. The lack of peace and security policy gets in the way of the integration of the region hence a clear need for a policy that will address the gap created under the treaty regime.

According to Wanyama Masinde and Christopher Otieno Omolo (2017 effective and deeper integration in the EAC is greatly inhibited by the insecurity and political instability in the region. Each of the five Member States, with the exception of Tanzania, has experienced at least one ethnic or civil conflict in the last two decades and each of the states is neighbored by at least one country experiencing one conflict or another. In this regard these unfortunate incidences in the state creates a common ground for formulation of common policy. Security is indeed a public good that the nation-states have not been able to provide individually, and for which can be easily achieved through collective efforts such as policy formulation initiative.

Little attention has been paid to the actions and activities of neighbouring States in the literature on internal conflicts. The regional subtleties and the international breadths of internal conflict are poorly understood and illustrated. The emphasis is usually on the effects posed by the overflow effect, rather than understanding the underlying motivations of external intervention and the effects that can be introduced by level and kind of assistance from the regional organisation. External factors can powerfully shape the peace building processes and outcomes and the outcomes. Although there is useful purpose for external actors to intervene, such activities complicate matters and may cause the situation to escalate into violent inter-communal conflict. A classic example in EAC is the delicate handling of the case of Burundi.

The purpose of any regional organization can be discerned from the conceptualizing documents such as treaties or agreements. The treaty of East African Community 2000 is the foundational legal instrument establishing the organization. (Binda 2017) argues that the man reason for the existence of the East African Community (EAC) as an intergovernmental organization is not stated verbatim (word for word) in the Treaty unlike the European Union where the powers of the supranational organization are spelt out with clarity so as to be separate and contrast propensity of the Member States to belong. The idea is very different in the EAC the situation and he argues that it is quite hazy. The main reason for existence for EAC can rather be implied from the objectives of the Community as broadly set in Article 5 of the Treaty. With this conceptual difficulty, one would expect that clarity on its operation would be attained from several policies and regulations as passed from time to time.

(Williams and Boutellis 2014) argue that restructuring the institutional and organizational dimension of Africa's regional security cooperation ensures structural coherence. This is more so under 'the principle of equitable regional representation and rotation'. They argue that this may necessitates pressuring states to improve their governance credentials in order to qualify for admission in the reconstituted Regional Organizations, consistent with the Constitute Act of the AU, the PSC Protocol, and other good governance conventions. The intermediate goals of EAC are Customs Union, Common Markets and Monetary Union which will ultimately lead to Political Union. Peaceful coexistence and neighborhood put in (Galtung, 1969) lenses would effectively include social justice initiatives such as peace building which would arguably be viewed by critics as interference with society

The ultimate goal of EAC is a political Federation based on Regional Integration. Under Article 5(2) of the Treaty for the Establishment of the East African Community creates the main goals of the community to consist of three pillars namely common foreign and security policies, good governance and effective implementation of the prior stages of Regional Integration. Attaining the status of a Political Federation is a

process and not an event. According to the EAC website[3], though the process of federation formation has been slow, the EAC Heads of State resolved at a Special Summit held in Nairobi on 29 August 2004 to underscore several means and strategies for deepening and fast-tracking the process through an accelerated consultative Mechanism.

Peace building is a broad phenomenon. It operates within different prisms including regional organisations. This adopts the reasoning by Johan Galtung on the idea of peace. The idea of regionalism has been subject of interest in the international political economy literature, but regionalism as related to international politics and peace and security matters is often associated with neorealist scholars (Lamy 2008: 126) with their state-centric interpretation of regional integration. Bachmann, O. (2011) attempted to define regionalism as "idea, ideology, policies and goals that seek to transform a geographical area into a clearly identified social space. (It) also relates to the construction of an identity and carries as a result, a strong cognitive component." From the foregoing it is clear that the social space of the region is at the centre of focus in peace building in the region. Isiaka A. Badmus, (2015) argues that neorealist perspectives on regionalism are based on the assumption of the existence of regional security threats that need to be confronted by regional hegemon(s) for the stability of the region. He further suggests that since neorealism is supported greatly by the state centric representations of regional integration, it assumes that states are the primary actors in international relations and enter into security cooperation as a strategy to counter external security threats.

According to (Badmus, 2015) the neo-realists, regionalism in the state's calculation is a useful political tool to achieve its national interests and maximise power. Therefore, since international politics is characterised by the states' struggles for power, prestige and wealth in a competitive international system and amid conditions of global anarchy, states are motivated to join regionalist projects because of the benefits, either in term of relative or absolute gains, that they expect to derive from such projects. The existence of security complexes, regional hegemons may

[3] Visited on Sunday 17th March 2019 at 1530hrs

assume the role of security provider or guarantor, and hence control regional stability and order. The idea of the regional organisation seeks to balance the power of the hegemon so that there is a clear policy that at the minimum will be respected. Although the regional hegemon may also provide "protection" from assumed security threats, this inevitably demonstrates the power asymmetries since the less powerful states in any regional may have to accept subordinate roles. The balance of power envisaged in a region such as EAC ensure that states are maintain peace and stability. The process of integration that has been envisioned by EAC together with the objectives that are set can only be compared to a community that seeks to be a regional block. It arguably takes after the model of the European Union and has adopted the EU's institutional framework which is considerably highly institutionalized. This include the EALA (legislature) and also EAC Court of Appeal (judicial mechanism) among others. This set up is ideally ambitious and requires deeper commitment financially and consistent political good will by the member states.

On the international relations front the goal of the EAC was and still remains to establish common foreign and security policies to safeguard the common values, fundamental interests, and independence of the Community through strengthening the security of the Community and its Partner States. In addition, the goal on peace and security Fostering and maintaining a conducive atmosphere that is a pre-requisite to social and economic development through co-operation and consultations on issues pertaining to peace and security of the Partner States. The phenomenon of regionalism provides a useful analytical framework to study Africa's efforts in maintaining regional security.

There has been a great push by scholars to have African solution to African problems. (**Okello, S. 2016)**, argue that there should be an approach that adopts African Solution for Peace and Security (AfSol), Try Africa First, Community self-help groups are the major themes and Do it yourself ideas. This is applicable to the EAC as well. (Munene 2015) argues that without external interference each EAC state has tried to become viable and acceptable to its people and have concentrated on

peace, meaning law and order at the expense of maintaining generic peace. In the process of maintaining the peace the idea of state ran into friction with the idea of nation within the states who refused to identify with the state.

Policy Issue

The East African Community has been a key player in attempts to resolve the ongoing instability in Burundi since 2004. Although EAC recognized at an early stage that a crisis was looming, it took a long duration for action to be taken at the highest level and as such it could not be to affect key aspects of the crisis, for instance the contested elections in June and July 2015 (Bar, 2018). There was a coup attempt in May 2015, as EAC heads of state were discussing the crisis at an EAC summit in Dar-es Salaam. This made the splits worse of since it took an angle that introduced division along political lines between the member states and undermined a coherent stance and policies on Burundi. This effectively means that the existing policies were not sufficient to address situation in Burundi or that there was no effective way of determining an appropriate peace and security initiative towards the crisis. The initiative that would arguably be considered as most successful of EAC's intervention was the call for a dialogue between key Burundian political parties although this came up almost two years after it was first mooted. The results of this initiative may not be quantified.

Can states intervene on the basis of peace and security in East Africa? To answer this question, one must encounter issues of state sovereignty. State sovereignty is a serious international law issue that introduces areas of the limitations for Regional Organization to interfere (intervene) with a state such as Burundi. There has to be an apparent overt violation of human rights or violence that demands bypassing State sovereignty. Initially, the EAC had no clear position on the question of a third term for President Nkurunziza beyond the principle of encouraging the continued stability of Burundi in respect of the basic texts contained in The Constitution of Burundi. Taking these considerations into account would require, *de-facto,* a diplomatic appeal to President Nkurunziza to forego or abandon desire to insist on a third term. However, there was a failure

to do so and as such there were serious violation of human rights leading to deaths and crisis. The situation in Burundi cannot be understood without a context. The cultural and perceptual factors, in the Burundian context, emphasis must be placed on the gradual erosion of national cultural and ethical values due to the "invasion of foreign ways and value systems.

Policy Formulation

The starting point of a peace and security intervention policy is the idea that most of the knowledge needed to fully achieve peace must be produced through a participatory and deliberative process involving all local and external actors. The peace and security intervention approach can be utilized to specifically identify and build on the embedded local knowledge. At the same time, a peace and security intervention approach build on local values and the "sense of community". This type of locally embedded social capital helps to overcome free-rider problems in the pursuit of development activities. Openness to outside values prevents the sense of community from degenerating into communitarian confinement.

What therefore emerges from this debate is the need to make policies more capable to respond to today's challenges, and thus, more effective and efficient than past intervention. The peace and security intervention policy implies that this can only be achieved by trying to make growth and development intervention more "place-aware" by taking into consideration the sheer variety of factors in diverse geographical locations that may affect the potential returns of intervention. Participation of women in peace building is justified.

The East Africa Community should formulate a policy for intervening in other states' domestic affairs. Some policies can be more robust than we generally acknowledge, such as a general agreement that states cannot cross the borders of another state. The community might agree that states would intervene to prevent genocide for example. To prevent political collapse through deterrence preventive diplomacy can work. However, it is common ground that states often ignore early warnings. That EAC can intervene in states' domestic affairs without necessarily supporting a

particular regime or its opponents. The very goal of peace means that the intervening state, or group of states, is taking sides in the conflict. This should be delicately handled to ensure that conflict is averted, peace is generated, and security is guaranteed.

Policy Recommendations

The policy would encompass several dimensions. First, humanitarian efforts by delivery of food supplies, medical care, or other provision of basic human needs in a non-threatening environment which can also encompass certain elements of nation-building if the context is benign. Secondly, the EAC should come up with special peace keeping forces. Peacekeeping by use of military personnel to observe and monitor peace situations, cease-fires, and boundary accords. EAC could come up with peace-keeping military as a neutral character, used to carry only light firearms, and operate under strict rules of engagement prohibiting them from engaging in hostilities except in self-defence.

Thirdly, peacebuilding by going beyond mere provision of food and medicine to the actual reconstruction of institutions and infrastructure within a target country in a violent or hostile atmosphere such as Burundi. Although this may not be employed on its own it may be used in conjunction with peacekeeping. Lastly, peacekeeping by the use of EAC forces to control and limit the scope of violence without taking sides to protect humanitarian efforts against military or criminal activity. Such actions are protective engagements that seek to contribute to peace and stability. The Summit of Heads of State should endorse the road map for an exit strategy to the crisis proposed by the team of facilitators and make provision for binding measures to ensure implementation and, where required, impose sanctions against those obstructing its implementation.

Women form the base for any society and in East Africa Community. Even though there is a youth Policy that addresses peace and security of the region there are additional dimensions that must be captured in the women empowerment front. The main objective of the policy is to ensure that women participation in political processes and peace building for political, social and economic stability of the East African Community.

States should ensure that the following is done. First, strengthen the capacity of women organizations in peace building, conflict prevention and conflict resolution through the promotion of intercultural learning, civic education, tolerance, human rights education and democracy, mutual respect for cultural, ethnic and religious diversity, the importance of dialogue and cooperation, responsibility, solidarity and international cooperation. Secondly, institute mechanisms to promote a culture of peace and tolerance amongst women that discourages participation in acts of violence, terrorism, xenophobia, racial discrimination, gender-based discrimination, foreign occupation and trafficking in arms and drugs.

This paper also suggests that there should be discussions on peaceful coexistence with a view to establish a treaty that would foster this peaceful coexistence. This could include humanitarian intervention efforts to offer food, among others.

Conclusion

This intervention approach presupposes that the states have both the information and knowledge to design, implement, and monitor the most adequate development strategies through either monetary policies, fiscal policies, or institutional intervention. The peace and security interventions are alternative pathways to development, which require attention to detail and the institutional context. In contrast, by acknowledging the limits of the central state to design good local development policies, peace and security intervention strategies recognize the need for peaceful coexistence based on partnerships between different levels of governance, both as a means of nation building and also of identifying and building peaceful neighborhood.

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A Critical Analysis of the Human Rights Approach in Environmental Management in Kenya

By: ***Doreen Olembo****

Human rights are the basic rights and freedoms that belong to every person in the world, from birth until death, based on universal values such as equality, fairness, dignity, fairness, respect and independence. [1] Applied to all regardless of origin of person, their beliefs or choice, they cannot be taken away but can be limited for security purposes and where the person breaks the law.[2]

At the international level, the Universal Declaration of Human Rights[3] was the principal instrument which charted the way forward for the recognition of the various generation of rights enshrined in subsequent rights instruments such as The International Covenant on Civil and Political Rights (ICCPR)[4], The International Covenant On Economic Social And Cultural Rights (ICESCR**)** [5] **,** The United Nations Convention on the Rights of the Child (CRC)[6], The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)[7], and regional rights chapters like The African Charter on People's and Human Rights (ACPHR) [8]**.**

Under a rights-based approach, donors may support duty-bearer efforts to fulfil their human rights obligations or promote the legal rights and legal

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[1]Equality And Human Rights Commission, What is the Universal Declaration of Human Rights?; https://www.equalityhumanrights.com/en/what-are-human-rights/what-universal-declaration-human-rights
[2] ibid
[3] https://www.un.org/en/about-us/universal-declaration-of-human-rights
[4] https://www.ohchr.org/
[5] https://www.ohchr.org/
[6] https://www.ohchr.org/
[7] https://www.ohchr.org/
[8] https://www.achpr.org/

capacity building of under-priviledged victims of right violations[9]. Promoting Legal empowerment programmes to defend the weak enhances accountability, reduces stigma and discrimination and contribute to altering unjust structures and systems.[10]

The journey to secure environmental rights to benefit all in Kenya has been long. Previously, the government followed a strict Command and Control management style limiting participatory conservation and requiring alternative or additional environmental management styles[11]. However, persistent activism has seen the gradual elevation of public participation through a rights-based agitation approach.[12] Significant efforts include the *Hirola and Ogiek* cases (cited hereafter), *Friends of Lake Turkana, Friends of Lake Bogoria, Friends of Lake Naivasha* and *Green Peace* initiatives, among others.

The following section captures a few instances in which the human rights approach for environment matters has been applied in Kenya, challenges in adopting a rights based route and the way forward.

9 Morten Broberg & Hans-Otto Sano (2018) Strengths and weaknesses in a human rights-based approach to international development – an analysis of a rights-based approach to development assistance based on practical experiences, The International Journal of Human Rights, 22:5, 664-680, DOI: 10.1080/13642987.2017.1408591

[10]Gruskin S, Safreed-Harmon K, Ezer T, Gathumbi A, Cohen J, Kameri-Mbote P. Access to justice: evaluating law, health and human rights programmes in Kenya. J Int AIDS Soc. 2013 Nov 13;16(3 Suppl 2):18726. doi: 10.7448/IAS.16.3.18726. PMID: 24242267; PMCID: PMC3833108; https://pubmed.ncbi.nlm.nih.gov/24242267/

11 Odhiambo Japheth, Using corporate governance as a tool to ensure compliance with constitutional environmental rights in Kenya (LLM thesis); University of Nairobi; http://erepository.uonbi.ac.ke:8080/xmlui/handle/123456789/14908

[12] Human Rights Watch, Save Lamu and Lamu Youth Alliance "They Just Want to Silence Us" Abuses Against Environmental Activists at Kenya's Coast Region December 17, 2018; available at https://www.hrw.org/report/2018/12/17/they-just-want-silence-us/abuses-against-environmental-activists-kenyas-coast;

1. A Recent Key Case Law - The Owino-Uhuru case KM & 9 others v Attorney General & 7 others[2020] eKLR[13]:

This intriguing case was filed at the Mombasa Environmental and Land Court. The key Petitioner, *Centre for Justice Governance and Environmental Action* suing on behalf of themselves and other Petitioners demonstrated among other things, how a human's rights based approach can be used to stress the need for proper environmental care.

The other Petitioners included village residents of *Kwale,* who lived near a lead processing plant. In spite of several complaints to the national and county government offices responsible for overseeing proper environmental safeguards around the plant, no serious action was taken and the residents continued to suffer from pollution related ailments.

The court found that the Respondents were complicit in abetting environmental pollution, resulting in grave public health concerns and environmental degradation. These included Evident from the constitutional provisions stated, this is an environmental landmark case in Kenya's current constitutional era. A number of rights and environmental Principles were invoked and duty bearers charged with responsibility as follows:

1.1 Laws and Rights Invoked

A class of rights invoked include fundamental freedom principles and rights, socio-economic rights, principles of inter-generational equity and Sustainable Development, and regional and international co-operation on enforcement of human and environmental rights.

These rights included Enforcement Of The Bill Of Rights Under Articles 22(1) (2) (C) 23, 70, 162, 165(3) (B) And 258 of The Constitution Of Kenya (*enforcement of rights violated or infringed through court proceedings*) Alleged contravention of Articles 2(1) (5) (6), Kenya 10, 19(1) (2) (3), 20(1), (2), 21(1), (3), (4), 26, 35(1), (3), 42, 43(A) (D), 69(1)9d) (F), (G), (2) and 70 of The Constitution of Kenya *(on the supremacy of the Constitution and other laws in the protection of the*

[13]Petition 1 of 2016 Kenya Law Reports

environment); alleged contravention of Articles 12(1), (2) (A) (B) of The International Covenant On Economic Social And Cultural Rights (ICESCR) *(respect for international obligations on the protection of socio-economic and cultural rights important in ensuring a clean and healthy environment)*; alleged contravention of Article 24(2) of The Convention Of The Rights Of The Child (CRC) (*safeguarding inter-generational human and environmental rights*); alleged contravention of The Basel Convention and Technical Guidelines For The Environmentally Sound Management of Waste Lead-Acid Batteries (*regard for international obligations on controlling hazardous waste harmful to the environment*); alleged contravention of Articles 16 and 24 of The African Charter On Human And People's Rights (ACHPR) (*regional provisions on co-operation for the protection of the environment as human rights*);alleged contravention of Articles 111 of The Treaty For The Establishment of The East Africa Community (EAC) (*regional co-operation in the management of the environment*).

Sections 58 and 68 of The Environmental Management And Coordination Act Chapter 387 of The Laws Of Kenya (The Environmental Management And Coordination (Environmental Impact Assessment/Environmental Audit) Regulations of 2003 *(requirements of an Environmental Impact Assessment)*; Environmental Management and Coordination (Water Quality) Regulations of 2006 (*maintaining safe water quality standards*); Sections 24, 36 and The Second Schedule of The Physical Planning Chapters 286 of The Laws Of Kenya *(proper physical planning to minimize environmental hazards within residential areas)*; Public Health Act Chapter 252 of The Laws of Kenya (*protection of the human health as a human right*); and Section 23(2) (C) of The Export Processing Zones Act Chapter 517 Of The Laws Of Kenya (*duty to ensure that EPZ enterprises abide by all required zoning and environmental laws)*.

1.2 Duty Bearers responsible

The *Honourable Attorney General* was tasked with properly guiding the government on all national and delegated legal requirements in the subject matter for government's positive compliance). *The Cabinet Secretary in the Ministry of Environment, Water and Natural Resources* was to have provided guidelines for the relevant application of sound

environmental management rules pertaining to the business activities in question and enforcement of the same when disregarded. The *Cabinet Secretary, Ministry of Health* was required to have addressed any public health concerns swiftly and adeptly, *National Environment Management Authority (NEMA)* was mandated to continually supervise Environmental Impact Assessment and subsequent activities around the business interests of the offending parties and penalize any breaches of domestic and international laws which turned out to be hazardous to the social and they physical environment, including revoking issued permits and make restoration orders. The *County Government of Mombasa* as the host government unit had a duty to ensure compliance with environmental laws considering prudent local physical planning for its own sake and on behalf of the national government. The *Export Processing Zones Authority*, *Metal Refinery (EPZ) Limited*, and *Penguin Paper and Book Company* as the offending parties chose to pay no attention to or act in contempt of the environmental laws brought to their attention, court orders and to adequately compensate victims of their violations.

For non-action or insufficient responses towards the complaints raised by victims of the pollution, the Respondents bore the costs of the suit according to liability.

1.3 Penalties under domestic and International Environmental Law rules

The record compensation for damages of USD 12M was based on the Polluter Pays Principle[14]. The need for co-operation for environmental conservation at domestic and international level was confirmed by the court's punishment in shared costs by all the Respondent institutions which ought to have practiced a reasonable standard and duty of care to prevent the hazardous pollution of the environment as highlighted in the case, but did not.

[14] Organization for Economic Cooperation and Development (OECD**)** Guiding Principles concerning International Economic Aspects of Environmental Policies (1972)

For the environment's good, the Court gave orders for the restoration of the said environment, and the implementation of appropriate regulations to avoid and minimize further degradation.

This case exemplifies how a rights-based if well employed can provide a strong base for environmental justice.

2. Constitution and Statute Law

Noteworthy strides have been made in distinguishing environmental rights, claims and obligations in laws and institutions in Kenya.

For instance, under article 35 of the Constitution of Kenya on *Access to Information*, awareness of environmental protection and conservation is steadily rising in institutions of learning and education is an increased effort to involve the citizenry in good management. Concepts such as renewable energy, effective waste disposal, preservation of sensitive ecosystems, and individual responsibility are part of the education curriculum at all levels.

Under A.35 on right to information, *Employment of EITI* - Extractive Industry Transparency Initiative (EITI), founded in 2003 with the goal of strengthening governance by increasing transparency over revenues from the oil, gas, and mining sectors, encourages international best practices in the different levels of implementation, and also requires players to disclose information about their earnings from natural resources [15]. Currently, government contracts previously protected by Secrecy Acts and confidential clauses are limited by the *Kenya Treaties and Ratification Act (2012).*

Under article 48 on *Access to Justice*, environmental justice activism of is developing in the courts and within the public sector. Cases like the *Green Belt Movement v Republic* - under Prof. *Wangari Maathai* saw the emergence of public environmental activism in Kenya.

Whereas the question of *locus standi* arose in this case and the case was quashed by the High Court's reasoning that only a person directly affected by an environmental harm could have *locus standi* in

[15]http://www.osisa.org/other/global/existing-legal-and-institutional-framework

environmental litigation claims, public awareness and outcry thereafter bore fruit and the intended building of a highrise structure by the government in the city's largest recreational public park was stopped. The seeds of current environmental activism were sown which later saw the scope of *locus standi* broadened in the new Constitution promulgated in 2010 and inclusion of the same in the various environmental sector Acts and regulations. *Friends of Lake Turkana, Friends of Lake Naivasha, Save Lamu* and *Green Peace* are other examples of environmental activists.

The role of Courts and other arbitral tribunals in enhancing environmental rights has been recognized with mandates for the resolution of disputes surrounding the environment to be addressed under rules of natural justice, access to justice and right to fair trial. This has paved way for the resolution of the disputes in the Environment and Land (ELC) Court (High Court), Magistrate courts, National Land Commission Tribunal, and NEMA Tribunal, among other institutions.

Under article 159 the Constitution has provided *Principles of Justice* by which dispute resolutions may abide to encourage speedy, fair and just trials, as well as promote the use of Alternative Dispute Resolution under common law and traditional dispute resolution rules. The Environment and Land Court was establish to expedite claims and matters raised under A.42 (right to a clean and healthy environment) and A.43 (socio-economic rights) with regard to environmental protection and the socio-economic rights related to the realization of a clean and healthy environment.

Under A.41 on *Fair labour* practices, considering that a majority of labourers work in agriculture and related environment sectors, the Constitution provides for fair labour terms rooting for certainty in contractual terms, occupational safety and reasonable remuneration terms.

Articles 42 and 43 and section s. 36 of EMCA strengthen NEMA's role via a National Environmental Action Plan which sets out guidelines for the integration of standards of environmental protection into development planning and management. It is a requirement that development planning

must factor environmental safety needs to promote socio-economic rights.Section.31 of EMCA establishes a Public Complaints Committee (NEMA) where such disgruntlements with the way the environment is managed will be channelled.

Devolution in state management under Chapter Eleven of the Constitution has seen the inclusion of county governments being participators in sustainable development. Communities are involved in public participation processes during awareness campaigns and Environmental Impact Assessment activities. A multi-sectoral cooperation, particularly at the decentralised district levels, which are the focal points of service delivery and support to sustainable community management of natural resources.[16]

Article 10 acknowledges the Principle of Sustainable Development (SD) protecting present and future generations' human and environmental rights through inter and intra- generational equity, which is critical in ensuring that resources are managed in a sustainable manner. SD means development that meets the needs of the present generation without compromising the ability of future generations to meet their needs by maintaining the carrying capacity of the supporting ecosystems[17]. Further it provides that rule of law and governance are part of national values.

In the area of natural resource management, Governance is a key mechanism of enforcing human rights through Environmental Justice.
The sub- section below briefly shows how Governance Principles have been applied to manage the environment in Kenya.

2.1 Human Rights in the Governance of the Natural Resources Sector in Kenya and the Region

Serious environmental disputes arise from the inequitable sharing of natural resources. The poor exploitation methods which degrade the environment and human health also create a clamour for the recognition of various human rights.

[16] Denmark in Kenya: Natural Resources Management in Kenya, available at http://kenya.um.dk/en/danida-en/nrm/ accessed 10/07/2016
[17] S. 3 EMCA

Governance is a key component of article10 of the Constitution of Kenya, premised with rule of law, democracy, principles of sustainable development, inclusivity, transparency, public participation, principles of among others. The promotion of good governance in the management of natural and human resources in the environment are crucial in ensuring sharing of salient information, equitable sharing of resources and public participation during key decision making processes by the state

Governance provides a mechanism for increased accountability to the body of human rights and environmental justice.The Business Dictionary defines governance as

> *"Establishment of policies, and continuous monitoring of their proper implementation, by the members of the governing body of an organization. It includes the mechanisms required to balance the powers of the members (with the associated accountability), and their primary duty of enhancing the prosperity and viability of the organization".*[18]

The concept of "governance" is not new but it is as old as human civilization.[19] Governance can be used in several contexts such as corporate governance, international governance, national governance and local governance.[20]

Principles of good governance include 8 major characteristics.[21] It is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law[22]. It assures that corruption is minimized, the views of minorities are taken into account and that the voices of the most vulnerable in society

[18]http://www.businessdictionary.com/definition/governance.html
[19] UN Economic and Social Commission for Asia and Pacific: What is Good Governance?; http://www.unescap.org/sites/default/files/good-governance.pdf accessed 10/03/2021
[20]ibid
[21] UN Economic and Social Commission for Asia and Pacific: What is Good Governance?; http://www.unescap.org/sites/default/files/good-governance.pdf accessed 10/03/2021
[22]ibid

are heard in decision-making. It is also responsive to the present and future needs of society.[23]

Africa Union has made provisions for governance in natural resource management. Kenya as a member is therefore guided by the principles promoted by the following actions by the AU: a) Lobbied for African Minerals Development Centre under UN Economic Commission for Africa, seeking to harmonize mining policies across the continent for maximum output and benefit in the mining sector; b) Integrated Geology and Mineral Information System (GMIS) Coordination systems; c) Engaged in collaborative efforts with the World Bank and European Union states in capacity building and social empowerment to compete with global players like China[24]; d) Established the African Natural Resources Centre (ANRC)[25] for capacity strengthening in negotiating better natural resources contracts and refusing unethical practices such as illicit funding. It encourages sector-based transparency; and e) Sharing of periodic reports on natural resource management initiatives[26]

2.2 Shortfalls in the Governance Approach in Environmental Management in Kenya

The Government's long-term development strategy, Vision 2030, accordingly includes strategies for action in the environment sector

[23]ibid

[24] Chris Alden & Christina Ana Alves, *China and Africa's Natural Resources: Challenges and Implications for Development and Governance*; Governance of Africa's Resources Programme, Occasional Paper no. 41, September 2009; available *at http://www.voltairenet.org/IMG/pdf/China_and_Africa_s_Natural_Resources.pdf*

[25]*http://www.afdb.org/en/topics-and-sectors/initiatives-partnerships/african-natural-resources-center-anrc/ accessed 17/07/2016*
http://www.nsi-ins.ca/wp-content/uploads/2014/01/Brief-Shaw-Post-2015-Natural-Resource-Governance-in-Africa-African-Agency-and-Transnational-Initiatives-to-Advance-Developmental-States.pdf accessed 17/07/2016

[26]Tim Shaw, *Post - 2015 Natural Resource Governance in Africa: African Agency and Transnational Initiatives to Advance Developmental States;* Massachussetts, Boston available at http://www.nsi-ins.ca/wp-content/uploads/2014/01/Brief-Shaw-Post-2015-Natural-Resource-Governance-in-Africa-African-Agency-and-Transnational-Initiatives-to-Advance-Developmental-States.pdf accessed 17/07/2016

include conservation of natural resources, pollution and waste management, high-risk disaster zone management, environmental planning and governance, and climate change adaptation.[27]Programmes and projects to be implemented in the environment, water and sanitation sectors within the period of the first Medium-Term Plan (2008-2012) are identified in sector-specific plans.[28]

Unfortunately, though in the public domain, the challenge in inadequate dissemination of information (language and channel limitations) not many citizens are conversant with the Vision 2030 document thereby losing opportunity to engage on environmental matters in the context of general planning and continue to be victims of human rights violations. Planners of economic development programmes also on many occasions overlook the need to balance the protection of the environment and economic growth appetite.

The *Ratification of International Instruments* such as UN Convention on the Law of the Seas (UNCLOS), ICESCR, ICCPR, UNEP's working documents, etc meets with the suspicion of elitism from their original creating organizations whose implementation priorities are wont to differ from the local context's priorities. These could aggravate human and environmental rights where there are economic inequalities.

Regarding the impact of *Extractive Industry Transparency Initiative (EITI*) whose goal is to strengthen governance by increasing transparency over revenues from the oil, gas, implementation is yet to be fully felt. [29] The government still retains confidential clauses in natural resource exploitation contracts contrary to A.35 of the Constitution which compels required persons to disclose relevant information pertaining matters of public interest. Information and educational and skills gaps contribute to poor pay working conditions, health complications from pollution and open shafts breeding water borne pathogens, ill equipping for tasks and little or no compensation for victims of these errors.

[27]Denmark in Kenya: Natural Resources Management in Kenya, available at http://kenya.um.dk/en/danida-en/nrm/ accessed 10/02/2021
[28] ibid
[29]http://www.osisa.org/other/global/existing-legal-and-institutional-framework

The *Constitution of Kenya (2010)* has been hijacked by political interests which have undermined the place of Articles 42, (the right to a clean and healthy environment) and Article 71 covering transactions requirements regarding exploitation of Kenya's natural resources[30] local citizens' participation is minimal but become greater victims of human and environmental rights abuses in the process. A. 35 on Access to information and public participation is sometimes ignored. The implementation of Chapter 5 on Land and Environment is a political tussle between government and commercial interests.- A, 69 on ensuring sustainable, exploitation, utilization, management and conservation of the environment and natural resources, in an equitable and beneficial sharing of revenues accruing thereof seems a subject for the Courts only whereas Chapter Six on Leadership and Integrity dictates ethics for public officials but some corrupt economic deals have negatively affected the environment in terms of haphazard construction without due regard to EIA triggering climate change-like impacts like flooding and environmental degradation in many other ways.

The *Mining Act 2016* and the *National Minerals and Mining Policy (Final Draft) of 2010*of Kenya seek to put in place a simple, stable, predictable, efficient and unified regulatory framework and stimulate investment in the minerals and mining sector while ensuring that small scale mining companies use well-integrated, efficient and modern technology. However, many of these have not been brought into the formal economy so that they contribute fairly to the tax base—and Kenya's future as a mining economy.[3132] Investment demands are too steep for local citizens who are left to the whims of market dynamics and do not benefit much, furthering increasing economic inequalities between the mining entities and local communities.

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[30]Hayward T, *Constitutional Environmental Rights*, (2005), Oxford University Press; also David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment (*2012), Law and Society

[31] Osborne Wanyoike, *New Dawn for Mining Sector in Kenya, But There Are Risks Ahead*, The East African, Posted Saturday, July 20 2013 at 11:17; *Osborne Wanyoike is a senior manager in tax, PwC and an expert in oil, gas and mining*.
http://www.theeastafrican.co.ke/OpEd/comment/New-dawn-for-mining-sector-in-Kenya--but-there-are-risks-ahead-/-/434750/1920686/-/27hs7fz/-/index.html

[32] ibid

Political manipulation and sometimes, harassment, cripples the efficiency of the enforcement roles of the *Environmental Management and Co-ordination Act, 1999 (Kenya)* and *The National Environmental Management Authority of Kenya (NEMA)*, in facilitating social and environmental accountability, compliance and appropriate regulation[33] Regrettably, even with a *vast environmental framework* in place, a lot is yet to be achieved. It takes citizen diligence and civil society activism to hold government accountable for environmental degradation.

Many local communities decry poor compensation for land rights given up in compulsory acquisition by the government. Unemployment is rife, resulting in high levels of poverty. Apathy in public resources management is endemic, due to perceived corruption, political cronyism in high offices, bias in resource distribution and lack of responsiveness to major NRM issues by government agencies.

On *Climate Change*, change in climatic patterns has exposed ill-preparedness in mitigating the same; floods, landslides, famine, pollution of wetlands, deforestation and injuries or damages from open cast mining are common place. In spite of the numerous EIA requirements, Investors in economic activities like mining are not held responsible for degradation as result from their activities. However, to safeguard the right of life, the government is compelled to act upon the effects of climate change in designing disaster preparedness, disaster mitigation, adaptation and resilience plans.

The Judiciary, commendably, have made an attempt to enforce environmental justice and governance to promote human rights under right to a clean and healthy environment and public participation. Notable claims in pushing for good governance of environmental resources include the*Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya* [34](*Endoroi/Ogiek) case* for the recognition and protection of indigenous

[33]ibid

[34]ttps://minorityrights.org/law-and-legal-cases/centre-for-minority-rights-development-minority-rights-group-international-and-endorois-welfare-council-on-behalf-of-the-endorois-community-v-kenya-the-endorois-case/

land and cultural rights to land[35], *Peter K Waweru v Republic* for the recognition of the Principle of Sustainable Development in physical planning and land use and the right to a clean and healthy environment as right to life and the *Abdulahi Ali Abdi & another v Cs, Ministry of Lands & 6 others [2021] eKLR ('Hirola')* [36] for the preservation of the Endangered *Hirola* Antelope *(Beatragus Hunteri*) cases.

3. Criticisms to Using the Human Rights Approach in Environmental Management in Kenya

A few challenges exist that impede the growth of human rights use in environmental management:

a)The framing of legal issues around the environment require more than stating Article 42, the right to a clean and healthy environment in order to bear weight. The environmental right has to be pegged on a fundamental right which would attract constitutional attention. This means that other components of the environment like biodiversity and flora and fauna can easily be damaged if sufficient scientific proof around them is not linked to the right to life to justify better management or conservation techniques. A recent innovative strategy has been to attach the right to life as the basis for the environmental right.

Looking at the *Owino Uhuru* case mentioned earlier, it is clear that the Petitioners embraced a wider scope of human rights to incorporate socio-economic rights, intra and inter-generational rights and Principles of International Environmental Laws such as Polluter Pays Principle, among others, to bring serious attention to state responsibility on conservation .

b)Rights claims would demand a complex compensation scheme based on multiple factors such as scientific assessment, studying ecological linkages to different environmental media,demographics concerned, social and economic losses and abatement costs[37]

[35] African Court on People's and Human Rights 276/03
[36] Petition E 255 of 2020 Kenya Law Reports
[37] UNEP, Enforcement of Environmental Law: Good Practices from Africa and Asia (Volume II);

c)The generally held realization that socio-economic rights are to be achieved in a progressive manner as provided for in A.20(5) of the Constitution makes it a challenge to enforce environmental rights if a minimum standard of realization is not yet prescribed by law or judicial authority.

*d)*Further, the inter-play between climate action and trade or foreign business investment creates an awkward situation for arbiters in Investor-State Dispute Settlements (ISDS) claims where business interests have to be considered against environment claims. A host state may be heavily penalized for cancelling, say, a coal powered plant contract in the interest of environmental protection. If Kenya had not argued a strong case against unlawful mining operations discounting the need for a proper Environmental Impact Assessment among other conservation safeguards by the *Cortec Mining Company*, Kenya would have been liable to pay a hefty compensation amount to the Company for its licence's cancellation[38].

e)As a result of (a) above, it appears a hurdle to persuade public institutions to take favourable actions to protect the environment in the absence of significant loss of lives or property.

f)Whereas the matter of *locus standi* has been expanded in the Kenyan Constitution since the ruling in the *Green Belt Movement v Kenya Times Media Trust Ltd (Wangari Maathai)*[39] ruling, the question of whether to charge or compensate corporate persons alongside natural persons in environmental claims remains mysterious, although the *Owino Uhuru* case is an apparent development in this area.. Some corporate persons could be violators or victims of the claims in question.

[38] *Cortec Mining* Kenya Limited v Cabinet Secretary Ministry of *Mining & 9 Others (*Civil Appeal 105 of 2015) also *Cortec Mining* Kenya Limited, *Cortec* (Pty) Limited and Stirling Capital Limited v. Republic of Kenya, ICSID *Case* No. ARB/15/29

[39] *Green Belt* Movement (Wangari Maathai) v *Kenya* Times Media Trust Ltd. Civil Case 5403 of 1989 -Kenya Law Reports

g)Under article 40 of the Constitution of Kenya, Intellectual Property right to Traditional Knowledge has yet to be fully exploited, with limited codification and value calculation of the unique species. Local communities may be aware of these resources and have norms which endorse a communal system of conservation but are not equipped with economic information to benefit significantly and therefore become vulnerable to unfair commercial exploitation. This right remains a right in name only.

a) *Competing rights; civil and political rights around resources:* Any positive developments on agriculture, trade and commerce, social and cultural harmony could be destroyed in a few hours by effects of political and armed strife and create environmental refugees and further resource conflicts. Further, Globalization brings about more competing rights and values which relegate environmental protection matters to the periphery. For example, the current pressure for minority, gender and reproductive rights and religious rights do not focus on the environment unless matters of exclusion from environmental public participation interests therein come up.

b)With stronger emphasis on economicobjectives during national planning, the government tends to ignore environmental claims which seem not to have weight on the economy even if those rights concern the survival of the people concerned. In spite of indigenous communities having legal respite against such national actions as was seen in the case of The *Endorois Community v Lake Bogoria Game Reserve* through the African Court on Human and Peoples Rights there is not much progress on resettling the community in their native land.[40] This erodes the generational meticulous conservation carried out over years and without due care from the government, their forest habitation would degrade faster.

*c)*The Human rights approach requires consistent and aggressive activism to remind planners to include key environmental stakeholders.

d)*Rapid population growth*: Human needs have increased and with competing rights requiring the use of more resources. The result has been deforestation through logging to clear land for settlement, industrial and

[40]Pambazuka News, *Kenya: From Non-Beneficiaries to Active Shareholders, The Endorois* ;http://allafrica.com/stories/201004150930.html

agricultural activities, mining activities for economic growth, large-scale fishing, among others. Competing economic needs make it difficult for the enforcement of socio-economic rights for the most disadvantaged demographic groups in society.

e)Technology and Scientific Advancements increasing mechanization of work and production minimizes opportunities to self determination and the realization of socio-economic rights with better environmental conservation. To some extent, poverty has been blamed for wanton environmental destruction. SDG 1 implores states to eradicate poverty for sustainable development.

f)Lack of political goodwill to enforce environmental rights: If the democratic tenets of public participation, inclusion in decision making, respect for human rights and rule of law are not adhered to, the negative effects resulting will trickle down to every aspect of society. Laxity by the government to act on the *Endorois* case ruling is an example. Environmental matters will take a back seat in government policy and planning, yet the environment is the bedrock upon which human activities are conducted. It is usually more difficult to deal with the adverse impacts of environmental degradation as opposed to planning and implementing environmental protection and conservation.

g)*Poverty creates apathy.* The need for poor populations to meet their daily needs removes any notion of conservation of natural resources. In most cases, this particular group will be at the centre of resource depletion by middlemen as they are only interested in eking out a living.[41] Consequently, they become both cause and victims of political instability, bad governance, resource depletion and environmental degradation.[42]

h)*Economic incapacity* – many African states including Kenya have human and natural capacity and potential but are not adequately equipped financially to exploit natural resources and management to their advantage. There is over-dependency on foreign input. Lack of ownership affects governance attitudes.

4. Way Forward

It is crucial for both public and private state actors to collaborate in efforts and address the challenges and shortfalls mentioned above. When

[41] Denmark in Kenya: Natural Resources Management in Kenya, available at http://kenya.um.dk/en/danida-en/nrm/

[42] ibid

environmental matters are looked at in context of these factors during national planning, the governance of natural resources will be enhanced. These disadvantages can be turned around by good governance principles of inclusivity, transparency, fairness, consistency, accountability, regard for human rights and justice and faster realization of socio-economic rights.

Environmental activism must go beyond litigation of environmental claims and include consumer awareness of conservation and protection and the requirement of prudent economic development planning processes. Capacity building to heighten environmental justice among people affected should continue. Another useful approach would be to explore the base of inter-generational equity and justice to inspire future generations to pursue their environmental rights for greater impact Environmental courts and judicial personnel in environmental matters should be prioritized.

5. Conclusion

Considering that man plays an important part in the appropriation of environmental goods and services, respect for human rights must continue to be upheld. Environmental justice through a rights based route will always be a going concern. We may not be there yet, but there is lot of room for growth. What Kenya needs is a strong supervisory function and periodic audits on progress on natural resource management. The spirit of the Constitution requires active citizen participation in governance, and the citizens, too, must aggressively take up their role.

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Rethinking The National Legal Aid Service

By: ***Onyango Aaron Okoth*** [*]

Abstract

Attention has been given to few rights in the constitution like the two-thirds gender rule and the right to emergency abortion, with others like the right to fair hearing cast on the back burner. This right includes, inter-alia, the right a state-funded legal representative.The passing of the Legal Aid Act was laudable, but it places many burdens solely on the shoulders of the National Legal Aid Service.

The service is charged with a multiplicity of roles that require resources and facilities which would otherwise have been used in ensuring and expanding legal justice for the indigent.

Some roles assigned to the service, like regulation and accreditation of legal practitioners, are performed by organisations like the Law Society of Kenya and Council for Legal Education and offering legal aid, by the Ombudsman, among others.Many resources go into these non-core functions, and the payment of the bloated workforce required to perform them.

The National Legal Aid Service has to be re-thought, and functions that are achievable by cooperating with other entities withdrawn. Its role can be limited to that of a fund or regulator, to facilitate the provision of legal aid through existing proxies. This will reduce its required workforce and free up more funds, allowing it to focus on fulfilling its core mandate and increase its impact and sustainability.

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1. Background

1.1 Introduction

Studies have demonstrated that during their lives, most people arrive at a point where they run into a legal problem of some sort. The Open Government Partnership (OGP) in its 2019 Global Report highlighted that 51% of people that live in OGP countries had at least one legal problem in the period of the immediately preceding two years.[1] It is estimated that only 37% of the number that sought help, with just over half of this demographic reporting satisfaction with the outcome.[2] This low figure casts doubt on the issues of quality and efficacy of the legal assistance they were able to acquire. Almost half of the majority who did not access legal services, on the other hand, expressed dissatisfaction with the eventual outcome of their legal issue.[3] This suggests an involuntary inability, on part of the victims, to seek the required legal aid given the high cost of legal services. This scenario is replicated here in Kenya, as per a 2017 report by Hiil and the Judiciary. The report established that 63% of Kenyans experienced a legal problem in the preceding four years.[4] The findings of the study further showed that of the respondents who had legal problems and were willing to seek legal aid, over half failed to access assistance either due to lack of knowledge or finances.[5] The high number of people unable to access quality legal aid is the basis for the Kenyan government's intervention in the provision of legal aid in the country.

It is important to note that prior to the establishment of the National Legal Aid service, there was no single harmonized state effort to provide legal aid and services and to the indigent and those in need of legal assistance. During this period, legal aid was provided by the state through various government departments. These include the Office of the Attorney

[1] Open Government Partnership, *Open Government Partnership Global Report 2019* (Justice Policy Series Psrt 2019)
[2] Ibid
[3] Ibid
[4] Hiil, *Justice needs and satisfaction in Kenya* (Hiil, 2017) https://www.hiil.org/wp-content/uploads/2018/07/hiil-report_Kenya-JNS-web.pdf Accessed 23 November 2020.
[5]Ibid

General whose main responsibility is to uphold the rule of law as well as ensure that both state and non-state parties' actions are congruent to the prevailing public interest.[6] In line with this role, the office is mandated to initiate and conduct proceedings with the aim of seeking protection and compensation of vulnerable victims of offences and crimes.[7] The Office of the Director of Public Prosecutions is similarly established under the constitution, with its major role spelt out as the institution of criminal proceedings in line with the law and public interest.[8] The Director of Public Prosecutions, through his prosecutors, has carried out its mandate of prosecuting offenders and instituting legal proceedings to aid victims of criminal offences to get retribution and closure through the conviction and subsequent fining or imprisonment of the offenders.

The office of the Ombudsman which is established under the constitution,[9] has its main function outlined as the protection of individual rights by investigating complaints of abuse of power and contravention of rights and thereafter, taking necessary legal steps to assist the victims.[10] It has since acted as a safeguard and deterrence of power for individuals and entities against oppressing the poor, as demonstrated in 2019 when its relentless efforts ensured the return of a widow's property irregularly acquired by a former governor in Kiambu County.[11] Similarly, other constitutional commissions like the Kenya National Human Rights Commission were also mandated to provide legal services and assistance to citizens in need.

Non-government players also provided legal aid. For instance, a large chunk of legal assistance for women and their children was also provided by Non-governmental Organisations like federacion Internacional de Abogadas – Kenya (FIDA-Kenya)*. FIDA-Kenya came into existence in 1985 through the efforts of female professionals who noted with worry,

[6] Constitution of Kenya 2010, Art 156
[7] Victim Protection Act 2014, s 31; see also, Office of the Attorney General and the Department of Justice https://statelaw.go.ke/services-to-the-public/compensation-of-victims-of-crime/
[8] Constitution of Kenya 2010, Art 157
[9] Ibid, Art 59
[10] Commission on Administrative Justice Act 2011, s 8, 38, 29, 32
[11] A Magut and E Kamurungi, *How Waititu Used his position to take away a widow's land*, (Nation Africa 2019)

the negative repercussions of lack of appropriate legal counsel, especially on indigent women and their children.[12] It was thus established to provide legal aid to indigent and deserving people, especially females, with a niche in family law matters.

This scenario: where the provision of legal aid is disjointed and not regulated by a central organisation, presented various challenges. Firstly, it increased the possibility of innocent parties being exploited by practitioners masquerading as providers of free legal aid due to inefficient safeguards*. Secondly, it posed a challenge to the harmonization of legal aid services to ensure that all legal aid for the indigent were of acceptable standards*. Finally, the overlapping of functions between various state agencies, offices, and commissions are a potential source of confusion over mandates*. They are also a breeding ground for chaos and disagreements over the extent of the limits of each entity. Furthermore, it risked the possibility of wasting scarce public resources due to duplicated functions of the various bodies.

It is against this backdrop that the dire and urgent need for the establishment of a coherent single regime for regulating legal aid became more evident. The National Legal Awareness Plan (NALEP), a precursor to the Legal Aid Act, was set up to provide affordable, accessible, and credible legal aid to the poor at the expense of the state.[13]

1.2 Establishment of the Legal Aid Act

The Legal Aid Act was enacted on 22nd April, 2016 and came into force on 10th May 2016.[14] The act came six years after the promulgation of the constitution, with its intention being to actualize the right to a fair hearing for Kenyans, as provided for under the constitution [15] The specific entitlement under the right to a fair hearing that it was intended to safeguard is the right of every individual to have legal counsel provided

[12]FIDA Kenya https://www.fidakenya.org/site/founders accessed 23 November 2020; See also https://www.fidakenya.org/site/history accessed 23 November 2020

[13] Legal Notice Number 220 of 2002

[14] Legal Aid Act, 2016; see also https://www.idlo.int/news/highlights/kenya-first-legal-aid-action-plan-formally-launched

[15] Constitution of Kenya 2010, Art 50

by the state. Some proponents have felt that the right is a progressive one and not yet as pressing as others like the right to healthcare and the right to food which affects a wider demographic.[16]It can easily be argued, in this regard, that this right should be limited to serious offenses where the possible sanctions faced by the accused are grave. This is the position in some jurisdictions within the United States of America where the right is has been reserved only for people accused of committing capital offences.[17] This, coupled with the fact that the right can be limited under special circumstances provided by the constitution, thus not absolute,[18]casts aspersions on the need for utilization of limited public resources to actualize it as opposed to other absolute rights that are yet to be attained.

The foregoing notwithstanding, the legislature enacted the instrument, thereby effectively establishing the National Legal Aid Service and from the onset, adorning it with a host of functions including; the collection and availing of funds to be used for the provision of legal aid[19]; the screening, identification, and acceptance or rejection of potential beneficiaries and candidates. It was also given the mandate to determine those deserving of legal assistance[20]; the establishment of standards and requirements for the accreditation; and the accreditation of qualified legal practitioners who can it can work within the view of achieving its functions.[21] The service is also required to carry out investigations and establish that the beneficiaries have remained within the purview of deserving legal aid in order to determine whether or to withdraw or scale down its assistance, or reclaim resources needlessly spent.[22]In addition, the service is tasked with reclaiming or collecting awards from courts won by their beneficiaries. Furthermore, like other agencies, the national legal aid service has been accorded a corporate status, which means that

[16]*Soobramoney v Minister of Health* (Kwazulu-Natal) (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997(12) BCLR 1696 (27 November 1997
[17] *Betts v. Brady* 316 U.S. 455, 62 S. Ct. 1252 (1942)
[18] Constitution of Kenya 2010, Art 24
[19]Legal Aid Act 2016, s 7
[20] Ibid
[21] Ibid
[22] Ibid

in addition to its numerous functions, as a consequence of its legal personality, it is also open to legal battles of its own.[23]

2. Challenges of the Legal Aid Act

From the foregoing, the first hurdle to the successful implementation of the objects of the act is glaringly evident.

2.1 Too many functions

The state agency has too many functions and duties that it is required to concurrently run. It has been asserted that when numerous functions and duties are housed under the hospices of a single entity, it is bound to become ineffective due to the fact that the entity will divert swathes of its attention and resources to ancillary roles. It also carries the risk of being complacent in delivering its core mandate.[24]This means that the National Legal Aid Service, in a bid to perform all the functions accorded to it under the act, some of which are merely ancillary to its main function, expends its limited resources and attention thereby leaving little time and resources for its main role.

The core role of the National Legal Aid service is the provision of legal aid to the indigent or those in need of assistance.[25] Although the ancillary functions it is accorded are meant to facilitate the attainment of his objective, they only serve to impede it. The main role fades into the background, overshadowed by the numerous other functions which it must fulfill. The reduction of these functions will accord the service more time to focus its attention and energy in availing and provision of funds for legal aid.

2.2 Duplication of roles performed by existing parties

Many of the functions that have been highlighted were and are still performed by other organisations and individuals as highlighted below:

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[23] Ibid
[24] S Stowell, *The 5 Most Common Problems of Organizations*, (Center for Management and Organization Effectiveness) https://cmoe.com/blog/organizational-problem/ Accessed 23rd November 2020
[25] Legal Aid Act 2016, s 7

2.2.1 Certification and regulation of legal professionals

Currently, the Council for Legal Education is tasked with assessing and evaluating the competency of lawyers and paralegals.[26] This is a function it shares with the Kenya School of Law, which also serves to train and certify the qualification of lawyers and paralegals in Kenya.[27]The Law Society of Kenya, another statutory body, is also tasked with certifying practicing advocates as well as maintaining a list of those licensed to practice.[28] The proposed Advocates Bill also outlines the Advocates Complaints Commission [29] and Advocate's Disciplinary Tribunal [30] whose roles are inter alia, ensuring that professional ethics and standards are maintained in the legal profession.

2.2.2 Accreditation of legal professionals

There is a plurality of legally recognised bodies that are tasked with the accreditation of professionals involved in the legal process. For instance, the National Centre for International Arbitration is mandated to undertake the accreditation of qualified arbitrators and maintains a database of the same.[31] In the proposed mediation bill, a Mediation Accreditation Committee has been similarly tasked, but with regards to qualified mediators.[32]Reputable Non-governmental organisations within the same field, like FIDA[33], have also developed systems of accreditation of their own that have proved to be efficient.[34]

2.2.3 Provision of legal aid Services

The field of legal aid and assistance is a crowded one, with both governmental and non-governmental entities playing a part. The governmental entities include the Ombudsman, responsible for receiving

[26]Legal Education Act 2012, s 3;see alsohttps://cle.or.ke/
[27] See https://www.ksl.ac.ke/
[28] See https://lsk.or.ke/
[29] Advocates Bill 2015, s 80
[30] Ibid, s 87
[31] Nairobi Centre for International Arbitration Act 2013, s 5
[32] Kenya Gazette Supplement No. 92 (National Assembly Bills No. 17) Section 59A
[33]See https://fidakenya.org/site/workcategory?id=1;
Also see https://www.ombudsman.go.ke/index.php;Constitution of Kenya 2010, Art 57
[34]https://www.fidakenya.org/site/faqs

and investigating complaints from the public and making recommendations with aim of aiding to facilitate appropriate legal intervention.[35] The Office of the Director of Public Prosecution has also been empowered to receive complaints and charge suspects on behalf of the complainants.[36] A role performed majorly in the criminal courts. The Kenya National Human Rights Commission has also staked its claim in the field of legal aid, often bringing forward cases or playing a role in public interest litigation involving human rights violations.[37]

Non-governmental institutions have also established a niche for themselves in the provision of legal assistance with two of the better-known organisations in the field being Kituo Cha Sheria and FIDA.[38] These organisations have been widely involved in public interest litigation and are arguably more attractive prospects for indigent persons as opposed to government entities. Individual legal practitioners and professionals have also taken it upon themselves to provide legal assistance with one of the best-known parties being Okiya Okoiti Omutatah, who has become a household name and the bane of government agencies and departments that have suffered sanctions arising from court orders, in addition to public humiliation and condemnation, courtesy of his legal exploits in the interest of public good.[39]

2.3 Conclusion

This duplication of roles can and has led to much confusion with regards to where parties in need of legal aid should seek legal assistance. The different niches in which the different entities operate also result in apprehension by the needy parties as to which entity would best suit their legal aid needs. Adding the National Legal Aid Service to the fray, and with some unique functions of its own, will only serve to aggravate the situation.

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[35] https://www.ombudsman.go.ke/
[36] Constitution of Kenya 2010, Article 157
[37] Constitution of Kenya 2010, Article 59(2)
[38] http://kituochasheria.or.ke/about-us/; see also https://www.fidakenya.org
[39] https://www.pd.co.ke/news/national/its-just-a-passion-for-the-law-says-omtatah-after-uhuru-jibe-21607/

3. Negative Impacts of the challenges

The challenges outlined above have led to the following undesirable outcomes, which continue to plague the National Legal Aid Service.

3.1 Cost Implications

The costs involved in carrying out numerous functions are enormous. The workforce of the service is also bloated because there is staff required to perform these ancillary tasks that are effectively a duplication of what other parties already perform. In addition, on retirement, the benefits payable to the large number of staff further aggravates the circumstances. Further, the National Legal Aid service will have to contend with numerous lawsuits filed against it and by it. The legal services required are paid for by the funds of the service which could have otherwise gone into performing its core mandate. If it faces multiple charges on different fronts and owing to the protracted nature of litigation, it stands to lose funds. This ultimately results in increasing the wage bill.

3.2 Divided attention

A consequence of performing multiple roles is the inability to effectively perform all assigned duties due to divided attention. Paying attention to its ancillary functions could prevent the service from performing its main role in the regulation of legal aid. Lack of regulation ultimately provides unscrupulous parties with opportunities to exploit the candidates they initially masqueraded to help. There are advocates and organisations that have been accused of securing their clients; awards only to disappear with the whole amount or keep substantial portions.[40] This state of affairs defeats the very essence of the national legal aid service, which is to ensure justice.

[40] KNA, *Woman who lost one leg narrates how lawyer conned her Ksh 4 Million,* (Business Today 2018) https://businesstoday.co.ke/woman-lost-one-leg-narrates-lawyer-conned-sh4-million/ Accessed 23rd November 2020; See also Agnes Oloo, *Nairobi lawyer sued by client over 'unfair' legal fees*, (Citizen Digital 2018) https://citizentv.co.ke/news/nairobi-lawyer-anthony-oluoch-sued-by-client-over-unfair-legal-fees-196612/

4. Potential Remedies

The aforesaid undesirable outcomes are, however, not insurmountable. With evident challenges faced by National Legal Aid Service arising, corresponding solutions have likewise come to the fore.

4.1 Reducing the functions

The first sensible move for any overburdened entity would be to reduce its workload. In this instance, the functions of the National Legal Aid Service under the Act, need to be downsized. This can be achieved in one of two ways: Limiting functions of the service to quality assurance or reconstituting the service into a fund.

4.1.1 Quality assurance (Regulation)

Quality assurance is a major component in realising access to justice.[41] The numerous governmental and non-governmental entities involved in the provision of legal aid largely go unregulated or have varying standards of self-regulation. This highlights the pressing need for a neutral oversight authority with its attention fully focused on quality assurance. The government carries the duty of facilitating quality assurance with regards to all the goods and services its populace consumes as well as put in place necessary frameworks for the protection of consumers.[42]This model has been adhered to in fields like information and communication with the Communications Commission of Kenya tasked with regulation and quality assurance in the goods and services by players in the industry ranging from telecoms and radio service providers to postal service providers and broadcasters.[43]

Quality assurance is a quagmire encompassing numerous aspects that work in tandem to ensure a suitable final product.[44] The quality assurance envisioned in this respect involves setting standards and continually

[41] The National Action Plan for Legal Aid (2017-2022) recognizes the prudence in having quality assurance as among its chief goals in the realization of the service. page 33see full action plan at https://kecosce.org/wp-content/uploads/2020/02/NAP-Legal-Aid-2017-2022.pdf
[42] Constitution of Kenya 2010, Article 46
[43] Kenya Information and Communications Act 1998, s 5
[44] M Thareja and P Thareja, *The Quality Brilliance Through Brilliant People*, (Quality World, 2007) 4 (2)

revising and improving them, accreditation of legal aid providers and maintenance of the database of accredited parties, and carrying out investigations and fact-finding to ensure compliance with established standards.

This will ensure that the attention of the service is fully focused on ensuring compliance with required standards hence ultimately leading to a well-regulated and coherent legal service encompassing both public and private players.

A possible challenge of this model, however, would be how the service would regulate the services of independent state parties who are not subject to external influence.[45] This hurdle can be cleared, however, through mutual cooperation and good faith between the service and the independent agencies and offices.

4.1.2 Operating as a fund

It can be argued that the main agenda for the enactment of the Legal Aid Act was to establish a framework that would enable the indigent to access much needed legal assistance. This core agenda can be achieved chiefly through the provision of necessary funds. Despite the many governmental and non-governmental players in place, the field of legal aid continues to be hindered by limited funds.

Focusing its efforts on raising and acquiring funds for the provision of public aid will not only greatly reduce its administrative costs of the National Legal Aid Service, but also enhance its efficiency. With the other functions such as accreditation withdrawn, the resources required to cover these services can be redirected to ensuring the provision of legal assistance. The staff required to perform these non-core functions as well will be rendered redundant, thus greatly reducing the workforce of the service and in turn reducing the strain on the exchequer.

A case study for this model is the research fund established under the National Science and Innovation Act.[46] The fund is tasked with

[45] Constitution of Kenya 2010, Art 157(10)
[46] Science Technology and Innovation Act 2013, s 32

cooperating with government entities and institutions as well as private stakeholders and individuals in the promotion of science, research, and innovation. [47] There are other government agencies like NACOSTI, [48] Kenya Research Agency [49] as well as institutions like KARI[50] that are tasked with the provision of facilities, developing the policies and framework, and generally, the regulation of science, technology, and innovation in the country. These entities that are complementary to the research fund are comparable to bodies like the Council for Legal Education[51], and Law Society of Kenya[52] that already serve similar functions with regards to legal aid. With these functions already catered for, the service can turn its attention solely towards the provision of funds for legal aid.

Precaution

There are safeguards however that must be employed to prevent the service if constituted into a fund. This would prevent it from realising the same fate as other government funds that have since become cash cows for corrupt public officers.

The proposed fund's avenues of raising funds should be greatly limited to government allocations, grants, and donations. Its investments should also be restricted to low-risk government-initiated investments such as Treasury Bills. The only monetary transactions it should be allowed to have with private businesses and individuals should be limited to those involving the acquisition of supplies required for administrative duties or any other goods and services required for administrative purposes.

The National Social Security Fund has been in the headlines regularly for engaging in fraudulent dealings ranging from botched land deals to acquisition of non-existent properties and overpriced projects that cost

[47] Ibid, s 33
[48] Ibid, s 4
[49] Ibid, s 29
[50] Ibid, s 53, Fourth schedule
[51] The Council of Legal Education Act 2003, s 6 See also https://www.idlo.int/news/highlights/kenya-first-legal-aid-action-plan-formally-launched
[52] Law Society of Kenya Act 1980, s 4

taxpayers billions. NSSF's latest blunder, the Hazina Tower's scandal, which potentially caused taxpayers 7 billion Kenyan shillings, is yet to be resolved.[53]Its counterpart the National Health Insurance Fund has also made the headlines severally for billions in public funds unaccounted for or lost due to unsustainable ventures, initiated with the sole purpose benefit a select few corrupt individuals operating in or out of government.[54]

Dissenters could argue that investing ventures beyond the scope of its mandate would raise funds that would facilitate financial fluidity, hence availing more funds for helping even more indigent people. These proponents should keep in mind the initial source of revenue intended under the act and the fundamental underpinning of the service, and by extension the act, as being to offer and not to raise money. The government already has numerous money-making vehicles, and establishing another under this act was not its intention. Furthermore, it is likely that involvement in revenue-generating ventures alone, or jointly with parties would expose the proposed fund to legal suits, administrative affairs, and undesirable financial implications that may arise from the ventures. This will only serve to further divest valuable time, attention and resources meant for its core function of providing legal aid.

Limiting the modes of acquiring funds, and the entities with which it can transact business will not only seal the loopholes through which the proposed entity could lose funds meant for the indigent but also directly allow it to direct its attention wholly towards the facilitation of legal aid by those in need.

5. Conclusion and Recommendations

From the foregoing, it is evident that there are several challenges that the National Legal Aid Service, as is currently constituted, possesses numerous hurdles that prevent it from maximizing its potential in

[53] M Njagih, *MPs fury at Shs 7 billion Hazina Tower's project*, (The standard 2018) https://www.standardmedia.co.ke/business/article/2001273335/mps-fury-at-sh7-billion-hazina-tower-s-project accessed 23 November 2020

[54] E Mutai, Civil *Servants LOSE 3.5bn medical cover cash*, (Nation 2014) https://nation.africa/kenya/business/civil-servants-lose-sh3-5bn-nhif-medical-cover-cash-1046280 Accessed on 23rd November 2020

fulfilling its envisioned purpose of promoting the right to access to justice through the provision of legal services to the indigent. These challenges, as has been stated, can be alleviated by stripping it of its ancillary functions and allowing it to perform a single role. This could be functioning as a regulator or operating as a fund.

Concerning accreditation, the proposed entity can liaise with the highlighted bodies to obtain updated databases of qualified legal practitioners to facilitate the recognition and accreditation, and to help build and revise its database of the legal aid providers.

The proposed entity can also partner with the aforesaid entities and individuals with the view of managing the legal practitioners and parties it engages. Regulation of legal aid also entails the maintenance of required standards, sanctions against those who break accepted standards, and fact-finding. The proposed entity can partner with the Law Society of Kenya[55] which already exercises its mandate of licensing advocates of the high court, as well as disciplining errant members in collaboration with the proposed Advocates Complaints Commission and Advocates Disciplinary Tribunal[56] in this regard. In fulfilling their mandate, the bodies have been able to ensure that errant practitioners are punitively fined and even disbarred[57], and records of the same archived. Through this cooperation, activities such as screening viable candidates and excluding parties with questionable records as well as those who have been adjudged unfit to practice can, and will, be easily undertaken. Such a partnership would also provide a database for reviewing the conduct and ethics or lack thereof, of legal practitioners.

These would save the service's finances and time as it will not have to start from scratch to build its own database or inject its resources into the maintenance of the flow of information.[58] When it comes to bureaucracy-

[55]Law Society of Kenya Act 1980, s 4

[56] Advocates Bill 2015, s 80,87 ; See also https://statelaw.go.ke/departments/advocates-complaints-commission/

[57]KNA, *Woman who lost one leg narrates how lawyer conned her Ksh 4 Million*, (Business Today, 2018) https://businesstoday.co.ke/woman-lost-one-leg-narrates-lawyer-conned-sh4-million/ Accessed 23rd November 2020

ridden government entities, fewer functions, fewer employees, less distractions and fewer liabilities are more desirable for optimum outcomes. This is one of the few instances where less is merrier.

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Towards Legal Recognition and Protection of Environmentally Displaced Persons Under Refugee Law

By: ***Esther Nyachia Kanyangi ****

Abstract

Natural and environmental disasters have been a cause of people crossing borders from their home countries into nearby states seeking refuge. The volcanic eruption of Mount Nyiragongo in the DRC is a recent example of this situation as some of the residents fled to the nearby Rwanda for safety. These incidences warrant a discussion as to the legal status of those who have to leave their homes and seek refuge in another state either permanently or temporarily as a result of natural environmental disasters and whether there is an appropriate framework in place to address such occurrences. This article particularly focuses on the legal status of persons who have been displaced due to natural and environmental disasters and therefore seek refuge in neighbouring countries and whether they are legitimately considered refugees under the existing refugee framework. This article argues that there is a need to broaden the definition of a refugee under the Refugee Convention as so to provide adequate protection for environmentally displaced persons under the current Refugee Legal Framework.

Key Words: Environmentally Displaced Persons, Natural and Environmental Disasters, Non-Convention Refugees, Refugees, Rights

1. Introduction

On the evening of 22nd May, 2021 residents of Goma in the Democratic Republic of Congo (DRC) were treated to a rude shock as Mount Nyiragongo erupted.[1] Its two streams of lava flows left 32 people dead, destroyed over 3,900 households and other structures such as hospitals and schools in the area.[2] The eruption of Mount Nyiragongo occurred barely 19

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[1] United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA), DR Congo: Volcanic Eruption in Goma, Situation Report No. 1, 25th May, 2021.

[2] United Nations High Commissioner for Refugees (UNHCR), Emergency Update on Volcano Nyiragongo #1 3rd June, 2021 available at

years after a similar volcano eruption in January 2002 which caused around 250 fatalities and resulted in the displacement of hundreds of thousands.[3] The fear of yet another volcanic eruption and the subsequent earthquakes/ tremors necessitated the partial evacuation of nearby areas in Goma leaving an approximated number of 400,000 people homeless.[4] The United Nations High Commissioner for Refugees (UNHCR), which is the main UN Refugee Agency, has been a key actor in addressing the plight of those displaced by the volcanic eruption by providing basic needs such as rescue shelters, food and water.[5] According to the UNHCR, around 8,000 residents who were displaced either as a direct or indirect cause of the volcanic eruption crossed the borders to the nearby Rwanda seeking refuge.[6] This adds to over 139, 000 refugees currently hosted by Rwanda, majority of who are from the DRC.[7]

From the above, it is evident that the natural disaster did not only cause an internal displacement of people but also resulted in the migration of some of the residents from their country into the nearby Rwandan state in a bid to preserve their lives. This occurrence is not uncommon. Natural and Environmental disasters have been a cause of people crossing borders from their home countries into nearby states. These incidences warrant a discussion as to the legal status of environmentally displaced persons who have to leave their homes and seek refuge in another state either permanently

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https://reporting.unhcr.org/sites/default/files/Emergency%20Update%20on%20Volcano%20Nyiragongo-3%20June%202021.pdf accessed on 17th June, 2021.

[3] Komorowski J-C and Karume K, "Nyiragongo (Democratic Republic of Congo), January 2002: A Major Eruption in the Midst of a Complex Humanitarian Emergency" in Susan C Loughlin and others (eds), Global Volcanic Hazards and Risk (Cambridge University Press 2015).

[4] United Nations Children Fund (UNICEF) DRC| Volcano Eruption (Goma) Situation Report, 26th May, 2021 available at https://www.unicef.org/media/99886/file/DRC-Humanitarian-SitRep-No3-Volcano-Eruption-Goma-May-2021.pdf accessed on 15th June, 2021.

[5] United Nations High Commissioner for Refugees (UNHCR), External Emergency Update on Volcano Nyiragongo, 8th June, 2021 available at https://reliefweb.int/sites/reliefweb.int/files/resources/External%20Emeregency%20Update%232_Volcano%20Nyiragongo_080621.pdf accessed on 15th June, 2021.

[6] Ibid.

[7] UNHCR, Operational Data Portal: Refugee Situation, Rwanda available at https://data2.unhcr.org/en/country/rwa accessed on 17th June, 2021.

or temporarily as a result of such disasters and whether there is an appropriate framework in place to address such occurrences.

2. Environmentally Displaced Persons and Refugee Law: The Suitability of Refugee Law as an Effective Framework for Protection

The key legal instrument which governs matters refugee at the International Level is the 1951 Convention relating to the Status of Refugees. Under the 1951 Convention, a refugee is one who 'as a result of the events occurring before 1st January, 1951 and owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his/her nationality and is unable or unwilling to avail himself/herself of the protection of that country or to return to it.[8]

The 1951 Convention relating to the Status of the Refugee covered those people who had become refugees as a result of the events occurring before January 1951. Evidently, this definition was too restrictive as it could not cater for occurrences after 1951 which might render one as a 'refugee'. In acknowledgement of the effects of the restrictive nature of this definition, the United Nations Protocol to the Convention on the Status of the Refugee was adopted in 1967 to remedy this defect.[9] The Protocol did away with the time qualifier of January 1951 in recognition of the fact that 'new refugee situations have arisen since then' and the need to ensure that all refugees have equal status of protection regardless of the 1951 timeline.[10]

From such developments in the area of Refugee law at the International level, it is clear that the criteria set out under which one must fulfill in order to be considered as a refugee are not conclusive enough to cater for all situations and circumstances that may lead to one becoming a refugee. Indeed, even at the regional level, these parameters as set out in the 1951 Convention have

[8] UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, December 2011.
[9] United Nations Protocol to the Convention on the Status of Refugees 6 I.L.M 78 (1967).
[10] Ibid.

been expanded to include factors that States consider play a role in the displacement of people.

At the Regional level, the OAU Convention provides that the term refugee shall also apply to persons who are compelled to leave their habitual residence to seek refuge outside their country owing to external aggression, occupation, foreign domination or events seriously disturbing public order.[11] This provision broadened the scope of refugees as envisioned by the 1951 Convention and the 1967 protocol to cover other factors that may be prevalent in the African context.

At the domestic level, countries have modified the definition of a refugee as coined in the 1951 Refugee convention. In Kenya for instance, the Refugee Act[12] adopts the 1951 definition of a refugee yet it also includes 'external aggression, occupation, foreign domination or events seriously disturbing public order' as additional factors that may contribute to a person's refugee status. This modification has been directly borrowed from the OAU Convention. Consequently, the modification at the regional and national level to the definition of a refugee as provided for under International law is manifest of the distinct inadequacy of the 1951 Convention and 1967 Protocol to adequately cater for new refugee situations.

This inadequacy is evident in the rigidity of the definition under the Refugee Convention which specifically sets out who can be accorded refugee status and therefore be accorded certain legal rights and protection. One has to have a 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion.'[13] However in this contemporary era and with the dynamics of modern-day problems, other factors have arisen, besides those explicitly mentioned in the convention, which could actually force persons to flee their countries of

[11] Organization of African Union (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa. Adopted on 10th September 1969 by the Assembly of Heads of State and Government and entered into force on 20th June 1974, 1001 U.N.T.S. 45.

[12] S. 3 (2) of the Refugee Act, No. 13 of 2006 Laws of Kenya.

[13] Art. 1 of the Convention relating to the status of Refugees, July 18th 1951, 189 U.N.T.S. 137, 152.

origin and therefore be in need of protection in their host country. Such persons who seek asylum yet do not fall under the Convention's criteria have been loosely referred to as 'non-convention refugees'[14] and may be deemed as undeserving of the legal rights and protection which accrue under law to conventional refugees as such.

Under this broad category of 'non- convention refugees' are those fleeing environmental and natural disasters who have been referred to as 'environmentally displaced persons' or 'environmental refugees'. This article uses the term 'Environmental Refugees' which has been defined as 'people who have been forced to leave their traditional habitat temporarily or permanently because of a marked environmental disruption that jeopardized their existence or seriously affected the quality of their life'.[15] Norman Myers, a British Environmentalist, defined the term as 'persons who no longer gain a secure livelihood in their traditional homelands because of what are primarily environmental factors of unusual scope.'[16] Environmental Refugee is considered a broad classification which entails causes from natural disasters to human induced ones including climate change.[17]

There has been contention as to what the term means and its scope considering the fact that there are divers environmental effects and natural disasters such as earthquakes that could lead to the displacement of people both internally and outside their countries. On the other hand, this term has been considered as an International misnomer[18] devoid of legal legitimacy due to the fact that it lacks legal recognition. While this may be true, it underscores the gap in the law to the extent that persons fleeing from

[14] Janina W. Dacyl, Europe Needs a New Protection System for Non-Convention Refugees, 7 Int'l J. Refugee L. 579, 605 (1995).

[15] Suzette Brooks Masters, *Environmentally-Induced Migration: Beyong a culture of Reaction*, 14. Geo. Immigr. L.J. 855, 866-67 (2000) (citing Essam El-Hinnawi's definition, Environmental Refugees 4 (1985)).

[16] Amanda A. Doran, Where Should Haitians Go: Why Environmental Refugees are up the Creek without a Paddle, 22 Vill. Envtl. L.J. 117, 140 (2011) pp.125.

[17] Victoria Sutton, Fiji: Climate Change, Tradition and Vanua, pp.363 in Randall S Abate. & Elizabeth Ann Kronk, 'Climate Change and Indigenous Peoples: The Search for Legal Remedies (2013) pp. 369.

[18] Tiffany T.V. Duong, When Islands Drown: The Plight of Climate Change Refugees and Recourse to International Human Rights Law, 31 U. Pa. J. Int'l L. 1239, 1266 (2010).

environmental disasters do not neatly fit under any particular International legal framework.

Clearly, the definition of the term refugee under the 1951 Convention does not cater for those who are out of their country due to environmental factors and natural disasters.[19] For persons fleeing from environmental causes, it therefore becomes an impossible task to prove that they fall within the ambit of the Refugee Convention as the five protected grounds in the Convention do not include environmental factors or natural disasters as reasons for flight. Consequently, such persons remain without legal recognition or protection.

3. Recommendation for the Legal recognition and protection of Environmentally Displaced Persons under Refugee Law

The need for legal status of persons fleeing environmental and natural disasters is important due to the fact that legal status follows legal recognition. An instrument providing for the recognition of such persons would lay out the rights accruing to them. With such provisions clearly laid out in an instrument with legal backing, it would be easier to make a case for those displaced by environmental and natural disasters in the protection of their rights.

This paper suggests the expansion of the definition of refugee under International law through another protocol to the 1951 Convention so as to provide legal recognition and protection to environmentally displaced persons.[20] There is recognition of the fact that the refugee problem has only gotten worse globally with the effect of an increase in the numbers of refugees. This has resulted in host countries being burdened with the mass influx of refugees. Increasingly more developed countries are turning away refugees at their borders and adopting strict migrant policies. A culture of 'Refugee apathy' has characterized most states which are not living up to their commitments and obligations under International Law.

[19] Bonnie Docherty; Tyler Giannini, Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees, 33 Harv. Envtl. L. Rev. 349, 404 (2009).
[20] Victoria Sutton, Fiji: Climate Change, Tradition and Vanua, pp.363 in Randall S Abate. & Elizabeth Ann Kronk, 'Climate Change and Indigenous Peoples: The Search for Legal Remedies (2013), pg. 372.

While a broadening of the term refugee to cover more people may be perceived negatively by states at the onset, however, it is needful to recognize that the five protected grounds in the Refugee Convention are not exhaustive of factors that lead to displacement and flight of persons outside their countries of origin. As such it is only appropriate to have the scope of the refugee definition broadened to take into account this fact.

An expansion of the refugee definition under the Convention should not only be limited to include environmentally displaced persons per se but should equally be flexible to cover other situations that may legitimately result in the flight of persons from their countries of origin to seek refuge elsewhere. This will ensure that the Convention remains relevant and responsive in this contemporary era as it has been over the past years with regard to refugees.

4. Conclusion

The causes and effects of environmental and natural disasters have a global impact with no respect to national or territorial boundaries. Consequently, there is need for legal recognition and protection of those affected by such occurrences. Whether viewed from a human rights lens or in a bid to attain environmental justice, the matter is one that cannot be ignored. The gravity of environmental displacement on individuals, families, communities and nations justifies an intervention. It is from a point of convergence that these grievances can be addressed and this can only be achieved through International Cooperation of States.

The need for legal status of persons fleeing environmental and natural disasters is therefore imperative so as to recognize and protect the rights of those displaced by environmental and natural disasters.

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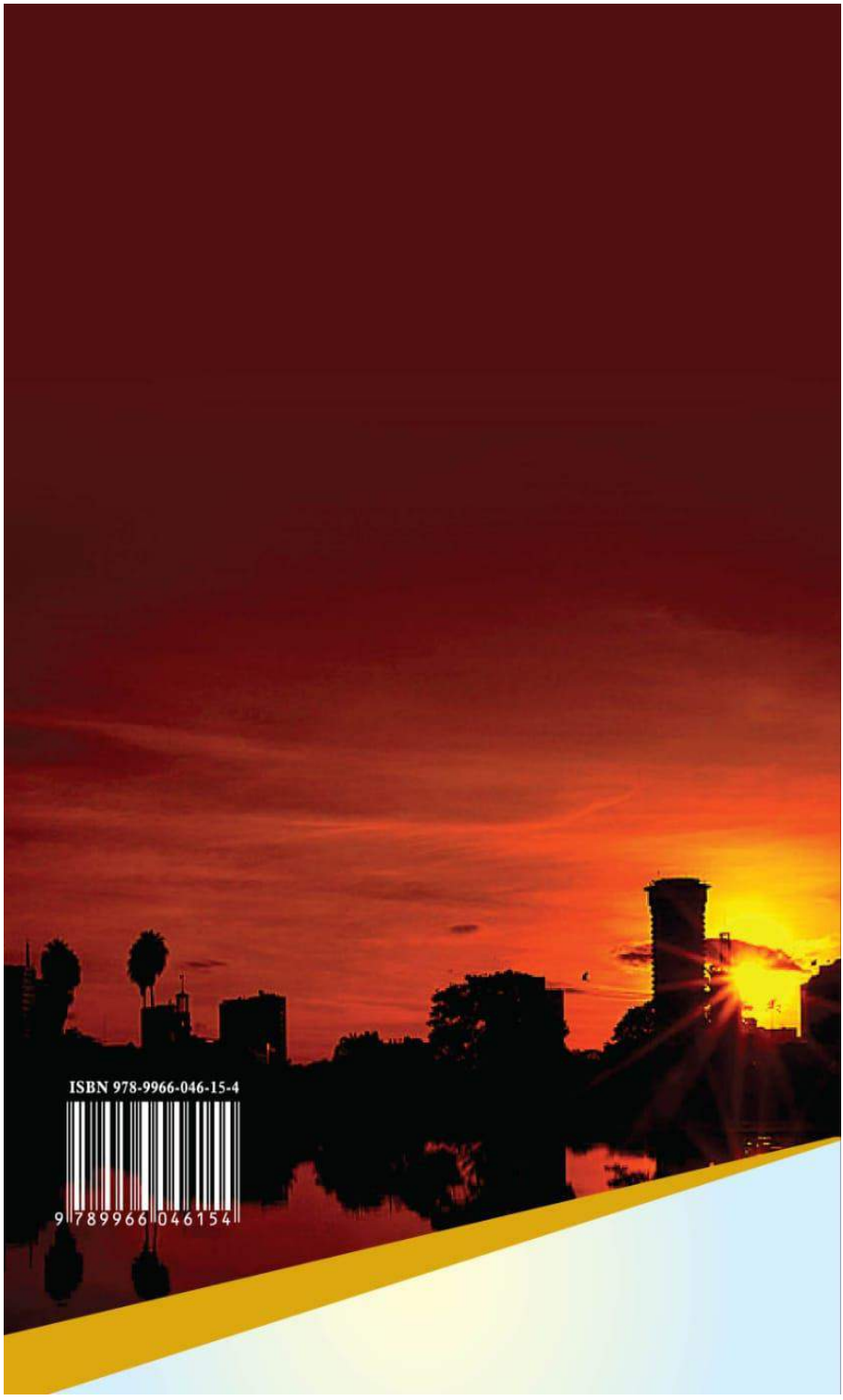
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