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Editor's Note

Happy New Year 2022!

Welcome to the first issue of the Journal of Conflict Management and Sustainable Development for the year 2022, Volume. 8, No.1.

The Journal is committed to providing a platform for established and upcoming scholars to engage in intellectual debate on key and pertinent themes in Conflict Management and Sustainable Development.

Sustainable Development has been defined as development that meets the needs of both the present and future generations. The Journal is thus vital in the ongoing debate around the globe towards attaining inter and intra generational equity.

However, sustainable development cannot be realised in an environment marred with conflicts. The Journal further offers insight on key conflict management techniques and concerns with the aim of creating a conducive environment both in Kenya and across the globe for the attainment of the ideal of sustainable development.

The Journal is peer reviewed and refereed in order to adhere to the highest quality of academic standards and credibility of information. To achieve this aim, the Journal draws from the experience and expertise of highly qualified and competent internal and external reviewers.

This volume contains papers covering relevant and emerging issues on the themes of Conflict Management, Sustainable Development and related fields of knowledge. These topics are: *Fostering the Principles of Natural Resources Management in Kenya; Boosting Biodiversity Conservation through improved Forest Resources Management; Health Related Intellectual Property Rights in Africa in Light of the COVID-19 Pandemic; Reconciling Refugees Right to Non-Refoulement and Repatriation of*

Refugees as a Counterterrorism Measure intended to Uphold National Security in Kenya; An Examination of the Legal and Policy Framework On Child Refugee Education in Kenya; Defining Democracy: A Review of Sen, Amartya Kumar (1999)? Democracy as A Universal Value. Journal of Democracy, (3); Presumption of Citizenship for Foundlings: Exploring Enforceability of Article 14(4) Of The Constitution of Kenya 2010; Decyrypting Cryptocurrencies and Corruption: Respice, Adspice, Prospice' and Mediation-Negotiation: A Template Therapy for Global Conflicts'

Despite the immense success of the Journal since its launch, the Editorial Team is committed to steering it to even greater heights. We thus welcome feedback from our readers both in Kenya and across the globe to help us continue improving the Journal.

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

The Journal can be accessed on https://journalofcmsd.net
We welcome submission of papers, commentaries, case digests, legal opinions and book reviews on the themes of Conflict Management and Sustainable Development or other related fields of knowledge to be considered for publication in subsequent issues of the Journal. These submissions should be channeled to editor@journalofcmsd.net and copied to admin@kmco.co.ke

The Journal adopts an open and non-biased approach in its publication. We thus encourage students, members outside the legal profession and other upcoming authors to submit papers to be considered for publication in subsequent issues of the Journal.

Dr. Kariuki Muigua, Ph.D., FCIArb, (Ch.Arb), Accredited Mediator.
Editor, Nairobi,
February, 2022.

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Fostering the Principles of Natural Resources Management in Kenya

By: ***Kariuki Muigua****

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[1], 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'.[2]

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

[2] 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.[3] 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.[4]

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. [5] 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. [6] Further, traditional ecological knowledge of communities in Kenya on the management of natural resources also applies.[7] Such traditional and cultural principles include traditional dispute resolution mechanisms.[8]

2. Sustainable Development

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

[3] 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* [Accessed on 5/1/2019].

[4] Ratification of Treaties; See also the *Treaty Making and Ratification Act*, 2012, Laws of Kenya.

[5] Art.10 (2), Constitution of Kenya.

[6] *Ibid*

[7] S. 3 (5) (b) of EMCA, Act No. 8 of 1999.

[8] See Art.159 (2) (c) and 67 (2) (f), Constitution of Kenya.

civilizations.[9] It seeks to limit environmental damage arising from anthropogenic activities and to lessen the depletion of non-renewable resources and pollution of the environment.[10] The *Brundtland Commission*[11] defined sustainable development as, *"development that meets the needs of the present without compromising the ability of future generations to meet their own needs."*[12] Under section 2 of Environmental Management and Co-ordination Act, 1999[13] (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.[14]

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 reduction, promotion of human rights, promotion of equitable opportunities,

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[9] Per Judge Christopher Weeramantry *in Hungary v Slovakia*, 1997 WL 1168556 (I.C.J-1997).

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

[11] 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.

[12] World Commission on Environment and Development, *Our Common Future*, GAOR, 42nd 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).

[13] Environmental Management and Co-ordination Act, No. 8 of 1999, Laws of Kenya.

[14] Weiss, E.B., "In Fairness to Future Generations and Sustainable *Development*," *American University International Law Review*, Vol.8, 1992.

environmental conservation and assessment of the impacts of development activities.[15] 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.[16] 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 Gabcikovo-Nagymoros Project,* [17] Judge Weeremantry[18] 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 development reconciles these rights by ensuring that the right to

[15] 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*.

[16] Kenya Vision 2030, Government of Kenya, 2007.

[17] 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.

[18] Judge of the International Court of Justice (ICJ).

development tolerates the '*reasonable demands of environmental protection.'*[19]

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.[20] However, the current *Mining Act 2016*[21] 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.[22]

Although the ecological approach has been incorporated in the legal framework [23] 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.[24]

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

[20] Munyiri, S.K., "Policy Position on the Proposed Amendments of the Mining and Minerals Bill 2009," Kenya Chamber of Mines, 2010.

[21] *Mining Act*, No. 12 of 2016, Laws of Kenya.

[22] 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).

[23] Art.10 (2) (d), 42, 69 and 70, Constitution of Kenya.

[24] 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 h*ttps://www.business-humanrights.org/en/kenya-court-declares-construction-of-lamu-port-violates-indigenous-communitys-right-to-information-healthy-environment-culture-orders-*

Courts in Kenya have applied the sustainable development principle as evidenced in the case of *Peter K. Waweru v Republic*,[25] 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.[26] Similarly, the role of the public in decision-making processes is necessary in the sustainable management, protection and conservation of the environment.[27]

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.[28]

Sustainable use refers to the need to reduce and eliminate unsustainable patterns of production and consumption.[29] It is described as use that in any way and rate does not lead to long-term decline of biological diversity,

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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].

[25] *Peter K. Waweru v Republic*, [2006] eKLR.

[26] 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.

[27] Art.10 (2) (a) and 69 (1) (d) of the Constitution.

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

[29] Principle 8 of the Rio Declaration.

thereby maintaining its potential to meet the needs of present and future generations.[30] 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.[31] It is a principle that is applied to determine the permissibility of natural resource exploitation[32] 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.[33] 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.[34] Strong sustainability is preferable to weak sustainability for reasons such as 'non-substitutability,'[35]'uncertainty'[36]and 'irreversibility.'[37] Weak sustainability makes a wrong assumption that future generations will be adequately compensated for any loss of environmental amenity by having alternative sources of wealth creation.[38]

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[30] Art.2, Convention on Biological Diversity.
[31] S. 2 of Act, No. 8 of 1999.
[32] See Birnie, P., Boyle, A. and Redgwell, C., 'International Law and the Environment,' (3rd ed., Oxford 2009).
[33] Ar. 69 (1) (a).
[34] Beder, S., "Costing the Earth: Equity, Sustainable Development and Environmental Economics," *New Zealand Journal of Environmental Law*, Vol.4, 2000, pp.227-243.
[35] *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.
[36] *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.
[37] *Ibid* The depletion of natural capital can lead to irreversible losses such as species and habitats, which cannot be recreated using man-made resources.
[38] *Ibid*

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.[39] 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.[40]

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 victims of pollution, if any.[41] The polluter pays principle promotes the right to a clean and healthy environment and gives appropriate

[39] 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.
[40] S. 2 EMCA.
[41] *Ibid*

remedies to victims of pollution.[42] 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.[43]

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*, [44] 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 costs of pollution.[45] 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

[42] Moutondo, E., "The Polluter Pays Principle," in "*Industries and Enforcement of Environmental Law in Africa-Industry Experts Review Environmental Practice*," *op. cit*, p. 43.
[43] Rio Declaration on Environment and Development 1992, A/CONF.151/26 (Vol. I).
[44] [1990] (4) SA 749.
[45] Moutondo, E., "The Polluter Pays Principle," in "*Industries and Enforcement of Environmental Law in Africa-Industry Experts Review Environmental Practice*,"*op cit*.

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.[46] 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.[47] 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.[48]

It was one of the principles applied by the court in *Peter K. Waweru v Republic*.[49] 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.

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.[50] The importance of public participation is the recognition that better decision-making flows from involving the public. It is now generally agreed that

[46] S. 111 of Act No. 8 of 1999.
[47] *Ibid*, S. 25 (2).
[48] *Ibid*, S. 25 (4).
[49] High Court of Kenya at Nairobi, Misc Civ. Applic. 118 of 2004, 2 March, 2006.
[50] Marianela, C., *et al*, *Environmental Law in Developing Countries: Selected Issues*, Vol. II, IUCN, 2004, p. 7.

environmental problems cannot be solved by solely relying on technocratic and bureaucratic monopoly of decision-making.[51]

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.[52] 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.*"[53]

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. 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.[54]

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

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[51] *Ibid*

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

[53] 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* [Accessed on 8/1/2019].

[54] Creighton, J.L., *The Public Participation Handbook: Making Better Decisions through Citizen Involvement*, *op cit*, p.8.

the public in environmental matters.[55] One of the national values and principles of governance entrenched in the Constitution is participation of the people.[56] The Constitution provides that the state should encourage public participation in the management, protection and conservation of the environment.[57] 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.[58] This is also extended to the administration of county governments within the devolved system.[59]

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 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.[60] 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

[55] 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].

[56] Art.10 (2) (a).

[57] Art.69 (1) (d).

[58] Art.69 (2).

[59] 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 [Accessed on 8/1/2019].

[60] Report of the United Nations Conference on Environment and Development (Rio De Janeiro, 3-14 June 1992).

that participants may not be truly representative and belief that citizens lack knowledge of complex technical issues.[61] 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.[62] This is necessary because technocrats in these institutions are not directly elected by the people.

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[61] 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.

[62] 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 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).
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> **[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

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.[63] 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.[64]

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 individuals not directly affected by the environmental issue but may choose to be part of the decision making process.[65]

In *Hassan and 4 others v KWS*[66] 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,*[67] the court gave a much wider description of the public by stating that it is "the individual

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> 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."

[63] Dietz & Stern (eds), *Public Participation in Environmental Assessment and Decision Making, op cit,* p.15.
[64] *Ibid*
[65] *Ibid*, p.15.
[66] [1996] 1KLR (E&L) 214, p.215.
[67] HC Judicial Review No. 122 of 2011, [2012] eKLR.

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."[68]

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[68] 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.
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> **[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 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.
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> **[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

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.[69] It requires effective protection of the human right to hold and express opinions and seek, receive and impart ideas.[70] The Constitution protects the freedom of expression.[71] Public participation also requires the right of access to appropriate, comprehensible and timely information held by public institutions.[72] In *Meza Galana and 3 others v AG and 2 others,*[73] 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*[74], the court stated that:

> 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.

[69] Dietz & Stern (eds), *Public Participation in Environmental Assessment and Decision Making, op cit,* p.14.
[70] UNEP, *Training Manual on International Environmental Law,* (UNEP, 2006), p.193.
[71] Art. 33.
[72] UNEP, *Training Manual on International Environmental Law, op cit,* p.193.
[73] HCCC No. 341 of 1993, [2007] eKLR.
[74] British American Tobacco Ltd v Cabinet Secretary for the Ministry of Health & 5 others [2017] eKLR, Civil Appeal 112 of 2016.

> **"***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."*[75]
>
> *"……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 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*."[76]

In the Matter of the Mui Coal Basin Local Community[77] case the court summarized what entails public participation as follows:

[75] Para. 49, British American Tobacco Ltd v Cabinet Secretary for the Ministry of Health & 5 others [2017] eKLR, Civil Appeal 112 of 2016.
[76] Ibid, Para. 52..
[77] 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).

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 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.[78] 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*,[79] the court stated that even if there was a distinct law on the environment, it was not exclusive and most 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,*[80] 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,*[81] 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,*[82] the court quashed the gazettement of Lake Kanyaboli National Reserve on the grounds that the Minister in gazetting the same did

[78] 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.
[79] [2001] 1KLR (E&L) 423.
[80] High Court Judicial Review No. 122 of 2011, [2012] eKLR.
[81] [1996] 1KLR (E&L) 214, p.215.
[82] HC Miscellaneous Application No. 55 of 2010, [2012] eKLR.

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.[83] EIA is an important tool for public participation in natural resources management. Internationally, the CBD requires public participation in EIA procedures.[84] The need for EIA was also captured in Principle 17 of the *1992 Rio Declaration on Environment and Development* in the following terms:[85] *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.[86] The procedure for EIA provided for under EMCA is designed to be quite comprehensive and to ensure public participation.[87] The Act requires proponent of any project specified in the Second Schedule[88] 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

[83] 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.

[84] Art. 14(1) (a).

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

[86] 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*.

[87] Ibid

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

certain cases.[89] 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.[90] 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.[91] 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 licence on such terms and conditions as may be appropriate and necessary to facilitate sustainable development and sound environmental management.[92]

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.

[89] S. 58 (2).
[90] S. 59.
[91] S. 62.
[92] S. 63, EMCA.

> 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,*[93] 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 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,*[94] 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.

[93] [2006] 1KLR (E&L) 772.
[94] HCCC No. 133 of 2012, [2013] eKLR.

EIA is a continuous process that goes on throughout the duration of the project.[95]

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).[96] While 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).[97] 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

[95] S. 64, EMCA; See also *Gabcikovo-Nagymaros Case,* ICJ Rep. (1997), 7.

[96] United Nations Economic Commission for Europe, 'Introduction,' available at 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 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.

[97] *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*.

economic aspects.[98] 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.[99]

c. Public Consultation

The *Forest Conservation and Management Act, 2016*[100]and the *Water Act 2016*[101] 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[102] while in the *Forest Conservation and Management Act*, they are in a schedule[103]. 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[104] 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.[105]

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[98] 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].

[99] 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].

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

[101] *Water Act*, No.43 of 2016, laws of Kenya.

[102] Ibid, S.139.

[103] Second Schedule, s.34, Provisions for Public Consultation.

[104] The Water Act 2016 provides for 30 days.

[105] Creighton, J.L., *The Public Participation Handbook: Making Better Decisions through Citizen Involvement*, *op cit*, p.7.

In *Lake Naivasha Friends of the Environment v AG and 2 others*,[106] 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 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.[107] 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.[108] There is an international obligation not to cause damage to the environment irrespective of whether or not there is transboundary impact or international responsibility.[109] This principle requires that activities that might cause risk or damage to the environment be reduced, limited or controlled.[110] It requires anticipatory investigation, planning and action before undertaking activities which can cause harm to the environment.[111]

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[106] HC Petition No. 36 of 2011, [2012] eKLR.

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

[108] UNEP, *Training Manual on International Environmental Law, op cit,* p.32.

[109] *Ibid*

[110] Sands, P., *Principles of International Environmental Law* (Cambridge University Press, 2003), p.246.

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

Under this principle, States are under an obligation to prevent damage to the environment within their own jurisdictions.[112] The standard of care for prevention, is due diligence.[113] Due diligence in customary international law requires effective national legislation and administrative controls.[114] In Kenya, the Constitution contains provisions that reflect this principle. One of the 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.[115]

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.

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[112] Sands, P., *Principles of International Environmental Law* (Cambridge University Press, 2003), p.246.
[113] Nanda V. & Pring, G.R, *International Environmental Law and Policy for the 21st Century, op cit*, p. 62.
[114] *Ibid*
[115] Art.70 (3), Constitution of Kenya, 2010.

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 principally includes both multilateral and bilateral, transboundary and private sector cooperation.[116]

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.[117]

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.[118]

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[116] Nkonya, E., *et al*., International cooperation for sustainable land and water management, *SOLAW Background Thematic Report* - TR16.

[117] No. 8 of 1999, S. 3 (5) (c).

[118] 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

The *Agenda 2030*[119] also affirms that international trade is an engine for inclusive economic growth and poverty reduction, and contributes to the promotion of sustainable development.[120] As such, it seeks to continue to 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.[121]

Equitable international trade can enable countries to achieve food security, generate decent employment opportunities for the poor, promote technology transfer[122], 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.[123] This is

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cooperation to address the persistent challenges related to sustainable development for all, in particular in developing countries.

[120] 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 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.

[121] Ibid, para. 68.

[122] 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."

[123] 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

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 and entrepreneurial capacity required for economic diversification, growth and development.[124] However, this can only be effectively achieved through international cooperation for realisation of sustainable development agenda.[125] 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.[126] 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

Available at *http://unctad.org/en/PublicationsLibrary/ditcted2014d1_en.*pdf [Accessed on 8/1/2019].

[124] Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016), p. 244.

[125] 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.

[126] SDG Goal 17.1.

development goals, including through North-South, South-South and triangular cooperation.[127]

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 United Nations that impede the full achievement of economic and social development, particularly in developing countries.[128]

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.[129] 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*."[130] 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

[127] SDG Goal 17.9.
[128] A/RES/70/1 - Transforming our world: the 2030 Agenda for Sustainable Development.
[129] 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.
[130] Art.3 of the UNFCCC.

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.

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.[131] The idea is to encourage universal participation and equity.[132]

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).[133] Article I thereof provides that the objectives of the

[131] UNEP, *Training Manual on International Environmental Law, op cit,* p.29.
[132] *Ibid*
[133] The Union for Ethical Bio-Trade, Available at *http://www.ethicalbiotrade.org/abs/*[Accessed on 7/1/2019].

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 into account all rights over those resources and to technologies, and by appropriate funding.[134]

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.

[134] Art. I, Convention on Biological Diversity.

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 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,[135]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.[136]

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. [137] The

[135] Convention on the Law of the Non-Navigational Uses of International Watercourses New York, 21 May 1997.

[136] 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].

[137] S. 2, Act No. 8 of 1999.

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 uncertainty. This principle requires that all reasonable measures be taken to prevent the possible deleterious environmental consequences of development activities.[138] This is well captured under Principle 15 of the *Rio Declaration*[139] 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.[140] 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*

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

[139] *Rio Declaration* of 1992, UN Doc. A/CONF.151/26 (Vol. I).

[140] 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.

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 considering a burden-sharing responsibility for those not being cautious or caring in the past.[141]

The precautionary principle encourages policies that protect human health and the environment in the face of uncertain risks.[142] 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.[143] 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

[141] *Ibid*

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

[143] 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.

of the environment. This places responsibilities on the member States to ensure realization of the goals and objectives of the Treaty.

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.[144] 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.[145] It has been

[144] UNEP, *Training Manual on International Environmental Law, op cit,* p.23.

[145] See generally, Muigua, K., *Harnessing Traditional Knowledge for Environmental Conflict Management in Kenya*, available at

acknowledged by some government officials that resettling traditional forest-dwelling communities in their natural habitats can play an important role in restoring the country's forest cover.[146] This is because such people have the traditional skills needed to help the Government conserve the forests.[147] 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.[148]

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.

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

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

[147] Ibid

[148] Republic of Kenya: Ministry of Forestry and Wildlife, *National Wildlife Conservation and Management Policy, 2012*, p.2.

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Mediation-Negotiation: A Template Therapy For Global Conflicts

By: ***Professor Adesina Temitayo Bello****[*]

Abstract

This article examines mediation and negotiation as a remedy to conflicts happening around the world. Based on the fact that human beings and conflicts are inseparable, it is imperative to seek out for methods in resolving these disputes without spilling blood. Mediation which alters the dynamics of negotiation has proven to be an important tool in resolving conflict at various fields. The article takes account of certain conflicts such as the Iraq-Iran conflict, Kuwait-Iraq invasion and the Nigerian-Cameroon border disputes and examined the interplay of mediation and negotiation in resolving such complex disputes.

The article highlights the efficacy of mediation and its ability to resolve disputes in the most amicable way possible, proving in every sense solution to disputes without the loss of lives providing a neutral party and professional assistance as regards conflicts brought for its relief. It concludes that these Alternative Dispute Resolution processes should be utilized more often as it is more advantageous coupled with the successive outcomes it guarantees. Finally, this article recommends that resolutions are done through mediation reducing the need for military aggression in the guise of resolving disputes, encourage parties' dialogue and promote resolution agreement that will be of public benefits.

Keyword: Alternative Dispute Resolution, Conflicts, Mediation, Negotiation.

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Introduction

John Burton asserts that conflict is a generic phenomenon that knows no system boundaries.[1] Whether we are dealing with interpersonal, community, ethnic, or international relations, we are dealing with the same ontological needs of people, requiring the same analytical processes of conflict resolution.[2] Anything that would lead to a disagreement produces conflicts. Owing to Attendant divergence in aims, objectives, ideas, beliefs, norms, values, customs and traditions fuels the inevitability of conflict.

In our world today, there exist countless conflicts which threaten global peace. From the United Kingdom (UK) and the United States of America (USA) engaged at war in Afghanistan and Iraq, through to insurgencies in Algeria, Burma, Nigeria, Columbia, civil wars in African nations, as well as conflicts between the people in China, Iran and Israel[3], depicts the unwholesome state of things globally. The particular cause of these conflicts are not uniform in themselves as they differ based on either ethnicity, religion, governance, politics resource allocation etc. The main issue of contention is how these conflicts may be resolved in the bid to achieving global peace.

The use of negotiation as an Alternative Dispute Resolution (ADR) process has proven itself as a viable tool in managing and resolving conflicts around the world. However, negotiations may fail owing to greed, intransigencies, poor relations etc. thus making a third party neutral intervention eminent. The intervention of third party to facilitate communication and help the disputants to search for a solution is known as mediation. This paper advocates for negotiation which will in certain circumstances migrate into

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[1] John W. Burton, Conflict resolution as a political theory *http://cardata.gmu.edu/docs/teaching/TEACHING%20PLATFORM/course%20501/UNIT%203/Burton%20-%20Conflict%20Resolution%20as%20a%20Political%20Philosophy%20copy.pdf* accessed 21st July 2019

[2] Ibid

[3] Vikas Shah (2009): Thought Economics: Global Conflict: Causes and Solutions for Peace, an interview with Kristiina Rintakoski Executive Director of the Crisis Management Initiative *http://thoughteconomics.blogspot.com/2009/07/global-conflict-causes-and-solutions_16.html* accessed August 12, 2019

mediation as a therapy to most of the global conflicts provided the parties in disputes are willing to resolve their differences.

Negotiation and Mediation

It is imperative to assert that negotiation and mediation are Alternative Dispute Resolution (ADR) processes that are non-violent by nature. Negotiation involves disputants exploring solutions to their mutual problems independently without any intervention from a third party.[4] The disputing parties have firm control of the entire discussion as there is no third-party facilitator. Negotiation could be a fast and inexpensive mode of managing and settling conflicts at whatever level. Fisher and Ury[5] argues that we negotiate because we desire an outcome better than what we would have had without negotiating.

However, circumstances arise when direct negotiation between disputing parties will fail. For the purpose of making the disputes resolved as soon as possible, the next logical step is to seek the assistance of a third party neutral. The third party assists the disputants to reach an agreement as he/she doesn't stand in the position of a judge or an arbitrator imposing a solution on the parties in disputes. This method is known as *'mediation'*. Mediation is the broad term used to describe the intervention of third parties in dispute resolution process.[6]

Negotiation is the most flexible, informal, and party-directed method; it is the closest to the parties' circumstances and control, and can be geared to

[4] Roy J. Lewicki, Stephen E. Weiss and David Lewin, '*Models of Conflict, Negotiation and Third-Party Intervention: A Review and Synthesis'* Journal of Organizational Behavior, Vol. 13, No. 3, Special Issue: Conflict and Negotiation in Organizations: Historical and Contemporary Perspectives (May, 1992), <https://www.jstor.org/stable/2488468> accessed 13th August 2019.

[5] Roger Fisher, William Ury et al (1991): *Getting To Yes: Negotiating Agreement Without Giving In*, 2nd ed., New York: Pengium Books p.100

[6] Christopher Moore, '*The Mediation Process: Practical Strategies for Resolving Conflict'*, 3rd., (San Francisco: Jossey-Bass Publishers, 2004). <https://www.beyondintractability.org/bksum/moore-mediation> accessed 13th August 2019.

each party's own concerns[7]. Mediation arises either based on the agreement of the disputants that a mediator should intervene or where after direct negotiations had already taken place but broke down, parties in disputes can subsequently agree for the intervention of a third party neutral (mediator). In a mediation procedure, the third party plays the role of adviser to both parties. He works with the parties to resolve their dispute by agreement, rather than imposing a solution[8].

The term 'conciliation' is sometimes used to describe the same process of involving third parties, usually in the context of labour relations when neutral intervention is used to break a stalemate, domestic relations or international commercial matters.[9] However, in recent times, mediation and conciliation have been used interchangeably. On the usefulness of mediation, Northrop F.S.C states that:

> *The "first best" and socially proper way to settle disputes used by the "superior man," was by the method of mediation, following the ethics of the "middle way". This consisted in bringing the disputants to something they both approved as a settlement of the dispute, by means of an intermediary. This middle man served largely as a messenger. Proper behaviour prescribed that he refuse even to arbitrate the differences at the request of the disputants. "Good" dispute settling consisted in conveying the respective claims of the disputants back and forth between them until the disputants themselves arrived at a solution which was approved by both."[10](after such and extensive quotation.*

[7] Lew Julian et al (2003): *Comparative International Commercial Arbitration*, Netherland: Kluwer Law International, p. 13

[8] Ibid p. 13

[9] *Alessandra Sgubini, Mara Prieditis & Andrea Marighetto,* 'Arbitration, Mediation and Conciliation: differences and similarities from an International and Italian business perspective' August 2004<*https://www.mediate.com/articles/sgubiniA2.cfm#bio*> accessed 13th August 2019.

[10] Northrop F.S.C (1958): "The Mediational Approval Theory of Law in American Legal Realism, Virginia Law Review Vol. 44 347, 349"

Mediation is negotiation carried out with the assistance of neutral third-party at the instance of the parties[11]. Mediation is an alternative to adjudication in which a neutral third party who has no final decision-making authority intervenes in negotiations to assist resolution of conflict[12]. It is imperative to note that mediation alters the dynamics of negotiation[13]. Negotiation which involves just the parties in dispute talking directly to each other in private, employing strategies and tactics such as the integrative (win-win) and distributive (win-lose) approach as well as going through different phases[14] to reach an agreement, automatically changes when the parties seek the help of a mediator to settle their difference. However, in mediation, mediators work with the disputants in reaching a common ground through revealing areas in their conflict that shows weaknesses in their cases as well as proffering ways of reaching an agreement.

It has been said that mediators often view the alternative process as serving a variety of objectives beyond merely facilitating settlement.[15] In addition mediation has been viewed as a problem-solving aid that helps parties to reach more satisfying resolution through generating 'win-win' solutions[16]. Moreover, some claim that mediation may work to achieve social justice by cultivating self-help skills, empowering communities, and reallocating power among groups.[17]

As stated earlier, mediation was originally used in labour or industrial dispute. Moreover, as a result of its acceptance in this field, mediation was

[11] MacFarlane J.: An Alternative to What? In MacFarlane (ed) Rethinking Disputes: The Mediation Alternative p.1

[12] Center for Dispute Resolution (CDR) Associates, Mediation 1 (1989) (defining mediation in manual for mediators); Linda R. Singer (1994): Settling Disputes: *Conflict Resolution in Business, Families, and the Legal System* 2nd Ed.

[13] Goldberg Stephen et al (2007): *Dispute Resolution: Negotiation, Mediation and Other Processes*, 5th Ed. Aspen Law Publishers

[14] Preparation, Presentation, Bargaining and Closing or Agreement phase

[15] Robert Bush and Joseph Folger (2004): *The Promise of Mediation: The Transformative Approach to Conflict*, San Francisco: Jossey-Bass Publishers

[16] Roger Fisher and William Ury (1991): *Getting Yes: Negotiating Agreement Without Giving In*

[17] Bush and Folger(2004): *The Promise of Mediation: The Transformative Approach to Conflict*

used in an increasingly broad range of non-labour disputes: divorce, environmental, housing, institutional (including prisons, schools, and hospitals), small-claims, personal injury and insurance, and general business disputes, as well as claims involving governmental agencies[18]. However, mediation acts as a potential for responding to urban conflicts.

Mediation Process

Mediation is fundamentally a process of assisted negotiation[19]. Hence the strategies used in negotiation such as the integrative and distributive strategies are central to mediation. The major difference between negotiation and mediation is the presence of the mediator whose neutrality is imperative towards the success of the mediation process. A mediator is essentially a facilitator of communication between disputants, assisting them to engage in a dialogue directed toward mutual resolution of their dispute. However, the role of a mediator is never static as it varies based on the circumstances of the conflict before him. Nevertheless, the roles may include being a facilitator of communication, arranger of processes to inform and enlighten the disputants, impresario of structured dialogue, encourager of problem-solving, generator of possible solutions or shuttle-diplomat using control of the information flow to focus on areas of agreement without the risks of much face-to-face confrontation by the parties[20].

The strength of mediation is predicated on the fact that the parties achieve their own resolution of dispute without being bound to a formal, and possibly inflexible, legal solution[21]. The benefits of mediation include:

[18] Singer L.R. (1990): *Settling Disputes: Conflict Resolution in Business, Families, and the Legal System*, Boulder, Colo.: Westview Press

[19] Marcel K.W & Wiseman, P. (1987): "Why We Teach Law Students to Mediate, Journal of Dispute Resolution Vol. 77"

[20] Rau Scott et al (2006): *Mediation and Other Non-Binding ADR Processes* 3rd Ed., New York: Foundation Press p. 14

[21] Lon Fuller (1971): "Mediation – its Forms and Functions, Southern California Law Review 44"

I. Parties keep control over the outcome of their own problem
II. Disputes can be settled promptly. A mediation session can be scheduled as soon as both parties agree to use mediation to resolve the dispute.
III. Mediation promotes better relationships through cooperative problem-solving and improved communication.
IV. Both facts and feelings are considered with the help of an impartial mediator
V. Mediation is private and confidential. The mediator and parties must maintain, to the full extent required by law, the confidentiality of the information disclosed during mediation.
VI. Mediation is voluntary, and may be terminated at any time by a party or mediator
VII. Mediation costs may be significantly less than taking a case to court[22].

For the management and resolution of conflicts involving nation-states, interstate or intrastate conflicts, the following processes for a successful mediation are stated below:[23]

Assess the Conflict: The first step in any mediation effort should be to assess the conflict. Conflict analysis should provide a contextualized understanding of the conflict and answer questions of strategy: at what level to engage, how to gain leverage, and know who to focus efforts on. In essence, assessing the conflict at hand involves understanding the rationale behind the conflict, who are the actors etc.[24]

[22] Mediation: Another Method for Resolving Disputes *www.alabar.org/brochures/mediation.pdf* accessed August 13, 2019
[23] Pildat Background Paper: Conflict Management The Mediation Process *www.pildat.org/publication/conflict_management-themediationprocess.pdf* Accessed August 13, 2019
[24] Pildat Background Paper: Conflict Management The Mediation Process www.pildat.org/publication/conflict_management-themediationprocess.pdf Accessed August 13, 2019

Ensure mediator readiness: At this point, the person acting as a mediator must satisfy himself and the parties of his readiness and competence to mediate. He or she must answer questions such as whether he/she has the right skills, the right resources, and the right support to be successful. Where the mediator through self-assessment shows that he or she can make a real contribution, then the mediator can have faith in such assessment and act accordingly.[25]

Ensure Conflict Ripeness: It is imperative to note that many mediation studies give considerable attention to the concept of conflict ripeness. A conflict may become ripe for negotiation when the enemy is aware of the fact that they are in a mutually hurting stalemate and sense that a way out is possible. The mediator must ensure that the conflict is ready to be tackled.[26]
Conduct Track-I Mediation: Once the mediator has assessed the conflict, determined his/her readiness to act and evaluated the conflict before him/her, the mediator can begin negotiation. Responsibilities that is saddled on the mediator at this stage include laying the groundwork, creating roles for all relevant actors, handling logistics, actually conducting negotiations, fitting the public into the process, and working with the media.[27]

Encourage Track-II Dialogue: There is a growing consensus among both official and unofficial actors that no single actor or activity is sufficient to build sustainable peace in situations of complex conflict. Track-II, or unofficial diplomacy conducted among grassroots and middle level opinion leaders can be a valuable adjunct to the formal peace negotiations. In addition, it can help local community engage in the kinds of tasks and make the necessary psychological changes required to generate and sustain support for peace process.[28]

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[25] Ibid
[26] Ibid
[27] Ibid
[28] Pildat Background Paper: Conflict Management The Mediation Process *www.pildat.org/publication/conflict_management-themediationprocess.pdf* Accessed August 13, 2019

Construct a Peace Agreement: Here, it is the final step in the mediation process to produce an agreement that is acceptable not only to the parties to the conflict but also to the wider public coupled with standing a good chance of being implemented.[29]

Mediation and Negotiation in Global Conflict

Conflict which is inevitable among human beings is also unavoidable among nation-states. Taking account of the Iran-Iraq war which occurred between 22nd September 1980 and 20th August 1988 has been held to be the 20th century longest conventional war[30]. The underlying cause of the conflict between these countries was based on border disputes. There was initially a 1975 Algiers Agreement which served as an agreement between Iran and Iraq to settle their border disputes and serving as bilateral treaty between the two countries.[31]

However, accusations were placed on Iran for frequent and blatant violation of Iraqi sovereignty, thus making the 1975 agreement to be null and void. Iraq invaded Iran in 1980 which resulted to the death of over 400,000 people[32]. Negotiations between Saddam Hussein and the Iran government for a ceasefire broke down owing to the fact that Iraqi troops occupying Iran border areas would continue to hold that front coupled with the fact that Iran would receive no foreign support to pressure Iraq to withdraw, nor receive compensation, nor get an international condemnation of Iraq[33]. The United Nations had to intervene in the conflict through resolution 598 which was unanimously accepted by Iran and Iraq. The resolution was for an immediate ceasefire between Iran and Iraq alongside sending back prisoners of war to their respective countries. This resolution became effective on August 8, 1988 thus ending the war between Iran and Iraq.

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[29] Ibid

[30] Weiss Martin: War of Blackmail *www.safehaven.com/article/7228/war-of-blackmail* Accessed August 12, 2019; Carlisle Rodney P.(2003):Persian Gulf War (American at War(Fact on File)), New York: Facts on File.

[32] Hiro Dilip (1991): *The Longest War: The Iran-Iraq Military Conflict*, New York: Routledge p 205

The Kuwait invasion of 1990 is worth examining based on the viability of mediation and negotiation. The Kuwait-Iraq war which was caused by the inability of Iraq and to repay the debt of $80billion to Kuwait being funds borrowed to finance the Iran-Iraq war[34] as well as the request of Kuwait to OPEC to increase the country's total oil production from 50% to 1.35million bpd which brought about economic sabotage in Iraq[35]. Owing to the actions of Kuwait, Iraq invaded Kuwait on August 2 1990 which claimed the lives of about 1000 Kuwait civilians while more than 300,000 people left the country[36]. Despites numerous negotiations between the major world powers and Iraq, including the United Nations, the invasion still continued until the United States of America through the use of force in January 1991[37] drove Iraq from Kuwait. It may be reasonable to submit here that the use of aggression to resolve conflict is usually not the best alternative.

The Kuwait invasion could have been averted if mediation was used to explore for other means on how Iraq would pay her debt. Mediation as an alternative dispute resolution mechanism is interest-based. It is well established that Iraq and Kuwait have different interests. The essence of mediation is on how these divergent interests could be harmonized without giving regard to their respective rights and positions. When several negotiations have broken down between the super powers of the world including the United Nations, the United States ought to have intervened as a mediator.

The Nigerian-Cameroon border dispute over the Bakassi peninsula is another dispute which could have been resolved through negotiation and mediation

[34] Stork Joe, Lesch Ann M. (1990): Middle East Report : Background to the Crises: Why War? www.middleeast.org accessed August 12, 2019

[35] ibid

[36] See Jafi (2005): The Use of Terror during Iraq's invasion of Kuwait *http://jafi.org/JewishAgency/English/jewish%20education/Compelling%20Content/Eye%20on%20Israel/Current%20Issues/Peace%20and%20Conflict/The%20Use%20of%20Terror%20in%20Kuwait.htm* accessed August 13, 2019

[37] Fairhall, David; Walker, Martin (1991): "Allied planes bomb Iraq: Kuwait's liberation begun, says US, The Guardian London" *http://www.theguardian.com/world/1991/jan/17/iraq.davidfairhall* accessed August 13, 2019

without going through the rigors of litigation at the International Court of Justice (ICJ). It is however imperative to assert that the Bakassi peninsula is an oil and gas rich area which could bring about economic development in Nigeria, Cameroon and Bakassi itself. Assuming the leaders of Nigeria, Cameroon and Bakassi negotiated on how the area would be co-habited and agree on the ways in which the natural resources would be exploited, there would have been no cause for clashes between Nigeria and Cameroon. A clear example is the Joint Development Zone between Nigeria and Sao Tome Principe, which was an agreement entered into over an overlapping maritime boundary.

It is imperative to note that there is no universally acceptable strategy to the practice of negotiation. The most important thing is finding a way to resolve the contentious issues between the disputants. There are other numerous conflicts which could just be solved through negotiation and mediation without putting lives and properties of humans on the line.

Conclusion

According to Immanuel Kant 'Perpetual peace is no empty idea, but a practical thing which, through its gradual solution, is coming always nearer its final realization'[38]. World peace and development is threatened with enormous events of conflicts. There is not only political and economic breakdown but unimaginable loss of lives and properties. It is well established that human beings and conflicts are inseparable. However, these differences can be settled amicably without even shedding a pint of blood.

Mediation and negotiation are non-violent Alternative Dispute Resolution (ADR) mechanisms that are highly flexible and cost effective. Negotiation which is communication with a view to reaching an agreement is considered as the first approach towards resolution of any dispute. A neutral third party steps in when negotiation between the disputants did not bring any positive results. Such neutral third party is known as a mediator who facilitates communication between the disputants as well as helping them to reach an agreement rather than forcing his (mediator) own decision on the disputants.

[38] Immanuel Kant "Perpetual Peace" *https://www.mtholyoke.edu/acad/intrel/Kant1.htm* accessed August 13, 2019

These flexible dispute resolution mechanisms are highly recommended in solving conflicts at whatever level owing to evident advantages it poses coupled with a guarantee for successful result.

Globally mediation is now been canvassed for resolving conflicts because it will bring peace to the parties rather than escalating the conflicts.

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20Israel/Current%20Issues/Peace%20and%20Conflict/The%20Use%20of%20Terror%20in%20 Kuwait.htm accessed August 13, 2019

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Weiss Martin: War of Blackmail *www.safehaven.com/article/7228/war-of-blackmail accessed August 12*, 2019

'Decyrypting Cryptocurrencies and Corruption: Respice, Adspice, Prospice'

By: ***Paul Mwaniki Gachoka****

Abstract

Time has come for us to introspectively think about the place of digital currencies and the war on corruption. Time has come for us to examine the past, examine the present and examine in the present. Increasingly, diverse world jurisdictions have adopted an array of measures aimed at combating the war on corruption aided by digital currencies.

As our country, our legal infrastructure on cryptocurrency remains built on quicksand while the winds of cryptocurrency continue to rage ferociously. The rationale of this paper is to engage in an academic endeavour to locate the role of digital currencies in the fight against corruption. The paper notes the inadequacies of the legal system and also proposes that perhaps time has come for us to take wings into the future.

1.1 Introduction

Governments globally survive on the basis of tax payers' money to fund its operations and render crucial services to its citizen's such as health, education, security and Infrastructure among others.[1] These services are capital intensive in nature therefore they remain largely a preserve of the

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[1] *World Bank REPORT: Kenya Economic Update: In Search of Fiscal Space; Government Spending and Taxation: Who Benefits? Published on 10th October, 2018, Available at https://www.worldbank.org/en/country/kenya/publication/kenya-economic-update-how-kenya-is-using-tax-revenues-to-enhance-access-to-education-and-healthcare-for-low-income-families accessed on 27/01/2022*

state to render them via the collected pool of taxes or sovereign borrowing. The utilisation of these public resources by government entities has since time immemorial attracted strong criticism from the public on account of deficiencies brought by weak legal safeguards in ensuring accountability.

Unending pilferage of public resources from all sectors of government operations have inevitably scaled down the standards of living of our people as well as lowering our mortality rate. [2] Surprisingly, such vices have permeated from every sphere of governance structure; judiciary, executive and the legislature which makes an individual question the nobility of the social contract theory philosopher as a camouflage which is parasitical upon the subjugations of classes of persons.[3]

Five decades post-independence, Kenya has been perennially been singing the same tune of eradicating corruption with different regimes coming to power yet the vice continues to be bigger and lethal as evidence by remarks made by President Kenyatta when he stated that;

> *"Corruption has become an accepted way of life. As individuals and as a collective, we have sacrificed our traditions, customs and values at the altar of materialism. Rather than shunning those who have made their wealth through illicit means, we celebrate them, even in places of worship."*[4]

This acknowledgment by the head of state explains in great length the deep-rooted nature of this vice and despite the presidential assurance of total erosion of it and absence of sacred cows in his regime, which elicited some

[2] *Migai Akech, evaluating the impact of corruption (perception) indicators on governance discourses in Kenya, Int. Law: Rev. Colomb. Derecho Int. no.25 Bogotá July/Dec. 2014*
[3] *https://iep.utm.edu/soc-cont/ accessed on 27/01/2022*
[4] *President Uhuru Kenyatta's speech on January 25, 2019 at the National Anti-Corruption Conference at the Bomas of Kenya (Kenya), available online: www.president.go.ke accessed on 27/01/2022*

considerable optimism, the reality is that corruption in Kenya grows at an average rate of 2.4% annually.[5]

Despite these alarming statistics, the war on corruption is a milestone that we are quite far from covering, though we must admit that Kenya is moving in the right direction going reports in the annual reports by Ethics and Anti-corruption Commission, Kenya on convictions and recovery of illicitly acquired assets. The technological advancement in the world trade and banking sectors has rendered the desire of eroding corruption fictional. Kenya is a third world country which operates on very limited resources hence unable to keep up with this fast-moving financial technological innovativeness.[6] This crisis has primarily given birth to illicit financial flows and trade therefore posing a hindrance to curbing the menace of corruption.

2.1 The digital currency as a medium of exchange

Digital currencies are now a hot potato of discourse in the global economy which is said to hold more than KES 163 billion (approx. USD 1.62 billion) worth of Bitcoin, which is approximately 2.3% of Kenya's gross domestic product (GDP). With only 4 countries having a higher Bitcoin to GDP ratio than Kenya, this is an indication of Kenyans' thirst for the cryptocurrency.[7] Majority of these transactions have been on peer-to-peer cryptocurrency exchanges. Kenyans have embraced this paradigm shift financial avenue due to the problems bedevilling the fiat currency which have outraged them which operated from a decentralised system. Transactions challenges

[5]*https://knoema.com/atlas/Kenya/Corruption-perceptions-index accessed on 27/01/2022 <In 2020, corruption perceptions index for Kenya was 31 score. Corruption perceptions index of Kenya increased from 20 score in 2001 to 31 score in 2020 growing at an average annual rate of 2.54%. CPI Score relates to perceptions of the degree of corruption as seen by business people and country analysts, and ranges between 100 (highly clean) and 0 (highly corrupt).*

[6] *Bruno Gurtner, The Financial and Economic Crisis and Developing Countries, Dossier | Africa: 50 years of independence — Review |Major development policy trends, open edition journals, 2010.*

[7] *Sonal Sejpal and Geunhak Shin, Bitcoin And Other Virtual Currencies From A Kenyan Legal Perspective, 2018*

ranging from privacy concerns, counterparty trade risk and elimination of intermediaries are the primary reasons influencing use of digital currency.[8] The enormous use of cryptocurrency has acquired some notoriety in the financial trade enabling it to acquire the character of fiat currency save for being a legal tender since it's not approved by the Central Bank. These features enjoyed by cryptocurrency include; a medium of exchange, store of value and unit of account. [9]

3.1 Shortcomings of the Capitalist economy

The evolution of the financial market has seen the rise of the use of cryptocurrency in trading. [10] The viability of cryptocurrency has been enhanced by the deficiency experienced by the use of fiat currency which has inhabited trade in a manner that has diminished the user's investment. The most attractive feature of cryptocurrency is its novel concept of eliminating intermediaries in the financial market[11]. The modern capitalist financial economy has a chain of legal imperatives that one must follow to gain value. For instance; financial institutions such as Banks provide services such as; savings accounts, mobile money transfer, trade in stocks etc with the ultimate aim of making profit.

The birth of cryptocurrency is a revolt into this money-making schemes which have been of severe financial implications to economic trade. The bank imposes ledger charges as fees for the services rendered and further loans out money to other uses for purposes of generating interest for their

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[8] *https://hedera.com/learning/what-is-a-central-bank-digital-currency-cbdc?gclid=Cj0KCQiA6NOPBhCPARIsAHAy2zD_OKTIZsikJo8g9JAVNA0P47uO-diMYFDGSC_eDtf6E2CXsTiCCdUaAmpDEALw_wcB accessed on 29/01/2022*

[9] *The Point, a bulletin published by Institute of Economic Affairs November 2018 avaliable < https://media.africaportal.org/documents/cryptocurrencies_in_kenya.pdf accessed on 29/01/2022>*

[10] *Saiedi, E., Broström, A. & Ruiz, F. Global drivers of cryptocurrency infrastructure adoption. Small Bus Econ 57, 353–406 (2021). https://doi.org/10.1007/s11187-019-00309-8*

[11] *ibid*

own gain which some people perceive this as predatory lending.[12] Parts of Kenya have bought into this novel idea at Mnarani in Kilifi where they use cryptocurrency in the form of Sarafu, Sarafu, to sell his vegetables, and to buy supplies without having to use any cash.[13] The elimination of the intermediaries has ensured that they reap the best of their resources without having to pay other additional cost in relation to the same.

Cryptocurrency has also acts as a digital wallet which can be utilised as medium of exchange for small and large purchases of goods and services. This feature reduces to a great length the risk of theft through mugging as a potential risk facing the use of fiat currency. This safety is further endorsed by the building of ATM's which can easily convert cryptocurrency into liquidity in Kenya.

In addition to these features, cryptocurrency has been fronted as a safeguard to the potential risk of currency devaluation over financial economic dynamics. This occurs when a country wishes to attract foreign investors hence it will deliberately tamper with the foreign exchange rate to reduce its currency value. The effects of capital inflows though good for investments as it improves economic growth, it equally results in inflation. Cryptocurrencies, not only provide protection against currency devaluation but offer it in a way that provides some protection for currency devaluation, liquidity and convenience.[14] Cryptocurrency value is the same all over the world as opposed to the currency superiority which exist in the world using the fiat currency and further benefit is exhibited in countries experiencing super abnormal inflation rates such as Venezuela whose inflation rate at one point was 65,000%.[15] Cryptocurrency as a store of value come in handy when deciding an individual purchasing power in times of inflation.

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[12] *https://www.debt.org/credit/predatory-lending/ accessed on 30/01/2022*
[13] *Ruud Elmendorp, Cryptocurrency Booming Among Kenyan Farmers, published on 26th July, 2021. https://www.voanews.com/a/africa_cryptocurrency-booming-among-kenyan-farmers/6208732.html accessed on 30/01/2022*
[14] *https://www.binance.com/en/blog/fiat/lets-talk-about-whether-crypto-is-a-hedge-against-currency-devaluation-421499824684902548 accessed on 30/01/2022*
[15] *Ibid*

4.1 Lethal implication in the use of Cryptocurrency in Kenya

Kenya is a member of FATF through the regional body Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG). The Financial Action Task Force (FATF) is the global money laundering and terrorist financing watchdog[16].

Kenya being a member of FATF, it is bound by the recommendations. One of the recommendation deals with New Technologies[17].
The recommendation requires countries to "ensure that virtual asset service providers are regulated for Anti-Money Laundering /Combating Financing Terrorism purposes, and licensed or registered and subject to effective systems for monitoring and ensuring compliance with the relevant measures called for in the FATF Recommendations".

Further the recommendations require that countries should ensure that there is competent Authority to supervise Virtual asset providers which is different from a supervisory body.[18]

Contrary to the overwhelming evidence in support of the use of cryptocurrency, empirical evidence exists in the contemporary world which unequivocally suggest that, the cryptocurrency financial model is premature and should be suspended*.[19] This is based on the absence of legal and regulatory mechanisms which act as safeguards in the operation of the financial market.

Existence of cryptocurrency operates on two fronts either; Retail Central Bank Digital Currency and Wholesale Central Bank Digital Currency.[20] Retail Central Bank Digital Currency entails the use of block chain

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[16] *https://www.fatf-gafi.org/ accessed on 9th February 2022.*
[17] *https://www.fatf-gafi.org/publications/mutualevaluations/documents/fatf-methodology.html accessed on 9th February 2022.*
[18] Ibid
[19] *https://www.capitalfm.co.ke/business/2021/02/akoin-launches-in-kenya-with-promise-for-alternative-continent-wide-currency/*
[20] *Supra no.8*

technology which is anonymous and traceable around the clock. [21] Wholesale Central Bank Digital Currency on the other hand is tailor made for financial institution which operate a reserve deposit with the central bank. They serve to increase payments and security settlement efficiency while resolving liquidity and counterparty risk issues.[22]

The current situation in Kenya is that we have none of those two types of currency despite trading in cryptocurrency witnessed. This is because the Central Bank of Kenya has through a public statement warned its citizens of the dangers of trading with cryptocurrency. In the statement, the central bank stated the following;

> *''This is to inform the public that virtual currencies such as Bitcoin are not legal tender in Kenya and therefore no protection exists in the event that the platform that exchanges or holds the virtual currency fails or goes out of business…. The public should therefore desist from transacting in Bitcoin and similar products.''*[23]

The effects of this public proclamation did not in any way render the trading in cryptocurrency illegal neither did it legitimise it. Notwithstanding this caution which for all intent and purpose, Kenya continues to trade in cryptocurrency which is reported to be to tune of Kenya Shillings One Hundred and Sixty-Three Billion constituting 2.3% of the Gross Domestic Product.[24]

More cautionary pronouncement was made by the Judiciary as was observed in the case of *Lipisha Consortium Limited & another v Safaricom Limited*

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[21] Ibid
[22] Ibid
[23] Public Notice Caution To The Public On Virtual Currencies Such As Bitcoin available at ,<https://www.centralbank.go.ke/images/docs/media/Public_Notice_on_virtual_currencies_such_as_Bitcoin.pdf accessed on 30/01/2022 >
[24]https://www.businessdailyafrica.com/news/Citi-warns-over-risk-of-Kenya-bitcoins/539546-4263658-mhoko2z/index.html accessed on 30/01/2022 a 2017 report by Citibank citing the rising popularity of cryptocurrency.

[2015] eKLR[25] this case, Safaricom suspended its MPESA services to Lipisha Consortium and Bitpesa because Bitpesa was engaged in a money remittance business using Bitcoin without approval from the CBK. The court held that Safaricom was within its rights to have suspended its services to Lipisha and Bitpesa for operating a money remittance business without CBK approval. Further, the court would not force Safaricom to trade with Lipisha and Bitpesa, as Safaricom could be found to be in breach of anti-money laundering regulations by allowing Bitcoin trading and remittances through its M-PESA platform. This is due to the anonymity associated with Bitcoin trading, which is in contravention of know-your-client (KYC) requirements in remittances and money transfer regulations.[26]

Whereas Safaricom's policy to require its agents to obtain government approval from CBK before transacting into the crypto trade was held valid, the same has not hindered operators of cryptocurrency to innovative measures to maintain their practices. Cryptocurrency trading centres such as Vietnam-based Remitano[27] a new entrant into the crypto financial market has circumvented the hurdle by providing their MPESA account details of a seller of Bitcoin to a purchaser of who wishes to have Bitcoins which have upon confirmation of deposit of the amount. In the alternative, crypto traders provide bank details for a purchaser of Bitcoin to carry out a bank-to-bank transfer. This therefore means that willing Kenyans can therefore exchange their cash towards the purchasing of cryptocurrency without any hindrance giving rise to a series of questions why Kenyans are determined into this financial trade that has already been flagged as unregulated.

5.1 The legal framework of Cryptocurrency

To examine the utility and safeness of the financial transactions one must first unearth the legal basis underpinning this model of financial trade. Of key statue is the Central Bank of Kenya Act which gives credence to the adoption of crypto in Kenya. The Act provides that;

[25] *Lipisha Consortium Limited & another v Safaricom Limited [2015] eKLR*
[26] *Supra Note 2*
[27] *https://remitano.com/ke accessed on 30/01/2022*

''The Bank shall have the sole right to issue notes and coins in Kenya and, subject to subsection (4), only those notes and coins shall be legal tender in Kenya… ''[28]

Despite the existence of this express provision the Central Bank has declined to issue digital currency or in any way issue regulations in giving legitimacy of the trade of cryptocurrency. In support to this legal instrument other pieces of legislations such is (1) The National Payments Systems Act (NPSA); (2) the Capital Markets Act (CMA); and (3) the Kenya Information and Communication Act (KICA). The NPSA is administered by the Central Bank of Kenya (CBK). In contrast, the CMA is administered by the Capital Markets Authority (CMA). Finally, the KICA is administered by the Communications Authority.[29]

In addition, the Kenya's Money Remittance regulations also aid Central Bank of Kenya in regulating the operations of cryptocurrency in Kenya. Under these regulations, cryptocurrency companies must acquire licensing from Kenyan authorities to offer transmission services within Kenya. Licensing is required whenever a company offers a service for the transmission of money or any representation of monetary value without any payment accounts being created in the name of the payer or the payee, including: (1) where funds are received from a payer for the sole purpose of transferring a corresponding amount to a payee or another payment service operator acting on behalf of the payee; or (2) where funds are received on behalf of and made available to the payee.[30]

A judicial stretch application of the law may bring the Proceeds of Crime and Anti-Money Laundering Act into one of the legislative instruments which ought to govern the operations of cryptocurrency traders. Since users

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[28] *Ibid Section 22(1)*
[29] *Kenya Cryptocurrency Laws Regulation of Digital Currencies: Cryptocurrency, Bitcoins, Blockchain Technology available at*
< https://freemanlaw.com/cryptocurrency/kenya/ accessed on 30/01/2022>
[30] *Legal Notice No. 66 The Central Bank Of Kenya Act (Cap. 491) The Money Remittance Regulations, 2013*

of cryptocurrency can acquire property using digital currency hence it's safe to assert that fintech innovations which include the transfer of money or value may be deemed to be "reporting institutions" under the AML Act and have reporting and compliance obligations.[31]

6.1 Cryptocurrency as a catalyst of corruption

Despite the existence of legislatives statutes to curb financial illicit practices such as corruption in Kenya, the absence of regulation by the Central Bank has provided an avenue for individuals to unjustly enrich themselves. One for instance wonders why despite the cautionary statements given by the Central Bank on cryptocurrency, individuals still trade in huge amounts to the tune of over 163 billion as was the case in the year 2017.

The truth of the matter is that the Kenyan legal environment at the moment favours hugely illicit trade due to the laxity or unwillingness by the Central Bank to recognize digital currency as a legal tender hence an economic fodder to stash ill-gotten wealth[32]. Therefore, institutions such as the Ethics and Anti-Corruption Commission becomes a toothless dog since cryptocurrency trade is not a recognised legal tender neither does it leave a paper trail. It follows then that a person may receive a benefit in his capacity as a public servant and be immune to prosecution if the same was done via cryptocurrency due to their anonymity character which lives no paper trail and has no intermediaries such likes banks which require proper documentation.

The constitution of Kenya is the supreme law in the country and any other law contrary to it is of null and void to the extent of its unconstitutionality.[33] The Constitution further forbids the prosecution of an individual with a crime which was not an offense in Kenya at the time it was done or a crime under

[31] *David Geral, Irene Muthoni and Brian Kalule, Unscrambling Blockchain: Regulatory Frameworks In Cryptocurrency published in 2019.*
[32] *https://theconversation.com/kenya-needs-to-grasp-the-cryptocurrency-nettle-how-a-digital-currency-could-help-172092*
[33] *Article 2 of the Constitution 2010 Supremacy of the Constitution*

international law.[34] This was judicially reinforced in the case of *Geoffrey Kirinya Igweta vs Republic Cr. App. 81 of 2011* where Judge Ngah held that:

> *"At the time the appellant is alleged to have committed the offences for which he was convicted, the law that defined those offences was the relevant provisions of the Penal Code. Under Article 50 (2) (n) (i) of the Constitution those acts were only offences because they were so defined and punishable under particular provisions of the Penal Code. Much as the same acts may have been defined in the Sexual Offences Act, they cannot be said to have been offences under the Act, because this latter Act was not in existence. Put simply, the offence of defilement as defined under Section 8(1) and (3) of the Sexual Offences Act could not have been such an offence in 2004 before this Act was conceived and therefore in the words of article 50 (2) (n) of the Constitution the appellant could not have been tried and convicted for an act that at the time it was committed was not an offence".*

In the same breadth, anticorruption officers as well as the office of Director of Public prosecution are bound to face legal challenges in mounting a charge for corruption against a person who is said to have illegitimately benefitted himself in the discharge of the office, that is held through cryptocurrency. This is because the current operating space of cryptocurrency is anonymous and the only charge that can be sustained is that of trading centre without a license from CBK.

There have been accusations of inflated cost of projects which end up in the pockets to those who initiated therefore constituting a corrupt conduct. However, despite Kenya losing these huge amounts of money, tracing the same has been difficult for anti-corruption officers as there is no paper trail linking them to this crime. This gives credence that such high-level graft payments are made using digital currency which could have been paid from any country.

[34] *Ibid Article 50(2n)*

Corrupt individuals are aware of the schemes that the government does in order to suppress corrupt individuals who have stashed a lot of cash in their homes away from the scrutiny of the unsuspecting public. Such practices have gained unprecedented momentum since institutions such as the Ethics and Anti-Corruption Commission, Kenya and Kenya Revenue Authority, in exercise of their statutory powers can seize the cash and demand answers on how the same was acquired. This has proven difficult to many people since one need to identify the legitimate revenue stream where such money was earned not to mention a corresponding tax deduction they incurred and paid for.

This was evident in the case of *Asset Recovery Agency v Ali Abdi Ibrahim*;[35] where the applicant sought preservation orders in respect to two accounts belonging to the respondent for the sum of Kshs. 39,647,426.00 and Kshs. 3,857,943.02 held at Equity Bank, Mandera Branch. The applicant filed forfeiture proceeding believing that the said amounts constituted proceeds of crime. In the case the respondent lacked any plausible defence to defeat the applicant's relief and the Court having found the inconsistencies contained therein on the part of the respondent granted the prayers sought. This case demonstrates the ease which the usage of fiat currency allows the enforcement authorities to undertake their duty.

However, the privacy nature of cryptocurrency trading is unregulated more so in remittances and money transfers, by the CBK. This therefore poses a hurdle to investigative agency who first as a matter of law need to get a warrant from a magistrate to investigate those accounts. This may not be possible since the current crypto trading has no ledger which identifies the parties to monetary transactions, exchange rates of each crypto when compared to shillings and finally the amount as well as the material date this is said to have happened. This issue goes directly to the core in proving elements of corruption as per the charge sheet without which no count can stand a trial.

[35] *Asset Recovery Agency v Ali Abdi Ibrahim [2020] eKLR*

7.1 The future of enforcement of corruption through cryptocurrency

The current regulatory regime spells doom in the fight against corruption. With Kenyans trading in billions through cryptocurrency yet the source of this cash cannot be ascertained places the countries national security as well as the economy into a vulnerable position. Kenya must wake up and realise we are in digital era and efforts to get cash stashed at home currently is a story of the past and find ways upon which accountability can be enhanced in the trade of crypto.

The Central Bank of Kenya must stop to shy away from inculcating accountability if the fight against the scourge against corruption stands a chance to be won. This can only happen through the Central bank accepting cryptocurrency as a legal tender and fully adopting Blockchain technology which shall allow total transparency between Remittances and money transfers of the party's involved and further regulations which shall require every institution trading in crypto to be not only licensed but be a reporting agency to the CBK with stiff penalties for default.

Blockchain technology has been fronted as the solution to allow enforcers of corruption carry out their job in a manner that is in tandem to the present realities. More importantly, Blockchain technology is referred to as Blockchain is an open ledger that several parties can access at once.[36] Blockchain helps in the verification and traceability of multistep transactions needing verification and traceability. It can provide secure transactions, reduce compliance costs, and speed up data transfer processing. Blockchain technology can help contract management and audit the origin of a product. It also can be used in voting platforms and managing titles and deeds.[37]

With Blockchain technology, features such as an immutable public digital ledger, which means when a transaction is recorded, it cannot be modified,

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[36] *By Sana Afreen, Why is Blockchain Important and Why Does it Matters available at <https://www.simplilearn.com/tutorials/blockchaintutorial/whyisblockchainimportant?source=sl_frs_nav_playist_video_clicked accessed on 31/01.2022>*
[37] *Ibid*

security, transactions are done instantly and transparently, as the ledger is updated automatically, elimination of intermediary and finally the authenticity of a transaction is verified and confirmed by participants goes along way into fighting corruption while securing the safety of financial transaction.

8.1 Conclusion

The paper inevitably comes at the conclusion that the absences of regulations and solutions which are in tandem with the technological advancement have hugely been an economic fodder for the soaring corruption cases.

Kenya has made major progress in the fight against corruption. We now have high level convictions and major recoveries in corruptly acquired assets as evidenced by the annual reports released by the Ethics and Anti-Corruption Commission.

Despite Kenya not having regulations on virtual assets, Kenyan Authorities responsible for fight against corruption have continued to invest heavily in training investigators on emerging issues including investigation, prosecution and recovery of crypto currencies.

These gains could be eroded if Kenyan Authorities do not put in place regulations on Crypto and virtual assets as it is an avenue for criminals to exploit.

Lack of regulations could have negative effect on the Kenya as it could be categorized as a high-risk jurisdiction posing a threat to global financial system. This could greatly impact negatively on Kenyan economic relationship with other countries. Such classification will result in other countries and global financial institution like world bank and IMF apply enhanced due diligence measures on our financial institutions.

One asks themselves why is it that despite the huge loss of tax payers' money through corruption, the conviction rate and the recovery of the stolen

properties continue to be a raging debate in view of the amount alleged to have been stolen?

The only answer to this question is the need to enact strong regulations and adapt to new technology such as digital currencies to fight the anonymity character of cryptocurrency for purposes of enhancing accountability and transparency in the digital currency financial trade.

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https://www.businessdailyafrica.com/news/Citi-warns-over-risk-of-Kenya-bitcoins/539546-4263658-mhoko2z/index.html accessed on 30/01/2022 a 2017 report by Citibank citing the rising popularity of cryptocurrency.

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Reconciling Refugees Right to Non-Refoulement and Repatriation of Refugees as a Counterterrorism Measure intended to Uphold National Security in Kenya

By: ***Peter Mwangi Muriithi****

Abstract

This paper seeks to conceptualize and discuss the interplay between the need to uphold national security through counterterrorism measures like repatriation of refugees and refugees' right to non-refoulement as codified by various laws. In doing so this paper will analyze the delicate balance that Kenya has to always maintain when repatriating refugees as a counter-terrorism measure while upholding refugees' right to non-refoulement.

Indeed, this discourse is timely considering that the government of Kenya has many times sought to close down Dadaab Refugee Camp, after terming it a breeding ground for terrorists.

1.0 Introduction

Over the past decade, millions of refugees have fled their countries of origin and asked for asylum in Kenya. Some of these refugees do not receive asylum, and later like in the case of Dadaab Refugee camp the government seeks to repatriate them, or they are denied basic rights of residency and even some forced into enclosed camps.[1]

The 1951 Convention relating to the Status of Refugees defines a 'refugee' as *"someone who owing to a well-founded fear of being persecuted for*

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[1]Gerver, Mollie (2016), Refugee repatriation and the problem of consent. British Journal of Political Science

reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself the protection of that country."

This definition has also been replicated in the Refugee's Act 2006 of the Laws of Kenya.[2] Kenya has a large number of refugees from neighboring countries mostly from Somalia. The refugee debate focuses on migration, forced migration. It is a discourse on human rights. It concerns duties that countries owe foreigners under international law and the rights of such persons including refugees. Alienage usually is a characteristic of refugees.[3] Fundamentally, this paper seeks to conceptualize and discuss the interplay between the need to uphold national security through eradicating terrorism and the right of refugees to non-refoulement.

2.0 Reconciling Refugees Right to Non-Refoulement and Repatriation of Refugees as a Counterterrorism Measure

A country's national security is its ability to protect itself from the threat of violence or attack.[4] One of the major threats to national security in Kenya is terrorism. The rise in terrorism in Kenya has been linked with an influx of refugees in Kenya.[5] Terrorism as a concept, has received a variety of definitions.

The United Nation has defined it as a collective term of criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes.[6]

[2]Refugees Act No. 13 of 2006 Laws of Kenya.
[3]Kariuki Muigua, Protecting Refugees Rights In Kenya: Utilizing International Refugee Instruments, The Refugee Act 2006 And The Constitution Of Kenya As Catalysts.
[4]<*https://www.collinsdictionary.com/dictionary/english/national-security*>lastly accessed on 17th January 2022
[5]Constitutional Petition No. 227 of 2016
[6]The United Nations General Assembly *A/RES/49/60* (1995)

In the book *'Terrorism in the Twenty-First Century helps readers understand terrorism, responses to it, and current trends that affect the future of this phenomenon',* Combs describes terrorism as a synthesis of war and theater, a dramatization of the most proscribed kind of violence, which is perpetrated on innocent victims, played before an audience in the hope of creating the mood of fear for political purposes.[7]

A terrorist act has also been defined by the Kenyan Prevention of Terrorism Act,[8] as an act or threat of action which among other things, creates a serious risk to the health or safety of the public or prejudices national security or public safety, carried with the aim of destabilizing social institutions and intimidating or causing fear among members of public or compelling governments to do or refrain from any act.[9]

From the above, it is evident, that the character of terrorism is a combination of well-orchestrated war and extreme violence which is perpetrated on innocent victims with the intention to propagate certain ideologies.[10]

By inference, therefore, terrorism may not be completely classified as either exclusively an ordinary criminal act with penal consequences or as an act of warfare that ought to be governed by the norms and rules of war.[11]Indeed, the Global Terrorism Index (GTI) 2016 report highlighted terrorism as a complex and rapidly changing concept.[12]

[7]Cynthia C. Combs *Terrorism in the Twenty-First Century helps readers understand terrorism, responses to it, and current trends that affect the future of this phenomenon* (Taylor & Francis, 2015)
[8]The Prevention of Terrorism Act No. 30 of 2012, Laws of Kenya
[9]Ibid, Section 2
[10] Andrea Bianchi, Yasmin Naqvi, *Enforcing International Law Norms Against Terrorism* (Hart Publishing, 2004) 5
[11]Ibid No.10
[12]Institute for Economics and Peace *The Global Terrorism Index 2016* (2016)14

This line of thought is also accentuated by Brian Jenkins[13] who opines that if terrorism is viewed as a crime, normal procedures for handling crimes (arrests, gathering evidence and putting suspects on trial) will ensue.

Brian Jenkins argues that, characterizing terrorism as a crime provokes problems of international cooperation.[14] This is in contradistinction to characterizing terrorism as acts of war which classification appeals to international cooperation.[15]

On the flip side, is the basic principle of refugee law is, non-refoulement which prescribes that no refugee should be returned (refouled) to a country where he or she is likely *to face persecution or other ill treatmen*t.[16] This principle encompasses not only a duty of the state not to return a refugee to another country where he/she faces danger but also a duty not to reject the entry of a refugee at the border of the receiving state.[17]

The principle of non-refoulement imposes an obligation on states not to refoule, or return, a refugee to "the frontiers of territories where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion."[18]

[13] Boaz Ganor, *The Counter-Terrorism Puzzle: A Guide for Decision Makers* (Transaction Publishers, 2011) 8
[14] Boaz Ganor, *The Counter-Terrorism Puzzle: A Guide for Decision Makers* (Transaction Publishers, 2011) 8
[15]Richard Jackson, *Writing the War on Terrorism: Language, Politics and Counter-terrorism* (Manchester University Press, 22 Jul 2005) 3
[16]Guy S. Goodwin-Gill, Jane McAdam, The Refugee in International Law (Oxford University Press, 2007) 201
[17] Andreas Zimmermann, Jonas Dörschner, Felix Machts, *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP Oxford, 2011) 1368
[18]1951 Convention relating to the Status of Refugees, Article 33(1)

The principle of *non-refoulement* is often regarded as one of the most important principles of refugee and immigration law.[19] The principle of non-refoulement has evolved into a norm of customary international law, as such states are bound by it whether or not they are party to the Convention relating to the Status of Refugees (following as "1951 Convention").[20]

The principle of non-refoulement has acquired the status of a ***jus cogens***(it is a fundamental principle of international law which is accepted by the international community of states as a norm from which no derogation is ever permitted).[21]Hence, as a part of *customary and treaty la***w**, all countries are legally bound by the prohibition of returning refugees in any manner whatsoever to countries or territories where their lives or freedom may be threatened because of their race, religion, nationality, membership in a particular social group or political opinion, which is the cornerstone of international protection.[22]

Over time the government of Kenya has insisted that as a counter-terrorism measure there is need to repatriate refugees in Kenya. [23] This has led to the government proposing the closure of Dadaab Refugee camp. [24] The government of Kenya in its statement 'Government statement on refugees and closure of camps' stated "*owing to national security, hosting of refugees has come to an end and that the Department of Refugee Affairs (DRA) has been disbanded."*[25]

[19]JUDr. Kamil Šebesta, The principle of non-refoulement. What is its standing in international law? <*http://www.elaw.cz/clanek/the-principle-of-nonrefoulement-what-is-its-standing-in-international-law*> accessed on 27/1/2022
[20] JUDr. Kamil Šebesta, The principle of non-refoulement. What is its standing in international law? <*http://www.elaw.cz/clanek/the-principle-of-nonrefoulement-what-is-its-standing-in-international-law*> accessed on 27/1/2022
[21]Prosper Weil, Towards Relative Normativity in International Law? Page 423
[22]JUDr. Kamil Šebesta, The principle of non-refoulement. What is its standing in international law? <*http://www.elaw.cz/clanek/the-principle-of-nonrefoulement-what-is-its-standing-in-international-law*> accessed on 27/1/2022
[23]Constitutional Petition No. 227 of 2016
[24]Ibid No. 23
[25]Constitutional Petition No. 227 of 2016

This indicates the conflict that exists between the need to uphold national security, through repatriation of refugees, as a means of combating terrorism and the need not to violate the rights of refugees as encapsulated in the existing legal framework governing refugees in Kenya.

In repatriation of refugees as a counter-terrorism measure, the question arises as to whether there is a violation of the seminal principle of non-refoulement by the government.

Reconciling these two divergent positions is vital in the human rights discourse especially considering that principle of non-refoulement is universally acknowledged as a human right.

The argument propounded by the government of Kenya is that 'national security' is an exception to the general principle of non-refoulement. In 1977, the European Court of Justice ruled that *"there must be a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society.*"[26]

It follows from state practice and the Convention *travaux* preparations that criminal offences without any specific national security implications are not to be deemed threats to national security, and that national security exceptions to *non-refoulement* are not appropriate in local or isolated threats to law and order.

United Nations High Commissioner for Refugees (herein UNHCR), also known as the UN Refugee Agency has recommended that refoulement should only be considered when one or several convictions are symptomatic of the basically criminal, incorrigible nature of the person and where other measures, such as detention, assigned residence or resettlement in another country are not practical to prevent him or her from endangering the community.

[26]Reg. vs. Bouchereau, 2CMLR 800

Articles 31 and 32 of the Convention relating to the Status of Refugees provides that, a State should allow a refugee a reasonable period of time and all necessary facilities to obtain admission into another country, and initiate *refoulement* only when all efforts to obtain admission into another country have failed.

As a general rule, the principle of non-refoulement is enshrined under Article 33 of the 1951 Convention Relating to the Status of Refugees(herein Convention)[27] which provides that no Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his or her life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.

Within the framework of the 1951 Convention/1967 Protocol, the principle of *non-refoulement* constitutes an essential and non-derogable component of international refugee protection.

The central importance of the obligation not to return a refugee to a risk of persecution is reflected in Article 42(1) of the 1951 Convention and Article VII (1) of the 1967 Protocol, which list Article 33, as one of the provisions of the 1951 Convention to which no reservations are permitted. The fundamental and non-derogable character of the principle of *non-refoulement* has also been reaffirmed by the Executive Committee of UNHCR in numerous Conclusions since 1977. [28] Similarly, the General

[27]UN General Assembly, *Convention Relating to the Status of Refugees*, (United Nations, Treaty Series, 1951)
< *http://www.refworld.org/docid/3be01b964.html*> accessed 19/1/ 2022 Article 33
[28]Executive Committee of UNHCR, for example, in its Conclusion No. 6 (XXVIII), paragraph (c) (reaffirming "the fundamental humanitarian principle of *non-refoulement* has found expression in various international instruments adopted at the universal and regional levels and is generally accepted by States."

Assembly has called upon States *"to respect the fundamental principle of non-refoulement, which is not subject to derogation.*"[29]

The 1951 Convention and its 1967 Protocol are the core of international refugee law they are the only universal treaties that define a specific legal regime for those in need of international protection. However, there are other universal documents regarding the non-refoulement principle.

The protection against *refoulement* under Article 33 of the 1951 Convention Relating to the Status of Refugees, applies to any person who is a refugee under the terms of the 1951 Convention that is, anyone who meets the requirements of the refugee definition contained in *Article 1A(2) of the 1951 Convention* (the "inclusion" criteria)[30] and does not come within the scope of one of its exclusion provisions.[31]

[29]See, for example, A/RES/51/75, 12 February 1997, para. 3; A/RES/52/132, 12 December 1997, at preambular paragraph 12

[30] Under this provision, which is also incorporated into Article 1 of the 1967 Protocol, the term "refugee" shall apply to any person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [or her] nationality and is unable or, owing to such fear, unwilling to avail him [or her]self of the protection of that country; or who, not having a nationality and being outside the country of his [or her] habitual residence is unable or, owing to such fear, unwilling to return to it"

[31]Exclusion from international refugee protection means denial of refugee status to persons who come within the scope of Article 1A (2) of the 1951 Convention, but who are not eligible for protection under the Convention because:

- They are receiving protection or assistance from a UN agency other than UNHCR (first paragraph of Article 1D of the 1951 Convention); or because

-They are not in need of international protection because they have been recognized by the authorities of another country in which they have taken residence as having the rights and obligations attached to the possession of its nationality (Article 1E of the 1951 Convention); or because

Given that a person is a refugee within the meaning of the *1951 Convention* as soon as he or she fulfills the criteria contained in the refugee definition, refugee status determination is declaratory in nature: a person does not become a refugee because of recognition, but is recognized because he or she is a refugee.[32]

It follows that the principle of *non-refoulement* applies not only to recognized refugees, but also to those who have not had their status formally declared.[33] The principle of *non-refoulement* is of particular relevance to asylum-seekers. As such persons may be refugees, it is an established principle of international refugee law that they should not be returned or expelled pending a final determination of their status.[34]

The *non-refoulement* obligation under Article 33 of the 1951 Convention is binding on all organs of a State party to the *1951 Convention and/or the 1967 Protocol*[35] as well as any other person or entity acting on its behalf.[36]

The principle of non-refoulement as contained in the *1951 Convention* is not an *unqualified* principle. There are *three exceptions to* the principle of non-refoulement. These exceptions are codified in *Article 1 (F) and Article 33*

-They are deemed undeserving of international protection on the grounds that there are serious reasons for considering that they have committed certain serious crimes or heinous acts (Article 1F of the 1951 Convention).

[32] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, 1979, Reedited Geneva 1992, paragraph 28.

[33] This has been reaffirmed by the Executive Committee of UNHCR, for example, in its Conclusion No. 6 (XXVIII) "*Non-refoulement*" (1977), para. (c) (reaffirming "the fundamental importance of the principle of *non-refoulement* … of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees

[34] UNHCR, Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol

[35]Article I (1) of the 1967 Protocol provides that the States Party to the Protocol undertake to apply Articles 2–34 of the 1951 Convention.

[36]Ibid No.35

(2) of the 1951 Convention.[37] It ought to be emphasized that the application of these *exceptions* under *Article 33(2)* [38] requires an individualized determination by the country in which the refugee is that he or she comes within one of the two categories provided for under *Article 33(2) of the 1951 Convention*.[39]

The provisions of *Article 33(2) of the 1951 Convention* do not affect the host State's non-refoulement obligations under international human rights law, which permit no exceptions. Thus, the host State would be barred from removing a refugee if this would result in exposing him or her, for example, to a substantial risk of torture. Similar considerations apply with regard to the prohibition of refoulement to other forms of irreparable harm.

Ideally, for example, the interpretation of Article 33(2) of the *1951 Convention* envisions only an apprehension of future danger as an exception by which a State may refoule a refugee.[40] However, of significance to this paper is that even though past conduct is important in evaluating the possibility of future danger, the nature of *Article 1 (F) and Article 33 (2) of the 1951 Convention* exceptions is clearly prospective, that is future danger as opposed to primarily investigating an individual on the basis of his past conduct.[41]

In regards to conducts encompassing 'reasonable grounds' *the 1951 Convention* provides that the provisions of the Convention shall not apply to

[37]JUDr. Kamil Šebesta, The principle of non-refoulement. What is its standing in international law? Lastly accessed on19/1/2022

[38]The 1951 Convention Relating to the Status of Refugees

[39] E. Lauterpacht and D. Bethlehem"The scope and content of the principle of *non-refoulement*, paragraph 145–192. *See also* "*Factum of the Intervenor, UNHCR, Suresh v. the Minister of Citizenship and Immigration; the Attorney General of Canada, SCC No. 27790*", Also in 14:1 International Journal of Refugee Law (2002).

[40]Ingrid Holm *Non-refoulement and national security* (Lund University, 2015) page 23

[41]Ingrid Holm *Non-refoulement and national security* (Lund University, 2015) page 23

any person with respect to whom there are serious reasons for considering that he:- has committed a crime against peace, a war crime, or a crime against humanity; [42] or has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee[43]; or has been guilty of acts contrary to the purposes and principles of the United Nations.[44]

The *exceptions to the principle of non-refoulement succinctly stated are: First,* the benefit of the principle may not be claimed by a refugee who may pose a danger to the security of the country in which he or she is present.[45] *Second,* the principle does not apply to a person who, having been convicted by a final judgment of a particularly serious crime constitutes a danger to the community of that country.[46]

Third, the benefit of the convention is to be denied to any person suspected of committing a crime against peace, a war crime, or a crime against humanity, a serious non-political crime outside the country of refuge, or acts contrary to the purposes and principle of the United Nations. [47]

These three exceptions *hence offer a leeway to refoul refugees as a means of upholding national security by states like Kenya.* The problem exists in interpretation and application of these salient non- refoulement principle exceptions, as a means of refouling refugees.

Over time, states' interpretation and application of these

[42]Article 1(F) of the 1951 Convention Relating to the Status of Refugees
[43]Ibid No. 42
[44]Article 1(F) of the 1951 Convention Relating to the Status of Refugees
[45]JUDr. Kamil Šebesta, The principle of non-refoulement. What is its standing in international law?
[46]Ibid No. 45.
[47]JUDr. Kamil Šebesta, The principle of non-refoulement. What is its standing in international law?

exceptions has come into question and even has been overruled by courts of law as was in the case of: *Kenya National Commission on Human Rights & another v Attorney General & 3 others [2017] eKLR.*[48]

In this case the government of Kenya was sued when it sought to refoul refugees by closing Dadaab Refugee camp as a counter-terrorism measure, arguing that it was harboring terrorist among other things. Among other issues, the Petitioners submitted that the act of labeling the refugees of Somali origin as terrorists was discriminatory. They contended that that act violated the principle of individual criminality.

The Petitioners stated that the decision to repatriate them was a violation of the provisions of *Articles 10, 2 (1), 94 (5), 129 (1) and 73* of the Constitution of Kenya 2010. The court was faced with inter alia, the following issues: - whether the decision to repatriate the refugees on account of national security violated the principle of non-refoulement; and whether the decision to repatriate refugees especially those of Somali origin was a violation of the rights to human dignity, fair administrative action, equality and freedom from discrimination.[49]

In this case, the High Court of Kenya held that the state could not refoule refugees from Dadaab refugee camp on basis of national security as an exception to non-refoulement principle. The Court held that the government of Kenya could only rely on the Article 33(2) exception as the act of refouling the refugees was an *ultima ratio* (the last recourse) in cases involving non-refoulement *vis a vis* national security concerns.

It is notable that this discourse of interpretation and application of non-refoulement principle exceptions, has existed since the making of the *1951 Convention Relating to the Status of Refugees*.

[48]Constitutional Petition No. 227 of 2016

[49]*Kenya National Commission on Human Rights & another v Attorney General & 3 others* [2017] eKLR

States like Israel, the United Kingdom and Switzerland are documented to have frowned against the inclusion of the exception into the Convention during the preparatory work to the 1951 Convention Relating to the Status of Refugees.[50]

In the same vein, other states have also depicted a modern-day tendency of evading the rationale behind the principle of non-refoulement by relying on the *Article 1 (F) and Article 33 (2) of the 1951 Convention*.

For example, in *Suresh*[51] and *Wellington*[52]cases at European Court of Human Rights, Canada and the United Kingdom have been documented to have placed a significant reliance on the national security concerns at the expense of upholding the right to non-refoulement.[53]

States have misinterpreted and misapplied exceptions to the principle of non-refoulement as codified under *Article 1 (F) and Article 33 (2) of the* 1951 Convention Relating to the Status of Refugees in *two ways*: - by interpreting these exceptions to apply to past conducts of a refugee; [54] and by misinterpreting 'reasonable grounds' set out under *Article 1 (F) and Article 33 (2)* of the 1951 Convention.

These interpretations and applications by states fall short of the threshold outlined under *Article 33(1)* of the *1951 Convention Relating to the Status of Refugees*, which sets out the general rule of non-refoulement of refugees. For

[50]UN High Commissioner for Refugees (UNHCR), *The Refugee Convention, 1951: The Travaux préparatoires analyzed with a Commentary by Dr. Paul Weis*, (1990) <*http://www.refworld.org/docid/53e1dd114.html*> Lastly accessed on 19/01/2022

[51]*Suresh vs. Canada (Minister of Citizenship and Immigration*)1 S.C.R. 3, 2002 SCC 1, Canada: Supreme Court, 11 January 2002

[52]*R (on the application of Wellington) (FC) v. Secretary of State for the Home Department* (Criminal Appeal from Her Majesty's High Court of Justice), UKHL 72, United Kingdom: House of Lords (Judicial Committee), 10 December 2008

[53]Ibid, see Suresh and Wellington cases

[54]See inference from Bundesrepublik Deutschland v B and D, CJEU - C-57/09 and C-101/09

example, in *Bundesrepublik Deutschland v B and D*, B had claimed asylum in Germany for supporting armed guerrilla warfare in Turkey.[55]

The *German Bundesamt* rejected his application for asylum on the basis that he had committed a serious non-political crime.[56] Later the Administrative Court annulled that decision and said his removal to Turkey was prohibited.[57] From the foregoing, it is evident that the possibility of a deviation from the general obligation not to refoule a refugee under Article 33(1) is highly limited by the 1951Convention Relating to the Status of Refugees.

From the foregoing it is clear that repatriation of refugees as a counter-terrorism measure to uphold national security in Kenya, must be informed and/or fall under the exceptions to the principle of non-refoulement as codified under *Article 1 (F) and Article 33 (2) of the* 1951 Convention which Kenya is a signatory to. Any other repatriation of refugees outside the exceptions to the principle of non-refoulement as codified under *Article 1 (F) and Article 33 (2) of the* 1951 Convention is illegal. Indeed, to perpetuate the same the government of Kenya would be violating the seminal principle of non-refoulement as codified under *Article 33 (1) of the* 1951 Convention. To avoid any abuse in the interpretation of these exceptions under *Article 33(2) and 1(F)* of the 1951 Convention Relating to the Status of Refugees the courts exist to independently interpret whether governments actions are a violation of the seminal principle of non-refoulement.

This was manifested in the *Constitutional Petition No. 227 of 2016*[58] where the Court held that the government of Kenya could only rely on the Article 33(2) exception as the act of refouling the refugees was an *ultima ratio* (the

[55]Bundesrepublik Deutschland v B and D, CJEU - C-57/09 and C-101/09
[56]Bundesrepublik Deutschland v B and D, CJEU - C-57/09 and C-101/09
[57]Ibid No.56
[58]Kenya National Commission on Human Rights & another v Attorney General & 3 others [2017]eKLR

last recourse) in cases involving non-refoulement *vis a vis* national security concerns.[59]

However, it is worrying as described by *Faye Jacobsen*,[60] that the real state of affairs is that States are relying more on the exceptions as a general rule as a justification for refoulement processes.[61]This reliance on the exceptions under Article 33(2) and 1(F) of the 1951 Convention Relating to the Status of Refugees as a point of departure and a primary consideration has transformed the general rule into an 'exception'. This is a discrepancy which must be deliberately curtailed by courts and the international community at large.

3.0 Conclusion

To maintain the delicate balance between repatriating refugees as a counter-terrorism measure intended to uphold national security, while on the other hand upholding refugees' right to non-refoulement, Kenya must deliberately seek to act within the confines of the 1951 Convention Relating to the Status of Refugees and other enabling laws. Indeed, as demonstrated above this balance is more often than not maintained by courts as it was in *Constitutional Petition No. 227 of 2016*[62]

[59]Ibid No.58

[60] Anette Faye Jacobsen Human Rights Monitoring: A Field Mission Manual (BRILL, 25 Jun 2008)

[61]Ibid No.60

[62] Kenya National Commission on Human Rights & another v Attorney General & 3 others [2017]eKLR

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Presumption of Citizenship for Foundlings: Exploring Enforceability of Article 14(4) of the Constitution of Kenya 2010

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Abstract

Article 14(4) of the Constitution of Kenya 2010 (CoK 2010) prescribes the presumption of citizenship to a child found in Kenya who is, or appears to be less than eight years of age, and whose nationality and parents are not known. This article explores the rationale and the mischief that article 14(4) of CoK 2010 endeavors to cure vis-à-vis the State's aptitude to implement such a provision. The article contends that Kenya's presumption of citizenship by birth for foundlings is significantly hazy. It is specifically in this haziness that the enforceability challenge of the provision lies. Whereas the CoK 2010 outlines various ways through which citizenship can be acquired, this article solely focuses on citizenship under Article 14(4). The article specifically examines the legal principles of acquisition of citizenship by birth; the jus sanguinis and jus soli, and expounds at length, the principle that is relevant to the specific area under discussion.

Key words: *Citizenship, foundlings, jus sanguinis, jus soli, Nationality*

1. Introduction

Whereas the terms "citizenship" and "nationality" technically have two distinct meanings, international human rights courts, advocates and scholars

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often use the two terms interchangeably.[1] This article largely uses the term "Citizenship" to mean the legal link between an individual and a State, or a territorial political entity, upheld by an ultimate political authority.[2] This legal status bequeaths homogeneous rights and duties upon all members of a State. The concept of citizenship is as old as humanity. Its pedigree is in Athens and Rome and the long advancement from tribal to civic States.[3] This is visible, albeit with minor variances, in the works of primordial writers as well as contemporary authors. Scholars suggest that the concept of citizenship contains many unresolved issues, sometimes called tensions, existing within the relation, that continue to reflect uncertainty about what citizenship is supposed to mean.

The 1948 Universal Declaration of Human Rights confers upon every individual, everywhere in the world, the right to have a legal connection with a State.[4] Nevertheless, the United Nations High Commissioner for Refugees (UNHCR) estimates that there are at least 12 million stateless people globally.[5] The number of stateless persons in Kenya is approximately 18,500.[6] According to Article 1 of the Hague Convention on Certain Questions relating to the Conflict of Nationality Laws, 1930, it is for each State to determine under its own laws who are its nationals.[4] The Constitution of Kenya 2010 (CoK 2010) and the Kenya Citizenship and

[1] 'Citizenship & Nationality' (*International Justice Resource Center*, 15 November 2012) <*https://ijrcenter.org/thematic-research-guides/nationality-citizenship/*> accessed 13 February 2022.
[2] Carol A Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' (1998) 10 International Journal of Refugee Law 156.
[3] Emily Salamanca, '"Singulis Etruriae Populis": The Political Mobilization of the Etruscan Foundation Myth in the Self-Conception of Renaissance Florence' (2021) 13 Carte Italiane.
[4] United Nations, 'Universal Declaration of Human Rights' (*United Nations*) <*https://www.un.org/en/about-us/universal-declaration-of-human-rights*> accessed 13 February 2022, article 15.
[5] 'OHCHR | OHCHR and the Right to a Nationality' <*https://www.ohchr.org/EN/Issues/Pages/Nationality.aspx*> *accessed 13 February 2022.*
[6] *'Stateless Persons' (UNHCR Kenya)* <*https://www.unhcr.org/ke/stateless-persons*> accessed 13 February 2022.

Immigration Act give no definition of citizenship but rather provide for conditions for its acquisition.[7] Article 13(2) of the CoK 2010 provides that citizenship may be acquired by birth or registration. This article specifically focuses on the matter of grant of citizenship for "foundlings" within the confines of Kenyan laws. Reference to foundlings in the CoK 2010 is alluded to under Article 14(4). In focusing on issues, problems and perspectives relating to citizenship for foundlings under the Kenyan laws, this provision forms the nucleus and as such informs the rationale of this article.

2. Citizenship Ascriptions

There are over 30 modes and sub-modes of acquisition of citizenship around the world.[8] The most common modes applied by States are: (a) birthright acquisition; (b) residence-based acquisition *(jus domicile)*; and (c) acquisition based on particular ties or characteristics.[9] Two legal principles embody acquisition of citizenship by birth: *Jus soli* (the law of the soil) and *Jus sanguinis* (the law of the bloodline).[10] Citizenship by immigration can either be acquired through striking a relationship with someone who is already a citizen or through length of residence within a State. Citizenship by particular ties include by marriage.[11] One of the characteristics –based acquisition is where a child found in a country of unknown parentage.[12] All these methods obviously admit of wide variations and interpretation in practice. In Kenya, the above conditions of acquisition of citizenship have

[7] 'Constitution of Kenya' (2010) <http://www.kenyalaw.org/lex//actview.xql?actid=Const2010> accessed 18 July 2018; Kenya Citizenship and Immigration Act No. 12 of 2011.

[8] Luuk van der Baaren and Maarten Vink, 'Modes of Acquisition and Loss of Citizenship Around the World-Comparative Typology and Main Patterns in 2020' (2021) 90 Robert Schuman Centre for Advanced Studies Research Paper No.# RSC.

[9] Ibid

[10] Vivian Gerrand, 'Reimagining Citizenship in the Black Mediterranean: From Jus Sanguinis to Jus Soli in Contemporary Italy?', *The Black Mediterranean* (Springer 2021); Azra Erdem Adak, 'Citizenship, Territoriality and Post-Soviet Nationhood: The Politics of Birthright Citizenship in Azerbaijan, Georgia, and Moldova' (2021) 23 Insight Turkey 287.

[11] Robin Cohen, 'Citizenship: From Three to Seven Principles of Belonging' [2021] Social Identities 1.

[12] van der Baaren and Vink (n 10).

been adopted with detailed elaborations both in the CoK 2010 and the Kenya Citizenship and Immigration Act. Since, foundlings are presumed to be Kenyan citizens by birth under the Kenyan laws, this article has confined itself to the analysis of citizenship by birth and its attendant legal principles.

2.1 Jus Soli

Jus soli is a Latin principle of common law, also known as the principle of birthright citizenship, under which citizenship is granted based on birth in a territory no matter the legality or status of the parents.[13] The principle grew out of the early modern expression that based personal claims to land and inheritance on birthright connections to the sovereign domain.[14] It appeared in common law as early as 1608 in Calvin's Case, where the King's Bench ruled that a Scotsman was not an alien, although alien born to England, and could claim testamentary benefits to land in England because he was born to British soil.[15] The principle of *jus soli* has become an explicit part of the Constitution of many countries. For instance, reference to "natural born" in the United States Constitution is an implicit rule of *jus soli*; such that, a child born to a foreign national in the United States (USA) (whether the said foreign national is in the USA legally or not) automatically becomes a US citizen by birth. *United States v Wong Kim Ark* is a landmark case in which the Supreme Court held that virtually everyone born in the USA is a citizen of the USA.[16]

[13] Christopher Robert Rossi, 'The Blind Eye: Jus Soli, And the" Pretended" Treaty of New Echota' (2021) 9 American Indian Law Journal 8.
[14] Ibid
[15] ibid; Caroline Sawyer, 'The Loss of Birthright Citizenship in New Zealand' (2013) 44 Victoria University of Wellington Law Review 653.
[16] 'U.S. Reports: United States v. Wong Kim Ark, 169 U.S. 649 (1898).' (*Library of Congress, Washington, D.C. 20540 USA*) <https://www.loc.gov/item/usrep169649/> accessed 13 February 2022; Julie Novkov and Carol Nackenoff, *American by Birth: Wong Kim Ark and the Battle for Citizenship* (University Press of Kansas 2021); Amanda Frost, '"By Accident of Birth": The Battle over Birthright Citizenship after United States v. Wong Kim Ark' (2021) 32 Yale JL & Human. 38.

In granting citizenship to those born in a country, *jus soli* incorporates even the children of immigrants as citizens at birth or thereafter. Pure *Jus soli* may often be 'over-inclusive' by awarding citizenship to persons born in the territory by mere chance or because their parents moved there in order to obtain a particular citizenship for their children. However, in a number of countries, to put off illegal immigration, automatic birthright citizenship has been cushioned by imposing conditions such as requiring parents' legal residence for a specified period of time within the country.[17] Forms of *Jus soli* that involve lengthy delay, retrospective and onerous conditions, and administrative discretion in the granting of citizenship generally create unnecessary obstacles to full membership. As a result, immigrants and many human rights organisations prefer the granting of citizenship automatically at birth or by declaration at majority, and on the basis of prior parental residence over the generationally deferred acquisition of double *jus soli*, which requires that one parent has already been born in the country, and to facilitated naturalization, which tends to be subject to significant conditions and costs. *Jus soli* is generally accepted for foundlings, and for children who would otherwise be stateless at birth, even in countries whose laws are otherwise based on *jus sanguinis*. [18] The Kenyan Constitution at Article 14(4) embraces application of pure *jus soli*.

2.2 Jus Sanguinis

Jus sanguinis which is Latin for "right of blood" *is* a concept of Roman or civil law under which a person's citizenship is determined by the citizenship of one or both parents, to wit, by descent.[19] It is a social policy by which citizenship is not determined by place of birth as in the case of *jus soli* but rather by having one or both parents who are citizens of a nation.[20] The proponents of this principle argue that birth at a State's territory does not necessarily reflect a link between the individual and the State, but, descent

[17] Van der Baaren and Vink (n 10).
[18] Ibid
[19] Amanda Candeias and Angelo Segrillo, 'Tracing The Debate Between Rosa Luxemburg And Lenin About The National Question'.
[20] Szabolcs Pogonyi, 'The Right of Blood:'Ethnically'Selective Citizenship Policies in Europe' [2022] National Identities 1.

and heritage play a pivotal role in defining who is, and can become, a citizen.[21] *Jus sanguinis* remains the most ordinary means of passing on citizenship in most countries. Application of this principle is explicit in the Constitution of Kenya 2010 which provides that a person is a citizen by birth if on the day of the person's birth, whether or not the person was born in Kenya, either the mother or father of the person is a Kenyan.[22] In general, the principles of *jus soli* and *jus sanguinis* remain valuable in explaining the deviating outcomes of citizenship policies across the globe. These outlines of citizenship policies continue to blur the distinction between the two principles by including elements of both in their broader procedures.

The word choice of the 1961 Convention on the Reduction of Statelessness at Article 2 brings to the fore the interplay between *jus soli* and *jus sanguinis.* [23] This 1961 Convention, rather than allow a child found abandoned on the territory of the State to automatically acquire the citizenship of that State, it declares that the child will implicitly have both the essential *jus soli* and *jus sanguinis* connections with the State.[24] The act of being "born on the territory" brings about the element of *jus soli* while "birth to parents possessing the nationality of the State" carries *jus sanguinis* ingredients. In such a scenario, the child will basically acquire citizenship as a matter of law, under the ordinary operation of the State's citizenship laws which brings about similar effects in both *jus soli* and *jus sanguinis* regimes. However, the dominance of either a "by birth" or "by blood" citizenship policy concurrently reflects and defines how a country views "link" and who does, and does not, belong. In the circumstance, registration of birth is a critical factor in establishing the right to a citizenship in many legal systems, for the birth certificate will indicate where the child is born, making acquisition of nationality by *jus*

[21] Candeias and Segrillo (n 21).
[22] 'Constitution of Kenya' (n 9), at article 14(1) .
[23] United Nations High Commissio*ner for Refugees, 'UN Conventions on Statelessness' (UNHCR) <https://www.unhcr.org/un-conventions-on-statelessness.html>* accessed 13 February 2022.
[24] Ibid

soli possible, and to whom the child is born, and making acquisition of nationality by *jus sanguinis* equally possible.

3. Citizenship for foundlings

The Black's Law Dictionary defines 'foundling' as a deserted or exposed infant; a child found without a parent or guardian, its relatives being unknown.[25] A foundling, therefore, is a child bereft through death or disappearance of, abandonment or desertion by, or separation or loss from, both parents and who has been discovered by others; or a child committed to an orphanage or charitable or similar institution with unknown facts of birth and parentage and registered in the Civil Register as a "foundling."[26] Without doubt, the codification and further amplification of the right to citizenship in global and regional human rights instruments has had a massive influence on the perception of acquisition of citizenship for foundlings. The global community has recognized the vulnerable position of foundlings in the society and adopted specific instruments to deal with their nationality status. It is noticeable from these instruments that the international community favours protection of human rights over claims to State sovereignty in the matter of citizenship ascription.[27]

In the specific circumstance of citizenship for foundlings, the international community has thrown in progressive acceptance of prevention against statelessness for foundling found in the territory of a Contracting State by calling upon such a State to provide citizenship to such children. This was vividly captured in both the 1930 Hague Convention and the 1961 Convention on the Reduction of Statelessness.[28] The 1930 Hague Convention at Article 14 provides that, "A child whose parents are both unknown shall have the nationality of the country of birth and that a

[25] *'Black's Law Dictionary 8th Edition - PDF Drive'* <*https://www.pdfdrive.com/blacks-law-dictionary-8th-edition-d40394506.html*> accessed 4 July 2020.

[26] Mai Kaneko-Iwase, 'Defining a "Foundling"', *Nationality of Foundlings* (Springer 2021).

[27] Axel Martínez Shepherd, 'Citizenship Beyond the Nation: Building Human Rights Inclusivity in a World of Exclusions' (2021).

[28] Refugees (n 25).

foundling is, until the contrary is proved, presumed to have been born in the territory of the State in which it is found".[29] Similarly, Article 2 of 1961 Convention on the Reduction of Statelessness provides that foundling found in the territory of a Contracting State shall, in the absence of proof to the contrary, be considered to have been born within that territory of parents possessing the nationality of that State.[30]

Although the codification of the duty to grant citizenship to foundlings in the two Conventions cannot be taken as sufficient evidence owing to the small number of State parties to the instruments, it can be contended nonetheless that a rule of customary international law has been established, legally placing States under an overall duty to encourage the right to citizenship for foundlings.[31] It can be argued that the recognition of a general duty upon States to grant citizenship to foundlings is evident as the basis for the *opinio juris* since States feel compelled to address the situation of foundlings who would otherwise be stateless.[32] The regional instruments also mirror the desires of the global community on the subject of citizenship for foundlings. The Organization of American States, the European Convention on Nationality as well as the 1999 African Charter on the Rights and Welfare of the Child emphasize not only a general right of every child to acquire a nationality, but also directs State Parties to ensure that their Constitutional legislation recognize the principles according to which a child shall acquire the citizenship of the State in the territory in which he was born if, at the time of the child's birth, he is not granted citizenship by any other State in accordance with its laws.

Clearly, within the context of international and regional instruments, a State Party should provide in its municipal law, for foundlings to acquire citizenship by operation of law (*ex lege)*. By and large, it would appear safe

[29] Ibid
[30] Ibid
[31] Mai Kaneko-Iwase, *Nationality of Foundlings: Avoiding Statelessness Among Children of Unknown Parents Under... International Nationality Law* (Springer Nature 2021).
[32] Ibid

to conclude that the treatment of foundlings has truly become a matter of international custom which can be vouched to be reflective of the accurate aspiration of the global community.

3.1 Foundlings Phenomenon in Kenya

Various factors including lack of parenting skills, substance abuse, physical or mental disease of parents or relatives, weakening social values and economic challenges are significant contributors to the growing number of dysfunctional families around the world, including in Kenya. [33] Consequently, the number of foundlings across the world, including in Kenya continues to grow.

In the small rural communities in Kenya, foundlings are cared for by their finders, or willing employers if the child is old enough to perform useful work. In an urban setting, care for foundlings has become primarily institutionalized, leading to growth of children's homes and religious communities devoted to the care of the poor.

Arguably though is that only the most prosperous of societies are able to provide institutional care for parentless children that rivaled the care children might otherwise have received if their parents had been alive and able to keep them at home. Many developing countries including Kenya are far from attaining such status. Nonetheless, important components of the social and economic policy on child welfare are increasingly being enacted by the Kenyan government. Having ratified the Convention of the Rights of the Child in July 1990, the Government of Kenya has developed a domestic legislation concerning childcare and protection. The enhancement of the Children's Act of 2001 gives effect to the obligations under the Convection of the Rights of the Child (CRC) and the African Children's Charter.

[33] Graeme Garrard, 'Children of the State: Rousseau's Republican Educational Theory and Child Abandonment' (2021) 50 History of Education 147.

3.2 Article 14(4) – The Contention

A remarkable stage towards promulgation of the Constitution of Kenya 2010 was the debate that preceded and culminated into its adoption through a referendum. The referendum phase offered Kenyans from all walks of life, an opportunity to make their views known before taking a vote for or against the proposed constitution. It was at the plebiscite stage that plethora of issues arose and were exhaustively debated upon. Of the contentious issues that created a great divide amongst the Kenyan populace then was the least expected provision of Article 14(4). Although every draft that emerged during the constitution-making process in Kenya carried the content of Article 14(4), contention arose during the review of the Revised Harmonized Draft (RHDC) Constitution by the committee of experts (CoE), when the Parliamentary Select Committee on the Review of the Constitution (PSC) altered the right to citizenship for foundling by introducing a requirement to apply for citizenship instead of presuming them to be citizens by birth.[34] The committee was apprehensive due to the obvious difficulty of revoking citizenship acquired by birth.[35]

In response, the CoE adjusted the PSC proposal to restore the right of citizenship for foundlings and provided explicitly for revocation by introducing Article 17(2) which annuls citizenship acquired under Article 14(4) if at any given time evidence emerged to show that any of the grounds on which citizenship was based turned out to be false. Article 17(2) provides as follows:

> *"The citizenship of a person, who was presumed to be a citizen by birth, as contemplated in Article 14(4), may be revoked if: -*

[34] Committee of Experts on Constitutional Review, 'Final Report of the Committee of Experts on Constitutional Review -Coe_final_report-2.Pdf' *<https://katibaculturalrights.files.wordpress.com/2016/04/coe_final_report-2.pdf>* accessed 13 February 2022.
[35] Ibid

> *a) The citizenship was acquired by fraud, false representation or concealment of any material fact by any per son.*
> *b) The nationality or parentage of the person becomes known and reveals that the person was a citizen of another country; or*
> *c) The age of the person becomes known and reveals that the person was older than eight years when found in Kenya."*

During the referendum, whether standing from an informed point of view or otherwise, the opponents of the proposed constitution raised as many queries on the provision of Article 14(4). A major concern that was raised was that Art. 14(4) could open up a heavy influx of foreigners and refugees, which in the long run could erode national values and culture. In their document that touched on almost every chapter of the proposed constitution, the Institute for Social Accountability (TISA) emphasized that the provision is an affront to the protection of Kenyan people and their culture especially with neighbouring countries facing conflicts and civil wars.[36] TISA therefore proposed that the article should be deleted. They further suggested that such provision for foundlings be made through a statute. These concerns mainly stem from fear that Kenya's unstable neighbours as well as terrorist networks could take advantage of such a provision to make unwarranted claim for Kenyan citizenship.

3.3 Effects of laws on *citizenship for foundlings* in Kenya

The constitution of Kenya 2010 at Article 13(2) provides for only two modes of acquisition of citizenship, acquisition by birth or registration. Consequently, presuming acquisition of citizenship by birth effectively bestows rights and privileges that go with such ascription. In both the repealed and the current Constitution of Kenya, citizenship by birth cannot

[36] 'The Institute for Social Accountability' <https://tisa.co.ke/> accessed 13 February 2022, The Institute for Social Accountability (TISA) is a civil society initiative committed towards the achievement of sound policy and good governance in local development in Kenya.

be revoked. In actual fact, Article 16 of the Constitution emphasizes the privileged position of a *citizen by birth* by protecting dual nationality thus, "A citizen by birth does not lose citizenship by acquiring the citizenship of another country." It is therefore not necessary that one renounces their citizenship by birth in the event that they want to undertake citizenship of another country.

The Kenya Citizenship and Immigration Act, 2011 sets out a criteria to be satisfied prior to the grant of citizenship for foundlings. First and second are that such foundling ought to be or appear to be less than eight years of age, and their nationality and parents are not known.[37] Third is that if the Government department responsible for matters relating to children fails to determine the origin and identity of the child in question, it shall present the child found to the Children's Courts and take out proceedings for the determination of the age, nationality, residence and the parentage of the child.[38] The court shall after determining the adequacy of the efforts undertaken by the Government department responsible for matters relating to children, issue an order directing that such a child be presumed to be a citizen by birth or any other order that it deems fit to grant.[39] Where the court makes an order that the child be presumed to be a citizen by birth, it may direct the Director to register the child in the register of children presumed citizen by birth.[40]

One criticism of this provision is anchored on section 9(1), which provides that any person who finds a child who is or appears to be less than eight years of age, and whose nationality and parents are not known shall present the child to the Government department dealing with matters relating to children and where there is no such department, present the child to the nearest Government department or agency. Here, considering the fact that Kenya is home to all categories of persons including stateless persons, refugees and illegal immigrants, reference to "*Any person…"* is certainly untenable. For

[37] Kenya Citizenship and Immigration Act No. 12 of 2011, article 9 (1) to (4).
[38] ibid, section 9(4).
[39] ibid, section 9 (5).
[40] ibid, section 9 (6).

instance, any of the above-mentioned persons regardless of their nationality, status in the country or even without regard to their mental capacity to depone to facts within their knowledge or upon information, can bring along a child and pursue claims for citizenship under Article 14(4).

Practical challenges for Kenya

States have special obligations towards its citizens, and grant of citizenship to a foundling then implies expanded obligations and duties to cater for the welfare of the child.[41] As illustrated, Kenyan streets are flooded with children who appear to be less than eight years of age and whose parentage are not known. In the circumstance the practicability of section 9(1) is put to test where Kenyans heed such a call to bring along any child who is or appears to be less than eight years of age, and whose nationality and parents are not known, and present them to the Government department dealing with matters relating to children.

The provision of the Act at section 9(3) where the Government department responsible for matters relating to children is directed to undertake the necessary investigations including, subject to the rights of the child under any written law, the use of media to determine origin of the child, appears impractical to enforce, especially due to capacity challenges, particularly to: (a) meet the cost of the process of investigation that includes use of media; (b) technical and monetary capacity to carry out such a process; (a) positively change the quality of the foundling's life, as a result of acquiring citizenship status. Some have argued that it is more ethical to prioritize the welfare of the child than to embark on the costly process of investigation in the manner provided. A contrary view that supports the step by step criteria is that it helps to detect and wean out those who are out to abuse the process.

[41] Refugees (n 25); Abdulaziz Abdullah Alsaif, Thamer Adel Alkhadra and AlBandary Hassan AlJameel, 'Oral Health-Related Quality of Life (OHRQoL) among Groups of Foundling and Delinquent Children in Comparison with Mainstream Children' (2021) 28 Journal of Population Therapeutics and Clinical Pharmacology.

Another criticism is that section 9 (4) complicates the process of determination of citizenship by conferring the department responsible for matters relating to children such a role whereas there exists a government agency that is responsible for matters relating to citizenship and management of foreign nationals. The Kenya Citizens and Foreign Nationals Management Service Act of 2011 provides for establishment of Citizenship Advisory Committee whose sole purpose is to guide in the process of determination of Kenyan citizenship.[42] Subsection 4 of section 9 of the Citizenship and Immigration Act appears to entrust determination of citizenship upon the department responsible for matters relating to children.

In the same breath, conflict of roles appear at section 9(5) where it is states, "The court shall after determining the adequacy of the efforts undertaken by the Government department responsible for matters relating to children, issue an order directing that such a child be presumed to be a citizen by birth or any other order that it deems fit to grant."[14] The pertinent question that arises here is, who between the courts and the Cabinet Secretary responsible for matters relating to citizenship and the management of foreign nationals, is responsible for granting of citizenship in Kenya?

Moreover, the Kenya Citizenship and Immigration Act provides that, "Where the court makes an order that the child be presumed to be a citizen by birth, it may direct the Director to register the child in the register of children presumed citizen by birth".[43] Ordinarily, Kenyan citizens by registration are issued with a registration certificate with a reference file at the Immigration department.[44] Although the fundamental principle of citizenship is the equality of all citizens, even for immigrants who may have recently acquired citizenship, in practice, citizens by registration have limited rights in comparison to citizens by birth in many jurisdictions. Some rights are restricted to citizens by birth, particularly the rights to hold certain state offices. For instance, both Kenyan Constitutions provide that for one to

[42] Kenya Citizens and Foreign Nationals Management Service, Act No. 31 of 2011.
[43] Kenya Citizenship and Immigration Act No. 12 of 2011, section 9 (6).
[44] Kenya Citizens and Foreign Nationals Management Service, Act No. 31 of 2011, section 2.

qualify to be elected president, they must be a Kenyan citizen by birth.[45] Other than a mere register, nothing seems to have been put in place to distinguish citizenship as granted under Article 14(4) and citizen by birth *per se*. It therefore follows that a foundling, who is presumed to be citizen by birth whether such has been acquired through fraudulent or appropriate means, shall enjoy full rights as a citizen by birth proper.

A further criticism is that while the Constitution provides for revocation of citizenship at article 17, without mention of which authority is to revoke, i.e whether the cabinet secretary or the courts, the Act provides only penalties for persons who bring into the country, conspires, assists or facilitates the abandoning of a child with the intention of conferring them citizenship at section 9(7). How then is revocation process instituted? By such an omission the drafters of the Act may have alluded to irrevocable nature of citizenship by birth for foundlings.

4. Conclusion

Despite the fact that the international law endeavors to guard against excesses in nationality laws of a State, the principle that a State determines who qualifies to be its citizen in accordance with its municipal law is backed by both judicial decisions and treaties. Judicial decisions include the 1923 decision by the Permanent Court of International Justice, in the Nationality Decree in Tunis and Morocco case, "in the present state of international law, question of nationality are … in the principle within the reserved domain." Article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, further confirms this principle; "it is for each state to determine under its own laws who are its nationals."

In determining nationality of a person, States employ connecting factors such as birth, descent, naturalization as well as the territorial origin of a person to establish genuine or effective link between the person and the state. In Kenya, these connecting factors for conferment of nationality cannot be relied upon in isolation so as to constitute good grounds for the grant of

[45] 'Constitution of Kenya' (n 9), article 137 (1) (a).

nationality. For instance, lack of clear birth records makes it difficult to prove claim to citizenship by birth. The consideration of the 'territorial origin of a person' determinant in the Kenyan circumstance poses a great challenge due to the porosity of Kenyan borders and its frequently unstable neighbours. In addition, the fact that Kenya is host to a huge refugee population makes the concept of territorial origin of a person difficult to obtain.

In context, it is easily perceptible from the foregoing paragraph that provisions of Article 14(4) of the constitution of Kenya and the attendant provisions under Citizenship and Immigration Act on the matter of citizenship for foundlings without doubt creates avenues for unmerited acquisition of Kenyan citizenship. Although these provisions are consistent with international law and are as a matter of necessity designed to avoid the dreadful position of a child without citizenship, they have not been customized to suit the prevailing circumstances in the country.

The revocation clause at Article 17(2) of the constitution to say the least is unwarranted. The resultant effect of such a revocation runs contrary to the anticipated object of prohibiting the quagmire of statelessness in the country. Besides, the subsequent legislation under the Citizenship and Immigration Act that outlines the process of granting citizenship for children found on the Kenyan soil makes it even more cumbersome. Undoubtedly, the legal ramifications emanating from revocation of citizenship acquired by birth can lead to an endless contestation.

In a nutshell, this article has illuminated on the inherent flaws in the set of laws governing citizenship for foundlings in Kenya. The most fundamental contribution of human rights law to the prevention of statelessness is the enunciation of an individual's right to a nationality.[18] Whereas it is in order for States to refrain from creating statelessness by adopting and implementing citizenship legislations within the confines of the principles enunciated in the International instruments, it is not proper to merely, for the sake of compliance, make laws whose provisions are not only hazy but also near impossible to implement.

4.1 Recommendations

As a matter of fact, it is not easy to have a process of conferment of citizenship for foundlings that is seamless in any jurisdiction. Even the relevant treaties and Conventions on the subject have espoused the desired principles of granting citizenship to foundlings but have provided no concrete obligations on its implementation mechanism. This is largely due to preservation of the concept of State sovereignty and the principle that birth at a state's territory does not necessarily reflect a link between the child and the state in which territory they were born.

It is discernible from this discourse that provisions in international and regional instruments regarding citizenship for foundlings, place emphasis on attribution of nationality to children born on state territory, but do not compel contracting state to adopt the form of automatic *jus soli* conferral of citizenship as constructed in the current Kenyan laws. In fact, the 1961 Convention on the Reduction of Statelessness at articles 1 & 4 provides for the attribution of nationality either *jus soli* or *jus sanguinis* at birth to a child who would otherwise be stateless but allows states to choose to delay the conferral of citizenship until late childhood or even early adulthood and set a number of additional conditions. By virtue of article 2 of the Constitution, Kenya is arguably a monist state and therefore even without the introduction of Article 14(4) the fact that it has ratified conventions and treaties that provide citizenship for foundlings makes such provisions to take effect automatically. As such therefore, all that was needed was to construct with precision statutory provisions encompassing principles enunciated by those instruments.

By and large it is possible for a foundling to obtain citizenship 'substantively' without the vague reference to 'presumed citizen by birth.' Such a child may be naturalized or may apply to become a citizen by *registration* when they attain the age of majority prior to which the child may be committed to children's homes or orphanages for care and maintenance. Further, the application process makes it possible for the relevant government agency to impose conditions to avoid abuse of the system and to safeguard the rights of the child. In a nutshell, the full

realisation of article 14(4) of the CoK 2010 with respect to granting of citizenship to foundlings is subject to numerous implementation challenges. This article therefore recommends that Kenya reviews her circumstances and proceed to effect necessary statutory and policy amendments with respect to the issue of the grant of citizenship to foundlings.

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Kenya Citizenship and Immigration Act No. 12 of 2011

Boosting Biodiversity Conservation Through Sustainable Forest Resources Management

By: ***Kariuki Muigua****

Abstract

As far as biodiversity conservation is concerned, forests are seen as not only a critical habitat for biological diversity but also as a tool for their conservation through sustainable management of forest resources. Communities living around forested areas rely heavily on these forest resources for their livelihoods. Indeed, conflicts have at times arisen from the use and control of forests, between authorities and the communities. This paper argues that managing these forests sustainably and in collaboration with the communities is not only likely to benefit the citizenry more but also boost efforts towards conservation of biodiversity.

1. Introduction

This paper discusses the challenges, and explores some of the ways that communities can be effectively included in forest resources management through fostered Environmental Democracy for biodiversity conservation and human rights protection. Arguably, loss of biodiversity in general, and in tropical forests in particular, has been identified as a major concern for modern society the world over.[1] It has been argued that deforestation is a major contributor to global emissions and reducing emissions from deforestation and degradation is a potentially cost-effective method of limiting emissions which can also yield important benefits in terms of

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[1] Lele, S., Wilshusen, P., Brockington, D., Seidler, R. and Bawa, K., 'Beyond Exclusion: Alternative Approaches to Biodiversity Conservation in the Developing Tropics' (2010) 2 Current Opinion in Environmental Sustainability 94.

biodiversity, watershed management, and local livelihoods, indeed development more generally.[2]

The *2030 Agenda for Sustainable Development Goals*[3] under Goal 15 (SDG 15) recognises the importance of forests and obligates States to 'protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification and halt and reverse land degradation and halt biodiversity'.[4] Among the targets associated with this Goal are that States should: by 2020, ensure conservation, restoration and sustainable use of terrestrial and inland freshwater ecosystems and their services, in particular forests, wetlands, mountains and drylands, in line with obligations under international agreements; by 2030, ensure the conservation of mountain ecosystems, including their biodiversity, to enhance their capacity to provide benefits which are essential for sustainable development; take urgent and significant action to reduce degradation of natural habitat, halt the loss of biodiversity, and by 2020 protect and prevent the extinction of threatened species; ensure fair and equitable sharing of the benefits arising from the utilization of genetic resources, and promote appropriate access to genetic resources; by 2020, integrate ecosystems and biodiversity values into national and local planning, development processes and poverty reduction strategies, and accounts; mobilize and significantly increase from all sources financial resources to conserve and sustainably use biodiversity and ecosystems; and enhance global support to efforts to combat poaching and trafficking of protected species, including by increasing the capacity of local communities to pursue sustainable livelihood opportunities.[5] Notably, these

[2] Masundire HM, 'Achieving Sustainable Development and Promoting Development Cooperation–Dialogues at the ECOSOC' (New York: United Nations, 2008),28.
[3] United Nations General Assembly, *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)].
[4] UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, Goal 15.
[5] 'SDG 15: Protect, Restore and Promote Sustainable Use of Terrestrial Ecosystems, Sustainably Manage Forests, Combat Desertification, Halt and Reverse Land Degradation and Halt Biodiversity Loss – SDG Compass' <*https://sdgcompass.org/sdgs/sdg-15/*> accessed 13 August 2021.

targets not only recognise the link between forests and biodiversity conservation but also calls for empowerment of local communities through capacity building to enable them pursue sustainable livelihood opportunities. This arguably means ensuring that they fully participate in forests resources management in the spirit of Environmental Democracy.

2. Forest Resources and Biodiversity Conservation

Notably, forests are considered as critical habitats for biodiversity and are also essential for the provision of a wide range of ecosystem services that are important to human well-being.[6] Forest resources offer a range of benefits and opportunities for local and national economic development, improved livelihoods and provision of environmental goods and services such as watershed protection and carbon sequestration.[7] They contribute directly and indirectly to the national and local economies through revenue generation and wealth creation, and it is estimated that forestry contributes to 3.6% of Kenya's GDP, excluding charcoal and Direct Subsistence Uses.[8] Forests also support most productive and service sectors in the country, particularly agriculture, fisheries, livestock, energy, wildlife, water, tourism, trade and industry that contributes about 33% to 39 % of the country's GDP.[9] Biomass comprises about 80% of all energy used in the country, while they also provide a variety of goods, which support subsistence livelihoods of many communities.[10] Other services provided include erosion control, natural hazard and disease regulation. Forest adjacent communities benefit directly through subsistence utilization of the forests. Deforestation in Kenya is, however, estimated at 50,000 hectares annually, with a consequent yearly loss to the economy of over USD 19 million.[11]

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[6] Brockerhoff, E.G., Barbaro, L., Castagneyrol, B., Forrester, D.I., Gardiner, B., González-Olabarria, J.R., Lyver, P.O.B., Meurisse, N., Oxbrough, A., Taki, H. and Thompson, I.D., 'Forest Biodiversity, Ecosystem Functioning and the Provision of Ecosystem Services' (2017) 26 Biodiversity and Conservation 3005.
[7] Republic of Kenya, *Policy 2014*, Laws of Kenya.
[8] Ibid
[9] Ibid, para. 1.1.2.
[10] Ibid
[11] Ibid

While Kenya is endowed with a wide range of forest ecosystems ranging from montane rainforests, savannah woodlands; dry forests and coastal forests and mangroves, the current forest cover is estimated at 6.99% of the land area of the country, below the constitutional requirement of 10%.[12]

Forest resources conservation is provided for both in the international and national legal frameworks. The CBD Aichi Target 5 provides that "by 2020, the rate of loss of all natural habitats, including forests, should at least be halved and where feasible brought close to zero, and degradation and fragmentation is significantly reduced. Notably, the CBD Aichi Biodiversity Target 7 also provides that countries should ensure that "by 2020 areas under agriculture, aquaculture and forestry are managed sustainably, ensuring conservation of biodiversity". The overall goal of Kenya's *Forest Policy 2014* was sustainable development, management, utilization and conservation of forest resources and equitable sharing of accrued benefits for the present and future generations of the people of Kenya. The *Draft National Forest Policy, 2020,* being a revised policy framework for forest conservation and sustainable management seeks to provide a framework for improved forest governance, resource allocation, partnerships and collaboration with the state and non-state actors and monitoring and evaluation to enable the sector contribute to the achievement of the country's growth and poverty alleviation goals within a sustainable environment.[13]

The *Forest Conservation and Management Act 2016*[14] was enacted to give effect to Article 69 of the Constitution with regard to forest resources; to provide for the development and sustainable management, including conservation and rational utilization of all forest resources for the socio-economic development of the country.[15]

The *National Spatial Plan 2015-2045* highlights some of the challenges facing forest ecosystems to include overwhelming pressure from competing

[12] Ibid
[13] Republic of Kenya, *Draft Policy 2020*, May 2020, Laws of Kenya.
[14] No. 34 of 2016, Laws of Kenya.
[15] Preamble, No. 34 of 2016, Laws of Kenya.

land uses like agriculture, industry, human settlement and development of infrastructure; extraction of forest products, illegal logging, cutting trees for fuel wood and charcoal and grazing of livestock have also contributed to the degradation of forests. These competing land uses have adverse environmental effects on long-term sustainability of forest ecosystems. Under this Plan, the Government is mandated to: *prepare integrated forest resource management plans to promote sustainable use of forest resources; develop and implement national standards, principles and criteria of sustainable forest management; indigenous forests shall be identified and protected from logging and involve and empower communities in the management of forest ecosystems through controlled logging, agro-forestry, re-forestation and natural regeneration.*

The Constitution of Kenya 2010 also requires under Article 69(1) that the State should, *inter alia*,—(*a*) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; (*b*) work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; (*d*) encourage public participation in the management, protection and conservation of the environment; (*e*) protect genetic resources and biological diversity; (*f*) establish systems of environmental impact assessment, environmental audit and monitoring of the environment.

The *Community Land Act*[16] provides that: for purposes of the sustainable conservation of land based natural resources within community land across counties, every respective registered community should abide by the relevant applicable laws, policies and standards on natural resources.[17] With respect to subsection (1), the communities should establish - measures to protect critical ecosystems and habitats; incentives for communities and individuals to invest in income generating natural resource conservation programmes; measures to facilitate the access, use and co-management of forests, water and other resources by communities who have customary rights to these resources; procedures for the registration of natural resources in an

[16] Community Land Act, No. 47 of 2016, Laws of Kenya.
[17] Ibid, sec. 20 (1).

appropriate register; and procedures for the involvement of communities and other stakeholders in the management and utilization of land-based natural resources.[18]

3. Challenges in Biodiversity Conservation and Forest Resources Management in Kenya

The management and conservation of forests is often associated with tension between powerful, centralised state authorities or the ruling elite and less powerful local communities. [19] Over the years, this state of affairs has led to decentralization of forest rights and tenure to local communities and indigenous groups in both developing and developed nations, giving greater local control of forest resources as a response to the failure of government agencies to exercise adequate stewardship over forests and to ensure that the values of all stakeholders are adequately protected.[20] While the law provides for community based approaches to forest management, there exists challenges at the local level, when local governance institutions are not downwardly accountable to the community and benefits are disproportionately captured by local elites.[21] As a result, tensions exist in some places between the development of locally accountable governance and traditional authorities, with Community-based natural resource management (CBNRM) interventions not being accompanied by the type of long-term investments in capacity-building required to ensure broader participation and the accountability of local leaders to their community.[22]

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[18] Ibid, se. 20 (2).

[19] Sayer, J., Elliott, C., Barrow, E., Gretzinger, S., Maginnis, S., McShane, T., & Shepherd, G., 'The Implications for Biodiversity Conservation of Decentralised Forest Resources Management Paper Prepared on Behalf of IUCN and WWF for the UNFF Inter-Sessional Workshop on Decentralisation Interlaken, Switzerland, May 2004'.

[20] Sayer J, Margules C and Boedhihartono AK, 'Will Biodiversity Be Conserved in Locally-Managed Forests?' (2017) 6 Land 6.

[21] Roe D, Nelson F and Sandbrook C, *Community Management of Natural Resources in Africa: Impacts, Experiences and Future Directions* (IIED 2009), ix.

[22] *Ibid*

The loss of control rights over natural resources during the colonial period affected other resources including forests and water.[23] The focus of forests management in reserved forests was production and protection and included collection of revenues, supervisory permits and licences, protection against illegal entry and use, reforestation and afforestation, research and extension.[24] Further, outside reserved forests, the focus by the government authorities was regulation and control of forest resources utilisation through legislation without considering the interests of the local communities or the existing traditional management systems.[25]

Thus, the colonial government effectively transferred the management of forests from the local communities to the government through exclusionist and protectionist legal frameworks, a move that was inherited by the independent governments of Kenya.[26] It was only in the 1990s that there emerged a paradigm shift towards community-based forests management, although this was done with minimal commitment from the stakeholders.[27] Arguably, this has been with little success due to the bureaucracy involved in requiring communities to apply for complicated licenses and permits in order to participate in the same.

A closer examination of the *Forest Conservation and Management Act*, 2016[28] reveals this challenge. For instance, all indigenous forests and

[23] Mogaka, H., 'Economic Aspects of Community Involvement in Sustainable Forest Management in Eastern and Southern Africa,' *Issue 8 of Forest and social perspectives in conservation*, IUCN, 2001, 74.
[24] Kigenyi, *et al*, 'Practice Before Policy: An Analysis of Policy and Institutional Changes Enabling Community Involvement in Forest Management in Eastern and Southern Africa,' *Issue 10 of Forest and social perspectives in conservation*, (IUCN, 2002), p. 9.
[25] *Ibid*
[26] For instance, in 1985 the Government of the day effected a total ban on the shamba system, which was participatory in nature in that it allowed communities to settle in forests and engage in farming as they took care of the forests. Following the ban, the communities were resettled outside the gazetted forest areas. This form of eviction has also been witnessed in such recent cases as the Endorois and the Ogiek cases.
[27] Emerton, L., 'Mount Kenya: The Economics of Community Conservation,' *Evaluating Eden Series*, Discussion Paper No.4, p. 6.
[28] *Forest Conservation and Management Act*, No. 34 of 2016, Laws of Kenya.

woodlands are to be managed on a sustainable basis for purposes of water, soil and biodiversity conservation; riverine and shoreline protection; cultural use and heritage; recreation and tourism; sustainable production of wood and non-wood products; carbon sequestration and other environmental services; education and research purposes; and as habitats for wildlife in terrestrial forests and fisheries in mangrove forests.[29] In this regard, the law requires the Kenya Forest Service to consult with the forest conservation committee for the area where the indigenous forest is situated in preparing a forest management plan.[30] Furthermore, the Forests Board is empowered to enter into a joint management agreement for the management of any state indigenous forest or part thereof with any person, institution, government agency or forest association.[31] While such arrangements can potentially promote co-management and are important in promoting environmental justice since communities get to participate in management of indigenous forests, there is little evidence of active involvement of these communities. If anything, these communities have been suffering eviction from the indigenous forests.[32]

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[29] Sec. 42 (1), *Forest Conservation and Management Act*, No. 34 of 2016; See also Article 60, Constitution of Kenya 2010.
[30] *Ibid*, S. 42(2).
[31] *Ibid*, S. 44(3).
[32] 'Kenya: Indigenous Peoples Targeted as Forced Evictions Continue despite Government Promises' <*https://www.amnesty.org/en/latest/news/2018/08/kenya-indigenous-peoples-targeted-as-forced-evictions-continue-despite-government-promises/*> accessed 7 July 2021; 'Kenya: Indigenous Ogiek Face Eviction from Their Ancestral Forest… Again' (*Mongabay Environmental News*, 8 October 2018) <*https://news.mongabay.com/2018/10/kenya-indigenous-ogiek-face-eviction-from-their-ancestral-forest-again/*> accessed 7 July 2021; 'Families Torn Apart: Forced Eviction of Indigenous People in Embobut Forest, Kenya - Kenya' (*ReliefWeb*) <*https://reliefweb.int/report/kenya/families-torn-apart-forced-eviction-indigenous-people-embobut-forest-kenya-0*> accessed 7 July 2021; 'Imminent Forced Eviction by Kenya Threatens Indigenous Communities' Human Rights and Ancestral Forests - Kenya' (*ReliefWeb*) <*https://reliefweb.int/report/kenya/imminent-forced-eviction-kenya-threatens-indigenous-communities-human-rights-and*> accessed 7 July 2021; 'Kenya Defies Its Own Courts: Torching Homes and Forcefully Evicting the Sengwer from Their Ancestral Lands, Threatening Their Cultural Survival | Forest Peoples Programme' <*http://www.forestpeoples.org/topics/legal-human-rights/news/2014/01/kenya-defies-its-own-courts-torching-homes-and-forcefully-evi*> accessed 7 July 2021;

The *Draft National Forest Policy 2020* acknowledges that 'while the Forests Act No. 7 of 2005 and the Forest Conservation and Management Act 2016 provide for PFM (a model where the authority managing forest land invites local people to participate in some activities with responsibilities outlined in participatory agreements and participatory forest management plans (PFMPs)), the implementation of PFMPs through management agreements between KFS and CFAs has been limited due to inadequate funding, where the PFM process needs to be strengthened, improved upon, and adequately financed'. In addition, the Policy document states that 'participation should extend to community engagement in the management and utilization of national gazetted forests through community forestry. Other issues that need to be addressed are: sustainable access, user rights and benefit sharing; enhancing the livelihoods of communities; adoption and mainstreaming of innovative climate change adaptation and mitigation models in forest resource management strategies; and identification of best practices on grievance and redress mechanisms between communities and forest management institutions'.[33]

It has been argued that many, if not all of the planet's environmental problems and certainly its entire social and economic problems, have cultural activity and decisions – people and human actions – at their roots.[34] As such, solutions are likely to be also culturally-based, and the existing models of sustainable development forged from economic or environmental concern are unlikely to be successful without cultural considerations.[35] Culture in this

'Kenya's Sengwer People Demand Recognition of "Ancestral Land" | Voice of America - English' <*https://www.voanews.com/africa/kenyas-sengwer-people-demand-recognition-ancestral-land*> accessed 7 July 2021; Jacqueline M Klopp and Job Kipkosgei Sang, 'Maps, Power, and the Destruction of the Mau Forest in Kenya' (2011) 12 Georgetown Journal of International Affairs 125; 'Kenya Forest Service - Kenya Forest Service' <*http://www.kenyaforestservice.org/index.php?option=com_content&view=article&catid=223&id=149&Itemid=98*> accessed 7 July 2021.

[33] Republic of Kenya, Draft National Forest Policy 2020, para. 2.2.2.

[34] Dessein, J. et al (ed), 'Culture in, for and as Sustainable Development: Conclusions from the COST Action IS1007 Investigating Cultural Sustainability,' (University of Jyväskylä, Finland, 2015), p. 14. Available at *http://www.culturalsustainability.eu/conclusions.pdf* [Accessed on 7 July 2021].

[35] Ibid, p.14.

context, has been defined as: the general process of intellectual, spiritual or aesthetic development; culture as a particular way of life, whether of people, period or group; and culture as works and intellectual artistic activity.[36]

Notably, the generation, adaptation and use of indigenous knowledge are greatly influenced by the culture.[37] It has rightly been observed that despite the indigenous populations having suffered from invasion and oppression, and oftentimes they have seen their knowledge eclipsed by western knowledge, imposed on them through western institutions, indigenous populations have managed to survive for centuries adapting in many different ways to adverse climate conditions and managing to create sustainable livelihood systems.[38] Indeed, their diverse forms of knowledge, deeply rooted in their relationships with the environment as well as in cultural cohesion, have allowed many of these communities to maintain a sustainable use and management of natural resources, to protect their environment and to enhance their resilience; their ability to observe, adapt and mitigate has helped many indigenous communities face new and complex circumstances that have often severely impacted their way of living and their territories.[39] It is, therefore, worth including indigenous knowledge and culture in any plans, programmes and policies aimed at realisation of sustainable development agenda.

Economically, forests provide timber which is an important source of revenue and a major foreign exchange earner. Forests also serve as habitats and a source of livelihoods for indigenous peoples and forest dwellers.[40] The

[36] Ibid, p. 21.
[37] SGJN Senanayake, 'Indigenous Knowledge as a Key to Sustainable Development' (2006) 2 Journal of Agricultural Sciences–Sri Lanka.
[38] Giorgia Magni, 'Indigenous Knowledge and Implications for the Sustainable Development Agenda.' (2017) 52 European Journal of Education 437, p.3 < *https://unesdoc.unesco.org/ark:/48223/pf0000245623*> Accessed 7 July 2021.
[39] Ibid; See also Anders Breidlid, 'Culture, Indigenous Knowledge Systems and Sustainable Development: A Critical View of Education in an African Context' (2009) 29 International Journal of Educational Development 140.
[40] UNFF Memorandum <*www.iucnael.org/en/.../doc.../849-unit-3-forest-game-*

Africa Forest Law Enforcement and Governance (AFLEG) Ministerial Declaration of 2003[41] recognized the role of forests in its preamble noting that Africa's forest eco-systems are essential for the livelihoods of the African people; especially the poor and that forests play important social, economic and environmental functions.[42]

Environmental injustice continues to manifest itself in modern times through conflicts such as those in Lamu County and in the pastoral counties, largely attributable to environmental injustices inflicted over the years.[43] The conflicts also rise as a result of some sections of the society habouring feelings that land and other land-based resources were taken away from local communities, creating a feeling of disinheritance. In other areas, there are conflicts over access to resources such as forests among forest communities for livelihood, while in others conflicts emerge due to competition over scarce natural resources and competing land uses.[44]

4. Sustainable Management of Forests for Biodiversity Conservation

The environment and forest sector is the foundation upon which the performance of the key primary sectors of the economy is anchored

backgrounder.html> Accessed on 15 August 2021; See also UNEP, *Global Environment Outlook 5: Environment for the future we want*, (UNEP, 2012), pp.145-154.

[41] Africa Forest Law Enforcement and Governance (AFLEG), Ministerial Conference 13-16 October, 2003; Ministerial Declaration, Yaoundé, Cameroon, October 16, 2003.

[42] Sec. 2, *Forest Conservation and Management Act*, No. 34 of 2016, Laws of Kenya.

[43] "They Just Want to Silence Us" (*Human Rights Watch*, 17 December 2018) <*https://www.hrw.org/report/2018/12/17/they-just-want-silence-us/abuses-against-environmental-activists-kenyas-coast*> accessed 9 July 2021; Rachel Berger, 'Conflict over Natural Resources among Pastoralists in Northern Kenya: A Look at Recent Initiatives in Conflict Resolution' (2003) 15 Journal of International Development 245.

[44] 'FAO Working Paper 1' <*http://www.fao.org/3/X2102E/X2102E01.htm*> accessed 9 July 2021; Urmilla Bob and Salomé Bronkhorst, 'Environmental Conflicts: Key Issues and Management Implications' (2010) 10 African Journal on Conflict Resolution.

including, manufacturing, energy, health and agriculture.[45] It was estimated that by 2010 the national forest cover stood at 4.18 million Ha, representing 6.99% of the total land area while the gazzetted public forests managed by Kenya Forest Service covered 2.59 million Ha.[46] In 2015, the forest cover was estimated at 7.2% based on the national projection from the 2010 forest cover data.[47] This is below the recommended minimum global standard of 10% thus necessitating Kenya's goal of increasing and maintaining the national tree cover to at least 10% by 2022.[48] Most of the forestland in Kenya has been attributed to change of and use over the years thus shrinking the country's forest cover to below the international accepted standards.[49] This is despite the fact that forests are considered important for the provision of vital ecosystem services to communities living around them, contributing immensely to their livelihoods. [50] Natural forests also provide many

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

[46] *Ibid*

[47] *Ibid*

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

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

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

ecosystem services needed for biodiversity conservation and sustainable management.[51]

Sustainable forest management is impossible without the conservation of biological diversity in forest ecosystems. In addition to the establishment and functioning of protected areas (PA) and a network of protective forests to maintain biodiversity, it is necessary to ensure the existence and species dispersal in the territories actively involved in forest management.[52]

Sustainable forest management practices that reduce the depletion of carbon stock and enhance forest resiliency (e.g., through reduced impact logging and longer harvesting cycles) could benefit biodiversity if they are applied in forests that have unsustainable harvest rates but would negatively impact forest biodiversity if applied in intact old-growth forests.[53]

4.1. Addressing Poverty as a Causation Factor in Deforestation

Kenya's Draft Forest Policy 2020 acknowledges that while forestlands provide an important resource base for rural people's livelihoods, rapidly increasing populations, poverty, demand for fuel wood and grazing have put pressure on land forcing large segments of the rural poor to resort to poor land use practices.[54] Arguably, there are better chances of maintaining biodiversity if local benefits are maximized and local costs are minimized through carefully negotiated allocation of forest land to different purposes and by optimising the balance between all the goods and services derived from forests, especially where poor people live in proximity to forests rich in biodiversity.[55] It is suggested that policies that address links between

[51] Sylvester Ngome Chisika and Chunho Yeom, 'Enhancing Ecologically Sustainable Management of Deadwood in Kenya's Natural Forests' (2021) 2021 International Journal of Forestry Research, 1.
[52] 'Biodiversity Conservation in Forest Management' (*WWF Russia*) <*https://wwf.ru/en/what-we-do/forests/biodiversity-conservation-in-forest-management/*> accessed 13 September 2021.
[53] Harvey CA, Dickson B and Kormos C, 'Opportunities for Achieving Biodiversity Conservation through REDD' (2010) 3 Conservation Letters 53.
[54] Republic of Kenya, *Draft Forest Policy 2020,* para. 1.2.4.
[55] Szaro, R.C., Sayer, J.A., Sheil, D., Snook, L., Gillison, A., Applegate, G., Poulsen, J. and Nasi, R., 'Biodiversity Conservation in Production Forests' [1999] Center for

ecological services and poverty can affect a lot of forest and many people.[56] Indeed, SDG 1 also acknowledge that one of the steps towards achieving sustainability will be eradicating abject poverty among the global citizenry. Some studies posit that policy options for reducing poverty can be sustainably effective in reducing deforestation and can be used in place of policies that, *inter alia*, restrict forest use excessively in order to reconcile forest conservation with social welfare.[57]

It is perhaps against this background that at COP 26, in an attempt to address poverty through diversified livelihood sources, world leaders acknowledged that meeting our land use, climate, biodiversity and sustainable development goals, both globally and nationally, will require transformative further action in the interconnected areas of sustainable production and consumption; infrastructure development; trade; finance and investment; and support for smallholders, Indigenous Peoples, and local communities, who depend on forests for their livelihoods and have a key role in their stewardship.[58]

Efforts towards addressing deforestation thus involve poverty eradication as both a means and an end.

International Forestry Research, Jakarta, Indonesia and International Union for Forestry Research Organizations, Vienna, Austria. 61pp, 2. Available at: http://www. cifor. cgiar. org/publications/pdf_files/others/biodiversity. pdf

[56] Kerr, S., Pfaff, A., Cavatassi, R., Davis, B., Lipper, L., Sanchez, A. and Timmins, J., *Effects of Poverty on Deforestation: Distinguishing behaviour from location*. No. 854-2016-56193. 2004, 2.

[57] Miyamoto M, 'Poverty Reduction Saves Forests Sustainably: Lessons for Deforestation Policies' (2020) 127 World Development 104746; see also Fagariba CJ, Song S and Soule SKG, 'Livelihood Economic Activities Causing Deforestation in Northern Ghana: Evidence of Sissala West District' (2018) 8 Open Journal of Ecology 57.

Some authors, however, contend this causality link between deforestation and poverty- Geist, H. and Lambin, E.,
"Is poverty the cause of tropical deforestation?" *The International Forestry Review* 5, no. 1 (2003): 64-67.

[58] 'Glasgow Leaders' Declaration on Forests and Land Use' (*UN Climate Change Conference (COP26) at the SEC – Glasgow 2021*, 2 November 2021) <https://ukcop26.org/glasgow-leaders-declaration-on-forests-and-land-use/> accessed 12 November 2021.

4.2. Role of Technology and Innovation in Combating Deforestation

Technological and social innovation has an important role in delivering a low-carbon growth through: short-term cost-effective emissions reductions using known technologies (for example, in energy generation and transmission), land use change (for example, in reduced deforestation), and energy efficiency; and in the medium – to longer-term, through delivering next-generation low-carbon technologies, especially for the power, transport, industry, and building sectors.[59] However, it must be noted that due to the development differences between countries, there would be different policy frameworks for different technologies at different stages of development.[60]

Social innovation refers to the reconfiguration of social practices and new institutions such as networks, partnerships, collaborations and governance arrangements—in response to societal challenges and opportunities, and it is seen as crucial for addressing challenges as it has the potential to deliver tangible and positive benefits for rural communities.[61] Arguably, its potential lies in offering 'new ways of framing, knowing, doing and organising and transforming the way researchers, development agents and rural stakeholders usually work together, and it represents a shift in the perspective and approach to development that provides opportunities for better inclusion of stakeholders' voices, values and vision in matters that concern them and for valuing their experience.[62]

Some of these innovations, it is hoped, will help in predicting changes in future land use and the effects of climate-related deforestation and this will in turn help governments and environment-oriented organizations to use the

[59] Masundire HM, 'Achieving Sustainable Development and Promoting Development Cooperation–Dialogues at the ECOSOC' (New York: United Nations, 2008),28.
[60] *Ibid*, 28.
[61] Barlagne, C., Bézard, M., Drillet, E., Larade, A., Diman, J.L., Alexandre, G., Vinglassalon, A. and Nijnik, M., 'Stakeholders' Engagement Platform to Identify Sustainable Pathways for the Development of Multi-Functional Agroforestry in Guadeloupe, French West Indies' [2021] Agroforestry Systems <https://doi.org/10.1007/s10457-021-00663-1> accessed 15 September 2021.
[62] Ibid

readily available vast data to hopefully make better policies to protect the forests.[63] Indeed, Kenya's *Draft National Forests Policy 2020* acknowledges that 'the forest sector suffers from low productivity of tree crops, low conversion efficiency and weak value addition schemes, as a result of climate change, small genetic base of crops, emerging pests and diseases, delayed investments in silvicultural technology[64], low investments in technology development, and poor investment in forest-based industry. As such, it states that research and development is needed to refocus basic forestry disciplines to pertinent issues such as productivity, low cost silvicultural technologies, health, crop diversification, processing, value addition, intellectual property rights and indigenous knowledge.[65]

The United Nations climate negotiations on Reducing Emissions From Deforestation And Degradation (REDD), a kind of payments for environmental services (PES)[66], provide a rare opportunity for conservation of tropical forests and biodiversity.[67] It has been observed that since Reducing emissions from deforestation and forest degradation (REDD+) policies, projects, and interventions focus on forests, they simultaneously affect socioeconomic and ecological outcomes at local, subnational, national, regional, and global levels.[68] Reducing emissions from

[63] 'Technology to Tackle Deforestation' (*AZoCleantech.com*, 29 November 2013) <https://www.azocleantech.com/article.aspx?ArticleID=470> accessed 15 September 2021.
[64] Developing silvicultural systems for sustainable forestry involves assembling the components of a silvicultural prescription such that the prescription will successfully maintain a range of ecosystem attributes (values). Those components include a suite of harvesting, regeneration, and tending methods. 'Developing Silvicultural Systems for Sustainable Forestry in Canada' <*http://www.fao.org/3/XII/0596-B1.htm*> accessed 15 September 2021.
[65] Republic of Kenya, *Draft National Forest Policy 2020*, para. 2.2.10.
[66] Pagiola S and Bosquet B, 'Estimating the Costs of REDD at the Country Level'.
[67] Harvey CA, Dickson B and Kormos C, 'Opportunities for Achieving Biodiversity Conservation through REDD' (2010) 3 Conservation Letters 53.
[68] Duchelle, A.E., De Sassi, C., Jagger, P., Cromberg, M., Larson, A.M., Sunderlin, W.D., Atmadja, S.S., Resosudarmo, I.A.P. and Pratama, C.D., 'Balancing Carrots and Sticks in REDD+ Implications for Social Safeguards' (2017) 22 Ecology and Society; Duchelle AE and others, 'What Is REDD+ Achieving on the Ground?' (2018) 32 Current Opinion in Environmental Sustainability 134; Arun Agrawal,

deforestation and forest degradation in developing countries (REDD) is based on the following basic idea: reward individuals, communities, projects and governments that reduce greenhouse gas (GHG) emissions from forests.[69]

There is a need for countries to continue exploring such projects as part of innovative responses to deforestation and climate change.[70] At the 26th UN Climate Change Conference of the Parties (COP26) in Glasgow, Scotland, held in November 2021, the *Glasgow Declaration on Forests and Land Use* was announced to the world, and was signed by 100 countries representing 85% of the globe's forested land, pledging to end or reduce deforestation by 2030.[71] Overall, the sustainable management and conservation of the world's forests received a significant boost at COP26 with financial pledges, technical progress and a declaration by World Leaders and other stakeholders on 'Forests and Land Use'.[72] Through the Declaration, the Participants emphasised the critical and interdependent roles of forests of all types, biodiversity and sustainable land use in enabling the world to meet its sustainable development goals; to help achieve a balance between anthropogenic greenhouse gas emissions and removal by sinks; to adapt to climate change; and to maintain other ecosystem services.[73] It is hoped that

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Daniel Nepstad, and Ashwini Chhatre, 'Reducing Emissions from Deforestation and Forest Degradation', Annu. Rev. Environ. Resour. 2011. 36:373–96, at 373.

[69] Verbist, B., Vangoidsenhoven, M., Dewulf, R. and Muys, B., 'Reducing Emissions from Deforestation and Degradation (REDD)' [2011] KLIMOS, Leuven, Belgium 1.

[70] Cf. Duchelle AE and others, 'Balancing Carrots and Sticks in REDD+ Implications for Social Safeguards' (2017) 22 Ecology and Society.

[71] 'COP26 Glasgow Declaration: Salvation or Threat to Earth's Forests?' (*Mongabay Environmental News*, 3 November 2021) <*https://news.mongabay.com/2021/11/cop26-glasgow-declaration-salvation-or-threat-to-earths-forests/*> accessed 11 November 2021.

[72] 'COP26: Pivotal Progress Made on Sustainable Forest Management and Conservation | UNFCCC' <*https://unfccc.int/news/cop26-pivotal-progress-made-on-sustainable-forest-management-and-conservation*> accessed 11 November 2021.

[73] Preamble< 'Glasgow Leaders' Declaration on Forests and Land Use' (*UN Climate Change Conference (COP26) at the SEC – Glasgow 2021*, 2 November 2021) <*https://ukcop26.org/glasgow-leaders-declaration-on-forests-and-land-use/*> accessed 11 November 2021.

the countries in question will uphold their commitments in combating deforestation for climate change mitigation and biodiversity conservation.

4.3. Promoting Agroforestry for Biodiversity Conservation

As already pointed out, Environmental Democracy is an important tool in promoting participatory management of resources, including forests. As a result, it has been suggested that social innovation is critical in shaping human-forest relationships and how farmers and scientists engage with each other to design sustainability transitions, where it has been observed that if countries are to address synergies between rural livelihoods, biodiversity conservation and the capacity of the natural environment to provide ecosystem services, the role of local communities is central.[74] Agroforestry is a participatory approach that can be used in enhancing the participation of communities in sustainable management of forest resources for biodiversity conservation.[75]

With declining biodiversity affecting food security, agricultural sustainability and environmental quality, agroforestry has been hailed as a possible partial solution for biodiversity conservation and improvement.[76] Agroforestry systems try to balance various needs: 1) to produce trees for timber and other commercial purposes; 2) to produce a diverse, adequate supply of nutritious foods both to meet global demand and to satisfy the needs of the producers themselves; and 3) to ensure the protection of the natural environment so that it continues to provide resources and environmental services to meet the needs of the present generations and those to come.[77]

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[74] Barlagne, C., Bézard, M., Drillet, E., Larade, A., Diman, J.L., Alexandre, G., Vinglassalon, A. and Nijnik, M., 'Stakeholders' Engagement Platform to Identify Sustainable Pathways for the Development of Multi-Functional Agroforestry in Guadeloupe, French West Indies' [2021] Agroforestry Systems <https://doi.org/10.1007/s10457-021-00663-1> accessed 15 September 2021.

[75] P Udawatta R, Rankoth L and Jose S, 'Agroforestry and Biodiversity' (2019) 11 Sustainability 2879.

[76] Ibid

[77] 'What Is Agroforestry?' (*World Agroforestry | Transforming Lives and Landscapes with Trees*) <https://www.worldagroforestry.org/about/agroforestry> accessed 15 September 2021.

Often, farmers see themselves as being part of the socio-ecological system and as custodians of the natural environment.[78] Agroforestry is a form of integrated land management that combines agriculture and forestry on a same unit of land and aims to 'create environmental, economic, and social benefits'.[79] Arguably, agroforestry contributes directly to SDGs) 1 (no poverty), 2 (zero hunger), 3 (good health and wellbeing), 6 (clean water and sanitation), 7 (affordable and clean energy), 8 (decent work and economic growth), 11 (sustainable cities and communities), 12 (responsible consumption and production), 13 (climate action), and 15 (life on land) and indirectly through implementation approaches to Goals 4 (quality education), 5 (gender equality), 9 (industry, innovation and infrastructure),10 (reduced inequalities), 14 (life below water), 16 (peace, justice and strong institutions) and 17 (partnerships for the goals).[80] If well designed and implemented, agroforestry systems can arguably provide the following: their role in rural development as they can improve food sovereignty and contribute to provision of energy for the smallholders; and their environmental functions: contribution to biodiversity conservation, to increased connectivity of fragmented landscapes, and adaptation and mitigation of climate change.[81]

5. Conclusion

It has been observed that more than 1.6 billion people all over the world depend on forests for food, medicine and livelihoods, with the forests preserving soil and supporting 80% of the world's biodiversity, and they also

[78] Barlagne, C., Bézard, M., Drillet, E., Larade, A., Diman, J.L., Alexandre, G., Vinglassalon, A. and Nijnik, M., 'Stakeholders' Engagement Platform to Identify Sustainable Pathways for the Development of Multi-Functional Agroforestry in Guadeloupe, French West Indies' [2021] Agroforestry Systems.

[79] Ibid

[80] 'What Is Agroforestry?' (*World Agroforestry | Transforming Lives and Landscapes with Trees*) <https://www.worldagroforestry.org/about/agroforestry> accessed 15 September 2021.

[81] Montagnini F, 'Integrating Landscapes: Agroforestry for Biodiversity Conservation and Food Sovereignty' (2017) 12 Advances in agroforestry (ISSN 1875-1199.

produce oxygen and purify the air, making them essential for mitigating climate change as they absorb up to 30% of Green House Gas Emissions.[82]

Thus, forests have increasingly been associated with global sustainability, with them re-taking centre stage in global conversations about sustainability, climate and biodiversity.[83] Arguably, there is a need for countries to adopt approaches in combating deforestation which involve public resources and governance reforms if the hard and soft infrastructure for controlling deforestation and the scale required is to work effectively, and these approaches should include observation, monitoring, definition and enforcement of property rights, legal and administrative reform, among others, at the country level. [84] Indeed, the *COP26 Glasgow Leaders Declaration on Forests and Land Use* acknowledges that there is a need for the empowerment of local communities, including indigenous peoples, which are often negatively affected by the exploitation and degradation of forests.[85]

There is no meaningful progress that can be made in achieving biodiversity conservation through sustainable forests management if communities are not actively and meaningfully involved in such efforts, through Environmental Democracy.

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[82] 'COP26: EU Announces €1 Billion Pledge to Protect Forests' (*European Commission - European Commission*) <https://ec.europa.eu/commission/presscorner/detail/en/IP_21_5678> accessed 12 November 2021.

[83] Oldekop JA and others, 'Forest-Linked Livelihoods in a Globalized World' (2020) 6 Nature Plants 1400; 'World Leaders, Corporations at COP26, Take Major Step to Restore and Protect Forests' (*UN News*, 2 November 2021) <https://news.un.org/en/story/2021/11/1104642> accessed 12 November 2021.

[84] Masundire HM, 'Achieving Sustainable Development and Promoting Development Cooperation–Dialogues at the ECOSOC' (New York: United Nations, 2008),28.

[85] 'World Leaders, Corporations at COP26, Take Major Step to Restore and Protect Forests' (*UN News*, 2 November 2021) <https://news.un.org/en/story/2021/11/1104642> accessed 12 November 2021.

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Health Related -Intellectual Property Rights in Africa in Light of the Covid- 19 Pandemic

By: Leah Aoko[1]

Abstract

This article argues that suspending IP rights considering the current COVID-19 pandemic would not necessarily lead to a win-win situation for African countries and Western Pharmaceuticals.

The first part introduces Intellectual property rights as a legal concept and provides its context considering the current COVID-19 pandemic.

The second part delves into the Regional Framework for intellectual property in Africa.

The third part analyses the current status of medical related intellectual property in Africa.

The fourth part provides the recommendations to enhancing intellectual property rights in Africa despite the current COVID-19 pandemic.

The last part provides the conclusion to the paper. It suggests that ultimately, Africa needs more sustainable solutions to meet emerging health emergencies as has been witnessed in the ongoing COVID-19 pandemic.

Key Words: Intellectual Property, Health Sector, COVID-19, pandemic, medical healthcare, developing countries.

1.1. Introduction

Intellectual property (IP) is a legal concept that involves the protection of legal rights resulting from the creation of the mind; inventions, literary and

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artistic works, symbols, names as well as images and designs used for commercial purposes.[2]

Intellectual property rights have come into sharp focus in the wake of the current Covid-19 pandemic. This has especially been the case in the health sector that has come under pressure to meet the contemporary demands of vaccines, hospital equipment and medicine to bring the pandemic under control. The situation has been more dire in African Countries which have critical need of medicine and health facilities to combat the Covid-19 pandemic.

Before delving into the current situation of Covid-19 in relation to intellectual property, it is important to briefly outline the Intellectual property regime in Africa.

1.2. Regional Regime on Intellectual Property in Africa.

There are two major regional Intellectual Property Organizations in Africa: African Regional Industrial Property Organization (ARIPO) and the African Organization of Intellectual Property (OAPI).[3]

1.2.1. African Regional Intellectual Property Organization (ARIPO)

ARIPO was established in 1976 under the Lusaka Agreement to cater for English speaking countries on industrial property.[4] This was after a regional seminar held in Nairobi in the early 1970s on patent and copyright for African countries which had recommended the establishment of a regional industrial property organization to facilitate the harmonization and co-ordination of industrial property matters.[5]

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[2] Wanjiku Karanja, "The legitimacy of Indigenous Intellectual Property Rights' Claims." Strathmore Law Review, vol. I, no. 1, January 2016, p.165-190.

[3] Dr. Patricia Kameri-Mbote, Intellectual Property Protection in Africa: An Assessment of the Status of Laws, research and Policy Analysis on Intellectual Property Rights in Kenya.

[4] *https://www.aripo.org/about-us/our-history/* accessed 27/12/2021.

[5] Sihanya Ben, Intellectual Property for Innovation and Industrialization in Kenya (2008).

This led to the establishment of the English-Speaking African Regional Industrial Property Organization (ESARIPO) on December 9, 1976 under the Lusaka Agreement. However, in 1982, the name ESARIPO was changed to ARIPO by the Harare protocol on patents and Industrial Designs within the framework of the ARIPO to reflect a new Pan-African outlook.[6]

Thereafter, The Council of Ministers decided to extend the mandate of ARIPO to include Copyright at its 8th session held in Malawi in 2002. A strategic plan by the strategic council changed the 'I' in ARIPO from Industrial to Intellectual.[7]

Objectives of ARIPO

The objectives of ARIPO are outlined in the agreement establishing the organization[8]. They include;

i. To promote the harmonization and development of Industrial Property Laws;
ii. To foster the establishment of close relationships among member states on matters relating to industrial property;
iii. To promote effective and continuous exchange of information and harmonization of co-ordination of their member states' Laws and activities in Industrial property matters; and
iv. To create an African regional industrial property organization for the study and promotion of and co-operation in Industrial property matters.

ARIPO therefore strengthens the intellectual property regime in Africa by providing a framework for the protection and registration of patents.[9]

[6] Ibid
[7] Ibid
[8] Agreement on the creation of ARIPO adopted by the Diplomatic conference for the Adoption of an Agreement on the creation of an Industrial Property Organization for English speaking at Lusaka on December 12, 1986 and November 27, 1996.
[9] Ugwu, Uchenna, African Journal of Intellectual Property (2017) African Journal of Intellectual Property. 1. 116-127.

Another protocol strengthening the ARIPO regime is the Harare Protocol on Patent and Industrial Design. It came into force in December 1982, empowering the ARIPO patent office to receive and process patent and Industrial design applications on behalf of its member states.

Further, the Banjul Protocol on Marks, like the Harare Protocol on Patent and Industrial Design was adopted by the ARIPO members on November, 13, 1993. Its main aim was to provide a centralized trade mark (™) registration system.[10]

ARIPO was put in place as a mechanism by African Countries to protect intellectual property rights and encourage innovation through science and technology. Through the years, innovation requiring intellectual protection has been robust and in depth globally. In Africa, countries such as South Africa is the number one contender in the Patent list under ARIPO and OAPI when it comes to pharmaceutical innovations. Many other countries in the African region have given lee way for compulsory licensing which one may argue does not really provide a fertile ground for innovation which is desperately needed during these unprecedented times. This is a fact that has partially contributed to the crises experienced in the wake of the Covid-19 pandemic.

The Covid-19 crisis exposed heavy reliance on Western pharmaceuticals. This has subsequently led to calls of suspension of Intellectual property rights among countries to help developing countries and Africa to curb the Covid-19 pandemic.

1.2.2. African Organisation of Intellectual Property (OAPI)

OAPI was established to cater for and co-ordinate Intellectual Property activities in Francophone Africa. It was established under the Libreville Agreement of September 13, 1962, which was later revised by the Bangui Accord of 2nd March 1977.[11]

[10] The Madrid Agreement on the International Registration of Marks, 1891.

[11] https://www.wipo.int/export/sites/www/patent_register_portal/en/docs/oapi.pdf accessed 10/2/2022

Unlike ARIPO, OAPI has a uniform system that applies across member states. Patent applications are filed at the patent office based at the Secretariat in Yaoundé, Cameroon.[12]

The objectives of OAPI include: to promote socio economic growth through the protection of intellectual property, to centralize and coordinate information on the protection of intellectual property, to provide intellectual property training and to protect the intellectual property of member states.[13]

The above objectives point to an intent to steer socioeconomic growth by encouraging innovation in science and technology. However, in the wake of the Covid-19 pandemic, and countries calling for compulsory licensing and the suspension of intellectual property rights, it is debatable intellectual protection would achieve positive results for the health sector in Africa.

More relevantly, section 56 of OAPI gives leeway to countries to effect non voluntary licensing regimes in the interest of the economy of the country, general public interest or health matters. This would certainly be relevant during such a period as this.

Nevertheless, the provision is not binding upon any entity to provide licensing of its products in the medical field. This means that the licensing of the same is wholly dependent on political goodwill and a fair amount of lobbying amongst key stakeholders in the health manufacturing industry.

1.3. Current Status of Intellectual Property Rights in Africa in the wake of Covid-19 Pandemic.

When the Covid-19 pandemic struck in Africa in 2020, there was immediate imbalance in the economy as demand surpassed supply in the heath sector.[14] This also corresponded with a global rush to come up with a vaccine to

[12] www.oapi.org/index.php <assessed on 27/12/ 2021 at 15:12>
[13]*https://www.worldtrademarkreview.com/guide-oapi-what-you-need-know* accessed 10/2/2022
[14] Adebisi, Yusuff & Alaran, Aishat & Olaoye, Omotayo, COVID-19 and Access to Medicines in Africa (2020) Online Journal of Health and Allied Sciences.

contain the spread of the ravaging virus.[15] Soon thereafter, there were emerging discussion and calls for the suspension of medical related IP rights in favor of developing countries to help them cope with the effects of the pandemic.[16]

In October 2020, South Africa and India, two powerhouses of generic pharmaceuticals manufacturing in the developing world, made a very broad proposal calling on members of the World Trade Organization, to suspend, for a limited time, intellectual property protection for patents, copyrights, industrial designs, and undisclosed information in relation to "the prevention, containment, or treatment of Covid-19 until widespread vaccination is in place globally, and the majority of the world's population has developed immunity." [17]

The suspension proposal was driven by the fear that developing countries will bear the brunt of the pandemic and will be devastated by it if they do not have rapid access to affordable Covid-19 vaccines, diagnostics, and treatment.[18]

From 2020 to date, one of the ways in which international organizations such as the World Health Organization have sought to curb the pandemic in the long term and short term is to equally suggest a suspension/waiver of Intellectual Property rights to enable faster manufacturing of drugs and vaccines that can stimulate the deteriorating health sector more so in third world countries.[19]

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[15] Ibid
[16] Adebisi YA, Oke GI, Ademola PS, Chinemelum IG, Ogunkola IO, Lucero-Prisno III DE. SARS-CoV-2 diagnostic testing in Africa: Needs and challenges. Pan Afr Med J 2020; 35:4
[17] Ann Danaiya Usher, South Africa and India Push for Covid-19 Patents Ban, World Report, Volume 396, Issue 10265, P1790-1791, December 05, 2020.
[18] Ibid
[19] https://www.who.int/news/item/05-05-2021-who-director-general-commends-united-states-decision-to-support-temporary-waiver-on-intellectual-property-rights-for-covid-19-vaccines accessed 10/2/2022.

This move has since gained popularity and has been supported by superpowers such as the USA. Whereas the thought behind it is commendable and noble to say the very least, it is still questionable whether this is the solution Africa needs to boost its health sector. The Covid-19 pandemic has illuminated the loopholes in our health care management systems and temporary solutions, helpful as they may be, would not necessarily lead to a better health care management system that we envision post the pandemic.[20]

The protection of intellectual property rights has always been essential in encouraging innovation and technological advancements even in the field of healthcare. Suspending such rights has a negative effect on this purpose as it will have an impact on research, innovation and development.

Intellectual property also places the owners of innovation in strong negotiating positions which allows them to profit from their innovation as well as allows for the resolution of conflict as intellectual property conflict is clearly resolved at the initial stages.[21]

However, strong intellectual property protection may hinder the free flow of scientific knowledge making follow-on innovation costly.[22] It also allows large corporations to disproportionately benefit as they are able to use their intellectual property rights to entrench themselves in the market as opposed to small and medium firms that are likely to use their intellectual property rights to establish market reputation and increase their revenues.
Weak patent protection on the other hand leads to suboptimal innovation and increased cost to protect the patents such as increased litigation.[23]

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[20]*https://phmovement.org/the-india-south-africa-waiver-proposal/* accessed 28/12/2021.
[21] Mendonça S, Pereira TS, Godinho MM., '*Trademarks as an indicator of innovation and industrial change.'* Research Policy. 2004 Nov 1;33(9):1385-404.
[22] Gangopadhyay, K. and Mondal, D., '*Does stronger protection of intellectual property stimulate innovation?.*' Economics Letters, 116(1), 2012. pp.80-82.
[23] Anton, James & Greene, Hillary & Yao, Dennis, Policy Implications of Weak Patent Rights. Innovation Policy and the Economy (2006) 6. 10.1086/ipe.6.25056178.

Moreover, most countries are usually keen on protecting their Intellectual property rights to maintain a competitive edge over other renowned pharma countries.

In a separate vein, given the weak food and drug regulatory capacity in most African Countries, such a leeway as suspension of Medical-related Intellectual Property rights has the potential of causing infiltration of counterfeits in the pharmaceutical market, which infiltration is already rampant.

Further, it is not a solution that would directly benefit African countries on any front as it would instead open doors to lesser and lesser innovative endeavors in the midst of the present health care needs. Needless to mention, the big pharma companies in the West are least likely to be favorable to the suspension push as it could make their cutting-edge technological advancements open to their competitors.

International organizations such as the World Health Organization have sought to curb the pandemic in the long term and short term is to equally suggest a suspension/ waiver of Intellectual Property rights to enable faster manufacturing of drugs and vaccines.

1.4. Recommendations on Intellectual Property rights in the wake of Covid-19 Pandemic in Africa.

A more viable approach perhaps would be to create an exchange forum where the West and the developing countries in Africa can exchange ideas and innovation techniques that would result into long-term expertise, capability and competence in the medical field. Africa already has an IP regime to protect its innovations. What it needs is to be equipped to come up with innovations that can meet health related emergencies as has been witnessed during the Covid-19 pandemic.

This could be augmented by offering scholarships and sponsorships to professionals for training and capacity building in technologically advanced countries which would in turn benefit the health sector in their mother

countries. The aim would be to ensure that Africa carves out lasting solutions and is better prepared for future health emergencies.

Voluntary pledges to make intellectual property broadly available to address urgent public health crises can overcome administrative and legal hurdles faced by more elaborate legal arrangements such as patent pools and thus achieve greater acceptance than governmental compulsory licensing.[24]

Equipping experts in the developing countries and adequate funding of the health sector along the lines of technological innovation would go a long way in ensuring that the health care management systems improve. It would also rid Africa of the incessant dependence on medicine and vaccine from the West while we are awash with experts in the field who could benefit from further training and targeted information exchange that enables them to be more useful and innovative to meet our health emergencies.

1.5. Conclusion.

In conclusion, suspending IP rights must be viewed as a stop-gap measure in the fight against the pandemic but there is a dire need for long term sustainable solutions that address the peculiar needs of Africa and other developing countries.

[24] Contreras, Jorge & Eisen, Michael & Ganz, Ariel & Lemley, Mark & Molloy, Jenny & Peters, Diane & Tietze, Frank, Pledging intellectual property for COVID-19 (2020). Nature Biotechnology. 38. 1146-1149. 10.1038/s41587-020-0682-1.

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Defining Democracy: A Review of Sen, Amartya Kumar (1999) *Democracy As A Universal Value.* Journal of Democracy, (3), 3-17. Article Review

By: ***Henry Kinyanjui****

Summary of Article

The main argument in the article is that the rise of democracy is the most important thing that occurred in the 20th Century (Page 1). This goes beyond the fall of fascism and Nazism, radical transformation of China and shift from economic dominance of the West. The article traces the concept of democracy from Greece to the several revolutions in Northern America and Europe. The author insists that it was wrong for 19th century theorist to argue whether one country was "fit for democracy" or not. Instead, he insists as the central thesis that democracy is a universal value (page 2).

The article uses several lenses to underscore the point that democracy is a universal value. Firstly, the Indian experience brings to the fore why no one questions the role of democracy in United States or Britain but is eager to do the same for third world countries or poor economies. Here the author argues that condemnation of sectarian violence in third world countries is a form of democracy. Secondly, the author locates the 'Lee hypotheses' from the experience in Singapore. The argument made here is that disciplinarian states have had faster economic growth. He questions the methodologies of those who seem to suggest the converse. He places premium on the need to consider the origin of policies in those Countries by comparing responses to famine.

Thirdly, the article posits that democracy function as universal value since it concerns itself with the political freedom as part of natural freedom. Also, democracy gives people right to express themselves during political

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contestations. People are able to participate in sharing their diversity of needs with one another. This means they learn from one another and inform universality of values. The fourth idea that flows from the universality of values is the constructive role of democracy to the formation of values. Here the author contends with objections to the universality of culture. The argument here is that universality implies the consent of everyone.

Fifthly, the author argues that difference in culture or class does not mean that democracy is not a universal value. Instead, the role of democracy is protective of the poor. That there is very little evidence that poor people would not choose democracy. The article takes the debate further by suggesting that different cultures have similar expression of democracy. Here he locates the Lee Kwan Yew hypothesis as originating from Singapore and is similar to the Confucius ideology that rejects blind allegiance to the State. Instead, loyalty to values is a pillar for any culture.

Last but not least, the author situates the debate to three aspects. First, the value of democracy is found in its intrinsic importance in human life. Secondly it plays a critical role in generating political incentives such as participation. Thirdly, it has a function in constructive formation of values. The author admits that there are challenges in arguing the democracy is a universal value but insists that a choice has to be made on where democracy belongs. This is more so since the contemporary world depends on the functioning of democracy. He concludes by arguing that the force of the claim the democracy is a universal value depends on the strength of this claim.

Critical Appraisal

This is a very interesting read on democracy as a concept that has worldwide worth. The author does a good job of attempting to refute some of the claims that contend against the idea of generality of democracy. The article seems to suggest that democracy as a value has risen to a place of what in international law is referred to as a dogmatic standard (*Jus cogens)*. The article raises a quintessential issue of why scholars place layers on different

States based on either their history or economic position. The response suggested in my view is critical. He suggests that it is important to deconstruct the claim dictatorial regimes are more developed by considering the methodology used.

One of the ontological perspectives used in the article is that culture is constructed, and it should be considered beyond idealist lenses. Under ontological materialism, culture operates broadly beyond what is observable. The author displays ontological idealism as superior to materialism since he argues that democracy is what controls the environment under which people in poor States react to democracy. This is a utopian approach that when placed under the prism of the Maslow's pecking order of human needs. Human needs drive the view of concepts such as democracy. In my view the author's paradigm is greatly influenced by the growth of India as a democracy. He may be criticized as being an apologist for the west.

Democracy as a universal value is waiting to be discovered irrespective of the context of culture in the 20th Century. The epistemology behind this thinking is that democracy exist irrespective of the cultural, economic, or political dynamics. The article suggests that a quantitative approach to democracy may not yield accurate results. However, asking the right question in a quantitative study, regardless the context, is likely to yield a response that supports one of the three functions of democracy. The author's axiology is influenced by the view of India as being democratic. His argument is utilitarian in approaching democracy from his values. For instance, when he argues that democracy is not an amenity that should pause waiting for the arrival of prosperity.

One of the things that is clear is that universality is very controversial. Sidney Verba in political culture demonstrate the approaches that can be used to understand how people relate to the governments including parochial, subject, and responsive attitude that informs behavior of citizens[1]. It would

[1]Verba, Almond G and Sidney. 1963. *The Civic Culture: Political Attitudes and Democracy in Five Nations.* New Jersey: Princeton University Press .

appear that the article projects a westernized as opposed to a universal view of democracy without considering the attitudes and context of each individual. The idea of constructing a universal value for democracy will always be problematic. If democracy is to be defined merely on the progressive policies formulated as suggested by the author, there must be a deeper understanding of creating of policy including context and culture before arriving at a universality. Adopting what Dahl Roberts argues on who governs, epistemic communities are a key player in determining the values way beyond their universality[2].

The author discerns that simply taking a quantitative approach to the study of democracy may not be effective in producing reliable data. More particularly, quantitative research may not correctly respond to several variables that might be anticipated within different cultures. Also, as a value system and culture specific matter, democracy cannot be fully understood only by qualitative methodology. The qualitative methods also have some weakness since there are several values that are attached to different cultures and induction would not produce appropriate knowledge for democracy. As radically suggested by the intellectual troublemaker Paul Feyerabend in 'Against Methods', there are many routes for attaining knowledge including but not limited to quantitative and qualitative methods[3].

Conclusion

Since there are many important things that have happened in the 20th Century, it is important to therefore applaud the author for attempting to show that democracy is the most important thing that happened. The claim that democracy is a universal value is equally bold as well as thought provoking and as such it should be applauded. The challenges that would be encountered in supporting the claim for democracy as a universal value are

[2] Dahl, Robert A. 1964. *Who Governs? Democracy and Power in an American City.* New Haven: Yale University Press.

[3]Feyerabend, Paul. 1993. *Against Method ; Outline of an Anarchistic Theory of Knowledge.* Minneapolis. University of Minnesota Press.

acknowledged in the article. The article is a good read which introduces good information for debate on the reality of democracy. The ontological paradigm of the article is that democracy is an imperative for both progressive and developed countries. The author's epistemology is that values are universal. Though they change in different context they remain deeply similar in posture and tenor. Participation is one of the foundational aspects of democracy which is shared as a universal value.

An Examination of the Legal and Policy Framework on Child Refugee Education in Kenya

By: **Leah Aoko**[1]

Abstract

This paper examines the various laws and instruments that support the right to quality education in Kenya, how they relate to child refugees and point out gaps in the legal framework that fail to enhance the right of child refugees to access education. It argues that this crucial omission has contributed to the dismal efforts by the government in enhancing child refugee education.

The first part contains the introduction and gives contex to child refugee education in Kenya.

The second part discusses the various domestic legal framework on child rights as pertains to access to quality education and further highlights the omission of the child refugee education from the various pieces of legislation.

The third part concludes the argument to the paper by pointing out that tis omission could possibly be a hindrance to promoting child refugee education in Kenya despite its international obligations to enhance the best interests of the child.

Key Words: Child refugee education, comprehensive legal framework, refugees, Kenya, access to education

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1.1. Introduction

Although, there are several child friendly statutes in Kenya, child refugees still face unique challenges in accessing the quality education. This is because in Kenya, there is inadequate legal policy framework specifically for education for child refugees given their unique plight and them being a vulnerable and marginalized group.[2] Another reason for this could be the target beneficiaries of this right as has been provided for under several domestic laws. It is possible that child refugees were not necessarily part of the intended target group to access education as enunciated under the Constitution of Kenya 2010.

Many of the child refugees are often in limbo concerning their future. The fact that they are least likely to access quality education makes their circumstances even worse and pitiable. They are also prone to all manner of psychological, emotional and sexual abuse[3]

With no avenue to be healed from their trauma and no hope for the future, most of these children are likely to fall into depression. [4] These circumstances coupled with the absence of a deliberate domestic legal framework to enable them access quality education leaves them at risk of becoming dissidents and societal outcasts.

1.2. Legal framework on Child refugee education in Kenya

There are several statutes in Kenya that touch on child rights and access to quality education in Kenya. These fundamental Laws are discussed below

[2] Comprehensive Refugee Response Framework Global Digital Portal (n.d. a). Kenya 2018. Available at: *http://www.globalcrrf.org/crrf_country/kenya-2/)*

[3] Education Cannot Wait, Action for Refugee Education Commitment. Framework for Commitments. Outcome from High-Level Meeting on Action for Refugee Education,(2018) *https://static1.squarespace.com/static/5b5b0e973917ee4023caf5f4/t/5baa6a2908522977c18490ff/1537894955358/Education+Cannot+Wait+ECW+Commitments+on+Action+for+Refugee+Education.pdf*

[4] UNESCO, Education in Situations of Emergency, Crisis and Reconstruction (2003a).

1.2.1. The Constitution 2010.

The Constitution of Kenya was promulgated in 2010 with a progressive bill of rights that was and still is highly acclaimed.[5] Impressively, the bill of rights under the Constitution caters for marginalized groups such as children and women.

Foremost, articles 2(5) and 2(6) of the Constitution provide that principles of international law are also incorporated into the laws of Kenya.

This in effect means that the general principles of law and treaties ratified by Kenya pertaining to child refugee education is binding upon the country. Such laws include the Convention of the rights of a Child[6] and the 1951 Convention relating to the Status of Refugees [7]in which states are obligated to take progressive steps towards the education for children within its borders including child refugees. This out rightly puts Kenya under the obligation of enhancing education for children including child refugees within its borders. Under article 21, the state is required to respect, promote and fulfil the rights under the bill of rights. This entails addressing the needs of vulnerable groups such as women, children, persons with disabilities, the elderly and the youth. Child refugees would fall under vulnerable groups under the Constitution, whose rights also need to be respected although they have not been expressly provided for.

Article 43 entitles everyone to socioeconomic rights such as: the highest attainable standard of health, adequate housing, freedom from hunger, clean safe water, social security and education. This means that child refugees

[5] *https://www.klrc.go.ke/index.php/constitution-of-kenya/110-chapter-four-the-bill-of-rights* accessed 25/8/2020.

[6] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: *https://www.refworld.org/docid/3ae6b38f0.html* [accessed 10 February 2022]

[7] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: *https://www.refworld.org/docid/3be01b964.html* [accessed 10 February 2022]

would also have the right to access education, as a socioeconomic right among the rights that have already been listed.[8]

Article 53 further provides that every child has the right to free and compulsory basic education, food, healthcare, protection from any form of abuse and parental care.[9] With regard to this, the child's best interests are to be taken into consideration in all decisions being made that will affect their wellbeing. In the case of the best interests of the child refugee, they need to access education as a tool that will lead to their socio-economic development. It ensures that they become useful individuals in society with values that enable them to live peaceably and meaningfully with others.

Effectively, these constitutional provisions indicate that the government is obligated under the Constitution to provide child refugees with access to education to equip them for a better future.[10]

Again, it is arguable whether the makers of the constitution had the child refugee in mind when putting in place the provisions on the right to education and other socioeconomic rights. They could as well have had in mind the child "citizens". By implication, this means that these are rights that are meant to be enjoyed by the citizens of a country and not necessarily refugees in this context.[11] The definition of a child in the minds of the constitution maker is most probably a Kenyan citizen who is thus entitled to education and other socio-economic rights. This could then explain the absence of a deliberate framework touching on access to education for child refugees despite a constitutional provision on the right to education.

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[8] Ibid

[9] Ibid

[10] Emmert, Simone, Education in Terms of Human Rights. Procedia - Social and Behavioral Sciences (2011) 12. 346-361. 10.1016/j.sbspro.2011.02.044.

[11] Heckmann, Education and Migration strategies for integrating migrant children in european schools and societies, http://www.interculturaldialogue2008.eu/ fileadmin/downloads/resources/education-and migration_bamberg.pdf (2008) (08.08.2009).

1.2.2. Basic Education Act 2013

The Basic Education Act was enacted in 2013 to give effect to the provisions of article 53 of the Constitution.[12] Its aim is to promote and regulate the provision of free compulsory basic education as envisioned under the Constitution.[13]The definition of a child under the statute is any person below the age of 18. The whole statutory text makes no direct reference to child refugees.

Section 4 emphasizes the right of every child to free and compulsory basic education. It provides that education should be given with regard to the marginalized and persons with special needs. Section 34 provides that no child shall be denied admission into a public school in Kenya. If this provision is contravened, then the parent or guardian of the child is supposed to report the same to the County Education Board. This provision points to the glaring fact that the child who is probably contemplated under it is the "child citizen." This is because some of the requirements of entering school pertain to a child's national identification documents which most child refugees do not have.

Section 39 states that it is the responsibility of the government through the cabinet secretary to ensure that children of school going age have access to education including those from marginalized, vulnerable, or disadvantaged groups.[14]

[12] Right to Education Project – Right to Education Country Factsheet Kenya, March 2014

[13] Boisvert, Kayla, "Case Study Report: RET International Kenya" (2017). Education in Crisis and Conflict Network. 2. Retrieved from https://scholarworks.umass.edu/cie_eccn/2

[14] General Comment ICESCR, Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 13, The right to education (Art.13) : 08/12/99. E/C.12/1999/10. (General Comments), http://www.unhchr.ch/ tbs/doc.nsf/(Symbol)/ae1a0b126d068e868025683c003c8b3b?Opendocument

The Basic Education act does not expressly incorporate child refugees into its provisions and the mechanisms or modalities of enabling them to access education in Kenya. It is due to such inadequacies that child refugee education remains unstructured and not fully incorporated into the national education curriculum or plan.

This is further made evident by the policies that have been put in place by the Ministry of Education under the Basic Education Act 2013 with regard to education. These policies are:

1.2.2.1. A Policy Framework for Reforming and Education Training for Sustainable Development in Kenya, Ministry of Education Sessional Paper No. 1 of 2019

The above policy framework entails the government's commitment to integrating education, training, and research in all sectors of development as a key pillar of socio-economic growth.[15] The government recognizes education as a basic human right which is critical for human resource and national development. The focus is thus on increasing the infrastructure to enhance educational initiatives. This includes building more learning facilities and increasing the capacity of the human resource involved in the training and research sector.

The policy also indicates the government's commitment to increasing education financing.[16] The objectives of the policy are to: foster national unity, encourage inclusivity and equality in education, enhance respect for diverse cultures, promote religious values and promote awareness on environmental protection. In terms of training and research the policy aims at improving data management systems to support evidence based learning and decision making in education.

[15] Sessional Paper No.1 of 2019 on Policy Framework for the Reforming Education and Training for Sustainable Development of Education.

[16] Valerie Karigitho, Realizing Quality and Inclusive Education in Kenya Through Financing, East African Centre for Human Rights, May 10th, 2021.

From the foregoing, the policy, though geared towards improving access to education and the quality of learning in the institutions, is definitely not tailor made to meet the needs of child refugees more so enabling them to access quality education. This is indicative of the existing structural gap in promoting access to education for child refugees.

1.2.2.2. Education Sector Disaster Management Policy 2018

This policy was put in place in 2018 to guide the Country's response to disaster that occur and affect education.

This policy was enacted according to the Sendai Framework for Disaster Risk Reduction 2015-2030. [17] The Education Sector Management policy is aimed at returning the victims of such disasters to a state of normalcy and to ensure that they are still able to access quality education. The disasters that are contemplated in the provisions of the policy are: natural, manmade and complex disasters that affect approximately 4million boys and girls every year. This denies them their constitutional right to education. It also incorporates peace education and standards on health and hygiene for learners.

It is aimed at furthering Vision 2030 that seeks to build up human social capital in a safe and sustainable environment. It seeks to do this by: raising awareness on disaster preparation in educational institutions, creating a pool of experts who are able to give sustainable insight on disaster preparedness and awareness in the Education sector, embracing the build back better theme in areas where disasters have disrupted education and normal human life and increasing funding for the disaster preparedness departments in the education sector. [18] Among the potential victims of disasters, the policy makes no reference or mention of child refugees who may suffer double jeopardy when they face calamities and health emergencies (take the

[17] The Framework was adopted at the Third UN World Conference on Disaster Risk Reduction in Sendai, Japan, on March 18, 2015.

[18] *http://www.iiep.unesco.org/en/iiep-supports-dissemination-kenyas-education-sector-disaster-management-policy-5034* accessed 10/2/2022.

example of the current health emergency caused by the Covid 19 virus that disrupted education in several institutions) in a foreign country.

1.2.2.3. Mentorship Policy for Early Learning and Basic Education Ministry of Education 2019

The Mentorship Policy for Early learning and Basic Education 2019 is aimed at providing avenues for learners to express themselves, share the challenges they may be facing and develop lifelong skills.[19] It addresses the difficulties learners may face in the course of their educational journey such as: exposure to violence, terrorism and violent extremism, neglect and abuse at home, death of their parents or guardians, bullying, disease, sexual abuse, psychological torture and mental health challenges.[20]

The policy aims at addressing the above issues by creating a network of peer educators and counsellors in educational facilities who may be at hand to assist the learners cope through the various challenges that they face in life. It also helps them avoid destructive thought processes that may lead them to self-harm and suicidal behaviors.[21]

The policy is also meant to encourage peaceful coexistence in line with the national values of peace love and unity among the learners so that they may grow to become responsible citizens capable of driving the sustainable development agenda.

The policy does not however address the unique psychological challenges that could be faced by child refugees in accessing quality education seeing that theirs is a difficult journey having gone thorough traumatic life changing events.

[19] Mentorship Policy for Early Learning and Basic Education Ministry of Education 2019.
[20] Ibid
[21] Ibid

1.2.2.4. National Pre-primary Education Policy Standard Guidelines, Ministry of Education, 2018

This policy was put in place in 2018 in line with the government's commitments to ensuring education for all children at the preprimary level and the sustainable development goal no. 4 that champions for inclusive and equal educational opportunities.[22] The policy places action points in the County governments and relevant stakeholders in the education sector to promote education among preprimary learners and enable them to have excellent cognitive functions and abilities as they transition into primary education. It focuses on childcare, nutrition, provision of care, early learning, early stimulation services in childcare facilities and adequate child protection as means of ensuring that young learners develop a solid foundation on which they can have a rich educational experience.[23]

The policy, however, does not make reference to the challenges that may be faced by young child refugees in their quest for quality education.

1.2.2.5. The National Policy Framework for Nomadic Education (2015)

This policy is quite progressive as it addresses the unique challenges learners face in nomadic areas in Kenya. It also addresses challenges faced in the informal set ups. The aim of the policy is to ensure that learners in these unique environments access quality education.[24] The policy recognizes that these are areas commonly characterized by: aridity, insecurity, high levels of poverty, lack of proper nutrition, lack of a permanent shelter for families and communities, poor social amenities such as schools, hospitals, electricity, and lack of water.[25]

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[22] Khataybeh, Abdalla & Subbarini, Mohammed & Shurman, Sameera, Education for sustainable development, an international perspective (2010) Procedia - Social and Behavioral Sciences. 5. 10.1016/j.sbspro.2010.07.149.

[23] Dinga, J.N. Cognitive strategy use for explicit and implicit text meaning by urban, peri- urban and rural primary school pupils in Kisumu Municipality (2011) Unpublished PhD thesis, Kenyatta University.

[24] The National Policy Framework for Nomadic Education (2015).

[25] Koissaba, Ben & Ole, & Cdpm. Education For All: Prospects and Challenges of Mobile Schools, (2017) Mobile Education, and E-Learning for The Nomadic Pastoralists In Kenya (2 nd Ed.).

It seeks to mitigate the above difficult circumstances by: increasing funding to support communities in such areas, being deliberate on the improvement of infrastructure and social amenities in such areas such as health and educational facilities.[26] The policy recognizes that it is through quality education that such communities that are considered to be remote and marginalized may be empowered. Education could also lead to the eradication of primitive child abuse practices such the infamous Female Genital Mutilation.

Despite the above impressive policy framework for learners in nomadic and marginalized communities, the plight of child refugees seems to be conspicuously missing. This omission even complicates their already feeble efforts at accessing quality education.

1.2.2.6. The National Plan of Action for Children 2015-2022

The National Plan of Action for Children was put in place to measure Kenya's efforts in child rights protection and point out significant areas of improvement regarding the implementation of the rights of a child[27]. It recognizes Kenya's international and regional commitment to promoting the rights of children within its territory.[28] It addresses challenges faced in child protection such as: child neglect, wars and disasters, child labour, drug abuse, sexual violence, retrogressive cultural practices, lack of identity and HIV/AIDS stigma.[29]

The Plan also provides a situational analysis of the steps Kenya has taken to enhance child protection despite the challenges mentioned above.[30]

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[26] Government of Kenya, Getting the Hardest to Reach. A Strategy to provide education to Nomadic Communities in Kenya through Distance Learning (2010a) Government Printer. Nairobi.

[27] The National Plan of Action for Children 2015-2022.

[28] Kithome, Titus & Syanyisa, W & Asatsa, S. The role of community-based informal approaches in child protection in Mwingi Central Sub-county, Kitui County (2021) 104-115.

[29] Ibid n 22.

[30] Ibid

It recognizes that Kenya has had an influx of refugees over the past year and that this marginalized groups faced unique socio-economic challenges. More specifically it appreciates that child refugees have a difficulty in accessing quality education to the country's strained resources in catering for refugees and ensuring that they have adequate amenities such as hospitals, nutrition, schools, and adequate shelter. It states that the flow of refugees has placed significant pressure on the education system that making universal education a distant reality.

In as much as the policy correctly identifies the challenges faced by refugees in accessing education, it is still insufficient as an actionable framework in ensuring that such children access quality education.

None of the above policies put in place thus far, critically explores access to education for child refugees. It is probable that the child envisioned as being a beneficiary of the above policies is not the child refugee but the children belonging to Kenyan citizens. Education is thus considered to be right of the citizenry and not necessarily an "outsider right".

Consequently, there are no clear legal guidelines as to how refugee education is to be conducted. This is not to mean that the government does not have the goodwill to promote refugee education but it just points out to the fact that these is a gap in the legal and policy framework with regard to refugee education.

This inadequacy needs to be remedied if child refugees are to have a structured education system in line with the national plans and monitoring mechanisms on the Education sector and Vision 2030. More critically, this gap leaves refugee education to be conducted on an ad hoc basis by international organizations and non-governmental organizations without being fully incorporated into the national education system. It leads to a huge number of child refugees not being able to access education with some dropping out along the system.

1.2.3. Children Act 2001

The Children Act was enacted in 2001 in order to out into effect the provisions of the Convention on the Rights of a Child that has been ratified by Kenya. [31] The Act is aimed at promoting the best interests of a childbearing in mind the welfare of all children and the need to ensure child participation in matters affecting them.[32] It provides that no child in Kenya should be discriminated upon. [33]

Further, under the act, the government is obligated to put in place mechanisms to ensure that all children have access to quality education. This is to be done in line with the best interests of a child which is a constitutional requirement.[34]

Although this is a very progressive piece of legislation with regard to the welfare of a child, it does not provide for the unique circumstances facing child refugees and their access to education. It focuses more of the general wellbeing of a child, leaving a gap in the framework for child refugee education.

1.2.4. Refugee Act 2006

The Refugee Act 2006 was enacted to cater for the management and welfare of refugees in Kenya. The act is centered on the reception, registration, stay and expulsion of refugees in Kenya. It establishes the Commissioner for Refugee affairs in Kenya.[35] The Act provides that[36] he/she should ensure that the welfare of child refugees whether they are accompanied or not is taken

[31] Ponge, Awuor 'The Dynamics of Implementing the Participation of Children with regard to Rights to Education in Kenya.' (2016) International Journal of Humanities and Social Studies (IJHSS). 4(6):178 – 186 International Journal of Humanities and Social Science. 4. 178-186.
[32] Children Act 2001, s4.
[33] Ibid, s5.
[34] Geoffrey Wango, Kenya New Constitution and Education: Education in Kenya Under the New Constitution, 2011:
https://profiles.uonbi.ac.ke/gwango/publications/kenya-new-constitution-andeducation-education-kenya-under-new-constitution
[35] *Refugee Act 2006, s7.*
[36] Ibid

care of. The Commissioner also ensure that he refugees have been correctly and legally processed to access the country.

The Commission of Refugees also initiates and implements policy concerning refugees in Kenya. He/she is also in-charge of advising the Minister on all matters concerning refugees including their registration, reception, identification of refugees, sourcing for refugee funds and management of refugee camps.

There has been an improvement in efforts to recognise the rights of child refugees in the Refugee Act 2006. It provides that every refugee in Kenya will be entitled to the rights that are accorded they under the various treaties and conventions to which Kenya is a party to under international Law.[37] However, key to note is whether these efforts are replicated in implementation of these rights in order to protect child refugees.

More importantly, this still points out to the fact that the act has made no express provision to the unique circumstances facing child refugee education in Kenya. This is despite it being a Refugee act.[38] This is because it was enacted mainly for the management of refugees within the country.

1.3. Conclusion

The Legal Framework including policy implementation in Kenya on child refugee education is heavily wanting despite Kenya international obligations towards them. These obligations include the right to access education which remains to be a challenge for child refugees in Kenya. This further compounded by the fact that there is no legislation or adequate policy framework to cater for their right to access education. It is the government's responsibility as per under the Constitution to ensure that child refugees access quality education at the same level and standard as other children and in line with its international obligations.

[37] Kariuki Muigua, Protecting Refugees Rights in Kenya: Utilizing International Refugee Instruments, The Refugee Act 2006 and the Constitution of Kenya 2010.
[38] *https://www.rckkenya.org/development-of-refugee-law-in-kenya/* accessed 26/12/2021.

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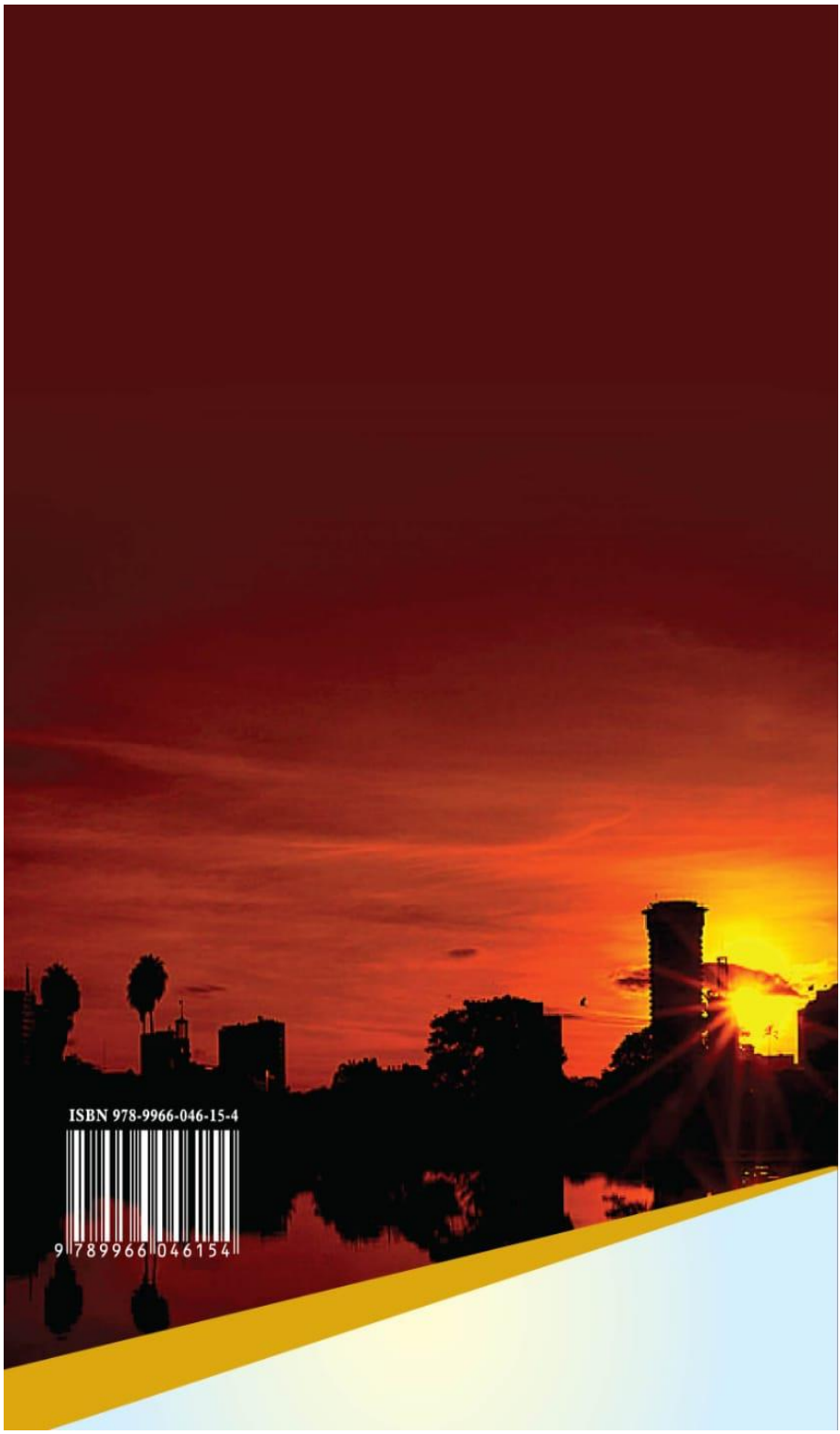
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