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## **Fostering the Principles of Natural Resources Management in Kenya**

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### ***Abstract***

*International environmental law mainly consists of legal principles that offer guidelines on how states are to carry out environmental and natural resource management. They also offer the minimal content on their domestic policy and legal instruments. This paper offers a detailed examination of these principles and how their adoption and full implementation within the context of Kenya can be fostered.*

### **1. Introduction**

This paper examines some of the principles of natural resource management and their application in Kenya. These principles are recognized in the Constitution of Kenya, 2010 and in various international environmental instruments. Understanding these principles at the outset will enable one to appreciate existing legal regimes on natural resources in Kenya vis-à-vis the international regimes and their meeting points. The Constitution and consequently sectoral laws on natural resources have translated these principles into legally binding norms. The Court, in *Amina Said Abdalla & 2 others v County Government of Kilifi & 2 others* [2017] eKLR<sup>1</sup>, rightly observed that ‘The Environmental Law is principally concerned with ensuring the sustainable utilization of natural resources according to a number of fundamental principles developed over the years through both municipal and international processes’.<sup>2</sup>

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<sup>1</sup> *Amina Said Abdalla & 2 others v County Government of Kilifi & 2 others* [2017] eKLR, ELC Case No. 283 OF 2016.

<sup>2</sup> *Ibid*, para. 17.

At the international level, these principles include the principle on transboundary environmental damage, sustainable development, sustainable use, prevention principle, precautionary principle, polluter pays principle, reasonable use and equitable utilization, international cooperation in management of natural resources and common but differentiated responsibilities.<sup>3</sup> These principles are now applicable to Kenya by virtue of Articles 2 (5) and (6) of the Constitution which domesticates the general rules of international law and any treaty or convention ratified by Kenya.<sup>4</sup>

In addition, to the international principles, the national values and principles of governance outlined in Article 10 of the Constitution are relevant in natural resource management.<sup>5</sup> These include devolution of power, democracy and participation of the people, equity, social justice, protection of the marginalized, good governance, transparency and accountability and sustainable development.<sup>6</sup> Further, traditional ecological knowledge of communities in Kenya on the management of natural resources also applies.<sup>7</sup> Such traditional and cultural principles include traditional dispute resolution mechanisms.<sup>8</sup>

## **2. Sustainable Development**

The concept of sustainable development predates the 1972 Stockholm Conference and can be traced back to traditional communities and ancient

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<sup>3</sup> See generally, Soto, M.V., "General Principles of International Environmental Law." *ILSA Journal of International & Comparative Law* 3, no. 1 (1996): 193-209; See also Sands, P. and Peel, J., *Principles of international environmental law*. Cambridge University Press, 2012; See also 'Chapter 3: The Principles Of International Environmental Law', available at [https://edisciplinas.usp.br/pluginfile.php/520713/mod\\_resource/content/1/Cap.3\\_International%20Environmental%20Law%20%281%29.pdf](https://edisciplinas.usp.br/pluginfile.php/520713/mod_resource/content/1/Cap.3_International%20Environmental%20Law%20%281%29.pdf) [Accessed on 5/1/2019].

<sup>4</sup> Ratification of Treaties; See also the *Treaty Making and Ratification Act*, 2012, Laws of Kenya.

<sup>5</sup> Art.10 (2), Constitution of Kenya.

<sup>6</sup> *Ibid*

<sup>7</sup> S. 3 (5) (b) of EMCA, Act No. 8 of 1999.

<sup>8</sup> See Art.159 (2) (c) and 67 (2) (f), Constitution of Kenya.

civilizations.<sup>9</sup> It seeks to limit environmental damage arising from anthropogenic activities and to lessen the depletion of non-renewable resources and pollution of the environment.<sup>10</sup> The *Brundtland Commission*<sup>11</sup> defined sustainable development as, “*development that meets the needs of the present without compromising the ability of future generations to meet their own needs.*”<sup>12</sup> Under section 2 of Environmental Management and Co-ordination Act, 1999<sup>13</sup> (EMCA), sustainable development is defined as development that meets the needs of the present generation without compromising the ability of future generations to meet their needs by maintaining the carrying capacity of the supporting ecosystems. Essentially, sustainable development seeks to address *intra-generational equity*, that is equity among present generations, and *inter-generational equity*, that is equity between generations.<sup>14</sup>

Sustainable development is also linked to the right to development, human rights and good governance, when it is described as sustainable human development. Sustainable human development focuses on material factors such as meeting basic needs and non-material factors such as rights and participation. It also seeks to achieve a number of goals to wit, poverty

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<sup>9</sup> Per Judge Christopher Weeramantry in *Hungary v Slovakia*, 1997 WL 1168556 (I.C.J-1997).

<sup>10</sup> Cullet P., *Differential Treatment in International Environmental Law and its Contribution to the Evolution of International Law* (Aldershot: Ashgate, 2003), pp.8 - 9.

<sup>11</sup> The Brundtland Commission was established by the United Nations in 1983 to address the problem of deterioration of natural resources. Its mission was to unite countries to pursue sustainable development together. The Commission was named after its chairperson, Gro Harlem Brundtland, a former Prime Minister of Norway. It was officially dissolved in 1987 after releasing a report entitled *Our Common Future*, also known as the *Brundtland Report*. This report defined the meaning of the term Sustainable Development.

<sup>12</sup> World Commission on Environment and Development, *Our Common Future*, GAOR, 42<sup>nd</sup>Sess, Supp. No. 25, UN Doc, A/42/25 (1987), p.27; See also the Rio Declaration of 1992, UN Doc. A/CONF.151/26 (Vol. I).

<sup>13</sup> Environmental Management and Co-ordination Act, No. 8 of 1999, Laws of Kenya.

<sup>14</sup> Weiss, E.B., “In Fairness to Future Generations and Sustainable *Development*,” *American University International Law Review*, Vol.8, 1992.

reduction, promotion of human rights, promotion of equitable opportunities, environmental conservation and assessment of the impacts of development activities.<sup>15</sup> Vision 2030 adopts sustainable human development as it seeks to address the economic, social and political pillars. It thus fosters both material factors and non-material factors.<sup>16</sup> Sustainable human development is, therefore, inextricably linked to people's livelihoods, and is thus requisite in moving towards environmental justice.

In the *Case Concerning the Gabčíkovo-Nagymaros Project*,<sup>17</sup> Judge Weeramantry<sup>18</sup> rightly opined that sustainable development reaffirms the need for both development and environmental protection, and that neither can be neglected at the expense of the other. He considered sustainable development to be a '*principle with normative value*' demanding a balance between development and environmental protection, and as a principle of reconciliation in the context of conflicting human rights, that is the *human right to development* and the *human right to protection of the environment*. Sustainable

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<sup>15</sup> See generally Amartya S., *Development as Freedom* (Anchor Books, New York, 1999), pp.35-53; See also UNDP, *Human Development Report 2011, The Real Wealth of Nations: Pathways to Human Development*, (Palgrave Macmillan Houndmills, Basingtoke, Hampshire, 2011), p. (i)-12. This report defines sustainable human development as *the expansion of the substantive freedoms of people today while making reasonable efforts to avoid seriously compromising those of future generations*.

<sup>16</sup> Kenya Vision 2030, Government of Kenya, 2007.

<sup>17</sup> The Gabčíkovo–Nagymaros Project relates to a large damming project on the [Danube](#) River. This river is classified as an international waterway as it passes through or touches the borders of ten European countries before emptying into the Black Sea. The Project was specific to the part of the river passing through Hungary and Slovakia. It was initiated by the Budapest Treaty of 1977 between Slovakia and Hungary and aimed at preventing floods, improving river navigability and producing clean electricity for the two countries. Only a part of the project was completed in [Slovakia](#), under the name Gabčíkovo Dam. Hungary suspended the Project in its territory and then later tried to terminate it citing environmental and economic concerns. Slovakia then proceeded with an alternative solution, called "Variant C", which involved diverting the river. These developments caused an international dispute between the two countries and they turned to the International Court of Justice for redress.

<sup>18</sup> Judge of the International Court of Justice (ICJ).

development reconciles these rights by ensuring that the right to development tolerates the ‘*reasonable demands of environmental protection*.’<sup>19</sup>

Previously in Kenya, the debate on sustainable development put a lot of emphasis on environmental protection to meet man’s needs (an anthropogenic approach) and ignored the need to protect the environment for its intrinsic value (an ecological approach). Such was the case in the mining industry where great emphasis was placed on the need to regulate the mining industry for extraction purposes to fulfill human needs without giving due attention to ecological issues.<sup>20</sup> However, the current *Mining Act 2016*<sup>21</sup> has made attempts at striking a balance between these two potentially conflicting approaches to conservation and management. For instance, the Act requires investors or potential investors in this sector to carry out certain measures geared towards environmental protection and conservation that result in approved environmental impact assessment report, a social heritage impact assessment and/or environmental management plan, where required.<sup>22</sup>

Although the ecological approach has been incorporated in the legal framework<sup>23</sup> its implementation is bound to face great challenges as exemplified by the conservation of the Mau ecosystem and the protection of the rights of the Lamu fishermen in the LAPSSET Project.<sup>24</sup>

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<sup>19</sup> *Hungary v Slovakia*, 1997 WL 1168556 (I.C.J-1997).

<sup>20</sup> Munyiri, S.K., “Policy Position on the Proposed Amendments of the Mining and Minerals Bill 2009,” Kenya Chamber of Mines, 2010.

<sup>21</sup> *Mining Act*, No. 12 of 2016, Laws of Kenya.

<sup>22</sup> See *Mining Act*, 2016, sec. 30(2); 42(2); 47(2); 72(3); 77(1); 78; 82(1)(e); 86(3)(c); 89(d); 98(2); 101(2)(i); 103(c); 106(i); 109(c); 115(c); 117(2) (d); 127(b); 133(b); 140(c); 144(4)(b); Part XI (Health, Safety And Environment, secs. 176-181); 200; 221(1)(3)(a); 223(2)(h); 225(5).

<sup>23</sup> Art.10 (2) (d), 42, 69 and 70, Constitution of Kenya.

<sup>24</sup> There has also been massive destruction of mangrove forests in the LAPSSET project in Lamu. See Mohamed Ali Baadi and others v Attorney General & 11 others[2018] eKLR, Petition 22 of 2012; Business & Human Rights Resource Centre, “Kenya: Court declares construction of Lamu port violates indigenous community’s right to information, healthy environment & culture, orders compensation,” May, 2018. Available at <https://www.business-humanrights.org/en/kenya-court-declares-construction-of-lamu-port-violates-indigenous-communitys-right-to-information->

Courts in Kenya have applied the sustainable development principle as evidenced in the case of *Peter K. Waweru v Republic*,<sup>25</sup> where the court stated that intragenerational equity involves equality within the present generation, such that each member has an equal right to access the earth's natural and cultural resources. Towards sustainable development, courts are key actors in terms of developing environmental jurisprudence that protects environmental resources not only for the benefit of human beings but also for conservation purposes.<sup>26</sup> Similarly, the role of the public in decision-making processes is necessary in the sustainable management, protection and conservation of the environment.<sup>27</sup>

### 3. Sustainable Use

In order to ensure sustainable consumption and production patterns, SDG Goal 12.2 requires that by 2030, all States should achieve the sustainable management and efficient use of natural resources. The aim is to protect the planet from degradation, including through sustainable consumption and production, sustainably managing its natural resources and taking urgent action on climate change, so that it can support the needs of the present and future generations.<sup>28</sup>

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*healthy-environment-culture-orders-compensation* [Accessed on 8/1/2019]; Lwanga, C., 'Court orders State to pay Lamu fishermen Sh1.7bn in LAPSSET compensation,' Daily Nation, Tuesday, May 1, 2018, available at <https://www.businessdailyafrica.com/news/Court-orders-State-to-pay-Lamu-fishermen-Sh1-7bn-over-Lapsset/539546-4538748-5wslscz/index.html> [ accessed on 8/1/2019].

<sup>25</sup> *Peter K. Waweru v Republic*, [2006] eKLR.

<sup>26</sup> See generally, Stone C., "Should Trees Have Standing?" *South California Law Review*, Vol. 45, 1972, p. 450. Stone posits that 'until the rightless thing receives its rights, we cannot see it as anything but a thing for the use of us.' We have to value our natural resources by granting them rights as suggested by Stone so that they can benefit the present and future generations.

<sup>27</sup> Art.10 (2) (a) and 69 (1) (d) of the Constitution.

<sup>28</sup> Preamble, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1.

Sustainable use refers to the need to reduce and eliminate unsustainable patterns of production and consumption.<sup>29</sup> It is described as use that in any way and rate does not lead to long-term decline of biological diversity, thereby maintaining its potential to meet the needs of present and future generations.<sup>30</sup> It requires that present use of the environment and natural resources does not compromise the ability of future generations to use these resources or degrade the carrying capacity of supporting ecosystems.<sup>31</sup> It is a principle that is applied to determine the permissibility of natural resource exploitation<sup>32</sup> and is central to the principle of sustainable development.

Sustainable use of natural resources is recognized in Article 69 of the Constitution where the State is obliged to ensure the sustainable exploitation, utilization, management and conservation of the environment and natural resources.<sup>33</sup> Sustainable use requires governments and public authorities to ensure *strong sustainability* as opposed to *weak sustainability*. Strong sustainability views the environment as offering more than just economic potential. She opines that the environment offers services and goods that cannot be replaced by human-made wealth and that future generations should not inherit a degraded environment, no matter how many extra sources of wealth are available to them.<sup>34</sup> Strong sustainability is preferable to weak sustainability for reasons such as ‘non-substitutability’,<sup>35</sup> ‘uncertainty’<sup>36</sup> and ‘irreversibility.’<sup>37</sup> Weak sustainability makes a wrong assumption that future

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<sup>29</sup> Principle 8 of the Rio Declaration.

<sup>30</sup> Art.2, Convention on Biological Diversity.

<sup>31</sup> S. 2 of Act, No. 8 of 1999.

<sup>32</sup> See Birnie, P., Boyle, A. and Redgwell, C., ‘International Law and the Environment,’ (3rd ed., Oxford 2009).

<sup>33</sup> Ar. 69 (1) (a).

<sup>34</sup> Beder, S., “Costing the Earth: Equity, Sustainable Development and Environmental Economics,” *New Zealand Journal of Environmental Law*, Vol.4, 2000, pp.227-243.

<sup>35</sup> *Ibid* The argument is that there are many environmental assets for which there are no substitutes, such as the ozone layer, tropical forests, wetlands, etc.

<sup>36</sup> *Ibid* It has been said that scientific knowledge about the functions of natural systems and the possible consequences of depleting and degrading them is uncertain.

<sup>37</sup> *Ibid* The depletion of natural capital can lead to irreversible losses such as species and habitats, which cannot be recreated using man-made resources.



generations will be adequately compensated for any loss of environmental amenity by having alternative sources of wealth creation.<sup>38</sup>

Sustainable use, therefore, puts fetters in the utilization of natural resources. For example, not all forms of resource use will be permissible since certain forms of exploitation may lead to destruction of environmental resources with no substitutes, thus limiting the enjoyment of these resources by future generations. Moreover, uncertainty about the role of certain components of the environment and consequences of depletion and irreversible losses of species may militate against unsustainable use of natural resources in the Kenyan context. It is yet to be seen how this principle will be implemented in relation to resources such as forests where there are strong ancestral claims by local communities and the need to conserve catchment areas by the state.

#### **4. Polluter Pays Principle**

The polluter pays principle provides that the costs of pollution should be borne by the person responsible for causing the pollution.<sup>39</sup> It is one of the principles that is to guide Kenyan courts in enforcing the right to a clean and healthy environment in section 3 (5) (e) of EMCA. It is an important tool in natural resources management as it aims at preventing harm to the environment using a liability mechanism. It is defined in section 2 of EMCA as the cost of cleaning up any element of the environment damaged by pollution, compensating victims of pollution, cost of beneficial uses lost as a result of an act of pollution and other costs that are connected with or incidental to the foregoing, is to be paid or borne by the person convicted of pollution under this Act or any other applicable law.<sup>40</sup>

It is evident that the polluter of the environment must pay the cost of pollution abatement, the costs of environmental restoration and costs of compensating

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<sup>38</sup> *Ibid*

<sup>39</sup> Moutondo, E., "The Polluter Pays Principle," in *Industries and Enforcement of Environmental Law in Africa-Industry Experts Review Environmental Practice* (UNEP/UNDP Joint Project on Environmental Law and Institutions in Africa, 1997), p.43.

<sup>40</sup> S. 2 EMCA.

victims of pollution, if any.<sup>41</sup> The polluter pays principle promotes the right to a clean and healthy environment and gives appropriate remedies to victims of pollution.<sup>42</sup> In this way, the polluter pays principle is key in enhancing access to environmental justice.

It also acts as an economic policy tool by internalizing the costs of pollution as required by Principle 16 of the Rio Declaration. Principle 16 states that national authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the application that the polluter should in principle bear the cost of pollution with due regard to the public interest and without distorting international trade and investment.<sup>43</sup>

However, the application of the polluter pays principle in natural resource management is limited by the fact that not all forms of environmental damage can be remedied by means of the liability mechanism. For a liability mechanism to be effective, the polluter must be identified, damage must have occurred, and must be quantifiable and a causal link must be established between the damage and the polluter. The issue of causation and the difficulty of identifying the polluter to establish liability for environmental damage was noted in *Natal Fresh Produce Growers Association v. Agroserve (Pty) Ltd*,<sup>44</sup> where a South African court held that the manufacturer of herbicides was not liable since the use of hormonal herbicides anywhere in South Africa could not result in damage to fresh produce in Tala Valley. The effectiveness of the polluter pays principle is also reliant on the ability of the polluter to pay the

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<sup>41</sup> *Ibid*

<sup>42</sup> Moutondo, E., "The Polluter Pays Principle," in *Industries and Enforcement of Environmental Law in Africa-Industry Experts Review Environmental Practice*, *op. cit*, p. 43.

<sup>43</sup> Rio Declaration on Environment and Development 1992, A/CONF.151/26 (Vol. I).

<sup>44</sup> [1990] (4) SA 749.

costs of pollution.<sup>45</sup> This may limit its efficacy in natural resources management.

In Kenya, there are efforts aimed at preventing environmental pollution and environmental damage through the internalization of externalities. Section 108 of EMCA provides for environmental restoration orders which can be issued by NEMA to deal with pollution. Such an order may require the person to whom it is issued to restore the environment, prevent any action that would or is reasonably likely to cause harm to the environment, require payment of compensation and levy a charge for abatement costs. Likewise, a court can issue an environmental restoration order to address pollution with similar effects.<sup>46</sup> Section 25 (1) establishes the National Environment Restoration Fund consisting of fees or deposit bonds as determined by NEMA, and donations or levies from industries and other project proponents as contributions to the fund.<sup>47</sup> This fund acts as a supplementary insurance for the mitigation of environmental degradation, where the polluter is not identifiable or where exceptional circumstances require NEMA to intervene towards the control or mitigation of environmental degradation.<sup>48</sup>

It was one of the principles applied by the court in *Peter K. Waweru v Republic*.<sup>49</sup> In this case, the Applicants and the interested parties had been charged with the offences of discharging raw sewage into a public water source and the environment and failing to comply with the statutory notice from the public health authority. The Court observed that sustainable development has a cost element which must be met by the developers. The Court also held that the right to a clean and healthy environment was equivalent to the right to life which ought to be protected at whatever cost.

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<sup>45</sup> Moutondo, E., “The Polluter Pays Principle,” in “*Industries and Enforcement of Environmental Law in Africa-Industry Experts Review Environmental Practice*,” *op cit*.

<sup>46</sup> S. 111 of Act No. 8 of 1999.

<sup>47</sup> *Ibid*, S. 25 (2).

<sup>48</sup> *Ibid*, S. 25 (4).

<sup>49</sup> High Court of Kenya at Nairobi, Misc Civ. Applic. 118 of 2004, 2 March, 2006.

## 5. Public Participation

Public participation is a key aspect of natural resources management. It allows individuals to express their views on key governmental policies and laws concerning the environmental conditions in their communities.<sup>50</sup> The importance of public participation is the recognition that better decision-making flows from involving the public. It is now generally agreed that environmental problems cannot be solved by solely relying on technocratic and bureaucratic monopoly of decision-making.<sup>51</sup>

Public participation is defined as the process by which public concerns, needs and values are incorporated into governmental and corporate decision-making with the overall goal of better decisions that are supported by the public.<sup>52</sup> Some scholars have however given a broader definition by stating that, “*public participation includes organized processes adopted by elected officials, government agencies or other public or private sector organizations to engage the public in environmental assessment, planning, decision making, management, monitoring and evaluation.*”<sup>53</sup>

There are various definitions of public participation but the main aspects that come out clearly are that: public participation relates to administrative decisions and not decisions made by elected officials and judges. It involves an interaction between the agency and the people participating. In public participation, there is an organized process of involving the public so that they can have some level of impact or influence on the decisions being made.

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<sup>50</sup> Marianela, C., *et al*, *Environmental Law in Developing Countries: Selected Issues*, Vol. II, IUCN, 2004, p. 7.

<sup>51</sup> *Ibid*

<sup>52</sup> Creighton, J.L., *The Public Participation Handbook: Making Better Decisions through Citizen Involvement* (John Wiley & Sons, 2005), p.7.

<sup>53</sup> Dietz t. & Stern, P.C., (eds), *Public Participation in Environmental Assessment and Decision Making*, (National Academies Press, 2008), p.1; See also Ondrik, R. S., "Participatory approaches to national development planning," *Framework for Mainstreaming Participatory Development Processes into Bank Operations*, ADB (1999): 15. Available at [http://siteresources.worldbank.org/INTEASTASIAPACIFIC/Resources/226262-1143156545724/Brief\\_ADB.pdf](http://siteresources.worldbank.org/INTEASTASIAPACIFIC/Resources/226262-1143156545724/Brief_ADB.pdf) [Accessed on 8/1/2019].

According to some scholars, the definition of public participation excludes some kinds of participation that are legitimate components of a democratic society such as the electoral process, litigation and extra-legal protests.<sup>54</sup>

Public participation may be provided for in law through at least three legal mechanisms; entrenchment in the Constitution as part of the Bill of Rights; in Environmental Impact Assessments; and through direct *locus standi* for the public in environmental matters.<sup>55</sup> One of the national values and principles of governance entrenched in the Constitution is participation of the people.<sup>56</sup> The Constitution provides that the state should encourage public participation in the management, protection and conservation of the environment.<sup>57</sup> It goes a step further and imposes a duty on individuals to cooperate with the state organs and other persons in the protection and conservation of the environment.<sup>58</sup> This is also extended to the administration of county governments within the devolved system.<sup>59</sup>

Principle 10 of the Rio Declaration provides that environmental issues are best handled with the participation of all concerned citizens, at the relevant level. It further provides for access to information by the public. At the national level, each individual must have appropriate access to information concerning the environment that is held by public authorities, including information on

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<sup>54</sup> Creighton, J.L., *The Public Participation Handbook: Making Better Decisions through Citizen Involvement*, *op cit*, p.8.

<sup>55</sup> Angwenyi, A.N., 'An Overview of the Environmental Management and Coordination Act,' in Okidi, C.O., *et al*, (eds), *Environmental Governance in Kenya: Implementing the Framework Law* (East Africa Educational Publishers, 2008), p.30; See also URAIA, "What Is Public Participation?" Available at <http://uraia.or.ke/wp-content/uploads/2016/11/Citizen-Participation-BOOKLET.pdf> [Accessed on 8/1/2019].

<sup>56</sup> Art.10 (2) (a).

<sup>57</sup> Art.69 (1) (d).

<sup>58</sup> Art.69 (2).

<sup>59</sup> Republic of Kenya, *County Public Participation Guidelines*, (Ministry of Devolution and Planning & Council of Governors, January, 2016). Available at [http://devolutionasals.go.ke/wp-content/uploads/2018/03/County-Public-Participation\\_Final-1216-2.pdf](http://devolutionasals.go.ke/wp-content/uploads/2018/03/County-Public-Participation_Final-1216-2.pdf) [Accessed on 8/1/2019].

hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States must facilitate and encourage public awareness and participation by making information widely available.<sup>60</sup> Effective access to judicial and administrative proceedings, including redress and remedy, must also be provided. Public participation is, therefore, an essential principle in natural resources management. However, public participation is hampered by factors such as financial cost of engaging the public, time constraints, fear that participants may not be truly representative and belief that citizens lack knowledge of complex technical issues.<sup>61</sup> In Kenya today, as the size and scope of government continues to grow, decisions that have previously been made by elected officials in a political process are now being delegated by statute to technical experts in state agencies and constitutional commissions. The rationale is, therefore, to incorporate public values into decisions, improve the substantive quality of decisions, resolve conflicts among competing interests and build trust in institutions and educate and inform the public.<sup>62</sup> This is necessary because technocrats in these institutions are not directly elected by the people.

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<sup>60</sup> Report of the United Nations Conference on Environment and Development (Rio De Janeiro, 3-14 June 1992).

<sup>61</sup> Senach, S.L., 'The Trinity of Voice: The Role of Practical Theory in Planning and Evaluating the Effectiveness of Environmental Participatory Process,' in Depoe, S.D. *et al*, (eds), *Communication and Public Participation in Environmental Decision Making* (SUNY Press Ltd., 2004) 13, p.16.

<sup>62</sup> Creighton, J.L., *The Public Participation Handbook: Making Better Decisions Through Citizen Involvement, op cit*, p.20; See also Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi – 2015, pp.24-25; In the Matter of the National Land Commission [2015] eKLR, Advisory Opinion Reference 2 of 2014, para. 346. Mutunga, CJ (as he then was) observed that:

“ [341]Cases touching on the environment and natural resources have examined the duty placed upon State organs to consult the people, and to engage communities and stakeholders, before making decisions affecting the environment. These cases were decided before and after the 2010 Constitution was promulgated, and the Courts have held that State organs that made or make decisions without consulting or engaging the people, the community or other interested stakeholders, acted or act outside their powers- and such actions stand to be quashed (see *Meza Galana and 3 Others v. AG*

### 5.1 Defining the ‘public’ in Public Participation

The ‘public’ in public participation refers to individuals acting both in their roles as citizens, as formal representatives of collective interest or affected parties that may experience benefit or harm or that otherwise choose to become informed or involved in the process.<sup>63</sup> The label ‘public’ is often used to refer to individual citizens or relatively unorganized groups of individuals but should be expanded to include the full range of interested and affected parties including corporations, civil society groups, technocrats and even the media.<sup>64</sup>

Four categories of the public must be considered when deciding whether or not the ‘public’ has been involved. These are: stakeholders who are organized groups that are or will be affected by or that have a strong interest in the outcome of the decision; the directly affected public who will experience positive or negative effects from the environmental decision; the observing public which includes the media and opinion leaders who may comment on the issue or influence public opinion; and the general public who are all

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*and 2 Others* HCCC No. 341 of 1993; [2007] eKLR, *Hassan and 4 Others v. KWS* [1996] 1 KLR (E&L) 214; *Mada Holdings Ltd t/a Fig Tree Camp v. County Council of Narok* High Court Judicial Review No. 122 of 2011; [2012] eKLR; and *Republic v. Minister of Forestry and Wildlife and 2 Others ex parte Charles Oduor Okello and 5 Others* HC Miscellaneous Application No. 55 of 2010).

[348] It is thus clear that the principle of the participation of the people does not stand in isolation; it is to be realised in conjunction with other constitutional rights, especially the right of access to information (Article 35); equality (Article 27); and the principle of democracy (Article 10(2)(a)). The right to equality relates to matters concerning land, where State agencies are encouraged also to engage with communities, pastoralists, peasants and any other members of the public. Thus, public bodies should engage with specific stakeholders, while also considering the views of other members of the public. Democracy is another national principle that is enhanced by the participation of the people.”

<sup>63</sup> Dietz & Stern (eds), *Public Participation in Environmental Assessment and Decision Making*, *op cit*, p.15.

<sup>64</sup> *Ibid*

individuals not directly affected by the environmental issue but may choose to be part of the decision making process.<sup>65</sup>

In *Hassan and 4 others v KWS*<sup>66</sup> the court described the public as “those entitled to the fruits of the earth on which the animals live” when stating that there was no express consent from the community allowing KWS to translocate the rare hirola antelope from their land. Further, in *Mada Holdings Ltd t/a Fig Tree Camp v County Council of Narok*,<sup>67</sup> the court gave a much wider description of the public by stating that it is “the individual who has sufficient interest in the issue over which the public body is exercising discretion, or where the exercise of that discretion is likely to adversely affect the interests of the individual or even where it is shown that the individual has a legitimate expectation to be consulted before the discretionary power is exercised.”<sup>68</sup>

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<sup>65</sup> *Ibid*, p.15.

<sup>66</sup> [1996] 1KLR (E&L) 214, p.215.

<sup>67</sup> HC Judicial Review No. 122 of 2011, [2012] eKLR.

<sup>68</sup> See also *In the Matter of the National Land Commission [2015] eKLR*, Advisory Opinion Reference 2 of 2014:

[352] The participation of the people is a constitutional safeguard, and a mechanism of accountability against State organs, the national and county governments, as well as commissions and independent offices. It is a device for promoting democracy, transparency, openness, integrity and effective service delivery. During the constitution-making process, the Kenyan people had raised their concerns about the hazard of exclusion from the State’s decision-making processes. The Constitution has specified those situations in which the public is assured of participation in decision-making processes. It is clear that the principle of public participation did not stop with the constitution-making process; it remains as crucial in the implementation phase as it was in the constitution-making process. It is further expounded in the County Government Act as well as the *Public Service Commission’s Guidelines for Public Participation in Policy Formulation*. The **Draft Public Participation Guidelines for County Government** are also important, as they reflect the constitutional and statutory requirement of public participation.

[353] I agree fully with the views of *Odunga J.* in the case of *Robert Gakuru*, that public participation is not an abstract notion and, on matters concerning



## 5.2 Dimensions of Public Participation

The dimensions of public participation are the boundaries within which the activity should fall for it to be properly termed as public participation.<sup>69</sup> It requires effective protection of the human right to hold and express opinions and seek, receive and impart ideas.<sup>70</sup> The Constitution protects the freedom of expression.<sup>71</sup> Public participation also requires the right of access to appropriate, comprehensible and timely information held by public

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land, State organs, the Ministry, and the NLC must breathe life into this constitutional principle, and involve the public in land management and administration; legislative plans and processes; and policy-making processes. This is clear from the terms of Article 10 of the Constitution, which requires these bodies to: (a) apply or interpret this Constitution; (b) enact, apply or interpret any law; or (c) make or implement public policy decisions bearing in mind the participation of the people, and the goals of democracy, and transparency.

[354] I would refer to the *Draft Public Participation Guidelines for County Governments*, which is of persuasive authority in this Advisory Opinion. It states that the importance of public participation includes to: strengthen democracy and governance; increase accountability; improve process, quality and results, in decision-making; manage social conflicts; and enhance process legitimacy. Although these are not the final guidelines, they bear similar objectives of public participation as those articulated in the Constitution, and in the County Governments Act. Finally, the Draft Guidelines provide conditions for meaningful public participation, such as: (i) clarity of subject-matter; (ii) clear structures and process on the conduct of participation; (iii) opportunity for balanced influences from the public in general; (iv) commitment to the process; (v) inclusive and effective representation; (vi) integrity; (vii) commitment to the value of public input; (viii) capacity to engage; (ix) transparency; and (x) considerations of the social status, economic standing, religious beliefs and ethnicity of the members of the public. These conditions are comparable to the constitutional values and principles of democracy, transparency, accountability and integrity.

<sup>69</sup> Dietz & Stern (eds), *Public Participation in Environmental Assessment and Decision Making*, *op cit*, p.14.

<sup>70</sup> UNEP, *Training Manual on International Environmental Law*, (UNEP, 2006), p.193.

<sup>71</sup> Art. 33.

institutions.<sup>72</sup> In *Meza Galana and 3 others v AG and 2 others*,<sup>73</sup> community representatives from Tana River District filed a suit against the defendants seeking, *inter alia*, a declaration that the legal notice declaring Tana Primate Reserve to be a national reserve to be quashed as it was not a valid notice. The court held that the legal notice was indeed not valid as the community had not been made aware of the decision to gazette the area as a national reserve and their views had not been sought before the decision was made.

The question of what constitutes public participation was also canvassed in the case of *British American Tobacco Ltd v Cabinet Secretary for the Ministry of Health & 5 others*<sup>74</sup>, the court stated that:

*“From these decisions and others that were cited before us by the parties’ advocates, it is clear that public participation is a mandatory requirement in the process of making legislation including subsidiary legislation. The threshold of such participation is dependent on the particular legislation and the circumstances surrounding the legislation. Suffice to note that the concerned State Agency or officer should provide reasonable opportunity for public participation and any person concerned or affected by the intended legislation should be given an opportunity to be heard. Public participation does not necessarily mean that the views given must prevail. It is sufficient that the views are taken into consideration together with any other factors in deciding on the legislation to be enacted.”*<sup>75</sup>

*“.....What the appellant is really saying is that although they had their say, their views were not adequately considered. However, the fact that the views of the appellant and the interested parties did not carry the day was neither here nor there. All that the learned judge needed to establish was the fact that that step of involving the public*

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<sup>72</sup> UNEP, *Training Manual on International Environmental Law*, *op cit*, p.193.

<sup>73</sup> HCCC No. 341 of 1993, [2007] eKLR.

<sup>74</sup> *British American Tobacco Ltd v Cabinet Secretary for the Ministry of Health & 5 others* [2017] eKLR, Civil Appeal 112 of 2016.

<sup>75</sup> Para. 49, *British American Tobacco Ltd v Cabinet Secretary for the Ministry of Health & 5 others* [2017] eKLR, Civil Appeal 112 of 2016.

*and any other affected persons was taken. Given the facts that were before the learned judge, we have no reason to fault the learned judge for finding that the stakeholder meetings, discussions and communications constituted adequate public participation and consultation.”<sup>76</sup>*

*In the Matter of the Mui Coal Basin Local Community*<sup>77</sup> case the court summarized what entails public participation as follows:

97. From our analysis of the case law, international law and comparative law, we find that public participation in the area of environmental governance as implicated in this case, at a minimum, entails the following elements or principles:

- a. First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.
- b. Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts

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<sup>76</sup> Ibid, Para. 52..

<sup>77</sup> *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR, Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated).

use is one of effectiveness. A variety of mechanisms may be used to achieve public participation. Sachs J. of the South African Constitutional Court stated this principle quite concisely thus:

*“The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day, a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case. (Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC))”*

- c. Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See *Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya* (JR Misc. App. No. 374 of 2012). In relevant portion, the Court stated:

*“Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them.”*

In the instant case, environmental information sharing depends on availability of information. Hence, public participation is on-going obligation on the state through the processes of Environmental Impact Assessment – as we will point out below.

- d. Fourth, public participation does not dictate that everyone must give their views on an issue of environmental governance. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective

affairs. A public participation programme, especially in environmental governance matters must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.

- e. Fifth, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.
- f. Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.

98. If we take these principles into account, can we give the public participation programme designed for the Coal Mining Project a clean bill of health? We think it meets the threshold subject to continuing engagement....”

These cases generally capture the current trend in Kenyan courts as far as implementation and promotion of the principle of public participation in environmental matters is concerned.

### **5.3 Application of Public Participation in Kenya**

Environmental Management and Co-ordination Act, 1999 (EMCA) is the overarching framework law on natural resource management and provides for specific application of public participation. Other sectoral statutes enacted after EMCA also have provisions for specific application of public participation. Most natural resources sectoral laws enacted prior to 1999 have no provisions relating to public participation. This part will take an in-depth look at public participation before 1999 and specific aspects of public participation provided for under EMCA and post-EMCA sectoral laws.

#### **a. Judicial Review**

The administrative system of government aids decision-making in natural resource management through the statutory functions of diverse administrative bodies.<sup>78</sup> Judicial review is a process through which a person aggrieved by a decision of an administrative body can seek redress in court. Judicial review is concerned with reviewing the decision-making process and not the merits of the decision itself. Some of the grounds upon which a person can bring a claim for judicial review are that the rules of natural justice were not followed during the process of decision-making. One important rule of natural justice, and which preceded the statutory requirements for public participation in natural resources management is the right to be heard. Before EMCA, most of the remedies sought against a public body which made a decision on natural resources without consulting the public were through judicial review. In *Nzioka and 2 others v Tiomin Kenya Ltd*,<sup>79</sup> the court stated that even if there was a distinct law on the environment, it was not exclusive and most

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<sup>78</sup> R. Kibugi, 'Development and Balancing of Interests in Kenya,' in Michael Faure & Willemien du Plessis (eds.), *The Balancing of Interests in Environmental Law in Africa* (Pretoria University Press, 2011) 167, p.168.

<sup>79</sup> [2001] 1KLR (E&L) 423.

environmental disputes were resolved by the application of principles of common law and administrative law.

Public consultation is an important aspect to be taken into account by agencies when making decisions that affect members of the public. In *Mada Holdings Ltd t/a Fig Tree Camp v County Council of Narok*,<sup>80</sup> the court issued an order of prohibition, stopping the respondent from charging the enhanced park entry fees because neither the applicant nor other stakeholders in the hotel industry had been consulted prior to revision of the said fees. Similarly, in *Hassan and 4 others v KWS*,<sup>81</sup> the court held that KWS would be acting outside its powers if it were to translocate animals away from their natural habitat without express consent of the community. In *Republic v Minister of Forestry and Wildlife and 2 Others ex parte Charles Oduor Okello and 5 Others*,<sup>82</sup> the court quashed the gazette of Lake Kanyaboli National Reserve on the grounds that the Minister in gazetting the same did not consult all the interested parties and should have obtained the consent of the county council before proceeding to gazette the area.

### **b. Environmental Impact Assessment**

Environmental Impact Assessment (EIA) is a tool that helps those involved in decision-making concerning development programs or projects to make their decisions based on the knowledge of the likely impacts that will be caused to the environment.<sup>83</sup> EIA is an important tool for public participation in natural resources management. Internationally, the CBD requires public participation in EIA procedures.<sup>84</sup> The need for EIA was also captured in Principle 17 of the *1992 Rio Declaration on Environment and Development* in the following

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<sup>80</sup> High Court Judicial Review No. 122 of 2011, [2012] eKLR.

<sup>81</sup> [1996] 1KLR (E&L) 214, p.215.

<sup>82</sup> HC Miscellaneous Application No. 55 of 2010, [2012] eKLR.

<sup>83</sup> Angwenyi, A.N., 'An Overview of the Environmental Management and Coordination Act,' in Okidi, C.O., *et al*, (eds), *Environmental Governance in Kenya: Implementing the Framework Law* (East Africa Educational Publishers, 2008) p.167.

<sup>84</sup> Art. 14(1) (a).

terms:<sup>85</sup> *Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant impact on the environment and are subject to a decision of a competent authority.*

In Kenya, EIA gets its legislative backing from EMCA.<sup>86</sup> The procedure for EIA provided for under EMCA is designed to be quite comprehensive and to ensure public participation.<sup>87</sup> The Act requires proponent of any project specified in the Second Schedule<sup>88</sup> to undertake a full environmental impact assessment study and submit an environmental impact assessment study report to the Authority prior to being issued with any licence by the Authority: Provided that the Authority may direct that the proponent forego the submission of the environmental impact assessment study report in certain cases.<sup>89</sup> The Act then provides that the EIA study report shall be publicised for two successive weeks in the Kenya Gazette, a local newspaper and inviting members of the public to give their comments either orally or in writing on the proposed project within a period not exceeding sixty days.<sup>90</sup> However, the Authority may require any proponent of a project to carry out at his own expense further evaluation or environmental impact assessment study, review or submit additional information for the purposes of ensuring that the environmental impact assessment study, review or evaluation report is as accurate and exhaustive as possible.<sup>91</sup> Thereafter, the Authority may, after being satisfied as to the adequacy of an environmental impact assessment study, evaluation or review report, issue an environmental impact assessment

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<sup>85</sup> 1992 *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 (vol. I) / 31 ILM 874 (1992).

<sup>86</sup> Sec. 42; Part VI – Integrated Environmental Impact Assessment (sec. 57A-67). See also *Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice No. 101 of 2003*.

<sup>87</sup> *Ibid*

<sup>88</sup> Second Schedule [Section 58, Act No. 5 of 2015, s. 80.]– Projects Requiring Submission of an Environmental Impact Assessment Study Report.

<sup>89</sup> S. 58 (2).

<sup>90</sup> S. 59.

<sup>91</sup> S. 62.



licence on such terms and conditions as may be appropriate and necessary to facilitate sustainable development and sound environmental management.<sup>92</sup>

In the *Mui case*, the Court observed as follows:

100. Having said that, we take cognizance of the fact that an Environmental Impact Assessment has not been completed. The Court therefore fully expects that the programme of public participation will continue even more robustly in the next phase of EIA. In particular, we expect that upon completion of the EIA the Government will follow the stipulations as directed under Regulation 17 of Legal Notice No. 101, the Environmental (Impact Assessment & Audit) Regulations 2003, and in disseminating the information to ensure that the relevant information is given to the public; these reports should be in a simple language that everyone can understand; the venues of the *Barazas* should be centrally convenient; the dates of the meetings should be known to all well in advance and the County Government should be involved from now henceforth.

131. EIA is an obviously important component to this entire process as it is vanguard of the principles of sustainable development. It is from this assessment that we are guided as to the potential or lack of adverse effects of the project on the environment and where the decision will be made as to whether the project should continue or not.

In *Bogonko v NEMA*,<sup>93</sup> the applicant sought an order to quash NEMA's decision to stop his project of putting up a petrol station. NEMA contended that it issued the order to stop the construction because the applicant had failed to publish the EIA study report for two successive weeks and hence the public was not given sufficient notice to comment on the report. The court held that the purpose of advertisement as provided for by the law is to ensure that the public see the proposed project and give their comments as to whether the

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<sup>92</sup> S. 63, EMCA.

<sup>93</sup> [2006] 1KLR (E&L) 772.

project is viable or not. In the present case, the members of the public were denied such an opportunity. The court, therefore, declined to quash the order stopping the project because according to it, the public interest far outweighed the applicant's individual right to put up a petrol station.

Similarly, in *Kwanza Estates Ltd. v KWS*,<sup>94</sup> the plaintiff sought orders to have KWS restrained from constructing a public toilet at the beach front as the toilet when in use would cause adverse environmental effects and devalue the plaintiffs prime beach property. KWS did not conduct an EIA before putting up the toilet. The court held that public participation was what informed the requirement for an EIA being done before any project commenced. The requirement for publicizing the report is what gave members of the public, like the plaintiff in this case, a voice in issues that may bear negatively on their right to a clean and healthy environment. The court proceeded to grant an injunction restraining KWS from constructing the toilet in the absence of an EIA to show how the waste from the toilet would be treated to prevent pollution in the ocean.

EIA is a continuous process that goes on throughout the duration of the project.<sup>95</sup>

In addition to EIA, EMCA also provides for Strategic environmental assessment (SEA) which should be undertaken much earlier in the decision-making process than project environmental impact assessment (EIA).<sup>96</sup> While

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<sup>94</sup> HCCC No. 133 of 2012, [2013] eKLR.

<sup>95</sup> S. 64, EMCA; See also *Gabcikovo-Nagymaros Case*, ICJ Rep. (1997), 7.

<sup>96</sup> United Nations Economic Commission for Europe, 'Introduction,' available at [http://www.unece.org/env/eia/sea\\_protocol.html](http://www.unece.org/env/eia/sea_protocol.html) [Accessed on 8/1/2019]. See also S. 57A, EMCA:

57A. Strategic Environmental Assessment

(1) All Policies, Plans and Programmes for implementation shall be subject to Strategic Environmental Assessment.

(2) For the avoidance of doubt, the plans, programmes and policies are those that are—

(a) subject to preparation or adoption by an authority at regional, national, county or local level, or which are prepared by an authority for adoption

the parent Act (EMCA) was initially silent on SEA, the same was introduced via the *Environmental Management and Co-ordination (Amendment) Act, 2015* (Amendment Act 2015).<sup>97</sup> Whereas EIA concerns itself with the biophysical impacts of proposals only (e.g. effects on air, water, flora and fauna, noise levels, climate etc), SEA and integrated impact assessment analyze a range of impact types including social, health and economic aspects.<sup>98</sup> SEA is, arguably, not a substitute for EIA or other forms of environmental assessment, but a complementary process and one of the integral parts of a comprehensive environmental assessment tool box.<sup>99</sup>

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through a legislative procedure by Parliament, Government or if regional, by agreements between the governments or regional authorities, as the case may be;

(b) determined by the Authority as likely to have significant effects on the environment.

(3) All entities shall undertake or cause to be undertaken the preparation of strategic environmental assessments at their own expense and shall submit such assessments to the Authority for approval.

(4) The Authority shall, in consultation with lead agencies and relevant stakeholders, prescribe rules and guidelines in respect of Strategic Environmental Assessments.

<sup>97</sup> *Environmental Management and Co-ordination (Amendment) Act, No. 5 of 2015*, Laws of Kenya. The Amendment Act 2015 defines SEA under section 2 thereof to mean *a formal and systematic process to analyse and address the environmental effects of policies, plans, programmes and other strategic initiatives*.

<sup>98</sup> Muigua, K., *Legal Aspects of Strategic Environmental Assessment and Environmental Management*, available at <http://kmco.co.ke/wp-content/uploads/2018/08/Legal-Aspects-of-SEA-and-Environmental-Management-3RD-December-2016.pdf> [Accessed on 8/1/2019].

<sup>99</sup> Organisation for Economic Co-Operation and Development, 'Applying Strategic Environmental: Assessment Good Practice Guidance for Development Co-Operation,' *DAC Guidelines and Reference Series*, 2006, p. 32. Available at <http://www.oecd.org/environment/environment-development/37353858.pdf> [Accessed on 8/1/2019].

### c. Public Consultation

The *Forest Conservation and Management Act, 2016*<sup>100</sup> and the *Water Act 2016*<sup>101</sup> were both enacted after EMCA and both make similar provisions on public consultation. The only difference is that the provisions under the Water Act 2016 are in the main body of the statute<sup>102</sup> while in the *Forest Conservation and Management Act*, they are in a schedule<sup>103</sup>. These statutes give the requirements for public consultation which are almost similar to those of EIAs. They provide that where the law requires public consultation, the relevant entity shall publish a notice in relation to the proposed action in the Kenya gazette (for the *Forest Conservation and Management Act*), newspapers and local radio stations. The notice should invite written comments or objections to the proposed action from the public within sixty days<sup>104</sup> of the publication of the notice. The said authority should then publish through the same media a notice that copies of the decision and reasons therefore are available for public inspection. The last provision is critical because in public participation, the public agency retains the ultimate decision-making authority.<sup>105</sup>

In *Lake Naivasha Friends of the Environment v AG and 2 others*,<sup>106</sup> the question was whether the respondents complied with the law on public consultation in developing a Catchment Management Strategy. The respondents advertised the Catchment Management Strategy in the Kenya Gazette and in a local newspaper inviting the public to forward their comments. There were also meetings held with various stakeholders. The court found that the meetings and advertisements constituted sufficient consultations under the Water Act and that it was impractical for the respondents to contact and invite every interested individual personally to give their input. It also held that in implementing policy, it was impossible for the

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<sup>100</sup> *Forest Conservation and Management Act*, No. 34 of 2016, Laws of Kenya.

<sup>101</sup> *Water Act*, No.43 of 2016, laws of Kenya.

<sup>102</sup> *Ibid*, S.139.

<sup>103</sup> Second Schedule, s.34, Provisions for Public Consultation.

<sup>104</sup> The Water Act 2016 provides for 30 days.

<sup>105</sup> Creighton, J.L., *The Public Participation Handbook: Making Better Decisions through Citizen Involvement*, *op cit*, p.7.

<sup>106</sup> HC Petition No. 36 of 2011, [2012] eKLR.

State to please each person or meet their individual interests. In some circumstances, the rights of the majority will be elevated over those of the individual.

## **6. Prevention Principle**

The prevention principle aims at averting damage to the environment before it actually occurs. The reasoning behind this principle is that prevention is less costly than allowing environmental damage to occur and then taking mitigation measures.<sup>107</sup> According to UNEP, experience and scientific expertise demonstrate that prevention of environmental harm should be the golden rule in environmental governance, for both ecological and economic reasons. This is because it is frequently impossible to remedy environmental injury.<sup>108</sup> There is an international obligation not to cause damage to the environment irrespective of whether or not there is transboundary impact or international responsibility.<sup>109</sup> This principle requires that activities that might cause risk or damage to the environment be reduced, limited or controlled.<sup>110</sup> It requires anticipatory investigation, planning and action before undertaking activities which can cause harm to the environment.<sup>111</sup>

Under this principle, States are under an obligation to prevent damage to the environment within their own jurisdictions.<sup>112</sup> The standard of care for prevention, is due diligence.<sup>113</sup> Due diligence in customary international law requires effective national legislation and administrative controls.<sup>114</sup> In Kenya, the Constitution contains provisions that reflect this principle. One of the

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<sup>107</sup> *Amina Said Abdalla & 2 others v County Government of Kilifi & 2 others* [2017] eKLR, ELC Case No. 283 OF 2016, para. 18.

<sup>108</sup> UNEP, *Training Manual on International Environmental Law*, *op cit*, p.32.

<sup>109</sup> *Ibid*

<sup>110</sup> Sands, P., *Principles of International Environmental Law* (Cambridge University Press, 2003), p.246.

<sup>111</sup> Nanda, V. & Pring, G.R., *International Environmental Law and Policy for the 21<sup>st</sup> Century* (2<sup>nd</sup> Revised Edition Martinus Nijhoff Publishers, 2012), p.62.

<sup>112</sup> Sands, P., *Principles of International Environmental Law* (Cambridge University Press, 2003), p.246.

<sup>113</sup> Nanda V. & Pring, G.R, *International Environmental Law and Policy for the 21<sup>st</sup> Century*, *op cit*, p. 62.

<sup>114</sup> *Ibid*

obligations of the State in respect of the environment, as envisaged under Article 69(1) of the Constitution, is to eliminate processes and activities that are likely to endanger the environment. Further, Article 69(2) places a legal duty on every person to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. Further, Article 70 of the Constitution gives courts the power to make orders or give directions that would be appropriate to prevent, stop or discontinue any act or omission that is harmful to the environment. It is also noteworthy, that this would be done after an application by any person who may feel that the right to a clean and healthy environment as guaranteed under Article 42 is likely to be violated, denied, threatened or infringed. Such a person does not have to demonstrate *locus standi* to do so.<sup>115</sup>

Under national legislation, EMCA has provisions that reflect the principle of prevention of harm to the environment. Section 9 of EMCA outlines the objects and functions of the National Environment Management Authority. Amongst these is the responsibility to publish and disseminate manuals, codes or guidelines relating to environmental management and prevention or abatement of environment degradation. Section 38 of EMCA outlines the functions of the National Environment Action Plan which includes identifying and recommending policy and legislative approaches for preventing, controlling or mitigating specific as well as general adverse impacts on the environment. The foregoing provisions play a preventive role, thus preventing environmental harm.

### **7. International Cooperation in Management of Natural Resources**

As countries embrace globalization and the resultant competition over natural resources, especially those that are transboundary to fast track economic growth, there has arisen a need for international cooperation in the management of natural resources. This is due to the fact that some environmental problems that arise out of mismanagement of natural resources like climate change are themselves transnational in nature hence requiring the effort and cooperation of every state to combat them. This cooperation

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<sup>115</sup> Art.70 (3), Constitution of Kenya, 2010.

principally includes both multilateral and bilateral, transboundary and private sector cooperation.<sup>116</sup>

The duty to cooperate is well established in international law. The first part of Principle 7 of the Rio Declaration provides that “*States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the earth’s ecosystem.*” Principle 14 provides that States should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health. In Kenya, this Principle has not been emphasized in natural resources legislation. However, EMCA recognizes this Principle as one of the principles of sustainable development in the management of environmental resources shared by one or more states.<sup>117</sup>

This principle is especially relevant when it comes to international trade between nations and regions. For instance, the *United Nations Conference on Sustainable Development - or Rio+20* calls on countries to cooperate in coming up with well-designed and managed tourism in order to make a significant contribution to the three dimensions of sustainable development, with close linkages to other sectors and can create decent jobs and generate trade opportunities.<sup>118</sup>

The *Agenda 2030*<sup>119</sup> also affirms that international trade is an engine for inclusive economic growth and poverty reduction, and contributes to the promotion of sustainable development.<sup>120</sup> As such, it seeks to continue to

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<sup>116</sup> Nkonya, E., *et al.*, International cooperation for sustainable land and water management, *SOLAW Background Thematic Report* - TR16.

<sup>117</sup> No. 8 of 1999, S. 3 (5) (c).

<sup>118</sup> United Nations, *The Future We Want*, A/RES/66/288, Sixty-sixth session Agenda item 19, Resolution adopted by the General Assembly on 27 July 2012, para. 130. Art. 1.11 of the RIO+20 Report, requires State parties to strengthen international cooperation to address the persistent challenges related to sustainable development for all, in particular in developing countries.

<sup>120</sup> Agenda 2030, Target 68. This is a restatement of para. 281 of the Rio+20 Conference outcome document (The Future We Want) which reaffirmed that

promote a universal, rules-based, open, transparent, predictable, inclusive, non-discriminatory and equitable multilateral trading system under the World Trade Organization, as well as meaningful trade liberalisation. It also calls upon all members of the World Trade Organization to redouble their efforts to promptly conclude the negotiations on the Doha Development Agenda.<sup>121</sup>

Equitable international trade can enable countries to achieve food security, generate decent employment opportunities for the poor, promote technology transfer<sup>122</sup>, ensure national economic security and support infrastructure development, not only for moving goods to and from ports, but also for basic services such as health, education, water, sanitation and energy.<sup>123</sup> This is important for the realisation of the SDG Goal 8 which seeks to promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all.

Participating in international trade can widen the economic space needed to create new job opportunities, promote efficient use of resources, increase access to food, energy and basic services, and improve productive, managerial

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international trade is an engine for development and sustained economic growth, and also reaffirmed the critical role that a universal, rules-based, open, non-discriminatory and equitable multilateral trading system, as well as meaningful trade liberalisation, can play in stimulating economic growth and development worldwide, thereby benefiting all countries at all stages of development as they advance towards sustainable development. In this context, the participants in the conference expressed their focus on achieving progress in addressing a set of important issues, such as, inter alia, trade-distorting subsidies and trade in environmental goods and services.

<sup>121</sup> Ibid, para. 68.

<sup>122</sup> Art. 7 of the Agreement on Trade-Related Aspects of Intellectual Property Rights states that: “The protection and enforcement of intellectual property should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.”

<sup>123</sup> Galmés, G.V., ‘Trade as an enabler of sustainable development and poverty eradication,’ in United Nations, *The Road from Rio+20: Towards Sustainable Development Goals*, Issue 4, September 2014, p. 10. UNCTAD/DITC/TED/2014/1 Available at [http://unctad.org/en/PublicationsLibrary/ditcted2014d1\\_en.pdf](http://unctad.org/en/PublicationsLibrary/ditcted2014d1_en.pdf) [Accessed on 8/1/2019].



and entrepreneurial capacity required for economic diversification, growth and development.<sup>124</sup> However, this can only be effectively achieved through international cooperation for realisation of sustainable development agenda.<sup>125</sup> This is also reflected in the SDG Goal 17 which seeks to strengthen the means of implementation and revitalize the global partnership for sustainable development. This is envisioned through, inter alia, strengthening domestic resource mobilization, including through international support to developing countries, to improve domestic capacity for tax and other revenue collection.<sup>126</sup> International cooperation is also envisioned through Goal 17.6 which seeks to enhance North-South, South-South and triangular regional and international cooperation on and access to science, technology and innovation and enhance knowledge sharing on mutually agreed terms, including through improved coordination among existing mechanisms, in particular at the United Nations level, and through a global technology facilitation mechanism. International cooperation is also important for capacity building through enhancing international support for implementing effective and targeted capacity-building in developing countries to support national plans to implement all the sustainable development goals, including through North-South, South-South and triangular cooperation.<sup>127</sup>

Notably, the 2030 Agenda on Sustainable Development strongly urges to refrain from promulgating and applying any unilateral economic, financial or trade measures not in accordance with international law and the Charter of the

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<sup>124</sup> Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016), p. 244.

<sup>125</sup> Principle 5 of the *Rio Declaration* calls on all States and all people to cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world; See also World Commission on Environment and Development, *Our Common Future: Report of the World Commission on Environment and Development*, 1987, A/42/427.

<sup>126</sup> SDG Goal 17.1.

<sup>127</sup> SDG Goal 17.9.

United Nations that impede the full achievement of economic and social development, particularly in developing countries.<sup>128</sup>

### **8. Common but Differentiated Responsibilities**

The principle of ‘common but differentiated responsibility’ is said to have evolved from the notion of the ‘common heritage of mankind’ and is also a manifestation of general principles of equity in international law.<sup>129</sup> Principle 7 of the Rio Declaration requires States to cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the earth's ecosystem. It goes on to state that, in view of the different contributions to global environmental degradation, States have common but differentiated responsibilities.

This principle is envisaged in a number of international legal instruments including, the Rio Declaration and the *United Nations Framework Convention on Climate Change* (UNFCCC) and its Kyoto Protocol. The UNFCCC provides that Parties should act to protect the climate system, “*on the basis of equality and in accordance with their common but differentiated responsibilities and respective capabilities.*”<sup>130</sup> Member States who have polluted most, have to take the biggest responsibilities in reducing the effects of that pollution. Differentiated responsibility is especially important in ensuring fairness to developing and Least Developed States that have contributed less to climate change and global warming. The responsibility of each State depends on the amount of emissions that result from them. For instance, large emerging economies would have a bigger responsibility towards environmental management and conservation when compared to a tiny developing State.

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<sup>128</sup> A/RES/70/1 - Transforming our world: the 2030 Agenda for Sustainable Development.

<sup>129</sup> The Principle of Common But Differentiated Responsibilities: Origins and Scope, For the World Summit on Sustainable Development, 2002, Johannesburg, 26 August, *A Centre for International Sustainable Development Law (CISDL) Legal Brief*, p. 1.

<sup>130</sup> Art.3 of the UNFCCC.

The principle of common but differentiated responsibility is a way to take into account the differing circumstances, particularly in each state's contribution to the creation of environmental problems and in its ability to prevent, reduce or control them.<sup>131</sup> The idea is to encourage universal participation and equity.<sup>132</sup>

This principle is important for the realisation of Agenda 2030 SDG goals which reaffirm all the principles of the Rio Declaration on Environment and Development, including, inter alia, the principle of common but differentiated responsibilities, as set out in principle 7 thereof. In order to reduce inequality within and among countries, SDG Goal 10.a seeks to inter alia, implement the principle of special and differential treatment for developing countries, in particular least developed countries, in accordance with World Trade Organization agreements.

### **9. Equitable Sharing of Benefits**

With the accelerated efforts to foster economic growth and globalisation, the natural resources available for exploitation are quickly dwindling due to the competition for the same. This favours some countries while working against others because of the variance in technology and expertise to exploit the same. The United Nations and other international bodies therefore call for equitable sharing of the benefits that accrue from such shared resources. For instance, the fair and equitable sharing of the benefits derived from biodiversity is one of the central objectives of the Convention on Biological Diversity (CBD).<sup>133</sup> Article I thereof provides that the objectives of the Convention, are to be pursued in accordance with its relevant provisions. The sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking

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<sup>131</sup> UNEP, *Training Manual on International Environmental Law*, op cit, p.29.

<sup>132</sup> *Ibid*

<sup>133</sup> The Union for Ethical Bio-Trade, Available at <http://www.ethicalbiotrade.org/abs/>[Accessed on 7/1/2019].

into account all rights over those resources and to technologies, and by appropriate funding.<sup>134</sup>

In the Kenyan context, the principle is explicit in a number of laws. Article 60(1) (a) of the Constitution of Kenya, 2010 enumerates equitable access to land as one of the guiding principles of the land policy in the country. All should have equitable access to land and public spaces including people with disabilities, the youth and marginalised communities. In addition, Article 69(1) (a) thereof, further provides that one of the obligations of the State with regard to the environment is to ensure equitable sharing of the accruing benefits. Article 42 guarantees every person the right to a clean and healthy environment, including the right to have the environment protected for the benefit of the present and future generations through legislative and other measures, particularly those contemplated under Article 69.

To facilitate more equitable distribution of accruing benefits among locals, often amongst subsistence, and indigenous peoples, the environmental laws provide for community based natural resource management. For instance, the Forests Act, 2005 provides for community participation in forests management under sections 45-48. Communities may register groups that get involved in management and use of forests resources in their area. Under the Water Act, 2002 provision is made for communities to establish Water Resources Users Associations and Catchment Areas Advisory Committees to among other things, ensure that water as a resource is used equitably and conflicts managed effectively at the local level. Section 43 of EMCA provides that the Minister (Cabinet Secretary) may, by notice in the Gazette, declare the traditional interests of local communities customarily resident within or around a lake shore, wetland, coastal zone or river bank or forest to be protected interests.

### **10. Reasonable Use and Equitable Utilization**

The principle of reasonable use and equitable utilisation of resources comes into play mostly where there are transboundary resources being shared by

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<sup>134</sup> Art. I, Convention on Biological Diversity.

more than one state. This principle has been incorporated in a number of international legal instruments on environmental conservation to which Kenya is a signatory. The principle has been codified in Article of the 1997 Convention on the Law of Non-Navigational Uses of International Water Courses,<sup>135</sup> which is considered a codification of customary principles. It requires that a State sharing an international watercourse with other States utilize the watercourse, in its territory, in a manner that is equitable and reasonable *vis-à-vis* the other States sharing it. In order to ensure that their utilization of an international watercourse is equitable and reasonable, States are to take into account all relevant factors and circumstances. Article 5 also sets forth, in paragraph 2, the principle of equitable participation. According to this principle, States are to “*participate in the use, development and protection of an international watercourse in an equitable and reasonable manner.*” This principle is expected to have significant implications in Kenya, in light of recent discoveries of underground water aquifers traversing a number of countries in the East African Region.<sup>136</sup>

### 11. Precautionary Principle

EMCA defines precautionary principle as the principle that where there are threats of damage to the environment, whether serious or irreversible, lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation.<sup>137</sup> The precautionary principle recognizes the limitations of Science in being able to accurately predict the likely environmental impacts and thus calls for precaution in making environmental decisions where there is

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<sup>135</sup> Convention on the Law of the Non-Navigational Uses of International Watercourses New York, 21 May 1997.

<sup>136</sup> BBC, “Kenya aquifers discovered in dry Turkana region,” 11 September 2013. Available at <https://www.bbc.com/news/science-environment-24049800> [Accessed on 8/1/2019]; Pflanz, M., “Kenya finds '70 year supply' of water in desert region,” The Telegraph, 11 Sep 2013. Available at <https://www.telegraph.co.uk/news/worldnews/africaandindianocean/kenya/10302421/Kenya-finds-70-year-supply-of-water-in-desert-region.html> [Accessed on 8/1/2019]; International Groundwater Resources Assessment Centre, ‘Eastern Africa,’ available at <https://www.un-igrac.org/regions/eastern-africa> [Accessed on 8/1/2019].

<sup>137</sup> S. 2, Act No. 8 of 1999.

uncertainty. This principle requires that all reasonable measures be taken to prevent the possible deleterious environmental consequences of development activities.<sup>138</sup> This is well captured under Principle 15 of the *Rio Declaration*<sup>139</sup> which provides that “*where there are warnings of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason of postponing cost-effective measures to prevent environmental degradation.*”

Some scholars have identified a number of core elements to the precautionary principle, indicating that there are seven main themes, though each of them has a different intellectual and policy underpinning.<sup>140</sup> These elements are: Firstly, *pro-action*: this is the willingness to take action in advance of scientific proof, or in the face of fundamental ignorance of possible consequences, on the grounds that further delay or thoughtless action could ultimately prove far more costly than the 'sacrifice' of not carrying on right now; Secondly, cost-effectiveness of action in that proportionality of response should be designed to show that there should be a regular examination of identifiable social and environmental gains arising from a course of action that justifies the costs; Third, safeguarding ecological space as a fundamental notion underlying all interpretations of the precautionary principle in terms of how far natural systems and social organisations are resilient or vulnerable to further change or alteration; Fourth, legitimising the status of intrinsic value or bioethics in that vulnerable, or critical natural systems, namely those close to thresholds, or whose existence is vital for natural regeneration, should be protected as a matter of moral right; Fifth, shifting the onus of proof such that the burden of proof should shift onto the proto-developer to show '*no reasonable environmental harm*' to such sites or processes, before development of any kind is allowed to proceed; Sixth, is meso-scale planning. A meso-scale is the period, over which any major decision will have an influence; and seventh, precautionary principle requires paying for ecological debt which is a case for

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<sup>138</sup> *Amina Said Abdalla & 2 others v County Government of Kilifi & 2 others* [2017] eKLR, ELC Case No. 283 OF 2016, para. 18.

<sup>139</sup> *Rio Declaration* of 1992, UN Doc. A/CONF.151/26 (Vol. I).

<sup>140</sup> O'riordan, T., *et al*, “The Precautionary Principle in Contemporary Environmental Politics,” *Environmental Values*, Vol. 4, No. 3 (August 1995), pp. 191-212, p. 195.

considering a burden-sharing responsibility for those not being cautious or caring in the past.<sup>141</sup>

The precautionary principle encourages policies that protect human health and the environment in the face of uncertain risks.<sup>142</sup> It is therefore at the heart of sustainable development agenda. Article 10 of the Constitution of Kenya, 2010 provides for sustainable development as one of the national values and principles of governance. This principle must therefore guide the law making organs while legislating on environmental management and conservation.<sup>143</sup> Section 11 of the *Land Act*, 2012 mandates the National Land Commission to take appropriate measures to conserve ecologically sensitive public land to prevent environmental degradation and climate change. The precautionary principle is one of the principles of sustainable development guiding the Environment and Land Court as provided for under section 18 of the *Environment and Land Act*, 2012.

## **12. Transboundary Environmental Damage**

Transboundary environmental damage usually arises where the impact of environmental damage and degradation affects not only the country of origin but also another country. This is especially so in the case of water pollution. This is one of the principles that informed the making of the Treaty for the Establishment of the East African Community which was signed in Arusha on 30 November 1999 and entered into force on 7 July 2000. The regional organisation aims at achieving its goals and objectives through, *inter alia*, promoting a sustainable growth and equitable development of the region, including rational utilisation of the region's natural resources and protection of the environment. This places responsibilities on the member States to ensure realization of the goals and objectives of the Treaty.

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<sup>141</sup> *Ibid*

<sup>142</sup> Kriebel, D., *et al*, "The Precautionary Principle in Environmental Science," *Environmental Health Perspectives*, Vol. 109, No. 9, Sep., 2001, pp. 871-876.

<sup>143</sup> Art. 10(1), Constitution, 2010 provides that the national values and principles must bind all State organs and all persons whenever they, *inter alia*, enact, apply or interpret any law, or make or implement public policy decisions.

Regulation 44 of the Legal Notice Number 101 provides that where a project is likely to have a transboundary impact, the proponent of the project must, in consultation with the Authority (NEMA), ensure that appropriate measures are taken to mitigate any adverse impacts, taking into account any existing treaties and agreements between Kenya and the other country. This places a huge responsibility on the State to prevent transboundary environmental damage.

### **13. Conclusion**

This Paper has examined some of the principles of natural resource management and their application in Kenya. These principles are recognized in the Constitution 2010 and in various international instruments some of which have been mentioned herein. Principles play an important role in environmental law and are engines in the evolution of natural resources law.<sup>144</sup> They guide policy formulators and legislators when developing policy and law on natural resources. Understanding these principles will help in appreciating the context within which natural resources management is required to take place in Kenya. Fostering the adoption of these principles in the policy and legal making processes can go a long way in achieving sustainable management of natural resources in Kenya as envisaged under the constitutional provisions. It is also noteworthy that most of these principles are similar to the traditional practices of indigenous communities in Kenya as far as application of indigenous ecological knowledge is concerned. Such principles as precautionary principle are a reflection of the unwritten principles on environmental management that have existed for generations across indigenous cultures. These communities considered themselves and their cultural ecological practices as part of the ecosystem hence adopted both anthropocentric and ecocentric approaches when dealing with environmental and natural resource management.<sup>145</sup> It has been acknowledged by some

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<sup>144</sup> UNEP, *Training Manual on International Environmental Law, op cit*, p.23.

<sup>145</sup> See generally, Muigua, K., *Harnessing Traditional Knowledge for Environmental Conflict Management in Kenya*, available at

<http://www.kmco.co.ke/attachments/article/175/TRADITIONAL%20KNOWLEDGE%20AND%20CONFLICT%20MANAGEMENT-25%20April%202016.pdf> [Accessed on 8/1/2019].



government officials that resettling traditional forest-dwelling communities in their natural habitats can play an important role in restoring the country's forest cover.<sup>146</sup> This is because such people have the traditional skills needed to help the Government conserve the forests.<sup>147</sup> Also worth pointing out is the fact that Kenyan communities have lived amongst, and used, wildlife resources since time immemorial without formal policy and legislation. These communities ensured conservation of the wildlife resource through cultural and social bonds, and traditional practices. Sacred beliefs centred on certain wildlife species ensured that conservation principles became part of their way of life.<sup>148</sup>

One way of implementing the constitutional obligations on the state to protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities is to incorporate it with the scientific knowledge and involving these communities and helping them appreciate all the foregoing principles of natural resource management for realisation of sustainable development agenda. These principles are both international and cultural.

## **References**

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<sup>146</sup> Kibet L., 'Swazuri reveals plans to recognise forest settlers,' *The Standard*, Thursday, July 28, 2016 (The Standard Group, Nairobi, 2016), p. 2.

<sup>147</sup> Ibid

<sup>148</sup> Republic of Kenya: Ministry of Forestry and Wildlife, *National Wildlife Conservation and Management Policy, 2012*, p.2.

‘Chapter 3: The Principles Of International Environmental Law’, available at [https://edisciplinas.usp.br/pluginfile.php/520713/mod\\_resource/content/1/Chapter\\_3\\_International%20Environmental%20Law%20%281%29.pdf](https://edisciplinas.usp.br/pluginfile.php/520713/mod_resource/content/1/Chapter_3_International%20Environmental%20Law%20%281%29.pdf) [Accessed on 5/1/2019].

Amartya S., *Development as Freedom* (Anchor Books, New York, 1999).

*Amina Said Abdalla & 2 others v County Government of Kilifi & 2 others* [2017] eKLR, ELC Case No. 283 OF 2016.

Angwenyi, A.N., ‘An Overview of the Environmental Management and Coordination Act,’ in Okidi, C.O., *et al*, (eds), *Environmental Governance in Kenya: Implementing the Framework Law* (East Africa Educational Publishers, 2008).

BBC, “Kenya aquifers discovered in dry Turkana region,” 11 September 2013. Available at <https://www.bbc.com/news/science-environment-24049800> [Accessed on 8/1/2019].

Beder, S., “Costing the Earth: Equity, Sustainable Development and Environmental Economics,” *New Zealand Journal of Environmental Law*, Vol.4, 2000, pp.227-243.

Birnie, P., Boyle, A. and Redgwell, C., ‘International Law and the Environment,’ (3rd ed., Oxford 2009).

*Bogonko v NEMA* [2006] 1KLR (E&L) 772.

*British American Tobacco Ltd v Cabinet Secretary for the Ministry of Health & 5 others* [2017] eKLR, Civil Appeal 112 of 2016.

Business & Human Rights Resource Centre, “Kenya: Court declares construction of Lamu port violates indigenous community's right to information, healthy environment & culture, orders compensation,” May, 2018. Available at <https://www.business-humanrights.org/en/kenya-court-declares-construction-of-lamu-port-violates-indigenous-communitys-right-to-information-healthy-environment-culture-orders-compensation> [Accessed on 8/1/2019].

Constitution of Kenya, 2010 (Government printer, Nairobi, 2010).

Creighton, J.L., *The Public Participation Handbook: Making Better Decisions through Citizen Involvement* (John Wiley & Sons, 2005).

Cullet P., *Differential Treatment in International Environmental Law and its Contribution to the Evolution of International Law* (Aldershot: Ashgate, 2003).

Dietz t. & Stern, P.C., (eds), *Public Participation in Environmental Assessment and Decision Making*, (National Academies Press, 2008).

Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice No. 101 of 2003.

*Environmental Management and Co-ordination (Amendment) Act, No. 5 of 2015*, Laws of Kenya.

Environmental Management and Coordination Act, Act No. 8 of 1999, Laws of Kenya.

*Forest Conservation and Management Act*, No. 34 of 2016, Laws of Kenya.

*Gabcikovo-Nagymaros Case*, ICJ Rep. (1997), 7.

Galmés, G.V., 'Trade as an enabler of sustainable development and poverty eradication,' in United Nations, *The Road from Rio+20: Towards Sustainable Development Goals*, Issue 4, September 2014. UNCTAD/DITC/TED/2014/1 Available at [http://unctad.org/en/PublicationsLibrary/ditcted2014d1\\_en.pdf](http://unctad.org/en/PublicationsLibrary/ditcted2014d1_en.pdf) [Accessed on 8/1/2019].

Hassan and 4 others v KWS, (1996) 1KLR (E&L) 214.

*Hungary v Slovakia*, 1997 WL 1168556 (I.C.J-1997).

In the Matter of the National Land Commission [2015] eKLR, Advisory Opinion Reference 2 of 2014.

International Groundwater Resources Assessment Centre, 'Eastern Africa,' available at <https://www.un-igrac.org/regions/eastern-africa> [Accessed on 8/1/2019].

Kibet L., 'Swazuri reveals plans to recognise forest settlers,' *The Standard*, Thursday, July 28, 2016 (The Standard Group, Nairobi, 2016).

Kibugi, R., 'Development and Balancing of Interests in Kenya,' in Michael Faure & Willemien du Plessis (eds.), *The Balancing of Interests in Environmental Law in Africa* (Pretoria University Press, 2011).

Kriebel, D., Tickner, J., Epstein, P., Lemons, J., Levins, R., Loechler, E.L., Quinn, M., Rudel, R., Schettler, T. and Stoto, M., "The Precautionary Principle in Environmental Science," *Environmental Health Perspectives*, Vol. 109, No. 9, Sep., 2001, pp. 871-876.

Kwanza Estates Ltd. v KWS, HCCC No. 133 of 2012, [2013] eKLR.

Lake Naivasha Friends of the Environment v AG and 2 others, HC Petition No. 36 of 2011, [2012] eKLR.

Lwanga, C., 'Court orders State to pay Lamu fishermen Sh1.7bn in LAPSSET compensation,' *Daily Nation*, Tuesday, May 1, 2018, available at <https://www.businessdailyafrica.com/news/Court-orders-State-to-pay-Lamu-fishermen-Sh1-7bn-over-Lapsset/539546-4538748-5wslscz/index.html> [accessed on 8/1/2019].

Mada Holdings Ltd t/a Fig Tree Camp v County Council of Narok, HC Judicial Review No. 122 of 2011, [2012] eKLR.

Marianela Cedeño Bonilla, Edgar Fernández Fernández, Sondes Jemaiel, Rose Mwebaza and Dana Zhandayeva *Environmental Law in Developing Countries: Selected Issues*, Vol. II, IUCN, 2004. Available at <https://portals.iucn.org/library/sites/library/files/documents/eplp-043-2.pdf> [Accessed on 8/1/2019].

Meza Galana and 3 others v AG and 2 Others, HCCC No. 341 of 1993, [2007] eKLR.

*Mining Act*, No. 12 of 2016, Laws of Kenya.

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

Moutondo, E., “The Polluter Pays Principle,” in *Industries and Enforcement of Environmental Law in Africa-Industry Experts Review Environmental Practice* (UNEP/UNDP Joint Project on Environmental Law and Institutions in Africa, 1997).

Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR, Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated).

Muigua, K., *Harnessing Traditional Knowledge for Environmental Conflict Management in Kenya*, available at <http://www.kmco.co.ke/attachments/article/175/TRADITIONAL%20KNOWLEDGE%20AND%20CONFLICT%20MANAGEMENT-25%20April%202016.pdf> [Accessed on 8/1/2019].

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

Muigua, K., *Legal Aspects of Strategic Environmental Assessment and Environmental Management*, available at <http://kmco.co.ke/wp-content/uploads/2018/08/Legal-Aspects-of-SEA-and-Environmental-Management-3RD-December-2016.pdf> [Accessed on 8/1/2019].

Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016).

Munyiri, S.K., “Policy Position on the Proposed Amendments of the Mining and Minerals Bill 2009,” Kenya Chamber of Mines, 2010.

Nanda, V. & Pring, G.R., *International Environmental Law and Policy for the 21<sup>st</sup> Century* (2<sup>nd</sup> Revised Edition Martinus Nijhoff Publishers, 2012).

Natal Fresh Produce Growers Association v Agrosolve (Pty) Ltd, [1990] (4) SA 749.

Nkonya, E.M., Cenacchi, N., Ringler, C. and Lantieri, D., International cooperation for sustainable land and water management, *SOLAW Background Thematic Report* - TR16. Available at [http://www.fao.org/fileadmin/templates/solaw/files/thematic\\_reports/TR\\_16\\_web.pdf](http://www.fao.org/fileadmin/templates/solaw/files/thematic_reports/TR_16_web.pdf) [ Accessed on 8/1/2019].

Nzioka and 2 others v Tiomin Kenya Ltd, [2001] 1KLR (E&L) 423.

Ondrik, R. S., "Participatory approaches to national development planning," *Framework for Mainstreaming Participatory Development Processes into Bank Operations*, ADB (1999): 15. Available at [http://siteresources.worldbank.org/INTEASTASIAPACIFIC/Resources/226262-1143156545724/Brief\\_ADB.pdf](http://siteresources.worldbank.org/INTEASTASIAPACIFIC/Resources/226262-1143156545724/Brief_ADB.pdf) [Accessed on 8/1/2019].

Organisation for Economic Co-Operation and Development, 'Applying Strategic Environmental: Assessment Good Practice Guidance for Development Co-Operation,' *DAC Guidelines and Reference Series*, 2006. Available at <http://www.oecd.org/environment/environment-development/37353858.pdf> [Accessed on 8/1/2019].

O'riordan, T. and Jordan, A., "The Precautionary Principle in Contemporary Environmental Politics," *Environmental Values*, Vol. 4, No. 3 (August 1995), pp. 191-212.

Peter K. Waweru versus Republic, [2006] eKLR. High Court of Kenya at Nairobi, misc civ. Applic. 118 Of 2004, 2 March 2006.

Pflanz, M., "Kenya finds '70 year supply' of water in desert region," *The Telegraph*, 11 Sep 2013. Available at <https://www.telegraph.co.uk/news/worldnews/africaandindianocean/kenya/10302421/Kenya-finds-70-year-supply-of-water-in-desert-region.html> [Accessed on 8/1/2019].

Republic of Kenya, *County Public Participation Guidelines*, (Ministry of Devolution and Planning & Council of Governors, January, 2016). Available at [http://devolutionasals.go.ke/wp-content/uploads/2018/03/County-Public-Participation\\_Final-1216-2.pdf](http://devolutionasals.go.ke/wp-content/uploads/2018/03/County-Public-Participation_Final-1216-2.pdf) [Accessed on 8/1/2019].

Republic of Kenya, Kenya Vision 2030, Government of Kenya, 2007.

Republic of Kenya: Ministry of Forestry and Wildlife, *National Wildlife Conservation and Management Policy*, 2012.

Republic v Minister of Forestry and Wildlife and 2 others ex parte Charles Oduor Okello and 5 Others, HC Miscellaneous Application No. 55 of 2010, [2012] eKLR.

Sands, P. and Peel, J., *Principles of international environmental law*. Cambridge University Press, 2012.

Senach, S.L., 'The Trinity of Voice: The Role of Practical Theory in Planning and Evaluating the Effectiveness of Environmental Participatory Process,' in Depoe, S.D. *et al*, (eds), *Communication and Public Participation in Environmental Decision Making* (SUNY Press Ltd., 2004).

Soto, M.V., "General Principles of International Environmental Law." *ILSA Journal of International & Comparative Law* 3, no. 1 (1996): 193-209.

Stone C., "Should Trees Have Standing?" *South California Law Review*, Vol. 45, 1972, p. 450.

The Union for Ethical Bio-Trade, Available at <http://www.ethicalbiotrader.org/abs/> [Accessed on 7/1/2019].

*Treaty Making and Ratification Act*, No. 45 of 2012, Laws of Kenya (Government printer, Nairobi, 2012).

UNDP, *Human Development Report 2011, The Real Wealth of Nations: Pathways to Human Development*, (Palgrave Macmillan Houndmills, Basingtoke, Hampshire, 2011).

UNEP, *Training Manual on International Environmental Law*, (UNEP, 2006).

United Nations Economic Commission for Europe, 'Introduction,' available at [http://www.unece.org/env/eia/sea\\_protocol.html](http://www.unece.org/env/eia/sea_protocol.html) [Accessed on 8/1/2019].

United Nations, Convention on Biological Diversity, 1760 UNTS, 79.

United Nations, Rio Declaration on Environment and Development 1992, UN Doc. A/CONF.151/26 (Vol. I).

United Nations, *The Future We Want*, A/RES/66/288, Sixty-sixth session Agenda item 19, Resolution adopted by the General Assembly on 27 July 2012.

United Nations, *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.

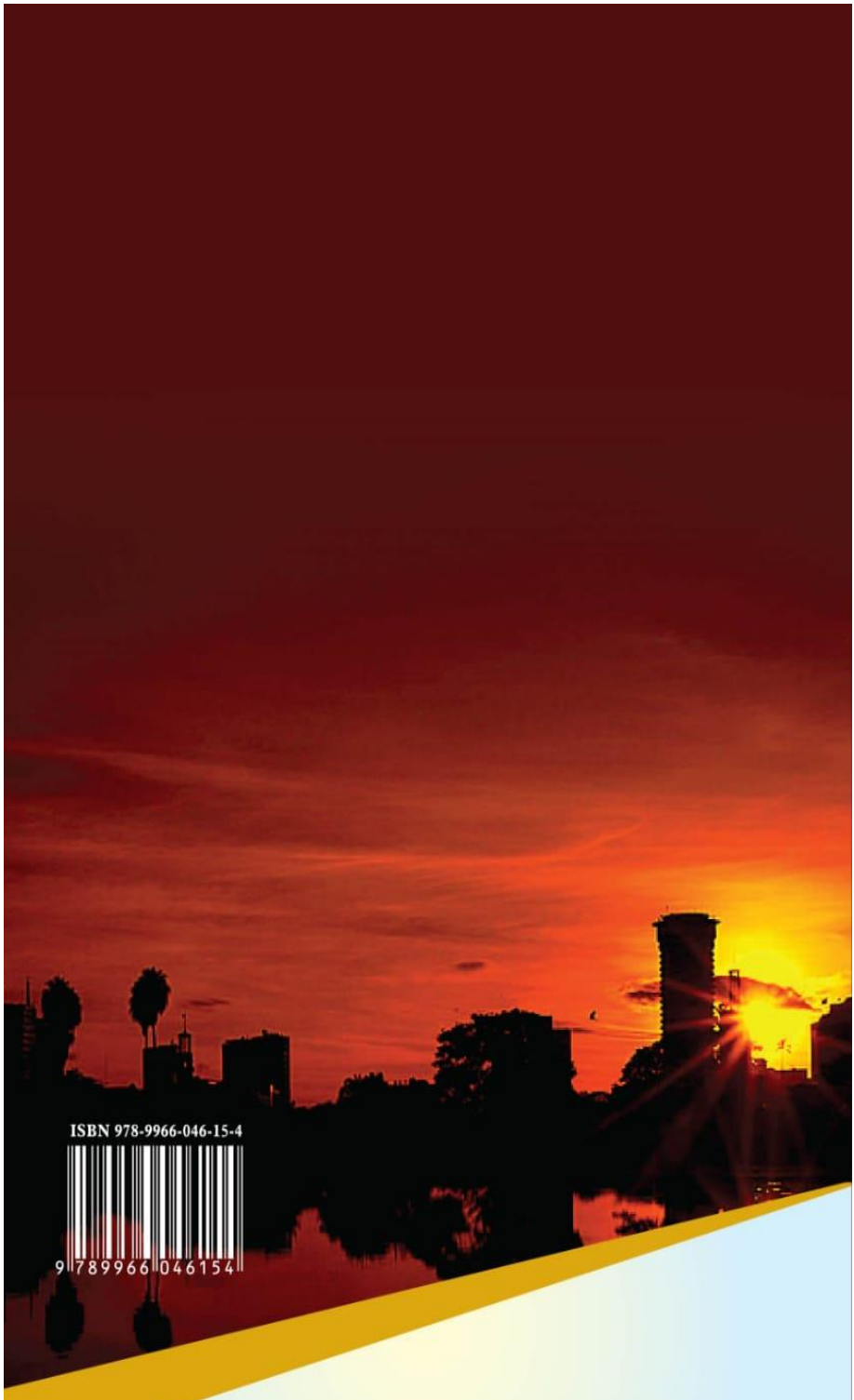
URAlA, “What Is Public Participation?” Available at <http://uraia.or.ke/wp-content/uploads/2016/11/Citizen-Participation-BOOKLET.pdf> [Accessed on 8/1/2019].

*Water Act*, No.43 of 2016, laws of Kenya.

Weiss, E.B., “In Fairness to Future Generations and Sustainable Development,” *American University International Law Review*, Vol.8, 1992.

World Commission on Environment and Development, *Our Common Future*, GAOR, 42<sup>nd</sup>Sess, Supp. No. 25, UN Doc, A/42/25 (1987).





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