

# Journal of Conflict Management & Sustainable Development



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# **Journal of Conflict Management and Sustainable Development**

## **Editor's Note**

Welcome to Volume 7, Issues 3 of the *Journal of Conflict Management and Sustainable Development*.

The Journal is a scholarly publication that focuses on key and emerging themes on Conflict Management and Sustainable Development.

Sustainable Development is arguably the most important theme of the 21<sup>st</sup> Century. In the wake of global challenges including poverty, gender inequalities, economic disparities between nations, global health challenges, climate change and environmental degradation, countries are faced with the dilemma of promoting development that meets the needs of both the present and future generations. It is on this basis that the Sustainable Development goals were adopted as the blueprint of development across the globe.

The Journal addresses some of the pertinent issues on Sustainable Development. However, development is not attainable in environment marred with conflicts. The discourse covered in the Journal aims at addressing some of these concerns with the overall goal being promoting a conflict free environment that will trigger Sustainable Development.

The Journal is peer reviewed and refereed in order to adhere to the highest quality of academic standards and credibility of information.

This issue contains papers on key thematic areas of Conflict Management and Sustainable Development. These topics are: *The Race to Zero Emissions from an African Perspective; Towards Effective Labour Disputes Resolution in Kenya: A Case for Entrenchment of Alternative Dispute Resolution Mechanisms; Enduring Debates in the Pedagogy and Practice of Sustainable Development Models in Africa; Eradicating Poverty for Inclusive Development in Kenya; Extending Sustainable Social Security Coverage in Kenya: A Review of Legal and Regulatory Framework; Role of Good Governance in Combating Climate Change in Africa; Redefining Online Dispute Resolution; Why ODR is Not A Stand-Alone Alternative and Tackling Gender Bias in the Prosecution of International and Transnational Crimes.*

The Journal 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 Editorial Team is committed towards continuous improvement of the Journal in order to enhance its quality, scope, diversity and target audience. We welcome feedback from our readers across the globe to enable us achieve this goal.

I wish to thank the contributing authors, editorial team, reviewers and all those who have made it possible to continue publishing such a high impact Journal.

The Journal can be accessed on <https://journalofcmsd.net>

We welcome submission of papers, commentaries, case digests, legal opinions 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](mailto:editor@journalofcmsd.net) and copied to [admin@kmco.co.ke](mailto:admin@kmco.co.ke)

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2021: Kibet Brian, *Breaking Free; Exorcising The Demons in the Witchcraft Act, Cap 67 and Call for Reforms*, The Platform for Law, Justice and Society issue no. 66 of 2021 and Kibet Brian, *The Defender of Community Lands: The Limping Warrior in the Community Land Act, 2016*, The Platform for Law, Justice and Society issue no.65 of 2021.

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# **Journal of Conflict Management and Sustainable Development**

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# **The Race to Zero Emissions from an African Perspective**

*By: Kariuki Muigua\**

## **Abstract**

*This paper discusses the efforts towards achieving zero carbon emissions in the context of the African continent owing to its unique circumstances. As the rest of the world aims to achieve the race to zero by 2030, the African countries, which are also expected to achieve the same by at least 2040, must work harder against the challenges of poverty, slower development pace and the rapidly increasing population, as a way of overcoming climate change for sustainable development. The paper offers some viable recommendations on some of the most important issues that the African governments must address. The main argument is that countries must strive to build low to zero carbon infrastructure as well as empowering their people to afford them the sustainable alternatives.*

## **1. Introduction**

Greenhouse Gases (GHGs) effect emitted by human activities, is considered to be among the greatest contributors to climate change, one of the biggest threats of the 21<sup>st</sup> century as far as sustainability is concerned.<sup>1</sup> Indeed, climate change has been termed as the ‘biggest threat modern humans have ever faced’.<sup>2</sup> Economic and industrial activities have adverse carbon impacts

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<sup>1</sup> Mora, C., Spirandelli, D., Franklin, E.C., Lynham, J., Kantar, M.B., Miles, W., Smith, C.Z., Freil, K., Moy, J., Louis, L.V. and Barba, E.W., ‘Broad Threat to Humanity from Cumulative Climate Hazards Intensified by Greenhouse Gas Emissions’ (2018) 8 Nature Climate Change 1062.

<sup>2</sup> ‘Climate Change “Biggest Threat Modern Humans Have Ever Faced”, World-Renowned Naturalist Tells Security Council, Calls for Greater Global Cooperation | Meetings Coverage and Press Releases’

on the environment and climate change mitigation activities must focus on such activities too, if these challenges are to be addressed.<sup>3</sup> Notably, the principal greenhouse gases whose concentrations have increased over the industrial period are carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), nitrous oxide (N<sub>2</sub>O), and chlorofluorocarbons CFC-11 (CCl<sub>3</sub>F) and CFC-12 (CCl<sub>2</sub>F<sub>2</sub>).<sup>4</sup> Arguably, most of these carbon emissions come from development projects as well as burning fuels for energy.<sup>5</sup>

The Race To Zero is a global campaign to rally leadership and support from businesses, cities, regions, investors for a healthy, resilient, zero carbon recovery that prevents future threats, creates decent jobs, and unlocks inclusive, sustainable growth.<sup>6</sup> The Race to Zero was initiated by the adoption of the *Paris Agreement*, a legally binding international treaty on climate change which was adopted by 196 Parties at Conference of Parties

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<https://www.un.org/press/en/2021/sc14445.doc.htm> accessed 23 September 2021.

<sup>3</sup> Zaman K and Moemen MA, 'Energy Consumption, Carbon Dioxide Emissions and Economic Development: Evaluating Alternative and Plausible Environmental Hypothesis for Sustainable Growth' (2017) 74 *Renewable and Sustainable Energy Reviews* 1119; Mgbemene CA, Nnaji CC and Nwozor C, 'Industrialization and Its Backlash: Focus on Climate Change and Its Consequences.' (2016) 9 *Journal of Environmental Science and Technology* 301.

<sup>4</sup> Change C and others, 'Greenhouse Gases and Their Effect on the Earth-Atmosphere Energy Balance' 1

<https://ntrs.nasa.gov/api/citations/19990109667/downloads/19990109667.pdf> accessed 23 September 2021.

<sup>5</sup> US EPA O, 'Sources of Greenhouse Gas Emissions' (29 December 2015) <https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions> accessed 15 October 2021; 'Building Sector Emissions Hit Record High, but Low-Carbon Pandemic Recovery Can Help Transform Sector – UN Report' (*UN Environment*, 16 December 2020)

<http://www.unep.org/news-and-stories/press-release/building-sector-emissions-hit-record-high-low-carbon-pandemic> accessed 15 October 2021; 'New Report: The Building and Construction Sector Can Reach Net Zero Carbon Emissions by 2050' (*World Green Building Council*)

<https://www.worldgbc.org/news-media/WorldGBC-embodied-carbon-report-published> accessed 15 October 2021; 'Low-Carbon Infrastructure: An Essential Solution to Climate Change?' <https://blogs.worldbank.org/ppps/low-carbon-infrastructure-essential-solution-climate-change> accessed 15 October 2021.

<sup>6</sup> 'Race To Zero Campaign | UNFCCC' <https://unfccc.int/climate-action/race-to-zero-campaign> accessed 23 September 2021.

(COP) 21 in Paris, on 12 December 2015 and entered into force on 4 November 2016.<sup>7</sup> The Paris Agreement was adopted with the goal of limiting global warming to well below 2, preferably to 1.5 degrees Celsius, compared to pre-industrial levels whereby to achieve this long-term temperature goal, countries aim to reach global peaking of greenhouse gas emissions as soon as possible to achieve a climate neutral world by mid-century.<sup>8</sup> This binding agreement is meant to combat climate change and adapt to its effects.<sup>9</sup>

This paper discusses the special circumstances and effects of climate change in the African continent and how these affect the people's and countries' response to the international calls for eliminating GHG emissions. This is in acknowledgement of the fact that the African continent must come up with its own unique custom- tailored responses to these efforts as it has to contend with challenges that may not necessarily be an issue to the rest of the world, and especially the developed world.

## **2. Greenhouse Gases Emissions and Climate Change: The Link**

The World Meteorological Organisation (WMO) attributes the build-up of greenhouse gases in the atmosphere during the 20th century to 'the growing use of energy and expansion of the global economy.'<sup>10</sup> The build-up of greenhouse gases in the atmosphere alters the radiative balance of the atmosphere and the net effect is to warm the Earth's surface and the lower atmosphere because greenhouse gases absorb some of the Earth's outgoing heat radiation and re-radiate it back towards the surface.<sup>11</sup> The Greenhouse gases (GHGs) warm the surface and the atmosphere with significant implications for rainfall, retreat of glaciers and sea ice, sea level, among other factors (the greenhouse effect).<sup>12</sup> The greenhouse effect involves:

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<sup>7</sup> 'The Paris Agreement | UNFCCC' <<https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>> accessed 24 September 2021.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> UNFCC, 'Fact Sheet: Climate Change Science-the Status of Climate Change Science Today', *United Nations Framework Convention on Climate Change* (2011).

<sup>11</sup> Ibid.

<sup>12</sup> Ramanathan V and Feng Y, 'Air Pollution, Greenhouse Gases and Climate Change: Global and Regional Perspectives' (2009) 43 *Atmospheric environment* 37.

‘infrared (IR) active gases, principally water vapor (H<sub>2</sub>O), carbon dioxide (CO<sub>2</sub>), and ozone (O<sub>3</sub>), naturally present in the Earth’s atmosphere, absorb thermal IR radiation emitted by the Earth’s surface and atmosphere. The atmosphere is warmed by this mechanism and, in turn, emits IR radiation, with a significant portion of this energy acting to warm the surface and the lower atmosphere. As a consequence, the average surface air temperature of the Earth is about 30° C higher than it would be without atmospheric absorption and re-radiation of IR energy’.<sup>13</sup>

Arguably, continuous emissions of GHGs are simultaneously shifting many elements of Earth’s climate beyond thresholds that can impact humanity, whereby these gases affect the balance between incoming solar radiation and outgoing infrared radiation, thus increasing the Earth’s energy budget, ultimately leading to warming and also affecting other aspects of the Earth’s climate system.<sup>14</sup>

Notably, carbon emissions affect the guarantee to a right to Clean and Healthy Environment, and this must be safeguarded considering that the UN Human Rights Council recently recognised the human right to a clean, healthy, and sustainable environment.<sup>15</sup> It is expected that “it will spark constitutional changes and stronger environmental laws, with positive implications for air quality, clean water, healthy soil, sustainably produced food, green energy, climate change, biodiversity and the use of toxic substances.”<sup>16</sup> The World Health Organization (WHO) estimates that 24 per cent of all global deaths, roughly 13.7 million deaths a year, are linked to the

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<sup>13</sup> Ledley TS and others, ‘Climate Change and Greenhouse Gases’ (1999) 80 Eos, Transactions American Geophysical Union 453.

<sup>14</sup> Mora, C., Spirandelli, D., Franklin, E.C., Lynham, J., Kantar, M.B., Miles, W., Smith, C.Z., Freel, K., Moy, J., Louis, L.V. and Barba, E.W., ‘Broad Threat to Humanity from Cumulative Climate Hazards Intensified by Greenhouse Gas Emissions’ (2018) 8 Nature Climate Change 1062.

<sup>15</sup> ‘OHCHR | UN Recognition of Human Right to Healthy Environment Gives Hope for Planet’s Future – Human Rights Expert’ <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27633&LangID=E>> accessed 17 October 2021.

<sup>16</sup> Ibid.

environment due to risks such as air pollution and chemical exposure.<sup>17</sup> Notably, most of these environmental-related deaths are witnessed in developing countries.<sup>18</sup> This, therefore, informs this paper's call for developing countries in Africa to do towards more to addressing the areas that contribute greatest to GHGs emissions as part of addressing climate change.

### **3. International Regulatory Framework on Carbon Emissions**

This section highlights the main legal and institutional framework on regulation of carbon emissions that guides countries in their efforts towards reduction of carbon emissions.

#### **3.1. Conference of Parties 26 (COP 26)**

UNFCCC established Conference of the Parties (COP), as the supreme body of the Convention, and it is empowered to keep under regular review the implementation of the Convention and any related legal instruments that the Conference of the Parties may adopt, and should make, within its mandate, the decisions necessary to promote the effective implementation of the Convention.<sup>19</sup>

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<sup>17</sup> 'Landmark UN Resolution Confirms Healthy Environment Is a Human Right' (UNEP, 14 October 2021) <<http://www.unep.org/news-and-stories/story/landmark-un-resolution-confirms-healthy-environment-human-right>> accessed 17 October 2021.

<sup>18</sup> 'Air Pollution Hurts the Poorest Most' (UNEP, 9 May 2019) <<http://www.unep.org/news-and-stories/story/air-pollution-hurts-poorest-most>> accessed 17 October 2021; 'WHO | Environment and Health in Developing Countries' (WHO) <<https://www.who.int/heli/risks/ehindevcoun/en/>> accessed 17 October 2021; Manisalidis I and others, 'Environmental and Health Impacts of Air Pollution: A Review' (2020) 8 *Frontiers in Public Health* 14; Nations U, 'The Health Effects Of Global Warming: Developing Countries Are The Most Vulnerable' (United Nations) <<https://www.un.org/en/chronicle/article/health-effects-global-warming-developing-countries-are-most-vulnerable>> accessed 17 October 2021.

<sup>19</sup> Article 7.

The Parties to the Convention meet every year (with the exception of 2020 due to Covid-19) at the Conference of the Parties (COP), the meeting of the UNFCCC in Glasgow in November 2021 being COP26.<sup>20</sup>

The COP26 Summit is meant to bring parties together to accelerate action towards the goals of the Paris Agreement and the UN Framework Convention on Climate Change.<sup>21</sup> The goals of COP26 include to: secure global net zero by mid-century and keep 1.5 degrees within reach; adapt to protect communities and natural habitats; mobilise finance; and work together to deliver.<sup>22</sup> At COP 26, countries are expected to commit to: come forward with ambitious 2030 emissions reductions targets that align with reaching net zero by the middle of the century, where they will consequently need to: accelerate the phase-out of coal, curtail deforestation, speed up the switch to electric vehicles, and encourage investment in renewables; protect and restore ecosystems and build defences, warning systems and resilient infrastructure and agriculture to avoid loss of homes, livelihoods and even lives; International financial institutions must play their part and we need work towards unleashing the trillions in private and public sector finance required to secure global net zero; and finalise the Paris Rulebook (the detailed rules that make the Paris Agreement operational), and accelerate action to tackle the climate crisis through collaboration between governments, businesses and civil society.<sup>23</sup>

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<sup>20</sup> 'What Is COP26, Who Will Attend It and Why Does It Matter?' (*Energy & Climate Intelligence Unit*) <<https://eciu.net/analysis/briefings/international-perspectives/what-is-cop26-who-will-attend-it-and-why-does-it-matter>> accessed 13 October 2021.

<sup>21</sup> 'UN Climate Change Conference (COP26) at the SEC – Glasgow 2021' (*UN Climate Change Conference (COP26) at the SEC – Glasgow 2021*) <<https://ukcop26.org/>> accessed 13 October 2021.

<sup>22</sup> 'COP26 Goals' (*UN Climate Change Conference (COP26) at the SEC – Glasgow 2021*) <<https://ukcop26.org/cop26-goals/>> accessed 15 October 2021.

<sup>23</sup> Ibid.



### **3.2. Intergovernmental Panel on Climate Change (IPCC)**

The Intergovernmental Panel on Climate Change (IPCC) is the United Nations body for assessing the science related to climate change.<sup>24</sup> It was created to provide policymakers with regular scientific assessments on climate change, through comprehensive Assessment Reports about the state of scientific, technical and socio-economic knowledge on climate change, its impacts and future risks, and options for reducing the rate at which climate change is taking place as well as special Reports on topics agreed to by its member governments, and Methodology Reports that provide guidelines for the preparation of greenhouse gas inventories.<sup>25</sup> They thus act as an updated source of information for the countries.

### **3.3. The United Nations Framework Convention on Climate Change 1992**

The United Nations Framework on Climate Change Convention (UNFCCC)<sup>26</sup> was adopted in 1992, entered into force on 21 March 1994 and its ultimate objective and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.<sup>27</sup> Notably, such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.<sup>28</sup>

In implementing the UNFCCC, the Parties are to be guided, *inter alia*, by the following principles: Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated

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<sup>24</sup> 'IPCC — Intergovernmental Panel on Climate Change' <<https://www.ipcc.ch/>> accessed 17 October 2021.

<sup>25</sup> Ibid.

<sup>26</sup> UN General Assembly, *United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly*, 20 January 1994, A/RES/48/189.

<sup>27</sup> Ibid, Article 2.

<sup>28</sup> Ibid.

responsibilities and respective capabilities; specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration; Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects; Parties have a right to, and should, promote sustainable development; and Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change.<sup>29</sup>

These principles are an acknowledgement that any activities or actions geared towards climate change mitigation including the efforts in the race to zero emissions must take account of the differences between developed countries and developing regions such as Africa. It also follows that African countries must be allowed to come up with tailor made responses to carbon emissions, based on the current challenges and needs. Notably, as they are the source of most past and current greenhouse gas emissions, industrialized countries are expected to do the most to cut emissions on home ground.<sup>30</sup>

### **3.4. Vienna Convention for the Protection of the Ozone Layer (1985)**

The Vienna Convention is a framework convention that lays out principles agreed upon by many parties which does not, however, require countries to take control actions to protect the ozone layer unlike the Montreal Protocol.<sup>31</sup> The Convention requires Parties to take appropriate measures in accordance with the provisions of the Convention and of those protocols in force to

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<sup>29</sup> Ibid, Article 3.

<sup>30</sup> ‘What Is the United Nations Framework Convention on Climate Change? | UNFCCC’ <<https://unfccc.int/process-and-meetings/the-convention/what-is-the-united-nations-framework-convention-on-climate-change>> accessed 14 October 2021.

<sup>31</sup> ‘The Vienna Convention for the Protection of the Ozone Layer | Ozone Secretariat’ <<https://ozone.unep.org/treaties/vienna-convention>> accessed 17 October 2021.

which they are party to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer.<sup>32</sup>

The Convention also requires that the Parties should co-operate, consistent with their national laws, regulations and practices and taking into account in particular the needs of the developing countries, in promoting, directly or through competent international bodies, the development and transfer of technology and knowledge. Such co-operation should be carried out particularly through: Facilitation of the acquisition of alternative technologies by other Parties; Provision of information on alternative technologies and equipment, and supply of special manuals or guides to them; The supply of necessary equipment and facilities for research and systematic observations; and appropriate training of scientific and technical personnel.<sup>33</sup>

### **3.5. Montreal Protocol on Substances that Deplete the Ozone Layer, 1987 and the Kigali Amendment of 2016**

The 1987 Montreal Protocol is a global agreement to protect the Earth's ozone layer through a phase-out plan which includes both the production and consumption of ozone-depleting substances, which was signed in 1987 and entered into force in 1989.<sup>34</sup> The Protocol has been termed as a success especially in reduction and elimination of anthropogenic emissions of ozone depleting substances (ODSs), primarily responsible for stratospheric ozone depletion since around the 1960s.<sup>35</sup> The nearly 100 man-made chemicals referred to as ozone depleting substances (ODS), when released to the atmosphere, damage the stratospheric ozone layer, Earth's protective shield

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<sup>32</sup> Vienna Convention for the Protection of the Ozone Layer, Article 2.1.

<sup>33</sup> Ibid, Article 4.2.

<sup>34</sup> 'The Montreal Protocol on Substances That Deplete the Ozone Layer | Ozone Secretariat' <<https://ozone.unep.org/treaties/montreal-protocol>> accessed 14 October 2021.

<sup>35</sup> Banerjee A and others, 'A Pause in Southern Hemisphere Circulation Trends Due to the Montreal Protocol' (2020) 579 Nature 544.

that protects humans and the environment from harmful levels of ultraviolet radiation from the sun.<sup>36</sup>

In recognition of the special situation of developing countries, Montreal Protocol provides that ‘the Parties undertook to facilitate access to environmentally safe alternative substances and technology for Parties that are developing countries and assist them to make expeditious use of such alternatives’.<sup>37</sup> In addition, ‘the Parties undertook to facilitate bilaterally or multilaterally the provision of subsidies, aid, credits, guarantees or insurance programmes to Parties that are developing countries for the use of alternative technology and for substitute products’.<sup>38</sup>

The Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer which was adopted in Kigali, Rwanda on 15 October 2016 and came into force 1<sup>st</sup> January 2019 (provided it would have been ratified by at least 20 parties)<sup>39</sup> at the Twenty-Eighth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, held in Kigali from 10 to 15 October 2016.<sup>40</sup> The Kigali Amendment to the Montreal protocol is expected to reduce the projected production and consumption of hydrofluorocarbons (HFCs) by more than 80 per cent over the next 30 years.<sup>41</sup> The Kigali Amendment is also expected to avoid up to

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<sup>36</sup> Environment UN, ‘About Montreal Protocol’ (*Ozonaction*, 29 October 2018) <<http://www.unep.org/ozonaction/who-we-are/about-montreal-protocol>> accessed 14 October 2021.

<sup>37</sup> Article 5(2).

<sup>38</sup> Article 5 (3).

<sup>39</sup> ‘United Nations Treaty Collection’

<[https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XXVII-2-f&chapter=27&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-2-f&chapter=27&clang=_en)> accessed 17 October 2021.

<sup>40</sup> Ibid.

<sup>41</sup> ‘World Takes a Stand against Powerful Greenhouse Gases with Implementation of Kigali Amendment’ (*UN Environment*, 3 January 2019) <<http://www.unep.org/news-and-stories/press-release/world-takes-stand-against-powerful-greenhouse-gases-implementation>> accessed 17 October 2021.

#### Addition of Article 2J

The following Article shall be inserted after Article 2I of the Protocol:

0.4°C of global warming this century while continuing to protect the ozone layer, thus substantively contributing to the goals of the Paris Agreement.<sup>42</sup>

While hydrofluorocarbons (HFCs), given their zero impact on the depletion of the ozone layer, are currently used as replacements of hydrochlorofluorocarbons (HCFCs) and chlorofluorocarbons (CFCs), they are extremely potent greenhouse gases with global warming potentials that can be many times higher than carbon dioxide, hence the need to phase them out in efforts towards climate change mitigation.<sup>43</sup> Key elements of the Kigali Amendment include: Innovative and flexible structure; Ambitious phasedown schedule; Incentive for early action; Broad participation; Enforcement and accountability; and Multiple opportunities to increase ambition.<sup>44</sup>

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***“Article 2J: Hydrofluorocarbons***

***1. Each Party shall ensure that for the twelve-month period commencing on 1 January 2019, and in each twelve-month period thereafter, its calculated level of consumption of the controlled substances in Annex F, expressed in CO<sub>2</sub> equivalents, does not exceed the percentage, set out for the respective range of years specified in subparagraphs (a) to (e) below, of the annual average of its calculated levels of consumption of Annex F controlled substances for the years 2011, 2012 and 2013, plus fifteen per cent of its calculated level of consumption of Annex C, Group I, controlled substances as set out in paragraph 1 of Article 2F, expressed in CO<sub>2</sub> equivalents:***

***(a) 2019 to 2023: 90 per cent***

***(b) 2024 to 2028: 60 per cent***

***(c) 2029 to 2033: 30 per cent***

***(d) 2034 to 2035: 20 per cent***

***(e) 2036 and thereafter: 15 per cent***

<sup>42</sup> Ibid.

<sup>43</sup> ‘The Montreal Protocol Evolves to Fight Climate Change | UNIDO’ <<https://www.unido.org/our-focus-safeguarding-environment-implementation-multilateral-environmental-agreements-montreal-protocol/montreal-protocol-evolves-fight-climate-change>> accessed 17 October 2021.

<sup>44</sup> US EPA O, ‘Recent International Developments under the Montreal Protocol’ (15 July 2015) <<https://www.epa.gov/ozone-layer-protection/recent-international-developments-under-montreal-protocol>> accessed 17 October 2021.

### **3.6. Kyoto Protocol to the United Nations Framework Convention on Climate Change (1997)**

The Kyoto Protocol<sup>45</sup> was adopted at the third session of the Conference of the Parties (COP 3) to the 1992 United Nations Framework Convention on Climate Change (“the Convention”), held at Kyoto (Japan) from 1 to 11 December 1997.<sup>46</sup> It applies the principle of common but differentiated responsibilities and sets binding targets for reducing greenhouse gas emissions for industrialized countries, recognizing them as those primarily responsible for the high levels of emissions currently present in the atmosphere.<sup>47</sup>

## **4. Domestic Regulatory Framework on Carbon Emissions: The Case of Kenya**

This section highlights the main regulatory legal instruments that the country can build on in its race towards zero emissions.

### **4.1. The Constitution of Kenya 2010**

Article 10 of the Constitution outlines the principle of sustainability as one of the national values and principles of governance that must bind of policy and law makers.<sup>48</sup> Article 42 thereof guarantees every person’s right to a clean and healthy environment, which includes the right- to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and to have obligations relating to the environment fulfilled under Article 70.<sup>49</sup> Article 69(1) requires the State to: ensure sustainable

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<sup>45</sup> United Nations, *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, Kyoto, 11 December 1997, United Nations, Treaty Series, vol. 2303, p. 162.

<sup>46</sup> ‘United Nations Treaty Collection’

<[https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XXVII-7-a&chapter=27&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-7-a&chapter=27&clang=_en)> accessed 17 October 2021.

<sup>47</sup> ‘Kyoto Protocol [Framework Convention on Climate Change] | Observatory on Principle 10’

<<https://observatoriop10.cepal.org/en/treaties/kyoto-protocol-framework-convention-climate-change>> accessed 17 October 2021.

<sup>48</sup> Article 10, Constitution of Kenya 2010.

<sup>49</sup> Ibid, Art. 42.

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; encourage public participation in the management, protection and conservation of the environment; establish systems of environmental impact assessment, environmental audit and monitoring of the environment; and eliminate processes and activities that are likely to endanger the environment.<sup>50</sup>

#### ***4.2. Sessional Paper No. 3 of 2016 on National Climate Change Framework Policy***

Kenya's *Sessional Paper No. 3 of 2016 on National Climate Change Framework Policy*<sup>51</sup> was formulated to enhance adaptive capacity and resilience to climate change, and promote low carbon development for the sustainable development of Kenya.<sup>52</sup> Its main objectives of this Policy are to: establish and maintain an effective and efficient institutional framework to mainstream climate change responses across relevant sectors and into integrated planning, budgeting, decision-making and implementation, at both the national and county levels; reduce vulnerability to the impacts of climate change by building adaptive capacity, enhancing climate change resilience and strengthening capacities for disaster risk reduction; catalyse Kenya's transition to cleaner, lower emission and less carbon intensive development; incentivize private sector involvement in building climate change resilience and engaging in low carbon development opportunities; facilitate widespread public awareness, participation, ownership and oversight of Kenya's climate change response efforts and Action Plans; provide a framework to mobilise resources for Kenya's climate change response and ensure effective and transparent utilisation of the resources; adopt intergenerational, special needs and gender mainstreaming approaches across all aspects of Kenya's climate change response; provide the policy framework to facilitate effective implementation of regularly updated and scientifically informed Climate Change Action Plans; and enhance research

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<sup>50</sup> Ibid, Art.69(1).

<sup>51</sup> Republic of Kenya, *Sessional Paper No. 3 of 2016 on National Climate Change Framework Policy*.

<sup>52</sup> Goal 3.1.

and use of science and technology in policy decisions and sustainable management of resources.<sup>53</sup>

The implementation of this Policy will be guided by the following principles: Common but differentiated responsibilities and respective capabilities; Right to a clean and healthy environment; Right to Sustainable Development; Partnership; Cooperative government; Equity and social inclusion; Special needs and circumstances; Avoiding maladaptation; Integrity and transparency; and cost effectiveness.<sup>54</sup>

The Climate Change Policy 2016 calls for low carbon climate resilient development through a number of actions: Enhancing Climate Resilience and Adaptive Capacity where the Government will: Put in place mechanisms for sustainable utilisation of natural resources to enhance climate resilience and adaptive capacity to protect the natural capital of Kenya; Mainstream climate resilience into national and county government development plans, processes and implementation; Ensure integration of climate change risk and vulnerability assessment in environment impact assessment and strategic environmental assessment; Develop incentives to promote climate resilient actions among public, private and other actors; Identify and implement priority adaptation actions across key social, environmental and economic sectors under the framework of a National Adaptation Plan; Promote public and stakeholder consultation and participation, including with vulnerable groups, to enhance adaptive capacity and climate resilience; and Develop mechanisms to build capacity to mainstream climate change into disaster risk reduction and management programmes;<sup>55</sup> Towards Low Carbon Growth-although Kenya currently contributes very little to global GHG emissions, a significant number of priority development initiatives outlined in Vision 2030 and regular Medium Term Plans (MTPs) will impact on Kenya's levels of GHG emissions. As such, the Government will: Identify and implement fiscal, taxation and other policy options in priority areas with high GHG emission abatement potential that enhance sustainable development; Mainstream low carbon growth options into the planning

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<sup>53</sup> Goal 3.2.

<sup>54</sup> Goal 3.3.

<sup>55</sup> Goal 4.1.



processes and functions of the national and county governments; Put in place mechanisms to establish a GHG emissions inventory to achieve efficient and effective collection, recording, sharing and utilisation of GHG emissions data; In view of strategic national interests, consider participating in voluntary emission reduction programmes when they support the country's sustainable development goals and achieve co-benefits; Put in place mechanisms to develop and promote clean technologies in all sectors of economic development; and Promote the creation of green jobs by establishing an enabling policy framework for investment, and creating business friendly regulatory environments in key areas such as renewable energy, efficient transport, clean manufacturing and sustainable agriculture.<sup>56</sup>

#### **4.3. Climate Change Act 2016**

The Climate Change Act 2016<sup>57</sup> was enacted to provide for a regulatory framework for enhanced response to climate change; to provide for mechanism and measures to achieve low carbon climate development, and for connected purposes.<sup>58</sup>

The Act is to be applied for the development, management, implementation and regulation of mechanisms to enhance climate change resilience and low carbon development for the sustainable development of Kenya.<sup>59</sup> The Act is to be applied in all sectors of the economy by the national and county governments to: mainstream climate change responses into development planning, decision making and implementation; build resilience and enhance adaptive capacity to the impacts of climate change; formulate programmes and plans to enhance the resilience and adaptive capacity of human and ecological systems to the impacts of climate change; mainstream and reinforce climate change disaster risk reduction into strategies and actions of public and private entities; mainstream intergenerational and gender equity in all aspects of climate change responses; provide incentives and obligations for private sector contribution in achieving low carbon climate

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<sup>56</sup> Goal 4.2.

<sup>57</sup> Climate Change Act, No. 11 of 2016, Laws of Kenya.

<sup>58</sup> Ibid, Preamble.

<sup>59</sup> Ibid, sec. 3(1).

resilient development; promote low carbon technologies, improve efficiency and reduce emissions intensity by facilitating approaches and uptake of technologies that support low carbon, and climate resilient development; facilitate capacity development for public participation in climate change responses through awareness creation, consultation, representation and access to information; mobilize and transparently manage public and other financial resources for climate change response; provide mechanisms for, and facilitate climate change research and development, training and capacity building; mainstream the principle of sustainable development into the planning for and decision making on climate change response; and integrate climate change into the exercise of power and functions of all levels of governance, and to enhance cooperative climate change governance between the national government and county governments.<sup>60</sup>

## **5. The Race to Zero Emissions: The Challenges**

In accordance with the Paris Agreement, every country agreed to communicate or update their emissions reduction targets – their Nationally Determined Contribution (NDC) – every five years to reflect their highest possible ambition and a progression over time, where the targets set out how far countries plan to reduce emissions across their entire economy and/or in specific sectors.<sup>61</sup>

Kenya's *Sessional Paper No. 3 of 2016 on National Climate Change Framework Policy* identifies the following challenges as far as climate change mitigation is concerned: fossil fuel based electricity generation and consumption, and increases in fossil fuel use in the transportation sector contribute significantly to GHG emissions; agricultural sector is the largest contributor of GHGs emissions in the country mainly from livestock methane emissions and land-use change; deforestation and forest degradation in search for fuel wood, charcoal production and creation of agricultural land; transport sector in Kenya contributes to GHG emissions through the use of more fossil fuel and increases local air pollution, which has serious health implications; and industrial processing in Kenya are some

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<sup>60</sup> Ibid, sec. 3(2).

<sup>61</sup> 'COP26 Goals' (*UN Climate Change Conference (COP26) at the SEC – Glasgow 2021*) <<https://ukcop26.org/cop26-goals/>> accessed 15 October 2021.

of the main challenges that are likely to affect any efforts towards achieving zero emissions.<sup>62</sup> Arguably, these challenges are a reflection of what is happening across the African continent. There is thus a need to address these challenges as part of the race towards zero carbon emissions.

## **6. The Race to Zero Emissions from an African Perspective: Way Forward**

In line with the principle of common but differentiated responsibilities under the international environmental law, this section offers some recommendations on some viable steps that African States can take to address climate change through reduced carbon emissions.

### **6.1. Clean Development Mechanism**

Carbon or emissions trading works by limiting the amount of carbon dioxide that entities such as companies, municipalities or countries can release into the atmosphere, creating competition to encourage them to become more energy efficient and adopt cleaner technology whereby companies aiming to reduce their carbon output can sell unused pollution allowances and those that exceed their allocated emissions allowance may have to buy more emissions permits, or be subject to monetary fines.<sup>63</sup>

African countries should invest in and explore more clean development mechanisms not only as way of raising funds but also climate change mitigation. Kenya should make more use of the Green Bond Programme - Kenya, which aims to promote financial sector innovation by developing a domestic green bond market.<sup>64</sup>

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<sup>62</sup> *Sessional Paper No. 3 of 2016 on National Climate Change Framework Policy*, Goal 4.2.

<sup>63</sup> Amesheva I, 'The Road to Net-Zero Is Paved with Good Intentions', 3 <[https://www.arabesque.com/wp-content/uploads/2021/09/The-Road-to-Net-Zero\\_Part-One\\_FINAL.pdf](https://www.arabesque.com/wp-content/uploads/2021/09/The-Road-to-Net-Zero_Part-One_FINAL.pdf)> Accessed 24 September 2021.

<sup>64</sup> 'Kenya Green Bonds Programme' (*greenbondskenya*) <<https://www.greenbondskenya.co.ke>> accessed 17 October 2021.

## **6.2. Transition from Fuel-Based Transport to Electric Vehicles in Africa**

It has been observed that ‘today’s transport sector accounts for around a quarter of energy-related CO<sub>2</sub> emissions globally since it is almost completely dependent on fossil fuels and, therefore, decarbonizing the sector is crucial to achieving the temperature goals of the Paris Agreement.’<sup>65</sup> Notably, in Africa and South Asia, the transition to low-carbon vehicles is vital in mitigating climate change.<sup>66</sup>

While improved and expanded physical infrastructure through investment in roads and rail lines is an important and necessary enabler of socio-economic development, countries must start moving towards environmental friendly means of transport such as electric vehicles, through financial incentives as has been witnessed in Rwanda where the country’s leadership has unveiled incentives meant to encourage the citizenry to embrace electric cars.<sup>67</sup>

## **6.3. Role of the Private Sector in Reducing Emissions**

Notably, the Paris Agreement underscores the important role of Non-State Actors (NSAs), particularly the private sector in the implementation of the key provisions the landmark Pact adopted in 2015, such as the Nationally Determined Contributions, adaptation, mitigation and finance.<sup>68</sup>

Arguably, in addition to top-down national or international policy instruments that aim to regulate the amount and flow of global emissions,

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<sup>65</sup> ‘Advancing Electric Mobility in Africa | UNFCCC’ <<https://unfccc.int/news/advancing-electric-mobility-in-africa>> accessed 13 October 2021.

<sup>66</sup> Collett, Katherine A., Maximus Byamukama, Constance Crozier, and Malcolm McCulloch. "Energy and Transport in Africa and South Asia." *Energy and Economic Growth* (2020), 2.

<sup>67</sup> ‘Rwanda Unveils New Incentives to Drive Electric Vehicle Uptake’ (*The New Times | Rwanda*, 16 April 2021) <<https://www.newtimes.co.rw/news/rwanda-unveils-new-incentives-drive-electric-vehicle-uptake>> accessed 17 October 2021.

<sup>68</sup> PACJA, ‘The role of the African private sector in the transition to low-emission, climate-resilient, green growth and NDCs implementation,’ *9<sup>th</sup> Conference On Climate Change and Development in Africa (CCDA-IX)*, Santa Maria, Sal Island, Cabo Verde, 13-17 September 2021.

the private sector is rising as a potent force for change.<sup>69</sup> It has been observed that the private sector is a key stakeholder in both urban and economic development, being a major contributor to national income and the principal job creator and employer, where it provides around 90% of employment in the developing world (including formal and informal jobs), delivers critical goods and services and contributes to tax revenues and the efficient flow of capital.<sup>70</sup> The private sector is considered to be an important player in creating innovative and technological solutions, as well as providing resources to meet our global environmental challenges.<sup>71</sup>

It has been suggested that in order able to make private-sector energy solutions affordable for low-income households, ‘private sector financing will be necessary to complement public sector finance in realizing universal energy access in conjunction with renewable energy uptake, which is often prevented by high financing costs as a result of a range of technical, regulatory, financial and informational barriers and their associated investment risks.’<sup>72</sup> This is against the background of some studies which have concluded that ‘without significant additional investments and dedicated policies, the goal of total rural electrification and universal access to modern cooking fuels and stoves by 2030 is unachievable’.<sup>73</sup>

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<sup>69</sup> Amesheva I, ‘The Road to Net-Zero Is Paved with Good Intentions’, 6 <<https://www.arabesque.com/wp-content/uploads/2021/09/The-Road-to-Net-Zero-Part-One-FINAL.pdf>> Accessed 24 September 2021.

<sup>70</sup> ‘The Role of the Private Sector’ (GSDRC) <<https://gsdrc.org/topic-guides/urban-governance/elements-of-effective-urban-governance/the-role-of-the-private-sector/>> accessed 27 September 2021.

<sup>71</sup> Environment UN, ‘Private Sector Engagement’ (UNEP - UN Environment Programme, 2 June 2021) <<http://www.unep.org/about-un-environment/private-sector-engagement>> accessed 27 September 2021.

<sup>72</sup> ‘Accelerating SDG 7 Achievement: Policy Briefs in Support of the First SDG 7 Review at the UN High-Level Political Forum 2018 | Environmental Migration Portal’ 2 <<https://environmentalmigration.iom.int/accelerating-sdg-7-achievement-policy-briefs-support-first-sdg-7-review-un-high-level-political>> accessed 12 October 2021.

<sup>73</sup> Pachauri, Shonali, Bas J. van Ruijven, Yu Nagai, Keywan Riahi, Detlef P. van Vuuren, Abeeku Brew-Hammond, and Nebojsa Nakicenovic. “Pathways to Achieve Universal Household Access to Modern Energy by 2030.” *Environmental Research Letters* 8, no. 2 (May 2013): 024015. <https://doi.org/10.1088/1748-9326/8/2/024015>.

#### **6.4. Investing in Affordable Energy Technology Innovation in Reducing Greenhouse Gas Emissions**

It is estimated that without new policies, by 2050, more disruptive climate change is likely to be locked in, with global greenhouse gas (GHG) emissions projected to increase by 50%, primarily due to a 70% growth in energy-related CO<sub>2</sub> emissions.<sup>74</sup>

Most rural area residents have relied on biomass fuels for long due to their relatively cheaper accessibility as lack of financial resources is a key barrier to access to energy in rural Africa.<sup>75</sup> As already highlighted, the combustion of biomass fuels in traditional stoves produces greenhouse gases and aerosols such as black carbon and the extensive use of biomass can also result in forest, land, and soil degradation, leading to net CO<sub>2</sub> emissions.<sup>76</sup> As a result, it has been pointed out that governments recognise that scaling up and shifting financial flows to low-emission and resilient infrastructure investments is critical to deliver on climate and sustainable development goals.<sup>77</sup>

As part of reducing GHG emissions, it has been suggested that understanding the influence of energy technology innovation in reducing a country's greenhouse gas emissions requires a systematic review to characterize the existing system.<sup>78</sup> Arguably, technology Platforms unite

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<sup>74</sup> 'Climate Change Chapter of the OECD Environmental Outlook to 2050: The Consequences of Inaction - OECD' <<https://www.oecd.org/env/indicators-modellingoutlooks/climatechangechapteroftheoecdenvironmentaloutlookto2050theconsequencesofinaction.htm>> accessed 17 October 2021.

<sup>75</sup> Allet M, 'Solar Loans through a Partnership Approach: Lessons from Africa' [2016] Field Actions Science Reports. The journal of field actions 128.

<sup>76</sup> Pachauri, Shonali, Bas J. van Ruijven, Yu Nagai, Keywan Riahi, Detlef P. van Vuuren, Abeeku Brew-Hammond, and Nebojsa Nakicenovic. "Pathways to Achieve Universal Household Access to Modern Energy by 2030." *Environmental Research Letters* 8, no. 2 (May 2013): 024015. <https://doi.org/10.1088/1748-9326/8/2/024015>.

<sup>77</sup> 'Achieving Clean Energy Access in Sub-Saharan Africa' (*Green Finance Platform*, 8 April 2019)

<<https://www.greenfinanceplatform.org/research/achieving-clean-energy-access-sub-saharan-africa>> accessed 12 October 2021.

<sup>78</sup> Jordaan, S.M., Romo-Rabago, E., McLeary, R., Reidy, L., Nazari, J. and Herremans, I.M., 'The Role of Energy Technology Innovation in Reducing

stakeholders from industry, the research community, public authorities, the financial community, regulators, consumers and civil society around a specific technological challenge, where the key concepts for the Technology platform are: Development of a shared long-term vision; Creation of a coherent, dynamic strategy to achieve the vision; Implementation of an action plan to deliver agreed programmes of activities; and Leading role of the industry.<sup>79</sup>

There is a need for adoption and promotion of low carbon resilient development initiatives.<sup>80</sup> Low-carbon resilience is an agenda that tackles reducing carbon emissions while simultaneously building climate resilience and supporting development in a supposed win-win policy agenda.<sup>81</sup>

### **6.5. Poverty Eradication**

It has been observed that ‘climate change is the defining issue of our time, and the world’s most vulnerable people are suffering the worst effects of climate change, such as more intense storms, dangerous heat waves, more frequent and longer-lasting droughts, rising seas, while contributing least to the problem’.<sup>82</sup> In addition, the two-way relationship between the lack of access to adequate and affordable energy services and poverty, in many respects, involves a vicious cycle in which people who lack access to cleaner and affordable energy are often trapped in a re-enforcing cycle of deprivation, lower incomes and the means to improve their living conditions while at the same time using significant amounts of their very limited income

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Greenhouse Gas Emissions: A Case Study of Canada’ (2017) 78 *Renewable and Sustainable Energy Reviews* 1397.

<sup>79</sup> Năstase C and Popescu M, ‘Sustainable Development through the Resource Use-Regional Innovation System.’, *Proceedings of the 3rd IASME/WSEAS International Conference on energy, environment, ecosystems and sustainable development (EEESD’07)*, Agios Nikolaos, Crete Island, Greece, 24-26 July, 2007 (World Scientific and Engineering Academy and Society Press (WSEAS Press) 2007).

<sup>80</sup> Fisher, S. “Low-Carbon Resilient Development in the Least Developed Countries: Emerging Issues and Areas of Research. IIED,” 2013.

<sup>81</sup> *Ibid*, 3.

<sup>82</sup> ‘Global Conference Aims to Link Climate Action, Sustainable Development Agendas More Closely | UNFCCC’ <<https://unfccc.int/news/global-conference-aims-to-link-climate-action-sustainable-development-agendas-more-closely>> accessed 12 October 2021.

on expensive and unhealthy forms of energy that provide poor and/or unsafe services.<sup>83</sup>

Notably, most people especially in developing world continue to struggle with lack of access to clean energy in what is now commonly referred to as energy poverty. The World Economic Forum 2010 defined energy poverty as *the lack of access to sustainable modern energy services and products*. To be more precise, it is not only a matter of sustainability: energy poverty can be found in all conditions where there is a lack of *adequate, affordable, reliable, quality, safe and environmentally sound energy services to support development*.<sup>84</sup> Notably, ‘the concept of “energy poverty” includes “fuel poverty” in the developed world, but is most often used in the context of lack of access in the developing world to electricity, and/ or clean cooking fuels or technologies, where it is also estimated that about 1.2 billion people still lack access to electricity and nearly 40 per cent of the people in the world lack access to clean cooking fuels’.<sup>85</sup>

World Health Organization estimates that indoor pollution causes an estimated 1.3 million deaths per annum in low income countries associated with the use of biomass in inadequate cook stoves.<sup>86</sup> There is a need to continually invest in research and development of newer and cleaner technologies as well as understanding the distribution of current and future

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<sup>83</sup> Stephen Karekezi and others, ‘Energy, Poverty, and Development’ in Global Energy Assessment Writing Team (ed), *Global Energy Assessment: Toward a Sustainable Future* (Cambridge University Press 2012) 153 <<https://www.cambridge.org/core/books/global-energy-assessment/energy-poverty-and-development/DC1771AD93DD0A5031A07B057CA3A8C7>> accessed 12 October 2021.

<sup>84</sup> Habitat for Humanity. “Energy Poverty.” Accessed October 12, 2021. <https://www.habitat.org/emea/about/what-we-do/residential-energy-efficiency-households/energy-poverty>.

<sup>85</sup> ‘Accelerating SDG 7 Achievement: Policy Briefs in Support of the First SDG 7 Review at the UN High-Level Political Forum 2018 | Environmental Migration Portal’ 2 <<https://environmentalmigration.iom.int/accelerating-sdg-7-achievement-policy-briefs-support-first-sdg-7-review-un-high-level-political>> accessed 12 October 2021.

<sup>86</sup> González-Eguino, Mikel. “Energy Poverty: An Overview.” *Renewable and Sustainable Energy Reviews* 47 (July 1, 2015): 377–85. <https://doi.org/10.1016/j.rser.2015.03.013>.



energy needs, if the African countries are to overcome energy poverty and also achieve zero emissions from energy sources. It has been observed that ‘on the one hand, lack of access to reliable energy is believed to hamper economic growth in poor economies (energy poverty), and on the other hand, energy consumption met with the current fossil fuel based energy mix leads to emissions of greenhouse gases, which are accumulating in the atmosphere and are the major source of global climate change’.<sup>87</sup>

It has been argued that ‘although energy poverty cannot be delinked from the broader, more complex problem of poverty in general, access to energy infrastructures would avoid its most serious consequences and would help to encourage autonomous development’.<sup>88</sup>

Addressing poverty can go a long way in empowering people to not only embrace but also afford alternative and sustainable sources of energy and transport.

## **6.6. Investing in Off-Grid and Mini-grid Energy Sources: Renewable Energy for Climate Change Mitigation**

Arguably, the most cost-effective way to expand household electricity access varies widely, within and between countries.<sup>89</sup> It has been observed that ‘in sub-Saharan Africa, two-thirds of the population live in areas that are not linked up with an electrical grid, and arguably, off-grid energy is the only option for these people.’<sup>90</sup>

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<sup>87</sup> Shoibal Chakravarty and Massimo Tavoni, ‘Energy Poverty Alleviation and Climate Change Mitigation: Is There a Trade Off?’ (2013) 40 *Energy Economics* S67, S67.

<sup>88</sup> González-Eguino, Mikel. “Energy Poverty: An Overview.” *Renewable and Sustainable Energy Reviews* 47 (July 1, 2015): 377–85. <https://doi.org/10.1016/j.rser.2015.03.013>.

<sup>89</sup> Association GO-GL, ‘Providing Energy Access through Off-Grid Solar: Guidance for Governments’ [2015] Utrecht, the Netherlands, 9.

<sup>90</sup> ‘3 Reasons Off-Grid Solar Energy Isn’t Yet Serving the Poor in Sub-Saharan Africa’ (*Sun-Connect-News*) <<https://www.sun-connect-news.org/de/articles/market/details/3-reasons-off-grid-solar-energy-isnt-yet-serving-the-poor-in-sub-saharan-africa/>> accessed 12 October 2021.

Off-grid energy options have been hailed as viable tools of combating energy poverty especially in Africa. Mini-grids are also considered to be a viable option for those living in the most remote areas, where standalone solar systems operating independently of the grid can meet smaller home electricity needs but may struggle with larger electricity loads such as powering machinery and agricultural equipment, and that is where mini-grids which operate in a space between the two come in; when the population is too small or remote for grid extension and standalone solar systems aren't viable for larger electricity needs.<sup>91</sup>

There is a need for continued exploration and investments in this sector to empower people regardless of their distance from the main national power grid.

## **7. Conclusion**

It is now an agreed fact that the most commonly considered indicator of climate change is the surface air temperature, mainly attributable to carbon based emissions.<sup>92</sup> Notably, of the several anthropogenic greenhouse gases, Carbon Dioxide is considered to be the most important agent of potential future climate warming because of its large current greenhouse forcing, its substantial projected future forcing, and its long persistence in the atmosphere.<sup>93</sup> It has been argued that the GHG mitigation actions pledged by countries in the Cancún Agreements at the United Nations Climate Change Conference will not be enough to prevent the global average temperature from exceeding the 2°C threshold, unless very rapid and costly emission reductions are realised after 2020.<sup>94</sup> It has also been documented that 'if the current rate of greenhouse gas emissions continue, temperatures

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<sup>91</sup> ODI: Think change. "How Solar Mini-Grids Can Bring Cheap, Green Electricity to Rural Africa." Accessed October 12, 2021. <https://odi.org/en/insights/how-solar-mini-grids-can-bring-cheap-green-electricity-to-rural-africa/>.

<sup>92</sup> Ledley TS and others, 'Climate Change and Greenhouse Gases' (1999) 80 Eos, Transactions American Geophysical Union 453, 455.

<sup>93</sup> Ibid, 455.

<sup>94</sup> 'Climate Change Chapter of the OECD Environmental Outlook to 2050: The Consequences of Inaction - OECD' <<https://www.oecd.org/env/indicators-modellingoutlooks/climatechangechapteroftheoecdenvironmentaloutlookto2050theconsequencesofinaction.htm>> accessed 17 October 2021.

will rise to 1.5°C above pre-industrial levels by 2040'.<sup>95</sup> As a result, it has been argued, if this is to be prevented, the greenhouse pollution ought to reduce by 45 percent from 2010 levels by 2030 and completely, that is, by 100 percent, by 2050, where coal use, currently accounting for 40 percent of electrical production, would have to drop to nearly one percent while renewable energy sources, currently supplying 20 percent of electrical production, would have to more than triple.<sup>96</sup>

African countries are already struggling with the current state of energy sector and other areas that contribute to greenhouse gas emissions. If they are to be considered worthy participants in the race to zero emissions, then they must address poverty levels, address pollution, invest in cleaner sources of energy and technologies and involve private sector more, among others. It is time for African countries to ensure that even as they engage in rapid development activities, the same are conscious of Sustainable Development agenda and the race to zero emissions.

The Race to Zero Emissions is one that can be won, in the fullness of time, within Africa and beyond.

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<sup>95</sup> 'Climate Change Is The Greatest Threat To Human Health In History | Health Affairs Blog', <https://www.healthaffairs.org/doi/10.1377/hblog20181218.278288/full/> accessed 14 October 2021.

<sup>96</sup> Ibid.

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## **Towards Effective Labour Disputes Resolution In Kenya: A Case For Entrenchment of Alternative Dispute Resolution Mechanisms**

*By: Kibet Brian & Kasidhi Valentine\**

### ***Abstract***

*This paper examines the positive role of alternative dispute resolution mechanisms can play in labour disputes resolution system in Kenya. Consequently, the paper is going to address the various pitfalls that are presented by resorting to litigation as a mechanism of solving labor related disputes. The study argues that, while most workers and workers' unions turn to the courts for judicial redress, the interests and the rights of workers in Kenya are still not given primacy that they deserve. The study also investigates the current Alternative Dispute Resolution (ADR) Framework and its interplay in labour relations. Additionally, comparative study reveals that, in South Africa, the inculcation of ADR in the labour dispute resolution system has promoted access to justice by workers. The study, therefore, argues for the Kenyan legal framework to embrace the role of alternative dispute resolution mechanisms in ensuring expeditious resolution of trade disputes and to promote access to justice by the Kenyan workers.*

**Key Words;** Alternative Dispute Resolution, Labor Disputes, Kenya, South Africa.

### **1. Introduction**

The constitution of Kenya, 2010 contemplates a justice delivery process that is non-discriminatory and fast; It goes ahead to call for the promotion of Alternative Dispute Resolution in the administration of justice. However, this is yet to be seen in the labor and employment sphere where litigants are

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yet to see the fruits of the “transformative” constitution of Kenya 2010 and therefore remain shackled in the old dispensation where justice was delayed and, in some instances, denied.<sup>1</sup>

Whilst appreciating the significant progress made by the Employment and Labor Relations Court, this paper makes a case for the entrenchment Alternative Dispute Resolution in Kenya particularly in employment and labor related disputes as encapsulated in the Constitution and in order to ensure that justice is served expeditiously. It begins by giving an introduction to the foundations of the ADR framework in Kenya. It goes ahead to enumerate the immense benefits such an approach would yield.

Next, it offers insights into the state experience of South Africa which has incorporated the designs of ADR in the resolution of labour disputes. It proceeds to relate the experience in South Africa with the existing Kenyan Framework. It then offers recommendations based on the state experience in South Africa and the lessons drawn from it. It then concludes.

All through it contends that the mainstreaming of ADR mechanisms in dispute resolution processes in the labour sector is the panacea to the plethora of problems that bedevil dispute resolution processes in this field of law.

## **2. The Aegis and Merits of ADR in the Kenyan Legal Framework: A Background for the Mainstreaming of ADR mechanisms in Labour Disputes**

The Constitution of Kenya, 2010 grants every Kenyan the right to access justice in a way that is not impeded in any way by amongst others, costs. In a bid to ensure full enjoyment of this right, the constitution broadens the available forums for the pursuit of justice to include Alternative Disputes Resolution mechanisms which include reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.

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<sup>1</sup> Gathongo JK, “Labour Dispute Resolution in Kenya: Compliance with International Standards and a Comparison with South Africa” <<https://core.ac.uk/download/pdf/188177779.pdf>> accessed October 30, 2021

It is noteworthy that the constitution uses the transitive verb “including” before listing the methods it contemplates as forming part of Alternative Dispute Resolution Mechanisms.<sup>2</sup> The verb “including” has been defined to mean “to contain within”.<sup>3</sup> This shows that the list is not exclusive but merely inclusive.<sup>4</sup> As such, the Constitution cogitates that the organs mandated with facilitating the enjoyment to access to justice can, when they feel this will improve the enjoyment of this right, create, develop and operationalize alternative dispute resolution mechanisms other than the ones mentioned in the constitution.

With such an enabling constitutional framework that is so receptive to alternative dispute resolution to the point that it offers scholars and practitioners the latitude to develop and apply Alternative Dispute Resolution mechanisms other than those mentioned in the Constitution, this paper contends that the time is nigh for Alternative Dispute Resolution Mechanisms to be mainstreamed into dispute resolution processes as envisioned by the Constitution. It should no longer be seen as a concept whose role is to be discussed in dissertations and academic theses but as the endgame to case backlogs and a system that is a means to achieving individualized justice to parties that approach the same. This will yield multiple benefits.

Firstly, the entrenchment of ADR in the labour law regime promotes the laborer’s right of access to justice.<sup>5</sup> As enunciated by Lord Hewart CJ, “Not only must justice be done, it must also be seen to be done”.<sup>6</sup> Access to justice

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<sup>2</sup> Article 159 (2) ( c ) of Constitution of Kenya, 2010

<sup>3</sup> Black's Law Dictionary. 8th ed. St. Paul, MN: Thomson/West, 2004.

<sup>4</sup> See also Paragraph 107 of *George Bala V Attorney General* (2017) EKLK where Justice George Odunga finds that the term including as used in Article 10 of the Constitution is not exhaustive but there exists other values and principles of governance that are not expressly mentioned in the Constitution that are binding on those exercising public authority. The decision is available at <http://kenyalaw.org/caselaw/cases/view/130164/> and accessed on 08/06/2021

<sup>5</sup> Muigua K, “Access to Justice and Alternative Dispute ... - Kmco.co.ke” <<http://kmco.co.ke/wp-content/uploads/2018/09/access-to-justice-and-alternative-dispute-resolution-mechanisms-in-kenya-23rd-september-2018-1.pdf>> accessed October 30, 2021

<sup>6</sup> *R v Sussex Justices*, ex parte McCarthy [1924] 1 KB 256, [1923] All ER Rep 233

is an essential characteristic of any judicial system. Access to justice is also considered as one of the key tenets in promoting the rule of law.<sup>7</sup> Moreover, access to justice is one of the pillars of the Constitution of Kenya. Article 22 (1) of the Constitution provides for the right of an individual to institute court proceedings where he or she contemplates that their rights have been denied, infringed, violated or threatened.<sup>8</sup> Moreover, Article 22 (3) empowers the Chief Justice to formulate rules for the proceedings contemplated in this article, the rules should ensure the following benchmarks are met: formalities as to court proceedings are minimized and, if necessary, the court can entertain proceedings on the basis of informal documentation.<sup>9</sup> Article 48 obliges the State to ensure access to justice for all, and the imposition of any court fees should not impede anyone from instituting court proceedings.<sup>10</sup> However, a cursory look at the current fees tells otherwise.<sup>11</sup> The import of Article 22(3) and Article 48 is buttressed by Article 159 (2)(d) which provides for the administration of justice without undue regard to procedural technicalities.<sup>12</sup> The spirit of article 159 is also replicated by Article 27 which guarantees an individual's right of equal protection and equal benefit of the law.<sup>13</sup>

Therefore, access to justice, and consequently, the recognition of ADR and traditional dispute resolution mechanisms, is predicted on the following principles of justice and fairness: equal opportunity, expedition, party autonomy, objectivity of the process, party satisfaction, effective redress and cost effectiveness.<sup>14</sup> However, if the foregoing provisions and yardsticks are anything to go by, then litigation has failed miserably to attain the requisite

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<sup>7</sup> JK Gathongo (*Core.ac.uk*, 2021)

<<https://core.ac.uk/download/pdf/188177779.pdf>> accessed 10 June 2021.

<sup>8</sup> Constitution of Kenya 2010, Article 22 (1)

<sup>9</sup> Ibid, Article 22(3)

<sup>10</sup> Ibid Article 48

<sup>11</sup> See generally Joseph Wangui, *Kenyans face expensive justice as court fees rise*, Available at <https://www.businessdailyafrica.com/bd/economy/kenyans-face-expensive-justice-as-court-fees-rise-3542322> Accessed on 31/10/2021

<sup>12</sup> Ibid Article 159

<sup>13</sup> Ibid Article 27

<sup>14</sup> Kariuki Muigua, 'Heralding A New Dawn: Achieving Justice Through Effective Application Of Alternative Dispute Resolution Mechanisms (ADR) In Kenya'.



threshold. The failure of litigation to attain the accessibility criteria can be attributed to the following factors: complex court rules and procedure, exorbitant court fees, the use of legalese and unfavorable geographical location.<sup>15</sup> Conflict resolution through the courts may at times take years due to resource limitations and limitations imposed by civil procedure. Thus, court settlement becomes slow and expensive, subsequently losing the credibility and expedition required in the corporate world. This inconvenience significantly violates the rights of the laborers of access to justice. The conclusive determination of disputes whereby unfair termination of employment is an issue, implies that the aggrieved laborer has to endure a lengthy court battle that would significantly drain his or her earnings, thanks to the high court fees and the extortive legal fees. This delay of justice denotes deprivation of justice as ensconced in Article 159 of the Constitution.

The above shortcomings of litigation highlight the necessity of recognizing ADR and traditional dispute resolution mechanisms in order to promote access to justice. If the high number of case backlog in the country is anything to go by, people have over-relied on the courts in pursuit of personal remedies that could be settled comfortably through ADR. It is also noteworthy, that the high number of cases recorded in the court daily is an indication of the breakdown of the social institutions such as family, religion, kinship and neighborhood. As a result of this breakdown, people have overburdened the court system with disputes that would have otherwise been resolved through ADR or traditional dispute resolution mechanisms.

Scholars have posited that litigation is a forum for winning arguments; it is not a forum for resolution of conflicts.<sup>16</sup> The core objective of any litigation proceedings is to arrive at a settlement. Court proceedings are characterized by power contests, whereby each party strives to assert their dominance, and

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<sup>15</sup> Muigua K and Francis K, “ADR, Access to Justice and Development in Kenya” <<http://kmco.co.ke/wp-content/uploads/2018/08/ADR-access-to-justice-and-development-in-Kenya-Revised-version-of-20.10.14.pdf>> accessed October 30, 2021

<sup>16</sup> JK Gathongo (*Core.ac.uk*, 2021) <<https://core.ac.uk/download/pdf/188177779.pdf>> accessed 10 June 2021.

the losing party is forced to live with inauspicious terms. Settlements are utterly predicated on interests. They narrowly address all the angles of the dispute by inadequately considering factors such as the parties' relationships, emotions and perceptions. Thus, failure to address these factors provide fodder for future conflicts, the social fiber holding the parties is irrevocably dented. In this case, the employer-employee professionally amicable relationship is adversely affected, and this frosty relationship may affect general performance of the organization or the company.

Power struggles have defined the court battles between the workers' unions and the employers which have led to the strained relationship between both parties.<sup>17</sup> This antagonistic mood between these parties clouds any incentive for progressive resolution of trade disputes, as the workers' unions and the employers are stuck in an almost infinite loop of power struggles and guerillaesque retaliation tactics, hence the need to entrench ADR and traditional dispute resolution mechanisms in the progressive resolution of labour disputes.<sup>18</sup>

The above-mentioned scenarios characterized by court proceedings are contrary to the principles of ADR which advocate for speedy, amicable, and party-directed conflict management process. Thanks to party autonomy, employers and workers are able to amicably direct the course of the conflict resolution process with the help of an arbiter or a mediator. Founded on the principle of party satisfaction, this type of dispute resolution process discards power struggles and embraces mutually satisfying, non-coercive, durable outcomes.<sup>19</sup>

### **3. The Current Structure and Governing Framework for ADR practice in the labour law sector in Kenya**

The legal framework of ADR is predicated on Article 159 which imposes the courts and tribunals, that in the exercise of their judicial authority, they

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<sup>17</sup> Zack "Conciliation of labour court disputes" 2006 26 *Comparative Labour Law & Policy Journal* 408 410

<sup>18</sup> Ibid

<sup>19</sup> Kariuki Muigua, 'Heralding A New Dawn: Achieving Justice Through Effective Application Of Alternative Dispute Resolution Mechanisms (ADR) In Kenya'.

are required to embrace alternative dispute resolution mechanisms. The same provision additionally enjoins the judiciary to ensure that justice is done to all, is not delayed and shall be administered without undue regard to technicalities.<sup>20</sup> The spirit of ADR equally prevails in Article 189 (4) which provides for the enactment of legislation that provides the settlement of inter-governmental disputes through ADR.<sup>21</sup> These constitutional provisions have elevated the importance of ADR and TDRM in resolving conflicts in the Kenyan context, with the main aim of promoting access to justice as provided for in Article 48. In the light of this, the utilization of ADR and TDRM is vital in the resolution of labour disputes.

Kenya currently has a dual system of labour dispute resolution; individual disputes are handled by the Labour Officer, as provided for in the Employment Act 2007<sup>22</sup>, while collective disputes are resolved by a conciliator appointed by the Cabinet Secretary in charge of Labour, as envisaged in the Labour Relations Act 2007.<sup>23</sup> Both government officers mentioned above are burdened with the momentous task of resolving trade disputes, and it remains to be seen whether this dual setup is effective as compared to an independent ADR body with the jurisdiction to resolve labour disputes.

Collective disputes are brought before the Ministry of Labour, Social Security and Services. As earlier stated, the department is empowered by the Labour Relations Act. Section 58 of the Act allows for conciliation or arbitration of any category of trade disputes identified in the collective agreement by an independent arbitrator or conciliator.<sup>24</sup> The above provision highlights the centrality of ADR in the resolution of trade disputes and goes ahead to provide requirements and procedures as to how the ADR processes are to be undertaken. Section 65 (1) further enumerates that upon the expiry of the twenty-one days required to report a trade dispute as specified in

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<sup>20</sup> Article 159, Constitution of Kenya

<sup>21</sup> Ibid, Article 189 (4)

<sup>22</sup> Section 87 1(c), Employment Act

<sup>23</sup> Section 65 (1), Labour Relations Act

<sup>24</sup> Section 58 (1), Labour Relations Act

Section 62, the Cabinet Secretary may appoint a conciliator to resolve the dispute.<sup>25</sup>

Section 67(2) expounds on the powers of the appointed conciliator, the conciliator or the conciliation committee may: mediate between the parties, conduct a fact-finding exercise, and make recommendations or proposals to the parties for settling the dispute.<sup>26</sup> In the event of a successful conciliation, the agreement is recorded in writing, signed by the parties and the conciliator, and the copy registered with the Cabinet Secretary as soon as practicable.<sup>27</sup>

However, if a dispute is deemed unresolved as per section 69 the conciliator issues a certificate declaring that the trade dispute has not been resolved by conciliation.<sup>28</sup> Additionally, section 70 empowers the Cabinet Secretary to appoint a conciliator in public interest if he or she is satisfied that it is in the public interest that the dispute is resolved or the same needs to be curtailed from arising.<sup>29</sup>

While collective disputes are handled by the Cabinet Secretary, individual disputes are resolved by the Labour Officer. Section 25(2) of the Employment Act empowers the Labour Officer to handle any complaint pertaining wrongful deduction or withholding of remuneration.<sup>30</sup> Besides, with regards to complaints of summary dismissal and unfair termination, section 47 sanctions the labour officer to recommend the best means of settling the dispute.<sup>31</sup> Though not express in indication, the above provision alludes to the utilization of ADR, in particular conciliation.

An examination of the above framework reveals a lot of frailties and loopholes. To begin, the Labour Relations Act vests lot of powers to the

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<sup>25</sup> Ibid, Section 65

<sup>26</sup> Ibid, Section 67(2)

<sup>27</sup> Ibid, Section 68 (1)

<sup>28</sup> Ibid, Section 69

<sup>29</sup> Ibid, Section 70

<sup>30</sup> Section 25 (2), Employment Act

<sup>31</sup> Ibid, Section 47

Cabinet Secretary; these powers are unchecked. For instance, it may not be wise empower the Cabinet Secretary to appoint a conciliators or conciliation team to preside over a matter where the CS is an interested party. Most importantly is also the issue of accessibility.

The current framework does not embody the principles of access to justice as elucidated in the case of *Dry Associates v Capital Markets Authority*<sup>32</sup>; the process is long and laborious, while the accessibility of the offices in charge of conflict resolution highly questionable. As such, the conflict resolution process may be detrimental to the business interests of the affected parties, as a long process translates to a costly venture. In addition, the Conciliation and Mediation Commission referred to in section 66 (c) of the Labour Relations Act has since been defunct; hence exposing the inadequacy of the institutional framework.

#### **4. A Comparative State Experience with the Republic of South Africa**

The labor related disputes resolution framework of South Africa has been described as ‘efficient and effective’ and with a framework that is ‘well established and well-trusted’.<sup>33</sup> The country is also a leader in the entrenchment of Alternative dispute resolutions in its labor disputes resolution regime in Africa and many countries across the globe are draw inspiration from it.<sup>34</sup>

The South African Labor Relations Act, 1995 sets out the framework for the resolution of labor disputes through the creation of; specialized labor courts which are the labor high court and the Labor Appeals Court, Bargaining and Statutory Councils and the Commission for Conciliation, Mediation and

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<sup>32</sup> Petition no. 328 of 2011

<sup>33</sup> JK Gathongo (*Core.ac.uk*, 2021)

<<https://core.ac.uk/download/pdf/188177779.pdf>> accessed 10 June 2021.

<sup>34</sup>Bamu and Mudarakiwa “Social Regionalism in the Southern Africa Development Community: Transnational, Regional and National Interplay of Labour Alternative Dispute Resolution Mechanisms” in Blakette *Research Handbook on Transnational Labour Law* (2015)

Arbitration (CCMA).<sup>35</sup> This section concerns itself with the role, procedures and the special place of the CCMA in the South African setting.

The CCMA is established under section 114 of the Labor Relations Act, 1995 and enjoys jurisdiction over all the provinces of the Republic of South Africa.<sup>36</sup> Its independence is enunciated by the Act in Section 113 and has powers to make rules governing its operations. It has since identified its mission as ‘To give effect to everyone’s Constitutional rights and freedom’ and has a mission of becoming ‘A world-class institution that promotes labour stability, social justice and job security’.<sup>37</sup>

The CCMA has a governing body which is its supreme decision making organ.<sup>38</sup> It consists of five persons who are appointed by the minister responsible for labor affairs.<sup>39</sup> The requirement for appointment as commissioners of the CCMA has been set as supposed to be “adequately qualified”.<sup>40</sup> Those who are appointed as commissioners are offered the opportunity to serve for a fixed period of time either on a full time or part time basis; as such they do not enjoy security of tenure.<sup>41</sup> The CCMA has

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<sup>35</sup> See Generally The Preamble of The South African Labor Relations Act, 1995 Available at [https://www.gov.za/sites/default/files/gcis\\_document/201409/act66-1995labourrelations.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/act66-1995labourrelations.pdf) Accessed on 15/06/2021

<sup>36</sup> The functions of the CCMA have been enumerated in Section 115 (1) of Labor Relations Act, 1995 to include; (a) attempt to resolve, through conciliation, any dispute referred to it in terms of this Act; (b) if a dispute that has been referred to it remains unresolved after conciliation, arbitrate the dispute if- (i) this Act requires arbitration and any party to the dispute has requested that the dispute be resolved through arbitration; or (ii) all the parties to a dispute in respect of which the Labour Court has jurisdiction consent to arbitration under the auspices of the Commission; (c) assist in the establishment of workplace forums in the manner contemplated in Chapter V; and (d) compile and publish information and statistics about its activities.

<sup>37</sup> Values and Goals of CCMA Available at <https://www.ccma.org.za/About-Us/Vision-Mission-Values> Accessed on 15/06/2021

<sup>38</sup> CCMA Governing Body <http://www.ccma.org.za/About-Us/Our-People/GoverningBody>

<sup>39</sup> The body consists of an independent chairperson, a director, three persons nominated by organized business, three persons nominated by organized labour and three persons nominated by the state

<sup>40</sup> Section 117 (1) of the Labor Relations Act, 1995

<sup>41</sup> Section 117 (2) of the Labor Relations Act, 1995

also been given the powers to recruit its own staff in order to enhance its efficiency.<sup>42</sup> This gives it some autonomy from its parent ministry.

A code of Conduct guides the performance of the commissioners in the course of their duties. This code of conduct is developed pursuant to section 117 of the act and any acts or omissions by a commissioner that contravene the code of conduct may warrant the dismissal of a commissioner from the commission.<sup>43</sup> On access, the commission has branches in all the nine provinces of South Africa and offers its services free of charge.<sup>44</sup> However, an individual who wants to access the services of the commission must do so within the province where the matter arose. However this requirement may be waived on application to a Senior Commissioner at the headquarters which is in Johannesburg, Gauteng Province.<sup>45</sup> The process for the adjudication of a dispute through the CCMA aegis depends on the mode of dispute resolution chosen by the parties to the dispute. These mechanisms are either, conciliation, mediation or arbitration.

Conciliation means bringing two opposing sides together to reach a compromise.<sup>46</sup> As a dispute resolution process, it involves the availing of an opportunity to disputants to reach an agreement through a process facilitated by a third party in this case a CCMA commissioner. This opportunity may take the form of mediation, fact-finding and recommendations and in some cases an advisory arbitration award.<sup>47</sup> The advantages of considering conciliation is that that conciliation offers the parties to the dispute a chance

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<sup>42</sup> Section 120 of the Labor Relations Act, 1995

<sup>43</sup> See Section 117 (2) of the Labor Relations Act, 1995 which provides that; The governing body may remove a commissioner from office for- (a) serious misconduct; (b) incapacity; or (c) a material violation of the Commission's code of conduct

<sup>44</sup> JK Gathongo (*Core.ac.uk*, 2021)

<<https://core.ac.uk/download/pdf/188177779.pdf>> accessed 10 June 2021

<sup>45</sup> See generally Rule 24(1) of the CCMA Rules.

<sup>46</sup> West's Encyclopedia of American Law, edition 2

<sup>47</sup> Mercel Garber, *Alternative Dispute Resolution In The Brics Nations: A Comparative Labour Law Perspective.*, University of Western Cape LLM Thesis Available at

[https://etd.uwc.ac.za/bitstream/handle/11394/6996/gerber\\_m\\_law\\_2019.pdf?sequence=1&isAllowed=y](https://etd.uwc.ac.za/bitstream/handle/11394/6996/gerber_m_law_2019.pdf?sequence=1&isAllowed=y) accessed on 15/06/2021

to work out a mutually acceptable settlement amongst themselves as opposed to arbitration where a third party will make a final award resulting in a winner and a loser.<sup>48</sup>

Conciliation is initiated under CCMA when one of the parties duly fills a CCMA dispute form called Form 7.11 and proceeds to serve the same on CCMA and the other party.<sup>49</sup> The CCMA will then inform both parties of the matter to be conciliated and communicate the date and time when the matter will be conciliated as well as the venue for the same. The CCMA should appoint a commissioner to oversee the conciliation process and who is obliged to dispense with the matter within thirty days from the date the matter was referred to the CCMA. However parties may elect to have the time extended by another thirty days. The conciliator, like all persons mandated to resolve a dispute under the CCMA framework, has many powers including the power to call expert to give evidence that is relevant to the resolution of the dispute.<sup>50</sup>

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<sup>48</sup> Mercel Garber, *Alternative Dispute Resolution In The Brics Nations: A Comparative Labour Law Perspective.*, University Of Western Cape Llm Thesis Available at

[https://etd.uwc.ac.za/bitstream/handle/11394/6996/gerber\\_m\\_law\\_2019.pdf?sequence=1&isAllowed=y](https://etd.uwc.ac.za/bitstream/handle/11394/6996/gerber_m_law_2019.pdf?sequence=1&isAllowed=y) accessed on 15/06/2021

<sup>49</sup> Jordaan B, Kantor P & Bosch C Labour Arbitration: With a Commentary on the CCMA Rules 2 ed (2011) 89

<sup>50</sup> See Generally Section 142 of Labor Relations Act, 1995 which gives commissioners appointed to resolve disputes the powers to; (a) subpoena for questioning any person who may be able to give information or whose presence at the conciliation or arbitration proceedings may help to resolve the dispute; (b) subpoena any person who is believed to have possession or control of any book, document or object relevant to the resolution of the dispute, to appear before the commissioner to be questioned or to produce that book, document or object; (c) call, and if necessary, subpoena, any expert to appear before the commissioner to give evidence relevant to the resolution of the dispute; (d) call any person present at the conciliation or arbitration proceedings or who was or could have been subpoenaed for any purpose set out in this section, to be questioned about any matter relevant to the dispute; (e) administer an oath or accept an affirmation from any person called to give evidence or be questioned; (f) at any reasonable time, but only after obtaining the necessary written authorization- (i) enter and inspect any premises on or in which any book, document or object, relevant to the resolution of the dispute is to be found or is suspected on reasonable grounds of being found there; and (ii) examine, demand the production of, and seize any book, document or object that is on or in



In the event that the conciliation process fails to result in an outcome that is agreeable to the parties, the commissioner is expected to issue a certificate of outcome indicating that the proceedings were not successful and therefore the parties can therefore proceed to other proceedings, which is in most cases, arbitration.<sup>51</sup> Such a scenario results in a dispute resolution model that has been termed as Con-Arb.

Con-Arb has been defined as process in which an independent third party first conciliates the dispute between parties and if conciliation fails to resolve the dispute, the arbitration begins immediately.<sup>52</sup> In such a process, the conciliator who had initially handled the case handles the matter as the arbitrator.<sup>53</sup> However, a new commissioner can be appointed as arbitrator if they feel their impartiality has been dented due to their involvement in the conciliatory process.<sup>54</sup> At the end of the process, an arbitration award is given. This award is akin to a decision of the Labor Courts in its enforceability can only be varied or rescinded in special circumstances. Such a circumstance may be when an award contains an ambiguity or an obvious error or omission.<sup>55</sup>

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those premises and that is relevant to the resolution of the dispute; and (iii) take a statement in respect of any matter relevant to the resolution of the dispute from any person on the premises who is willing to make a statement, and (g) inspect, and retain for a reasonable period, any of the books, documents or objects that have been produced to, or seized by, the Commission.’

<sup>51</sup> Mercel Garber, *Alternative Dispute Resolution In The Brics Nations: A Comparative Labour Law Perspective.*, University Of Western Cape Llm Thesis Available at

[https://etd.uwc.ac.za/bitstream/handle/11394/6996/gerber\\_m\\_law\\_2019.pdf?sequence=1&isAllowed=y](https://etd.uwc.ac.za/bitstream/handle/11394/6996/gerber_m_law_2019.pdf?sequence=1&isAllowed=y) accessed on 15/06/2021

<sup>52</sup>Jordaan B, Kantor P & Bosch C Labour Arbitration: With a Commentary on the CCMA Rules 2 ed (2011) 89

<sup>53</sup> JK Gathongo (Core.ac.uk, 2021)

<<https://core.ac.uk/download/pdf/188177779.pdf>> accessed 10 June 2021

<sup>54</sup> Zack “Conciliation of labour court disputes” 2006 26 *Comparative Labour Law & Policy Journal* 408 410

<sup>55</sup> JK Gathongo (Core.ac.uk, 2021)

<<https://core.ac.uk/download/pdf/188177779.pdf>> accessed 10 June 2021. Other reasons for the varying of an arbitration award include when, the award was erroneously sought or granted in the absence of any person affected by the award and when If an award was granted as a result of a mistake common to both parties to the proceedings.

Arbitration is another dispute resolution process available under CCMA. Arbitration has been defined as “process whereby the parties make presentations to a mutually agreed neutral third party, known as an arbitrator, and commit them to abide by that arbitrator’s decision as final and binding”.<sup>56</sup> In case parties to a dispute choose this method of dispute resolution, the Labor Relations Act, sets a deadline that the case must be resolved within ninety days from the date when it was registered.<sup>57</sup>

Arbitration proceedings initiated under the auspices of CCMA operate outside the provisions of The South African Arbitration Act, 1965.<sup>58</sup> Under Section 191 (5A) of the Labour Relations Act, 1995, arbitration enjoys exclusive primary jurisdiction over all matters that are unresolved and concern; the dismissal of an employee for any reason relating to probation and any unfair labour practice relating to probation.

The arbitration proceedings begin by the arbitrator introducing themselves and establish who is appearing for each of the involved parties as well as explain to the parties how they intend to proceed with the proceedings.<sup>59</sup>

They must also show the jurisdiction of the CCMA to the matter. After the introductory and preliminary stage, the arbitrator affords every party an opportunity to make their respective cases.<sup>60</sup> Pursuant to Section 132 of the Labor Relations Act, 1995 parties may call witnesses in support of their case and question the witnesses of the opposing party. However, this is at the discretion of the arbitrator.<sup>61</sup>

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<sup>56</sup> As defined by World Intellectual Property Organization available at <https://www.wipo.int/amc/en/arbitration/what-is-arb.html> Accessed on 15/06/2021

<sup>57</sup> JK Gathongo (*Core.ac.uk*, 2021)

<<https://core.ac.uk/download/pdf/188177779.pdf>> accessed 10 June 2021

<sup>58</sup> Section 156 of the Labor Relations Act, 1995

<sup>59</sup> Section 138 of the Labor Relations Act, 1995

<sup>60</sup> Section 136 of Labor Relations Act, 1995

<sup>61</sup>Section 138(2)of the Labour Relations Act, 1995

The arbitrator, after considering the case as presented by each party makes a decision on the matter. This decision is known as an arbitration award.<sup>62</sup> This award is binding and final and can be appealed to the Labour Court which can review the award.<sup>63</sup> No appeals are allowed beyond this court.<sup>64</sup>

Mediation has been defined as “the use of an independent individual who acts in his or her capacity as a neutral person with the aim to mediate or facilitate a possible solution in a dispute”.<sup>65</sup> This third neutral person is called a mediator and facilitates discussions between the disputing parties so that they can each understand the issues arising in the dispute so that they can develop possible solutions to them in their own terms. The parties eventually come to a mutually acceptable settlement and if not, they can make use of any dispute resolution mechanisms such as litigation in the labor court and arbitration or Con-Arb.<sup>66</sup>

As seen above South Africa boasts of a robust Alternative Dispute Resolution framework that ensures a quick and expeditious resolution of disputes in the labor sector. This ensures that the right of South Africans to “to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum” is realized.<sup>67</sup>

## **5. Inspirations from South Africa; Potential Legal Reforms**

Drawing from the South African experience, this work advances for the formation of a statutory body that operates like the CCMA of South Africa.

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<sup>62</sup> Kariuki Muigua, 'Heralding A New Dawn: Achieving Justice Through Effective Application Of Alternative Dispute Resolution Mechanisms (ADR) In Kenya'

<sup>63</sup> Section 145 of The Labour Relations Act, 1995

<sup>64</sup> Jordaan B, Kantor P & Bosch C Labour Arbitration: With a Commentary on the CCMA Rules 2 ed (2011) 100.

<sup>65</sup> Maclons W Mandatory Court Based Mediation as an Alternative Dispute Resolution Process in the South African Civil Justice System, LLM thesis, University of the Western Cape, 2014

<sup>66</sup> Maclons W Mandatory Court Based Mediation as an Alternative Dispute Resolution Process in the South African Civil Justice System, LLM thesis, University of the Western Cape, 2014

<sup>67</sup> Section 34 of the Constitution of the Republic of South Africa, 1996

Given the Kenyan Constitutional framework that only recognizes the courts and tribunals as the bodies mandated to exercise judicial authority,<sup>68</sup> it can take the form of a tribunal that appoints conciliators, arbitrators and mediators to matters that the public raise for hearing and determination. Appeals from this tribunal can lie in the Employment and Labor Relations Court and no further appeals should be allowed beyond the Employment and Labor Relations Court. The appellate powers of the Employment and Labor relations court in arbitration cases should also be limited.

As an improvement to the South African model, the Kenyan version of the CCMA, the minimum qualifications to serve in it should be succinctly set out in the enabling Act and should not be as tentative as the South African one where the qualification has been set as one should be ‘adequately qualified’. The members of the Kenyan version should also be accorded security of tenure like the judges of the superior courts of Kenya.

This work also recommends that in Con-Arb proceedings, when a certificate is issued that the dispute did not come to a mutually acceptable settlement after Conciliation, the conciliator should be automatically barred from appointment as an arbitrator in the ensuing arbitration proceedings. This will ensure that the arbitration proceedings are impartial in the eyes of the parties involved thus facilitating access to justice.

## **6. Conclusion**

This work has critically analyzed the Kenyan legal framework as an enabler and promoter of Alternative Dispute Resolution mechanisms in the quest to ensure the right to access to justice is enjoyed by all Kenyans. It has gone ahead to make a case for the entrenchment of ADR mechanisms in the resolution of labor related disputes. It has shown, through a comparative analysis with the South African approach, that this will yield expeditious dispute resolution framework and decongest our courts. It has finally made recommendations for the adoption of the South African model in Kenya though with modifications and improvements which it has set out.

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<sup>68</sup> Article 1 (3) ( C ) of Constitution of Kenya,2010

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<sup>1</sup> R v Sussex Justices, ex parte McCarthy [1924] 1 KB 256, [1923] All ER Rep 233

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## Enduring Debates in the Pedagogy and Practice in Sustainable Development Models in Africa

By: Henry Murigi Kinyanjui\*

### Abstract

*Sustainable development as a subject is important because it concerns itself with ensuring the availability of basic needs such as food, clean water, shelter, clothing, transport, health, education symptomatic of a poor country. The concern is whether when all these are achieved, a call can be made that a state has become developed. Three broad thematic concerns could guide the attempt to respond to this question. Do we begin by getting the correct answers to the questions what is development? how does the presence or absence of development look like, and what do poverty and wealth look like. Second, depending on the answers to these questions then it becomes apparent the content, context, and composition of undertaking development. Third, why should one care (or should one care) about development as an area of study? It will be clear that these are fluid concepts that have not gained conceptual unanimity on the approach and effect while attempting to engage in international development but it's possible to find a middle ground. To respond to these concerns the paper seeks to highlight the relevant principles that guide the enduring debates and takes a position on each of these arguments.*

### Introduction

Although learning is always continuous, certain debates seem to be ageless and cannot be easily resolved by straight jacket answers or sweeping statements. Sustainability of development faces a similar predicament as it has been the concern of philosophers, scholars, and practitioners over the different generations. From the definitional difficulties that arise in defining concepts, it is clear that how we conceptualize sustainable development informs how development is taught and practiced<sup>1</sup>. Although scholars have

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<sup>1</sup> (Asouzi 2001)

attempted to theorize concepts that can explain development such as modernization, dependency, and neoliberalism<sup>2</sup>, the more practical questions on how to measure development remain unsatisfactorily unanswered. Concepts such as good life, quality of life, rich-poor gap, inequality are dominant themes that one must contend with in attempting to debate the idea of sustainable development. If one succeeds in resolving these concepts, which is hardly possible, then other ideas such as environment, conflict, aid, democracy will crop up that require a response that is not easy to come by<sup>3</sup>. The central argument made in this paper is that development is not a straightforward concept. It requires highly analytical thinking and an appreciation of the context within which such efforts must succeed<sup>4</sup>. This argument is premised on the thinking that, for development to be sustained, there must be a myriad of factors, actors, activities, and approaches toward the success of it, and ignoring one will lead to unsustainable development.

### **Definitional Difficulties**

Social science subjects have problems in finding compelling and commonly acceptable definitions to ideas<sup>5</sup>. Although development studies are housed by several academic disciplines such as economics, law, social science, humanities, and international relations, no globally accepted definition can satisfy each discipline. Perhaps this is due to its multiple dimensions and irrespective of whether one looks at it from its different etymological strands such as growth, conversion, construction, start to exist, evolution, maturity, advancement, among others.

One may argue that development is as old as the human quest for knowledge. That development began when man started wondering and experimenting with ideas. This can go way back to medieval philosophers all through to the new age of thinking. A more pointed view of development thinking is seen after the age of enlightenment when human progress was tied to the economy

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<sup>2</sup> (Keohane 1986 ) (Chomsky 1997) (Mazrui 2006)

<sup>3</sup> (Klein, *Surviving Democracy : Bomb Made Laws* 2007)

<sup>4</sup> (Friere 1972)

<sup>5</sup> (Rist 2008)



by thinkers such as contributions from David Hume<sup>6</sup> and Adam Smith<sup>7</sup>, among others which mark the origin of debates on economic growth, the distribution of wealth, and the principles underlying public action (market-based approach). Also, the growth of international development can be traced from the end of the Second World War which saw an increase in the involvement of States in the international arena in a quest to control ideas (right-based approach). This is important because it places focus on different ways to explain the varying ideas that help crystalize international development.

### **Lack of uniformity in Approach**

It is important to be ready to accept that each part of the world ought to be allowed to define its understanding and expectation of development. When considering the expansion of international development, one cannot ignore the idea that each nation is affected by its history, context, and struggles, coupled with the fact that development is a national, international, and global affair, and each part is highly interlinked with the other<sup>8</sup>. In attempting to define the evolution of development it is important to contend with a critical issue such as the definition of poverty<sup>9</sup>, wealth and riches<sup>10</sup>. It is difficult to have a uniform conceptualization of development from the society generally. What may be seen as good thinking (or acceptable) for one part of society is termed backward (or weird) in another part of society that may reject such thinking even though there are positives that can be seen in the that can be produced. The complex question that has not been adequately answered is whether there can ever be a uniform conceptualization of the common good of society as suggested by Jean Jacques Rousseau<sup>11</sup>. Then it is very difficult for society/nations to agree nationally, internationally, and globally on uniformity in international development<sup>12</sup>.

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<sup>6</sup> (Rotwein 1976)

<sup>7</sup> (Smith 1776)

<sup>8</sup> (Rist 2008)

<sup>9</sup> (Kay 2009)

<sup>10</sup> (Smith 1776)

<sup>11</sup> (Rousseau 1895)

<sup>12</sup> (Rist 2008)

## Conceptualizing Development

First, the actors in political and international development circles keep shifting the goal post on what development should look like. The political actors in development studies are driven by the human needs identified by Abraham Maslow from the psychological needs (basic needs such as air, water, food, shelter, clothing among others) to the self-actualization needs (which envision the idea that a man should be all they can be) in their quest for the global development<sup>13</sup>. For instance, the spirit of *ubuntu* should be the guiding and organizing principle for development in Africa<sup>14</sup>. Departing from the *ubuntu* spirit in Africa is one of the leading courses of a detour as basic needs are sacrificed by political leaders in the quest for gaining self-actualization for the politicians.

Second, development actors, often called choice architects are ideally driven by natural laws to consider assisting the plight of those who cannot access basic needs. However, these architects are not always legitimate or innocent since they can manufacture or invent crises to sustain their continued existence in poverty-stricken areas as suggested by Naomi Klein<sup>15</sup>. Also, Dambisa Moyo in her book *Dead Aid* has argued that pumping aid in Africa has not necessarily produced development instead it has caused underdevelopment<sup>16</sup>. In addition, one cannot easily confine sustainable development to a definite timetable or singular framework since it appears to be an evolving concept with different strands and meanings<sup>17</sup>. The evolution of international development is therefore a continuous matter that should be studied in the lenses of time, space, ideas, and human agency among others using several approaches.

Third, the market-based approach to development insists that a working society capable of producing goods for internal consumption and external markets can be classified as developed<sup>18</sup>. This brings to mind the distinction between States that focus on production for export and those that focus on

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<sup>13</sup> (Donnelly 1985)

<sup>14</sup> (Mazrui 2006)

<sup>15</sup> (Klein, *The Shock Doctrine* 2007)

<sup>16</sup> (Moyo 2010)

<sup>17</sup> (Daron Acemoglu 2012)

<sup>18</sup> (Chomsky 1997) (Dru 1997)

production for consumption. The latter is likely to be considered developed. Each of these concentrations by States produces different types of development. For instance, some “choice architects” consider producing material for export in nations where labor is cheap which reduces the cost of production and maximizes profit<sup>19</sup>. The suggestion here is that in developing growth poles one must be prepared to contend with coordination, accountability, and risk management that arises from the approach adopted including market-based approaches<sup>20</sup>. From the foregoing, it is then clear why there are several approaches to sustainable development. Some approaches emphasize the economic aspects of a nation while others will emphasize individual wellbeing.

Fourth, the right based approach emphasizes is on human rights which tie in with development as human freedom or universal value as the truest measure of development<sup>21</sup>. This explains what David Flynn contends with when he suggests the universality of rights and suggest that one must look at human rights as discursive and not positive in the same fusion as social work considers both the macro and micro<sup>22</sup>. Unfortunately, the rights approach does not respond to all the facets of development hence the deed for other approaches such as the need-based approach or what Srilatha Batliwala suggest on when rights go wrong<sup>23</sup>. It would then be unproductive to only insist on a right-based approach to development as it would not produce the allocative and distributive justice anticipated in every aspect of human progress<sup>24</sup>.

### **Measuring Poverty**

Firstly, development according to Jaffrey Sachs begins with accepting that we have a big problem on how to resolve challenges posed by poverty suggests three ways of measuring poverty (1) extreme, (2) moderate, and (3) relative poverty<sup>25</sup>. Although his idea is seriously criticized by William

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<sup>19</sup> (Koivisto 2013) (Broad 2006)

<sup>20</sup> (W. R. Easterly 2002)

<sup>21</sup> (Sen 2000)

<sup>22</sup> (Flynn 2005)

<sup>23</sup> (S. Batliwala n.d.) (S. Batliwala 2007)

<sup>24</sup> (Rawls 1971)

<sup>25</sup> (Sachs 2015)

Easterly<sup>26</sup>, Jaffrey Sachs, in a clear depiction of how poverty looks like, illustrates how countries like Malawi and Indonesia should attempt to access the development ladder as India and China did<sup>27</sup>. Sachs argues that for Americans Harry Porter's book is considered a need while for a village in Africa medicine is of equal value as the book is all they need for survival<sup>28</sup>. The question that arises is what we should do with the divergent realities especially when the design is to ensure that poverty or wealth is not accurately measured as suggested by Robert Chambers<sup>29</sup>.

This is compounded by the fact that various variables affect an attempt at measuring development such as environment, science, and politics among others. One might argue that it is common sense that famine is caused by a shortage of food and a shortage of food causes death therefore supply of adequate food would eradicate deaths caused by famine. Although a country like Uganda may have succeeded in the eradication of food shortage, insisting on this as an adequate measure of development is misleading and a distraction as it might not be an appropriate measure for development in light of the other variables. To this end, development should then be viewed as the transitional from a place of lack of essentials to a more solid position of the positive abundance of essential goods for the public<sup>30</sup>. An even more convincing definition as suggested by Amartya Sen is that development simply means social justice (John Rawls type of distributive justice)<sup>31</sup>

### **Professionals Errors in Measurement of Development**

Secondly, the concern is what to do with the big problem of lack of adequate measurement of development. Easterly argues that there is a need to be cautious in an approach to development and contends that foreign aid has been in the world for a long time, but it has not ended poverty<sup>32</sup>. This view

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<sup>26</sup> (W. Easterly, *The White Mans Burden : Why the West's Effort to Aid the Rest Have Done So Much Ill and so Litte Good* 2006)

<sup>27</sup> Ibid

<sup>28</sup> (Sachs 2015)

<sup>29</sup> (Chambers 1997)

<sup>30</sup> (Rustow 2014) (Dankwart 1970)

<sup>31</sup> (Rawls 1971) (Sen 2000)

<sup>32</sup> (W. Easterly, *The White Mans Burden : Why the West's Effort to Aid the Rest Have Done So Much Ill and so Litte Good* 2006)

finds agreement with Dambisa Moyo argument that aid is one of the causes of poverty in Africa<sup>33</sup>. Easterly employs Isaiah Berlin analogy on *Fox and Hedgehog* in distinguishing between planners and searchers<sup>34</sup>. Easterly correctly questions the approach adopted by Sachs of attempting to use a fox mentality in approaching development. Here the contention is that when one adopts a big plan for aid work there is a chance that it might not attract the professionals who engage in aid work. Instead, it might well be a distraction that is likely to cause underdevelopment.

Development professionals are not capable of completing measurable realities without difficulty since these epistemic community hails from different ontological persuasion and are unlikely to agree on a common position<sup>35</sup>. According to Chambers, two measurement errors are likely to occur when attempting to measure development namely embraced errors that end up producing new approaches to the problem and embedded errors which like development, are aimed at sustaining the mistakes in the process<sup>36</sup>. One must therefore carefully choose the type of project to engage in to avoid the embedded and embraced errors in measuring success. It has been suggested that the ancient Empires such as Mauryan, Roman, British empires collapsed because of having grand plans (embraced errors) that did not cater for some realities of these plans such as the ethical considerations (embedded errors). However, Granato et al suggest even with the possibility for errors the reason for the sustained development and revolution in Europe was protestant ethics argued by Marx Weber<sup>37</sup>.

The other argument here is that the success that was produced by the revolution in Europe led to inequality and as such the empire must be confronted by a peaceful revolution<sup>38</sup>. One must therefore engage the right approach to study development or else the outcomes will lead to measurement errors, detours, or distractions. To avoid errors that are produced by mixed approaches such that politicians, scientists, economists

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<sup>33</sup> (Moyo 2010)

<sup>34</sup> (W. Easterly, *The White Man's Burden* 2006)

<sup>35</sup> (Chambers 1997)

<sup>36</sup> *Ibid*

<sup>37</sup> (Granato 2008) (Weber 1958)

<sup>38</sup> (Arendthathi 2003)

seem not to agree on how to measure development as they will view society differently based on their desired outcomes, there is a possibility of accomplishing Sachs grand plans and avoid embedded errors as well adopt the Easterly's searcher approaches and avoid embraced errors.

### **Diagnostic Errors in Measuring Development**

Third, the place of the African man, wealth, and environment are critical to understanding international development which is a multidisciplinary subject. One method of studying international development might not suffice unless it attains the level of falsifiability<sup>39</sup>. Paul Feyerabend argues that insistence on one scientific method as a source of knowledge is fallacious<sup>40</sup>. Scientists have not studied the African man to gain a clear understanding of the realities of the wealth of knowledge and resources available in the environment in Africa. Searchers<sup>41</sup> have a better chance of understanding what is prevalent within Africa and can offer context for the study of development in Africa. Aid was previously diagnosed as the main solution to international development in the context of third world countries but has not worked<sup>42</sup>. However, China and India according to Sachs did not require aid for them to climb the development ladder<sup>43</sup>.

To avoid the diagnosis detour, good plans that start with a differentiation diagnosis that shapes the economic conditions of a nation are critical. Such plans must be measurable, smart, cater for current African realities, and comfortably adopt African thinking for them to succeed which may be an outlier to conventional thinking<sup>44</sup>. This is more so because development is achievable incrementally. To this end, international development should not restrict itself to a westernized ideology of understanding poverty in Africa. One good comparison in Kenya is the famous Handshake and the Big Four Agenda. All these and other initiatives appear to be African solutions to African problems that have achieved measurable development indices<sup>45</sup>.

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<sup>39</sup> (Popper 1963)

<sup>40</sup> (Feyerabend 1993)

<sup>41</sup> (W. Easterly, *The White Man's Burden* 2006)

<sup>42</sup> (Moyo 2010) (Prebisch 1950)

<sup>43</sup> (Sachs 2015)

<sup>44</sup> (Gladwell 2011)

<sup>45</sup> (Bachmann 2011)

The reality however is that international development is largely affected by the international system that is anarchic where interest and power are the main currency<sup>46</sup>. This calls for states to come up with grand strategies to ensure that they accomplish the big picture suggested by Sachs as well as sizeable and achievable goals as suggested by Easterly. This calls for what John Lewis Gaddis calls grand strategy<sup>47</sup> which is the ability to maintain competing ideas in the mind while maintaining the ability to properly function (attain development) and maintaining a proper view of history as well as the future<sup>48</sup>.

### **Amartya Sen Doctrine on Measurements**

Although there are different approaches used to measure development, one that is convincing is suggested by Amartya Sen in his classical works *Development as Freedom*. This is the most convincing of the definition because it adopts an all-around view of measuring development. The suggested issues by Sen on development as justice is one in which one would find whether we agree with its ultimate conclusions or not will be virtually impossible to ignore. This is for good reason in my view because it takes on one of my favorite political philosophers of our time, John Rawls, and deepens, enriches, and challenges some basic Rawlsian ideas. Sen's basic argument is that the Rawlsian approach to justice, which has profoundly influenced the development of contemporary political theory since the publication of *A Theory of Justice* in 1971, is so focused on ideal, transcendentally just institutions that it is unable to offer practical guidance for advancing justice in an increasingly borderless world. Although Sen has a critique on Rawls and attempts to take a winding but engaging path, through political and moral philosophy, economics, history, and law. Along the way, he challenges mainstream economic theories of rationality, explores deontological and consequentialist ethics through the lens of classical Indian thought, articulates and defends an understanding of freedom in terms of capability, and rethinks the relationship between development, agency, and democracy in a global context.

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<sup>46</sup> (Wallerstein 1989)

<sup>47</sup> (Gaddis, *On Grand Strategy* 2017)

<sup>48</sup> (Gaddis, *The Landscapes of History : How Historians Map the Past* 2002)

### **“Good Life” as Development**

The other concern is how to measure development in terms of capabilities, quality of life, and well-being of the individual within society. As seen above development is a fluid concept and therefore measuring it would be more subjective than objective. The big question being asked here is whether there is a universal agreement on what constitutes a good life. This concern has troubled several philosophers without finding a unanimous view on what would constitute a good life<sup>49</sup> with different generations having divergent views and values on what would contribute to a good life.

There is also a lack of observable quality as to what would constitute well-being. It has been suggested that feature aspects of health where consideration such as mortality and morbidity as well as quality education<sup>50</sup>. The only concern is whether these variables are uniformly achievable to determine the extent and quality of life. The list of factors that would inform the quality of life include political freedom, availability of economic facilities, express social opportunities and transparency, and lastly protective security<sup>51</sup>. No doubt some countries are considered poorer than others due to various measurements used in defining development. The validity of the tools used comes to question since an accurate measurement can only be as good as the instruments used to measure it<sup>52</sup>. Using either economic, social, political, or religious indicators cumulatively as independent variables for measuring the quality of life may not produce valid results.

### **Philosophy of Measurement Tools**

Development means progress and requires measurement as means assigning numbers or other symbols to characteristics of objects according to certain prespecified rules<sup>53</sup>. It is a one-to-one correspondence between the numbers and the characteristics being measured, in other words, measurement is the process of assigning numbers to objects in meaningful ways to gain insight into the current reality on development. The rules for assigning numbers

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<sup>49</sup> Plato, Socrates, Aristotle, Cicero, Augustine, Locke, Hobbes, Rousseau, Hume, et al.

<sup>50</sup> (Fitoussi 2008)

<sup>51</sup> (McMahon 2005)

<sup>52</sup> (Meadow 1988)

<sup>53</sup> (Rist 2008)



should be standardized and applied uniformly meaning that rules must not change over objects or time. This is what complicates aspects of measuring development since by its very nature development implies progress which is a moving target. Measurement always begins by placing a set of empirical objects into mutually exclusive and jointly exhaustive categories, based upon some discernible attribute of the objects<sup>54</sup>. This classification task becomes measurement when numbers are assigned to the categories, and by implication, to the objects within the categories.

Measurement is always a tentative and potentially falsifiable statement about the nature of reality<sup>55</sup>. Falsification occurs whenever the specified properties of the real number system do not correspond to the empirical property under investigation<sup>56</sup>. This is not a trivial question, but the answer is almost disappointingly simple in the context of the quest for happiness and quality of life. Whichever measurement tool or approach used the concern to the individual is whether development produces or is important for happiness which is a subjective consideration<sup>57</sup>.

Although there is no way of consistently studying happiness, virtue is what determines whether one is happy or not depending on whether happiness is a means to an end or an end in itself<sup>58</sup>. This explains why some determine happiness as a destination (a holiday at the coast) while others consider it as a journey (the trip to the coast). In sum, there are several approaches to measuring development. These approaches are neither uniform nor unanimous. Different contexts produce different requirements for these measurements. The quality of life would equally require an all-round view since there is no uniform measure of quality. Although there are no objective criteria for determining the quality of life, there are certain bare minimums that humanity has agreed upon as considerable qualities. Happiness can certainly be a measure of development however it may not always be effective since it is very subjective. It is therefore important to consider

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<sup>54</sup> (Chambers 1997)

<sup>55</sup> (Karl 1963)

<sup>56</sup> Ibid

<sup>57</sup> (McMahon 2005)

<sup>58</sup> Ibid

whether an all-round view of development is a sufficient and suitable measurement as suggested by Amartya Sen.

Although this may be considered a neoliberalism project its fault lines are apparent including being a threat to the rule of law<sup>59</sup>, promoting inequality in the society through markets<sup>60</sup> and it was too ambitious in its attempt to affect all aspects of life<sup>61</sup>. an all-round view of international economic development is critical especially since every abstract theory such as neoliberalism collapse when attacked from all sides as is the case here<sup>62</sup>. The realities of models of development which would perhaps lead to a definition of development are considered as nothing more than global faith<sup>63</sup>.

### **Measuring the Rich-Poor Gap**

Jesus said “The poor you will always have with you, and you can help them any time you want. But you will not always have me”<sup>64</sup>. If this is to be believed, then we can be sure the debate is not going anywhere even though it has evolved in different formats including treaties of governments<sup>65</sup>. The issue under scrutiny here is the origin or source of inequality and whether there is anyone who benefits from it. The premise taken by here is that the rich-poor gap will continue to exist because of the bourgeoisie philosophy which operates in the service of economic imperialism, its superstructures, and the people who rally behind it for the promised benefits<sup>66</sup>. The origin of the rich-poor gap is the structure as modeled by those in power.

As seen above there is no universally accepted measurement for the rich-poor gap because of the bourgeoisie mentality. Common indicators have been suggested to include healthcare, wealth, and education as the primary basis for measuring the gap. One way of attempting to measure world income distribution inequality is testing whether there has been an increase in the

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<sup>59</sup> (Ngugi 2005)

<sup>60</sup> (Rawls 1971) (Sachs 2015)

<sup>61</sup> (Marber 2005)

<sup>62</sup> (Erick S. Reintert 2016)

<sup>63</sup> (Rist 2008)

<sup>64</sup> Mathew 26:11

<sup>65</sup> (Aristotle 1888)

<sup>66</sup> (Moore 1958)

distribution alternatives to enable countries to have equal purchasing power<sup>67</sup>. Here the suggestion is that this will cause the increase in the growth of middle-income countries such as India and China inviting an increase in the tendency for migration. The second way of measuring the rich-poor gap is found in what can be demonstrated as the characteristic of the income gap between the countries between 1960 to 2020<sup>68</sup>. These characteristics include (1) absolute gap which is the difference between the mean Gross Domestic Product Per Capita (GDP/PC) of a set of high-income countries and that of poor countries or group of countries and (2) relative gap which is the measure of GDP/PC of the poor or middle-income groups as a percentage of the high-income countries. Both the relative and absolute gaps are based on the three thematic areas health, knowledge, and wealth. The third way of measuring the inequality gap is based on the resource mobilization of any state structure based on land maldistribution<sup>69</sup>.

The central challenge that should be addressed in attempting to measure the income gap is how to deal with what states at the macro level can produce vis what is produced and how what is produced can be equitably distributed vis how it is distributed. The issue is whether there is a working formula for this distribution. John Rawls suggests that the government should fill in the inequality gap by subsidizing the cost of production for different categories based on the aspirations of each sector<sup>70</sup>. What is apparent therefore is that measuring the rich-poor gap will produce different results based on the perspective that one adopts. The bourgeoisies will often carry the day.

### **Effects of Inequality**

High inequality can cause slow economic growth, hinders poverty reduction, diminishes the overall quality of life particularly in matters of personal security, diminish social trust, undermine political democracy, subvert the rule of law, and effectively condition social-political power<sup>71</sup>. When carefully examined these are the same issues that inspired the creation of the Bretton Wood institutions and unfortunately, they are sometimes accused,

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<sup>67</sup> (Wade 2008)

<sup>68</sup> (Passe-Smith 2008)

<sup>69</sup> (Seligson 2008 )

<sup>70</sup> (Rawls 1971)

<sup>71</sup> (Carter 2010)

oftentimes with good reason to carry out their work based on the bourgeoisie philosophy which he calls planners and gangsters<sup>72</sup>. These and other state and non-state actors are engaged in the business of using rights and freedom without a serious commitment to their ideals especially in poor resource-rich countries that are conflict-prone. The question then is whether the rich should help the poor in bridging the inequality gap and the obvious answer is that the rich help the poor albeit with ulterior motives and for collateral purposes such as personal aggrandizement through increased wealth.

### **Environment and Development**

Development does not occur without a direct impact on the population and the environment<sup>73</sup>. To attempt to downplay these realities is to court ignorance. In this regard, one must not detour from considering the dire consequences of climate change on both the environment and population in terms of the development realities it portends. Here it's important to insist that any attempt at international development studies without a serious analysis of the climate change realities builds their ideas on faulty ground<sup>74</sup>. Human activities are the greatest reasons that lead to climate change which is the chief threat to humanity today. Climate change poses and unpredictable effects on the world's water system and many other environmental aspects. These include an increase in floods and droughts, causing in turn, an impact on food supply, displacement, and conflict, seasonal shifts, extreme weather conditions, change in precipitation patterns caused by climate change is likely to affect farming and agriculture which is a primary basis for livelihood to the global population.

The literature on demographics suggests that diseases such as AIDs in Africa have a direct relationship with the population and the environment<sup>75</sup>. Malaria and AIDs are treatable diseases and should be dealt with by giving more assistance<sup>76</sup>. It has been argued that geography has conspired with economics to give Africa a particularly weak hand due to the lack of

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<sup>72</sup> (W. Easterly, Planners and Gangsters 2006)

<sup>73</sup> (Koivisto 2013)

<sup>74</sup> (Collier, The Natural Resource Trap 2007)

<sup>75</sup> (W. Easterly, Planners and Gangsters 2006)

<sup>76</sup> (Sachs 2015)

navigable rivers with access to oceans by landlocked countries<sup>77</sup>. Sub-Saharan Africa has better interior environmental realities with rainfall in places such as Ethiopia and Rwanda and as such diseases such as Malaria and Aids in Africa and crop yield to systematically and diligently introducing a green revolution<sup>78</sup>.

There is a clear understanding that Africa has existed the longest compared to other continents, yet it remains the most underdeveloped with the best environmental terrain that was exploited by the colonialist who had guns, steel, oceangoing ships, political organization, and writing<sup>79</sup>. This introduced institutions that were based on the environmental conditions that were found in the different regions of Africa by the colonialists and formulated institutions differently from other regions<sup>80</sup>. The other important lesson from the interplay between history, environment, poverty, and development in Africa is that the disparities created between the rural and urban areas are evident in Africa and a greater cause for inequality than labor-capital or foreign-national interest<sup>81</sup>. In addition, the dependency theory would explain the reason why resources remain a curse in Africa as suggested in the proposal for oil democracy and move toward autocracy in Africa<sup>82</sup> as well as the bourgeoisie democracy<sup>83</sup>.

The polycentric approach to climate change suggests that one must consider the arguments and propositions by both the scientist and epistemic communities in addressing policy on environmental subjects<sup>84</sup>. These two approaches produce ‘regime complex’ which is the fragmentation of ideas touching on climate change<sup>85</sup>. This reality poses a serious challenge to the formulation and implementation of regimes. The suggestion here is that (1) there are global challenges to climate change with no single authority to

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<sup>77</sup> (Diamond 2008)

<sup>78</sup> (Sachs 2015)

<sup>79</sup> (Diamond 2008)

<sup>80</sup> (Dani Rodrick 2008) (Frank 2014)

<sup>81</sup> (Lipton 2008) (DeLong 2004)

<sup>82</sup> (Collier, *The Natural Resource Trap* 2007) (Lipset 1959)

<sup>83</sup> (Moore 1958)

<sup>84</sup> (Ostrom 2010)

<sup>85</sup> (Robert Keohane 2011)

control the effects, (2) the negative effects of climate change are observable, and (3) any change in approach would require everyone's effort<sup>86</sup>.

The first thing to note is that the Paris Agreement promises a more realistic path towards globally coordinated emissions reductions, mainly because it has managed to better align international climate policy with the realities of international climate politics by removing two major structural barriers to international cooperation. First, the agreement accepts that most major emitters are reluctant to tie themselves into a rigid set of predetermined emissions reductions that are legally binding. This reluctance was at the heart of the US decision not to ratify the Kyoto Protocol. Secondly, it sidesteps the distributional conflict that is inherent in any attempt to negotiate mitigation targets as part of a comprehensive international agreement.

### **Intervention in Conflicts and Development**

In the context of international law, third-party intervention arguably goes against the principle of state sovereignty and non-interference with internal affairs<sup>87</sup>. Intervention here is described as a move by state or international organization to involve itself with the domestic affairs of another state with or without its consent in the name of development<sup>88</sup>. To intervene means to enter into an existing system or relationship, or to come between a group for purpose of helping that group attain development. Third-party interveners in the context of development present themselves as consultants, facilitators, evaluators, agenda-setters seek to combine their effort with those of the community to attain peace and development.

Due to the increased inequality and poverty, there is a need to consider whether the global north should intervene to fast track development globally even where there may be a clash of civilization<sup>89</sup>. Several objections could be raised to the idea of intervention. First, when intervening in product development, the intending intervenors should exhaust other avenues of

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<sup>86</sup> Ibid

<sup>87</sup> (Wallerstein 1989)

<sup>88</sup> (Hoffman 1992)

<sup>89</sup> (Huntington 1996)

development including getting innovative ways to engage the government toward development. Second, intervention in a conflict violates the targeted nation's sovereignty. Third, an outsider is incapable of understanding fully the gravity or intensity of the conflict and all its dynamics and complexities and therefore they are incapable of offering development solutions. If anything opinionated third-party intervenors often escalates the conflict. Fourth the fluid nature of the definition of success by the third parties leads them to overstay their welcome and do not ultimately resolve the conflict as such no development would ensue.

### **When to intervene**

Third-party interveners should, before engaging in any intervention, including bridging inequality should first define what success or failure will look like and should have in mind that they might become part of the problem<sup>90</sup>. Indeed when third parties intervene, they modify the physical or social structure of the situation with specific goals in mind which are imperialistic<sup>91</sup>. The underdeveloped natural resource-rich countries are always soft targets for violation of rights and freedoms and are exploited by third parties who come, use the excuse of bridging the inequality gap but train their attention on natural resources<sup>92</sup>. This is the same issue on the question of training that is required for those who have conflict-prone countries. The argument is that the education that is presented by those who seek to offer development to conflict-prone states but then the same education ends up advancing inequality and more oppression<sup>93</sup>. In other words, when training or educating people in conflict-prone areas of unequal societies, the approach should be carefully taken so that the same conflict is not repeated, or the inequality enhanced.

The overarching question in international relations debates around power and politics is whether states are justified to intervene in the affairs of another state in the name of helping such as state to become developed. The real motive of intervention is a debate that rages on since the experience has

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<sup>90</sup> (C. A Cocker 1996)

<sup>91</sup> (Collier, *The Conflict Trap and Military Intervention* 2007)

<sup>92</sup> (Franklin 2010)

<sup>93</sup> (Friere 1972)

shown that there are usually ulterior motives by those who attempt to intervene. Two outcomes are produced by the intervention. Firstly, third parties intervene to modify the physical or social structure of the conflict<sup>94</sup>. The intervener can facilitate communication, provide venues for discussion, impose timelines and deadlines contribute resources, and put pressure on the warring parties<sup>95</sup>. They may help identify the missing link in the stalemate. They may offer possible solutions by motivating the parts to concessions. However, the intervention by third parties may seek to secure their position as hegemonies and in that connection intervene to promote this position and interests. States in doing this often consider the ripeness of conflict. This is influenced by the character of the states and their decision-making process. The intervention may include diplomatic intervention such as the pursuit of US interests in the Middle East, and sometimes military intervention<sup>96</sup>.

Intervention may take different types such as preventive intervention, where states intervene to avert an outbreak of conflict. Secondly pre-emptive intervention for the sake of avoiding premature and possibly polarized elections, to disarm and reintegrate former combatants, and to avoid states from collapsing<sup>97</sup>. The third type may be a curative intervention that seeks to control or regulate an existing conflict. Fourth, de-escalating intervention that aims at reducing tension and must be aimed at resolving factors that led to an escalation in the first place. Lastly, escalating intervention seeks to avert a cold conflict where parties do not seek confrontation and yet there is simmering discontent. In sum, intervention should only be conducted when there is an overarching strategy to do so especially militarily such as failure to intervene in Rwanda in 1994 or Burundi.

### **Democracy and Development**

It is important to begin by asking whether states are developed because they are democratic or whether states are democratic because they are developed. Three theoretical arguments can be made in this regard<sup>98</sup>. First states are democratic because they are developed. Second, modernization theory does

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<sup>94</sup> (Collier, *The Conflict Trap and Military Intervention* 2007)

<sup>95</sup> (Franklin 2010)

<sup>96</sup> (W. Easterly, *Bailing Out the Poor* 2006)

<sup>97</sup> (C. A Cocker 1996)

<sup>98</sup> (Murigi 2020)



not sufficiently consider the historical terrain of underdeveloped countries. Third, while it is true that dependency theory responds to underdeveloped country's realities, it also fails to unshackle the global South from chains of poverty. These arguments are discussed as follows; First, States are democratic because they are developed. For instance, America endured rule by one to arrive at the idea of rule by many. At the time of rule by one, protectionist policies were used to ensure internal growth and global domination is achieved.

However, while adopting the definition of development as freedom as suggested by Amartya Sen<sup>99</sup> it is clear that to arrive at the status of development states must undergo certain processes before they become free. It has been argued and correctly in my view that there are stages (beginning traditional society, the precondition for take-off, take-off, drive to maturity, and age of high consumption) that states have to go through in their journey toward development<sup>100</sup>. It is my considered view that that the journey to development is not always smooth or straightforward but often odious<sup>101</sup>. It contains several variables and dynamics such as culture, politics, and history among others that must be accounted for in determining why states failed to develop or remain underdeveloped. In the debate on democracy and development, two schools of thought emerge. On the one hand, cultural differences do not matter in the process of development since states like China, North and South Korea, and East Asia generally developed despite the cultural constraints<sup>102</sup>. On the other hand, I contend that States in Africa were modeled for extraction by the Colonialists since the Berlin conference in 1884. For instance, the rich Democratic Republic of Congo is always exploited by choice architects who seek to benefit from its resources to the detriment of its development<sup>103</sup>. One must take account of the history of a state before passing a verdict as to why it is or remains underdeveloped<sup>104</sup>. In sum, it is my view that when states become developed democracy is a byproduct.

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<sup>99</sup> (Sen 2000)

<sup>100</sup> (Rustow 2014)

<sup>101</sup> (Friedman 2000)

<sup>102</sup> (Daron Acemoglu 2012)

<sup>103</sup> (Rodney 1972) (Chang 2002)

<sup>104</sup> (Frank 2014)

## **Myths on Aid**

Development Aid is a central discussion around how to end poverty in the world we live in. The disturbing reality however is that certain myths surround what Aid has achieved, can achieve, and certainly what it has not done. Also, these myths reveal that there are no magic bullets to be used to alleviate poverty. Economic growth is a precursor to democracy and not the converse. One may ask what has this to do with Aid? A deeper analysis of international development reveals that aid is directly linked with democracy and economic growth. The argument is that the model that attempts to provide solutions on how to alleviate poverty contends with the economy and democracy as very important variables. This is because on the one hand economic growth cannot be measured without looking at the poverty levels yet on the other hand an economically developed state often contends with questions of democracy. To understand how the poverty levels come about the usual suspect cause is the political system.

What I take issue from the literature is the idea that Aid has not worked and more superficially the conditions imposed such as democracy have been counterproductive in the context of Africa. This is because when considered greatly it fails to produce the distributive justice model which seems to balance the three-interest poverty, economy, and democracy. I take the view that Aid is not benign as sold to Africans instead it is malignant by design and structured to preserve the Westernized status quo. This explains why (1) many Africans are still in poverty and (2) the insistence of democracy has not produced development. The myth of aid is that in all the continents in the world Africa seems to convincingly not manage to get their foot on the economic ladder and equally not attain the democratic aspirations by the donors. While I concede that systematic, focused, and short aid has been used to bring about some alleviation of poverty in some areas, generally speaking, the interaction in Africa and Aid has produced what (Moyo 2010) refers to as dead aid.

My suggestion, therefore, is donors of Aid, and the recipients should have the priorities right. They should be aware that economic development is the precursor to democracy, and it does not need to come from Aid. A case in point is China which used state capitalism as opposed to private capitalism promoted by the west, development democracy as opposed to western liberal

democracy, and prioritized economic rights in place of political rights<sup>105</sup>. Voter turnout, citizen participation, and accountable government do not produce better economies but certainly, a strong economy is more likely to produce cherished democratic values. Therefore, the priority should be on making the economy work as we progressively achieve democratic aspirations.

## **Conclusion**

Although rights and freedoms ought to be the basis for ending inequality, they are incorporated as the structures that promise freedom to hoodwink everyone to believe in them, but they do not mean what they say. Basic rights should be value-neutral especially where shelter, food, and healthcare are guaranteed. To attain this value-neutral status there would be a consideration on how inequality works. The reality is that there would be a need for the transfer of wealth from the rich to the poor to ensure that there is substantive compliance with basic human rights requirements. The challenge however is that the majority are the chaotic aggregate and very disorganized while the minority are well organized and rich and will eventually call the stakes in political matters<sup>106</sup>. There is available evidence to show that some interventions are good. The international community was criticized for failing to intervene in the situation of Rwanda. However, development has ensued eventually presented itself progressively. To this end, conflicts do not always produce underdevelopment instead they can be transformed to produce development without the need for third parties' interventions

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<sup>105</sup> (Schumpeter 1942)

<sup>106</sup> (Handleman 2009)

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## **Eradicating Poverty for Inclusive Development in Kenya**

By: **Kariuki Muigua\***

### ***Abstract***

*The sustainable development goals as captured under the United 2030 Agenda for Sustainable Development (SDGs) seek to ensure that natural resources are managed in a way that balances the needs of human beings and the need for conservation of these resources for the sake of present and future generations. The SDGs acknowledge the complex relationship between economic, social and environmental elements of development. They also set goals and targets that states must meet by the year 2030 using these resources. SDG Goal 1 thereof seeks to ensure that countries end poverty in their all its forms in their territories as part of a prerequisite for the realisation of sustainable development. It is an open secret that world is still struggling with abject poverty and huge inequalities. Kenya is no exception since a huge number of its population are still considered to be living below poverty line. Thus, even when the country boasts of impressive economic growth, this class of people have little, if anything, to celebrate since the gains do not trickle down to positive touch their lives. As such, they often feel marginalised and sidelined as far as national development agenda is concerned.*

*This paper discusses how the SDG Goal 1 can be achieved in Kenya especially in the aftermath of Corona Virus Disease pandemic (COVID 19) which has affected the global economy, with the developing countries suffering the greatest. The paper offers some recommendations that may be considered for the sake of ensuring poverty in all its form is eradicated, consequently allow all sections of the society to feel that they belong, and that that the government's development agenda is inclusive. The recommendations range from financial support for empowerment, to climate change and gender equality and equity, among others. Poverty eradication is an important step towards ensuring that every person's inherent dignity and the right to have that dignity respected and protected is realised as guaranteed under the Constitution of Kenya.*

## **1. Introduction**

The sustainable development agenda is mainly informed by an anthropocentric approach to development. The concept of sustainable development seeks to combine growing concerns about a range of environmental issues, socio-economic issues to do with poverty and inequality and concerns about a healthy future for humanity.<sup>1</sup> This is an approach that puts the needs of the human beings at the centre of development activities with a view to ensuring that their needs are fully satisfied while protecting and conserving the environment for the sake of future (human) generations.<sup>2</sup>

The anthropocentric approach to environmental management and development, both of which form the basis of sustainable development agenda, include poverty eradication, food security, environmental democracy, environmental justice, environmental security, public participation, gender equity, access to information and conflicts management, amongst others.<sup>3</sup> Sustainable development seeks to promote and ensure the fulfilment of the basic needs of the world's poor without compromising the capacity of the environment to provide similar benefits for future generations.<sup>4</sup> In this respect, the sustainable development debates revolve around how natural and environmental resources can be utilized to

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<sup>1</sup> Hopwood B, Mellor M and O'Brien G, 'Sustainable Development: Mapping Different Approaches' (2005) 13 Sustainable development 38, 39.

<sup>2</sup> See generally, Muigua K, *Nurturing Our Environment for Sustainable Development*. Glenwood Publishers Limited, 2016; see also Howarth RB, 'Sustainability, Well-Being, and Economic Growth' (2012) 5 Minding Nature 32.

<sup>3</sup> See Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016).

<sup>4</sup> Mbote, P.K. & Cullet, P., 'Environmental Justice and Sustainable Development: Integrating Local Communities in Environmental Management,' *ELRC Working Paper 1996 – 1*, (International Environmental Law Research Centre, 1996), p. 7 < <http://www.ielrc.org/content/w9601.pdf> > accessed 24 December 2020.

alleviate human suffering and poverty.<sup>5</sup> The United Nations Environmental Assembly (UNEA) asserts that this development path should maintain, enhance and, where necessary, rebuild natural capital as a critical economic asset and source of public benefits, especially for poor people whose livelihoods and security depend strongly on nature.<sup>6</sup>

This is important considering that ‘more than one billion people in the world live in abject poverty on less than \$1.25 per day while the richest 1% people have almost half of the world’s wealth, leading to the conclusion that there is a huge gap and inequality in the distribution of the world economy’.<sup>7</sup> Thus, while many countries across the world, including Kenya, have been working towards eradication of poverty, huge inequalities have persisted and progress has been uneven.<sup>8</sup> The high rates of poverty have especially been more pronounced in developing countries mainly in the African continent.<sup>9</sup> This is despite the fact that Africa as a continent is endowed with immense natural and human resources as well as great cultural, ecological and economic

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<sup>5</sup> ‘The Relationship between Poverty and the Environment’ (*Voices of Youth*) <<https://www.voicesofyouth.org/blog/relationship-between-poverty-and-environment>> accessed 24 December 2020.

<sup>6</sup> ‘What Is an “Inclusive Green Economy”? | UNEP - UN Environment Programme’ <<https://www.unenvironment.org/explore-topics/green-economy/why-does-green-economy-matter/what-inclusive-green-economy>> accessed 24 December 2020.

<sup>7</sup> ‘Poverty Is a Human Rights Violation | Apolitical’ (17 June 2020) <[https://apolitical.co/en/solution\\_article/poverty-is-a-human-rights-violation](https://apolitical.co/en/solution_article/poverty-is-a-human-rights-violation)> accessed 24 December 2020.

<sup>8</sup> ‘Poverty Eradication: Sustainable Development Knowledge Platform’ <<https://sustainabledevelopment.un.org/topics/povertyeradication>> accessed 25 December 2020.

<sup>9</sup> ‘Poverty in Africa Is Now Falling—but Not Fast Enough’ <<https://www.brookings.edu/blog/future-development/2019/03/28/poverty-in-africa-is-now-falling-but-not-fast-enough/>> accessed 25 December 2020; Chandy L, ‘Why Is the Number of Poor People in Africa Increasing When Africa’s Economies Are Growing?’ (*Brookings*, 30 November 1AD) <<https://www.brookings.edu/blog/africa-in-focus/2015/05/04/why-is-the-number-of-poor-people-in-africa-increasing-when-africas-economies-are-growing/>> accessed 25 December 2020; ‘On the Poorest Continent, the Plight of Children Is Dramatic’ (*SOS-US-EN*) <<https://www.sos-usa.org/SpecialPages/Africa/Poverty-in-Africa>> accessed 25 December 2020; ‘Poverty and Development in Africa’ <<https://www.globalpolicy.org/social-and-economic-policy/poverty-and-development/poverty-and-development-in-africa.html>> accessed 25 December 2020.

diversity.<sup>10</sup> Some of the causes of poverty in Africa include, *inter alia*, population growth, war and crises, climate change, illnesses, inadequate agricultural infrastructure, and unjust trade structures.<sup>11</sup> This is however not to say that poverty is only to be found in developing countries because, as it has been pointed out by one scholar, ‘extreme poverty prevails in all countries of the world, regardless of their economic, social, and cultural situation and seriously affects the most vulnerable and disadvantaged individual’s families and groups who are hindered in the exercise of their Human Rights and fundamental freedom’.<sup>12</sup>

The United Nations 2030 agenda for Sustainable Development which contains 17 Sustainable Development Goals (SDGs) has some goals and targets that are specifically meant to address poverty and inequalities in the world. SDG Goal 1 seeks to ensure that State Parties end poverty in all its forms everywhere by the year 2030.<sup>13</sup> This is supposed to involve targeting

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<sup>10</sup> ‘Poverty and Development in Africa’ <<https://www.globalpolicy.org/social-and-economic-policy/poverty-and-development/poverty-and-development-in-africa.html>> accessed 25 December 2020; Muigua K, *Utilizing Africa’s Natural Resources to Fight Poverty* (2014)

<<http://kmco.co.ke/wp-content/uploads/2019/06/Utilizing-Africas-Natural-Resources-to-Fight-Poverty-26th-March2014.pdf>> accessed 25 December 2020.

<sup>11</sup> ‘On the Poorest Continent, the Plight of Children Is Dramatic’ (SOS-US-EN) <<https://www.sos-usa.org/SpecialPages/Africa/Poverty-in-Africa>> accessed 25 December 2020.

<sup>12</sup> Dr Dharmendra Kumar Singh, ‘Poverty and Human Dignity: A Human Rights Approach’ (2017) 22 IOSR Journal of Humanities and Social Science 48; see also ‘Goal 1: No Poverty | UNDP’

<<https://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-1-no-poverty.html>> accessed 25 December 2020.

<sup>13</sup> SDG Goal 1, United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1.

The related targets include:

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

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

the most vulnerable, increasing basic resources and services, and supporting communities affected by conflict and climate-related disasters.<sup>14</sup>

## 2. The Definition of Poverty: Meaning and Scope

While there is no single meaning of the term ‘poverty’ due to the varying elements associated with the same, there exists a number of definitions that ably captures the scope of the term as intended to be used in this paper. One author has observed that:

“Poverty is commonly understood as the state of one who lacks a certain amount of material possessions or money. It is a human condition where people do not have adequate access to their

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

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

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

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

*1.B Create sound policy frameworks at the national, regional and international levels, based on pro-poor and gender-sensitive development strategies, to support accelerated investment in poverty eradication actions.*

<sup>14</sup> ‘Goal 1: No Poverty | UNDP’

<<https://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-1-no-poverty.html>> accessed 25 December 2020.

fundamental needs such as income, food, clothing, shelter, health care, security, education etc.”<sup>15</sup>

Poverty can also be conceptualized in a broad manner which may include, inter alia, the recognition that it is not limited to lack of income only, but comprises of deprivations in areas of health, education, participation and security.<sup>16</sup> Furthermore, human poverty may also be perceived as a denial of human rights as it arguably infringes on, among others, human freedom and destroys human dignity. It is viewed as an intrusion into human dignity.<sup>17</sup>

Basic human rights are an integral part of human rights and their violation has been seen as sabotage of human dignity.<sup>18</sup> Indeed, in the Kenyan case of *M W K v another v Attorney General & 3 others* [2017] eKLR<sup>19</sup>, the High Court referred to South African jurisprudence and stated as follows:

49. Article 28 provides no definition of dignity. However its role and importance as a foundational constitutional value has been emphasized in a number of cases. In the South African case of *S v Makwanyane*, [18] O'Regan J pointed out that "without dignity, human life is substantially diminished" and pronounced the prime value of dignity in the following terms:-

*“The importance of dignity as a founding value of the ... Constitution cannot be overemphasized. Recognizing a right to dignity is an acknowledgment of the intrinsic worth*

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<sup>15</sup> ‘Poverty Is a Human Rights Violation | Apolitical’ (17 June 2020) <[https://apolitical.co/en/solution\\_article/poverty-is-a-human-rights-violation](https://apolitical.co/en/solution_article/poverty-is-a-human-rights-violation)> accessed 24 December 2020.

<sup>16</sup> Gordon, D., Chapter 1, ‘Definitions of Concepts for the Perceptions of Poverty and Social Exclusion’ [www.bris.ac.uk/poverty/downloads/.../pse/99-Pilot/99-Pilot\\_1.doc](http://www.bris.ac.uk/poverty/downloads/.../pse/99-Pilot/99-Pilot_1.doc) accessed 24 December 2020.

<sup>17</sup> Rukooko, A.B., ‘Poverty and human rights in Africa: historical dynamics and the case for economic social and cultural rights’, *The International Journal of Human Rights*, Vol. 14, Iss. 1, 2010.

<sup>18</sup> *Vienna Declaration and Programme of Action*, Article 25, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

<sup>19</sup> *M W K v another v Attorney General & 3 others* [2017] eKLR, Constitutional Petition 347 of 2015.



of human beings: human beings are entitled to be treated as worthy of respect and concern. The right is therefore the foundation of many of the other rights that are specifically entrenched in Chapter 3."<sup>20</sup> (Emphasis added)

Sustainable development, as defined in the *Brundtland Commission* Report, includes human development.<sup>21</sup> One of the ways of achieving human development which empowers people, both men and women, is addressing poverty in order to empower people to contribute positively towards national development with dignity, without solely relying on the Government to do so.<sup>22</sup>

The view that poverty is a shortage of income should also be discarded and instead embrace that perceives poverty as 'unfreedoms' of various sorts: the lack of freedom to achieve even minimally satisfactory living conditions.<sup>23</sup> This is because while low income can contribute to poverty, lack of schooling facilities, absence of health facilities, unavailability of medicines, the suppression of women, hazardous environmental features and lack of jobs do also play a major role.<sup>24</sup> Thus, as long as these factors exist, then poverty cannot be said to have been eliminated. Poverty is viewed as a socio-economic phenomenon.<sup>25</sup> It is therefore arguable that while the Constitution of Kenya guarantees right to dignity for everyone, this right goes beyond freedom from being treated or punished in a cruel, inhuman or degrading

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<sup>20</sup> Ibid, Para. 49.

<sup>21</sup> Costantini, V. & Monni, S., "Measuring Human and Sustainable Development: an integrated approach for European Countries," *Working paper No. 41*, 2004. p. 8 <<http://host.uniroma3.it/dipartimenti/economia/pdf/WP41.pdf> > accessed 24 December 2020.

<sup>22</sup> Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016).

<sup>23</sup> Green, D., *From Poverty to Power: How active citizens and effective states can change the world*, (2nd ed., 2012), p. IX (Foreword by Amartya Sen), Rugby, UK: Practical Action Publishing and Oxford: Oxfam International <[http://www.oxfamamerica.org/static/media/files/From\\_Poverty\\_to\\_Power\\_2nd\\_Edition.pdf](http://www.oxfamamerica.org/static/media/files/From_Poverty_to_Power_2nd_Edition.pdf) > accessed 24 December 2020.

<sup>24</sup> Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016).

<sup>25</sup> Dr Dharmendra Kumar Singh, 'Poverty and Human Dignity: A Human Rights Approach' (2017) 22 IOSR Journal of Humanities and Social Science 48, 48.

manner; it must be guaranteed through ensuring that the ‘unfreedoms’ mentioned above are addressed. Certainly, there is no dignity in living in abject poverty. Indeed, it has been posited that abject poverty conditions are not only a violation of the right to human dignity but in some circumstances, it is actually a threat to right to life.<sup>26</sup> The State must protect its people from descending into such circumstances where their human dignity becomes compromised through deprivation of basic needs or even reaches a point of threat to right to life. Some scholars have rightly argued that ‘poverty is not only deprivation of basic needs or material resources but a violation of human dignity. The most injurious and debilitating characteristic of poverty is loss of dignity’.<sup>27</sup> Arguably, social economic rights as guaranteed under Article 43 of the Constitution of Kenya<sup>28</sup> are critical for enjoyment of the right to life.

### **3. International and National Legal Frameworks on Poverty Eradication**

There exists a number of international and regional legal instruments that are geared towards eradication of poverty.

#### **3.1. International Human Rights Legal Instruments**

The central aim of the *Agenda 21*<sup>29</sup> as adopted in 1992 was combating poverty, hunger, ill health and illiteracy, and the continuing deterioration of the ecosystems on which the human race depend for their well-being. It also sought to deal with the integration of environment and development concerns and greater attention to them which would lead to the fulfillment of basic needs, improved living standards for all, better protected and managed ecosystems and a safer, more prosperous future.<sup>30</sup> Thus, the aim

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<sup>26</sup> Ibid, 48.

<sup>27</sup> Ibid, 48.

<sup>28</sup> ‘Kenya Law: The Constitution of Kenya’

<<http://www.kenyalaw.org/kl/index.php?id=398>> accessed 25 December 2020.

<sup>29</sup> (A/CONF.151/26, vol.II), United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992, Agenda 21.

<sup>30</sup> Ibid, Preamble.

was to achieve a global consensus and political commitment at the highest level on development and environment cooperation.<sup>31</sup>

Article 2 of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*<sup>32</sup> states:

*“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”*

*Agenda 21*<sup>33</sup> also rightly pointed out that managing resources sustainably requires an environmental policy which not only focuses on the conservation and protection of resources but also takes due account of those who depend on the resources for their livelihoods as a way of addressing poverty and achieving long-term success in resource and environmental conservation.<sup>34</sup> In order to ensure that biological diversity management takes care of the needs of the people especially those living around them, the *Convention on Biological Diversity*<sup>35</sup> was negotiated with the objective of promoting the conservation of biodiversity, the sustainable use of its components, and the fair and equitable sharing of benefits arising out of the utilization of genetic resources.<sup>36</sup>

The 2002 World Summit on sustainable Development in Johannesburg adopted a plan of implementation reiterating the Rio principles and establishing poverty eradication, sustainable consumption and production

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<sup>31</sup> United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992, Agenda 21, Preamble (para. 1.3).

<sup>32</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

<sup>33</sup> (A/CONF.151/26, vol.II), United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992, Agenda 21.

<sup>34</sup> *Ibid*, Clause 3.2.

<sup>35</sup> 1992 Convention on Biological Diversity, [1993] ATS 32 / 1760 UNTS 79 / 31 ILM 818 (1992).

<sup>36</sup> Article 1.

patterns and protection of the natural resource base for economic and social development as the three prime objectives (Johannesburg Plan).<sup>37</sup>

The *United Nations Conference on Sustainable Development* ("Rio+20")<sup>38</sup> which took place in Rio de Janeiro, Brazil in June 2012, also involved governments committing to sustainable development and to ensure the promotion of an economically, socially and environmentally sustainable future for the planet and for present and future generations. The participants would ensure that they work towards eradicating poverty which they recognised as the greatest global challenge facing the world today and an indispensable requirement for sustainable development, thus creating the need for freeing humanity from poverty and hunger as a matter of urgency.<sup>39</sup> At the Rio+20 Conference, world leaders, participants from governments, the private sector, NGOs and other groups, deliberated on how they can reduce poverty, advance social equity and ensure environmental protection.<sup>40</sup>

The *2030 Agenda for Sustainable Development*, includes a set of 17 Sustainable Development Goals (SDGs) to end poverty, fight inequality and injustice, and tackle climate change by the year 2030.<sup>41</sup> The 2030 Agenda for Sustainable Development<sup>42</sup> is a plan of action for people, planet and prosperity. It also seeks to strengthen universal peace in larger freedom and was formulated in recognition that eradicating poverty in all its forms and

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<sup>37</sup> World Summit on Sustainable Development, *Johannesburg Declaration on Sustainable Development*, A/CONF.199/20, Annex: Plan of Implementation of the World Summit on Sustainable Development.

<sup>38</sup> United Nations, *Report of the United Nations Conference on Sustainable Development*, Rio de Janeiro, Brazil 20–22 June 2012, A/CONF.216/16.

<sup>39</sup> Ibid, Article 1.2; Article 1.8.

<sup>40</sup> United Nations Conference on Sustainable Development  
<<http://www.uncsd2012.org/about.html>> accessed 24 December 2020.

<sup>41</sup> United Nations Development Programme, 'Sustainable Development Goals (SDGs)', < <http://www.undp.org/content/undp/en/home/mdgoverview/post-2015-development-agenda.html> > accessed 24 December 2020.

<sup>42</sup> *Transforming our world: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015, [without reference to a Main Committee (A/70/L.1)], Seventieth session, Agenda items 15 and 116, 21 October 2015.

dimensions, including extreme poverty, is the greatest global challenge and an indispensable requirement for sustainable development.<sup>43</sup>

The *Sustainable Development Goals, Agenda 2030* (SDGs) define sustainable development broadly to cover issues such as poverty, inequality, gender equality, health, education, governance, climate change and environmental protection.<sup>44</sup>

The *African Convention on the Conservation of Nature and Natural Resources*<sup>45</sup> seeks: to enhance environmental protection; to foster the conservation and sustainable use of natural resources; and to harmonize and coordinate policies in these fields-with a view to achieving ecologically rational, economically sound and socially acceptable development policies and programmes.<sup>46</sup>

Under the SDGs and other legal instruments and policies, poverty eradication efforts have since adopted a human rights approach due to its complex relationship with the basic human rights. The Office of the High Commissioner for Human Rights (UN Human Rights) rightly observes that:

*A human rights definition and understanding leads to more adequate responses to the many facets of poverty, responses that do not trample on rights in the pursuit of growth and development. It gives due attention to the critical vulnerability and subjective daily assaults on human dignity that accompany poverty. Importantly, it looks not just at resources but also at the capabilities, choices, security and power needed for the enjoyment of an adequate standard of living and other fundamental civil, cultural, economic, political and social rights.*<sup>47</sup>

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<sup>43</sup> Ibid, Preamble.

<sup>44</sup> See United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, Resolution adopted by the General Assembly on 25 September 2015.

<sup>45</sup> African Union, *African Convention on the Conservation of Nature and Natural Resources*, OAU, 1001 UNTS 3.

<sup>46</sup> Ibid, Article I.

<sup>47</sup> 'OHCHR | Human Rights Dimension of Poverty'

The main objective of all the major international legal instruments, policies and actions on human rights is the alleviation of human suffering and to promote the total wellbeing of all, the absence of which wellbeing is usually perceived to be poverty.<sup>48</sup>

### **3.2. National Policy and Legal Frameworks on Poverty Eradication in Kenya**

The Constitution of Kenya 2010 stipulates that ‘the national values and principles of governance include, inter alia, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised’.<sup>49</sup> The Preamble also recognises 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.<sup>50</sup> In addition, the Constitution states that ‘the Bill of Rights is an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies’.<sup>51</sup> It also states that ‘the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings’.<sup>52</sup> Article 28 of the Constitution also guarantees that ‘every person has inherent dignity and the right to have that dignity respected and protected’.<sup>53</sup>

One of the ways that human dignity is violated or lost is through poverty. Indeed, it has been argued that the loss of dignity is worse than poverty itself.<sup>54</sup> The Court of Appeal at Mombasa in *COI & another v Chief*

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<<https://www.ohchr.org/en/issues/poverty/dimensionofpoverty/pages/index.aspx>>  
accessed 23 December 2020.

<sup>48</sup> Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016).

<sup>49</sup> Article 10 (2) (b), Constitution of Kenya, 2010.

<sup>50</sup> Preamble, Constitution of Kenya 2010.

<sup>51</sup> Article 19 (1), Constitution of Kenya, 2010.

<sup>52</sup> Article 19 (2), Constitution of Kenya, 2010.

<sup>53</sup> Article 28, Constitution of Kenya, 2010.

<sup>54</sup> ‘The Saddest Thing in the World Is Not Poverty; It’s Loss of Dignity | Jonathan Glennie’ (*the Guardian*, 28 January 2015) <<http://www.theguardian.com/global-development/2015/jan/28/dignity-sustainable-development-goals>> accessed 23 December 2020.

*Magistrate Ukunda Law Courts & 4 others* [2018] eKLR<sup>55</sup> quoted with approval the Constitutional Court of South Africa in *Dawood and Another vs. Minister of Home Affairs and Others* (CCT35/99) [2000] ZACC 8 :-

*“Human dignity informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. Human dignity is also a constitutional value that is of central significance in the limitations analysis.” [Emphasis added].*<sup>56</sup>

The Court Appeal went on as follows:

26. *It is thus apparent, regardless of one’s status or position or mental or physical condition, one is, by virtue of being human, worthy of having his or her dignity or worth respected. In addition, the South African Constitutional Court in Mayelane vs. Ngwenyama and Another (CCT 57/12) [2013] ZACC 14 stated that: -*

*“...the right to dignity includes the right-bearer’s entitlement to make choices and to take decisions that affect his or her life – the more significant the decision, the greater the entitlement. Autonomy and control over one’s personal circumstances is a fundamental aspect of human dignity.”*<sup>57</sup>

The place of human dignity in the Bill of rights has also been acknowledged in both the *International Covenant on Civil and Political Rights* (ICCPR)<sup>58</sup> and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)<sup>59</sup> provide in their preambles which are similar as follows:

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<sup>55</sup> COI & another v Chief Magistrate Ukunda Law Courts & 4 others [2018] eKLR, Civil Appeal 56 of 2016.

<sup>56</sup> Ibid, para. 25.

<sup>57</sup> Ibid, para. 26.

<sup>58</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

<sup>59</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

*“Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, recognizing that these rights derive from the inherent dignity of the human person...” [Emphasis added].<sup>60</sup>*

The Constitution also guarantees that ‘every person has the right—to the highest attainable standard of health, which includes the right to health care services, including reproductive health care; to accessible and adequate housing, and to reasonable standards of sanitation; to be free from hunger, and to have adequate food of acceptable quality; to clean and safe water in adequate quantities; to social security; and to education.<sup>61</sup> It also guarantees that no person shall not be denied emergency medical treatment.<sup>62</sup> It also obligates the State to provide appropriate social security to persons who are unable to support themselves and their dependants.<sup>63</sup>

The Constitution obligates all State organs and all public officers to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.<sup>64</sup>

Going by the elements of poverty that were discussed hereinabove, it is arguable that the denial of any of these social economic rights in Kenya

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<sup>60</sup> See also the *African Charter on Human and People’s Rights* whose Article 5 provides that:

*“Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”*

<sup>61</sup> Article 43(1), Constitution of Kenya 2010.

<sup>62</sup> Ibid, Article 43(2).

<sup>63</sup> Ibid, Article 43(3).

<sup>64</sup> Ibid, Article 21(3).



places one on a direct path to poverty. For instance, in the case of *Githunguri Residents Association v Cabinet Secretary - Ministry of Education, Attorney General & 5 others* [2015] eKLR<sup>65</sup>, the Court affirmed the relationship between education and alleviation of poverty by citing a South African case as follows:

*Why is education such an important right? In Constitutional Law of South Africa/Commentary /Part 11, <http://ipproducts.jutaland.co.za>, Ste Woolman and Michael Bishop quoted the opening lines of the Committee on Social, Economic and Cultural Rights' General Comment on the Right to Education to make the point that education is empowerment. The Committee stated thus;*

*"Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make. But the importance of education is not just practical; a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence."*<sup>66</sup>

*I agree with the above sentiments.....*<sup>67</sup>

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<sup>65</sup> *Githunguri Residents Association v Cabinet Secretary - Ministry of Education, Attorney General & 5 others* [2015] eKLR, Petition 464 of 2013.

<sup>66</sup> *Ibid*, Para. 30.

<sup>67</sup> *Ibid*, Para. 31.

The Kenyan Court went on as follows:

*It is therefore the conviction and strong view of this Court that the right to basic education is not to be progressively realised as seems to be the expectation of school management bodies. That right is to be enjoyed now and to argue otherwise would be to cheapen the Constitution and even in a society where we live with great wealth disparities and million wallowing in abject poverty, only education can give everyone the chance and opportunity to realise their dream and aspirations. That opportunity was not granted in the circumstances obtaining in this Petition (emphasis added).*

While the Constitution affirms that the State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43<sup>68</sup>, and courts have also ruled in the past that some of the social economic rights are to be progressively realised,<sup>69</sup> it is also true that ‘in applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles—it is the responsibility of the State to show that the resources are not available; in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.’<sup>70</sup> While striving towards progressive realisation of social economic rights in Kenya, the Government should thus work towards ensuring that the most basic needs of people are met or such people are empowered enough to access the same, as a step towards fighting poverty.

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<sup>68</sup> Article 21(2), Constitution of Kenya 2010.

<sup>69</sup> *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012]eKLR, Advisory Opinions Application 2 of 2012.

<sup>70</sup> Article 20(5), Constitution of Kenya 2010.

*Sessional paper No. 10 of 2012 On Kenya Vision 2030*<sup>71</sup> is a long-term development blueprint for Kenya which aims to transform the country into “a newly-industrialising, middle-income country providing a high quality of life to all its citizens in a clean and secure environment”.<sup>72</sup> Kenya Vision 2030 was launched in 2008 as Kenya’s development blueprint covering the period 2008 to 2030.<sup>73</sup>

The social pillar of the Vision 2030 seeks to invest in the people of Kenya.<sup>74</sup> The social pillar forms the basis of transformation in eight key social sectors, namely: education and training; health; water and sanitation; the environment; housing and urbanisation; as well as in gender, youth, sports and culture.<sup>75</sup> The Blueprint has very forward looking strategies meant to address poverty in the country. However, as at 2020, only ten years shy of the deadline to achieve Vision 2030, the same is threatened by lack of funds, lack of political good -will and corruption.<sup>76</sup> There is a need for the Government to renew its commitment towards ensuring that the same is achieved.

The Presidency’s *Big Four Agenda* which is a 5-year development plan under 4 key pillars, namely: food security, affordable housing, manufacturing, and affordable healthcare for all.<sup>77</sup> The Agenda thus mainly

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<sup>71</sup> Republic of Kenya, *Sessional paper No. 10 of 2012 On Kenya Vision 2030*, (Government Printer, 2012).

<sup>72</sup> ‘Sessional Paper No. 10 of 2012 on Kenya Vision 2030 - Welcome to Foresight for Development’ <<http://www.foresightfordevelopment.org/sobipro/54/1263-sessional-paper-no-10-of-2012-on-kenya-vision-2030>> accessed 25 December 2020.

<sup>73</sup> ‘Towards 2030 | Kenya Vision 2030’ <<https://vision2030.go.ke/towards-2030/>> accessed 25 December 2020.

<sup>74</sup> ‘Sessional Paper No. 10 of 2012 On Kenya Vision 2030 - Welcome to Foresight for Development’, chapter Four.

<sup>75</sup> Ibid, 93.

<sup>76</sup> ‘Viewpoint: Will Corruption Kill off Kenya’s Vision 2030 Plans?’ *BBC News* (18 October 2012) <<https://www.bbc.com/news/world-africa-19980173>> accessed 25 December 2020; KIBATI M, ‘Corruption, Impunity Blocking Vision 2030’ (*The Standard*) <<https://www.standardmedia.co.ke/commentary/article/2001284573/corruption-impunity-blocking-vision-2030>> accessed 25 December 2020.

<sup>77</sup> ‘The Big 4 - Empowering the Nation’ <<https://big4.delivery.go.ke/>> accessed 25 December 2020.

focuses on social economic rights. It is expected to advance the goals of Vision 2030.<sup>78</sup> Specifically, the Third Medium Term Plan will be driven by the Big Four Agenda, implemented on the foundations that have been put in place during the First and Second Medium Terms Plans.<sup>79</sup>

The above national constitutional, policy and statutory instruments are not exhaustive as they are implemented through various government policies, programmes, plans and actions. Also noteworthy is the fact that Article 2 (5) (6) of the Constitution provides that the general rules of international law shall form part of the law of Kenya<sup>80</sup> and to this end, they thus inform the government actions and measures geared towards eradication of poverty, in line with the United Nations 2030 Agenda on Sustainable Development.

#### **4. Poverty Eradication in Kenya: Challenges and Prospects**

A sustainably managed environment is seen as a prerequisite for socio-economic development and poverty reduction. This is because the natural environment supplies ecosystem goods and services that provide income, support job creation, poverty alleviation, contribute to safety nets and reduce inequity.<sup>81</sup>

As at 2019, that is, pre-COVID 19 period, it was reported that Kenya experienced robust economic growth from 2005-06 to 2015-16, growing at an average annual rate of 5.3%, higher than the average in Sub-Saharan Africa.<sup>82</sup> The result was accelerated gains in the fight to reduce poverty, with about 4.5 million Kenyans escaping poverty, a decline from 46.8% to 36.1% of the population.<sup>83</sup> This growth was however inequitable since not every

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<sup>78</sup> 'Towards 2030 | Kenya Vision 2030' <<https://vision2030.go.ke/towards-2030/>> accessed 25 December 2020.

<sup>79</sup> Ibid.

<sup>80</sup> See also *Treaty Making and Ratification Act*, No. 45 of 2012, Laws of Kenya.

<sup>81</sup> Environment UN, 'GOAL 1: No Poverty' (*UNEP - UN Environment Programme*, 3 October 2017) <<http://www.unenvironment.org/explore-topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-1-no>> accessed 24 December 2020.

<sup>82</sup> 'More than Just Growth: Accelerating Poverty Reduction in Kenya' <<https://blogs.worldbank.org/africacan/more-than-just-growth-accelerating-poverty-reduction-in-kenya>> accessed 25 December 2020.

<sup>83</sup> Ibid.

segment of the population benefited from the same.<sup>84</sup> While rural areas have been experiencing some growth due to economic diversification, it was reported that urban poverty rate remained statistically unchanged, where the absolute number of urban poor increased from 2.3 million to 3.8 million due to high population growth, increasing living costs, especially because of high housing costs as well as high food prices, paired with scarce job opportunities thus reducing the disposable income for urban households.<sup>85</sup>

While the World Bank observes that the poverty rate in Kenya had been on a downward trend over the past 15 years before 2020, the rate of poverty in Kenya cannot still be ignored, especially with the numbers rising due to the Corona Virus Disease pandemic (COVID-19).<sup>86</sup> According to the World Bank, an additional two million people in Kenya have been pushed into deprivation as the coronavirus pandemic increased poverty levels by four percentage points, with the country experiencing a situation where Kenya's poor population was predominantly rural and less well educated pre-Covid-19.<sup>87</sup> However, Covid-19 created a new group of 'newly' poor Kenyans with different demographic characteristics," such as urban with household heads who are younger and more educated.<sup>88</sup> As at November, 2020, it was also estimated that Kenya's unemployment rate almost doubled to 10.4% in the second quarter.<sup>89</sup>

Thus, as things stand, the situation is getting worse and all the gains of yesteryears are quickly being undone. This therefore calls for the Government to work even harder than before to not only stabilize the

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<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

<sup>86</sup> 'Pandemic Created New Class of Kenyan Poor, World Bank Says' *Bloomberg.com* (25 November 2020)

<<https://www.bloomberg.com/news/articles/2020-11-25/pandemic-hit-created-new-class-of-kenyan-poor-world-bank-says>> accessed 25 December 2020.

<sup>87</sup> Ibid.

<sup>88</sup> Ibid; 'Pandemic Pushes 2 Million Kenyans into Poverty' (*The East African*) <<https://www.theeastafrican.co.ke/tea/business/pandemic-pushes-2-million-kenyans-into-poverty-3216566>> accessed 25 December 2020.

<sup>89</sup> Ibid; 'Kenya: Rising Unemployment Leads People to Line for Dirty Jobs' <<https://www.aa.com.tr/en/africa/kenya-rising-unemployment-leads-people-to-line-for-dirty-jobs/1965212>> accessed 25 December 2020.

economy, which has been shrinking<sup>90</sup>, but also to ensure that the same gets back on track and the efforts towards eradication of poverty are given maximum attention.

## **5. Eradicating Poverty for Inclusive Development in Kenya**

The SDGs ought to inform the efforts of member states in achieving sustainable development, poverty eradication, and environmental conservation and protection. They offer an integrated approach, which is environmentally conscious, to combating the various problems that affect the human society as well as the environmental resources.<sup>91</sup>

It has rightly been argued that a development strategy anchored in inclusive growth can have two mutually reinforcing strategic focuses, namely: high, sustainable growth which can create and expand economic opportunities; and broader access to these opportunities which can ensure that members of society can participate in and benefit from growth.<sup>92</sup> This is meant to ensure that growth reaches the impoverished who remain excluded by circumstance, poor governance, and other market-resistant obstacles.<sup>93</sup>

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<sup>90</sup> 'Kenyan Economy Shrinks for the First Time since September 2008 - Citizentv.Co.Ke' <<https://citizentv.co.ke/business/kenyan-economy-shrinks-for-the-first-time-since-september-2008-347867/>> accessed 25 December 2020; 'Kenyan Economy Shrinks for First Time in 17 Years Due to Virus' <<https://www.bloombergquint.com/business/kenyan-economy-shrinks-for-first-time-in-17-years-due-to-virus>> accessed 25 December 2020; 'Kenya's Economy Shrinks by 5.7% in 2020 Q2 as Pandemic Hits Key Sectors - Kenyan Wallstreet' <<https://kenyanwallstreet.com/kenyas-economy-shrinks-by-5-7-in-2020-q2/>> accessed 25 December 2020.

<sup>91</sup> Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016).

<sup>92</sup> Elmer, 'Inclusive Growth and Poverty Reduction' (*Asian Development Bank*, 6 January 2015)

<<https://www.adb.org/themes/social-development/poverty-reduction/inclusive-growth>> accessed 25 December 2020.

<sup>93</sup> Ibid; see also 'Africa: Poor Excluded From Benefits of High Economic Growth' <<https://www.globalpolicy.org/social-and-economic-policy/poverty-and-development/poverty-and-development-in-africa/50363-africa-poor-excluded-from-benefits-of-high-economic-growth.html?itemid=id#969>> accessed 25 December 2020; 'Growth Without Equity Roils South Africa' <<https://www.globalpolicy.org/social-and-economic-policy/poverty-and-development/poverty-and-development-in-africa/50363-africa-poor-excluded-from-benefits-of-high-economic-growth.html?itemid=id#969>> accessed 25 December 2020.

## 5.1 Gender Sensitive Approaches to Poverty Eradication

Poverty affects males and females in varying ways and as such, any efforts geared towards its eradication should bring on board all the affected parties in order to come up with effective mechanisms that will not only reflect and address the needs of all sections of the society, but will also facilitate participation of all.<sup>94</sup> This is also important as it helps generate social acceptance of the government's policies while are geared towards addressing the real issues affecting its people.<sup>95</sup> In most parts of the world, women comprise the largest group among those excluded from the benefits of economic expansion and thus ought to be closely involved in development agenda to address their unique needs and ensured that they are also empowered in all spheres of life.<sup>96</sup> One of the main reasons why it is critical to empower women is the fact that women are considered as economic actors: they produce and process food for the family; they are the primary caretakers of children, the elderly and the sick; and their income and labour are directed toward children's education, health and well-being.<sup>97</sup> If both men and women are empowered, then households will get closer to eradicating poverty and focus on self-actualization and national development.<sup>98</sup>

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[development/poverty-and-development-in-africa/52239-growth-without-equity-roads-south-africa-.html?itemid=id#44653](https://development/poverty-and-development-in-africa/52239-growth-without-equity-roads-south-africa-.html?itemid=id#44653)> accessed 25 December 2020.

<sup>94</sup> 'Chapter 1: Women and Poverty – Global Women's Issues: Women in the World Today, Extended Version'

<<https://opentextbc.ca/womenintheworld/chapter/chapter-1-women-and-poverty/>> accessed 25 December 2020.

<sup>95</sup> Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016).

<sup>96</sup> elmer, 'Inclusive Growth and Poverty Reduction' (*Asian Development Bank*, 6 January 2015) <<https://www.adb.org/themes/social-development/poverty-reduction/inclusive-growth>> accessed 25 December 2020.

<sup>97</sup> 'Chapter 1: Women and Poverty – Global Women's Issues: Women in the World Today, Extended Version' <<https://opentextbc.ca/womenintheworld/chapter/chapter-1-women-and-poverty/>> accessed 25 December 2020.

<sup>98</sup> Lefton R, 'Gender Equality and Women's Empowerment Are Key to Addressing Global Poverty' (*Center for American Progress*, 11 March 2013) <<https://www.americanprogress.org/issues/poverty/news/2013/03/11/56097/gender-equality-and-womens-empowerment-are-key-to-addressing-global-poverty/>> accessed 25 December 2020.

## 5.2. Eradicating Poverty for Environmental Sustainability

Poverty deprives people of the choice about whether or not to be environmentally sound in their activities.<sup>99</sup> The 1987 *Brundtland Commission Report* stated: ‘those who are poor and hungry will often destroy their immediate environment in order to survive: They will cut down forests; their livestock will overgraze grasslands; they will overuse marginal land; and in growing numbers they will crowd into congested cities. The cumulative effect of these changes is so far-reaching as to make poverty itself a major global scourge.’<sup>100</sup> This may result in climate change, which again, has the reverse effect of contributing to poverty due to dwindling natural resources. Thus, poverty eradication should go hand in hand with climate mitigation measures. Notably, the *2030 Agenda for Sustainable Development* acknowledges this interrelationship as it seeks to end poverty, fight inequality and injustice, and tackle climate change by the year 2030.<sup>101</sup>

## 5.3 Value Addition Model versus Commodity Export Model for Africa

It has been pointed out that one of the greatest unresolved challenges facing Africa’s agribusiness sector is the lack of value addition.<sup>102</sup> As a way of addressing poverty in Kenya and Africa in general, there is a need for governments to adopt and develop the value addition model as opposed to a commodity export model, as a way of promoting the use of the resources as

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<sup>99</sup> Beder, S, ‘Costing the Earth: Equity, Sustainable Development and Environmental Economics,’ *New Zealand Journal of Environmental Law*, Vol. 4, 2000, pp.227-243 at p.230; See also generally, Emas, R., ‘The Concept of Sustainable Development: Definition and Defining Principles,’ Brief for GSDR 2015,

p3<[https://sustainabledevelopment.un.org/content/documents/5839GSDR%202015\\_SD\\_concept\\_definiton\\_rev.pdf](https://sustainabledevelopment.un.org/content/documents/5839GSDR%202015_SD_concept_definiton_rev.pdf)> accessed 25 December 2020.

<sup>100</sup> Beder, S, ‘Costing the Earth: Equity, Sustainable Development and Environmental Economics,’ *New Zealand Journal of Environmental Law*, Vol. 4, 2000, pp.227-243, p.230).

<sup>101</sup> United Nations Development Programme, ‘Sustainable Development Goals (SDGs),’<<http://www.undp.org/content/undp/en/home/mdgoverview/post-2015-development-agenda.html>> accessed 25 December 2020.

<sup>102</sup> ‘Why is so Little Value Added in Africa’s Soft Commodity Value Chain?’ (*Global Trade Review (GTR)*) <<https://www.gtreview.com/supplements/gtr-africa-2019/little-value-added-africas-soft-commodity-value-chain>> accessed 25 December 2020.



anchors for regional growth clusters and consequently ensuring that they attract value-addition industries for job creation.<sup>103</sup>

Notably, most processing of cash crops in Africa is basic where the majority of cash crops go through the bare minimum required for export or sale to the next part of the value chain and the results are that while African farmers and processors put in all the work to make a fungible commodity that is easy to trade, all of the value add goes to those further down the chain.<sup>104</sup>

There is a need to change this practice as way of ensuring that African farmers and processors get value for the African resources and also get an opportunity for job creation which will ultimately help in alleviation of poverty. The lack of an efficient marketing infrastructure in Africa which prevents farmers and processors from getting full value from their crop, even in its raw form ought to be addressed in order to reverse this trend.<sup>105</sup> Such initiatives as the African Union's African Commodity Strategy, a part of Agenda 2063, should be fully exploited in order to find strategic measures to address price volatility and to use Africa's wealth of natural resources and absolute advantage in the commodities market to ensure that Africa's commodities are used for its industrialisation.<sup>106</sup>

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<sup>103</sup> Ngwenya, S., "Africa has to Shed off the Resource Curse Stigma" *The Star Newspaper*, Friday January 3, 2014.

<sup>104</sup> 'Why is so Little Value Added in Africa's Soft Commodity Value Chain?' (*Global Trade Review (GTR)*) <<https://www.gtreview.com/supplements/gtr-africa-2019/little-value-added-africas-soft-commodity-value-chain>> accessed 25 December 2020; 'Development Aid to Africa Negligible in Comparison to Illicit Outflows' <<https://www.globalpolicy.org/component/content/article/211-development/52662-development-aid-to-africa-negligible-in-comparison-to-illicit-outflows-.html>> accessed 25 December 2020.

<sup>105</sup> 'Why is so Little Value Added in Africa's Soft Commodity Value Chain?' (*Global Trade Review (GTR)*) <<https://www.gtreview.com/supplements/gtr-africa-2019/little-value-added-africas-soft-commodity-value-chain>> accessed 25 December 2020; Muigua K, *Utilizing Africa's Natural Resources to Fight Poverty* (2014) < [kmco.co.ke/wp-content/uploads/2019/06/Utilizing-Africas-Natural-Resources-to-Fight-Poverty-26th-March2014.pdf](http://kmco.co.ke/wp-content/uploads/2019/06/Utilizing-Africas-Natural-Resources-to-Fight-Poverty-26th-March2014.pdf)> accessed 25 December 2020.

<sup>106</sup> 'African Commodity Strategy | AUDA-NEPAD' <<https://www.nepad.org/agenda-2063/flagship-project/african-commodity-strategy>> accessed 25 December 2020.

Notably, increased participation in international trade can catalyse economic growth and foster sustainable development. As such, promoting value addition and enhancing domestic productive capacity is therefore of continuing importance in developing countries as they seek to participate beneficially in global trade.<sup>107</sup>

There is also a need for diversification of economic activities in the country as this may cushion the communities and national economy generally from unforeseen disruptions or a decline in the agricultural sector production which is prone to climate change yet it is considered to be the backbone of Kenya's economy.<sup>108</sup> The need for diversification has been witnessed in rural areas where it was reported in 2019 that poverty declined considerably in rural areas, from about 50% in 2005-06 to 38.8% in 2015-16, largely attributed to the increasing importance of non-agricultural income (particularly commerce) to supplement agricultural income for rural households, which has been aided by the expansion of mobile money and the telecommunication revolution.<sup>109</sup> There is therefore a need for the Government to work closely with stakeholders in different sectors to create opportunities for the Kenyan people, as a channel for diversification.

#### **5.4. Population Control**

Notably, while African economies are generating more income, that income has to be shared among an ever-increasing number of people, thus causing a

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<sup>107</sup> United Nations, 'Promoting value addition and the enhancement of domestic productive capacity through local economic empowerment,' *Note by the UNCTAD secretariat*, Expert Meeting on Promoting Value Addition and Enhancement of Domestic Productive Capacity through Local Economic Empowerment Geneva, 16 October 2019 Item 3 of the provisional agenda <[https://unctad.org/system/files/official-document/ciem10d2\\_en.pdf](https://unctad.org/system/files/official-document/ciem10d2_en.pdf)> accessed 25 December 2020.

<sup>108</sup> 'Kenya at a Glance | FAO in Kenya | Food and Agriculture Organization of the United Nations' <<http://www.fao.org/kenya/fao-in-kenya/kenya-at-a-glance/en/>> accessed 25 December 2020; Jowi E, 'Is Agriculture Still the Backbone of Kenya's Economy?' [2016] Natural Resource Modelling.

<sup>109</sup> 'More than Just Growth: Accelerating Poverty Reduction in Kenya' <<https://blogs.worldbank.org/africacan/more-than-just-growth-accelerating-poverty-reduction-in-kenya>> accessed 25 December 2020.

slower rate in poverty reduction than population growth.<sup>110</sup> The result has been that as more people leave the poverty class, others are joining that reducing the rate of poverty eradication in the continent.<sup>111</sup> For instance in Kenya, in 2009, it was estimated that Kenya had a population of 37.7 million people and the figure grew to about 47.6 million people in 2019.<sup>112</sup> As already pointed out, high population growth comes with extra expenditure and stretched out incomes thus undoing all the gains made in eradication of poverty. There is a need for the Government to work closely with other stakeholders such as religious organizations, civil societies and Non-Governmental Organizations (NGOs) to educate the communities on the need for birth control. This will not only ease strain on the particular households but also on the national economy.

### **5.5. Need for Increased Access to Finance for Communities Empowerment**

It has been pointed out that eradicating deprivations, building capabilities and opening up opportunities require investment and as a result, governments should not only increase public spending towards empowerment programmes and measures but should also work closely with the private sector in order to help increase access and offer new approaches to provisioning.<sup>113</sup> While there has been a number of Kenyan Government funded initiatives aimed at financing youth and women groups for

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<sup>110</sup> Chandy L, 'Why Is the Number of Poor People in Africa Increasing When Africa's Economies Are Growing?' (*Brookings*, 30 November 1AD) <<https://www.brookings.edu/blog/africa-in-focus/2015/05/04/why-is-the-number-of-poor-people-in-africa-increasing-when-africas-economies-are-growing/>> accessed 25 December 2020.

<sup>111</sup> Ibid.

<sup>112</sup> '2019 Kenya Population and Housing Census Volume II: Distribution of Population by Administrative Units' (*Kenya National Bureau of Statistics*) <<https://www.knbs.or.ke/?wpdmpro=2019-kenya-population-and-housing-census-volume-ii-distribution-of-population-by-administrative-units>> accessed 25 December 2020.

<sup>113</sup> Independent Group of Scientists appointed by the Secretary-General, *Global Sustainable Development Report 2019: The Future is Now – Science for Achieving Sustainable Development*, (United Nations, New York, 2019), 45 <[https://sustainabledevelopment.un.org/content/documents/24797GSDR\\_report\\_2019.pdf](https://sustainabledevelopment.un.org/content/documents/24797GSDR_report_2019.pdf)> accessed 25 December 2020.

empowerment,<sup>114</sup> and commendably so, there is a need for the Government to also consider the men folk especially in the villages and informal urban settlements especially where the man is the head of the household. This will not only ensure that there is equity and equality but will also empower these households financially especially where the man has children and no wife or the wife is not in a position to work for gain for one reason or the other. Empowered households are able to tackle poverty without waiting for government handouts and donations and this also safeguards their dignity as human beings. This is also likely to spur economic diversification through investments in non-agricultural sectors such as information technology and science and technology in general, in line with the Constitution of Kenya 2010<sup>115</sup>. The Government should thus continually work with financial institutions to ensure that financing is available to all those who need it. This should target both formal and informal sectors in both urban and rural areas for accelerated eradication of poverty in Kenya.

However, the Government should also ensure that as these groups of people make their investment, there is a conducive tax regime to promote growth

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<sup>114</sup> ‘Youth Enterprise Development Fund’ <<http://www.youthfund.go.ke/>> accessed 25 December 2020; ‘Home’ <<https://www.wef.co.ke/>> accessed 25 December 2020; ‘Women Empowerment in Kenya Organizatione. (WEIKE) - Kenya - 50 Million African Women Speak’ <[https://www.womenconnect.org/web/kenya/empowerment/-/asset\\_publisher/aV6bGKqYx8gS/content/women-empowerment-in-kenya-organizatione-weike-](https://www.womenconnect.org/web/kenya/empowerment/-/asset_publisher/aV6bGKqYx8gS/content/women-empowerment-in-kenya-organizatione-weike-)> accessed 25 December 2020.

<sup>115</sup> The Constitution provides as follows:

### *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.*

and development as well as ready markets both within the country and outside Kenya for the marketing of the end products, whichever the sector.

### **5.6. Promotion of Regional and International Trade**

Trade is one of the most critical driving forces of economic development for all countries, usually aimed at development and the eradication of poverty.<sup>116</sup> The World Bank asserts that countries that are open to international trade tend to grow faster, innovate, improve productivity and provide higher income and more opportunities to their people. In addition, open trade also benefits lower-income households by offering consumers more affordable goods and services.<sup>117</sup> The Government of Kenya should continually take advantage of the regional and international trade agreements and deals that will ensure that they get markets for goods and services produced or offered in the country and also ensure that the market remains affordable for the average Kenyan especially for goods and services that may not be available locally. This has the twin effect of not only ensuring that Kenyans earn money but also ensuring that they get the best deals when making purchases. The increased disposable income and the potential savings by consumers from an expanded market has the potential to address poverty and ultimately contribute to national development.<sup>118</sup>

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<sup>116</sup> 'The Link between Trade and Development: What Role for the EU Trade Policy?' AIF Conference, Christiansborg, 12 September 2000; See also Preamble, World Trade Organization. "Marrakesh Agreement Establishing the World Trade Organization. Annex 1A: Multilateral Agreements on Trade in Goods-Agreement on Trade-Related Investment Measures", The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts (World Trade Organization, Geneva, 1995), pp. 163-167; 'Stronger Open Trade Policies Enable Economic Growth for All' (*World Bank*) <<https://www.worldbank.org/en/results/2018/04/03/stronger-open-trade-policies-enables-economic-growth-for-all>> accessed 25 December 2020.

<sup>117</sup> 'Stronger Open Trade Policies Enable Economic Growth for All' (*World Bank*) <<https://www.worldbank.org/en/results/2018/04/03/stronger-open-trade-policies-enables-economic-growth-for-all>> accessed 25 December 2020.

<sup>118</sup> 'Global Trade Liberalization and the Developing Countries -- An IMF Issues Brief' <<https://www.imf.org/external/np/exr/ib/2001/110801.htm>> accessed 25 December 2020.

## **6. Conclusion**

Sustainable development mainly involves the integration of environmental, social, and economic concerns into all aspects of decision making.<sup>119</sup> Arguably, ending poverty can be achieved if sustainable economic growth, social protection, and environmental health and stewardship are considered together.<sup>120</sup> Even as Kenya seeks to become a newly industrialising middle income country, there is a need to adopt empowerment measures that will ensure that this development is inclusive of all groups in the society. It is possible for Kenya to achieve Vision 2030 in a way that not only promotes and upholds the principles of sustainable development but also one that embraces all communities for inclusive development that benefits all. Economically and socially empowered people are able to appreciate the import of political and civil rights and therefore, they will be more likely to participate meaningfully in the governance of the country. Eradication of poverty therefore potentially holds the key to the economic, social, economic and political prosperity of the country.

Eradication of Poverty For Inclusive Development in Kenya is goal and a dream that is achievable through concerted effort by all.

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<sup>119</sup> Emas, R., 'The Concept of Sustainable Development: Definition and Defining Principles,' *Brief for GSDR* 2015, p.3<[https://sustainabledevelopment.un.org/content/documents/5839GSDR%202015\\_SD\\_concept\\_definiton\\_rev.pdf](https://sustainabledevelopment.un.org/content/documents/5839GSDR%202015_SD_concept_definiton_rev.pdf)> accessed 24 December 2020.

<sup>120</sup> Environment UN, 'Eradicating Poverty through an Inclusive Green Economy : UNEP Post 2015 Note 6' (*UNEP - UN Environment Programme*, 16 September 2017) <<http://www.unenvironment.org/resources/report/eradicating-poverty-through-inclusive-green-economy-unep-post-2015-note-6>> accessed 25 December 2020.

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## Extending Sustainable Social Security Coverage in Kenya: A Review of Legal and Regulatory Framework

By: *Austin Ouko*\*

### *Abstract*

*Social security is a fundamental human right. This paper explores the level of social security coverage in Kenya with a focus on old age social security. It finds that the level of social security coverage in Kenya is low but there has been recent policy, legal and regulatory reforms seek to increase this level.*

### **1. Introduction**

The term “social security” was first officially used in the title of the United States Legislation – the Social Security Act of 1935.<sup>1</sup> The Act initiated a system to meet the risks of old age, death, disability and unemployment.<sup>2</sup> It appeared again in an Act passed in New Zealand in 1938, which brought together a number of existing and new social security benefits such as general medical and hospital services and maternity care, and cash benefits during sickness.<sup>3</sup> The International Labour Organisation (ILO) was quick to adopt the term, impressed by its value as a simple and arresting expression of one of the deepest and most widespread aspirations of people around the

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<sup>1</sup> The Act established a permanent national old-age pension system through employer and employee contributions.

<sup>2</sup> Almon F. Rockwell, ‘The New Zealand Social Security Act’ (May 1939) <https://www.ssa.gov/policy/docs/ssb/v2n5/v2n5p3.pdf> accessed 6 October 2021.

<sup>3</sup>*Ibid.*



world.<sup>4</sup> Social security was also incorporated as a human right in the Universal Declaration of Human Rights in 1948.<sup>5</sup>

Similarly, the Constitution of Kenya 2010 provides for social security as an economic and social right. Article 43(1) (e) of the Constitution provides that “every person has a right to social security”. It further provides that “the state shall provide appropriate social security to persons who are unable to support themselves and their dependants.”<sup>6</sup>

World over the concept of social security is defined and interpreted in very diverse ways.<sup>7</sup> In some countries, the law defines the concept of social security while others do not define it but at least they state which arrangements in terms of national law belong to the realm of social security law. This definition often the case in countries aiming at assembling all legislation relating to social security into one code or law book.<sup>8</sup> Nevertheless, many countries like Kenya do not have a legal definition of social security. One would expect international law to provide solace in this respect; yet even there a definition of social security is lacking.<sup>9</sup>

Supra-national or international legal instruments all describe their own material scope of application; either by describing the content of the desired social security schemes or by enumerating (the names of) the intended schemes of national law, or even by combining both techniques. The description of the material scope of application is what the ILO Social Security (Minimum Standards) Convention, 1952 (No. 102), has adopted.<sup>10</sup>

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<sup>4</sup>Ailsa McKay, *The Future of Social Security Policy, in Women, work and a Citizens' Basic Income*, (Taylor & Francis Group, 2005)

<sup>5</sup>See Article 22: “Everyone, as a member of society, has the right to social security”. Article 25: “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, (...) and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”

<sup>6</sup>Article 43(2).

<sup>7</sup>Danny Pieters, *Social Security: An Introduction to the Basic Principles*, Kluwer Law International BV, The Netherlands.

<sup>8</sup>*Ibid.*

<sup>9</sup>*Ibid.*

<sup>10</sup>*Ibid.*

However, it does not describe the content of social security either but rather the content of the intended schemes. The International Labour Organisation defines the term “social security” as:<sup>11</sup>

“...the protection which society provides for its members, through a series of public measures, against the economic and social distress that otherwise would be caused by the stoppage or substantial reduction of earnings resulting from sickness, maternity, employment injury, unemployment, invalidity, old age and death; the provision of medical care; and the provision of subsidies for families with children.

In this spectrum, the term ‘social security’ implies an ideological goal of ensuring and maintaining the protection of all citizens from economic insecurity and recognizing the importance of the desire of all citizens to be secure in the knowledge that such public protection exists.<sup>12</sup> Effective social security systems guarantee income security and health protection, thereby contributing to the prevention and reduction of poverty and inequality, and the promotion of social inclusion and human dignity.<sup>13</sup> This can be through provision of benefits, in cash or in kind, aimed at ensuring access to medical care and health services as well as income security throughout the life cycle, particularly in the event of illness, maternity, unemployment, employment injury, family responsibilities, invalidity, loss of the family breadwinner, as well as during retirement and old age.<sup>14</sup> The pictorial below is an illustration of an effective social security system, which is from cradle to the grave cover.

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<sup>11</sup> International Labour Organisation, ‘Facts on Social Security’, <[https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms\\_067588.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_067588.pdf)>. accessed on 13 July 2021.

<sup>12</sup> Dr. Marcin Wujczyk, *The Constitutionalisation of Social Security Rights as the Way to a Social Justice State in the Right to Social Security in the Constitutions of the World: broadening the moral and legal space for social justice*. ILO Global Study, Volume 1: Europe at page 1 to 6 [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/publication/wcms\\_518153.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_518153.pdf).

<sup>13</sup> International Labour Organisation, ‘International Labour Standards on Social Security’, <https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/social-security/lang--en/index.htm>

<sup>14</sup> *Ibid*.



It is against this backdrop that Section 2 of the paper will discuss some key social security terms. Part 3 will review the social security cover status in Kenya. Part 4 will discuss the National Social Security Fund, the challenges it faced as the Country's comprehensive social security scheme and its reform agenda. Part 5 will review the salient features of the National Social Security Fund Act, 2013. Part 6 concludes.

## **2.0. Social Security Terms**

Some of the key terms used when discussing social security and which will be used in this paper include:

- **Social protection** – are policies and actions, including legislative measures, that enhance the capacity and opportunities for the poor and vulnerable in society to improve and sustain their lives, livelihoods, and welfare.<sup>15</sup> They also enable income-earners and their dependants to maintain a reasonable level of income through

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<sup>15</sup>Ministry of State for Planning, National Development and Vision 2030, *Kenya Social Protection Sector Review, Executive Report*, June 2012 <https://openknowledge.worldbank.org/bitstream/handle/10986/16974/837710WP0P12150Box0382105B00PUBLIC0.pdf?sequence=1&isAllowed=y>.

decent work, which ensures they get access to affordable healthcare, social security, and social assistance.<sup>16</sup>

- **Social Insurance** – is based on the principle that benefits are a form of return of contributions paid whilst in paid work.<sup>17</sup> Individuals insure themselves against loss of income, either temporary or permanent. The basis of entitlement is past contribution records, that is evidence of paid social security contributions by both employer and employee and benefits can either be on a flat rate and uniform or salary related. Social or national insurance implies a pooling of risks and avoids the problems of adverse selection. Workers are protected against contingencies such as old age, sickness, or unemployment, which might interrupt their incomes.<sup>18</sup>
- **Social Assistance Scheme** – grant benefits to people needing them.<sup>19</sup> They are geared towards poverty alleviation benefits in cash and kind for citizens and residents in special need. They are funded from taxes and are paid as a right when the prescribed conditions of need are met.<sup>20</sup> Examples include education bursaries, school feeding programmes, fee waivers in public health facilities, Orphans and Vulnerable Children's (OVC) programme, older persons cash transfer and youth enterprise fund, among others.
- **Pension Scheme** – in a pension scheme on retirement a member has access to a third of their funds as a lump-sum and the balance of two thirds is used to buy an annuity or transferred into an income drawdown.<sup>21</sup> An annuity is an arrangement where an insurance

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<sup>16</sup>*Ibid.*

<sup>17</sup>McKay, *Supra* note 4.

<sup>18</sup>*Ibid.*

<sup>19</sup>*Ibid.* See also ILO/Wouter van Ginneken Extending social security: Policies for developing countries. ESS Paper No. 13. Geneva, International Labour Office, 2003; *Kenya Social Protection Sector Review, Executive Report*, June 2012.

<sup>20</sup>*Ibid.*

<sup>21</sup>Retirement Benefit Authority, *The Pension Survey 2019 Examining the Social and Economic Factors Affecting the Life of Occupational Schemes' Retirees*, November 2020 <https://www.rba.go.ke/download/the-pensioner-survey-2019/>.

company enters into a contract to pay a set amount of money in regular intervals, usually monthly, to the annuitant or its beneficiary.<sup>22</sup> An Income Drawdown is a fund that provides individuals and members of a retirement benefits scheme an option to access their retirement benefits as a regular income through an investment fund upon retirement rather than taking up an annuity or taking their benefits as a lump sum.<sup>23</sup>

- **Provident Fund** - in a provident fund the total retirement benefit is payable as a cash lump sum so the retiree accesses all their funds at a go.<sup>24</sup>
- **Defined benefit (or final salary) scheme** - in a defined benefit (DB) pension scheme an employee's pension depends on his or her salary at or near retirement.<sup>25</sup> The amount of benefit is therefore determined according to a formula (e.g. the benefit formula which applies under the current Kenyan scheme is for a retirement pension of 1/480ths of pensionable emoluments for each month of pensionable service). The pension benefit is guaranteed by the sponsoring employer and not dependent on the level of contributions or performance of investments (if any).<sup>26</sup>
- **Defined Contribution** – in contrast with the defined benefit scheme in a defined contribution scheme like the NSSF, the level of contributions are pre-determined and are invested in separate accounts for each employee.<sup>27</sup> On retirement, the member's

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<sup>22</sup>*Ibid.*

<sup>23</sup>Retirement Benefits Authority, *Prudential Guidelines Number RBA 002*, August 2012, [https://www.rba.go.ke/download/prudential-guidelines-number-rba-002\\_income-drawdown\\_17-august-2012\\_final/](https://www.rba.go.ke/download/prudential-guidelines-number-rba-002_income-drawdown_17-august-2012_final/)

<sup>24</sup>Retirement Benefit Authority, *Supra* note 21.

<sup>25</sup>The National Treasury and Planning, *Public Service Superannuation Scheme Handbook*, October 2020 <https://www.treasury.go.ke/wp-content/uploads/2021/03/Public-Service-Superannuation-Scheme-HandBook.pdf>

<sup>26</sup>*Ibid.*

<sup>27</sup>Sundeeep Raichura, *Social Security Principles and Trends*, Presentation to NSSF on 30 June 2011.

accumulated fund comprises of the contributions and the returns from investment of the contributions. Therefore, the level of benefit ultimately bears no direct relationship to an employee's salary near retirement. There is no guarantee of the level of pension at retirement.<sup>28</sup>

- **Income smoothing** – is where individuals' income are shifted over a lifetime by cutting down on present consumption to increase future consumption.<sup>29</sup> The expected value of benefits depends on the value of contributions one makes. There is a link between benefits a person receives and the contributions they make.<sup>30</sup>
- **Redistribution/social solidarity** – emphasis is placed on shifting income across groups. The expected lifetime benefits by one group is greater than its lifetime contributions as compared to another group.<sup>31</sup>
- **Social Protection Floor** - The idea of the social protection floor is based on the principle that social security is a fundamental human right and everyone is entitled to social security and a standard of living adequate for the health and well-being of themselves and their families.<sup>32</sup> It is part of a two dimensional strategy which incorporates a basic set of social guarantees applicable to everyone (the horizontal dimension), and further provides for the gradual implementation of higher standards (the vertical dimension), as a

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<sup>28</sup> E. Philip Davis, *Pension Funds, Retirement-Income Security and Capital Markets, An international Perspective*, (Oxford University Press., New York 2004).

<sup>29</sup> Raichura, supra note 27.

<sup>30</sup> *Ibid.*

<sup>31</sup> International Social Security Association , Africa: Strategic approaches to improve social security Developments and Trends 2014, available at <https://ww1.issa.int/sites/default/files/documents/publications/2-DT-Africa-2014-24507.pdf>

<sup>32</sup> Nathaniel S.B. Wellington, ISSA, Regional Social Security Forum for Africa , The role of social security institutions in extending coverage to vulnerable groups in Africa available at <https://ww1.issa.int/system/files/documents/events/2Wellington-8628.pdf>.

country's growth and financial capacity may permit over time.<sup>33</sup> The basic guarantees include, on the one hand, basic income security in the form of cash or in kind, such as pensions for the aged and the disabled, child benefits, income support benefits and/or employment guarantees and services for the unemployed or those with inadequate incomes. The other elements of the basic guarantees include universal access to essential social services in health, water and sanitation, food security, housing, and others as defined by national priorities. It is important to emphasize the assertion that the social protection floor is not prescriptive of a universal standard but allows for flexibility in its determination based on national priorities, needs and resources.<sup>34</sup>

- **Pillars/Tiers** – The ILO and world bank came up with a multi-tier or multi-pillar conceptual framework for social security.<sup>35</sup> The zero tier refers to non-contributory, cash transfers financed by the state through taxes such as the cash transfer programme for orphans and vulnerable children, and the older persons cash transfer. The first tier is the more traditional social insurance model with mandated and compulsory contributions such as the NSSF contributions typically aimed at insuring against the income risks associated with old age, disability and death. These programs are publicly administered. In contrast, the term second tier refers to recognized modes of voluntary retirement savings, usually regulated and encouraged by the government and taking varied forms (individual retirement accounts, employer-sponsored defined benefit or defined contribution plans, etc.). Finally, the third tier captures a range of important non-pension sources of income support including family support (private intergenerational transfers), health insurance,

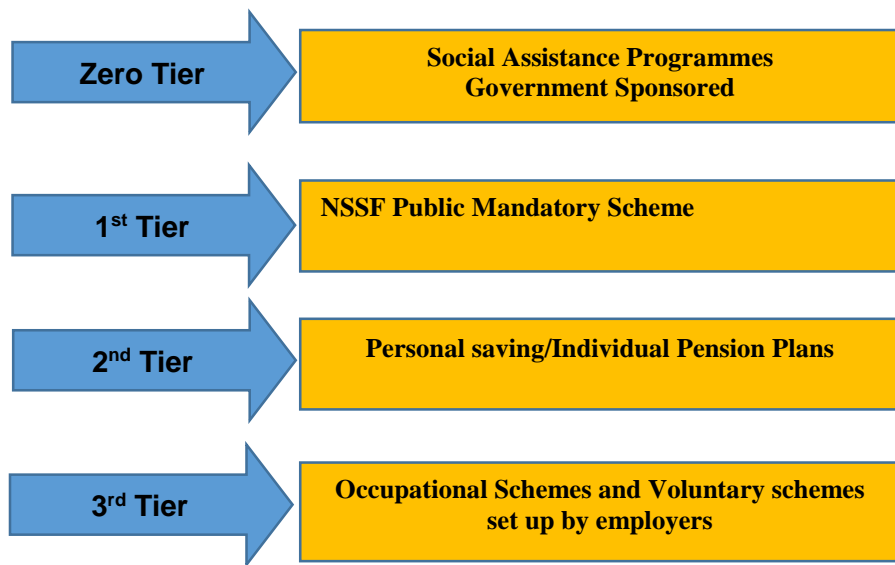
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<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> Mark Dorfman and Robert Palacios, "World Bank Support for Pensions and Social Security, A Background Paper for the World Bank 2012–2022 Social Protection and Labor Strategy", (March 2012) <<https://documents1.worldbank.org/curated/en/427291468331138312/pdf/709250NWP0P12600Box370060B00PUBLIC0.pdf>>

housing subsidies and even emerging financial instruments such as reverse mortgages.<sup>36</sup>



The National Social Security Fund (NSSF) and National Hospital Insurance Fund currently bear the burden of the effort to make the constitutional right to social insurance for all a reality. The next section of the paper will review the social security cover status in Kenya with a focus on retirement benefits.

### **3. Review of the Social Security Cover Status in Kenya**

As per the last census report done by the Kenya National Bureau of Statistics (KNBS) 2019, Kenya's population stood at about 47.6 million.<sup>37</sup> 41% of the population is below the age 15 while 6% is above 55 years.<sup>38</sup> Further, data from the KNBS show that the number of people in employment as at the end

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

<sup>37</sup>Kenya National Bureau of Statistics, *2019 Kenya Population and Housing Census: Volume III, Distribution of Population by Age, Sex and Administrative Units*, (February 2020)<https://www.knbs.or.ke/?wpdmpromo=2019-kenya-population-and-housing-census-volume-iii-distribution-of-population-by-age-sex-and-administrative-units>.

<sup>38</sup>*Ibid.*



of March 2021 was 17.84 million.<sup>39</sup> The informal sector generated 91% of new jobs in the country.<sup>40</sup>

It has been observed that most pension systems are designed to cater mostly for workers in the formal sector resulting in low coverage of the huge population working in the informal sector.<sup>41</sup> Pension coverage in Kenya increased from 19.5% in 2014 to 20.5% in 2019. However, pension coverage in the informal sector has remained low at approximately 1.3% in 2019.<sup>42</sup> Informal work brings with it a number of challenges: it is characterised by the absence of formal contracts, which leads to high levels of job insecurity, harsh working conditions and low pay. Importantly, informal-sector workers lack access to social security and, therefore, have very little to support them in cases of shocks, crises or even retirement.<sup>43</sup>

Further, the demographic factor is of great importance to the financial equilibrium of a social security system. The implication of a growing or stagnant population for the ratio between the economically active and inactive population are obvious: this is inevitably reflected in the amount of contributions received and benefits paid.<sup>44</sup> As stated above, Kenya's population is largely young. By the time today's labour force market entrants retire, the proportion of the population above the age of 55 is expected to almost triple. The dependency ratio (ratio of elderly to active labour force)

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<sup>39</sup> Otiato Guguyu, '253,544 jobs lost amid recovery from Covid-19', *Business Daily*, (Wednesday 29 September 2021) 1.

<sup>40</sup> Retirement Benefits Authority, 'Classification of Informal Sector Workers and Employers for Appropriate Pension targeting, report' (October 2020), <https://www.rba.go.ke/download/classification-of-informal-sector-workers-and-employers-for-appropriate-pension-targeting/>.

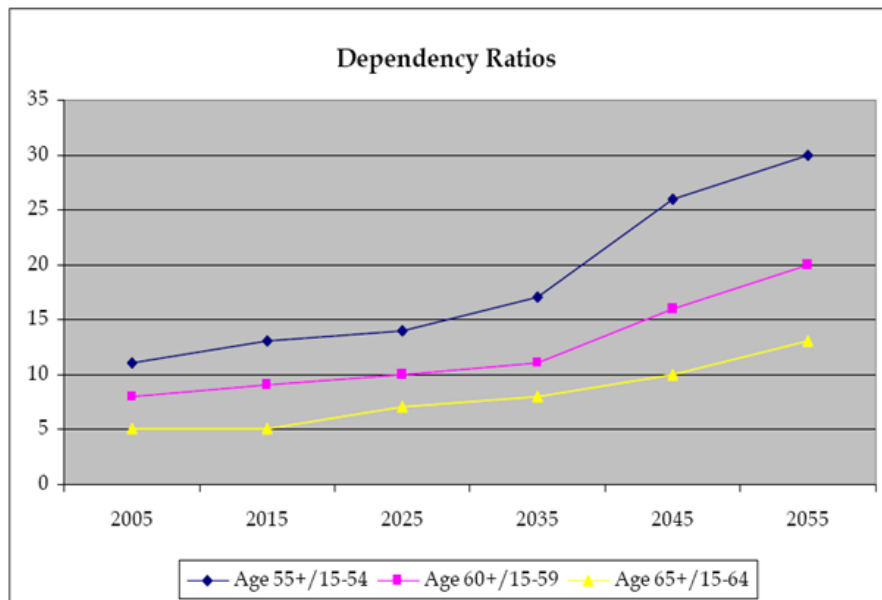
<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> Kenya National Bureau of Statistics 2018 and 2016. See also Krystle Kabare, 'The Mbao Pension Plan: Savings for the Informal-Sector', Working Paper: October 2018, <https://www.developmentpathways.co.uk/wp-content/uploads/2018/10/Mbao.pdf>

<sup>44</sup> Luke Odhiambo Musiga, 'Organizational Aspects of Social Security in Kenya', (A Thesis Submitted in Partial fulfillment of the requirements for the requirement for the Degree of Master of Arts University of Nairobi, 1973).

is also expected to increase from 12% to 30% by 2050 as depicted by the graph below:



Source: *Can we afford age old pensions* by Charles Machira

In Kenya before colonisation, an embryonic form of social security was found in the indigenous institutions. The tribe, the clan, the village and the family are the bodies, which provided and to some extent still provide for social security in the customary environment. The security of members of the family is organised on a scale which came to be known as the extended family - or the complete family.<sup>45</sup>

Institute of Certified Public Accountants Kenya carried out a study (Understanding Pensions, 2018) and according to the report 47.0% of the retired population are dependent on family and relatives, 31.0% have to continue working to earn a living, 16.0% are dependent on monthly pensions and only 6.0% are financially independent.<sup>46</sup> The above problem is

<sup>45</sup>*Ibid.*

<sup>46</sup>Cytonn Investments, 'Retirement Benefits options i.e. Pension Funds vs Provident Funds' <https://cytonn.com/uploads/downloads/pension-vs-provident-fund.pdf>

compounded by the rising old-age dependency ratios, changing family values necessitating retirees to secure their own financial support and increasing life expectancy.<sup>47</sup>

The social fabric of Kenya is changing. There has hitherto been a reliance on the traditional forms of old age support such as extended family and community support, social culture and even taboos.<sup>48</sup> However, with the impact of urbanization, the breakdown of extended families and cultural values and pandemics, these informal support systems are crumbling suggesting that lesser reliance can be placed on informal family support systems as a means of keeping the elderly out of poverty.<sup>49</sup>

For most people, the ability to get to the right income replacement ratio is a big challenge.<sup>50</sup> According to the Retirement Benefits Authority (RBA), the average income replacement ratio in the country is below 34% as compared to the ILO Convention 102 recommended minimum of at least 40% by.<sup>51</sup> Some of the reasons for the low replacement ratio include the low pension coverage penetration ratio, currently at 15.0% and accessibility of pension when one changes employment hence reducing the adequacy of the pension on retirement.<sup>52</sup>

However, the past two decades have witnessed increasingly strong and sustained political will in support of social security coverage extension. This has been demonstrated by the inclusion of social security as one of the guaranteed socio-economic right in the Bill of Rights contained in the 2010

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<sup>47</sup>*Ibid.*

<sup>48</sup> Sundeep Raichura, 'Analytical Review of the Pension System in Kenya', (September 2008) <https://www.oecd.org/daf/fin/private-pensions/41564693.pdf>

<sup>49</sup>*Ibid.*

<sup>50</sup> An Income replacement ratio is the percentage of a worker's pre-retirement income that is paid out by a pension program after the worker retires.

<sup>51</sup> ILO, The Social Security (Minimum Standards) Convention, 1952 (No. 102) in its Parts V, IX, and X, and ILO Convention No 128 specify rights to social security benefits at retirement (old-age pension), <https://www.social-protection.org/gimi/ShowTheme.action?id=21>

<sup>52</sup> Cytonn, *Supra* note 46.

Constitution.<sup>53</sup> The adoption of a number of regional and pan-African agreements, including the 2004 Pretoria Declaration on Economic, Social and Cultural Rights in Africa, the 2008 African Union's Social Policy Framework for Africa, and the 2010 Yaounde Tripartite Declaration on the Implementation of the Social Protection Floor has given further impetus to coverage extension in the Country.<sup>54</sup> The adoption of the ILO Recommendation concerning National Floors of Social Protection, 2012 (No. 202), where it is widely recognized that social protection floors can make an important contribution to effectively reducing poverty and inequality and promoting decent employment and inclusive growth. Furthermore, the development and adoption of a Social Protection Policy.<sup>55</sup>

As the Government extended coverage of safety nets and assistance programmes through the social protection policy and others, it did not lose sight of the need to review and reform the National Social Security Fund and National Hospital Insurance Fund as these reforms would benefit the poor and vulnerable populations.<sup>56</sup> In the long term, they would reduce the need for social assistance as well-functioning social insurance schemes protect households from falling into poverty.<sup>57</sup>

The next part of the paper will focus on old age social security and more specifically the National Social Security Fund (NSSF). NSSF was established with the mandate of providing basic social security to Kenyan

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<sup>53</sup>Article 43(1) (e) of the Constitution of Kenya 2010.

<sup>54</sup> International Social Security Association , 'Africa: Strategic approaches to improve social security Developments and Trends 2014', <<https://www.issa.int/sites/default/files/documents/publications/2-DT-Africa-2014-24507.pdf>>

<sup>55</sup>Ministry of Gender, Children, and Social Development, *Kenya National Social Protection Policy*, (June 2011) <<https://www.socialprotection.or.ke/images/downloads/kenya-national-social-protection-policy.pdf>>

<sup>56</sup>Ministry of State for Planning, National Development and Vision 2030, *Supra* note 14. Currently, pending before the National Assembly is the National Hospital Insurance Fund (Amendment) Bill 2021 that proposes that NHIF and contributory universal health coverage should be mandatory for all Kenyan residents over the age of 18.

<sup>57</sup>*Ibid.*

workers in the formal sector when they reach retirement age. Throughout the history of social security, public pension schemes have proved to be an effective instrument in ensuring income security of older persons as well as in combating poverty and social inequality.<sup>58</sup>

In order to assess the aspects of the current old age social security cover, the following criteria is used;<sup>59</sup> Adequacy – benefits are for the full breadth of the population, sufficient to prevent old age poverty and provide reliable means to smooth lifetime poverty for the vast majority of the population. Affordability – both within the financing capacity of individuals and of society, and without undue displacement of other social or economic imperatives, or untenable fiscal consequences. Sustainability – which refers to financial soundness over an appropriate time horizon under a broad set of reasonable assumptions. Robustness - capacity to withstand major shocks, such as significant shifts in economic prospects or demographic trends.<sup>60</sup>

#### **4. A Review of the National Social Security Fund, The Law and Regulation**

The National Social Security Fund Act established the NSSF in 1965 with the primary objective of providing basic social security to Kenyan workers in the formal sector when they reach retirement age.<sup>61</sup> It sought to position it as the first pillar/tier of social security (analogous to Pillar I of the World Bank/ILO multi-pillar/tier framework).<sup>62</sup>

The total cumulative membership of the NSSF as per its records as at June 2021 is about 6.7 million members but the active contributing membership is about 2.7 million. The number of registered employers (cumulative) is about 229,000 while the active ones are about 82,000. NSSF covers about

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<sup>58</sup>International Labour Organisation, ‘Social protection for older persons: Policy trends and statistics 2017–19,’ Social Protection Policy Papers, Paper No. 17 (2018)[https://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---soc\\_sec/documents/publication/wcms\\_645692.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---soc_sec/documents/publication/wcms_645692.pdf)

<sup>59</sup>Robert Holzmann and Richard Hinz, ‘Old Age Income Security in the 21st Century’ as cited by Raichura, *Supra* note 31.

<sup>60</sup>*Ibid.*

<sup>61</sup>Chapter 258 of the Laws of Kenya – now repealed.

<sup>62</sup>Raichura, *Supra* note 48.

53% of formal sector employees and about 10% of total recorded employment.

Though originally conceived as a comprehensive social security scheme, NSSF had failed to mature into this role and had remained stuck in its mould as a provident fund providing only lump sum benefits to its members or their beneficiaries.<sup>63</sup> The lump sum benefits are provided on retirement or after the age of 50, earlier invalidity, to survivors on death of a member and on permanent emigration from Kenya.<sup>64</sup>

There is mounting evidence that a lump sum benefit payment upon retirement tends to be poorly applied or squandered resulting in inadequate protection against poverty in old age or disability as the case may be. Benefits paid in the form of a lump sum are typically spent within the first year of retirement thereby leading to a situation where destitution rapidly sets in.<sup>65</sup>

More concern was the adequacy of benefits that NSSF provides. Statutory contributions to NSSF were at 10% of an employee's pay, half of which is paid by the employer and half by the employee.<sup>66</sup> However, there is a monetary ceiling on the maximum combined contribution at Kshs 400 per month. Further, there had only been two adjustments to the statutory ceiling on contributions since the inception of NSSF - increase from Kshs 80 to Kshs 160 in 1977<sup>67</sup> and from Kshs 160 to 400 in 2001<sup>68</sup>. Therefore, the level of benefits, given the low monetary ceiling on contributions, is woefully inadequate. Given that low contribution level, what is likely to be available to sustain one in retirement after 30 years of contributions to NSSF is projected to be much lower than one's average earnings for just one year.<sup>69</sup>

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<sup>63</sup>Raichura, *Supra* note 27.

<sup>64</sup>*Ibid.*

<sup>65</sup>*Ibid.*

<sup>66</sup>*Ibid.*

<sup>67</sup> Legal Notice Number 224 of 1976.

<sup>68</sup> Legal Notice Number 162 of 2001.

<sup>69</sup>Raichura, *Supra* note 48.

Therefore, there is need to increase the level of contributions if there is desire to improve benefit adequacy. Increasing the current level of mandatory contributions is justified on the grounds of protecting workers from their own “myopic behaviour” and failure to save for their old age and protecting society from the moral hazard of those who do not provide for their old age because they anticipate that society will take care of them.<sup>70</sup>

All the above factors coupled with external interventions on critical investment policy decisions, which led to imprudent commitments and investments, made NSSF’s public image to be badly tainted that stakeholder support was at its lowest level.<sup>71</sup> Negative public opinion discouraged compliance and resistance to revision of contribution rates.<sup>72</sup>

The stakeholders are unanimous that the NSSF has to change and reform if it is to meet the evolving social security needs of the workers.<sup>73</sup> The public opinion is that a reformed NSSF will have a distinct role in the welfare of the society for this and future generations.<sup>74</sup> From the perspectives highlighted above, the key objectives of the reform were to; improve NSSF’s coverage, improve adequacy of benefits it provides, improve the type of benefits and form in which it provides them, overcome behavioural obstacles to saving, increase savings rates, and promote voluntary contributions and participation by informal sector.

Moreover, the reform of NSSF had always been on the Government’s policy agenda for quite some time. The National Development plan 1997-2001 provided for “a comprehensive structural transformation of the NSSF to enable it ... to offer better social security benefits to its members”. The Economic Recovery Strategy for wealth and employment creation 2003-

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<sup>70</sup>*Ibid.*

<sup>71</sup>Naftali O. Mogere, “Recent reforms and experiences of pension schemes, The experience of the National Social Security Fund”, International Social Security Association ISSA Regional Conference for Africa Lusaka, Zambia, (9-12 August 2005), ISSA/AFRICA/RC/LUSAKA/KENYA-4(a) available at <https://ww1.issa.int/html/pdf/lusaka05/2mogere.pdf>

<sup>72</sup>*Ibid.*

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

<sup>74</sup>*Ibid.*

2007 explicitly provided for NSSF to be converted into an autonomous pension fund with increased coverage and range of benefits. The social pillar of Kenya Vision 2030 and the National Social Protection Policy.<sup>75</sup>

The upshot of the reform agenda culminated in the enactment of the NSSF Act, 2013 that converted the NSSF from a provident Fund to a pension scheme while strengthening its corporate governance.<sup>76</sup> The next section of the paper will dovetail into the salient features of the NSSF Act 2013.

### **5. Salient Features of the National Social Security Fund Act, 2013**

As per the NSSF Act (the “Act”) the principal objectives of the NSSF are to; increase overall benefit adequacy levels of the system through a phased increase in mandatory contributions, widen benefits provided, expand coverage through appropriate policy measures and incentives, and to strengthen the institutional structures of the Fund.<sup>77</sup>

In order to improve adequacy of benefits, the mandatory contributions have to be increased.<sup>78</sup> However, to limit macro-economic implications and a negative impact on employment costs, disposal incomes the contributions were increased at modest levels and phased in over a five-year period.<sup>79</sup> It provides for two tiers of contributions.<sup>80</sup> Tier 1 contributions being mandatory contributions in respect of pensionable earnings up to the statutory minimum wage targeting basic social security benefits. Tier I contributions are mandatory for all workers. Tier II contributions are made in respect of pensionable earnings between the statutory minimum wage and

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<sup>75</sup>Raichura, *Supra* note 27.

<sup>76</sup>The National Social Security Fund Act, 2013 was assented to by His Excellency the President on 24<sup>th</sup> December 2013 with its commencement date being 10<sup>th</sup> January 2014.

<sup>77</sup>Section 4 of the NSSF Act, 2013.

<sup>78</sup>Section 21 and Third Schedule of the Act. The rates of contribution to the pension fund will be at 12% of pensionable earnings (basic earnings), Employers contributing 6% and Employees 6%. There is a ceiling on earnings which are pensionable and on which contributions are payable of 4 times the national average earnings for the prior year.

<sup>79</sup>*Ibid.*

<sup>80</sup>Sections 20 & 21.



four times national average earnings targeting a level of income replacement. Employers may opt out of making Tier II contributions to NSSF and make these contributions to another scheme that meets the scheme reference test. The reference scheme test entails fulfilling certain minimum conditions in term of the type and level of benefits provided by the alternative scheme.<sup>81</sup> Opting out of making Tier I contributions to NSSF is not permitted. The Act has made provision that the statutory Tier I and Tier II contributions are tax deductible and that the consequent benefits provided are also to be tax exempt.<sup>82</sup>

To increase social security coverage, the Act makes it compulsory for everyone in formal employment whether in public or private sector to contribute to NSSF or another scheme as stated above. The only exempt persons are those exempted from making contributions to NSSF under an international convention.<sup>83</sup> The Provident Fund has been retained for self-employed persons who voluntarily register to be members of NSSF and for members who want to make voluntary contributions.<sup>84</sup> The Pension Fund covers all employed persons employed in the formal sector who are above 18 years of age and have not attained the pensionable age. Provision has been made for members who move to other countries to have their benefits secured and exported.<sup>85</sup>

With the aim of ensuring sustainability and affordability of the Fund, it is a defined contribution scheme with some level of minimum benefits on death and invalidity.<sup>86</sup> It provides for an emigration benefit for a member who migrates to another country without any present intention of returning to reside in Kenya.<sup>87</sup> In the event a member dies who has paid atleast six monthly contributions preceding his death, a lump sum of Kshs. 10,000 is to be paid to the next of kin to defray funeral expenses.<sup>88</sup> It provides for phasing

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<sup>81</sup> Section 21.

<sup>82</sup> Sections 66 and 67.

<sup>83</sup> Section 29 and First Schedule on exempt persons.

<sup>84</sup> Section 18.

<sup>85</sup> Section 64.

<sup>86</sup> Sections 24, 38 & 40.

<sup>87</sup> Section 39.

<sup>88</sup> Section 40.

in of some benefits like maternity grant or unemployment grant as circumstances may allow.<sup>89</sup> It seeks to ensure better protection of members by providing benefits as pensions rather than lump sums and ensuring full preservation of benefits.<sup>90</sup> The expenses of the fund are not to exceed 2% of the total assets of NSSF reducing to 1.5% after five years.<sup>91</sup> So as not to crowd out private sector occupational schemes and plans, the Act provides for partial opt out for occupational schemes and umbrella retirement benefits schemes that meet the scheme reference test administered by the Retirement Benefits Authority.<sup>92</sup>

The Act provides for strong governance measures. The Fund is governed by a Board of Trustees. The composition of the Board is on a tri-partite basis with representation from the Government, employers and workers.<sup>93</sup> NSSF is regulated by the Retirement Benefits Authority.<sup>94</sup> In compliance with the provisions of the Retirement Benefits Act, management and custody of the Fund's assets is outsourced to external fund managers and custodians.<sup>95</sup> The Fund is required to publish its financial statements in the print media and to hold had Annual General Meetings.<sup>96</sup> The Board and management are required to take into account corporate best practices in the leadership and management of the Fund. Provision has been made to strengthen and mitigate corrupt practices.<sup>97</sup>

The benefits payable under the Pension Fund include retirement pension, invalidity pension, survivors benefit, funeral grant and emigration benefit.<sup>98</sup> The retirement pension is paid to a member who has attained the pensionable

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<sup>89</sup> Section 34 (2).

<sup>90</sup> Sections 20, 34, 36, 37 & 38. Preservation of benefits is to be achieved through the requirement that a pension purchased from a registered insurer should be for a minimum period of ten years.

<sup>91</sup> Section 50.

<sup>92</sup> Section 21 and Fourth Schedule.

<sup>93</sup> Section 6.

<sup>94</sup> Section 71.

<sup>95</sup> Section 49.

<sup>96</sup> Sections 51 & 52.

<sup>97</sup> Sections 10 & 54.

<sup>98</sup> Section 34.

age or opted for early retirement after attaining the age of 50 years.<sup>99</sup> The pension payable to a member is such an amount as can be purchased by his accumulated contributions with interest. A member may elect to receive part of his benefit as a lump sum so long as it does not exceed one-third of the accumulated Tier II contributions with the balance of the benefit paid as a pension.<sup>100</sup> A member is required to purchase a pension under their name from a registered insurer of the member's choice or be secured from the pension fund. Pension purchased is non-commutable, non-assignable and payable for life and should be paid for a guaranteed minimum period of ten years.<sup>101</sup> Benefits provided for under the provident fund are a replica of the benefits offered under the old NSSF Provident scheme.<sup>102</sup>

Lastly, full implementation of the Act has been hampered by lawsuits. Upon enactment and commencement date of the Act in 2014, five trade union organisations filed lawsuits against implementation the Act.<sup>103</sup> The Employment and Labour Relations Court suspended implementation of Sections 18, 19, 20 & 71 of the Act until the matter is heard and determined. Further, it directed that the old rates of Kshs. 400/= continue pending determination of the matter. NSSF has engaged the Unions in out of court negotiations, which are at an advanced stage.

## **Conclusion**

The paper sought to discuss the status social security in Kenya and more so, old age social security cover. Social security has a direct impact on poverty reduction, both in risk prevention and through the provision of compensation against its consequences. The impact of "shocks" due to the occurrence of a social or economic risk (such as an expensive illness, the loss of employment of the head of the family, or an accident leading to disability) has a significant adverse impact on the level of poverty of individuals and

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<sup>99</sup> Section 36.

<sup>100</sup> Ibid.

<sup>101</sup> Ibid.

<sup>102</sup> Section 41

<sup>103</sup> HCCC No. 35 of 2014 Kenya County Government Workers Union –Vs- NSSF, Cabinet Secretary, Ministry of Labour, Retirement Benefits Authority, Competition Authority : Interested Parties COTU & FKE

families. It finds that social security coverage rate has been characterised by low overall levels and benefit adequacy, small size of the formal economy relative to informal economy, low levels of disposal income, insufficient insurance against longevity and competing priorities.<sup>104</sup>

However, recent ongoing reforms are geared towards providing comprehensive social security coverage to Kenyans and their dependants against life risks and effecting income re-distribution, thereby contributing to social cohesion and national stability. The ongoing reforms of the NSSF and NHIF have demonstrated the Government's will in extending social security coverage in the Country.

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<sup>104</sup>Raichura, *Supra* note 48.

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## Role of Good Governance in Combating Climate Change in Africa

By: *Salome Karimi* \*

### *Abstract*

*This Paper examines the role of good governance in combating climate change in Africa. The author explores how elements of good governance such as transparency, accountability, curbing corruption, gender equality, access to information, public participation and inclusivity may be entrenched in climate change governance to enable African countries decarbonize their economic development and build a resilient population. To achieve sustainable development, Africa should free itself from the shackles of governance challenges such as impunity in leadership, corruption, poverty, poor democratic processes and the effects of climate change such as food insecurity, water scarcity, desertification, disasters and floods, rising sea levels, conflicts and migration. Whereas most African countries have ratified international climate change instruments, few have taken legislative steps to entrench and mainstream climate change at the national level. In addition, there is lack of transparency and accountability in climate funds expenditure despite the fact that African countries receive substantial climate change funds from bilateral and multilateral sources.*

*In this paper, the author posits that good governance is fundamental in achieving effective climate change mitigation and adaptation in Africa. Accordingly, the author examines how elements of good governance may be*

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*entrenched in climate change governance to address governance challenges for effective climate change mitigation and adaptation.*

## **1.0 Introduction**

Africa contributes only 4 % of global emissions yet the continent suffers the brunt effects of climate change.<sup>1</sup> The Sahel region is the most vulnerable due to exposure to rising temperatures, fluctuating precipitation and low adaptive capacity.<sup>2</sup> As a result, Africa has dragged in socio-economic development as resources are diverted to address social-economic impacts of climate change such as food insecurity, water scarcity, migration, climate change refugees, civil wars and disease outbreaks. In addition, the burden of climate change adaptation continues to intensify as UNEP statistics estimate current Africa climate change adaptation to \$70 billion, to rise to \$300 billion by 2030 and to \$500 billion by 2050.<sup>3</sup>

At the Leaders' Summit on Climate Change hosted by the President of the United States of America on 22<sup>nd</sup> and 23<sup>rd</sup> April 2021, the leaders agreed on the need to galvanize efforts by the major economies to tackle climate change.<sup>4</sup> The Summit drew members from 40 countries, with Africa being represented by Presidents of Five Countries, i.e Kenya, South Africa, Nigeria, Democratic Republic of Congo and Gabon. This was further echoed by African countries during the General Debate of the 76<sup>th</sup> Session of the UN General Assembly in September 22, 2021 where they called for multilateral actions in, *inter alia*, commitment by developed countries to provide tangible climate financial support to developing countries, ensure that a significant portion of green manufacturing is located in developing countries as well as strengthening the competence of states to manage

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<sup>1</sup>Tanguy Gahouma-Bekale, 2021, 'COP 26 on Climate-Top Priorities for Africa', *Africa News Renewal E-Magazine*, available at <https://www.un.org/africarenewal/magazine/july-2021/cop26-climate-top-priorities-africa> Accessed on 7<sup>th</sup> October 2021.

<sup>2</sup> Etienne Espagne, Luc Jacolin and Florian Leo, 2021, 'How Could Africa Finance its Development in a Climate Change Context?' *Sustainable Development News*. Available at <https://ideas4development.org/en/how-could-africa-finance-its-development-in-a-climate-change-context/> Accessed on 4<sup>th</sup> October 2021.

<sup>3</sup> Tanguy Gahouma-Bekale, 2021, op.cit.

<sup>4</sup> Tanguy, ibid.

diversity and regional trust between citizens and institutions and between citizens and their leaders.

In the upcoming COP 26<sup>5</sup>, African countries will seek to enforce the polluter pays principle against developed countries by ensuring that they set ambitious emission targets as well as lobby for financial, technological and research support for adaptation and establishment of mechanisms to address loss and damage from the impacts of climate change.<sup>6</sup> In particular, African countries will continue to lobby for higher commitment of USD \$100 billion annually by developed countries for increased contributions towards climate change over and above the USD \$80 billion under COP 21.<sup>7</sup> These clear targets will enable developing countries boost investment in green manufacturing and infrastructure. African countries will reiterate their commitment to their responsibilities of implementing sustainable development practices and decarbonizing their economic development pathways, subject to obtaining financial support from developed countries.<sup>8</sup>

## **2.0 Good Governance and Climate Governance**

Good governance refers to the provision of political, social, economic and environmental public goods and services that every citizen has the right to expect from their government, and the responsibility of the government to deliver to its citizens.<sup>9</sup> Climate governance entails the social, economic, political, technical and policy elements of climate change.<sup>10</sup> Under Agenda 2063,<sup>11</sup> African States aspire for, *inter alia*, Africa of good governance,

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<sup>5</sup> A 'COP' is a Conference of Parties to the United Nations Framework Convention on Climate Change (UNFCCC). The 195 member states meet once every year to assess progress and agree on concrete actions to reduce greenhouse gas emissions.

<sup>6</sup> , Heinrich Boll Stiftung, *Climate Governance in Africa: A Handbook for Journalists*, Inter Press Service Africa 2013. Available on [https://ke.boell.org/sites/default/files/climategovernancehandbook\\_2.pdf](https://ke.boell.org/sites/default/files/climategovernancehandbook_2.pdf) <Accessed on 19th October 2021>.

<sup>7</sup> Etienne Espagne, Luc Jacolin and Florian Leo, 2021, op.cit.

<sup>8</sup> Heinrich Boll Stiftung, op.cit.

<sup>9</sup> Mo Ibrahim Foundation, 'meaning of Governance', available at <https://mo.ibrahim.foundation/news/2020/2020-ibrahim-index-african-governance-key-findings> <Accessed on 7th October 2021>.

<sup>10</sup> Heinrich Boll Stiftung, op.cit.

<sup>11</sup> Africa's Agenda 2063, dubbed 'Africa We Want' is Africa's blueprint and masterplan for transforming Africa into the global Powerhouse of the future. See a

democracy, respect for human rights, justice and the rule of law.<sup>12</sup> This aspiration is anchored on two goals of entrenching democratic values, practices, universal principles for human rights, justice and the rule of law; and strengthening institutional capacity, facilitating emergence of development oriented and visionary leadership at all levels.<sup>13</sup> As the former UN Secretary General Kofi Annan observes, “Good governance is perhaps the single most important factor in eradicating poverty and promoting development”.<sup>14</sup>

The Ibrahim Index of African Governance 2020<sup>15</sup> indicates that African governance has improved between 2010 and 2019 with 60% of African population living in 36 countries with improved governance.<sup>16</sup> However, the findings also point to a decline in the overall governance score in the last half of the decade from 2015 to 2019. In essence, there is an unbalanced progress in African governance with improved governance in some countries and a decline in others. The overall improved sectors include

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pdf copy at [https://au.int/sites/default/files/documents/33126-doc-01\\_background\\_note.pdf](https://au.int/sites/default/files/documents/33126-doc-01_background_note.pdf) <Accessed on 19th October 2021>.

<sup>12</sup> African Development Bank, “Our Aspirations for the Africa We Want”, available at <https://au.int/agenda2063/aspirations> <Accessed on 16th October 2021>.

<sup>13</sup> Other aspirations in Africa Agenda 2063 include, A prosperous Africa based on inclusive growth and sustainable development; An integrated continent, politically united and based on the ideals of Pan-Africanism and the vision of African Renaissance; A peaceful and secure Africa; An Africa with a strong cultural identity, common heritage, shared values and ethics; people driven development and Africa as a strong, united, resilient and influential global player. See Africa Agenda 2063 pdf, available on [https://au.int/sites/default/files/documents/33126-doc-01\\_background\\_note.pdf](https://au.int/sites/default/files/documents/33126-doc-01_background_note.pdf) <Accessed on 16th October 2021>.

<sup>14</sup> Former UN Secretary General Kofi Annan, 1998, as quoted in John Mukum Mbaku, 2020, ‘Good and Inclusive Governance Imperative for Africa’s future’, *Brookings*, Available on <https://www.brookings.edu/research/good-and-inclusive-governance-is-imperative-for-africas-future/> <Accessed on 16<sup>th</sup> October 2021>.

<sup>15</sup> Report of the MO Foundation on the status of Governance in 54 African Countries between 2010 and 2019. The index uses governance indicators such as citizen participation rights and inclusivity, security and the rule of law, human development and foundations for economic opportunity.

<sup>16</sup> Mo Ibrahim Foundation, 2020 Ibrahim Index of African Governance: Key Findings., 25<sup>th</sup> November 2020. Available at <https://mo.ibrahim.foundation/news/2020/2020-ibrahim-index-african-governance-key-findings> <Accessed on 7th October 2021>.

infrastructure, health, and environmental sustainability while there has been a decline in citizen participation, human rights, rule of law and security.<sup>17</sup>

The Ibrahim's Index uses four indicators which are citizen participation, rights and inclusivity; security and the rule of law; human development and foundations for economic opportunity. In terms of scores between 2010 and 2019, 20 countries hosting 41.9% population improved in human development and foundations of economic opportunity but declined in security and rule of law and citizen participation, rights and inclusivity. Only 8 countries recorded improvement in all the categories.<sup>18</sup>

Climate governance requires inclusion and participation of those affected by impacts of climate change, commitment to international obligations for countries that are parties to international climate change instruments, strong and effective institutions, transparency, accountability, social justice and enabling legal and policy framework.<sup>19</sup> Further, climate governance imports the concept of climate justice which refers to the fair treatment of all people and freedom from discrimination with the creation of policies and projects that address climate change and its causes and ensuring equity for all.<sup>20</sup>

## **2.0 Entrenching Good Governance in Climate Change Governance in Africa**

### **2.1 Climate Finance**

Under the Paris Agreement, developed countries are required to provide financial resources to developing countries for climate change mitigation and adaptation.<sup>21</sup> In this regard, developed countries are tasked with taking the lead in mobilizing climate finance from a variety of sources, instruments and channels taking into account the needs and priorities of developing

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<sup>17</sup> Ibrahim's Index for African Governance (IIAG) 2020, Key indicators.

<sup>18</sup> See Ibrahim's Index of African Governance 2020 Report for details. Available at <https://mo.ibrahim.foundation/news/2020/2020-ibrahim-index-african-governance-key-findings> <Accessed on 7th October 2020>.

<sup>19</sup> Heinrich Boll Stiftung, op.cit.

<sup>20</sup> UNEP, Definitions, Climate Justice, at <https://leap.unep.org/knowledge/glossary/climate-justice> <Accessed on 19th October 2021>.

<sup>21</sup> Article 9(1), Paris Agreement.

countries.<sup>22</sup> The rationale for climate finance flow is to ensure balanced mitigation and adaptation actions by offsetting the vulnerability and resource constraints of developing countries.<sup>23</sup> In Africa, climate finance mostly comes in form of grants, loans and technical assistance to projects and initiatives for climate change mitigation and adaptation.<sup>24</sup>

In the G7<sup>25</sup> Summit held in the United Kingdom in June 2021, G7 countries agreed to increase their climate contributions to \$100 billion annually to help developing countries decarbonize development and adapt to the impacts of climate change.<sup>26</sup> Some of the G7 members like United States, Canada and Germany pledged to increase their contributions over and beyond their targets.<sup>27</sup> However, these remain political commitments as there was no agreement entered to that effect.<sup>28</sup>

Climate Finance will be one of the key priorities by African Countries in COP 26 at Glasgow.<sup>29</sup> Other priorities include climate change adaptation, carbon market mechanisms, ambitious Nationally Determined Contributions and a transparency mechanism, meeting pre-2020 mitigation commitments and recognizing Africa's unique needs and circumstances.<sup>30</sup> African climate negotiators will strive to bring the unique needs and circumstances of Africa to the forefront of climate negotiations with a view to hold developing

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<sup>22</sup> Article 9(3).

<sup>23</sup> Article 9(4).

<sup>24</sup> Gemma Norrington-Davis & Nigel Thornton, 2011, 'Climate Change Financing and Aid Effectiveness: Kenya Case Study', *Alghus Applied Knowledge*. Available at <https://www.oecd.org/countries/kenya/48458443.pdf> Accessed on 3rd October 2021.

<sup>25</sup> G7 Countries consists of the USA, Britain, Canada, Japan, Germany, France and Italy.

<sup>26</sup> William Schomberg & Elizabeth Piper, 2021, 'More Needed: G7 Nations agree to boost Climate Finance' *Reuters*, 8<sup>th</sup> June 2021. Available at <https://www.reuters.com/business/sustainable-business/g7-leaders-commit-increasing-climate-finance-contributions-2021-06-12/> <Accessed on 7<sup>th</sup> October 2021>.

<sup>27</sup> Canada pledged to double its climate finance pledge to C\$5.3 which is equivalent to US\$ 4.4. over the next five years while Germany will increase its pledge by 2 billion Euros to 6 billion Euros (equal to US\$ 7.26 billion) by 2025.

<sup>28</sup> African countries will seek to cement the commitments in COP 26 in Glasgow this November 2021.

<sup>29</sup> Tanguy Gahouma-Bekale, 2021, op.cit

<sup>30</sup> Tanguy, ibid.

countries responsible for their higher emissions percentage.<sup>31</sup> Further, African countries will seek to have developed countries mobilize more financial resources and technology transfer to Africa pursuant to Article 4 of United Nations Framework Convention on Climate Change.<sup>32</sup> Given that finance is at the heart of climate mitigation and adaptation, African countries will negotiate for Long Term Climate Finance agreements with developed countries.<sup>33</sup> The role of climate finance is to meet commitments by developed countries under international climate change instruments pursuant to the principle of common but differentiated responsibilities.

### **2.1.1 Principle of Common but Differentiated Responsibilities**

The Principle of common but differentiated responsibilities is one of the cardinal principles of international environmental law. The principle is founded in equity and has overtime transited the realms of international environmental law with a view to ensure that needs of developing countries and low income countries are given due consideration in development, application and interpretation of rules of international environmental law.<sup>34</sup> This is based on the recognition that climate change is a common concern for humankind hence a common responsibility on States to combat climate change through mitigation and adaptation. In implementing this principle, States are obligated to participate in international response measures aimed at addressing environmental problems and to comply with environmental standards that impose differing obligations.<sup>35</sup>

In international climate change framework, the Principle of common but differentiated responsibilities is enshrined in the UNFCCC,<sup>36</sup> the Kyoto Protocol<sup>37</sup> as well as the Paris Agreement. Article 4 of the UNFCCC stipulates that Parties should act to protect the climate system ‘on the basis

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<sup>31</sup> Tanguy, *ibid.*

<sup>32</sup> Article 4 of UNFCC stipulates the Common but Differentiated Responsibilities of State Parties to UNFCC;

<sup>33</sup> Tanguy Gahouma-Bekale, 2021, *op.cit*

<sup>34</sup> Philippe Sands & Jacqueline Peel, 2018, *Principles of International Environmental Law*, Cambridge University Press 4<sup>th</sup> Edition, Chapter 6, p. 244.

<sup>35</sup> Philippe Sands, *ibid.*

<sup>36</sup> Preamble, Art.3(1) and (2) & Article 4.

<sup>37</sup> Kyoto Protocol was adopted on 11<sup>th</sup> December 1997 in Kyoto, Japan and entered into force on 16<sup>th</sup> February 2005, operationalizes the UNFCCC by setting specific emission reduction targets for developed countries.

of equity and in accordance with their common but differentiated responsibilities and respective capabilities'. The Paris Agreement requires that its implementation must reflect equity and the principle of common but differentiated responsibilities and respective capabilities in light of different national circumstances.<sup>38</sup> Further, Principle 7 of the Rio Declaration enjoins States to co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. Furthermore, under the framework of the Paris Agreement, countries are required to submit Nationally Determined Contributions (NDCs) that must be more ambitious than that of preceding years.<sup>39</sup> To implement the NDCs, African countries need more funding hence another reason for access to additional climate finance under bilateral or multilateral agreements. However, there is need for transparency and accountability in climate financing to ensure that funds meet their intended purpose.

## **2.2 Gender Issues and Inclusivity**

Although international legal instruments on climate change envisage gender equity in climate change policy and decision making, in practice, there are gender issues in implementation. This is the case despite the fact that women comprise the majority of poor populations in Africa contributing up to 70-80% of domestic food production in Sub-Saharan Africa.<sup>40</sup>

Climate change adaptation actions should be gender-responsive, participatory and fully transparent taking into consideration the interests of vulnerable groups, communities and ecosystems.<sup>41</sup> This is because different genders suffer different degrees of vulnerabilities to climate change induced disasters such as floods, droughts, water scarcity, food insecurity and diseases. Whereas men are more resilient to such events, women are highly vulnerable due to lack of assets and means to enable them respond and adapt to harsh climatic conditions. Secondly, climate change overburdens women as they have to cope with the effects of climate change in addition to other socio-economic roles. For instance, water scarcity due to low precipitation makes women travel over long distances and spend more time in search of

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<sup>38</sup> Article 2(2), Paris Agreement 2015.

<sup>39</sup> Paris Agreement 2015, Article 3 and Article 4(2) and 4(3).

<sup>40</sup> Heinrich Boll Foundation, op.cit.

<sup>41</sup> Article 7(5), Paris Agreement.

water. Women may not get information on early warnings in time and are less mobile hence may not escape disasters in time. Women suffer loss of crops due to harsh weather and face security risks and are highly exposed to sexual abuse during conflicts.

Women are the axis of a society and thus their welfare should be of paramount consideration. To this end, climate change policies and decision should effectively respond to the needs of women. Indeed, due to their dedication to causes that affect families and communities, women are the best agents for climate change adaptation initiatives and programs. As the world climate change negotiators convene in Glasgow for COP 26, there is need for clear positions and commitments on gender justice accompanied by clear accountability frameworks at the international and national levels.<sup>42</sup>

### **2.3 Mainstreaming Climate Change in Public Policy and Practice**

Climate change mainstreaming refers to the continuous process of integrating climate change into policy making, budgeting, implementation and monitoring process at the national, sectoral and sub-sectoral levels.<sup>43</sup> The overall objective of climate change mainstreaming is to ensure a balanced policy framework for sustainable development that steers economic development while addressing climate change concerns.

Fundamentally, climate change is not just a scientific issue but a developmental issue affecting all sectors. Thus, it is paramount that these sectors be aligned to best practices for climate change adaptation while addressing any contradictions with a view to make them resilient and sustainable. The sectors that need alignment include energy, agriculture, trade, water, tourism, transport and infrastructure, etc. Most African economies highly depend on agriculture as it contributes 35-40% GDP of most countries. Indeed, agriculture has ripple effects on the economy as many economic activities are agriculture based for instance food production, employment, health, education, etc.<sup>44</sup>

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<sup>42</sup> Heinrich Boll Stiftung., op.cit.

<sup>43</sup> Climate Policy Info Hub, 'Mainstreaming Climate Change Adaptation in the EU' available at <https://climatepolicyinfohub.eu/mainstreaming-climate-change-adaptation-eu.html> <Accessed on 19th October 2021>.

<sup>44</sup> Heinrich Boll Stiftung, op.cit.



## **2.4 Eradicating Corruption and Impunity**

In June 1, 2003, African States adopted the African Union Convention on Preventing and Combating Corruption with an overall objective of providing a penal policy against corruption and to guide African State Parties in development and formulation of legislative and adequate preventive measures against corruption. At the time of adopting the Convention in 2003, the African continent was being plagued by rampant corruption, impunity and human rights violations. Still, corruption continues to ravage economies of most African Countries. The Convention provides a framework for eradicating corruption and fostering good governance through prevention, detection and punishing involvement in acts of corruption.

In the Preamble, African States are cognizant of the need to foster a culture of good governance and rule of law and curb corruption and impunity in order to minimize its effects on political, economic, social and cultural stability of African States. The African states are alive to the fact that bad governance and corruption undermines accountability, transparency in the management of public affairs as well as socio-economic development of the continent.<sup>45</sup> The objectives of the Convention are enshrined in Article 2 which are, *inter alia*, to promote and strengthen development of measures for prevention, detection, punishing and eradication of corruption; harmonize and coordinate policies and legislation between State Parties for the purposes of prevention and combating corruption as well as to establish the necessary conditions to foster transparency and accountability in the management of public affairs.<sup>46</sup>

In Article 3, the African states agreed on the principles of the Convention such as respect for democratic principles and institutions, popular participation, the rule of law and good governance; respect for human and people's rights in accordance with the African Charter on Human and People's Rights and other relevant human rights instruments; transparency

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<sup>45</sup> African Union, *African Union Convention on Preventing and Combating Corruption*; available at [https://au.int/sites/default/files/treaties/36382-treaty-0028\\_\\_african\\_union\\_convention\\_on\\_preventing\\_and\\_combating\\_corruption\\_e.pdf](https://au.int/sites/default/files/treaties/36382-treaty-0028__african_union_convention_on_preventing_and_combating_corruption_e.pdf). Accessed 3<sup>rd</sup> October 2021.

<sup>46</sup> See Art.2 of the African Union Convention on Preventing and Combating Corruption(AUCPCC).

and accountability in the management of public affairs; promotion of social justice and to ensure balanced socio-economic development and condemnation and rejection of acts of corruption, related offences and impunity.

By and large, these principles embody key tenets of good governance such as transparency, accountability, combating corruption, citizen participation, enabling legal, policy and institutional framework and respect for democratic processes and rule of law.<sup>47</sup> However, despite enactment of the AU Convention and domestic legislation to curb corruption, corruption remains the major governance challenge in Africa. Indeed, the culture of corruption has permeated into enforcement institutions that are tasked with enforcing anti-corruption laws such as the judiciary and oversight bodies.

## **2.6 Prioritizing Climate Change Initiatives and Programs**

One of the aims of the Paris Agreement is to align all financial flows with a pathway towards low greenhouse gas emissions and climate-resilient development. According to the African Development Bank, all the 54 African Countries have ratified the Paris Agreement and submitted NDCs pursuant to Article 4(2).<sup>48</sup> This indicates the political will and commitment by African countries to combat climate change. To achieve these commitments, African countries should prioritize climate change mitigation and adaptation programs and projects in their national budgets.<sup>49</sup> In addition, African countries need to explore investment opportunities at the global and national levels for climate sensitive sectors such as renewable energy, agriculture etc. At the regional level, the African Development Bank through its Africa NDCs Hub has committed to support governments, non-state actors and private sector in formulating policies, strategies and actions to enable African countries achieve their commitments to the Paris Agreement.<sup>50</sup>

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<sup>47</sup> African Development Bank, *Bank Group Policy on Good Governance* (Abidjan: African Development Bank, July 2000).

<sup>48</sup> African Development Bank, 'Africa NDCs Hub', available on <https://www.afdb.org/en/topics-and-sectors/initiatives-partnerships/africa-ndc-hub> <Accessed on 16th October 2021>.

<sup>49</sup> Etienne Espagne, Luc Jacolin and Florian Leo, 2021, op.cit.

<sup>50</sup> African Development Bank. Op.cit

## **2.7 Enabling Legal and Institutional Framework**

In the Preamble of UNFCCC, Parties are encouraged to enact effective environmental legislation whereby environmental standards, management objectives and priorities reflect their own environmental and developmental contexts.<sup>51</sup> Since independence, African countries have undergone fundamental transformation of their governance structures by enactment of independent Constitutions.<sup>52</sup> These Constitutions anchor salient issues of governance such as sovereignty of African citizens, Bill of Rights, separation of powers and checks and balances in public administration. Notably, some African countries have entrenched the right to a clean and healthy environment in their Bill of Rights hence establishing a constitutional imperative for environmental protection and conservation.<sup>53</sup> The rationale for anchoring climate change in a national legal framework is to domesticate international climate change instruments with a view to provide a framework for compliance and ensure that climate change does not just exist within the realm of international law but also at the national levels. Undoubtedly, an enabling legal framework backed with strong enforcement institutions is fundamental in entrenching good governance in the fight against climate change.

## **2.8 Climate Reporting and Access to Information**

The Paris Agreement requires Parties to submit Nationally Determined Contributions (NDCs) every five years.<sup>54</sup> In submitting the NDCs, Parties are required to submit information in a clear and transparent manner and to account for anthropogenic emissions in a manner that promotes environmental integrity, transparency, accuracy, completeness, comparability and consistency.<sup>55</sup> Parties are encouraged to cooperate in climate change adaptation actions by, *inter alia*, sharing information, good practices, experiences and lessons in relation to science, planning policies and implementation of adaptation programs. The Parties to the Agreement

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<sup>51</sup> UNFCCC, Preamble.

<sup>52</sup> John Mukum Mbaku, 2020, 'Good and Inclusive Governance Imperative for Africa's future', *Brookings*, Available on <https://www.brookings.edu/research/good-and-inclusive-governance-is-imperative-for-africas-future/> <Accessed on 16<sup>th</sup> October 2021>.

<sup>53</sup> Kenya, Constitution 2010, Art. 42,

<sup>54</sup> Article 4(2) and 4(9), Paris Agreement.

<sup>55</sup> Article 4(8) and (13), Paris Agreement.

are further encouraged to cooperate in taking measures to enhance climate change education, training, public awareness, public participation and public access to information in achieving the purposes of the Agreement.

Additionally, the importance of sharing accurate information and timely reporting is highly recognized in the UNFCCC and its Kyoto Protocol. Climate Reporting and Access to Information is critical in providing reliable information for predicting future trends in climate change, progress in implementation and to inform policy making.

Access to Information is also anchored under the AU Convention on Preventing and Combating Corruption wherein Parties are enjoined to adopt such legislative and other measures to give effect to the Right of Access to Information to any information that is required to assist in the fight against corruption and related offences.<sup>56</sup>

In terms of climate change governance, there is lack of adequate and accurate information on the amount of climate funding flowing into Africa, how the funds can be accessed and which projects and initiative are supported.<sup>57</sup> Arguably, due to lack of accurate and timely information, African countries have lagged behind in tapping into global innovations in climate change mitigation and adaptation. For instance, it has been reported that Africa has been slow in adopting green bonds which is a barely new global innovation in climate change mitigation and adaptation.<sup>58</sup> According to the report<sup>59</sup> issued by region, Africa constitutes a mere 0.4% of the global market value while Europe and North America takes the lead by 36.4% and 26.2% respectively.<sup>60</sup> The leading countries in issuance of green bonds in Africa

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<sup>56</sup> AUCPCC, Art.9.

<sup>57</sup> Gemma Norrington-Davis & Nigel Thornton, 2011, op.cit.

<sup>58</sup> Leo Holts & Chris Heitzhig, 2021, Africa's Green Bond Market Trails Behind Other Regions. Brookings, Africa in Focus, Available on <https://www.brookings.edu/blog/africa-in-focus/2021/03/26/africas-green-bond-market-trails-behind-other-regions/> <Accessed on 16<sup>th</sup> October 2021>.

<sup>59</sup> George Marbuah, 2020, Scoping the Sustainable Finance Landscape in Africa: The Case of Green Bonds. *Stockholm Sustainable Finance Centre* Available on [https://www.stockholmsustainablefinance.com/wp-content/uploads/2018/06/SSFC\\_greenbonds\\_africa\\_report.pdf](https://www.stockholmsustainablefinance.com/wp-content/uploads/2018/06/SSFC_greenbonds_africa_report.pdf) Accessed on 13th October 2021>.

<sup>60</sup> Leo Holts & Chris Heitzhig., ibid.

are South Africa, Nigeria and Morocco which cumulatively accounts for 97% of bonds issued in Africa.

## **2.9 Transparency and Accountability**

In Africa, the flow of climate finance into the continent raises valid concerns as to transparency, accountability and integrity of decisions regarding their expenditure.<sup>61</sup> For instance, whilst African States receive climate change financing from both global climate funds and from bilateral agreements, there's a culture of deep rooted corruption in the continent which undermines the intended objective of combating climate change.<sup>62</sup>

Under the Paris Agreement, measures taken for reduction of greenhouse gas emissions should adhere to the principles of environmental integrity, transparency and accountability.<sup>63</sup> In climate funding, transparency requires availability of accurate information on the total amount of money coming to each country for climate change mitigation and adaptation in order to track appropriation and projects implementation. The Public Finance Management Systems should be strengthened to ensure accountability in public expenditure in addition to establishment of national reporting frameworks for tracking and monitoring implementation of funded projects. At the global level, bilateral and multilateral climate financing bodies such as development banks should ensure that release of climate funds is accompanied by accountability responsibilities.

Furthermore, the role of oversight bodies in climate governance cannot be gainsaid. To this end, there is need to build the capacity of citizens, civil society, private sector and other oversight bodies that monitor how resources are utilized. At the policy level, citizen participation and oversight ensures prioritization of mitigation and adaptation programs. Moreover, Parliaments of African countries should effectively perform their role of holding their Executives accountable in respect to implementation of laws and policies including implementation of commitments to international legal

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<sup>61</sup> Transparency International, 2011, 'Climate Governance & Corruption', Available on <https://www.transparency.org/files/content/activity/ClimateGovernanceIntegrityProgrammeOverview.pdf> <Accessed on 18th October 2021>.

<sup>62</sup> Gemma Norrington-Davis & Nigel Thornton, 2011, op.cit.

<sup>63</sup> Article 4(11) and Article 6(2).

instruments. This includes ensuring timely submission of NDCs under the Paris Agreements and implementation of Sustainable Development Goals strategies.<sup>64</sup> For example, the Kenyan Parliament is actively involved in international negotiations, tracking implementation of international obligations, scrutinizing budgets and allocations and legislating on environmental matters such as the enactment of climate change Act, 2016 and facilitates submission of NDCs under the Paris Agreement as well as mainstreaming climate change in public policy.

In terms of access to justice in enforcing the fight against corruption and misuse of resources, there is need for strong legal and policy framework safeguarding climate funds from corruption risks. Enforcement institutions such as courts of law, tribunals and oversight bodies should have adequate capacity in terms of funding, staffing, and relevant infrastructure to enforce laws without fear or favour.

### **2.11 Public Participation and Inclusivity**

The importance of involvement of all actors in environmental matters at all levels is well stipulated in Principle 10 of the Rio Declaration and mirrored in international climate change instruments. Under the Rio Declaration, the international community acknowledges the need to involve all actors in environmental policy and decision making at all levels through access to information, public participation in decision-making and access to judicial and administrative proceedings to seek redress and remedies.<sup>65</sup>

In the Preamble of the Paris Agreement, Parties are required to respect and consider their respective obligations on human rights, right to health, rights of indigenous peoples, local communities, migrants, children, persons with disabilities, and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and inter-generational equity when taking action to address climate change. The Agreement also affirms the importance of public participation in decision making.<sup>66</sup>

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<sup>64</sup> Westminster Foundation for Democracy, May 5<sup>th</sup> 2021, 'Stronger Democratic Process in Kenya to tackle Climate Change', available on <https://www.wfd.org/2021/05/05/stronger-democratic-process-in-kenya-to-tackle-climate-change/> Accessed on 11<sup>th</sup> October 2021.

<sup>65</sup> Rio Declaration, Principle 10.

<sup>66</sup> See the Preamble of the Paris Agreement 2015.

Inclusivity and public participation in the climate sector requires that the voices or interests of those affected by the effect of climate change are given due consideration in policy and decision making. In Africa, the severity of climate change is highly felt by most marginalized groups in Sub-Saharan Africa.<sup>67</sup> The poverty situation in Africa compounds vulnerability to climate change and vice-versa as majority of the poor populace cannot adequately adapt to and respond to the impacts of climate change. The poor populations live in more vulnerable places than the rich who live in rich neighbourhoods and as such disaster response interventions are not immediate.<sup>68</sup> Indeed, Africa's vulnerability to the effects of climate change is a matter of climate injustice as the continent contributes minimally to global emissions yet suffers the brunt effects of climate change.

To ensure climate justice in climate policy formulation and implementation, African countries should establish measures to ensure maximum participation by all actors at all levels. This is because climate change affects all groups and thus climate action requires concerted efforts by actors at the global and local levels.<sup>69</sup> Of course, meaningful participation can be best achieved through availability of timely information and capacity building. For instance, in Kenya, the legal framework has been strengthened to ensure meaningful public participation in public policy making and administration to the effect that any decision or policy made in absence of public participation is null and void.<sup>70</sup>

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<sup>67</sup> Open Society Foundations, 2019, 'Q&A: Organizing for Climate Justice in Sub-Saharan Africa' Available at <https://www.opensocietyfoundations.org/voices/q-and-a-organizing-for-climate-justice-in-sub-saharan-africa> <Accessed on 11th October 2021>.

<sup>68</sup> Joseph Rowntree Foundation, 2014, 'Climate Change and Social Justice: An Evidence Review, Inspiring Social Change', available at <https://www.jrf.org.uk/sites/default/files/jrf/migrated/files/climate-change-social-justice-summary.pdf> <Accessed on 11th October 2021>.

<sup>69</sup> Etienne Espagne, Luc Jacolin and Florian Leo, 2021, op.cit.

<sup>70</sup> Under Article 10 of Kenyan Constitution 2010, participation of the people is among national values and principles of governance and binds all State Organs, State Officers or Public Officers in interpretation of the law, legislation and policy formulation and implementation. In enforcing public participation, the courts in Kenya have nullified many decisions and policies passed in absence of meaningful public participation, including a proposed amendment to the Constitution known as Building Bridges Initiative in 2021. See Kenya's Court of Appeal decision in

## **Conclusion**

As discussed above, good governance is critical for successful climate change mitigation and adaptation in Africa. Whilst there is substantial flow of climate funds to aid the continent in combating climate change, there is a valid concern that the funds may not sufficiently achieve the purpose. This is because some African countries face challenges governance such as heightening corruption, impunity, poor citizen participation, gender inequalities and weak institutions. The fact that most African countries are yet to enact domestic legislation on climate change undermines efforts of mainstreaming climate change at the national level. Overall, African countries should aspire for good governance that addresses peaceful co-existence, effects of climate change, economic development, curbing corruption, eradicating inequality, health and pandemics, citizen participation and rule of law as well as bolstering regional and international cooperation.



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## Redefining Online Dispute Resolution; Why ODR is Not A Stand-Alone Alternative

By: *Daniel M. Ntongai\**

### *Abstract*

*The traditional interpretation of what Online Dispute Resolution (ODR) comprises of is slowly fading, more so after the impact from the COVID 19 pandemic. The outbreak of the virus has seen courts in the Republic of Kenya close their doors, or in some instances, as a less adverse effect, scale down on their operations necessitating the need for other means of dispute resolution. This exposed the country to the use of the internet and existing virtual platforms for interactions and other purposes. The upshot is a redefinition of what Online Dispute Resolution is, and to the greatest extent, the marrying of Online Dispute Resolution with Alternative Dispute Resolution (ADR) and the Judicial Court System. This paper will provide a redefined meaning of what is now to be considered Online Dispute Resolution, its place in conflict resolution and the impact on the existing dispute resolution mechanisms. The paper will also assess the practicality in upholding and enforcing the new redefined Online Dispute Resolution as a means of conflict resolution, independent from all other existing dispute resolution mechanism.*

**Keywords:** Alternative Dispute Resolution, COVID 19 Pandemic, Online Dispute Resolution, Kenya.

### **Introduction**

There exists a number of dispute resolution mechanisms. Litigation has always been the most widely recognized mode of dispute resolution not only in Kenya but also globally.<sup>1</sup> The process has posed major challenges, the top

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<sup>1</sup> Muigua, K. and Kariuki, F., 2015. Alternative Dispute Resolution, Access to Justice and Development in Kenya. Strathmore Law Journal, 1(1), pp.1-21.

most being a backlog of cases.<sup>2</sup> In attempts to deal with these issues, many states (for instance Kenya and India) are now embracing alternative forms of dispute resolution. As a recognition of the need to embrace alternative forms, among other treaties and internationally recognized regulatory frameworks (for example *ICC ADR Rules 2001* and *UNCITRAL Model Law on International Commercial Conciliation 2002*), the UN Charter under article 33 states that parties to a dispute shall first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. This encourages the use of different dispute resolution mechanisms other than the judicial process.

Article 48 of the Constitution of Kenya provides for the right to access justice<sup>3</sup>. The Constitution of Kenya encourages the use of ADR in administration of justice. Alternative Dispute Resolution mechanisms in Kenya are recognized and provided for by the Constitution under Article 159(2)(c).<sup>4</sup> The provision requires that in the administration of justice, proper regard be made to all existing forms of dispute resolution other than court litigation. Deployment of the alternative mechanism (alternative to the court process) is calculated towards ensuring expeditious settling of disputes, being that it does not involve complex formalities as is with the judicial process.

ADR is advocated for essentially for three reasons as discussed by Carrie Menkel-Meadow.<sup>5</sup> The first reason, she argues, is quantitative. ADR is meant to achieve faster and extra efficient resolution. The second reason is qualitative, in that ADR establishes a more tailored and party friendly resolution of legal disputes, laying emphasis on the possibility of future relations, rather than just dwelling on the past. The third reason is more inclined to the politics in dispute resolution, as it ensures greater party

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<sup>2</sup> Wangui, Grace. "Factors Influencing Performance of the Judicial System in Kenya, the Case of Delayed Court Rulings." *International Journal of Law and Policy* 1, no. 1 (2017): 64-72.

<sup>3</sup> Article 48, *Constitution of Kenya* (2010).

<sup>4</sup> Article 159(2)(c), *Constitution of Kenya* (2010).

<sup>5</sup> Carrie Menkel-Meadow; *Is ODR ADR? Reflections of an ADR Founder from 15th ODR Conference, The Hague, The Netherlands, 22-23 May 2016.*

participation, diluting the role of lawyers. Carrie argues that ADR creates the ‘*let’s not have lawyers if we do not need to*’ mentality.

A common adage goes that necessity is the mother of invention. The legal world is not in any way immune. The COVID 19 Pandemic ultimately necessitated the need to consider other forms of dispute resolution that do not include actual physical in person interactions. In due time, virtual court proceedings became a thing, bringing to a halt the long tradition of physical court sessions. Online Dispute Resolution is arguably one of the best, among many others, inventions in the legal field. At inception, ODR was arguably slightly distinct from ADR.<sup>6</sup> This discourse will analyze the distinction, as it was, and as it is now, assessing whether ODR is ADR. Aziz in his article *The Settlement of disputes through Online Dispute Resolution (ODR): A Literature Review* argues that ODR differs from ADR in that different forms of ADR are integrated into a comprehensive process with several stages. Major reference is made to the article by Carrie Menkel-Meadow, the consensus being despite the unimagined benefits ODR is set to achieve in some cases, there is need to embrace the old-fashioned in person interactions, especially for us, the members of the legal profession. Selfish as it may sound, there is need to remain relevant.

### **Understanding ODR**

Knowingly or otherwise, we engage in ODR in our activities. The simplest form is the discussion and settling of issues over phone or sending documents with tracked changes and markings.<sup>7</sup> With the new digital era, ODR cannot and ought not be ignored. ODR, in layman’s language, is defined as dispute resolution which involves different aspects of the internet, or in general, the Information and Communication Technology (ICT) sector.<sup>8</sup> The rapid advancements in the ICT sector have been a major boost to the growth and recognition of ODR, not only in Kenya but globally. It

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<sup>6</sup> Aziz, Tuan Nurhafiza Raja Abdul, and Nor’Adha Abdul Hamid. "The Settlement of disputes through Online Dispute Resolution (ODR): A Literature Review." *Asian Journal of Research in Business and Management* 2, no. 4 (2020): 90-98.

<sup>7</sup> Loutocký, Pavel. "Online Dispute Resolution as an Inspiration for Contemporary Justice." *Jusletter IT. Die Zeitschrift für IT und Recht* (2019).

<sup>8</sup> Matteucci, Giovanni. "ODR-online dispute resolution and justice, in the post Covid-19." *ODR-online dispute resolution and justice, in the post Covid-19* (2020): 71-97.



would therefore be disastrous to act or actually be ignorant of these developments, more so with the continued use of ICT related services in our day to day lives. As early as in the 1990s, the emergence and continued use of the internet was predicted to eventually foresee the rise of ODR due to the possible emergence of conflicts from internet use.<sup>9</sup>

ODR is actualized in a number of ways. One such is automated negotiations which involves participation of two or more parties in a bargain, which negotiations are achieved in most cases by use of tools of e-commerce.<sup>10</sup> The process may also involve computerized intelligent software commonly referred to as autonomous agents, which help negotiate and resolve disputes. The artificial intelligent agent asks each party questions pertaining their interests and preferences and works to facilitate an efficient agreement.<sup>11</sup>

Online mediation is a second form of ODR.<sup>12</sup> The process involves mediation which is facilitated with the help of ICT advancements for instance emails and video conferences.<sup>13</sup> With more advancements in ICT, the mediator may be replaced by artificial intelligence which plays the exact role.<sup>14</sup> The third form is online arbitration, which differs from online mediation (assisted negotiation) in that the final decision, once signed in an agreement is binding. All submission of documents and evidence is effected by online means such as emails.<sup>15</sup>

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<sup>9</sup> Ethan Katsh and Janet Rifkin, *Online dispute resolution* (Jossey-Bass 2001)

<sup>10</sup> Beam C & Segev A, 'Automated Negotiations: A Survey of the State of the Art', Fisher Centre for Information Technology & Management: University of California.

<sup>11</sup> Zhou, Michelle X., Gloria Mark, Jingyi Li, and Huahai Yang. "Trusting virtual agents: The effect of personality." *ACM Transactions on Interactive Intelligent Systems (TiiS)* 9, no. 2-3 (2019): 1-36.

<sup>12</sup> Kandashvili, Irakli. "Mediation and Online Dispute Resolution (odr) as an Innovative Form of Dispute Resolution." *J. Law* (2018): 94.

<sup>13</sup> ABA Taskforce on Electronic Commerce and Alternative Dispute Resolution Taskforce, *What is Online Dispute Resolution? A Guide to Consumers*, 2002

<sup>14</sup> Jacobs P 'Mediation Now and Then', Newsletter, Mediation, International Bar Association Legal Practice Division, 2007

<sup>15</sup> Ponte L and Cavenagh T, *Cyberjustice, 'Online Dispute Resolution for E-Commerce'* Parson Prentice Hall, 2005

Colin Rule<sup>16</sup> in response to the article by Carrie acknowledges that many of the ODR advocates presuppose that it is synonymous with the internet. Regardless of the internet slowly developing into the defining communication platform in the current era, Colin emphasizes that the less forms of digital communication such as telephones whether wired or not, fit well into the description of ODR. In his article he states that these technologies have turned out to be part of our everyday lives to an extent that we do not even notice when we make use of them.<sup>17</sup> The use of technology is now becoming a new normal. (*May be virtual courts are the new normal; or the so called 'social-distancing'; or 'working from home'*).<sup>18</sup> The article and sentiments by Colin Rule are paramount in this discourse, bearing in mind that he is the CEO of mediate.com and a co-founder of modria.com both of which provide for ODR.

The digital world is borderless. There are no limits to the ends to which one can travel. When disputes arise, forming key part of the issues is jurisdiction which like a coin has two sides. On the one side, there may be conflict on which laws apply if the conflicting parties are from different states (see *Bangura v. Washington Post*<sup>19</sup>). On the other hand, the mere fact that the online world is borderless infers that ODR may be used and is applicable in any jurisdiction.<sup>20</sup> A classical case illustration such application of ODR is *Funzi Furnitures v. UEFA*<sup>21</sup> which involved a dispute over domain name registration. Without the digital space, settlement of this specific dispute would have proved difficult and costly considering the geographical distance between the parties and the differences in laws governing either.

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<sup>16</sup> Colin Rule, "Is ODR ADR?" (2016) 3 International Journal on Online Dispute Resolution 8-11

<sup>17</sup> *ibid*

<sup>18</sup> Carroll, Noel, and Kieran Conboy. "Normalising the "new normal": Changing tech-driven work practices under pandemic time pressure." *International Journal of Information Management* 55 (2020): 102186.

<sup>19</sup> *Bangura vs. Washington Post* [2005] O.J. NO. 3849

<sup>20</sup> Rizkiana, Rina Elsa. "The Future Of Online Dispute Resolution: Building A Framework For E-Commerce Dispute Resolution In Indonesia." *The Lawpreneurship Journal* 1, no. 2 (2021): 114-138.

<sup>21</sup> *Funzi Furnitures vs. UEFA* [Decision 710 of 2000 WIPO Arbitration and Mediation Centre]

In Kenya, the Constitution and other statutory framework including the Civil procedure Act all advocate for just, expeditious and affordable resolution of disputes. The laws have allowed for the use of ADR mechanisms in promoting these objectives. The Kenyan laws however do not expressly recognize the use of ODR. ODR lacks an independent legal framework (*one of the main reasons it cannot be considered a stand-alone alternative*). ODR is still clinging on ADR for recognition and validity, subjecting it to possibilities of scrutiny while at the same time evolving, conforming and blending with the existing dispute resolution mechanisms.

### **Viability of ODR as an independent dispute resolution mechanism in Kenya**

There is no existing independent legal framework governing ODR in Kenya. The lack of express legislation does not however count that much as an inhibitor to the application ODR. The Arbitration Act for instance is perceived in a number of its provisions to be advocating for other forms alternative to ODR. Section 19(a)<sup>22</sup> on party autonomy allows individual parties to conduct proceedings expeditiously where else Section 20<sup>23</sup> on the freedom to determine procedure gives room for use of ODR related procedures for instance tele-conferencing, emails or phone calls.

The Consumer Act allows that dispute resolution be in accordance with the procedures provided in law, to which ODR is not.<sup>24</sup> Just as is with the other statutory provisions, there is no sufficient legal backing in support of ODR unlike the case in UK with the Online Dispute Resolution for Consumer Disputes and Amending Regulations (Regulations on Consumer ODR)<sup>25</sup> which applies directly to ODR. The regulatory framework must set

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<sup>22</sup> Section 19A, Arbitration Act (1995).

<sup>23</sup> Section 20, Arbitration Act (1995).

<sup>24</sup> Muigua, Kariuki. "Utilising Alternative Dispute Resolution Mechanisms to Manage Commercial Disputes." In 1st Nairobi Centre for International Arbitration (NCIA) Alternative Dispute Resolution (ADR) National Conference, Intercontinental Hotel, Nairobi, Kenya on 5th-6th June. 2018.

<sup>25</sup> Regulation on Consumer ODR, Regulation (EC) No 2006/2004 and Directive 2009/22/EC

safeguards so as to ensure justice and fairness in the use of ODR as a means of dispute resolution<sup>26</sup>.

Discussed in this discourse, ODR shares the underlying principles of ADR classified as qualitative and quantitative.<sup>27</sup> At the very best, it is to be complimentary to the court mechanisms. The rise and survival of ADR for instance is not only pegged on its recognition by the Constitution of Kenya but also on recognition of its legitimacy by the Judiciary and the establishment of institutions that dictate its procedures and applicability.

In order to be self-sustaining, ODR would require to borrow much more than the dispute resolution mechanisms from ADR. Key to its survival, ODR lacks the institutional framework that ADR has developed such as the Chartered Institute of Arbitrators and the Nairobi Centre for International Arbitration. Without such recognized institutions' outright embrace on ODR, then it would be close to impossible to create an ODR as an independent system of dispute resolution.

The digital implementation of ODR is not in itself self-sufficient. Forms of ODR that have put into use the developments in technology in dispute resolution still largely depend on human supervision and regulation. The divorce platform developed by the Dutch Rechtswijzer for instance is proposed to integrate aspects of the computer design and human interfaces.<sup>28</sup> Carrie argues that the integration of human and computer design is a relevant future for ODR. However, from the institutions' approach, ODR involving semi-autonomous programs thereby diminishing the role played by humans may seem inopportune. Being that the institutions are a source of livelihood for its members, more so the lawyers, suggesting to replace them with enhanced technology will result to reluctance in embracing ODR.

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<sup>26</sup> J. Gachie, 'An Evaluation of The Need for Regulation of Online Dispute Resolution (ODR) In Kenya, LLM Thesis, University of Nairobi, November 2016.

<sup>27</sup> Carrie Menkel-Meadow; Is ODR ADR? Reflections of an ADR Founder from 15th ODR Conference, The Hague, The Netherlands, 22-23 May 2016.

<sup>28</sup> De la Rosa, Fernando Esteban, and John Zeleznikow. "Making intelligent online dispute resolution tools available to self-represented litigants in the public justice system: towards and ethical use of the ai technology in the administration of justice." In Proceedings of the Eighteenth International Conference on Artificial Intelligence and Law, pp. 195-199. 2021.

ADR and ODR suffer the same fate when it comes to enforceability. Enforceability of decisions arising out of ODR settlements is in itself difficult.<sup>29</sup> Legitimacy of ADR is pegged on recognition by the courts as under Article 159 of the constitution of Kenya. ADR therefore turns to the court for enforcement of its decisions for lack of its own enforcement mechanisms.<sup>30</sup> The assumption therefore would be that any enforcements on the decisions arrived at through ODR be achieved by the courts, which beats the whole logic of not in the first instance seeking to use alternative forms of dispute resolution.

Evidently, ODR methods cannot be utilized where technology has not developed. Its practicality for this reason is questionable more so with regard to the entire country's proficiency with the use of technology.<sup>31</sup> In as much as change is inevitable, acceptance may prove difficult. ODR, considering its much reliance on ADR cannot be a stand-alone alternative.<sup>32</sup>

### **Redefining ODR. Why ODR is ADR**

An underlying notion, which considerably is turning out to be a myth is that ODR is different and distinct from ADR. Currently, there is little distinction between ODR and ADR. As a foundation to this discourse, it is paramount to note that ODR heavily borrows from existing forms of ADR.<sup>33</sup> The forms discussed above wherein ODR is employed are the same exact mechanisms considered relevant in ADR. As Mercedes and Gonzalez put it, ODR is as a result of combined enhancements in ICT and ADR<sup>34</sup>. The article by Mercedes and Gonzalez did at the time take cognizance of the use of electronic means of communication or admitting audiences through video conferences by the courts in exercise of their everyday duties, referring to

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<sup>29</sup> Zheng, Jie. "Enforcement of the ODR Outcomes." In *Online Resolution of E-commerce Disputes*, pp. 281-344. Springer, Cham, 2020.

<sup>30</sup> Ahmed, Masood. "Route 66: enforcing arbitral awards." (2020).

<sup>31</sup> Friedman G H, 'Alternative Dispute Resolution and Emerging Online Technologies: Challenges and Opportunities', 708

<sup>32</sup> Carrie Menkel-Meadow; Is ODR ADR? Reflections of an ADR Founder from 15th ODR Conference, The Hague, The Netherlands, 22-23 May 2016.

<sup>33</sup> Zheng, Jie. "The Development of ODR in E-Commerce Transactions." In *Online Resolution of E-commerce Disputes*, pp. 33-62. Springer, Cham, 2020.

<sup>34</sup> Mercedes M A and Gonzalez N M, 'Feasibility Analysis of Online Dispute Resolution in Developing Countries', 44:1 *Inter-American Law Review* 2012, 44.

them as cyber-courts<sup>35</sup>. Notably, they were not considered as alternatives, but just the courts using new ICT services to undertake their duties. It therefore becomes difficult to comprehend why we would consider ODR distinct from, or an alternative to ADR.

The main distinction between ODR and ADR is the use of ICT.<sup>36</sup> ODR was birthed and has since developed due to innovations in technology. The use of ICT by the Kenyan judicial systems as a means to promoting the judicial processes and ensuring that the court processes are not interfered with kills the strongest foundational basis for ODR. The COVID 19 pandemic brought to light the efficiency of telecommunications in ensuring effective running of the court activities. The upfront is the continued use of ICT services by the courts in carrying out its mandate, impacting on the traditional understanding of what ODR is.

ODR is an aid to the development and continued use of ADR. The 'redefined' meaning of ADR is premised on the notions that ODR is ADR, and that ODR is a means to an end, or simply, an opportunity for ADR to expand. For instance, communication between parties during dispute resolution is relevant, hence there is need to identify effective modes of communication. ODR has simply enhanced communication between parties through ICT hence promoting different forms of ADR.

ODR lacks an independent regulatory framework which therefore poses questions on its legitimacy.<sup>37</sup> Application of ODR in dispute resolution is currently pegged on the Constitution's reference to alternative dispute resolution mechanisms under Article 159(2)(c).<sup>38</sup> Most of the advocates of ODR however find no fault in it lacking regulatory framework or legislation.

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<sup>35</sup> Mercedes M A and Gonzalez N M, 'Feasibility Analysis of Online Dispute Resolution in Developing Countries', 44.

<sup>36</sup> Zheng, Jie. "The Development of ODR in E-Commerce Transactions." In *Online Resolution of E-commerce Disputes*, pp. 33-62. Springer, Cham, 2020.

<sup>37</sup> Carrie Menkel-Meadow; Is ODR ADR? Reflections of an ADR Founder from 15th ODR Conference, The Hague, The Netherlands, 22-23 May 2016.

<sup>38</sup> Article 159(2)(c), *Constitution of Kenya* (2010).

Schultz in an article<sup>39</sup> highlights that advocating for control or government intervention or regulation is felt to be a creation of an obstacle to its development. In the article, he asserts that the best regulation is no regulation. ODR may not have a specific set of legislation or set rules but its borrowing and use of ADR mechanisms makes it subject to the rules governing the use of ADR. Considerably, even with legislation on ODR, there is little or no distinction between key aspects of ADR and ODR. The England Regulation on Consumer ODR<sup>40</sup> is an example of existing ODR framework that so much mirrors ADR.

The place of ODR as an alternative has since been lost. ODR is just what the words in it mean. The settling of disputes virtually(online). The court's use of virtual platforms and ADR's use of virtual platforms are both forms of ODR. However, the traditional understanding of ODR (being that it is an extrapolation from ADR) is to be more likened to ADR.

### **The impact of redefinition**

The traditional reference of ODR was to a system majorly suitable to settling disputes arising from online interactions. The objective at the time of its inception was to settle disputes that cannot be amicably settled in person due to their complexity.<sup>41</sup> Discussed herein, this ODR system has made major reliance on ADR for its development and survival. However, with the redefined meaning, the term ODR now makes reference to not only the application of ADR mechanisms online but to the general use of virtual platforms and developments in ICT to facilitate dispute resolution.<sup>42</sup>

Appreciating this new meaning addresses two of the main obstacles that the traditional ODR was faced with. The first is on regulatory framework. Unlike in England, this discourse has established that Kenya has no express

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<sup>39</sup> Schultz T, 'Does Online Dispute Resolution Need Governmental Intervention? A Case for Architectures of Control and Trust', *Journal of Law and Technology*, 6:1 2004, 106.

<sup>40</sup> Regulation on Consumer ODR, Regulation (EC) No 2006/2004 and Directive 2009/22/EC.

<sup>41</sup> Nadler J 'Electronically-Mediated Dispute Resolution and E-Commerce.' *Negotiation Journal* 17.4 (2001), 33-347

<sup>42</sup> Carrie Menkel-Meadow; Is ODR ADR? Reflections of an ADR Founder from 15th ODR Conference, The Hague, The Netherlands, 22-23 May 2016.

legislation dictating on ODR despite having a 2030 vision on digitization of major aspects of the economy. Embracing the redefined meaning that ODR is nothing new but an extrapolation of the existing means through the use of ICT services will be an acknowledgement that ODR is actually regulated through the existing regulated methods of dispute resolution. The existing methods already have a defined procedure that has been acceptable and employed widely.

The second challenge addressed is on culture and the traditional practice. The society in which we live in is slow and adamant in accepting change. The idea of using robots (as any layman would put it) in dispute resolution has not well registered with many of our citizens. That aside, the virtual world has been used a number of times to defraud netizens and the levels of illiteracy are somewhat alarming. If ODR is nothing new but an enhancement of the existing, then it is a better idea to sell.

### **The legal profession's opinion on ODR as ADR**

ODR developed mostly by members outside the legal profession where else ADR was developed by academics, lawyers, the government and other interested parties in the legal profession.<sup>43</sup> The focus by the private sector while developing ODR was commercial. Technology moves fast, is expensive to build and maintain hence entrepreneurs keen to reap the most are the top advocates of ODR. What therefore is the role of the legal profession? Or what ought be their role?

The role played by members of the legal profession, more so lawyers is imperative in conflict management more so in advocacy for the use of the various forms of dispute resolution mechanisms. With the recognition of ADR mechanisms in our Constitution, lawyers are presented with an opportunity to get involved in conflict resolution processes.<sup>44</sup> Courts, in a bid to reduce backlog refer some cases to ADR, allowing lawyers to act as representatives, negotiators and generally explore the ADR platform.

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<sup>43</sup> Sorabji, John. "Justice Without Lawyers." In *New Pathways to Civil Justice in Europe*, pp. 221-242. Springer, Cham, 2021.

<sup>44</sup> Muigua K., *The Lawyer as a Negotiator, Mediator and Peacemaker in Kenya*. (2015)



Despite there being no independent legal framework addressing ODR, Article 159 of the constitution introduces different forms of ADR that every advocate should embrace. Viewing ODR as a separate form of dispute resolution renders the role of lawyers in administration of justice insignificant.<sup>45</sup> ODR embraces all forms while using the online platform. Most of the methods used e-commercial disputes developed by the ICT sector where technology serves as a third party in conflict resolution. For this reasoning lawyers have no part to play in it.

ODR as ADR allows lawyers to carry out sessions online through video conferencing, draft legal opinions online without having to worry about the distance between them and their clients.<sup>46</sup> Further ODR creates online arbitrators, online judges and mediators which positions are best filled with persons in the legal profession.

Setting of standards and regulations governing ODR would be a step towards improving the involvement of advocates in ODR processes. Institutional implementation of these set standards would provide lawyers with a framework of operation in the ADR arena.

Embracing ODR as a form of ADR allows lawyers involved to create awareness to their clients on the alternative forms of solving disputes as provided for under Article 159(3) of the constitution of Kenya.<sup>47</sup> This way the lawyers' role in administration of justice will remain relevant and significant.

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<sup>45</sup> Carrie Menkel-Meadow; Is ODR ADR? Reflections of an ADR Founder from 15th ODR Conference, The Hague, The Netherlands, 22-23 May 2016.

<sup>46</sup> Goodmann J, The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber Mediation Websites. (2003)

<sup>47</sup> Article 159, Constitution of Kenya (2010).

## **Conclusion**

ODR has no means of developing without reliance on conventional methods. Its proponents are wrong to want to consider it separate and distinct from ADR. With the continued use of ICT related services in dispute settlement, the backbone of ODR has since been destroyed, necessitating the need to redefine what is meant by it. ODR is a means to achieving reliable dispute resolution mechanisms. It does not develop any new structures or methods for dispute settlement but borrows from the existing and attempts to improve on them.

ODR consequently faces almost similar challenges to those faced by ADR. One of such, which is a key aspect in dispute resolution is on enforcement of decisions. There is no practical way demonstrated on how decisions arrived at after a successful ODR session are enforced. In furtherance, reliance on the courts by both ADR and ODR for enforcement of decisions is enough justification that none of the two can comprehensively be considered a stand-alone alternative. The root of the problem is the reliance of ADR on the courts for recognition. The constitution ought to have independently recognized ADR without much reliance on the existing judicial court systems.

The redefinition of ODR not only addresses key loopholes in the system (that would have otherwise remained resolved) but also weakens a number of its strengths, the fundamental one being jurisdiction. In a number of ways, the traditional meaning still has its relevance in the whole system.

As a member of the legal profession, ODR (whether in its traditional form or in the redefined meaning) evidently denies us a number of privileges, the most obvious being commercial. It may sound selfish to not advocate for ODR on this basis alone. Carrie Menkel-Meadow in her article is similarly inclined to sticking with the traditional old-fashioned way of in person dispute resolution methods. True to her words, ODR will work for some people in some cases but let us not forget our existing working systems.

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## **Tackling Gender Bias in the Prosecution of International and Transnational Crimes**

*By: Aaron Onyango\**

### ***Abstract***

*The recent conviction of Dominic Ong'wen by the ICC despite the pleas of the defense team highlighting the unfortunate and involuntary circumstances under which he came to commit the crimes he was convicted of, has elicited much debate over the fairness of the strict application of international laws. The conviction has also highlighted the difference in the treatment male and female members and accomplices of the LRA are accorded with the females being treated as victims and programs put in place for their rehabilitation and reintegration. On the other hand their male counterparts are either treated as criminals to either be pardoned or prosecuted. This work, using the LRA as a case study, sought to highlight the negative bias towards males in the prosecution of international and transnational crimes and manners in which this bias is exhibited. It also outlined the negative consequence of selective prosecution on sustainable rehabilitation and punishment of wrongdoers. Furthermore, this work provides pragmatic solutions on attaining holistic, efficacious and objective means of ensuring that all parties, regardless of their genders are adequately brought to book for their criminalities.*

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## 1.0 Introduction

### 1.1 Definition and scope

International crimes constitute of serious offences that not only concern humanity as a whole, but also challenge the collective human conscience.<sup>1</sup> The crimes generally regarded as international crimes as outlined by the Rome Statute are genocide, war crimes, crimes against humanity and the crime of aggression.<sup>2</sup> Clear definitions for transnational crimes, on the other hand, remain elusive<sup>3</sup> with some scholars indicating that transnational crimes,<sup>4</sup> unlike international crimes create direct criminal liability, create indirect responsibility by imposing the responsibility upon respective states to criminalise certain acts.<sup>5</sup> For the purpose of this article however, transnational crimes will entail those crimes, other than international crimes outlined in amendment 28A of the Malabo Protocol.<sup>6</sup>

### 1.2 Background

The day 25<sup>th</sup> December 1989 saw the first time that a woman would answer for crimes committed in her own right since the post-WWII trials that saw several female Nazi officers like Ilsa Koch convicted of war crimes.<sup>7</sup> It would take decades for another female to be formally charged with committing an international crime. On the fateful day in Romania, Elena [Ceaușescu](#) stood by her husband Nicolae [Ceaușescu](#), as they were dispatched by a firing squad after being found guilty of genocide and corruption-related crimes by a hastily constituted local military tribunal.<sup>8</sup> It can still be argued

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<sup>1</sup> R Cryer H Friman, D Robinson and El Wilmschurst, *An introduction to international criminal law and procedure* (2nd edn) (2010) 4

<sup>2</sup> Rome Statute 1998, Art 5

<sup>3</sup> Evelyn Owiye Asaala, *Fighting Impunity through the Prosecution of International Criminal Law*(Doctorate Thesis), (University of Witwatersrand 2017)

<sup>5</sup> CC Jalloh, *The nature of the crimes in the African Criminal Court*, (Journal of International Criminal Justice 2017)

<sup>6</sup> Protocol to the Amendment to the Protocol on the Statute of the African Court of Justice 2014 (Malabo Protocol), Art 28A

<sup>7</sup> William L. Shirer, *The Rise and Fall of the Third Reich*. (Simon & Schuster 1990) p. 885.

<sup>8</sup> Roger Boyes, *Ceausescu looked in my eyes and he knew that he was going to die*, (The Times 2009); see also, Sinziana Demian , *In Romania, Ceausescu's death*

however, that Romania's former first lady only met her indictment as a result of her proximity to her husband; a fate she could have avoided if she was not his spouse. This, however, is rebuttable considering she had consolidated political power in her own right. She had become an influential member of the governing political body of Romania at the time, holding a sway over decisions taken by the regime.<sup>9</sup>

Since the inception of the International Criminal Court, only one woman, Simone Gbagbo, has been formally indicted for an international crime initiated and committed of her own accord, free of coercion or prevailing attitudes.<sup>10</sup> Despite the ICC's indictment, Allasane Outtara's regime opted to try her locally, citing social and political stability as the reason owing to her husband's lingering support within the country.<sup>11</sup> This move arguably planted the seed of complacency in prosecuting the atrocities committed by troops and militias loyal to Gbagbo which precipitated the Second Ivorian Civil War.<sup>12</sup> The ICC indicted Simone alongside her husband Laurent Gbagbo, a former Ivorian president. No other females have since been indicted of international or transnational crimes by any international tribunal save for Pauline Nyiramasuhuko<sup>13</sup> and the nuns Consolata Mukagango and Julienne Mukabutera who were convicted in relation to their roles in the Rwandan Genocide.<sup>14</sup> The former was held responsible for

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haunts Christmas, (Global Post. Cluj-Napoca 2009)  
<https://www.pri.org/stories/2009-12-25/romania-ceausescus-death-haunts-christmas> Accessed 13th February 2010

<sup>9</sup> Victor Sebestyen, *Revolution 1989: The Fall of the Soviet Empire*, (Pantheon Books 2009)

<sup>10</sup> *The Prosecutor v Simone Gbagbo* ICC-02/11-01/12

<sup>11</sup> Kiran Moodley, *Simone Gbagbo, former Ivory Coast first lady, sentenced to 20 years in prison*, (The Independent 2015)

<sup>12</sup> *The Prosecutor v. Laurent Gbagbo* ICC-02/11-01/11-656-Red

<sup>13</sup> Peter Landesman, *A Woman's Work*, (The New York Times Magazine 2002)  
<https://www.nytimes.com/2002/09/15/magazine/a-woman-s-work.html?pagewanted=all&src=pm>

<sup>14</sup> Andrew Osborn, *Belgium puts nuns in docks over genocide*, (The Guardian 2001)  
<https://www.theguardian.com/world/2001/apr/17/warcrimes#:~:text=The%20two%20Benedictine%20nuns%2C%20Sister,dock%20by%20two%20other%20accuse>  
d. See also; Keith B. Richburg, *Rwandan Nuns Jailed in Genocide*, (The Washington



arming Hutu militants and ordering attacks against Tutsi's which often involved sexual assault.<sup>15</sup> The latter pair was found guilty of facilitating the slaughter of Tutsi refugees seeking refuge from their attackers by informing the militia men of their whereabouts.<sup>16</sup> Does this then mean that men have a greater affinity to the perpetration or facilitating the commission of international and transnational crimes? What of the female soldiers seen armed and donning military attire in armies and rebel factions accused of committing international crimes, whose fellow ranking soldiers have been tried and convicted of the same? This article seeks to analyse the extent of this gender bias in the existing international legal framework and in practice.

## **2. 0 A case study of the Lord's Resistance Army(LRA)**

### **2.1 Dominic Ong'wen's case**

The recent conviction of long-time rebel Dominic Ong'wen by the ICC was viewed by some quarters as populist show that not only highlighted the discriminatory results of applying Eurocentric legal standards to African conditions, but also highlighted the manifest gender inequality that the international criminal regime possesses.<sup>17</sup> The case evoked discussions of whether Ong'wen was more victim than perpetrator within the hospices of the LRA.

### **2.2 The LRA**

The LRA, formed and led by Joseph Kony, is a rebel faction that intended to bring the territory of Uganda under Kony. It has perpetrated numerous atrocities since its inception including murder, rape, genocide and other

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Post 2001) <https://www.washingtonpost.com/archive/politics/2001/06/09/rwandan-nuns-jailed-in-genocide/fce3308b-3e6e-4784-8490-0887f69c7a39/>

<sup>15</sup> Andrew Osborn, *Belgium puts nuns in docks over genocide*, (The Guardian 2001) <https://www.theguardian.com/world/2001/apr/17/warcrimes#:~:text=The%20two%20Benedictine%20nuns%2C%20Sister,dock%20by%20two%20other%20accuse%20>

<sup>16</sup> Ibid

<sup>17</sup> *The Prosecutor v. Dominic Ongwen* ICC-02/04-01/15

heinous crimes.<sup>18</sup> Dominic Ongwen was abducted as a child, and indoctrinated over the next half decade into the ways of the LRA through fear, mysticism, brainwashing, and constant threats of violence.<sup>19</sup> Other males were recruited in a similar manner and would end up serving the LRA as soldiers and junior commanders.<sup>20</sup>

Similarly, girls and young women were abducted and forced to serve as wives, cooks and sex slaves of the LRA troops.<sup>21</sup> Among them were women that rose up the ranks to command respect only subordinate to Kony himself. They also stayed with the young abductees when the male troops went out for their raids and military operations inculcating them into the LRA's way of life.<sup>22</sup>

This backdrop evokes surprise as to why to-date, only male members of the LRA, most of whom were abducted were treated as perpetrators while their female counterparts are viewed as victims. It evokes the question as to why Dominic Ongwen and other male abductees are to spend the remainder of their lives languishing behind bars when their accomplices being their wives, either go free, tour the world amassing wealth from book sales, interviews

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<sup>18</sup> Julian Borger, *Q&A: Joseph Kony and the Lord's Resistance Army*, (The Guardian 2012) <https://www.theguardian.com/world/2012/mar/08/joseph-kony-lords-resistance-army> Accessed 12th February 2021

<sup>19</sup>JRP, *Complicating Victims and Perpetrators in Uganda: On Dominic Ongwen*, (JRP Field Note 7 2008) [http://justiceandreconciliation.com/wp-content/uploads/2008/07/JRP\\_FN7\\_Dominic-Ongwen.pdf](http://justiceandreconciliation.com/wp-content/uploads/2008/07/JRP_FN7_Dominic-Ongwen.pdf) Accessed 12th February 2021

<sup>20</sup> Anonymous, *Should child soldiers be prosecuted for their crimes?*, (The New Humanitarian, 2011) <https://www.thenewhumanitarian.org/2011/10/06/should-child-soldiers-be-prosecuted-their-crimes> Accessed 12th February 2021

<sup>21</sup> JRP, *Complicating Victims and Perpetrators in Uganda: On Dominic Ongwen*, (JRP Field Note 7 2008) [http://justiceandreconciliation.com/wp-content/uploads/2008/07/JRP\\_FN7\\_Dominic-Ongwen.pdf](http://justiceandreconciliation.com/wp-content/uploads/2008/07/JRP_FN7_Dominic-Ongwen.pdf) Accessed 12th February 2021

<sup>22</sup> Anonymous, *Dominic Ongwen - from child abductee to LRA rebel commander*, (BBC News 2021) <https://www.bbc.com/news/world-africa-30709581>, Accessed 12th February 2021

and talks,<sup>23</sup> when both were taken under similar circumstances and are equally culpable for the offences committed by the LRA with their roles as aiders, abettors or accomplices.

### **2.3 Adjudication LRA-related crimes: practice and opinions**

Different justifications have been given by courts, scholars and stakeholders for the prosecution or lack thereof of LRA members and combatants including;

#### **2.3.1 The extent of involvement**

Accounts have been advanced that the men have been directly involved in the perpetration of crimes such as executing killings, tortures, and destroying houses whereas their female counterparts only performed domestic and conjugal duties, and were never part of the atrocities as they were left behind in camps while the atrocities were perpetrators.<sup>24</sup>

The Rome Statute assigns criminal responsibility not only to perpetrators of crimes but also those who aid and abet in the commission or attempted commission of the crimes.<sup>25</sup> This means that even those who do not commit the actual crimes are as culpable as the perpetrators. This provided that they act with the intention of assisting the perpetrators in committing crime or in the knowledge that the perpetrators intend to commit a crime.<sup>26</sup> The women's performance of domestic duties ensured that the militants remained

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<sup>23</sup> Anonymous, *My husband the warlord: an extract from the memoir of Joseph Kony's wife*, (The Guardian 2015) <https://www.theguardian.com/world/2015/dec/22/joseph-kony-lra-book-evelyn-amony-memoir-extract>, Accessed 12th February 2021 ; see also Anonymous, *Florence Ayot, "My children are always reminded that their father is a notorious rebel commander*, (The New Humanitarian 2012) <https://www.thenewhumanitarian.org/report/95645/uganda-florence-ayot-my-children-are-always-reminded-their-father-notorious-rebel-commander> , Accessed 12th February 2021

<sup>24</sup> Anonymous, *My husband the warlord: an extract from the memoir of Joseph Kony's wife*, (The Guardian 2015) <https://www.theguardian.com/world/2015/dec/22/joseph-kony-lra-book-evelyn-amony-memoir-extract>, Accessed 12th February 2021

<sup>25</sup> Rome statute of the International Criminal Court 1998, Art 25 (3)(c)

<sup>26</sup> Ibid, Art 25 (3)(d)

fed and energized to perform the atrocities. They also nursed the injured combatants back to health as well as helped carry and nurse children who had been abducted by the LRA, just as Ong'wen was carried around for his first few weeks with the LRA.<sup>27</sup> The women also helped inculcate younger girls in the group, preparing them to be wives of the soldiers<sup>28</sup>. All these acts meet the threshold under the Rome Statute for aiding and abetting, adorning them with similar liability over the crimes.

### 2.3.2 The fear factor

It has been advanced that all the acts performed and the cooperation exhibited by the girls and women abducted were coerced by through fear and a threat to harm.<sup>29</sup> This paints a picture that abducted females were disproportionately vulnerable compared to their male counterparts, something that is contrary to proven reality.<sup>30</sup>

It has been demonstrated that fear was dished out equally among all abductees regardless of gender, and threats of violence as well as actual violence metered unto males as well.<sup>31</sup> During the inculcation period, the males were forced to kill and mutilate at gunpoint, rendering them similarly slaves of the LRA.<sup>32</sup> This fear persisted long after the indoctrination.

Both genders were thus equally privy to the fear evoked by the LRA and performed the acts or duties they did either to please Kony or gain his favour

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<sup>27</sup> JRP, *Complicating Victims and Perpetrators in Uganda: On Dominic Ongwen*, (JRP Field Note 7 2008) [http://justiceandreconciliation.com/wp-content/uploads/2008/07/JRP\\_FN7\\_Dominic-Ongwen.pdf](http://justiceandreconciliation.com/wp-content/uploads/2008/07/JRP_FN7_Dominic-Ongwen.pdf) Accessed 12th February 2021

<sup>28</sup> Ibid

<sup>29</sup> J. Kelly, L. Branham, L. & M.R. Decker, M.R, *Abducted children and youth in Lord's Resistance Army in Northeastern Democratic Republic of the Congo (DRC): mechanisms of indoctrination and control*. (Conflict & Health, 2016) **10**, 11

<sup>30</sup> Ibid

<sup>31</sup> Anonymous, Florence Ayot "My children are always reminded that their father is a notorious rebel commander", (The New Humanitarian 2012) <https://www.thenewhumanitarian.org/report/95645/uganda-florence-ayot-my-children-are-always-reminded-their-father-notorious-rebel-commander> , Accessed 12th February 2021

<sup>32</sup> Ibid

to improve their chances of survival, or under the threat of death or grievous harm.

Intention to carry out a crime or to cause the resultant consequences, and knowledge of the likely consequences that one's conduct may cause, form the mental element required for criminal responsibility.<sup>33</sup> This there means that in the absence of this mental element, perpetrators cannot be criminally liable. The fear and coercion experienced by both male and females by the LRA therefore voided their criminal responsibility. Both genders involved should thus be spared from criminal conviction. In practice, only the female ex-LRA members are treated as victims and offered rehabilitation as their male counterparts are prosecuted for international crimes, both locally and at the ICC.

### **2.3.2 The choice to escape**

It has been advanced that Dominic Ong'wen and other male combatants on various occasions had the opportunity to escape but instead chose to stay with Kony.<sup>34</sup> It was similarly suggested by the ICC that these combatants were males who after many years in the jungle new the terrain and could have easily absconded.<sup>35</sup>

The fear used by Kony, encompassing 'mystical powers', which his brainwashed followers genuinely believed he possessed played a role in preventing both males and females from escaping from the camp.<sup>36</sup> They had also witnessed people who had attempted to escape being killed or mutilated. Ong'wen recalled having been forced skin alive a third abductee with whom he had tried to escape.<sup>37</sup> Assuming that his fear affected one gender more would be unfair because the fear of impending harm is not gender specific

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<sup>33</sup> Rome statute of the International Criminal Court 1998, Art 30

<sup>34</sup> *The Prosecutor v. Dominic Ongwen* ICC-02/04-01/15

<sup>35</sup> Ibid

<sup>36</sup> Anonymous, *Dominic Ongwen - from child abductee to LRA rebel commander*, (BBC News 2021)

<https://www.bbc.com/news/world-africa-30709581>, Accessed 12th February 2021

<sup>37</sup> Ibid

and can affect someone's action or inaction regardless of their ability to maneuver the forests.

In addition, the women and girls left behind when the troops went out for raids and expeditions for extended periods at a time,<sup>38</sup> had similar opportunity to flee. Having traversed the wilderness with the troops, they also had an idea of the routes and paths to the nearest villages, outposts and to rescue.

Another rebuttal of this position is the simple fact that as some of Kony's male troops fled and surrendered to authorities, sometimes accompanied by females, some women stayed with the LRA.<sup>39</sup>

## **2.4 Conclusion**

It is clear from the aforementioned that both the men and women abducted by the LRA were subjected to similar conditions which encompassed the same levels of threats and fear. They are also similarly implicated in the same crimes despite their different degrees of participation, all of which make them legally culpable for committing international crimes.

## **3.0 Women only treated as accomplices**

Of the forty-four(44) people who have been indicted of international crimes by the ICC, only one is female.<sup>40</sup> Simone Gbagbo was indicted alongside her husband for crimes against humanity.<sup>41</sup> This is owing to her position to the proximity her husband's regime and her role in co-creation of policies that

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<sup>38</sup> Anonymous, *My husband the warlord: an extract from the memoir of Joseph Kony's wife*, (The Guardian 2015) <https://www.theguardian.com/world/2015/dec/22/joseph-kony-lra-book-evelyn-amony-memoir-extract>, Accessed 12th February 2021

<sup>39</sup> Anonymous, *My husband the warlord: an extract from the memoir of Joseph Kony's wife*, (The Guardian 2015) <https://www.theguardian.com/world/2015/dec/22/joseph-kony-lra-book-evelyn-amony-memoir-extract>, Accessed 12th February 2021

<sup>40</sup> Sarah J Goodman, *The Effectiveness of the International Criminal Court: Challenges and Pathways for Prosecuting Human Rights Violations*, (Inquiries Journal 2020) Vol. 2 No 9

<sup>41</sup> *The Prosecutor v Simone Gbagbo* ICC-02/11-01/12

resulted in the commission of the crimes. She was however locally tried unlike her husband who was handed over to the ICC for prosecution, despite being accused for committing the same acts<sup>42</sup>

The bias in the treatment of males demonstrated in Simone Gbagbo's case pales in comparison with the treatment of Isabella dos Santos, the daughter of Angola's former president Eduard dos Santos. Although it can be demonstrated that her deliberate actions, albeit with her father's initial assistance led to her irregular enrichment, she is still viewed as a beneficiary of her father's corrupt regime.<sup>43</sup> Dos Santos stands accused irregularly enriching herself while majority of Angolans live in poverty.<sup>44</sup> The only repercussions she has suffered are some of her foreign held investments being seized and accounts frozen. Angolan authorities are yet to issue an international arrest warrant for her arrest and subsequent prosecution.<sup>45</sup>

This selective approach effecting justice against women implicated in committing international and transnational crimes has resulted in women not facing the full brunt of the law, as their cases are determined from a perspective of being chance accomplices of male counterparts despite having played an equal or even greater role in the related crime, and given arguably more favourable treatment than their counterparts.

## **4.0 Conclusion and recommendations**

### **4.1 Conclusion**

It is clear from the aforesaid, that the current international criminal law regime is biased towards men, and skewed towards the permissible disregard

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<sup>42</sup> Moodley, Kiran (2015-03-10). "[Simone Gbagbo, former Ivory Coast first lady, sentenced to 20 years in prison](#)". *The Independent*.

<sup>43</sup> Kerry A. Dolan and Rafael Marques de Morais., *Daddy's Girl: How An African 'Princess' Banked \$3 Billion In A Country Living On \$2 A Day*. (Forbes 2013) <https://www.forbes.com/sites/kerryadolan/2013/08/14/how-isabel-dos-santos-took-the-short-route-to-become-africas-richest-woman/?sh=304ea90545f5>

<sup>44</sup> Ibid

<sup>45</sup> Anonymous, Angola mulling arrest warrant for Isabel dos Santos – prosecution, (News 24 2020)

of female perpetrators unless they are implicated in extreme acts of crime. This approach is unfair considering men have been convicted of even the lowest degrees of complacency in conduct with regards to the said crimes. The application of the law has also been biased towards men resulting in an unequal rate of convictions and indictments which do not truly reflect the extent of participation of both genders in the commission of international and transnational crimes.

## **4.2 Recommendations**

Going forward, legal regimes should be revised to eliminate leeway through which one gender can be erroneously allowed to escape the full repercussions of their criminal conduct under the guise of victimhood, or being merely an accomplice. The application of the laws should also be strictly uniform regardless of gender.

Some of the ways of achieving this could be through a wholesome approach at the prosecution of international and transnational crimes. This can be done in association with an objective presumption-free approach at investigations into the crimes.

### **4.2.1 Wholesome approach:**

This approach simply refers to the scenario where the actual perpetrators of the crimes, their aiders as well as their abettors are assigned equally attention and burden for their crimes. As mentioned earlier, the Rome Statute already recognises aiders and abettors as being equally liable for the crime as the actual perpetrator,<sup>46</sup> in practice however, this is not always the case. In the case of the LRA for instance, women were primarily viewed as victims<sup>47</sup> and

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<sup>46</sup> Rome statute of the International Criminal Court 1998, Art 25 (3)(c)

<sup>47</sup> Anonymous, *My husband the warlord: an extract from the memoir of Joseph Kony's wife*, (The Guardian 2015) <https://www.theguardian.com/world/2015/dec/22/joseph-kony-lra-book-evelyn-amony-memoir-extract>, Accessed 12th February 2021 ; see also Anonymous, *Florence Ayot, "My children are always reminded that their father is a notorious rebel commander*, (The New Humanitarian 2012) <https://www.thenewhumanitarian.org/report/95645/uganda-florence-ayot-my-children-are-always-reminded-their-father-notorious-rebel-commander> , Accessed 12th February 2021



therefore not probed as a suspect would have been. The lenses should be lifted and a new approach where every suspect who is potentially guilty, receives an equal amount of attention as their counterparts.

#### **4.2.2 Presumption-free**

The presumption of innocence until one is proven guilty until one's complicity in a crime is established by a legitimate tribunal of good standing is the hallmark of justice that has been embedded in numerous constitutions the world over.<sup>48</sup> Kenya<sup>49</sup> and South Africa's<sup>50</sup> constitutions are but some of the few countries that have enshrined the right in their respective constitutions. The right ensures that a person has a right to fair hearing before the truth is established. Laudable as it may be, the right can be counterproductive if selectively applied to the detriment of some suspects. For instance, when it is automatically assumed that all women and persons under eighteen are victims or acted out of coercion, and focus only placed on the grown men involved in a crime, a miscarriage of justice may be implemented as equally guilty women and young adults might escape prosecution as the wrath and full glare of the law is directed towards men who are presumed to be the 'expected' architects of the various crimes.

#### **4.2.3 Ramifications**

The use of either approach or a blend of the two would ensure that a comprehensive prosecution of criminalities is undertaken. An unbiased approach in the investigation and prosecution of crimes where every person is presumably innocent and suspects not given biased leases on evading culpability will result in a scenario where all the contributors to the crimes are equally prosecuted in their own right. Where all responsible persons are held accountable for their illegal conduct, rehabilitation becomes more efficacious as it will be targeted to all responsible individuals.

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<sup>48</sup> Christopher Moore, *The Law Society of Upper Canada and Ontario's lawyers, 1797–1997*. (University of Toronto Press 1997)

<sup>49</sup> Constitution of Kenya 2010, Art 41

<sup>50</sup> Constitution of South Africa 1997, Art 35

Furthermore, holding all responsible parties accountable will prevent injustice as the legal burden will be proportionally distributed among all the involved parties, preventing the disproportionate punishment and vilification of a few individuals in the process. It will also provide a greater sense of retribution for all the victims of the crimes as no perpetrator will fall from focus as a result of a limited prosecutorial scope. Ultimately, a greater sense of justice will be achieved for the perpetrators and the victims alike, enhancing the efficacy and credibility of the concerned legal regimes.

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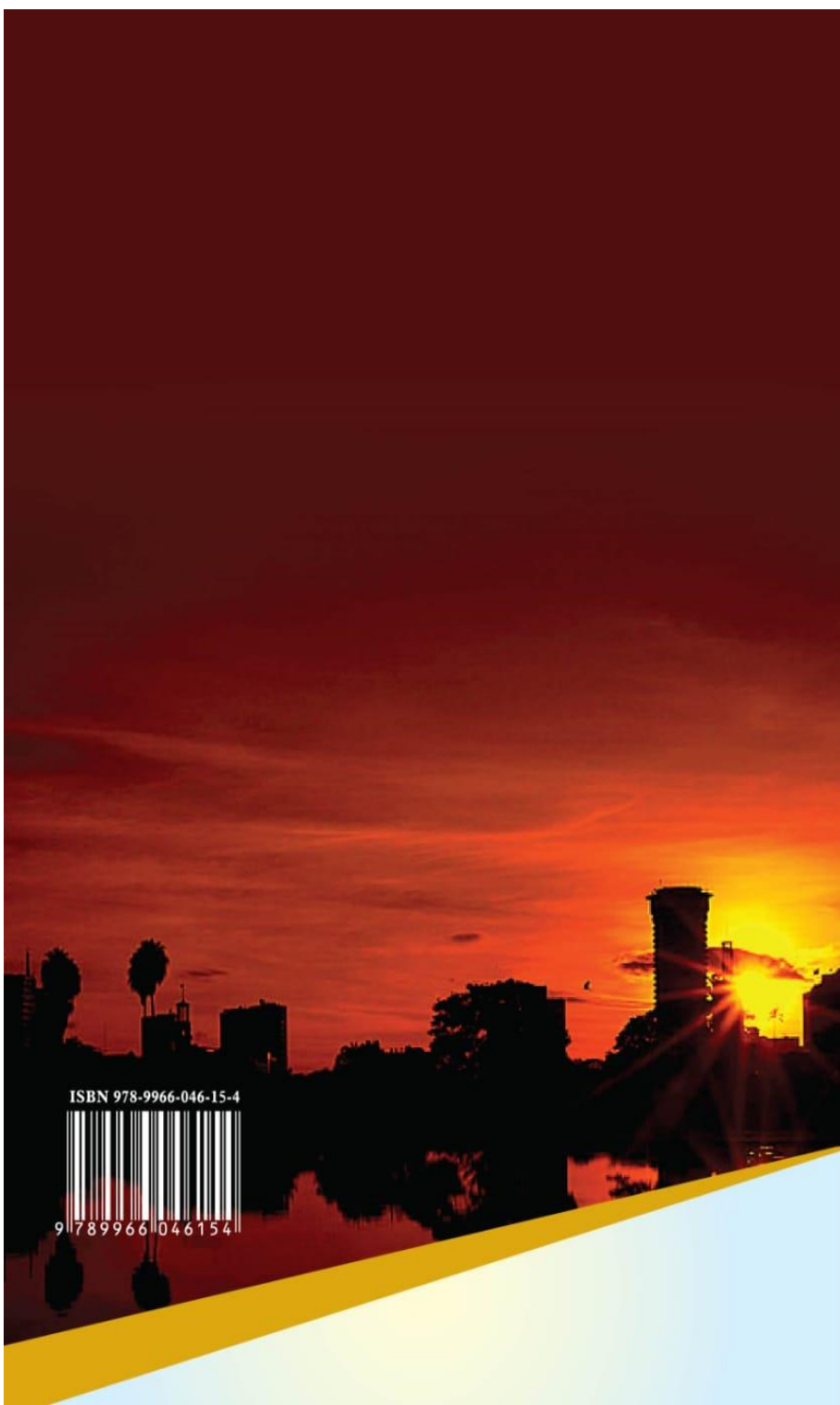
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