

Journal of Conflict Management & Sustainable Development



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Resources Management for Biodiversity Conservation

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Journal of Conflict Management and Sustainable Development

Editor's Note, Volume 8, No. 5

Welcome to Volume 8 issue 5 of the Journal of Conflict Management and Sustainable Development.

The Journal is an interdisciplinary publication that focuses on key and emerging themes in Conflict Management, Sustainable Development and other related fields of knowledge.

Sustainable Development has been embraced at both the global and national level as the blue print for socio-economic development and governance. The Journal interrogates and offers solutions to some of the current concerns in the sustainable development agenda. It also explores the role of Conflict Management in the attainment of Sustainable Development.

The Journal is peer reviewed and refereed so as to ensure credibility of information and validity of data.

This volume contains papers on various themes including: *Promoting Sustainable Land Use Practices and Agricultural Resources Management for Biodiversity Conservation Proposed; Theorizing Children's Right of Access to Basic Education in Conflict Situations in Kenya; A Review of Dispute Resolution Mechanisms for Communities in the Mining Sector in Kenya; Addressing the Contemporary Issues in Biodiversity Conservation; The Test and Place of Public Participation in Kenya's Governance;* It also contains a book review on Stephen David Krasner's book titled '*Sovereignty: Organized Hypocrisy.*'

We welcome feedback, comments and critique from our readers to enable us continue improving the Journal.

I wish to thank all those who have made this publication possible including reviewers, editors and contributors.

The Editorial Team also welcomes submission of articles to be considered for publication in subsequent issues of the Journal. Submissions can be channeled to editor@journalofcmsd.net and copied to admin@kmco.co.ke.

Our readers can access the Journal online at <https://journalofcmsd.net>.

**Dr. Kariuki Muigua, Ph.D., FCI Arb, (Ch. Arb), Accredited Mediator.
Editor, Nairobi,
July, 2022.**

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Promoting Sustainable Land Use Practices and Agricultural Resources Management for Biodiversity Conservation

*By: Kariuki Muigua**

Abstract

Sustainable Land use practices as well as sustainable agriculture can arguably go a long way in promoting biodiversity conservation. However, a number of factors which include unsustainable agricultural practices and poor approaches to land use, among other social factors such as poverty and growing population pose a threat to not only biodiversity conservation but also guaranteeing human wellbeing for the sake of achieving sustainable development. This paper highlights the existing challenges in this area especially in the context of Kenya, and offers some recommendations on the way forward.

1. Introduction

While the threats to biodiversity conservation in Kenya are varied and acute, human population growth and the pressure on land and renewable natural resources have been identified as are the biggest threats.¹ Arguably, current land use practices reflect the economic priorities of powerful interested parties, including governments, development banks and companies, private land holders, farmers and others.² A combination of anthropogenic land-use practices and climate change have been attributed to massive biodiversity

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¹ Wakhungu, J.W., Waruingi, L., Agwanda, B., Awori, P., Isiche, J., Itela, S. and Njumbi, S., 'Towards a National Biodiversity Conservation Framework: Policy Implications of Proceedings of the International Conference on Biodiversity, Land-Use and Climate Change', 5.

² Murray MG and Williamson D, 'Current Issues in Biodiversity Conservation' [2002] Wildlife Management Working Paper (FAO), 8.

loss globally.³ Most commentators have identified the major direct causes of human-induced biodiversity loss as the fragmentation, degradation or loss of habitats (land-use change); the over-exploitation of natural resources; pollution of air and water (by several activities such as agriculture); the introduction of non-native (alien, or exotic) species and climate change-induced biodiversity loss - these factors being inextricably linked with some or all of the other direct causes and in turn are driven by underlying causes.⁴ In addition, studies have concluded that one major cause of future species loss will be land use change from agriculture. Further, infrastructure development and settlement expansion as well as the consequences of climate change will be significant contributors to future biodiversity loss if no new policy measures are being implemented.⁵

This paper critically discusses the biodiversity conservation issues that arise from land use and agricultural activities and makes some recommendations on how to promote sustainable land use practices as well as promoting sustainable agricultural practices to promote and protect biodiversity conservation.

2. Relationship between Agriculture and Biodiversity

It is generally agreed that the services provided by biodiversity cover a large spectrum of factors contributing to the generation of agricultural income: crop yield and quality, soil fertility, pest control and pollination. Other services, such as contributions to landscape quality are not directly beneficial to the farmer, but are beneficial to the community as a whole.⁶ Agricultural environments and landscapes constitute a reservoir of diversity in terms of

³ Smith, M.M., Gilbert, J.H., Olson, E.R., Scribner, K.T., Van Deelen, T.R., Van Stappen, J.F., Williams, B.W., Woodford, J.E. and Pauli, J.N., 'A Recovery Network Leads to the Natural Recolonization of an Archipelago and a Potential Trailing Edge Refuge' n/a Ecological Applications e02416.

⁴ Slingenberg, A., Braat, L., van der Windt, H., Rademaekers, K., Eichler, L. and Turner, K., "Study on understanding the causes of biodiversity loss and the policy assessment framework." (2009).

⁵ *Ibid.*

⁶ Le Roux, X., R. Barbault, J. Baudry, F. Burel, I. Doussan, E. Garnier, F. Herzog et al. "Agriculture and biodiversity: benefiting from synergies. Multidisciplinary Scientific Assessment." *Synthesis Report, INRA (France)* (2008), p.3.

the number of species and the number of functions useful for agriculture (pollination, recycling of organic matter, amongst others). However, intensification of agricultural practices threatens this diversity.⁷

Intensification of agricultural production is believed to have led to an increase in the productivity of cultivated areas, associated with the use of mineral fertilisers and synthetic pesticides and with the "simplification" of agricultural landscapes resulting from a reduction in the diversity of production systems.⁸ Thus, while agricultural intensification has allowed mankind to feed the growing world population it has been cited as one of the main drivers of worldwide biodiversity decline.⁹ The effect of biodiversity decline has been felt on broad ecosystems and environmental aspects. For instance, freshwater ecosystems have suffered as excess nutrients from agricultural practices enter surface and ground waters and inefficient irrigation systems deplete water sources.¹⁰ Furthermore, biological control of pests in arable fields is an important ecosystem service provided by high-diversity landscapes and species-rich enemy communities, but it can be affected by the intensification of agriculture.¹¹

Inputs of mineral fertilizers and pesticides can lead to degradation of habitat quality at local-field scales, while transformation of perennial habitats (grassland) to arable fields and destructions of field boundaries and hedges

⁷ Ibid, p.1.

⁸ Ibid, p.2.

⁹ Kleijn, D., F. Kohler, A. Báldi, P. Batáry, E. D. Concepción, Y. Clough, M. Díaz et al. "On the relationship between farmland biodiversity and land-use intensity in Europe." *Proceedings of the Royal Society of London B: Biological Sciences* 276, no. 1658 (2009): 903-909, p.903.

¹⁰ Geier, Bernward, Jeffrey A. McNeely, and Sue Stolton. "The relationship between nature conservation, biodiversity and organic agriculture." *Stimulating positive linkages between agriculture and biodiversity. Recommendations for building blocks for the EC-Agricultural Action Plan on Biodiversity. European Centre for Nature Conservation, ECNC Technical report series, Tilburg, The Netherlands* (2000): 101-105 at p. 102.

¹¹ Thies, Carsten, Sebastian Haenke, Christoph Scherber, Janne Bengtsson, Riccardo Bommarco, Lars W. Clement, Piotr Ceryngier et al., "The relationship between agricultural intensification and biological control: experimental tests across Europe." *Ecological Applications* 21, no. 6 (2011): 2187-2196, p. 2187.

leads to a loss of semi-natural habitats and simplification at landscape scales, including changes in the distribution and supply of resource for many species and the food webs building on them.¹²

It has been observed that since the world cannot stop producing food and, arguably, the world can little afford to lose more of its biological diversity, the challenge, therefore, is to find a system of agriculture that will produce food in a sustainable manner that enhances biodiversity rather than depleting it.¹³

Biodiversity is, therefore, considered important at all scales of the agricultural landscape, from the different soil microbes that help cycle nutrients and decompose organic matter, to wasps and bats that help reduce crop pests, and to birds and insects that pollinate high value crops, biodiversity helps farmers successfully grow food and maintain sustainable farm landscapes.¹⁴ Thus, not only does the maintenance of biodiversity help ensure viable crop production, but many organisms and species have come to rely on particular agricultural landscapes for their very survival. That is, agriculture both supports, and is supported by, the maintenance of biodiversity.¹⁵

It is on this basis that this chapter discusses some viable options that can be useful in Kenya's efforts towards enhancing agricultural production through biodiversity conservation while eliminating the adverse agricultural practices and land use.

¹² Ibid, p. 2187.

¹³ Geier, Bernward, Jeffrey A. McNeely, and Sue Stolton. "The relationship between nature conservation, biodiversity and organic agriculture." *Stimulating positive linkages between agriculture and biodiversity. Recommendations for building blocks for the EC-Agricultural Action Plan on Biodiversity. European Centre for Nature Conservation, ECNC Technical report series, Tilburg, The Netherlands* (2000): 101-105 at p. 102.

¹⁴ GRACE Communications Foundation, Biodiversity, available at <http://www.sustainabletable.org/268/biodiversity>.

¹⁵ Ibid.

3. Sustainable Land Use and Agricultural Practices and Biodiversity Resources in Kenya: The Challenges

The Food and Agriculture Organization of the United Nations defines ‘sustainable land management (SLM)’ as ‘comprising measures and practices adapted to biophysical and socio-economic conditions aimed at the protection, conservation and sustainable use of resources (soil, water and biodiversity) and the restoration of degraded natural resources and their ecosystem functions’.¹⁶ SLM is associated with activities that are meant to: prevent land conversion and protect vulnerable lands; prevent and mitigate land degradation and restore degraded soils; control soil erosion; improve soil-water storage; manage soil organic matter for soil carbon sequestration; manage and enhance soil fertility; promote integrated soil–crop–water management and integrated agroforestry and agrosilvopastoral systems; rehabilitate and sustainably manage dryland environments (e.g. managing grazing and livestock; rainwater harvesting; sand-dune reclamation; oasis management; drought management; and precision agriculture); and improve crop–water productivity and manage soil salinity in irrigated dryland agriculture.¹⁷

The agricultural sector in Kenya comprises the following subsectors: industrial crops, food crops, horticulture, livestock, fisheries and forestry—and employs such factors of production as land, water and farmer institutions (cooperatives, associations).¹⁸ It is estimated that Kenya has an area of about 587,000 km² out of which 11,000 km² is water. Of the remaining 576,000 km² landmass, only about 16 per cent is of high and medium agricultural potential with adequate and reliable rainfall. This potentially arable land is dominated by commercial agriculture with cropland occupying 31 per cent,

¹⁶ ‘SLM Practices | Land & Water | Food and Agriculture Organization of the United Nations | Land & Water | Food and Agriculture Organization of the United Nations’ <<https://www.fao.org/land-water/land/sustainable-land-management/slm-practices/en/>> accessed 17 November 2021.

¹⁷ Ibid.

¹⁸ Republic of Kenya, *Agricultural Sector Development Strategy 2010–2020*, p. 1.

grazing land 30 per cent, and forests 22 per cent. The rest of the land is used for game parks, urban centres, markets, homesteads and infrastructure.¹⁹

Arguably, the services provided by biodiversity cover a large spectrum of factors contributing to the generation of agricultural income: crop yield and quality, soil fertility, pest control and pollination.²⁰ It is also worth pointing out that agricultural environments and landscapes constitute a reservoir of diversity in terms of the number of species and the number of functions useful for agriculture (pollination, recycling of organic matter, amongst others).²¹

In 2008, Kenya launched *Vision 2030*, a long term development blue print for the country, with the goal of transforming Kenya into “a newly-industrialised, middle-income country providing a high quality of life to all its citizens in a clean and secure environment”.²² Agriculture is identified as a key sector to deliver the 10 per cent economic growth rate per annum envisaged under the economic pillar. As a result, the Development Blueprint leans heavily towards promotion of a commercially-oriented, and modern agricultural sector, which it plans to accomplish by institutional reforms in agriculture and livestock, increasing productivity of crops and livestock, introducing land use policies for better utilisation of high and medium potential lands, developing more irrigable areas in arid and semi-arid lands for both crops and livestock and improving market access for our smallholders through better supply chain management. This comes with its own fair share of challenges.

¹⁹ Republic of Kenya, Agricultural Sector Development Strategy, 2010-2020, p. 9. (Government Printer, Nairobi, 2010).

²⁰ Le Roux, X., Barbault, R., Baudry, J., Burel, F., Doussan, I., Garnier, E., Herzog, F., Lavorel, S., Lifran, R., Roger-Estrade, J. and Sarthou, J.P., ‘Agriculture and Biodiversity: Benefiting from Synergies’ [2008] Multidisciplinary Scientific Assessment. INRA, Paris.

²¹ *Ibid*, 1.

²² Sessional Paper 10 of 2012 on Kenya Vision 2030, Government of Kenya, Office of the Prime Minister
Ministry of State for Planning, National Development and Vision 2030.

Agriculture has been termed as the largest contributor to biodiversity loss with expanding impacts due to changing consumption patterns and growing populations as it destroys biodiversity by converting natural habitats to intensely managed systems and by releasing pollutants, including greenhouse gases.²³ Historically in Kenya, the colonialists used the law to appropriate all land and land-based resources from Africans and to vest them in the colonial masters.²⁴ In addition, the law gave the colonial authorities powers to appropriate land held by indigenous people and allocate it to the settlers.²⁵ The colonial authorities were, therefore, able to grant land rights to settlers in the highlands, while Africans were being driven and restricted to the native reserves. In the natives' reserves, there was overcrowding, soil erosion, and poor sanitation, amongst many other problems.²⁶ This colonial practice naturally led to massive loss of biodiversity in the country, with the Africans trying to maximize productivity in the small portions of land that they were allowed to control and cultivate for their own livelihoods.²⁷ Arguably, the African continent has never recovered from this and the negative effects on environment and biodiversity continue to manifest in present day land use and practices, especially in Kenya.²⁸ Arguably, conflicts between local groups and other more powerful actors, including both state agencies and private sector investors, remain widespread across the sub-continent and are often intensifying with strong political economic incentives for political elites and central bureaucracies to consolidate their

²³ Dudley N and Alexander S, 'Agriculture and Biodiversity: A Review' (2017) 18 *Biodiversity* 45, 31.

²⁴ Ogendo, HWO, *Tenants of the Crown: Evolution of Agrarian Law & Institutions in Kenya*, (ACTS Press, Nairobi, 1991), p.54.

²⁵ See generally the case of *Isaka Wainaina and Anor v Murito wa Indagara and others*, [1922-23] 9 E.A.L.R. 102.

²⁶ See Ogendo, HWO, *Tenants of the Crown: Evolution of Agrarian Law & Institutions in Kenya*, (ACTS Press, Nairobi, 1991).

²⁷ Domínguez L and Luoma C, 'Decolonising Conservation Policy: How Colonial Land and Conservation Ideologies Persist and Perpetuate Indigenous Injustices at the Expense of the Environment' (2020) 9 *Land* 65; Le Billon P and Lujala P, 'Environmental and Land Defenders: Global Patterns and Determinants of Repression' (2020) 65 *Global Environmental Change* 102163.

²⁸ Domínguez L and Luoma C, 'Decolonising Conservation Policy: How Colonial Land and Conservation Ideologies Persist and Perpetuate Indigenous Injustices at the Expense of the Environment' (2020) 9 *Land* 65.

control over natural resources.²⁹ In summary, some of the main challenges affecting efforts towards sustainable land management and land use are: land degradation, attributable to overgrazing; arable farming and conversion of arid and semi-arid lands to other uses; increasing population pressure; poverty; and climate change, among others.³⁰ There is a need for conscious efforts by all stakeholders in addressing these challenges.

4. Legal and Policy Framework on Biodiversity Conservation in Land Use and Agricultural Practices in Kenya

Article 60 of the Constitution of Kenya 2010 provides for the principles of land policy in Kenya and states that land in Kenya should be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with, *inter alia*, the principles of--equitable access to land; security of land rights; sustainable and productive management of land resources; transparent and cost effective administration of land; sound conservation and protection of ecologically sensitive areas; elimination of gender discrimination in law, customs and practices related to land and property in land; and encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution.³¹

The *Land Act 2012*³² provides that the National Land Commission should take appropriate action to maintain public land that has endangered or endemic species of flora and fauna, critical habitats or protected areas. The Commission should also identify ecologically sensitive areas that are within public lands and demarcate or take any other justified action on those areas and act to prevent environmental degradation and climate change.³³ It also envisages a management body which should, on its own motion or at the

²⁹ Roe D, Nelson F and Sandbrook C, *Community Management of Natural Resources in Africa: Impacts, Experiences and Future Directions* (IIED 2009), ix.

³⁰ Waswa PF, 'Opportunities and Challenges for Sustainable Agricultural Land Management in Kenya' (2006) 1 *environment and sustainable development: a guide for higher education in Kenya* 1.

³¹ Article 60 (1), Constitution of Kenya 2010.

³² Land Act, No. 6 of 2012, Laws of Kenya.

³³ Land Act, Section 11.

request of the Commission, submit to the Commission for approval a plan for the development, management and use of the reserved public land vested in the management body. However, before submitting a plan to the Commission a management body should— (a) consider any conservation, environmental or heritage issues relevant to the development, management or use of the public land in its managed reserve for the purpose of that managed reserve; and (b) incorporate in the plan a statement that it has considered those issues in drawing up the plan; (c) submit an environmental impact assessment plan pursuant to existing law on environment; and (d) comply with the values and principles of the Constitution.³⁴

The Land Act states that: - The National Land Commission shall make rules and regulations for the sustainable conservation of land based natural resources. The rules and regulations may contain—(a) *measures to protect critical ecosystems and habitats; (b) incentives for communities and individuals to invest in income generating natural resource conservation programmes; (c) measures to facilitate the access, use and co-management of forests, water and other resources by communities who have customary rights to these resources; (d) procedures for the registration of natural resources in an appropriate register; (e) procedures on the involvement of stakeholders in the management and utilization of land-based natural resources; and (f) measures to ensure benefit sharing to the affected communities.*

The Agriculture and Food Authority (AFA) 2016-2021 Strategic Plan³⁵ also states the need to: -*Establish institutional capacity for data collection and collation on agricultural land use; continuously monitor emerging environmental issues that affect the value chains; Enhance technical capabilities of the counties to increase agricultural production for food security and wealth creation. The overarching idea is to boost farmers' capacity to produce food crops in more efficient, climate-resilient and ecologically responsible ways; develop and implement climate change*

³⁴ Ibid, Section 17.

³⁵ Republic of Kenya, Agriculture and Food Authority (AFA) 2016-2021 Strategic Plan.

adaptation and mitigation measures in agriculture responsible ways; Establish a Research Advisory Unit composed of AFA's Technical Team, and Researchers (KALRO, universities, other research institutions) to drive innovation in the Agricultural sub sectors; Create collaborative linkages with institutions such as KALRO, KEPHIS, Kenya Seed, universities and other research institutions on innovation and technology; Facilitate establishment of a collaborative arrangement between County Governments and KALRO on use of existing Agriculture Training Centres (ATCs) as technology transfer and innovation centres and provide technical assistance to the counties in promoting the concept of green growth economy as a way of ensuring environmental protection and sustainability through agricultural practices. AFA in conjunction with the Ministry of Environment and Natural Resources and other institutions should take on this task.

The *National Land Policy 2009*³⁶ is also relevant to land-based biodiversity conservation. The overall objective of the National Land Policy 2009 is to secure rights over land and provide for sustainable growth, investment and the reduction of poverty in line with the Government's overall development objectives. The Policy also offers a framework of policies and laws designed to ensure the maintenance of a system of land administration and management that provides: All citizens with the opportunity to access and beneficially occupy and use land; economically viable, socially equitable and environmentally sustainable allocation and use of land; efficient, effective and economical operation of land markets; efficient and effective utilisation of land and land-based resources; and efficient and transparent land dispute resolution mechanisms.

The *National Spatial Plan 2015-2045* (NSP) aims at creating a spatial planning context that enhances economic efficiency and strengthens Kenya's global competitiveness, promoting balanced regional development for national integration and cohesion, optimizing utilization of land and natural resources for sustainable development, creating livable and functional human settlements in both urban and rural areas, securing the natural

³⁶ Republic of Kenya, *Sessional Paper No. 3 of 2009 on National Land Policy*, Laws of Kenya.

environment for a high quality of life and establishing an integrated national transportation network and infrastructure system. In order to boost agricultural productivity in Kenya, the *National Spatial Plan* seeks to develop policies and measures that will spur a positive shift in the sector such as: establishment of fertilizer factories to reduce the cost of agricultural inputs, increase investment in irrigation to reduce dependency on rain fed agriculture and increase amount of land under crop production and to ensure that each county has at least one agricultural value addition processing plant.³⁷ The NSP provides strategies and policies to guide future growth of towns and assignment of roles to different urban areas.³⁸

The *Urban Areas and Cities Act*, 2011³⁹ calls for city and municipality established under its provisions to operate within the framework of an integrated urban areas and city development planning, whose objectives should be, *inter alia*: (d) be the basis for—(i) the preparation of environmental management plans; (ii) the preparation of valuation rolls for property taxation; (iii) provision of physical and social infrastructure and transportation; (iv) preparation of annual strategic plans for a city or municipality; (v) disaster preparedness and response; (vi) overall delivery of service including provision of water, electricity, health, telecommunications and solid waste management; and (vii) the preparation of a geographic information system for a city or municipality; (e) nurture and promote development of informal commercial activities in an orderly and sustainable manner; (f) provide a framework for regulated urban agriculture; and (g) be the basis for development control.⁴⁰

A city or urban area integrated development plan should be aligned to the development plans and strategies of the county governments.⁴¹

The *Preparation and Implementation of County Spatial Plans, Draft Guidelines, February 2017* is an instrument to provide support to the County

³⁷ National Spatial Plan 2015-2045, p.65.

³⁸ Ibid, p.103.

³⁹ Urban Areas and Cities Act, No. 13 of 2011, Laws of Kenya.

⁴⁰ S. 36, Urban Areas and Cities Act, No. 13 of 2011.

⁴¹ S. 37, Urban Areas and Cities Act, No. 13 of 2011.

Governments to facilitate preparation of County Integrated Development Plans as required by law and also to realize coordinated and sustainable development planning in the counties. The manual guides: the process of plan preparation; Visioning; stakeholder engagement; presentation of the plan outputs; plan implementation; monitoring and Evaluation framework. The Manual also provides a reference frame to enable the realization of a unified understanding of the intention of the Integrated Planning framework among the planners, the County Governments and other public and private agencies that have a stake in County Integrated Planning.

It advocates for a mainstreaming approach in order to ensure mainstreaming of cross cutting issues into the County Spatial Plans. Such issues include, *inter alia*, land, infrastructure, tourism, agriculture, livestock and fisheries, trade, manufacturing, education and training; health; environment, water and sanitation, Population, Urbanization and Housing, Gender, vulnerable Groups and Youth, sports and culture.

The *National Horticulture Policy, 2012*, mandates the Government to finalize the development and implementation of a land- use policy which shall guide agricultural land use including land subdivision.

The *National Environment Policy, 2013* was formulated to: provide a framework for an integrated approach to planning and sustainable management of Kenya's environment and natural resources; strengthen the legal and institutional framework for good governance, effective coordination and management of the environment and natural resources; ensure sustainable management of the environment and natural resources, such as unique terrestrial and aquatic ecosystems, for national economic growth and improved livelihoods; promote and support research and capacity development as well as use of innovative environmental management tools such as incentives, disincentives, total economic valuation, indicators of sustainable development, Strategic Environmental Assessments (SEAs); Environmental Impact Assessments (EIAs), Environmental Audits (EA) and Payment for Environmental Services (PES); promote and enhance cooperation, collaboration, synergy, partnerships and

participation in the protection, conservation, sustainable management of the environment and natural resources; ensure inclusion of cross-cutting and emerging issues such as poverty reduction, gender, disability, HIV&AIDS and other diseases in the management of the environment and natural resources and promote domestication, coordination and maximisation of benefit from Strategic Multilateral Environmental Agreements (MEAs).

Some of the aims of the Environment Policy were to give the framework to guide the country's efforts in addressing the ever-growing environmental issues and challenges such as: *Loss of biodiversity*: Kenya continues to lose her biodiversity due to habitat destruction, overgrazing, deforestation, pollution, unsustainable harvesting of natural resources, biopiracy and introduction of invasive and alien species, among others. Invasive and alien species are a major threat to the environment. They threaten indigenous species through the effects of predation, alteration of habitat or disruption of ecosystem processes. The challenge of dealing with loss of biodiversity becomes even more complicated when one is dealing with shared resources where laws and policies of respective countries are not harmonized;⁴² *Rehabilitation and restoration of environmentally degraded areas*: There are several degraded areas in Kenya which require rehabilitation and restoration. These include wetlands, riverbanks, deforested areas, eroded shoreline, hilltops and disused quarries and mines;⁴³ *Climate change, energy, security and disaster management*: Climate change poses significant environmental challenges for Kenya as evidenced by the frequent droughts and water shortages that even affect power supplies. This is happening at a time when power demand is on the rise and utilisation of renewable energy sources exclusive of hydro remains relatively low. Other adverse impacts of climate change can be seen in the form of frequent and severe natural disasters such as floods, landslides and prolonged droughts. Increased frequency and intensity of extreme climatic conditions continue to undermine the country's sustainable development. Managing climate-related disasters remains a significant challenge.⁴⁴

⁴² National Environment Policy, p.5.

⁴³ Ibid.

⁴⁴ Ibid, p.6.

The foregoing policy and statutory instruments are some of the legal tools used to lay a foundation for protection and conservation of land-based biodiversity resources.

5. Adoption of Sustainable Agricultural Production Methods and Diversification of Livelihoods

It has been argued that Agricultural land serves many purposes beyond food production and mechanisms are needed to pay farmers for wider stewardship of land resources and thus a multifunctional landscape approach balances different needs at a landscape scale while incorporating site-level specificity on land use, demand, and condition.⁴⁵ In addition, consumers are believed to play a critical role in reducing unsustainable food waste and many of the techniques and strategies for biodiversity-friendly farming systems exist; the challenge is to bring them to scale.⁴⁶

Notably, under Kenya's Vision 2030, agriculture is identified as a key sector to deliver the 10 per cent economic growth rate per annum envisaged under the economic pillar. As a result, the Development Blueprint leans heavily towards promotion of a commercially-oriented, and modern agricultural sector, which it plans to accomplish through institutional reforms in agriculture and livestock, increasing productivity of crops and livestock, introducing land use policies for better utilisation of high and medium potential lands, developing more irrigable areas in arid and semi-arid lands for both crops and livestock and improving market access for our smallholders through better supply chain management.⁴⁷

While intensification of agricultural production has the potential to lead to an increase in the productivity of cultivated areas, associated with the use of mineral fertilizers and synthetic pesticides and with the "simplification" of agricultural landscapes resulting from a reduction in the diversity of

⁴⁵ Dudley N and Alexander S, 'Agriculture and Biodiversity: A Review' (2017) 18 Biodiversity 45.

⁴⁶ Ibid.

⁴⁷ Sessional Paper 10 of 2012 on Kenya Vision 2030, para. 3.3.

production systems in order to feed the growing world population,⁴⁸ the same has also been cited as one of the main drivers of worldwide biodiversity decline.⁴⁹ The adverse effect has been on broad ecosystems and environmental aspects such as freshwater ecosystems which have suffered as excess nutrients from agricultural practices enter surface and ground waters and inefficient irrigation systems deplete water sources,⁵⁰ while biological control of pests in arable fields which is an important ecosystem service provided by high-diversity landscapes and species-rich enemy communities can be affected by the intensification of agriculture.⁵¹

In addition, use of mineral fertilizers and pesticides can lead to degradation of habitat quality at local-field scales, while transformation of perennial habitats (grassland) to arable fields and destructions of field boundaries and hedges can lead to a loss of semi-natural habitats and simplification at landscape scales, including changes in the distribution and supply of resource for many species and the food webs building on them.⁵² Soils may

⁴⁸ Le Roux, X., Barbault, R., Baudry, J., Burel, F., Doussan, I., Garnier, E., Herzog, F., Lavorel, S., Lifran, R., Roger-Estrade, J. and Sarthou, J.P., 'Agriculture and Biodiversity: Benefiting from Synergies', p.2.

⁴⁹ Kleijn, D., F. Kohler, A. Báldi, P. Batáry, E. D. Concepción, Y. Clough, M. Díaz et al. "On the relationship between farmland biodiversity and land-use intensity in Europe." *Proceedings of the Royal Society of London B: Biological Sciences* 276, no. 1658 (2009): 903-909, p.903; Poisson, M.C., Garrett, D.R., Sigouin, A., Bélisle, M., Garant, D., Haroune, L., Bellenger, J.P. and Pelletier, F., 'Assessing Pesticides Exposure Effects on the Reproductive Performance of a Declining Aerial Insectivore' n/a *Ecological Applications* e02415.

⁵⁰ Geier, Bernward, Jeffrey A. McNeely, and Sue Stolton. "The relationship between nature conservation, biodiversity and organic agriculture." *Stimulating positive linkages between agriculture and biodiversity. Recommendations for building blocks for the EC-Agricultural Action Plan on Biodiversity. European Centre for Nature Conservation, ECNC Technical report series, Tilburg, The Netherlands* (2000): 101-105 at p. 102.

⁵¹ Thies, Carsten, Sebastian Haenke, Christoph Scherber, Janne Bengtsson, Riccardo Bommarco, Lars W. Clement, Piotr Ceryngier et al., "The relationship between agricultural intensification and biological control: experimental tests across Europe." *Ecological Applications* 21, no. 6 (2011): 2187-2196, p. 2187.

⁵² *Ibid*, p. 2187.

also deteriorate as a result of erosion, compaction, loss of organic matter and contamination with pesticides, and in some areas, heavy metals.⁵³

It has rightly been argued that where the connection between producers and consumers is weak or costly, farmers' earnings are reduced, creating disincentives to adopt agricultural productivity enhancing technologies.

This is because, certain types of technologies or innovations are only profitable when farmers are integrated into market.⁵⁴ Furthermore, the understanding of the structure and function of markets and value chains; farmers' output market participation level and participation of various actors and constraints along the value chain is essential for accelerating technology adoption and increasing growth of agricultural production and the competitiveness of smallholder farmers.⁵⁵

The National Horticulture Policy, 2012 ascribes to the Government the mandate to: - *enhance environmental conservation and measures to mitigate the effects of climate change and global warming; Encourage and offer incentives for green and conservation farming; Establish a clear framework to enhance inter-institutional coordination; Partner with the private sector to enable the country participate in carbon trading, sustainably protect fragile ecosystems like riparian areas and the country's major water towers, promote water use efficiency and adopt green energy; Introduce incentives for investment on green energy and other alternative sources of energy; Support initiatives on carbon and water trading, and green water credit; Enhance horticultural production, the Government will strengthen and harmonize public extension services to offer specialized extension services.* The Crops Act, 2013, in Section 4 sets out that: - *the national government and county governments shall be guided by the principles in the management and administration of agricultural land that land owners and lessees of*

⁵³ Chris Stoate and others, 'Ecological Impacts of Arable Intensification in Europe' (2002) 63 *Journal of Environmental Management* 337.

⁵⁴ International Centre of Insect Physiology and Ecology (*icipe*), 'Markets and Value Chains Research,' available at <http://www.icipe.org/research/social-science-and-impact-assessment/markets-and-value-chains-research> [Accessed on 11/07/2017].

⁵⁵ *Ibid.*

agricultural land, being stewards, have the obligation to cultivate the lands they own or lease and make the land economically productive on a sustainable and environmentally friendly manner.

Biodiversity is important at all levels of the agricultural landscape, from the different soil microbes that help cycle nutrients and decompose organic matter, to wasps and bats that help reduce crop pests, and to birds and insects that pollinate high value crops, biodiversity helps farmers successfully grow food and maintain sustainable farm landscapes.⁵⁶ Thus, not only does the maintenance of biodiversity help ensure viable crop production, but many organisms and species have come to rely on particular agricultural landscapes for their very survival. That is, agriculture both supports, and is supported by, the maintenance of biodiversity.⁵⁷

6. Conclusion

Arguably, while secure rights, such as tenure and access to resources, can also contribute to biodiversity conservation by providing the incentives and legal frameworks for careful stewardship of resources, conservation can also impact negatively on people's rights, for example by denying access to resources, and weak rights can undermine conservation efforts.⁵⁸ There is thus a need to strike a balance between achieving conservation and ensuring that communities exploit natural resources sustainably to meet their basic needs and also improve their lives. A sustainable land management approach

⁵⁶ GRACE Communications Foundation, Biodiversity, available at <http://www.sustainabletable.org/268/biodiversity>; see also Benton, T.G., Bryant, D.M., Cole, L. and Crick, H.Q., 'Linking Agricultural Practice to Insect and Bird Populations: A Historical Study Over Three Decades' (2002) 39 *Journal of applied ecology* 673; Saunders, M.E., Peisley, R.K., Rader, R. and Luck, G.W., 'Pollinators, Pests, and Predators: Recognizing Ecological Trade-Offs in Agroecosystems.' (2016) 45 *AMBIO-A Journal of the Human Environment*; Wenny, D.G., Devault, T.L., Johnson, M.D., Kelly, D., Sekercioglu, C.H., Tomback, D.F. and Whelan, C.J., 'The Need to Quantify Ecosystem Services Provided by Birds' (2011) 128 *The auk* 1.

⁵⁷ *Ibid.*

⁵⁸ BirdLife International, 'An Introduction to Conservation and Human Rights for BirdLife Partners', 2.

should ensure active participation of affected communities especially those engaged in agricultural practices, if the same is to be achieved for the sake of conservation of biological resources in the country.

References

‘SLM Practices | Land & Water | Food and Agriculture Organization of the United Nations | Land & Water | Food and Agriculture Organization of the United Nations’ <<https://www.fao.org/land-water/land/sustainable-land-management/slm-practices/en/>> accessed 17 November 2021.

Benton, T.G., Bryant, D.M., Cole, L. and Crick, H.Q., ‘Linking Agricultural Practice to Insect and Bird Populations: A Historical Study Over Three Decades’ (2002) 39 Journal of applied ecology 673.

BirdLife International, ‘An Introduction to Conservation and Human Rights for BirdLife Partners’.

Chris Stoate and others, ‘Ecological Impacts of Arable Intensification in Europe’ (2002) 63 Journal of Environmental Management 337.

Domínguez L and Luoma C, ‘Decolonising Conservation Policy: How Colonial Land and Conservation Ideologies Persist and Perpetuate Indigenous Injustices at the Expense of the Environment’ (2020) 9 Land 65.

Dudley N and Alexander S, ‘Agriculture and Biodiversity: A Review’ (2017) 18 Biodiversity 45.

Geier, Bernward, Jeffrey A. McNeely, and Sue Stolton. "The relationship between nature conservation, biodiversity and organic agriculture." *Stimulating positive linkages between agriculture and biodiversity*.

Recommendations for building blocks for the EC-Agricultural Action Plan on Biodiversity. European Centre for Nature Conservation, ECNC Technical report series, Tilburg, The Netherlands (2000): 101-105.

GRACE Communications Foundation, Biodiversity, available at <http://www.sustainabletable.org/268/biodiversity>.

International Centre of Insect Physiology and Ecology (*icipe*), 'Markets and Value Chains Research,' available at <http://www.icipe.org/research/social-science-and-impact-assessment/markets-and-value-chains-research> [Accessed on 11/07/2017].

Isaka Wainaina and Anor v Murito wa Indagara and others, [1922-23] 9 E.A.L.R. 102.

Kleijn, D., F. Kohler, A. Báldi, P. Batáry, E. D. Concepción, Y. Clough, M. Díaz et al. "On the relationship between farmland biodiversity and land-use intensity in Europe." *Proceedings of the Royal Society of London B: Biological Sciences* 276, no. 1658 (2009): 903-909.

Land Act, No. 6 of 2012, Laws of Kenya.

Le Billon P and Lujala P, 'Environmental and Land Defenders: Global Patterns and Determinants of Repression' (2020) 65 *Global Environmental Change* 102163.

Le Roux, X., Barbault, R., Baudry, J., Burel, F., Doussan, I., Garnier, E., Herzog, F., Lavorel, S., Lifran, R., Roger-Estrade, J. and Sarthou, J.P., "Agriculture and biodiversity: benefiting from synergies. Multidisciplinary Scientific Assessment." *Synthesis Report, INRA (France)* (2008).

Ministry of State for Planning, National Development and Vision 2030.

Murray MG and Williamson D, 'Current Issues in Biodiversity Conservation' [2002] *Wildlife Management Working Paper* (FAO).

Ogendo, HWO, *Tenants of the Crown: Evolution of Agrarian Law & Institutions in Kenya*, (ACTS Press, Nairobi, 1991).

Poisson, M.C., Garrett, D.R., Sigouin, A., Bélisle, M., Garant, D., Haroune, L., Bellenger, J.P. and Pelletier, F., 'Assessing Pesticides Exposure Effects

on the Reproductive Performance of a Declining Aerial Insectivore' n/a
Ecological Applications e02415.

Republic of Kenya, *Agricultural Sector Development Strategy 2010–2020*.

Republic of Kenya, *Agricultural Sector Development Strategy*, 2010-2020.
(Government Printer, Nairobi, 2010).

Republic of Kenya, *Agriculture and Food Authority (AFA) 2016-2021
Strategic Plan*.

Republic of Kenya, *Constitution of Kenya 2010*.

Republic of Kenya, *Sessional Paper 10 of 2012 on Kenya Vision 2030*, 2008.

Republic of Kenya, *Sessional Paper No. 3 of 2009 on National Land Policy*,
Laws of Kenya.

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

Saunders, M.E., Peisley, R.K., Rader, R. and Luck, G.W., 'Pollinators, Pests,
and Predators: Recognizing Ecological Trade-Offs in Agroecosystems.'
(2016) 45 AMBIO-A Journal of the Human Environment.

Sessional Paper 10 of 2012 on Kenya Vision 2030, Government of Kenya,
Office of the Prime Minister

Slingenberg, A., Braat, L., van der Windt, H., Rademaekers, K., Eichler, L.
and Turner, K., "Study on understanding the causes of biodiversity loss and
the policy assessment framework." (2009).

Smith, M.M., Gilbert, J.H., Olson, E.R., Scribner, K.T., Van Deelen, T.R.,
Van Stappen, J.F., Williams, B.W., Woodford, J.E. and Pauli, J.N., 'A

Recovery Network Leads to the Natural Recolonization of an Archipelago and a Potential Trailing Edge Refuge' n/a *Ecological Applications* e02416.

Thies, C., Haenke, S., Scherber, C., Bengtsson, J., Bommarco, R., Clement, L.W., Ceryngier, P., Dennis, C., Emmerson, M., Gagic, V. and Hawro, V., "The relationship between agricultural intensification and biological control: experimental tests across Europe." *Ecological Applications* 21, no. 6 (2011): 2187-2196.

Urban Areas and Cities Act, No. 13 of 2011, Laws of Kenya.

Wakhungu, J.W., Waruingi, L., Agwanda, B., Awori, P., Isiche, J., Itela, S. and Njumbi, S., 'Towards a National Biodiversity Conservation Framework: Policy Implications of Proceedings of the International Conference on Biodiversity, Land-Use and Climate Change'.

Waswa PF, 'Opportunities and Challenges for Sustainable Agricultural Land Management in Kenya' (2006) 1 environment and sustainable development: a guide for higher education in Kenya 1.

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

Theorizing Children's Right of Access to Basic Education in Conflict Situations in Kenya

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&

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Abstract

Children's right of access to basic education has been provided for under International Law, Article 53(1) (b) of the Constitution of Kenya, the Basic Education Act and the Children's Act.¹ Nevertheless, these laws do not accommodate the needs of children who are living in the conflict areas of Kenya. For instance, in the arid and semi-arid areas of Kenya, over 5million children miss out on their right to access to education due to conflict. At Arabel Primary School in Baringo County, intercommunal conflicts have constantly result to vandalization of school property. In Samburu County, parents have had to withdraw their children from school due to insecurity.

This has subsequently seen children miss out on their education. Aside from the conflicts, the effects of the COVID-19 pandemic and the tensions owing to the looming general elections continue to escalate the education crisis. The objective of this study is to determine the factors that impede the children's right of access to basic education in conflict areas. In order to answer the research questions, the paper utilized diverse theories to investigate, explain and possibly offer a solution to these problems. This

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¹ The Constitution of Kenya, 2010; Basic Education Act, No. 14 of 2013; Children's Act, No. 8 of 2001.

paper also utilized the diverse theories to draw responses to these children's plight. The above mentioned theories include; theories that explain the nature and effectiveness of the law on children's right of access to basic education in conflict situations and theories that analyze the current situation and its impact on the right of access to basic education. The research will undertake a library-based approach. The methodology utilized is mainly an analysis of the available literature, observation and examination of the unfolding events in the field.

Keywords: *Access, discrimination, distribution, conflict, children and governance systems theorizing.*

1 Introduction

In the world today, education has been acknowledged as the gateway for the enjoyment of all the other human rights. Conversely, the children who find themselves in conflict situations have difficulties in enjoying their right to basic education.² A case in point is West Pokot County where there have been conflicts with surrounding communities. The affected communities include the Tugen, Marakwet, Turkana and the Samburu communities.³

Subsequently, conflict occurs in other arid and semi-arid areas of Garissa, Mandera, Moyale, Lamu, Kilifi and Kwale. Due to the prevailing

²Achoka J S K, 'Accessing to Basic Education in Kenya: Inherent Concerns,' (2007) 2 (10) Educational Research and Review at 1. Also see Mooney E. and French C., 'Barriers and Bridges: Access to Education for Internally Displaced Children' (2005) Brookings-Bern Project on Internal Displacement, available at https://www.brookings.edu/wp-content/uploads/2016/06/20050111_mooney.pdf accessed on 19th August, 2020. also see Kariuki Muigua actualizing social economic rights for sustainable development in Kenya <<http://kmco.co.ke/wp-content/uploads/2019/02/Actualising-Socio-Economic-Rights-for-Sustainable-Development-in-Kenya-Kariuki-Muigua-9-February-2019.pdf>> accessed on 4th October 2020.

³Stephen Aleksovi, Oliver Bakreski, and Biljana Avramovska (2014), Collective Security— The Role of International Organizations: Implications in International Security Order, *Mediterranean Journal of Social Sciences*, 5(27).

circumstances of conflict in these areas, over five million children aged six to seventeen years are deprived of adequate education.⁴

The various theories utilized demonstrate the reason behind the phenomena. It was our finding that the right to education among other social economic rights are guaranteed in the Constitution.⁵ It is important that the enforcement, actualization and promotion of these rights should not be done as an extension of an act of *grace* from the duty bearers.⁶ The realization of these rights should instead be based on the State's obligations to its citizens. Additionally, it was important to evaluate whether the nature of the relationship between the State and its citizens, created some leeway for the State to realize rights on its own terms. Grace is a Hebrew word used by Christians to mean undeserved favors extended by the superior Jesus Christ when he died on the cross for the inferior humanity.⁷ The question that begs an answer is if access to basic education is a right, why is it not readily available to all including children in conflict situations? To answer the above question and to identify the gap in law the paper mainly examined various theories to understand the phenomenon and lead to practicable solutions.⁸

⁴ Mongare A.B, 'the right to education for children in Conflict situations in Kenya: How responsive is Kenya?' (2014), available http://erepository.uonbi.ac.ke/bitstream/handle/11295/94616/Mong%60are_The%20to%20education%20for%20children%20in%20conflict%20situation:%20how%20is%20Kenya.pdf?sequence=1>

Accessed on 19th January, 2019. Also see Macharia, M. (2011). *Reflections on Kenya's National and Security Interests*, Journal of Language, Technology and Entrepreneurship in Africa, 3(1).

⁵ The Constitution of Kenya, 2010.

⁶ The word 'grace' literally means 'favor' In Hebrew it is CHEN from a root word CHANAN - to bend or stoop in kindness to another as a superior to an inferior https://en.wikibooks.org/wiki/HebrewRoots/Theoriginal_foundation/Grace accessed on 24th April, 2020.

⁷ Clifford Goldstein, 'The Final Hope Three Messages for an anxious world,' (2021) Africa Herald Publishing House; also see New King James Bible: 2Corinthians 12:8-9, Hebrews 4:16, Romans <https://www.biblestudytools.com/topical-verses/grace-bible-verses/> accessed on 24th April 24, 2019.

⁸ Achoka J S K, 'Accessing to Basic Education in Kenya: Inherent Concerns,' (2007) 2 (10) Educational Research And Review at 1.

The children in conflict situations being rights holders, are entitled to demand protection of their rights from the State and its organs.⁹ The question is, have the duty bearers lived up to their promise and obligation to protect all citizenry rights regardless of their status?¹⁰ This paper analyzes various theories surrounding this area of rights. It is this paper's argument and assertion that the learning process of the children who live and go to school in an unstable, chaotic and conflict ridden environment, was constantly interrupted.

2 Theories Examining the Nature of the Law On Right to Education and the Input Required for its Realization in Conflict Situations in Kenya

There are several theories that explain the reasons why education is not available for children in conflict areas. To explain this topic, the authors settled on the various theories. The theories include the rights theory, social contract theory, vulnerability theory, conflict theory and Ubuntu theory.

2.1 The Rights Theory

Robert Nozick a key proponent of this theory in the new age states that, individuals have rights, and there are things no person or group may do to them (without violating their rights).¹¹ Locke argues that in a state of nature there would be a natural law that “no-one should harm another in his life, liberty or property.”¹² To gauge the nature and legal position of the right to basic education and its availability, we begin with the analysis of the Rights Theory. Rights are inherent to all human beings, the State being the duty

⁹Benta A. Abuya, Maurice Mutisya, Elijah O. Onsomu, Moses Ngware, and Moses Oketch, ‘Family Structure and Child Educational Attainment in the Slums of Nairobi, Kenya’

<file:///C:/Users/uaer/Desktop/articles/2158244019855849-%20education%20in%20conflict.pdf>. Accessed on 20th

December 2019.

¹⁰ ibid

¹¹ Robert Nozick, ‘Anarchy, State and Utopia’ (1974)

¹² *Two Treatises of Government*, ed. Peter Laslett, 2nd edition, Cambridge University Press, 1967).

bearer should ensure that nobody is deprived of that which is their legal entitlement, such as the right to education.¹³

States shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized within the Convention of the Rights of the Child. With regard to economic, social and cultural rights, States shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.¹⁴

Further, the Convention on the Rights of the Child seeks to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation by providing that States shall take the appropriate measures to protect the child.¹⁵ The available framework has not accounted for the right to access basic education for the children living in conflict areas. In the rights theory as read with the convention on the rights of the child, it is essential to safeguard the child's social, economic and cultural rights from being violated.¹⁶ Their vulnerability entitles them to this protection as they are physically and mentally immature to pursue this rights themselves¹⁷.

The law does not specifically recognize the double vulnerability of children who find themselves in conflict situations, which require clear and enabling systems, to realize their rights.¹⁸ Perhaps that explains absence of this right. The children's right to access to basic education in conflict areas has been compromised and neglected despite the existence of this theory that resonates well with the Constitution of Kenya, 2010. Every person is equal

¹³ Abuya E.O and Ikobe, internally displaced person during 2007/08 in Kenya

¹⁴ Article 4, UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577

¹⁵ Article 19, UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577

¹⁶ *ibid*

¹⁷ A conclusion pursuant to The Preamble, UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577

¹⁸ Scholastica Awino Omondi, 'An Evaluation of Child Sexual Abuse Trial Procedure in Kenya' www.questjournals.org, vol 2 issue 4(2014) pp:11-63

before the law and has the right to equal protection and equal benefit of the law. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.¹⁹

Based on the above provisions, every child has the right to equal treatment. Discrimination is only allowed to bring the vulnerable to the level of their peers who are not affected by conflict.²⁰ The situation is further supported by the social contract theory that guarantees children in conflict situations, their rights as citizens of Kenya and participants in the social contract. The question that begs answers is why then are children in conflict situations not able to access their right to basic education?

2.2 The Social contract theory

The social contract theory postulates that there exists a contract between those in governance and the governed.²¹ Accordingly, the proponents of this theory argue that a body polity is formed by the people through a social covenant also known as government.²² The sovereign body polity created is therefore empowered, mandated and given the relevant machinery to enforce the rights of the people on their behalf and on their own.²³ In this case the right being protected is the right to basic education for their children.

Most scholars criticize this theory on the basis that it requires other criteria to directly confer the right to education to the rights holders.²⁴ As a matter

¹⁹ Article 27 of the Constitution of Kenya, 2010.

²⁰ The 2010 Constitution of Kenya, on equality at Article 27, also see Kurki, Visa A. J., Rights, Harming and Wrongs: A restatement of Interest Theory |Oxford Journal of Legal studies, vol 38, issue 3, Autum2018, pages 430-450, <<https://doi.org/10.1093/ojls/ggy005>> accessed on 22nd December 2020.

²¹ A. Weale, associative obligation and social contract', . accessed on 20th December, 2019.

²² Hobbes, Thomas. "Social Contract Theory. "Also see Gerhard F. Hasel (PhD, Vanderbilt University) The Theory. "Also 2nd Quarter, 2021, The Promise God's Everlasting Covenant

²³ RG HOLCOMBE (2014) The economic theory of rights / journal of institutional economics /Cambridge Core

²⁴ *ibid*

of fact and law, the right to education is one of the benefits that should be extended to children in conflict situations.²⁵

Under the Constitution of Kenya, 2010, the polity formed by the people of Kenya is divided into two; the national and county government. As postulated in the Social Contract Theory, the people of Kenya ceded their rights to the government to enforce it on their behalf. *Ex abundanti cautela*, the people of Kenya found it necessary to include the right to education under Article 43(1) (f), perhaps to remind the government that they are entitled to that right.²⁶ The provision herein then proceeded to expressly mention the right to education as a socio-economic right to which the people of Kenya, including children, are entitled, and that the right is mandatorily free and compulsory.²⁷

This means that holding everything constant, all governance systems and levels should ensure that all children including those in conflict situations access basic education at all costs. This is notwithstanding, the challenges against them. Unfortunately, the realization of this noble idea has been a tall order.²⁸ For clarity purposes, this paper argues that the social contract is in the Constitution of Kenya, 2010. The elephant in the room, however, is that, despite the Constitution being a grundnorm, children who find themselves in conflict situations are still not able to access their right to education.

Although children and education are not pointed out by Hobbes and Rousseau in their discussions concerning social contract theory, one can infer that children in conflict situations in Kenya deserve free and proper access to basic education.²⁹ Pursuant to the covenant mentioned above, it is

²⁵ Benta A. et al family structure on education achievement in slums of Nairobi

²⁶ Article 43(1)(f) Constitution of Kenya, 2010. *Ex abundanti cautela* means out of an abundance of caution

²⁷ Article 53(1)(b) of the Constitution of Kenya, 2010.

²⁸ Brock-Utne, B. (2000). *Who's Education for All? The decolonization of the African Mind*. Falmer Press, New York.

²⁹ A. B. Mongare (2018) When the victim stings the Good Samaritan: Legal implication on Refoulment of refugees, a Kenyan perspective: *Journal of Current innovation* 6th Edn vol 2.

the state's obligation to protect its citizens and preserve their rights and fundamental freedoms.³⁰ This acknowledgement forms the rationale for the people ceding their power to the body polity which they created and gave the mandate to work on their behalf and for their benefit.³¹

The social contract under the Constitution envisaged strict protection of the rights and fundamental freedoms including the right to education. The entrenchment of the Bill of Rights in the Constitution was to make it impossible for anyone to interfere with these rights.³² This protection is reiterated under Article 255(1) (e), whereby an amendment involving the rights and fundamental freedoms of the people, must be subjected to a referendum, in which case the people must pass the amendment by themselves.³³ This means, that the people were cautious of the fact that the government, may fail to protect these rights. It is in that light that they decided that these fundamental rights should be protected by the Constitution which is the supreme law rather than the government.³⁴

Protection of the right to education for the children in the marginalized regions and conflict zones needs to be elevated so that the regional standards of living are improved.³⁵ This elevated protection can be realized by ensuring that every concerned citizen can enforce the right to free and compulsory basic education. When considering whether a party has *locus standi*, courts generally take a liberalized approach especially in matters related to the upholding of the bill of rights.³⁶

³⁰ David Jason Karp, (2015) the concept of human rights Protection and the UN Guiding Principles on Business and Human Rights pp137-158.

³¹ *ibid*

³² Chapter 4 of the Constitution of Kenya, 2010

³³ Constitution, *supra*. Article 255(1)(e)

³⁴ Section 4 and 5 of The Fair Administrative Actions Act No. 4 of 2015

³⁵ ALRMP/GoK. (2004). The Pastoralist communities and free primary education in Kenya. Preliminary findings. Commissioned by Coalition of Pastoralist Child Education of Arid Lands Resource Management Project and Action Aid Kenya.

³⁶ Mohamed Feisal & 19 others v Henry Kandie, Chief Inspector of Police, OCS, Ongata Rongai Police Station & 7 others; National Police Service Commission & another (Interested Party) [2018] eKLR

Luckily, the Constitution under Articles 22 and 258 has adopted a liberal approach to the doctrine of *locus standi*.³⁷ The Constitution has donated power to any person whose rights are violated alongside other persons who are vulnerable to appear in court to seek redress on their behalf.³⁸ This powers accord members of the society an opportunity to move to court to enforce the right to basic education of the child.

Other great milestones in the post-2010 Constitutional dispensation include, the power of the High Court to entertain strategic litigation under Articles 22 and 165 of the Constitution.³⁹ Additionally, the power to make appropriate orders to enforce children's rights, including the right to education for all the children born or living in the Republic of Kenya, has been a great milestone in the post-2010 dispensation.

Take for example Ms. Kadzo a teacher at Utange Primary school at the Coastal region of Kenya. She recently declined to continue teaching at a school that had been marred by early marriages. Spurred by the government's slow rate of rescuing victims and prosecuting offenders, Ms. Kadzo has made it her mission to fight the abuse that blights her neighborhood. So much so, that she has even taken the initiative to inquire at the local courthouse about a case that has dragged on for two years.⁴⁰

Based on the above scenario, it is discernible that the government has done little to address the plight of the children to the extent that a private citizen has decided to take matters into her own hands. Why would this be the case yet, the Kenyan Constitution opens the gate for anyone who considers that any right including the right to education, has been infringed or is likely to

³⁷ OAPA (Suing as Parents and/or Guardians of student minors currently schooling at Oshwal Academy) v Oshwal Education Relief Board & 2 others [2020] eKLR

³⁸ Article 22 (1) a) (b) and (c) of the Constitution of Kenya, 2010.

³⁹ Article 22 and 165 (3)(b) of the Constitution of Kenya, 2010.

⁴⁰ Mukelwa Hlatshwayo, 'This Woman Rescues Kenyan Girls From Sex Traffickers' *The Christian Science Monitor* (2022)

<<https://www.csmonitor.com/World/Africa/2022/0706/This-woman-rescues-Kenyan-girls-from-sex-traffickers>> accessed 7 July 2022.

be infringed or is in the process of being infringed, to approach the court for remedies?⁴¹

Your answer might be as good as mine, that the above provision offers blanket protection to the government. In turn, this insinuates that the government has failed and/or neglected to take proper and effective measures to address the plight of children in conflict situations in Kenya. It shows that the government as the body polity created by the people of Kenya has breached the social contract which brought it to existence.

Under the social contract theory, the people are the sovereign. The people have the right by themselves to address their issues directly, but for orderly purposes, they seek to have the power exercised on their behalf by the government that they created and ceded their individual powers to. The Kenyan government is obligated to take affirmative actions to redress the plight of historically disadvantaged people.⁴² Additionally, Article 27 envisages positive discrimination aimed at uplifting the marginalized such as children's education in conflict regions. The education of children living in conflict situations in Kenya has been a major example of marginalization.⁴³

The government of Kenya has, for far too long, neglected the conflict regions due to their unproductive nature in the same manner and for the same reason the colonial government did.⁴⁴ This explains why Article 27 of the

⁴¹ M Roa, 2014, Considering strategic litigation as an advocacy tool: <www.tandfonline.com > doi > pdf> accessed on 13/4/21

⁴² Judy Achieng Kabballah, office of the ombudsman as an advocate of access to administrative justice: Lessons for Kenya. Also see Migai Akech, public law values and the politics of criminal injustices: creating a democratic Framework for Policing in Kenya.

⁴³ Adan, M. A., & Orodho, J. A. (2016). Effects of inter-clan conflicts on quality school outcomes in secondary Schools among nomadic community in Mandera County, Kenya. *Journal of Research and Methods in Education*, 6(3); 22-29

⁴⁴ Sifuna, D.N. (2005). Increasing access and participation of pastoralist communities in primary education in Kenya. In *International Review of Education* (2005) 51: 499-516.

Constitution reiterates the social contract that exists between the people and the government, by providing that: -

“... to give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.”⁴⁵

From this provision, it is important to appreciate that, even though under social contract theory the government is the holder of power, Kenyans may not be able to implement the rights individually.⁴⁶ The prevailing circumstances point to the people's vulnerability calling for an explanation and analysis of the situation under the vulnerability theory.

2.3 Vulnerability Theory

The key proponent of this theory is Martha Fineman. Martha Albertson Fineman proposes that vulnerability is inherent to the human condition, and that governments therefore have a responsibility to respond affirmatively to that vulnerability by ensuring that all people have equal access to the societal institutions that distribute resources.⁴⁷

The people who are factually susceptible or exposed to harm than ordinary people in the ordinary state of events such as children in a conflict situation are considered vulnerable.⁴⁸ The theory postulates that the vulnerable need

⁴⁵ The Constitution of Kenya, 2010.

⁴⁶ Mary Nyeri Kinyanjui African Markets and the Utu-ubuntu Business Model: a perspective on economic informality in Nairobi. Cape Town: African Minds (Pb R250 – 978 1 928331 78 0). 2019, 200 pp. Cambridge University Press: 15 January 2021.

⁴⁷ Nina Kohn, 'Vulnerability Theory And The Role Of Government' (2014) 26 Yale Journal of Law and Feminism <<https://core.ac.uk/download/pdf/72837901.pdf>> accessed 7 July 2022.

⁴⁸ Anton J. M. Dijkster 2014 A Theory of Vulnerability- based Morality<<https://>

special protection than that accorded to the general population. It is worth noting that vulnerability is considered a long-lasting problem requiring positive action to remedy it.

Children are vulnerable members of the society and this is depicted in the Constitution which provides that every child has the right to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour.⁴⁹ The child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.⁵⁰

Although the constitution recognizes the vulnerable and disadvantaged persons, children who find themselves in conflict situations miss out on their right to access to education. In addition to the aforementioned provisions of the Constitution, Article 56 of the Constitution responds and complies with the vulnerability principle.⁵¹ The government is specifically, required to extend the scope of affirmative action to include the protection and preservation of the vulnerable people's right to education.⁵²

//doi.org/10.1177/17540073913514120> accessed on 23rd December 2019.

⁴⁹ Article 53(1)(d) of the Constitution of Kenya, 2010

⁵⁰ As Set out in the Preamble of, 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 6 July 2022]; given effect by Article 2(6) of the Constitution of Kenya, 2010; also see N. de Groot, Gouke J., Erwin Birnie, Nicole B. Valentine (2019) towards a universal concept of vulnerability: Broadening the evidence from the elderly to prenatal health using a Delphi approach. <PLoS ONE14 (2): e0212633.doi: 101371/journal.pone.0212633> accessed 23rd dec 2019.

⁵¹ The State shall put in place affirmative action programmes designed to ensure that minorities and marginalized groups—(a) Participate and are represented in governance and other spheres of life; (b) Are provided special opportunities in educational and economic fields;(c) Are provided special opportunities for access to employment;(d) Develop their cultural values, languages and practices; and (e) Have reasonable access to water, health services and infrastructure.

⁵² Lucyline Nkatha Murungi 'the right to Education under the constitution of Kenya: Scope and prospects for Enforcement' in Japhet Biegon and Geoffrey Musila (eds), *Judicial Enforcement of Socio-Economic Rights under the New Constitution:*

When the above proviso of the Constitution is read together with Articles 43 and 53, the resultant inference will be that the governance systems are under a strict obligation to ensure that children in conflict situations in Kenya are accorded quality education.⁵³ That is notwithstanding the challenges that come with according them such services.

It is imperative that the government, notwithstanding the difficulty associated with providing educational services in the places hit by conflict, it should demonstrate efforts made to ensure the children have access to education services.⁵⁴ Research cites lack of infrastructure as one of the critical issues affecting the delivery of basic education to children in conflict situations in arid and semi-arid regions.⁵⁵

To explain more on the question of vulnerability from a theoretical perspective, we shall look at the Ubuntu theory.

2.4 Ubuntu (Humanity)

This theory comes from the Swahili word UTU (meaning humanity).⁵⁶ It means that as a people, we should empathize with each other and especially the vulnerable such as persons with disabilities, children and the marginalized.⁵⁷ We should be sensitive to the needs of everyone in society

Challenges and Opportunities for Kenya (Kenya Section of the International Commission of Jurists 2011). 217-244.

⁵³ The Constitution of Kenya, 2010.

⁵⁴ Nzesei, Mutua Meshack. "Education Marginalization in the Kenyan Conflict-Affected Areas: Human Capital Theory and Rights-based Perspectives." *International Journal of Innovative Research and Development* 6, no. 6 (2017).

⁵⁵ Ruto Sarah J, Ongwenyi Zipporah N, Mugo John K, 2009. Educational Marginalization in Northern Kenya. *United Nations Educational, Scientific and Cultural Organization*, UNESCO.

⁵⁶ Mary Nyeri Kinyanjui African Markets and the Utu-ubuntu Business Model: a perspective on economic informality in Nairobi. Cape Town: African Minds (Pb R250 – 978 1 928331 78 0). 2019, 200 pp. Cambridge University Press: 15 January 2021

⁵⁷ M Letseka, 2012, in defense of Ubuntu.

since we exist because they do. The concept of Ubuntu ideally recognizes the importance of everyone in society.⁵⁸

Therefore, in enacting policies and laws, the legislature should consider all the vulnerable persons in society and provide for their needs. The question is why do children in conflict situations seem to have been left out of the foundation for the enjoyment of basic rights? This calls for the conflict theory to explain the problem.

2.5 Conflict Theory

The famous philosopher Socrates asserts that an unexamined life is not worth living. In the same breath, Conflict theory proponents postulate that society is perpetually in a conflict in the bid to compete for the limited resources.⁵⁹ Formulated by Karl Marx, the conflict theory postulates that the bourgeoisie is constantly oppressing the proletariat for purposes of acquisition of more resources and maintenance of the same. While the bourgeoisie has a lot of wealth and means for maintenance, the proletariat has to attempt to serve the bourgeoisie so that they can survive.

Developed from the deepest part of capitalism, the conflict theory postulates that most societal alignments are characterized by social exclusion and marginalization in an attempt by the bourgeoisie to isolate the proletariats from reaping the benefits therefrom. This is the position that attempts to explain that much of marginalization is due to the continued conflict of class between the wealthy owners and the servants. Between the haves and the have-nots, the situation is best explained by George Orwell in "*Animal Farm*."⁶⁰ The notion is that children in conflict situations are in a survival mode and owing to their vulnerability, they cannot compete.

⁵⁸ Chuma Himonga, the right to health in an African Cultural Context: The role of Ubuntu in realization of right to Health with special reference to South Africa. Cambridge University press.

⁵⁹ Kariuki Muigwa, Natural resources conflict addressing inter- ethnic strife through environmental justice in Kenya <natural –resource-conflict- addressing inter-ethnic strife- through-environmental justice> 20th November 2019.

⁶⁰ The Survival for the fittest and the Darwinian principle of natural selection.

In the present case, it is believable that the government of Kenya which has always been led by top families with a lot of wealth and power has marginalized the north and eastern regions. The arid and semi-arid areas, in the manner contemplated under the conflict theory, have been neglected for so many years since independence.

The government of Jomo Kenyatta the first Kenyan President and that of President Daniel Arap Moi ignored and neglected the conflict regions.⁶¹ In both regimes education has not been realized in the areas. The national government included increased funding for education in the country but failed to appreciate that the North-Eastern region needed special attention due to the situations and practices in the place. The government promised free primary education and included it in their manifesto which they dubbed "*What a KANU Government offers you.*"⁶² KANU was the ruling party then. In the infancy stage, the government attempted to create a public image that they were good and put in place appropriate measures to address the issue of education in the whole country including the marginalized conflict regions. The Ominde Commission – *The Kenya Education Commission* was charged with coming up with policies aimed at improving the education sector. The Ominde Commission came up with a report that proposed the need to shift focus to Northern Kenya which had been neglected by the colonial government on the premise that it had no significance to the economic ambitions of the then government.⁶³

Other notable inquiries included the Sessional Paper No. 10 of 1965 which advocated for the channeling of the country's resources to "high potential areas" most of which were agricultural areas.⁶⁴ This would take the form of

⁶¹ Krätli, S. (2001). Education provision to nomadic pastoralists a literature review. IDS Working Paper 126

⁶² Sifuna, D.N (2007). The challenge of increasing access and improving quality: An analysis of universal primary education interventions in Kenya and Tanzania since 1970s. In *International Review of Education* (2007) 53: 687-699.

⁶³ Republic of Kenya. (1974). *Development Plan 1974-1978*. Government Printers. Nairobi. (1964). *Education Commission Report of 1964*. Government Printers. Nairobi.

⁶⁴ Sessional Paper No. 10 of 1965 on African Socialism and its Application in to Planning in Kenya.

more financial allocation for purposes of, *inter alia*, running the education programs.

The Ndegwa Commission was operationalized in (1970-1971) and its mandate was centered on the Civil Service. It made some recommendations on education in a bid to foster the development of the Civil service. It recommended the formulation of District Education Boards to respond adequately to the local needs of the communities by the active participation and local involvement of the community.⁶⁵ Based on the above inquiry, it is notable that the key objective of the recommendation was the growth of the Civil service and not to realize the right to education.

The Koech Commission Report was formed in 1999 and one of the key recommendations of the report was the provision of a universal and compulsory basic education. This recommendation aimed to eliminate disparities caused by geographical factors, social and gender issues thus leading to equity in education at all levels.⁶⁶ It is notable that even though this report may have formed the basis of the Right to education as envisaged under the Constitution, H.E. The Late Daniel Toroitich Arap Moi dismissed the report.⁶⁷

The situation in Kibera a slum in Nairobi, Kenya, parents threatened to set the school ablaze after the principal declined to admit any more students due to the numbers. A citizen who had taken his child to school at the time remarked that the government declaration that primary education is free and

⁶⁵ Jospat Gachie, 'The Ndegwa Commission Report And Recommendations- Ndegwa Report' (*Kenya Cradle.com*, 2020) <<https://kenyacradle.com/ndegwa-commission-report-and-recommendations-ndegwa-report/>> accessed 7 July 2022. The Ndegwa Commission was also known as The Public Service Structure and Remuneration commission chaired by Duncan Ndegwa

⁶⁶ Brian Waititu, 'Koech Commission Report and Recommendations- Koech Report' (*Kenya Cradle.com*, 2020) <<https://kenyacradle.com/koech-commission/>> accessed 7 July 2022. The Commission of Inquiry into the Education System of Kenya is also known as the Koech Commission.

⁶⁷ Article 53 of the Constitution of Kenya, 2010; His Excellency the Late President Daniel Moi dismissed the report terming it as wishful thinking, unrealistic and unworkable.

compulsory does not help when it has not made preparations for its implementation.⁶⁸ This scenario as was witnessed in the Kibaki regime validates the sentiments espoused under the conflict theory on the limitation of resources.

Notably, the government came up with **Sessional Paper No. 8 of 2012**, which set out an elaborate policy framework for children's education in, marginalized conflict zones.⁶⁹ The Sessional Paper was followed by an initiative of aiding northern Kenya from its worst problems, a year later.⁷⁰ Implementation of the same did not change the sad story concerning the provision of basic education in these regions. It appears that the bourgeoisie government was more interested in developing the more productive places than the northern part of Kenya.

It is worth noting that the bourgeoisies' government has been coming up with ideas to solve the problem of poor education and marginalization of the aforementioned region. The real solution lies in proper financial allocation to this place for installation of infrastructure for the education program, even if the schools are mobile. The Conflict theory seems to have provided a good explanation concerning the reluctance by the Kenyan Government to allocate adequate resources to Northern Kenya to ameliorate the place and the education system.

⁶⁸ Marc Lacey, 'Primary Schools In Kenya, Fees Abolished, Are Filled To Overflowing' *The New York Times* (2003)
<<https://www.nytimes.com/2003/01/07/world/primary-schools-in-kenya-fees-abolished-are-filled-to-overflowing.html>> accessed 7 July 2022.

⁶⁹ GoK (2005). Sessional Paper No. 1 of 2005 on a Policy framework for education, training and Research. Government Printers, Nairobi. And Sessional paper No. 8, 2012.

⁷⁰ GoK (2006). National policy for the sustainable development of arid and semi-arid lands of Kenya.

3 Theories Analyzing The Findings on the Learning Process of Children in Conflict Situations in Kenya.

3.1 Introduction.

It was this research's assertion that the learning process for children in conflict situations is a checkered one. We have seen the importance of the law in ensuring access to basic education in conflict situations. It was established under this research that several factors influence the learning outcomes. For instance, currently, in Kenya, learning continues amid the COVID-19 pandemic. In Arabel and Mukuru Kwa Njenga in Baringo and Nairobi counties respectively, children were unable to report back to school because their schools had been vandalized. In Samburu, County, parents had to withdraw their children from school due to insecurity.

This part of the paper examines theories that explain the problem at hand in the areas mentioned. There are several theories explaining that situation of learning in conflict areas. However, we shall concentrate on four theories to explain the phenomena: The cognitive development theory, the attachment theory, the social learning theory and the social-cultural theory.

3.2 Cognitive Development Theory

Cognitive development theory was designed by Jean Piaget to look into the thought process of a person in the bid to make a comprehensive appreciation of his or her surroundings.⁷¹ This theory has a lot of implications for the learning process of children in conflict situations in Kenya. The cognitive development theory looks into how a person understands and interacts with the world around them.

It is notable that, how children perceive their environment and relate to concepts is very different from how adults do. Children who are brought up by a single parent or who are orphaned are not likely to do well in their

⁷¹ Papalia, Diane E., Sally Wendkos Olds, and Ruth Duskin Feldman. *Human development*. McGraw-Hill, 2007.

studies.⁷² Perhaps this explains why children in conflict situations stand disadvantaged because they would need a state of normalcy and proper setting to relate to the ideas and concepts imparted to them during their early childhood basic education.

Cognitive development theory postulates that children's thought and perception is influenced by their environment and the things they relate to.⁷³ There are stages of this theory as advanced by Piaget but the underlying idea is the effect of the environment on the education and learning process. It needs to be appreciated that the role of the environment in shaping the mental development and perception of children on matters is fundamental to their appreciation of academic concepts. It is for this reason that it becomes necessary to recognize that a chaotic situation herein referred to as 'a conflict situation' fails to provide a conducive environment for child learning and education.

Notwithstanding the developed mental ability and ability to learn, children remain attached to the ideas and the situations they went through during their early stages of mental development. This is why children in conflict situations in Kenya are disadvantaged because there are a lot of things, they learn due to the hardship and aggression which they cannot unlearn easily.

Children also develop interpersonal skills based on their interactions with people, what they observe and what they are taught. It is worthy to note that all the aforementioned learning processes are affected by the conflict situation in arid and semi-arid areas of Kenya.

3.3 Attachment Theory

Apart from Jean Piaget's cognitive development theory, the next influential theory in the realm of early childhood basic education is the attachment theory developed by John Bowlby. Bowlby, the major proponent of this

⁷² Abuya B. etal, Family Structure and Child Educational Attainment in the Slums of Nairobi, Kenya

<https://doi.org/10.1177/2158244019855849> accessed on 23rd December 2019.

⁷³ *ibid*

theory opines that there is an inherent tendency for children to form attachments with their caregivers as they grow and learn.⁷⁴ Children inherently form attachments during their early stages.⁷⁵

This theory postulates that though children would form some form of attachment with their caregivers, the nature of attachments they form may differ from one child to another. According to this theory, if children are given consistent care, they form secure attachments but if they are not given consistent care their attachments become repulsive, disorganized or ambivalent.⁷⁶ The implication of lacking proper and secure attachments usually influences the behavior of children when they grow to become adults. Insecure attachments in children have serious implications on children's learning, especially in conflict situations, such as the cases of Moyale, Wajir, Garissa, Kwale, Lamu and West Pokot areas among others. It is very natural for children who failed to have secure attachments during their childhood to become repulsive or aggressive. The problem is that children in conflict situations in Kenya are unlikely to have secure attachments due to the rough conditions of life that make it very difficult for their parents to give them consistent attention.⁷⁷

Livelihood in conflict situations in Kenya is characterized by migration from one place to another, transfer of teachers, death or injury of some teachers or caregivers and food problems. This situation implies that children are not able to form proper attachments because they do not have a proper setting for that. If they develop some attachments with a teacher as a caregiver but the teacher leaves the region due to insecurity issues, the children who depended on her or him are left without the support they are used to.

⁷⁴ Schore, Judith R., and Allan N. Schore. "Modern attachment theory: The central role of affect regulation in development and treatment." *Clinical Social Work Journal* 36, no. 1 (2008): 9-20.

⁷⁵Psychologist World. Attachment Theory. Developmental Psychology. Retrieved from:

<https://www.psychologistworld.com/developmental/attachment-theory>. Accessed: August 30th, 2018.

⁷⁶ Holmes, Jeremy. *John Bowlby and attachment theory*. Routledge, 2014.

⁷⁷ Some parents in conflict situations may have died or simply displaced leaving their children without proper attachment.

On other occasions, teachers resign from their employment due to issues concerning insecurity. In the same manner, children who depended on the teacher for support are seriously disadvantaged.⁷⁸ On other occasions, when parents migrate with their children from one region to another in search of food and livelihood, they fail to give their children sufficient attention because of the never-ending problems they have to solve.

In the above mentioned situations, children never get sufficient and consistent attention. They, therefore, become repulsive and continue to be so even after they pass the age of ten.⁷⁹ The implication of the same is that children in such places become difficult to teach. Such children with repulsive behavior are never willing to learn.

Children's learning at an early stage of education requires that they develop some attachments with the teacher. As compared to children learning in serene and conducive environments in places such as Nairobi; children in Pokot and Samburu lands would be slow in learning and grasping concepts because on most occasions they did not have secure attachments with their caregivers including teachers in their early stages.

3.4 Social Learning Theory

Developed by Albert Bandura, the social learning theory explains how children learning in conflict situations is utterly impaired due to their exposure. The theory postulates that children's learning takes place through observation, listening and/or perception of their environment.⁸⁰ Other than what children are taught in school, they mostly learn from what they see other people do, what they hear from other people and what they have been exposed to. It would be difficult for children to unlearn what the environment has taught them consistently.

⁷⁸ Due to ethnic conflict in the Northeastern teachers have resigned to secure their lives.

⁷⁹ Bretherton, Inge, and Kristine A. Munholland. "Internal working models in attachment relationships: Elaborating a central construct in attachment theory." (2008).

⁸⁰ Fonagy, Peter. *Attachment theory and psychoanalysis*. Routledge, 2018.

Further, it is worth noting that observation plays a critical role in the learning and development of children.⁸¹ When children in the marginalized conflict situations in Kenya are exposed to incessant conflict, they become accustomed to conflict and in the process, they acquire such habits or behavior.⁸² While school learning would impact how children perceive things and go about their business when they become adults, the mannerisms and the behavior of adults around the children in armed conflict areas as well as the habits of their peers influence a lot of their conduct and behavior.

3.5 The Sociocultural Theory

Developed by Lev Vygotsky, the sociocultural theory postulate that children learning is majorly influenced by the social and cultural setting they are exposed to.⁸³ When children are born in a region and grow in it, they are likely to acquire the traits they find there. According to the sociocultural theory, culture and social happenings around a child provide elementary education to a child and continue to form an integral part of his education life until he becomes an adult. It is noteworthy that the influence of culture and social organization of a child does not cease with adulthood.

Children have an innate tendency to observe the values they learnt from their cultural and social upbringing especially when the said cultural or social learning was very strong. For this reason, the exposure of children to conflict and chaotic societal alignment influence how children learn and acquire new ideas. When academic learning of children is constantly interrupted due to conflict and chaos, the children would begin to relate cordially with violence and get their attention much to issues revolving around violence instead of focusing on academic concepts. For this reason, the social and cultural environment children are exposed to have a serious impact on them.

⁸¹ Cherry, Kendra. "Social learning theory: An overview of Bandura's social learning theory." *The New York Times Company. (Online article)* (2011).

⁸² McLeod, Saul A. "Bandura-social learning theory." *Retrieved from* (2011).

⁸³ Lantolf, James P., ed. *sociocultural theory and second language learning*. Vol. 78, no. 4. Oxford University Press, 2000.

Vygotsky who is the major proponent of the sociocultural theory holds the opinion that learning is a social process especially when the same is being done formally in an education system.⁸⁴ When children are taught, they attempt to first relate with the person teaching them and interact with him or her socially before they get to appreciate the concepts he/she is talking about.⁸⁵ This is the reason why learning is faster and more efficient when children relate cordially with their teacher than when they have no regard for him.

The social aspect of learning requires that teachers develop a good working relationship with the students since this makes the process of acquisition of knowledge easier and better.

4 Conclusions and Recommendations

4.1 Conclusion

4.1.1 Pros

It is apparent from the theories concerning the nature of the right to basic education that;

1. The right to basic education if deprived, violated or denied leads to the infringement of a right.
2. That the government under the social contract theory, ought to take the necessary steps to protect the right to basic education.
3. From the vulnerability theory, it is apparent that focus ought to be channeled towards the children in the vulnerable regions in order to realize the right to basic education.

⁸⁴ Kozulin, Alex, Boris Gindis, Vladimir S. Ageyev, and Suzanne M. Miller, eds. *Vygotsky's educational theory in cultural context*. Cambridge University Press, 2003.

⁸⁵ Lupton, Deborah, ed. *Risk and sociocultural theory: new directions and perspectives*. Cambridge University Press, 1999.

It is also clear that the right to education under the social contract theory cannot be alienated. It is noteworthy that a slight change in the children's environment might go a long way to realizing the right to basic education. The study established that the available laws generally provide that education shall be availed to all.

4.1.2 Cons

From the assessment of the conflict theory and the various commission reports it is apparent that the government has a bit of an issue allocating resources to less productive regions for educational purposes. It is also a challenge to get teachers who are the caregivers of the children at school in conflict situations to stay in those areas let alone perform their duties. Lastly, conflict prevents some students from getting to school, while some schools are closed indefinitely until the status of security in the regions improves. It is only under a secure atmosphere that individuals within the State can engage in productive activities to meet their needs.

4.2 Recommendations.

The people who find themselves in conflict situations need to be taught the effect of conflict on their social-economic activities and children's education. There is a need to adopt methodologies of learning to unlearn the negative ideas imparted to the youth. We need to synergize the governance systems and stakeholders' roles in the lives of the children who find themselves in conflict situations.

Once each duty bearer gets committed to their respective roles the result will be the achievement of uniformity on children's right to access to basic education. We need to embrace the spirit behind the distributive justice theory by John Rawls. Finally, the laws and policies should be aligned to cater for children in conflict situations.

Bibliography

- A. B. Mongare (2018), 'When the Victim Stings the Good Samaritan: Legal implication on Refoulment of refugees, a Kenyan perspective' *Journal of Current innovation* 6th Edn vol 2.
- A. Weale, 'Associative Obligation and Social Contract.' <
<https://doi.org/10.1007/s11406-016-9797-5> >accessed on
21st July 2022.
- Abuya B. et al, 'Family Structure and Child Educational Attainment in the Slums of Nairobi, Kenya'
- Abuya E.O and Ikobe, 'Internally displaced person during 2007/08 in Kenya.'
- Achoka J S K, 'Accessing to Basic Education in Kenya: Inherent Concerns,' (2007) 2 (10) *Educational Research*
- Adan, M. A., & Orodho, J. A. (2016), 'Effects of inter-clan conflicts on quality school outcomes in secondary.'
- ALRMP/GoK. (2004). 'The Pastoralist communities and free primary education in Kenya. Preliminary findings. Commissioned by Coalition of Pastoralist Child Education of Arid Lands Resource Management Project and Action Aid Kenya.
- Anton J. M. Dijker (2014), 'A Theory of Vulnerability- based Morality.'
- Benta A. Abuya, Maurice Mutisya, Elijah O. Onsomu, Moses Ngware, and Moses Oketch, 'Family Structure and Child Educational Attainment in the Slums of Nairobi, Kenya' Can be accessed at;
<<file:///C:/Users/uaer/Desktop/articles/2158244019855849%20education%20in%20conflict.pdf>.

Benta A. Abuya et al, 'Parental education and high school completion in the urban informal settlements in Kenya'

Benta A. et al, 'Family Structure on Education Achievement in Slums of Nairobi.'

Bretherton, Inge, and Kristine A. Munholland. "Internal working models in attachment relationships: Elaborating a central construct in attachment theory." (2008).

Brock-Utne, B. (2000), 'Who's Education for All? The decolonization of the African Mind,' Falmer Press, New York.

Cherry, Kendra. "Social learning theory: An overview of Bandura's social learning theory." *The New York Times Company. (Online article)* (2011).

Chuma Himonga, 'The right to health in an African Cultural Context: The role of Ubuntu in realization of right to Education.'

Clifford Goldstein, 'The Final Hope: Three Messages For An Anxious World,' 2021, Africa Herald Publishing House.

David Jason (2015), 'The Concept of Human Rights Protection and the UN Guiding Principles on Business and Human Rights.' pp137-158.

Fonagy, Peter, 'Attachment theory and psychoanalysis,' Routledge, 2018.

Hobbes, Thomas. "Social Contract Theory. "Also see Gerhard F. Hasel (PhD, Vanderbilt University) The Theory. "Also 2nd Quarter, 2021, The Promise God's Everlasting Covenant

Holmes, Jeremy. *John Bowlby and attachment theory*. Routledge, 2014.

- B. Abuya, Family Structure and Child Educational Attainment in the Slums of Nairobi, Kenya
< <https://doi.org/10.1177/2158244019855849> > accessed on 23rd December 2019.
- Justino, Patricia. "Barriers to education in conflict-affected countries and policy opportunities." *Findings from the Global Initiative on Out-of-School Children* (2014).
- Kariuki Muigua, 'Natural resources conflict addressing inter- ethnic strife through environmental justice in Kenya.' Can be accessed at < *natural –resource-conflict- addressing-inter-ethnic strife- through-environmental justice*>
- Kendra Cherry, "The 4 Stages of Cognitive Development: Background and Key Concepts of Piaget's Theory." *Very well mind*, 2018. Retrieved from: <https://www.verywellmind.com/piagets-stages-of-cognitive-development-2795457>
- Migai Akech, 'Public Law Values and the Politics of Criminal Injustices: Creating a Democratic Kenya.' In *International Review of Education* (2005) 51: 499-516.
- Kozulin, Alex, Boris Gindis, Vladimir S. Ageyev, and Suzanne M. Miller, eds. *Vygotsky's Educational Theory in Cultural Context*. Cambridge University Press, 2003.
- Krätli, S. (2001). 'Education Provision to Nomadic Pastoralists a Literature Review.' IDS Working Paper 126
- Lantolf, James P., ed. *Sociocultural Theory and Second Language Learning*. Vol. 78, no. 4. Oxford University Press, 2000.
- Learning Theories. Cognitive Development Theory-Learning Theories. Retrieved from:

[<https://www.learning-theories.com/piagets-stage-theory-of-cognitive-development.html>](https://www.learning-theories.com/piagets-stage-theory-of-cognitive-development.html)

Lucyline Nkatha Murungi, 'The Right to Education under the Constitution of Kenya: Scope and Prospects for Enforcement' in Japhet Biegon and Geoffrey Musila (eds), *Judicial Enforcement of Socio-Economic Rights under the New Constitution: Challenges and Opportunities for Kenya* (Kenya Section of the International Commission of Jurists 2011). 217-244.

Lumen, 'Cognitive Development: The Theory of Jean Piaget. Educational Psychology. Student Development.' Module 3. Retrieved from:

[<https://courses.lumenlearning.com/educationalpsychology/chapter/cognitive-development-the-theory-of-jean-piaget/>](https://courses.lumenlearning.com/educationalpsychology/chapter/cognitive-development-the-theory-of-jean-piaget/)

Lupton, Deborah, ed. *Risk and Sociocultural Theory: New Directions and Perspectives*. Cambridge University Press, 1999.

M Roa, 2014, 'Considering Strategic Litigation as an Advocacy tool.' Can be accessed at < www.tandfonline.com > doi > pdf>

Macharia, M. (2011), 'Reflections on Kenya's National and Security Interests', *Journal of Language, Technology and Entrepreneurship in Africa*, 3(1).

Mary Nyeri Kinyanjui, 'African Markets and the Utu-ubuntu Business Model: A Perspective on Economic Informality in Nairobi,' Cape Town: African Minds (Pb R250 – 978 1 928331 78 0). 2019, 200 pp. Cambridge University Press: 15 January 2021.

McLeod Saul, 'Jean Piaget's Theory of Cognitive Development' (2018) Retrieved from:

< <https://www.simplypsychology.org/piaget.html> on August 28>

McLeod, Saul A. "Bandura-social learning theory," (2011).

Ministry of Education (2008), 'Report on the Policy Framework for Nomadic Education in Kenya', July 2008.

Ministry of Education (2009), 'Various Reports on Monitoring of Mobile Schools in Fafi, Lagdera, Wajir West, Wajir East, Ijara, Tana River, Tana Delta, Turkana North and Samburu East Districts.'

MOEST (2005), 'Kenya Education Sector Support Programme 2005-2010: Delivering Quality Education and Training to all Kenyans.'

Mongare A.B, 'The Right to Education for Children in Conflict Situations in Kenya: How Responsive is Kenya?' (2014). Available at <http://erepository.uonbi.ac.ke/bitstream/handle/11295/94616/Mong%60are_The%20to%20education%20for%20children%20in%20conflict%20situation:%20how%20is%20Kenya.pdf?sequence=1>

Moon, Jennifer A. *Reflection in learning and professional development: Theory and practice*. Routledge, 2013.

New King James Bible: 2Corinthians 12:8-9, Hebrews 4:16, Romans
<https://www.biblestudytools.com/topical-verses/grace-bible-verses/> accessed on 24th April 24, 2019.

Ngome, C.K (2005), 'Mobile School Programme for Nomadic Pastoralists in Kenya: Pilot project in Wajir, Ijara and Turkana Districts,' Prepared for ALRMP.

Nzesei, Mutua Meshack. "Education Marginalization in the Kenyan Conflict-Affected Areas: Human Capital Theory and

Rights-based Perspectives." *International Journal of Innovative Research and Development* 6, no. 6 (2017). Can be accessed at;< ONE14 (2): e0212633.doi: 101371/journal.pone.0212633>

Papalia, Diane E., Sally Wendkos Olds, and Ruth Duskin Feldman. *Human development*. McGraw-Hill, 2007.

Piaget, 'Stages of Development.' Retrieved from:
<<https://www.webmd.com/children/piaget-stages-of-development#1>>

Psychologist World, 'Attachment Theory and [Developmental Psychology](#).' Retrieved from: <
<https://www.psychologistworld.com/developmental/attachment-theory>>

Republic of Kenya. (1974), 'Development Plan 1974-1978,' Government Printers. Nairobi. (1964). Education Commission Report of 1964. Government Printers. Nairobi.

RG HOLCOMBE (2014), 'The Economic Theory of Rights / Journal of Institutional Economics' Cambridge Core

RG Holicomb, 'Economic Theory of Rights.'

Riley, Patrick. "Will and political legitimacy: A Critical Exposition of Social Contract Theory in Hobbes, Locke, Rousseau, Kant, and Hegel." (1982).

Ruto Sarah J, Ongwenyi Zipporah N, Mugo John K, (2009), 'Educational Marginalization in Northern Kenya,' *United Nations Educational, Scientific and Cultural Organization, UNESCO*.

Scholastica Awino Omondi, 'An Evaluation of Child Sexual Abuse Trial Procedure in Kenya' www.questjournals.org, vol 2 issue 4(2014) pp:11-63

Schore, Judith R., and Allan N. Schore. "Modern Attachment Theory: The Central Role of Affect Regulation in Development and Treatment." *Clinical Social Work Journal* 36, no. 1 (2008): 9-20.

Sifuna, D.N (2007), 'The Challenge of Increasing Access and Improving Quality: An Analysis of Universal Primary Education Interventions in Kenya and Tanzania since 1970s,' In *International Review of Education* (2007) 53: 687-699.

Sifuna, D.N. (2005), 'Increasing Access and Participation of Pastoralist Communities in Primary Education.'

Stephen Aleksovi, Oliver Bakreski, and Biljana Avaramovska (2014), 'Collective Security— the Role of International Organizations: Implications in International Security Order,' *Mediterranean Journal of Social Sciences*, 5(27).

A Review of Dispute Resolution Mechanisms for Communities in the Mining Sector in Kenya

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Abstract

Mineral extraction in Africa has been synonymous with community protests, acts of sabotage and armed conflict. At the centre of these conflicts are local communities contesting for resources. Kenya is increasingly focusing on the mining sector for its economic development. This article undertakes a review of the dispute resolution mechanisms available to communities in the sector.

Introduction

The intersection of conflict and mining in Africa is well documented¹. Conflict² is identified as one of the drivers and manifestations of the

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¹ From Conflict to Peace building: The Role of Natural Resources and the Environment, UNEP, 2009, accessed at <https://wedocs.unep.org/handle/20.500.11822/7867>

² Conflict is defined as 'a dispute or incompatibility caused by the actual or perceived opposition of needs, values and interests. In political terms, conflict refers to wars or other struggles that involve the use of force.' Refer to *ibid*, p.7. Dispute is defined as 'A conflict or controversy; a conflict of claims or rights; an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other, refer to *Black's Law Dictionary*, Rev. 4th Ed., St Paul, Minn, West Publishing Co., 1968, p. 558; Disputes can be categorized as being over material/physical resources such as land and originate from conflicts based on human needs and aspirations such as identity, freedom, justice, equality, security etc. Refer to John W. Burton, *Conflict Resolution: The Human Dimension*, *The International Journal of Peace Studies*, January 1998, Vol.3, No.1. Conflict is defined as 'interactions of interdependent people who see their goals as incompatible, and who believe the 'other' people are interfering with their efforts to satisfy their interests or values'. Unresolved conflicts escalate into disputes.' Refer to Belynda Hoffman, *Pioneering New Approaches in Support of Sustainable Development in the Extractive Sector: Guidelines and methodologies for Conflict management*, World Bank, ICCM & ESMAP, 16th November, 2003.

‘resource curse’ phenomenon. Poverty, corruption and inequitable governance systems have the potential to fuel conflict and possibly wars and civil strife in resource rich areas. This flammability is enhanced by the conflicting interests of the main protagonists in a mining project namely, local communities, foreign mining companies and government. The points of friction from the standpoint of communities include access to land, access to mineral resources, ownership of land and mineral resources, impacts of displacement, cultural differences, access to water, environmental impacts, sharing of benefits such as revenues, jobs and business opportunities, access to information, revenue mismanagement, amongst others.

The African Mining Vision³ identifies the elimination of human rights abuses and conflict connected to natural resources as an important objective for the region. Globally, there is an influx of international and regional initiatives that are aimed at managing conflicts in the mining sector in Africa in response to the ‘conflict minerals’⁴ problem.⁵

Domestically, the gap analysis of the Kenya Country Mining Vision⁶ identifies conflict between communities and mining rights holders, and lack

³ Accessed at <https://www-cdn.oxfam.org/s3fs-public/bp-africa-mining-vision-090317-en.pdf> on 24th November, 2021

⁴ This term is defined by section 1502, US Dodd- Frank Wall Street Reform and Consumer Protection Act 2010 to refer to minerals identified by the Secretary of Finance that are financing conflict in the DRC and adjoining countries. This term associates the extraction of minerals to civil war, armed groups, forced labour, gender violence, money laundering, smuggling, amongst other illegal activities which have been experienced in Africa and South America, notably in DRC, the Great Lakes Region, Colombia, Liberia, Angola and Sierra Leone.

⁵ IRP (2020). Mineral Resource Governance in the 21st Century: Gearing extractive industries towards sustainable development. Ayuk, E. T., Pedro, A. M., Ekins, P., Gatune, J., Milligan, B., Oberle B., Christmann, P., Ali, S., Kumar, S. V, Bringezu, S., Acquatella, J., Bernaudat, L., Bodourogrou, C., Brooks, S., Buergi Bonanomi, E., Clement, J., Collins, N., Davis, K., Davy, A., Dawkins, K., Dom, A., Eslamishoar, F., Franks, D., Hamor, T., Jensen, D., Lahiri-Dutt, K., Mancini, L., Nuss, P., Petersen, I., Sanders, A. R. D. A Report by the International Resource Panel. United Nations Environment Programme, Nairobi, Kenya, p. 203

⁶ Ministry of Mining, Kenya Country Mining Vision gap analysis report, March 2017, P. 20 accessed at

of knowledge of dispute resolution mechanisms to deal with them as some of the impediments to the sustainable development of the sector. The linkage between conflict management and sustainable development is amplified by Sustainable Development Goal 16⁷ which aims to '*promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels*'. There is no doubt that when conflicts escalate to disputes, an effective resolution mechanism prevents further escalation and ensures sustainability in the mining sector. This article examines the dispute resolution mechanisms in the mining sector available to communities with a focus on the role of the Cabinet Secretary in light of emerging legal issues.

Methods of Conflict Resolution in the Mining Sector

The World Bank in 2003 provided guidelines for conflict resolution in the extractives sector.⁸ These guidelines identify four approaches to conflict resolution⁹. The avoidance approach where one or both parties ignore the conflict resulting in a 'take it or leave it' situation, the power approach which employs the threat of coercion and dominance tactics to impose a one-sided solution, the rights approach based on legally recognized rights and consensus approach which focuses on compromising the interests of the contesting parties.

Section 154 of the Mining Act, 2016 establishes four mechanisms for dispute resolution for matters concerning a mineral right, namely:

<https://www.ke.undp.org/content/kenya/en/home/library/poverty/Mining-Vision-Gap-Report.html> on 24th November, 2021

⁷ SDG 16, Peace Justice and Strong Institutions, accessed at <https://www.unep.org/explore-topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-16> on 24th November, 2021

⁸ Belynda Hoffman, *Pioneering New Approaches in Support of Sustainable Development in the Extractive Sector: Guidelines and methodologies for Conflict management*, World Bank, ICCM & ESMAP, 16th November, 2003

⁹ Ibid, p.4, For purposes of this article conflict is defined as '*interactions of interdependent people who see their goals as incompatible, and who believe the 'other' people are interfering with their efforts to satisfy their interests or values*'. *Unresolved conflicts escalate into disputes.*'

1. The Cabinet Secretary;
2. Mediation or Arbitration as per the agreement of the parties; and
3. Courts of law.

In addition to the above, project grievance resolution mechanisms¹⁰ together with accountability mechanisms provided by international financiers are growing in their influence in dispute resolution in the extractives industries.¹¹ The Community Development Agreement (CDA) Committees¹² which are established to negotiate the community development agreements between large scale mining licensees and local communities, have a mandate of dispute resolution. This includes disputes arising from the implementation of the CDA¹³ as well as other grievances and complaints not related to the CDA raised by the mining company or the community.¹⁴ The Kwale CDA Committees have established a Grievance Resolution Sub-Committee which employs good faith negotiation methods, it can advise parties to refer disputes that do not relate to the CDA to formal mechanisms or escalate disputes to the Committee.

The Community Land Act¹⁵ also specifically recognises alternative dispute resolution methods including mediation, arbitration and traditional dispute/conflict resolution methods where community land is involved. The said Act encourages courts to apply customary law subject to constitutional

¹⁰ These are internal grievance mechanisms established and managed by mining companies sometimes in liaison with community representatives.

¹¹ For example World Bank Inspection Panel investigation of the Ol Karia geothermal project, accessed at <https://www.inspectionpanel.org/panel-cases/electricity-expansion-project> on 24th November, 2021 and complaints made to European investment Bank Complaints Mechanism accessed at https://www.eib.org/attachments/complaints/sg-e-2014-07-sg-e-2017-08-mediation-agreement_redacted-additional-protection-applied.pdf

¹² S. 7 Mining (Community Development Agreements) Regulations, 2017

¹³ These are agreements between local communities and large scale miners on projects financed by at least 1% of the gross revenues earned per year.

¹⁴ Section 7 (4) Mining (Community Development Agreements) Regulations, 2017

¹⁵ Part VIII, Community Land Act no. 27 of 2016

safeguards. The National Environment Tribunal¹⁶ and water agencies¹⁷ resolve environmental disputes including those connected to mining.

The Mining and Minerals Policy 2016¹⁸ recognises the potential of conflict between communities and mining companies on access to land, it states:

‘The Constitution of Kenya vests minerals on the National Government in trust for the people. At the same time, it sanctifies rights to property including land. Mineral operations are undertaken on, in and or under land surface. However, it is not clear between the Land Act and the Mining Act which one supersedes the other in case there is a dispute between mineral rights and surface rights. This hampers exploration and mineral development in some areas and discourages investments in mining.’¹⁹

To address this grave issue, the policy proposes to deploy liaison officers to communities and ensure that communities’ human rights are respected during displacement and that they are compensated²⁰. The Mining and Minerals Policy 2016 considers dispute resolution in the sector perfunctorily and fails to establish clear principles, objectives, options or structures for this important function.

Challenges of Dispute resolution mechanisms under the Mining Act

A brief overview of the dispute resolution mechanisms under the Mining Act discloses the following:

Arbitration and Mediation

Most of the dispute resolution mechanisms prescribed by the Mining Act are alternative dispute resolution methods. Arbitration and mediation are confidential processes, therefore there are few published cases. Arbitration in the mining sector focuses on commercial and investment disputes. For

¹⁶ Section 125, Environmental Management and Coordination Act, No. 8 of 1999

¹⁷ Water Act, Cap 372 Laws of Kenya

¹⁸ Republic of Kenya, Sessional Paper No. 7 of 2016

¹⁹ Ibid, p. 3

²⁰ Ibid, P.9

example, the Cortec case²¹ which was resolved through international investment arbitration. The Nairobi Centre for International Arbitration²² reports that it handles commercial matters under the rubric of energy and resources but does not disaggregate the cases concerning the mining sector. Compared to arbitration, there is a great opportunity for community based mediation in the extractives sector. The Sessional Paper No. 5 of 2014 on National Policy for Peace Building and Conflict Management²³ established a peace building and conflict resolution structure of peace fora and peace committees comprising of community members. Although these peace platforms are hosted in the national security docket, their mandate includes resource based conflicts. Their membership is drawn from faith based organisations, community elders, civil society, representatives of women and youth, county government officials and national government administration officials as patrons. The Ministry of Interior and National Coordination has developed guidelines for mediators and mediation as an inclusive, consensual and non-coercive process. Several successful interventions have been undertaken but funding and capacity constraints have limited the impact of these peace platforms.²⁴ Court annexed mediation²⁵ provides another avenue for consensual resolution of disputes filed in court.

Litigation

The Environment and Land Court Act No. 19 of 2011, vests the Environment and Land Court with jurisdiction over mining disputes²⁶. Section 157 of the Mining Act mandates the said court to hear appeals from and review the decisions of the Cabinet Secretary. Magistrate courts have the jurisdiction to hear criminal proceedings for offences under the Mining Act.

²¹ *Cortec Mining & 2 others vs The Republic of Kenya*, ICSID ARB No. 15/29

²² <https://ncia.or.ke/>

²³ Ministry of Interior and National Coordination, Guidelines for Mediation and Mediators, p.4, accessed at https://nscpeace.go.ke/resources/item/download/6_487289a54d054a46a54ab356b659f3c1

²⁴ Directorate of Peace building and Conflict Management, Capacity Building Forum for Peace Committees, September 2020, accessed at <https://www.nscpeace.go.ke/>

²⁵ Section 59 B, Civil Procedure Act, Cap 21 Laws of Kenya

²⁶ Section 13 (2)

Out of the four mechanisms espoused by section 154 of the Mining Act 2016, only the courts have institutionalised the public reporting of disputes, albeit decisions of the Superior courts. A random survey of 35 civil mining cases on the *kenyalaw* website²⁷ reveals that most litigation filed after the promulgation of the Constitution of Kenya 2010 relate to resource allocation in terms of licensing and land access.

Subject matter	NO. /35
Land	12
Licencing	18
Taxation	5
Total	35

The above figures indicate that half the disputes involve licencing (18/35). Most of these disputes relate to revocation of licences and double allocations. The land disputes are about a third (12/35), more than a third of these disputes involve local communities' interest in land (8/12).

These statistics cohere with the findings of the World Bank Extractives Industries (EI) Value Chain Prevention of Conflict²⁸ paper which identifies the first stage in the EI value chain, namely the award of contract and licences stage, as raising most of the triggers to conflict from issues of lack of consultation and inclusion of local communities, land, local content and corruption. If one estimates that only about 10% of disputes are filed in court,²⁹ this indicates that a majority of disputes are unresolved or employ alternative dispute resolution methods.

The Doctrine of Exhaustion

The Judiciary has developed and published the Alternative Justice System (AJS) framework policy. This is founded on Article 159 (2) (c) of the Constitution which requires the Judiciary to promote alternative, traditional

²⁷ <http://kenyalaw.org/caselaw/>

²⁸ Prevention of Conflict in Resource Rich Countries, World Bank SEGOM, 2015, p.6

²⁹ Alternative Justice Systems Framework Policy, Judiciary of Kenya, 2020, p. iv

and other dispute resolution mechanisms. The AJS is founded on philosophical and constitutional precepts of freedom, human dignity and equality. It adopts a human rights approach which is expected to be infused in traditional, informal and other dispute resolution mechanisms.

Sections 9 (2) & (3) of the Fair Administrative Action Act No. 4 of 2015 espouse the doctrine of exhaustion which requires statutory dispute resolution mechanisms to be utilised and completed before a party accesses the courts³⁰. This principle requires courts to only take up matters where statutory ADR mechanisms have been exhausted. This principle is controversial as it may appear as though the courts are abdicating their responsibility and yet it is aligned to Article 159 (2) (c) of the Constitution and provides an important tool for managing case backlog.

This doctrine has been applied in constitutional matters as in the recent case of *Peter Nzeki & 14 others v Base Titanium Limited & 4 others [2021] eKLR*, which involved a constitutional petition seeking conservatory and declaratory orders against a mining company and government officials for land compensation claims for persons under the threat of displacement, the court held that the Petitioners had approached the Court prematurely and ought to have filed their claim with the Cabinet Secretary and dismissed the Petition.³¹

³⁰ Section 9 (4) provides for exceptions to this rule

³¹ Excerpt from **Peter Nzeki & 14 others v Base Titanium Limited & 4 others [2021] eKLR**, '13. *From the above provisions of the law, it is clear that a clear and elaborate procedure for redress of any grievance exists and outlined under the Mining Act. Under the Act, disputes are referred to the Cabinet Secretary in the first instance. It is also clear that any person who is aggrieved by any decree, order or decision made or given under the powers vested in the Cabinet Secretary may appeal to this court within thirty days. The question then becomes whether an aggrieved party can ignore the elaborate provisions in the Mining Act and resort to this court, not in an appeal as provided, but in the first instance.... I find no difficulty in concluding that the petitioners herein failed to apply or follow the procedure provided for under the Mining Act and have therefore come to this court prematurely and on that ground alone, this petition fails.*'

The doctrine has been invoked against the High Court's supervisory jurisdiction of judicial review. Therefore not only should a party have the dispute determined by the Cabinet Secretary but any appeal to the High Court³² must be exhausted before the supervisory jurisdiction is invoked. In the *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others* [2017] eKLR, the Court of Appeal upheld the High Court's decision to that effect and dismissed the judicial review application.³³ This suit ended up in international arbitration.

It is clear from the above cases that the Judiciary in accordance with Article 156 (2) (c) of the Constitution has given judicial recognition to the Cabinet Secretary as an alternative dispute resolution mechanism established by the Mining Act, 2016. Although section 154 of the Act appears to confer a concurrent jurisdiction in both the court and the Cabinet Secretary, the application of the doctrine of exhaustion in the above – mentioned cases confers an exclusive jurisdiction in the first instance on the Cabinet Secretary.

Below we carry out an assessment of the current statutory mechanism that places dispute resolution responsibilities on the Cabinet Secretary to determine whether it promotes or hampers access to justice for local communities. The assessment considers a normative criteria where Independence, Impartiality and Competence³⁴ are evaluated.

³² Section 157 Mining Act 2016 refers to appeals to the High Court although by virtue of the Environment and Land Court Act No. 19 of 2011, the appellate jurisdiction is vested in the Environment and Land Court.

³³ Excerpt from **Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others** [2017] eKLR '35. *That was an alternative remedy which the appellant ought to have disclosed and explained why it was not efficacious, thus resorting to judicial review. The appeal process, unlike judicial review, would afford the parties an opportunity to explore the merits of the decision. We think in the circumstances, the trial court did not misdirect itself in the exercise of its discretion as it accorded with the law. That finding would be sufficient to dispose of this appeal.*'

³⁴ Bangalore Principles of Judicial Conduct, UNODC, Vienna, 2018

Jurisdiction of the Cabinet Secretary for Mining

Under the Mining Act, the Cabinet Secretary has the function of resolving specific disputes between mineral right holders and communities regarding the assessment and payment of compensation for interference with property, land rights, agricultural livelihoods and water.³⁵ In addition, the Cabinet Secretary has powers to determine disputes on access to roads, electricity and water for mining; boundaries of mining areas³⁶ and operational infractions.³⁷

Under the Mining (Community Development Agreement) Regulations, 2017, the Cabinet Secretary is mandated to resolve impasses in the negotiation of the CDA and disputes regarding the identification of the affected community.

The Cabinet Secretary's jurisdiction under the Mining Act indicates the pivotal role the Cabinet Secretary plays in disputes concerning communities. It is surprising to note that the role of the Cabinet Secretary in the mining sector is not captured in the Mining and Minerals Policy 2016.

The provisions regarding the Cabinet Secretary's powers on compensation in Kenya's Mining Act 2016 borrow heavily from the Minerals and Mining Act 2006 of Ghana³⁸. The Ghanaian law is fundamentally different from the Kenyan law in one significant aspect, the conferment of a mineral right in Ghana simultaneously grants access to land rights³⁹.

³⁵ S. 153 i.e. deprivation or disturbance of land rights, destruction to buildings and immovable property, loss of sustenance and earnings from agricultural activities arising from the damage or loss caused by the mineral right holder, damage to water levels and water supply; determining the boundaries of mining areas; water access rights for mining purposes; claims for access to utilities and other infrastructure for mining purposes;

³⁶ Disputes between mineral right holders concerning mining area boundaries are still vested in the Director of Mines. Reg. 22 Mining (Licence and Permits) Regulations 2017

³⁷ S. 155, i.e. operational wrongful acts and omissions.

³⁸ Sections 72, 73 and 74

³⁹ Sections 2-4, 13 (9) and 72 (1)

‘13 (9) Subject to sections 73 and 74, a mineral right granted by the Minister under this section is sufficient authority for the holder over the land and entitles the holder to enter the land in respect of which the right is granted.’

Therefore, the discussion between a mineral right holder and a land owner in Ghana under the said law is one of compensation. The Kenyan scenario is different, the Mining and Minerals Policy 2016⁴⁰ highlights the issue as follows:

Mineral right holders are required to obtain consents from owner or lawful occupier of land in which their operations are to be undertaken. However, government plays no role in the negotiations of these consents between land owners and exploration entities. Nonetheless, due to the high priority given to the mining and extractive industry as a whole, the government intends to deploy liaison officers to facilitate such negotiations and address other community related issues for purposes of achieving and maintaining harmony in the industry.

*For mining purposes, access to land may entail compensation, relocation and resettlement of the affected land owners and occupiers. As a result, the government shall ensure prompt, just and adequate compensation to the affected.*⁴¹

The consent of landowners is required by sections 36, 37 and 38 of the Mining Act 2016. In *Titus Musau Ndome vs CS Mining and Anor JR 51 of 2016* Ogola J stated thus:

‘....it is important to observe that under the Constitution of Kenya a person’s right to property is protected and so, the Applicant cannot purport to have the rights to carry out mining or prospecting activities on the Interested Party’s land without consent of the owner of the land in perpetuity. The Applicant’s claim to have that right is clearly illusory, for Sections 37 and 38 of the Mining Act 2016 have made it clear that persons applying for a prospecting and/or mining right must obtain consent of the land owner in

⁴⁰ Sessional Paper No. 7 of 2016, p. 3

⁴¹ Ibid, p.9

case of private land and or the County Government in case of trust land before they can be issued with a prospecting or mining licence.'

Therefore, if the negotiations for access to land fail, under the Kenyan mining law, land owners have the right to refuse to pave way for a mining project. Therefore, when a land owner's rights to land are deprived or disturbed by a mineral right holder, the dispute may not be a compensation issue. The Cabinet Secretary's powers are therefore limited to voluntary resettlement and a case involving the refusal of a landowner to leave their land including involuntary resettlement⁴² are outside the Cabinet Secretary's remit.

Section 153 (4) of the Mining Act 2016 provides as follows:

'A person shall not demand or claim compensation whether under this Act or otherwise—

- (a) in consideration for permitting entry to the land connected with the enjoyment of rights conferred under a mineral right;'*

This provision fetters property rights for example lease arrangements which enable the land to revert back to the landowners once mining operations end, where this is feasible. The Cabinet Secretary's role in this regard may be construed as providing an avenue for arbitrary deprivation of land and threatening Article 40 rights.

Independence and Impartiality

The Cabinet Secretary (CS) is a member of the Executive arm of government⁴³. The Cabinet Secretary is vested with a wide mandate by the Mining Act which includes to negotiate mineral agreements, select mining

⁴² 'Resettlement is considered involuntary when affected persons or communities do not have the right to refuse land acquisition or restrictions on land use that result in displacement. "World Bank Environmental and Social Framework." World Bank, Washington, DC, 2016, p.53

⁴³ Article 130 of the Constitution of Kenya

investors, identify strategic minerals, licensing, designate mining areas, enact regulations, resolve disputes and general administration of the sector. The Cabinet Secretary in the mining sector wears many hats, he/she is the agent of the owner of the mineral resource, the policy maker, the administrator, the regulator and the judge.

The mining sector has adopted a unique governance structure as compared to other sectoral laws in Kenya which have separated administrative from adjudicatory functions e.g. water, energy, environment, wildlife, petroleum, fisheries, amongst others. Most of these sectors have institutionalized these roles through boards, authorities, tribunals among others thereby ensuring some level of independence, continuity, transparency and accountability. In the mining sector, many of these functions are bundled in the office and person of the Cabinet Secretary⁴⁴. This creates a vulnerability in the sector for example when the Cabinet Secretary is removed or resigns.

The paper argues that this multiplicity of roles poses a challenge for impartiality which is a pre-requisite for dispute resolution. Article 50 (1) of the Constitution of Kenya guarantees the right to every person to have any legal dispute resolved through a fair and public hearing before a court or if appropriate another independent and impartial tribunal or body.

Black's Law Dictionary defines the word impartial as '*Favoring neither; disinterested; treating all alike; unbiased; equitable, fair, and just.*'⁴⁵

The impartiality may be caused by the influence of government policy, international commitments or foreign investment promotion and protection. The design of the extractives sector places governments at the centre of every mining investment, agreement or transaction, fundamentally because, firstly, the natural resources are vested in the government. Secondly, government

⁴⁴ It is acknowledged that various institutions and departments have been established by the Mining Act 2016 but these are subordinate to the Cabinet Secretary (e.g. Directors of Mines and Geology) or play an advisory role (e.g. Mineral Rights Board)

⁴⁵ Black's Law Dictionary, Rev. 4th Ed., St Paul, Minn, West Publishing Co., 1968, p. 886

has an enormous interest in the financial benefits such as royalties and taxes. Finally, most mining companies are foreign due to insufficient domestic capital, expertise and trading networks and therefore the government plays an important role as a host country to promote the attractiveness of the country as an investment destination, meet its commitments under bilateral investment treaties with the home countries and investment agreements with the mining company. The Cabinet Secretary is the person charged with negotiating and protecting these government interests. It is therefore logical to question whether the Cabinet Secretary can act as a disinterested, neutral and independent umpire in a dispute touching on these interests? It is a fundamental tenet of natural justice that one cannot be a judge in their own cause.

Competence

The Mining Act dispute resolution provisions require the Cabinet Secretary to apply ‘relevant rules and principles’⁴⁶. The regulation of the extractives sector usually involve technical, economic and legal rules.⁴⁷ The dispute resolution mandate is vested in the Cabinet Secretary personally, there is no provision for coopting experts. The Cabinet Secretary is a political appointee and there is no framework to ascertain whether the office bearer has the qualifications to discharge dispute resolution responsibilities.

Comparative Jurisdictions

A short review of other jurisdictions highlights how other countries have treated the overlap of administrative and adjudicatory functions.

South Africa

The main sectoral mining law is the Mineral and Petroleum Resources Development Act, 2002. In terms of claims for compensation by land owners and occupiers it provides that these will be determined by the Regional Manager at the first instance through a form of mediation and if the parties are unable to agree, the dispute is referred to arbitration or the courts⁴⁸. The

⁴⁶ Section 156 (3), MA 2016

⁴⁷ Section 153 (4) (e), MA 2016

⁴⁸ Section 54 (3) & (4)

Regional Manager is a public officer in charge of a mining region. In addition, the Act provides for a Minerals and Mining Development Board which advises the Minister on dispute resolution at the strategic level.

Tanzania

The Mining Act 2010 has empowered the Mining Commission which is the regulator of the sector to decide on some disputes such as compensation cases. The Tanzanian Mining (Disputes Resolution) Rules⁴⁹ strengthen the independence and impartiality of the Commission. Resort to the Commission is optional and not mandatory. The Commission cannot handle disputes involving the government. The Rules prescribe clear timelines. Appeals lie with the High Court.

Western Australia

The governing law is the Mining Act, 1978. It establishes a warden's court which is presided by a magistrate. The magistrate is a qualified lawyer and doubles up as the warden with various administrative functions under the said Act. The warden's court has territorial jurisdiction to determine disputes arising from a prescribed mining area⁵⁰ and a subject jurisdiction including ownership and title, trespass, land compensation, water access, mining operations, mining area boundaries and commercial disputes⁵¹. It has wide powers to grant injunctions, declaratory orders, award of damages or compensation, interlocutory orders, appointment of receivers, amongst others⁵². Appeals lie to the Environment, Resources and Development Court. The warden's court can reserve a question of law to be determined by the equivalent of the High Court in the form of a special case.

⁴⁹ (the **Rules**) which are made under section 122 of the Mining Act Cap 123 Revised Edition 2019 (the **Mining Act**), were published in the Government Gazette dated 16 April 2021

⁵⁰ Section 132 (2)

⁵¹ Section 132 (1)

⁵² Section 134 (1)

Ghana

The Minerals and Mining Act 2006⁵³ of Ghana provides a tiered dispute resolution mechanism for disputes between government and mineral right holders commencing with amicable settlement by mutual discussion or ADR and after 30 days to arbitration and in the case of non-citizens to international arbitration. The Minister⁵⁴ has the mandate for determining compensation claims between mineral right holder and a land owner, where good faith negotiations fail, with the assistance of a government land valuer. The High Court retains its supervisory oversight over the Minister's decision.

The models above indicate that in South Africa a regional administrative officer may mediate compensation claims but does not oust the court's concurrent jurisdiction. In Tanzania the regulator determines compensation disputes and the court's retain a concurrent jurisdiction. In Australia, a warden's court is part of the formal justice system with appeals lying in a higher court. In Ghana and Kenya, the Minister determines compensation claims and in Ghana, the court's jurisdiction is expressly ousted by the Act. Therefore, there are hybrid models. Kenya and Ghana stand out in that the minister/Cabinet Secretary undertakes the role of dispute resolution in the prescribed matters and the court's jurisdiction is ousted expressly or by implication.

Conclusion

The history of conflict and mining in Africa behooves a critical examination of the dispute resolution mechanism. A modern and robust dispute resolution mechanism in the mining sector should adopt a human rights approach, be impartial, competent, independent, fast, measurable, transparent and deliver benefits to the sector and local communities. The gaps in law, weak policy framework, the mandate of the Cabinet Secretary, lack of monitoring framework are some of the factors contributing to a problematic dispute resolution structure in the mining sector. The reforms of Kenya's mining

⁵³ Section 27

⁵⁴ Sections 73, 74 and 75

sector in 2016 heralded a positive transformation, as we enter a new dispensation, it is time to review the dispute resolution mechanisms.

References

Alternative Justice Systems Framework Policy, Judiciary of Kenya, 2020

Bangalore Principles of Judicial Conduct, UNODC, Vienna, 2018

Belynda Hoffman, *Pioneering New Approaches in Support of Sustainable*

Development in the Extractive Sector: Guidelines and methodologies for

Conflict management, World Bank, ICCM & ESMAP, 16th November, 2003

*Black's Law Dictionary, Rev. 4th Ed., St Paul, Minn, West Publishing Co.,
1968*

Community Land Act, No. 27 of 2016

Constitution of Kenya

Environmental Management and Coordination Act, No. 8 of 1999

From Conflict to Peace building: The Role of Natural Resources and the

Environment, UNEP, 2009

Fair Administrative Action Act No. 4 of 2015

Ghana Minerals and Mining Act 2006

IRP (2020). *Mineral Resource Governance in the 21st Century: Gearing
extractive industries towards sustainable development*. Ayuk, E. T., Pedro,

A. M., Ekins, P., Gatune, J., Milligan, B., Oberle B., Christmann, P., Ali, S.,

Kumar, S. V, Bringezu, S., Acquatella, J., Bernaudat, L., Bodouroglou, C.,

Brooks, S., Buergi Bonanomi, E., Clement, J., Collins, N., Davis, K., Davy,

- A., Dawkins, K., Dom, A., Eslamishoar, F., Franks, D., Hamor, T., Jensen, D., Lahiri-Dutt, K., Mancini, L., Nuss, P., Petersen, I., Sanders, A. R. D. A Report by the International Resource Panel. United Nations Environment Programme, Nairobi, Kenya
- John W. Burton, Conflict Resolution: The Human Dimension, The International Journal of Peace Studies, January 1998, Vol.3, No.1
- Ministry of Interior and Coordination of National Government, Final Guidelines for Mediation and Mediators
- Ministry of Mining, Kenya Country Mining Vision Gap Analysis Report, March 2017
- Mining Act, No. 12 of 2016
- Mining (Community Development Agreement) Regulations, 2017
- Mining (Licence and Permits) Regulations 2017
- Prevention of Conflict in Resource Rich Countries, World Bank SEGOM, 2015
- Republic of Kenya, Mining and Minerals Policy 2016, Sessional Paper No. 7 of 2016
- South Africa Mineral and Petroleum Resources Development Act, 2002
- Tanzania Mining Act Cap 123 Revised Edition 2019
- Water Act, Cap 372 Laws of Kenya
- Western Australia, Mining Act, 1978

World Bank Environmental and Social Framework, World Bank,
Washington, DC, 2016

Case Law

Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9
others [2017] eKLR

Peter Nzeki & 14 others v Base Titanium Limited & 4 others [2021] eKLR
Titus Musau Ndome vs CS Mining and Anor JR 51 of 2016

Addressing the Contemporary Issues in Biodiversity Conservation

By: Kariuki Muigua*

Abstract

Biodiversity resources play a huge role in not only meeting the needs of human beings but also sustaining healthy ecosystems for the sake of all living organisms. However, there are increased rates of biodiversity degradation, thus calling for improved measures towards conservation of these biological diversity resources. In acknowledging that biodiversity resources face a myriad of threats, this paper discusses the various issues that affect biodiversity conservation efforts and which issues must thus be addressed as part of conservation measures.

1. Introduction

This paper highlights some of the contemporary issues that arise from biological diversity debates, and ones that are likely to affect how countries respond to the conservation of biodiversity responsibilities as envisaged under the international, regional and national environmental regulatory frameworks. The author argues that unless these issues are strategically addressed, any efforts geared towards biodiversity conservation may not bear much fruits. Biological diversity is a term used to refer to the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems. These resources play a huge role in not only environmental processes but also in provision of ecosystem resources for all living organisms, including human beings.¹ Arguably, if the world is to achieve the

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sustainable development goals, then the conservation of these resources must be treated with urgency and it also calls for the concerted efforts of all stakeholders and cooperation from all countries, at least at the international level. The world must address the human activities that have been contributing to the degradation of these resources.²

The need for this cooperation was born out of the fact that ‘the responsibility for biodiversity conservation has traditionally been seen as a function of government and, particularly, of its environment departments and conservation agencies, where Non-governmental organisations, local communities and other interest groups have supported this role by championing specific environmental issues and conversely, business and industry are typically regarded as competitors to environmental causes, needing land and resources for production’.³

This paper acknowledges that biodiversity conservation is a cross-cutting issue which is affected by different but related development and environmental issues that must be considered in any efforts taken by stakeholders in any conservation measures.

2. Contemporary Issues in Biodiversity Conservation

It is now a non-contentious position that ‘biodiversity is considered to be an essential component for sustainable development and human well-being, which underpins the provision of food and water; mitigates and provides resilience to climate change; supports human health, and provides jobs in agriculture, fisheries, and forestry, among other sectors.’⁴ It is worth pointing out that globally, early environmental conservation and natural resource

¹ United Nations Development Programme. "The future we want: Biodiversity and ecosystems—driving sustainable development." (2012),1.

² *Ibid.*

³ Ginsburg, A., Stephens, A., Tau, M., Botts, E., & Holness, S., ‘Biodiversity Mainstreaming in South Africa’s Production Landscapes: Lessons and Achievements’ [2020] International Grassland Congress Proceedings <<https://uknowledge.uky.edu/igc/22/2-15/1>> accessed 24 July 2021.

⁴ United Nations, “Biodiversity at the Heart of Sustainable Development”, *Input to the 2018 High-level Political Forum on Sustainable Development (HLPF)*, Secretariat of the Convention on Biological Diversity (CBD), 27 April 2018, 1.

management initiatives concentrated on improving water and land management, by the 1980s, there had been a shift in country-level's environmental focus to integrate biodiversity conservation into mainstream development processes, with an emphasis on production sector projects, national and sub-national policy and planning, institutional development, and disaster risk reduction.⁵ This section highlights some of the main environmental and development issues that have a bearing on biodiversity conservation efforts.

2.1. Sustainable Trade and Investment Regimes

Kenya's position as a global investment destination has been improving significantly, with the World Bank's latest 'Ease of Doing Business' ratings identifying Kenya as one of the most notably improved countries globally, progressing 24 places in two years from 80th in 2017 to 56th in 2019.⁶ During the said period, the flow of foreign direct investment also saw a significant step up in 2018, increasing by 27 per cent to \$1.6 billion, according to the United Nations Conference on Trade and Development (UNCTAD).⁷ In order to strengthen the private sector which is considered to be crucial to implementing the President's Big Four Agenda, and foreign direct investment which has a key role in increasing private sector activity, the Kenyan Government has been working towards increased foreign direct investment by taking steps to facilitate private enterprise and foreign investment, for instance, through predictable regulatory and tax practices.⁸ The Presidency's *Big Four Agenda* which is a 5-year development plan under 4 key pillars, namely: food security, affordable housing, manufacturing, and affordable healthcare for all.⁹

⁵ United Nations Development Programme, 'The Future We Want: Biodiversity and Ecosystems—Driving Sustainable Development.' (Biodiversity and ecosystems global framework 2012–2020, 2012), 9-10.

⁶ 'What's the Role of an Impact Investor like CDC in Kenya?' (CDC Group) <<https://www.cdcgroup.com/en/news-insight/insight/articles/whats-the-role-of-an-impact-investor-like-cdc-in-kenya/>> accessed 23 July 2021.

⁷ *Ibid.*

⁸ 'What's the Role of an Impact Investor like CDC in Kenya?' (CDC Group) <<https://www.cdcgroup.com/en/news-insight/insight/articles/whats-the-role-of-an-impact-investor-like-cdc-in-kenya/>> accessed 23 July 2021.

⁹ 'The Big 4 - Empowering the Nation' <<https://big4.delivery.go.ke/>> accessed 25 December 2020.

The *Kenya National Action Plan On Business And Human Rights For the Implementation of the United Nations Guiding Principles on Business and Human Rights*¹⁰ (NAP) was drafted to domesticate the UN Guiding Principles on Business and Human Rights focusing on five thematic issues identified by stakeholders, namely: Land and Natural Resources; labour rights; revenue transparency; environmental protection; and access to remedy.¹¹ The objectives of this NAP are: To guide the State as it fulfils its duty to protect individuals and communities from business-related human rights abuses, consistent with its domestic and international obligations; To guide businesses on the measures they should undertake to meet their responsibility to respect human rights in their operations; To offer a roadmap of strengthening access to State-based judicial and non-judicial remedies for victims of business-related harm and to promote human rights due diligence by businesses, ensuring that they play their role in the attainment of SDGs in a manner that respects human rights; and to form a basis for dialogue between the State, businesses, individuals and communities whose rights are adversely impacted by business operations, and civil society organisations on promoting respect for human rights by businesses.¹²

The NAP outlines policy actions aimed at enhancing State duty to protect human rights as well as those aimed at enhancing and upholding corporate responsibility to respect human rights.¹³ It is a step in the right direction and has the potential to enhance respect for human rights in the country. Notably, businesses must also ensure that their business operations and decisions are friendly and indeed promote biodiversity conservation. In light of this, it has been suggested that for a business to establish whether their actions are contributing to the strategic goals, they must: (a) make a clear commitment to balance or outweigh any negative impacts on biodiversity through

¹⁰ Republic of Kenya, Kenya national action plan on business and human rights For the Implementation of the United Nations Guiding Principles on Business and Human Rights, June 2019

<https://www.ohchr.org/Documents/Issues/Business/NationalPlans/2019_FINAL_BHR_NAP.PDF> accessed 23 July 2021.

¹¹ *Ibid*, p. ii.

¹² *Ibid*, p. 11.

¹³ *Ibid*, chapter two.

mitigation activities (e.g., no net loss or net gain for biodiversity); (b) quantify their impacts on biodiversity, and the biodiversity benefits that are derived from their actions; and (c) determine the net outcome of their biodiversity performance at site, supply chain or organizational level, thus advancing business accountability.¹⁴

There is a need for continued development of a trade and investment regime aimed at enhancing and promoting public participation in development as part of ensuring that there is encouragement and realization of development, transfer, dissemination and diffusion of environmentally sound technologies to developing countries on favourable terms, including on concessional and preferential terms, as mutually agreed, as envisaged under SDG 17, Target 17.7. Notably, the push for economic growth cannot only be driven by Kenya's Government but also by its people, hence the need for a regime that promotes active and meaningful participation of the people in these activities.¹⁵ The Convention on Biological Diversity (CBD) Aichi Target 3 also requires that "by 2020, at the latest, incentives, including subsidies, harmful to biodiversity are eliminated, phased out or reformed in order to minimize or avoid negative impacts, and positive incentives for the conservation and sustainable use of biodiversity are developed and applied, consistent and in harmony with the Convention and other relevant international obligations, taking into account national socio-economic conditions".¹⁶

In order to achieve the sustainable development goals, the *2015 Addis Ababa Action Agenda on Financing for Development* captured the importance of domestic resource mobilization, noting that the "mobilization and effective use of domestic resources ... are central to our common pursuit of sustainable

¹⁴ Smith, T., Beagley, L., Bull, J., Milner-Gulland, E.J., Smith, M., Vorhies, F. and Addison, P.F., 'Biodiversity Means Business: Reframing Global Biodiversity Goals for the Private Sector' (2020) 13 Conservation Letters e12690, 7.

¹⁵ 'What's the Role of an Impact Investor like CDC in Kenya?' (CDC Group) <<https://www.cdcgroup.com/en/news-insight/insight/articles/whats-the-role-of-an-impact-investor-like-cdc-in-kenya/>> accessed 23 July 2021.

¹⁶ Unit B, 'Aichi Biodiversity Targets' (18 September 2020) <<https://www.cbd.int/sp/targets/>> accessed 8 September 2021.

development.”¹⁷ Notably, it has also been rightly pointed out that the only reliable and sustained sources of government revenue are taxes and some non-tax revenue instruments, such as royalties and resource rents from extractive industries and, to a limited extent, user fees for public services, generally delivered by local governments.¹⁸ However, most African countries have been over relying on foreign aid and loans to fund their ever expanding national budgets, and Kenya is no exception.¹⁹ With the pressure and the 2030 deadline to achieve the sustainable development goals, the need for alternative funding will only grow. As such, there is a need for these countries to not only look for alternative sources of the required financial resources but also the ones that come with less complications and strings attached. It is for this reason that these countries need to focus more on capitalizing on domestic resource mobilization as a source of funding development projects. This is important as Official Development Assistance (ODA) is finite and fluctuates over time, creating uncertainty for recipient countries about planning, budgeting, and expenditures in the public sector.²⁰ External debt burdens have an impact on biodiversity conservation as both climate and biodiversity targets require countries to mobilise resources to meet those ambitions.²¹ Some researchers have even suggested that forgiving developing countries’ debts, such as Kenya’s hefty foreign debt, in exchange for the government devoting those resources to fighting climate change threats and biodiversity loss, could tackle several big

¹⁷ Junquera-Varela, R. F., Verhoeven, M., Shukla, G. P., Haven, B., Awasthi, R., & Moreno-Dodson, B., *Strengthening Domestic Resource Mobilization: Moving from Theory to Practice in Low-and Middle-Income Countries* (The World Bank 2017), chapter Two.

¹⁸ *Ibid*, 5.

¹⁹ Kwemo AB, ‘Making Africa Great Again: Reducing Aid Dependency’ (Brookings, 20 April 2017) <<https://www.brookings.edu/blog/africa-in-focus/2017/04/20/making-africa-great-again-reducing-aid-dependency/>> accessed 8 September 2021.

²⁰ Junquera-Varela, R. F., Verhoeven, M., Shukla, G. P., Haven, B., Awasthi, R., & Moreno-Dodson, B., *Strengthening Domestic Resource Mobilization: Moving from Theory to Practice in Low-and Middle-Income Countries* (The World Bank 2017), 6.

²¹ ‘Time for Solutions to Tackle the Twin Sovereign Debt and Nature Crises’ (Green Fiscal Policy Network) <<https://greenfiscalfpolicy.org/blog/time-for-solutions-to-tackle-the-twin-sovereign-debt-and-nature-crises/>> accessed 8 September 2021.

problems at once, in what is referred to as debt swaps.²² However, while debt-for-nature and debt-for-climate swaps are a relatively new idea, they hold a potential to tackling biodiversity loss challenges through funding, while promoting sustainable development.²³

It is documented that when the investment requirements for the Sustainable Development Goals (SDGs) were first assessed in the United Nations Conference on Trade and Development's (UNCTAD's) World Investment Report 2014, at least 10 relevant sectors (encompassing all 17 SDGs) were identified and the report projected an annual investment gap of \$2.5 trillion in developing countries.²⁴ While this projection remains valid today, according to a recent review (UNCTAD, 2020), the SDGs have significant resource implications across developed and developing countries and require a step-change in levels of both public and private investment in the SDGs.²⁵ In line with this, the CBD post-2020 biodiversity framework negotiations have increased attention on opportunities for increased businesses engagement with, and accountability for, their interdependencies.²⁶

²² 'Debt Swaps Could Free Funds to Tame Climate, Biodiversity and Virus Threats' *Reuters* (7 September 2020) <<https://www.reuters.com/article/us-global-debtrenegotiation-nature-clima-idUSKBN25Y26P>> accessed 8 September 2021.

²³ *Ibid*; Yue M and WANG CN, 'Debt-For-Nature Swaps: A Triple-Win Solution for Debt Sustainability and Biodiversity Finance in the Belt and Road Initiative (BRI)? – Green Belt and Road Initiative Center' <<https://green-bri.org/debt-for-nature-swaps-in-the-belt-and-road-initiative-bri/>> accessed 8 September 2021; Smith, T., Beagley, L., Bull, J., Milner-Gulland, E.J., Smith, M., Vorhies, F. and Addison, P.F., 'Biodiversity Means Business: Reframing Global Biodiversity Goals for the Private Sector' (2020) 13 *Conservation Letters* e12690; Bishop J, *The Economics of Ecosystems and Biodiversity in Business and Enterprise* (Routledge 2013); Arlaud M and others, 'The Biodiversity Finance Initiative: An Approach to Identify and Implement Biodiversity-Centered Finance Solutions for Sustainable Development' [2018] *Towards a Sustainable Bioeconomy: Principles, Challenges and Perspectives* 77.

²⁴ Zhan JX and Santos-Paulino AU, 'Investing in the Sustainable Development Goals: Mobilization, Channeling, and Impact' (2021) 4 *Journal of International Business Policy* 166.

²⁵ *Ibid*.

²⁶ Smith, T., Beagley, L., Bull, J., Milner-Gulland, E.J., Smith, M., Vorhies, F. and Addison, P.F., 'Biodiversity Means Business: Reframing Global Biodiversity Goals for the Private Sector' (2020) 13 *Conservation Letters* e12690, 2.

The need for enhanced domestic resource mobilization is also more urgent in light of the UNCTAD's observations that the COVID-19 shock has exacerbated existing constraints for the SDGs and could undo the progress made in the last six years in SDG investment and the international private sector investment flows to developing and transition economies in sectors relevant for the SDGs were also expected to fall by about one-third in 2020 because of the COVID-19 pandemic, posing a risk to delivering on the 2030 agenda for sustainable development.²⁷

Thus, as part of laying the groundwork for the achievement of SDGs, there is a need for countries, including Kenya, to review their domestic resource mobilization efforts and work towards enhancing the same, aimed at reducing over-reliance on external debt which may come with conditions and subsequently affect a country's commitment to climate change and biodiversity conservation.

Indeed, at the UN/WTO joint side event to COP26, held in November 2021, whose agenda was 'climate finance and trade to build resilience to climate change', it was agreed that international trade can be an integral part in building resilience and achieving the SDGs through generating the resources needed for investment, simultaneously creating wealth and building resilience of the most vulnerable nations while promoting a systemic shift towards sustainable production and consumption.²⁸ It was also agreed that mobilizing climate finance and investment capital through innovative finance mechanisms, such as climate action-debt swaps and green bonds, can also ensure that solutions are translated into practice and enhance the adaptive capacity and resilience of the most vulnerable.²⁹

The unveiling of the SDGs in 2015 meant that most developing countries would have to step up their efforts to raise domestic resources to finance

²⁷ Zhan JX and Santos-Paulino AU, 'Investing in the Sustainable Development Goals: Mobilization, Channeling, and Impact' (2021) 4 Journal of International Business Policy 166.

²⁸ 'Program COP26 Side Event' <<https://unctad.org/system/files/information-document/ditc-ted-06112021-COP26-sideevent-programme-v1.pdf>> accessed 23 November 2021.

²⁹ Ibid.

needed domestic investment as support from development partners and private sector investors would not be enough.³⁰

While there are various external mechanisms of funding that are available to countries for exploitation, there is a need for countries such as Kenya to enhance their domestic resources mobilization mechanisms.

Domestic trade and investments that financially and socially empower communities will mean that their over-reliance on environmental resources will decrease and subsequently reduce over-exploitation of these resources, which usually has a great impact on biodiversity. This is protecting, restoring, and managing key ecosystems helps biodiversity and people to adjust to changing climatic conditions.

2.2. Climate Change Mitigation and Biodiversity Conservation

Climate change is one of the factors that affect agricultural production and, therefore, critical in understanding biodiversity mainstreaming and conservation in the agricultural sector.

The Convention on Biological Diversity (CBD) Aichi Target 15 obligates States to ensure that “by 2020, ecosystem resilience and the contribution of biodiversity to carbon stocks has been enhanced, through conservation and restoration, including restoration of at least 15 per cent of degraded ecosystems, thereby contributing to climate change mitigation and adaptation and to combating desertification”.³¹ Current reports also indicate that countries need to decrease greenhouse gas emissions by 25% by 2030 compared to 1990 levels to achieve the 2 degrees Celsius (°C) target of the Paris Agreement and 55% to reach the 1.5°C target, and this can arguably be achieved through, *inter alia*, conserving, sustainably managing and restoring ecosystems as plants and soils in terrestrial ecosystems absorb an estimated

³⁰ ‘Heightening Domestic Resource Mobilization in Africa During COVID-19’ (Center for Global Development) <<https://www.cgdev.org/blog/heightening-domestic-resource-mobilization-africa-during-covid-19>> accessed 22 March 2021.

³¹ Unit B, ‘Aichi Biodiversity Targets’ (18 September 2020) <<https://www.cbd.int/sp/targets/>> accessed 8 September 2021.

9.5 billion tonnes of carbon dioxide equivalent every year.³² This is especially important considering that land-use change and poor management have depleted carbon stocks in terrestrial ecosystems, resulting in large emissions of carbon into the atmosphere, with deforestation and forest degradation accounting for around 12% of global emissions of carbon dioxide (CO₂).³³

The *Climate Change Act 2016* is to be applied for the development, management, implementation and regulation of mechanisms to enhance climate change resilience and low carbon development for the sustainable development of Kenya. The Act is to be applied in all sectors of the economy by the national and county governments to mainstream climate change responses into development planning, decision making and implementation; build resilience and enhance adaptive capacity to the impacts of climate change; formulate programmes and plans to enhance the resilience and adaptive capacity of human and ecological systems to the impacts of climate change; mainstream and reinforce climate change disaster risk reduction into strategies and actions of public and private entities; mainstream intergenerational and gender equity in all aspects of climate change responses and provide incentives and obligations for private sector contribution in achieving low carbon climate resilient development.

It is hoped that the commitments made at the COP 26 will renew the hope for funding, especially with the *Glasgow Climate Pact*, which includes an unprecedented goal for developed countries to double the funding provided to developing countries for adaptation by 2025, taking the annual figure to around US \$40 billion.³⁴

The National Policy for the Sustainable Development of Northern Kenya and other Arid Lands affirms that in Kenya, the ASALs occupy 89% of the

³² OECD (2019), *Biodiversity: Finance and the Economic and Business Case for Action*, report prepared for the G7 Environment Ministers' Meeting, 5-6 May 2019, 31.

³³ Ibid, 31.

³⁴ 'What Does COP26 Mean for Adaptation?' (UNEP, 17 November 2021) <<http://www.unep.org/news-and-stories/story/what-does-cop26-mean-adaptation>> accessed 23 November 2021.

country and are home to about 36% of the population, 70% of the national livestock herd and 90% of the wild game that supports the country's tourism industry. The objectives of this policy are to: provide a framework for ASAL development coordination, resource mobilization, research, monitoring and evaluation; strengthen cohesion and integration of ASAL with the rest of the country and address inequality including gender, youth and vulnerable groups; improve the enabling environment for development in the ASALs by establishing the necessary foundations for development and bridge development gaps; develop alternative approaches to service delivery in Pastoral Areas; provide a policy framework for enhancing synergy on ending drought emergencies; promote sustainable utilization of existing land and land based resources to facilitate national economic development; and to provide an enabling environment for sustainable agriculture, livestock, trade and tourism development in the ASALs.

Arguably, climate change adaptation actions that do not consider the role of, and potential impacts on, biodiversity can have adverse effects – increasing rather than reducing climate change vulnerability.³⁵ Thus, an effective climate change response requires consideration of the role of, and potential impacts on, biodiversity and ecosystem services, where biodiversity and ecosystem services support people to adapt to climate change through approaches collectively called ecosystem-based adaptation.³⁶ Ecosystem-Based Adaptation (EBA) has been defined as the adaptation policies and measures that take into account the role of ecosystem services in reducing the vulnerability of society to climate change, in a multi-sectoral and multi-scale approach, where BA involves national and regional governments, local communities, private companies and NGOs in addressing the different pressures on ecosystem services, including land use change and climate change, and managing ecosystems to increase the resilience of people and economic sectors to climate change.³⁷ Arguably, ecosystem based approaches to adaptation

³⁵ Mant, R., Perry, E., Heath, M., Munroe, R., Väänänen, E., Großheim, C., & Kümpfer-Schlake, L., 'Addressing Climate Change—Why Biodiversity Matters' [2014] UNEP-WCMC: Cambridge, UK, 3.

³⁶ *Ibid*, 2.

³⁷ Vignola, R., Locatelli, B., Martinez, C., & Imbach, P., 'Ecosystem-Based Adaptation to Climate Change: What Role for Policy-Makers, Society and

harness the capacity of nature to buffer human communities against the adverse impacts of climate change through the sustainable delivery of ecosystem services.³⁸ This is because, deployed with focus on specific ecosystem services with the potential to reduce climate change exposures, the forms used are targeted management, conservation and restoration activities.³⁹

Ecosystems are important to not only important to sustenance of human life but they also deliver services that can help meet adaptation needs across multiple human development sectors including disaster risk reduction (through flood regulation and storm surge protection), food security (from fisheries to agro-forestry), sustainable water management and livelihood diversification (through increasing resource-used options) and can also generate significant multiple benefits such as carbon sequestration and other social, economic and cultural benefits.⁴⁰ **In short, healthy ecosystems and their services provide opportunities for sustainable economic prosperity while providing defence against the negative effects of climate change.⁴¹ It has thus been posited that EBA integrates the use of biodiversity and ecosystem services into an overall strategy to help people adapt to the adverse impacts of climate change and it includes the sustainable management, conservation and restoration of ecosystems to provide services that help people adapt to both current climate variability, and climate change, consequently contributing to reducing vulnerability and increasing resilience to both climate and non-climate risks and provides multiple benefits to society and the environment.⁴² Notably, COP 26 Glasgow Climate Pact recognized the critical role of “restoring nature**

Scientists?’ (2009) 14 *Mitigation and adaptation strategies for global change* 691, 692.

³⁸ Richard Munang and others, ‘Climate Change and Ecosystem-Based Adaptation: A New Pragmatic Approach to Buffering Climate Change Impacts’ (2013) 5 *Current Opinion in Environmental Sustainability* 67, 68.

³⁹ *Ibid*, 68.

⁴⁰ *Ibid*, 68.

⁴¹ *Ibid*, 68.

⁴² A Colls, Neville Ash and Ninni Ikkala, *Ecosystem-Based Adaptation: A Natural Response to Climate Change*, vol 21 (Iucn Gland 2009), 1.

and ecosystems in delivering benefits for climate adaptation”, which is basically ‘ecosystem-based adaptation’.⁴³

Due to the important connection between climate change mitigation and biodiversity conservation, it has been observed that the multiple international agreements and national processes relevant to climate change and biodiversity should be implemented in ways that are coordinated, mutually supportive and enhance synergies.⁴⁴ It follows that **protecting, restoring, and managing key ecosystems helps biodiversity and people to adjust to changing climatic conditions.**⁴⁵ It has thus been argued that **‘ecosystem-based Adaptation can be embedded into national, regional and local policy and practice by adopting an integrated, participatory and ecosystem-based approach to territorial planning’.**⁴⁶ Policy makers must, however, be aware of the fact that **‘unlike some adaptation measures, while Ecosystem-based Adaptation can be readily implemented, adopting best practice approaches for the sustainable management of, for example, fisheries, forests, agricultural systems, river catchments, and coastlines, Ecosystem-based Adaptation initiatives still face a range of barriers, which can include a lack of finance, land use conflict and community opposition and knowledge gaps, where there is lack of information about the costs and benefits of EBA measures.**⁴⁷

2.3. Global Partnerships for Biodiversity Conservation and Sustainable Development

The Convention on Biological Diversity (CBD) calls for cooperation among Contracting States in conservation and sustainable use of biological

⁴³ ‘What Does COP26 Mean for Adaptation?’ (UNEP, 17 November 2021) <<http://www.unep.org/news-and-stories/story/what-does-cop26-mean-adaptation>> accessed 23 November 2021.

⁴⁴ Mant, R., Perry, E., Heath, M., Munroe, R., Väänänen, E., Großheim, C., & Kümpfer-Schlake, L., ‘Addressing Climate Change—Why Biodiversity Matters’ [2014] UNEP-WCMC: Cambridge, UK.

⁴⁵ A Colls, Neville Ash and Ninni Ikkala, *Ecosystem-Based Adaptation: A Natural Response to Climate Change*, vol 21 (Iucn Gland 2009), 2.

⁴⁶ *Ibid*, 3.

⁴⁷ *Ibid*, 15.

diversity.⁴⁸ The 2030 Agenda for SDGs⁴⁹ and specifically SDG 17 also requires state parties to create partnerships for the Goals and specially to strengthen the means of implementation and revitalize the global partnership for sustainable development.⁵⁰ The United Nations reports that as at 2021, ‘Kenya aimed to attract more than USD 30 billion in manufacturing investments over the next 5 years by focusing on sectors with high growth potential’ by ‘boosting domestic manufacturing which is believed to have huge potential to attract investment, create employment, stimulate growth, and linkages to all other sectors of the economy’.⁵¹

SDG Goal 17 related targets are spread over several target areas namely: finance; technology; Capacity-Building; Trade; and Systemic issues which entail, Policy and institutional coherence, multi-stakeholder partnerships, and Data, monitoring and accountability.⁵²

At 2021 COP 26, it was recognized that climate change poses serious threats to sustainable development, so countries urgently need to integrate efforts to reduce greenhouse gas emissions (GHG), as well as investments in adaptation, in their development strategies.⁵³ It is thus acknowledged that tackling climate change will require major social, economic and technological changes, many of which are costly and will

⁴⁸ Article 5, Convention on Biological Diversity.

⁴⁹ United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1.

⁵⁰ SDG 17.

⁵¹ ‘United Nations Supporting Kenya’s Post COVID-19 Industrial Recovery and Growth to Achieve Inclusive and Sustainable Growth | United Nations in Kenya’ <<https://kenya.un.org/en/126013-united-nations-supporting-kenyas-post-covid-19-industrial-recovery-and-growth-achieve>> accessed 23 July 2021.

⁵² ‘SDG 17: Strengthen the Means of Implementation and Revitalize the Global Partnership for Sustainable Development – SDG Compass’ <<https://sdgcompass.org/sdgs/sdg-17/>> accessed 8 July 2021.

⁵³ ‘Country Climate and Development Report (CCDR) | DataBank’ <<https://databank.worldbank.org/source/country-climate-and-development-report-ccdr>> accessed 23 November 2021.

require large investments.⁵⁴ Countries must thus start considering exploring strategic cooperation and partnerships with not only governments but also private sector to enable them achieve some of these adaptation goals.

2.4. Upholding Human Rights and Meaningful Public Participation in Development Projects

The Convention on Biological Diversity (CBD) Aichi Target 2 requires that “by 2020, at the latest, biodiversity values have been integrated into national and local development and poverty reduction strategies and planning processes and are being incorporated into national accounting, as appropriate, and reporting systems”.⁵⁵ This, arguably, combines sustainability in environmental aspirations as well as social sustainability, as part of promoting biodiversity conservation for the achievement of the sustainable development agenda.

Articles 2(5) and (6) of the Constitution of Kenya 2010⁵⁶ provide that the general rules of international law, and any treaty or convention ratified by Kenya, form part of the laws of Kenya, thus binding Kenya to observe its human rights obligations under international bill of human rights.⁵⁷ In addition, Article 20 of the Constitution of Kenya states that the Bill of Rights binds all state organs and all persons, which persons are defined under Article 260 as including a “company, association or other body of persons whether incorporated or unincorporated.”

Arguably, there is a need for governments together with their development partners to solicit proposals and suggestions from indigenous and local communities about policies, the Constitution, and development strategies to encourage communities to express their views and increase their sense of

⁵⁴ ‘COP26 Climate Change Briefs – Summaries and Downloads’ (World Bank) <<https://www.worldbank.org/en/topic/climatechange/publication/world-bank-group-cop26-climate-briefs>> accessed 23 November 2021.

⁵⁵ Unit B, ‘Aichi Biodiversity Targets’ (18 September 2020) <<https://www.cbd.int/sp/targets/>> accessed 8 September 2021.

⁵⁶ Republic of Kenya, Constitution of Kenya 2010 (Government Printer, Nairobi, 2010).

⁵⁷ See also Treaty Making and Ratification Act, No. 45 of 2012, Laws of Kenya.

ownership and responsibility in the future of their country.⁵⁸ While Kenya has been making tremendous steps towards opening up the marginalised parts of the country such as the North Eastern parts of Kenya, there have been concerns about violation of human rights of the locals in these areas.⁵⁹ For instance, there have been reports that while Kenya's newest mega infrastructure project, the Lamu port, is aimed at integrating marginalised northern Kenya into the Kenyan economy and the nation, the planning and construction of the port have yielded a wide range of concerns and contestations, particularly on land rights, the environment, local livelihoods and security.⁶⁰ There have been documented reports by different rights groups from the residents about compulsory land acquisition with the government being accused of having taken more land than it paid compensation for.⁶¹ If such reports on forceful acquisition of property were to be true, then such actions would be against Article 40 of the Constitution of Kenya 2010.⁶² There have also been major concern on the environmental

⁵⁸ Environmental Research Institute Science Technology and Environment Agency Lao People's Democratic Republic, "Public Participation in Development Projects in LAO PDR" <http://pdf.wri.org/mekong_governance_mreg_eri.pdf> accessed 21 July 2021.

⁵⁹ Benard Musembi Kilaka and Jan Bachmann, 'Kenya Launches Lamu Port. But Its Value Remains an Open Question' (*The Conversation*) <<http://theconversation.com/kenya-launches-lamu-port-but-its-value-remains-an-open-question-161301>> accessed 24 July 2021.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² 40. Protection of right to property

(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property--

- (a) of any description; and
- (b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person--

- (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
- (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

impact of the port's construction⁶³, and local protests against the project have been met with harassment by Kenyan security forces.⁶⁴ There were also growing concerns about employment opportunities to residents.⁶⁵ Arguably, such allegations against the government, that is, inadequate meaningful public participation may raise concerns on the government's commitment to protection and promotion of human rights of the affected communities.

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation--

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that--

(i) requires prompt payment in full, of just compensation to the person; and
(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

⁶³ See *Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR* where the Petitioners averred that the LAPSSET Project was designed and implemented in violation of the Constitution and statutory law; the project would have far reaching consequences on the marine ecosystem of the Lamu region in terms of the destruction of the mangrove forests, discharge of industrial effluents into the environment, and effects of the fish species and marine life; and if the project was to be implemented as designed, it would affect their cultural heritage and way life as well as their livelihoods.

⁶⁴ Benard Musembi Kilaka and Jan Bachmann, 'Kenya Launches Lamu Port. But Its Value Remains an Open Question' (*The Conversation*) <<http://theconversation.com/kenya-launches-lamu-port-but-its-value-remains-an-open-question-161301>> accessed 24 July 2021.

⁶⁵ *Ibid.*

The United Nations *Declaration on the Right to Development*⁶⁶ states that development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.⁶⁷ The *Declaration* also provides that the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.⁶⁸ The need for public participation is well captured in the following quote:

"People today have an urge - an impatient urge - to participate in the events and processes that shape their lives. And that impatience brings many dangers and opportunities. It can dissolve into anarchy, ethnic violence or social disintegration. But if properly nurtured in a responsive national and global framework, it can also become a source of tremendous vitality and innovation for the creation of new and more just societies." (UNDP, 1993: 1)⁶⁹

The international human rights law is designed primarily to protect individuals and groups from abusive action by states and state agents.⁷⁰

While it is true that most of the investment projects are financed and carried out by international companies, with Development Financial Institutions (DFIs) and multi-national development banks having long track records of being critical providers of financing in Africa, supplying riskier, longer term

⁶⁶ UN General Assembly, *Declaration on the Right to Development: resolution / adopted by the General Assembly*, 4 December 1986, A/RES/41/128.

⁶⁷ *Ibid*, Preamble.

⁶⁸ Article 1.1, *Declaration on the Right to Development: resolution / adopted by the General Assembly*, 4 December 1986, A/RES/41/128.

⁶⁹ 'Human Development Report 1993 | Human Development Reports' <<http://hdr.undp.org/en/reports/global/hdr1993>> accessed 16 July 2021; Giles Mohan, 'Participatory Development' [2002] *The companion to development studies* 49.

⁷⁰ Shelton Dinah, 'Protecting Human Rights in a Globalized World', *Human Rights and Corporations* (Routledge 2017).

investment capital that tends to focus on sustainability⁷¹, some commentators have accused some international and multinational investors of alleged human rights and environmental abuses, including using child labour to clean toxic materials, failing to repair pipeline leakages, and operating in protected indigenous lands without authorization especially in developing countries.⁷² As far as trade agreements are concerned, there have also been worldwide concerns in relation to the lack of transparency of the negotiations as far as citizens are concerned, in contrast with the fundamental role being played by the large multinationals.⁷³ Notably, the negotiations are the result of long-term efforts by ultraliberal circles, politicians and directors of multinationals, working through many common bodies and the treaties are not published until, at best, the negotiations have been concluded.⁷⁴

It has been argued that the international protection of human rights and environmental protection represent two of the fundamental values and aims of modern international society.⁷⁵ It has been opined that ‘the rights to the highest attainable standard of health and to an adequate standard

⁷¹ ‘ESG Investments Will Fuel Africa’s Post-Pandemic Recovery’ (13 July 2021) <<https://www.internationalinvestment.net/opinion/4031186/esg-investments-fuel-africa-post-pandemic-recovery>> accessed 23 July 2021.

⁷² ‘Foreign Investors Gone Wild’

<<https://archive.globalpolicy.org/soecon/develop/democracy/2007/0507wild.htm>> accessed 21 July 2021; ‘What Are the Main Criticisms of the World Bank and the IMF?’ (*Bretton Woods Project*, 4 June 2019)

<<https://www.brettonwoodsproject.org/2019/06/what-are-the-main-criticisms-of-the-world-bank-and-the-imf/>> accessed 24 July 2021; see also ‘Globalization, Tourism, and Indigenous Peoples: What You Should Know About the World’s Largest Industry – Planeta.Com’ <<https://www.planeta.com/globalization-1999/>> accessed 24 July 2021.

⁷³ Robert Joumard, ‘The Free Trade Agreements: Contempt for Citizens, Sovereignty for Multinationals’ (*CADTM*, 23 July 2021) <<https://www.cadtm.org/The-free-trade-agreements-contempt>> accessed 24 July 2021.

⁷⁴ *Ibid*; see also Eric Toussaint, ‘The World Bank, the IMF and the Respect of Human Rights’ (*CADTM*, 23 July 2021) <<https://www.cadtm.org/The-World-Bank-the-IMF-and-the-respect-of-human-rights>> accessed 24 July 2021.

⁷⁵ Dinah Shelton, *A Rights-Based Approach to Public Participation and Local Management of Natural Resources* (2008), 20 <https://www.iges.or.jp/en/publication_documents/pub/conferenceproceedings/en/739/3ws-26-dinah.pdf> Accessed 16 July 2021.

of living depend on a certain degree of environmental quality and in several cases, environmental degradation or destruction has been viewed as a violation of these human rights'.⁷⁶ In addition to this, destruction of the environment through such problems as pollution or global warming can directly interfere with the enjoyment of communities' fundamental human rights including a wide range of social and cultural right as well.⁷⁷

Notably, among the extraordinary achievements of the *Declaration on the Right to Development*⁷⁸ is the advancement of a human rights-based approach to development.⁷⁹ For those who advocate for this approach, 'development from a human rights perspective embraces as key attributes: Social justice (through inclusion, equality and non-discrimination, taking the human person as the central subject of development and paying special attention to the most deprived and excluded); Participation, accountability and transparency (through free, meaningful and active participation, focusing on empowerment); and international cooperation (as the right to development is a solidarity-based right).'⁸⁰

Participatory development, as it is popularly referred to, has been defined as: "development that seeks to give the poor a part in initiatives and projects that are designed by outside organizations in the hopes that these projects will be more sustainable and successful by involving local stakeholders in the projects goals."⁸¹

⁷⁶ Bridget Lewis, 'Environmental Rights or a Right to the Environment? Exploring the Nexus between Human Rights and Environmental Protection.' (2012) 8 *Macquarie Journal of International and Comparative Environmental Law* 36.

⁷⁷ *Ibid*, 36.

⁷⁸ UN General Assembly, *Declaration on the Right to Development: resolution / adopted by the General Assembly*, 4 December 1986, A/RES/41/128

⁷⁹ Flávia Piovesan, 'Active, Free and Meaningful Participation in Development' (2013) 25 *Office of the High Commissioner for Human Rights, Realizing the Right to Development: Essays in Commemoration of*, 103 <<https://www.ohchr.org/Documents/Issues/Development/RTDBook/PartIIChapter6.pdf>> Accessed 16 July 2021.

⁸⁰ Flávia Piovesan, 'Active, Free and Meaningful Participation in Development' (2013) 25 *Office of the High Commissioner for Human Rights, Realizing the Right to Development: Essays in Commemoration of*, 104.

⁸¹ 'Why Is Participatory Development So Important for Your Nonprofit?' (*grassrootscollective*)

Community participation has been defined as the involvement of people in a community in projects to solve their own problems, where people should be given the opportunity where possible to participate as a basic human right and a fundamental principle of democracy.⁸²

The need for public participation and respect for human rights is important for development projects to gain social license to operate.⁸³ This is because as it has been observed, ‘a development process often has four phases: articulation of demand, knowledge generation, dissemination and knowledge utilization where the result of the development cycle is that the solutions are implemented, and the more ownership is felt in all steps of this process, the more applicable the solutions are.’⁸⁴ Thus, rapid and sustained economic growth (“development”), popular political participation (“democracy”), and respect for the rights of their citizens (“human rights”) are considered to be hegemonic political ideals all around the world.⁸⁵ A Social License to Operate (SLO) refers to the perceptions of local stakeholders that a project, a company, or an industry that operates in a given area or region is socially acceptable or legitimate.⁸⁶ Companies can gain the social license through: maintaining positive corporate reputation; understanding culture, customs,

<https://www.thegrassrootscollective.org/what-is-participatory-development>
accessed 22 July 2021.

⁸² “Chapter 12 Community participation,” *Manual*, 2005

https://ec.europa.eu/echo/files/evaluation/watsan2005/annex_files/WEDC/es/ES12CD.pdf accessed 21 July 2021.

⁸³ Kathleen Wilburn and Ralph Wilburn, ‘Achieving Social License to Operate Using Stakeholder Theory’ (2011) 4 J. Int. Bus. Ethics 3; Emmanuel Raufflet and others, ‘Social License’ in Samuel O Idowu and others (eds), *Encyclopedia of Corporate Social Responsibility* (Springer 2013) https://doi.org/10.1007/978-3-642-28036-8_77 accessed 24 July 2021; Lain Dare, Jacki Schirmer and Frank Vancley, ‘Community Engagement and Social Licence to Operate’ (2014) 32 Impact Assessment and Project Appraisal 188.

⁸⁴ Chris J Koopmans, K van Veluw and FG Wijnands, ‘Participatory Development as a Way to Innovations: Five Key Elements for Success’ (2014) 3 Building Organic Bridges 791, at 792.

⁸⁵ Jack Donnelly, ‘Human Rights, Democracy, and Development’ (1999) 21 Human Rights Quarterly 608.

⁸⁶ Emmanuel Raufflet and others, ‘Social License’ in Samuel O Idowu and others (eds), *Encyclopedia of Corporate Social Responsibility* (Springer 2013) https://doi.org/10.1007/978-3-642-28036-8_77 accessed 24 July 2021.

language history and history of communities, among others;⁸⁷ educating local stakeholders about project; ensuring open communication amongst all stakeholders;⁸⁸ business partnerships with communities; workforce training; community support and capacity building; and employing innovation and technology.⁸⁹ Arguably, these activities are capable of enhancing respect for human rights. As for communities, for them to grant the social license, they ask themselves the following questions: Do they Respect us? Are they Listening? Do they let us Participate? Do they let us Participate? Are they Transparent with us? Can we Believe what they say? Are they Responsive to our issues? Can we Trust them?⁹⁰ Companies must ensure that the answers to all these questions remain continually affirmative.

It has been argued that ‘democratic governance and human rights are critical components of sustainable development and lasting peace’, where ‘countries with ineffective government institutions, rampant corruption, and weak rule of law are estimated to have a 30-to-45 percent higher risk of civil war and a higher risk of extreme criminal violence than other developing countries’.⁹¹ In addition, public involvement in decision-making processes is not only important for development projects affecting the environment, but is also necessary for identifying the impact projects will have on communities.⁹² Arguably, development, particularly at the local level, can be made much more effective by active public participation where effective civic action can hold governments accountable⁹³ and ensure that the decisions of government

⁸⁷ Ian Thomson and Susan Joyce, ‘The Social Licence to Operate: What It Is and Why Does It Seem so Difficult to Obtain?’, *Prospectors and Developers Association of Canada Convention, Toronto, Ontario, Canada* (2008).

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ ‘Democracy, Human Rights and Governance | U.S. Agency for International Development’ (26 March 2021) <<https://www.usaid.gov/democracy>> accessed 21 July 2021.

⁹² Environmental Research Institute Science Technology and Environment Agency Lao People’s Democratic Republic, “Public Participation in Development Projects in LAO PDR” <http://pdf.wri.org/mekong_governance_mreg_eri.pdf> accessed 21 July 2021.

⁹³ ‘How Can Participatory Development Be Improved? | Devex’ <<https://www.devex.com/news/how-can-participatory-development-be-improved-80472>> accessed 24 July 2021; ‘Determinants of Public Participation in Kenya

are in line with the needs of citizens and thus potentially solve failures in government that plague most poor countries including; wastage and leakage, unequal access, corruption, and poor coordination.⁹⁴

Communities are mostly impacted upon by investments and development projects through what is popularly known as the impact investing, defined which is “part of the decades-old tradition of corporate social responsibility that holds domestic and international financial institutions and corporations accountable for harmful employment, community, or environmental impacts.”⁹⁵ Impact investments have also defined as “investments made into companies, organizations, and funds with the intention to generate social and environmental impact alongside a financial return.”⁹⁶ As far as impact investment in Kenya is concerned, Kenya has in the recent past been ranked highly compared to its East African counterparts, with Kenya representing nearly half of impact capital disbursed in East Africa—more than USD 650 million by non-development finance institutions (non-DFIs) impact investors and more than USD 3 billion by development finance institutions (DFIs), and more than triple the amount deployed in each of Uganda and Tanzania, the countries with the next highest amounts at around 13% and 12% respectively.⁹⁷

County Governments - Antony Mbiti, Damiana Ndambuki, Fredrick Owino Juma, 2019’ <<https://journals.sagepub.com/doi/full/10.1177/0021909618794028>> accessed 24 July 2021; Berner, M. M., Amos, J. M., & Morse, R. S., “What constitutes effective citizen participation in local government? Views from city stakeholders.” *Public Administration Quarterly* (2011): 128-163; Alessandra Ricciardelli, ‘Governance, Local Communities, and Citizens Participation’ in Ali Farazmand (ed), *Global Encyclopedia of Public Administration, Public Policy, and Governance* (Springer International Publishing 2017) <https://doi.org/10.1007/978-3-319-31816-5_3221-1> accessed 24 July 2021.

⁹⁴ Devex Editor // 11 March 2013, ‘How Can Participatory Development Be Improved?’ (*Devex*, 11 March 2013) <<https://www.devex.com/news/sponsored/how-can-participatory-development-be-improved-80472>> accessed 21 July 2021.

⁹⁵ Ronald Phillips, ‘Impact Investing and Community Development’ (2016) 25 *Maine Policy Review* 63, 63.

⁹⁶ Castano, T., “Preparing for Impact: Five Ideas to Maximize the Potential of Impact Investing”, New Start New Jersey, April 2017, 1< <https://ideas.nsnj.org/wp-content/uploads/2017/08/NSNJ-Preparing-for-Impact.pdf>> accessed 21 July 2021.

⁹⁷ ‘Kenya Tops East Africa Blocs in Impact Investment - Ministry of Industrialization, Trade and Enterprise Development (MoITED)’

It has been observed that ‘while governments at every level –local, state, national –determine how to meet fundamental needs with constrained resources, impact investing continues to mature into a vehicle for innovative, socially oriented enterprises, where the convergence of these two macro-level developments can create opportunities for stakeholders and communities.’⁹⁸

The success of development activities is thus closely linked with the status of respect for human rights for concerned communities as well as how effectively these communities are involved in the processes leading to the negotiations leading to the setting up and operation of investment and development projects.

2.5. Funding Biodiversity Conservation Efforts

CBD Decision XIII/3 called for Parties to encourage public and private sources of finance to be channelled into practices that improve the sustainability of production while reducing biodiversity loss, and to promote and support the restoration of ecosystems that provide essential services in a way that provides for the needs of indigenous peoples and local communities, does not cause harm to other ecosystems.⁹⁹

The CBD Aichi Target 20 also requires countries to ensure that “by 2020, at the latest, the mobilization of financial resources for effectively implementing the Strategic Plan for Biodiversity 2011-2020 from all sources, and in accordance with the consolidated and agreed process in the Strategy for Resource Mobilization, should increase substantially from the

<<https://www.industrialization.go.ke/index.php/media-center/blog/240-kenya-tops-east-africa-bloc-in-impact-investment>> accessed 23 July 2021; ‘Kenya: The Country Impact Investors Cannot Afford to Ignore’ (20 January 2020) <<https://www.pioneerspost.com/news-views/20200120/kenya-the-country-impact-investors-cannot-afford-ignore>> accessed 23 July 2021; Global Impact Investing Network and Open Capital Advisors, *The Landscape for Impact Investing in East Africa* (ETHIOPIA 2015).

⁹⁸ Castano, T., “Preparing for Impact: Five Ideas to Maximize the Potential of Impact Investing”, New Start New Jersey, April 2017, 1 < <https://ideas.nsnj.org/wp-content/uploads/2017/08/NSNJ-Preparing-for-Impact.pdf>> accessed 21 July 2021.

⁹⁹ CBD Decision XIII/3, para 32.

current levels. This target will be subject to changes contingent to resource needs assessments to be developed and reported by Parties.

Closer home, the *National Horticulture Policy, 2012* states that: - *horticulture Research will be financed through the Government of Kenya, private sector, development partners, trust funds, royalties and competitive grants. Partnerships with relevant public and private institutions will be promoted to increase funding for germplasm conservation and to protect plant varieties with potential for commercial value.*

The *Kenya Agricultural and Livestock Research Act, 2013* establishes the Kenya Agricultural and Livestock Research Organisation, whose object and function is to— promote, streamline, co-ordinate and regulate research in crops, livestock, genetic resources and biotechnology in Kenya; promote, streamline, co-ordinate and regulate research in crops and animal diseases; and expedite equitable access to research information, resources and technology and promote the application of research findings and technology in the field of agriculture.

The unveiling of the Sustainable Development Goals (SDGs) in 2015 meant that most developing countries would have to step up their efforts to raise domestic resources to finance needed domestic investment as support from development partners and private sector investors would not be enough.¹⁰⁰ The SDG Goal 17 acknowledges that the SDGs cannot be realised without the global cooperation amongst countries as well as mobilizing the relevant resources necessary to achieve these goals.¹⁰¹ Target 17.1 seeks to strengthen domestic resource mobilization, including through international support to developing countries, to improve domestic capacity for tax and other revenue collection.

¹⁰⁰ 'Heightening Domestic Resource Mobilization in Africa During COVID-19' (Center For Global Development) <<https://www.cgdev.org/blog/heightening-domestic-resource-mobilization-africa-during-covid-19>> accessed 22 March 2021.

¹⁰¹ Martin, 'Global Partnerships' (*United Nations Sustainable Development*) <<https://www.un.org/sustainabledevelopment/globalpartnerships/>> accessed 8 July 2021.

Domestic Resource Mobilization remains essential to accelerate economic growth and lift people from extreme poverty, particularly in the low-income countries, an important component of the SDGs.¹⁰² Lower poverty levels means better response to conservation measures by the general public.

In order to achieve the sustainable development goals, the 2015 Addis Ababa Action Agenda on Financing for Development captured the importance of domestic resource mobilization, noting that the “mobilization and effective use of domestic resources ... are central to our common pursuit of sustainable development.”¹⁰³ Notably, it has rightly been pointed out that the only reliable and sustained sources of government revenue are taxes and some non-tax revenue instruments, such as royalties and resource rents from extractive industries and, to a limited extent, user fees for public services, generally delivered by local governments.¹⁰⁴ However, most African countries have been over relying on foreign aid and loans to fund their ever expanding national budgets. Kenya is no exception. With the pressure and the 2030 deadline to achieve the sustainable development goals, the need for alternative funding will only grow. As such, there is a need for these countries to not only look for alternative sources of the required financial resources but also the ones that come with less complications and strings attached.

At COP 26, while indigenous leaders welcomed the United Kingdom’s \$1.7 billion pledge to help protect emissions-absorbing forests, the indigenous leaders at COP26 felt that their pleas were starting to be heard, but some still expressed concern that the pledges were too little and worried that the money

¹⁰² Yamada K, ‘Financing Sustainable Development with Enhanced Domestic Resource Mobilization: Transitional Role of International Cooperation’ (2017) 23 Asia-Pacific Development Journal 61, at 61.

¹⁰³ Junquera-Varela, R. F., Verhoeven, M., Shukla, G. P., Haven, B., Awasthi, R., & Moreno-Dodson, B., *Strengthening Domestic Resource Mobilization: Moving from Theory to Practice in Low-and Middle-Income Countries* (The World Bank 2017), chapter Two.

¹⁰⁴ Ibid, 5.

won't end up where it is needed if they continue to be kept out of the decision-making.¹⁰⁵

It is for this reason that these countries need to focus more on capitalizing on domestic resource mobilization as a source of funding development projects. This is important as Official development assistance (ODA) is finite and fluctuates over time, creating uncertainty for recipient countries about planning, budgeting, and expenditures in the public sector.¹⁰⁶

It is documented that when the investment requirements for the SDGs were first assessed in the United Nations Conference on Trade and Development's (UNCTAD's) World Investment Report 2014, at least 10 relevant sectors (encompassing all 17 SDGs) were identified and the report projected an annual investment gap of \$2.5 trillion in developing countries.¹⁰⁷ While this projection remains valid today according to a recent review (UNCTAD, 2020), the SDGs have significant resource implications across developed and developing countries and require a step-change in levels of both public and private investment in the SDGs.¹⁰⁸

The need for enhanced domestic resource mobilization is also more urgent in light of the UNCTAD's observations that the COVID-19 shock has exacerbated existing constraints for the SDGs and could undo the progress made in the last six years in SDG investment and the international private sector investment flows to developing and transition economies in sectors relevant for the SDGs were also expected to fall by about one-third in 2020

¹⁰⁵ 'Why It's Not Just about the Money for Indigenous Leaders at COP26' (*The New Humanitarian*, 10 November 2021)

<<https://www.thenewhumanitarian.org/news/2021/11/10/COP26-Indigenous-leaders-welcome-funding-but-demand-more>> accessed 23 November 2021.

¹⁰⁶ Junquera-Varela, R. F., Verhoeven, M., Shukla, G. P., Haven, B., Awasthi, R., & Moreno-Dodson, B., *Strengthening Domestic Resource Mobilization: Moving from Theory to Practice in Low-and Middle-Income Countries* (The World Bank 2017), 6.

¹⁰⁷ Zhan JX and Santos-Paulino AU, 'Investing in the Sustainable Development Goals: Mobilization, Channeling, and Impact' (2021) 4 *Journal of International Business Policy* 166.

¹⁰⁸ *Ibid.*

because of the COVID-19 pandemic, posing a risk to delivering on the 2030 agenda for sustainable development.¹⁰⁹

Thus, as part of laying the groundwork for the achievement of SDGs, there is a need for countries, including Kenya, to review their domestic resource mobilization efforts and work towards enhancing the same.

While there are various external mechanisms of funding that are available to countries for exploitation, there is a need for countries such as Kenya to enhance their domestic resources mobilization mechanisms. Indeed, this is acknowledged by the UNCTAD which points out that ‘strengthening domestic public resource mobilization is crucial for Governments in financing national sustainable development strategies and implementing Agenda 2030 for Sustainable Development and the Addis Ababa Action Agenda.

In addition, the particular role of fiscal revenues in public resource mobilization lies in their greater stability and predictability compared to other sources of long-term finance. According to International Monetary Fund (IMF) estimates, for low-income countries, average domestic taxes would have to increase by about 5 percentage points if they were to meet the SDGs in five key areas (education, health, roads, electricity, and water), with the financing needed in sub-Saharan Africa being larger given their development level.¹¹⁰ It is also worth pointing out that investment in human, social, and physical capital, are at the core of sustainable and inclusive growth and represent an important share of national budgets—specifically, education, health, roads, electricity, and water and sanitation.¹¹¹ IMF

¹⁰⁹ Zhan JX and Santos-Paulino AU, ‘Investing in the Sustainable Development Goals: Mobilization, Channeling, and Impact’ (2021) 4 Journal of International Business Policy 166.

¹¹⁰ ‘Heightening Domestic Resource Mobilization in Africa During COVID-19’ (Center For Global Development) <<https://www.cgdev.org/blog/heightening-domestic-resource-mobilization-africa-during-covid-19>> accessed 22 March 2021.

¹¹¹ ‘Fiscal Policy and Development: Human, Social, and Physical Investments for the SDGs’ (IMF) <<https://www.imf.org/en/Publications/Staff-Discussion-Notes/Issues/2019/01/18/Fiscal-Policy-and-Development-Human-Social-and-Physical-Investments-for-the-SDGs-46444>> accessed 22 March 2021.

estimates that delivering on the SDG agenda will require additional spending in 2030 of US\$0.5 trillion for low-income developing countries and US\$2.1 trillion for emerging market economies.¹¹² To achieve this, IMF points out that countries themselves own the responsibility for achieving the SDGs, especially through reforms to foster sustainable and inclusive growth that will in turn generate the tax revenue needed, and their efforts should focus on strengthening macroeconomic management, combating corruption and improving governance, strengthening transparency and accountability, and fostering enabling business environments.¹¹³

The IMF considers domestic resources as the largest untapped source of financing to fund national development plans.¹¹⁴ Arguably, the Global Goals can only be met if countries work together, where international investments and support is needed to ensure innovative technological development, fair trade and market access, especially for developing countries.¹¹⁵ It has been argued that domestic resource mobilization will be crucial not only to meet the sheer scale of investment needed to implement the 2030 Agenda for Sustainable Development and the Sustainable Development Goals (SDGs), but also because it holds its own broader promise for transformative change.¹¹⁶ Transformative change will give rise to stronger Environmental Democracy, lower poverty levels and more effective biological diversity conservation by all stakeholders.

3. Conclusion

This paper has highlighted some of the contemporary issues that either directly or indirectly affect efforts aimed at sustainable biodiversity utilisation and conservation. This is a demonstration that biodiversity

¹¹² Ibid, 5.

¹¹³ Ibid.

¹¹⁴ 'Tax Policy for Domestic Resource Mobilization | ADB Knowledge Event Repository' <<https://events.development.asia/learning-events/tax-policy-domestic-resource-mobilization>> accessed 24 March 2021.

¹¹⁵ 'Goal 17: Partnerships for the Goals' (The Global Goals) <<https://www.globalgoals.org/17-partnerships-for-the-goals>> accessed 8 March 2021.

¹¹⁶ 'Mobilizing Domestic Resources for Sustainable Development: Toward a Progressive Fiscal Contract | United Nations ILibrary' <<https://www.un-ilibrary.org/content/books/9789210601023c009>> accessed 24 March 2021.

conservation should not be treated as an independent issue but a complex one that involves various actions spanning across sectors. The issues touch on environmental, social, political and economic spheres of development. This is why there is a need for adoption of integrated approaches to management of various environmental and biodiversity resources, in order to ensure that the issues raised in this paper have been addressed.

References

‘COP26 Climate Change Briefs – Summaries and Downloads’ (*World Bank*) <<https://www.worldbank.org/en/topic/climatechange/publication/world-bank-group-cop26-climate-briefs>> accessed 23 November 2021.

‘Country Climate and Development Report (CCDR) | DataBank’ <[https://databank.worldbank.org/source/country-climate-and-development-report-\(ccdr\)](https://databank.worldbank.org/source/country-climate-and-development-report-(ccdr))> accessed 23 November 2021.

‘Debt Swaps Could Free Funds to Tame Climate, Biodiversity and Virus Threats’ *Reuters* (7 September 2020) <<https://www.reuters.com/article/us-global-debtrenegotiation-nature-clima-idUSKBN25Y26P>> accessed 8 September 2021.

‘Democracy, Human Rights and Governance | U.S. Agency for International Development’ (26 March 2021) <<https://www.usaid.gov/democracy>> accessed 21 July 2021.

‘Determinants of Public Participation in Kenya County Governments - Antony Mbithi, Damiana Ndambuki, Fredrick Owino Juma, 2019’ <<https://journals.sagepub.com/doi/full/10.1177/0021909618794028>> accessed 24 July 2021.

‘ESG Investments Will Fuel Africa’s Post-Pandemic Recovery’ (13 July 2021) <<https://www.internationalinvestment.net/opinion/4031186/esg-investments-fuel-africa-post-pandemic-recovery>> accessed 23 July 2021.

‘Fiscal Policy and Development: Human, Social, and Physical Investments for the SDGs’ (*IMF*) <<https://www.imf.org/en/Publications/Staff-Discussion-Notes/Issues/2019/01/18/Fiscal-Policy-and-Development-Human-Social-and-Physical-Investments-for-the-SDGs-46444>> accessed 22 March 2021.

‘Foreign Investors Gone Wild’ <<https://archive.globalpolicy.org/socecon/develop/democracy/2007/0507wi ld.htm>> accessed 21 July 2021.

‘Globalization, Tourism, and Indigenous Peoples: What You Should Know About the World’s Largest Industry – Planeta.Com’
<<https://www.planeta.com/globalization-1999/>> accessed 24 July 2021.

‘Goal 17: Partnerships for the Goals’ (The Global Goals)
<<https://www.globalgoals.org/17-partnerships-for-the-goals>> accessed 8 March 2021.

‘Heightening Domestic Resource Mobilization in Africa During COVID-19’
(Center for Global Development)
<<https://www.cgdev.org/blog/heightening-domestic-resource-mobilization-africa-during-covid-19>> accessed 22 March 2021.

‘How Can Participatory Development Be Improved? | Devex’
<<https://www.devex.com/news/how-can-participatory-development-be-improved-80472>> accessed 24 July 2021.

‘Human Development Report 1993 | Human Development Reports’
<<http://hdr.undp.org/en/reports/global/hdr1993>> accessed 16 July 2021.

‘Kenya Tops East Africa Blocs in Impact Investment - Ministry of Industrialization, Trade and Enterprise Development (MoITED)’
<<https://www.industrialization.go.ke/index.php/media-center/blog/240-kenya-tops-east-africa-bloc-in-impact-investment>> accessed 23 July 2021.

‘Kenya: The Country Impact Investors Cannot Afford to Ignore’ (20 January 2020)
<<https://www.pioneerspost.com/news-views/20200120/kenya-the-country-impact-investors-cannot-afford-ignore>> accessed 23 July 2021.

‘Mobilizing Domestic Resources for Sustainable Development: Toward a Progressive Fiscal Contract | United Nations ILibrary’ <<https://www.un-ilibrary.org/content/books/9789210601023c009>> accessed 24 March 2021.

‘Program COP26 Side Event’ <<https://unctad.org/system/files/information-document/ditc-ted-06112021-COP26-sideevent-programme-v1.pdf>>
accessed 23 November 2021.

‘SDG 17: Strengthen the Means of Implementation and Revitalize the Global Partnership for Sustainable Development – SDG Compass’ <<https://sdgcompass.org/sdgs/sdg-17/>> accessed 8 July 2021.

‘Tax Policy for Domestic Resource Mobilization | ADB Knowledge Event Repository’ <<https://events.development.asia/learning-events/tax-policy-domestic-resource-mobilization>> accessed 24 March 2021.

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

‘Time for Solutions to Tackle the Twin Sovereign Debt and Nature Crises’ (*Green Fiscal Policy Network*) <<https://greenfiscalspolicy.org/blog/time-for-solutions-to-tackle-the-twin-sovereign-debt-and-nature-crises/>> accessed 8 September 2021.

‘United Nations Supporting Kenya’s Post COVID-19 Industrial Recovery and Growth to Achieve Inclusive and Sustainable Growth | United Nations in Kenya’ <<https://kenya.un.org/en/126013-united-nations-supporting-kenyas-post-covid-19-industrial-recovery-and-growth-achieve>> accessed 23 July 2021.

‘What Are the Main Criticisms of the World Bank and the IMF?’ (*Bretton Woods Project*, 4 June 2019) <<https://www.brettonwoodsproject.org/2019/06/what-are-the-main-criticisms-of-the-world-bank-and-the-imf/>> accessed 24 July 2021.

‘What Does COP26 Mean for Adaptation?’ (*UNEP*, 17 November 2021) <<http://www.unep.org/news-and-stories/story/what-does-cop26-mean-adaptation>> accessed 23 November 2021.

‘What’s the Role of an Impact Investor like CDC in Kenya?’ (*CDC Group*) <<https://www.cdcgroup.com/en/news-insight/insight/articles/whats-the-role-of-an-impact-investor-like-cdc-in-kenya/>> accessed 23 July 2021.

‘Why Is Participatory Development So Important for Your Nonprofit?’ (grassrootscollective) <<https://www.thegrassrootscollective.org/what-is-participatory-development>> accessed 22 July 2021.

‘Why It’s Not Just about the Money for Indigenous Leaders at COP26’ (*The New Humanitarian*, 10 November 2021) <<https://www.thenewhumanitarian.org/news/2021/11/10/COP26-Indigenous-leaders-welcome-funding-but-demand-more>> accessed 23 November 2021.

“Chapter 12 Community participation,” *Manual.*, 2005 <https://ec.europa.eu/echo/files/evaluation/watsan2005/annex_files/WEDC/es/ES12CD.pdf> accessed 21 July 2021.

A Colls, Neville Ash and Ninni Ikkala, *Ecosystem-Based Adaptation: A Natural Response to Climate Change*, vol 21 (Iucn Gland 2009).

Alessandra Ricciardelli, ‘Governance, Local Communities, and Citizens Participation’ in Ali Farazmand (ed), *Global Encyclopedia of Public Administration, Public Policy, and Governance* (Springer International Publishing 2017) <https://doi.org/10.1007/978-3-319-31816-5_3221-1> accessed 24 July 2021.

Arlaud, M., Cumming, T., Dickie, I., Flores, M., van den Heuvel, O., Meyers, D., Riva, M., Seidl, A. and Trinidad, A., ‘The Biodiversity Finance Initiative: An Approach to Identify and Implement Biodiversity-Centered Finance Solutions for Sustainable Development’ [2018] *Towards a Sustainable Bioeconomy: Principles, Challenges and Perspectives* 77.

Benard Musembi Kilaka and Jan Bachmann, ‘Kenya Launches Lamu Port. But Its Value Remains an Open Question’ (*The Conversation*) <<http://theconversation.com/kenya-launches-lamu-port-but-its-value-remains-an-open-question-161301>> accessed 24 July 2021.

Berner, M. M., Amos, J. M., & Morse, R. S., "What constitutes effective citizen participation in local government? Views from city stakeholders." *Public Administration Quarterly* (2011): 128-163.

Bishop J, *The Economics of Ecosystems and Biodiversity in Business and Enterprise* (Routledge 2013).

Bridget Lewis, 'Environmental Rights or a Right to the Environment? Exploring the Nexus between Human Rights and Environmental Protection.' (2012) 8 *Macquarie Journal of International and Comparative Environmental Law* 36.

Castano, T., "Preparing for Impact: Five Ideas to Maximize the Potential of Impact Investing", New Start New Jersey, April 2017
<<https://ideas.nsnj.org/wp-content/uploads/2017/08/NSNJ-Preparing-for-Impact.pdf>> accessed 21 July 2021.

Castano, T., "Preparing for Impact: Five Ideas to Maximize the Potential of Impact Investing", New Start New Jersey, April 2017
<<https://ideas.nsnj.org/wp-content/uploads/2017/08/NSNJ-Preparing-for-Impact.pdf>> accessed 21 July 2021.

Chris J Koopmans, K van Veluw and FG Wijnands, 'Participatory Development as a Way to Innovations: Five Key Elements for Success' (2014) 3 *Building Organic Bridges* 791.

Devex Editor // 11 March 2013, 'How Can Participatory Development Be Improved?' (*Devex*, 11 March 2013)
<<https://www.devex.com/news/sponsored/how-can-participatory-development-be-improved-80472>> accessed 21 July 2021.

Dinah Shelton, *A Rights-Based Approach to Public Participation and Local Management of Natural Resources* (2008)
<https://www.iges.or.jp/en/publication_documents/pub/conferenceproceedings/en/739/3ws-26-dinah.pdf> Accessed 16 July 2021.

Emmanuel Raufflet and others, ‘Social License’ in Samuel O Idowu and others (eds), *Encyclopedia of Corporate Social Responsibility* (Springer 2013) <https://doi.org/10.1007/978-3-642-28036-8_77> accessed 24 July 2021.

Environmental Research Institute Science Technology and Environment Agency Lao People’s Democratic Republic, “Public Participation in Development Projects in LAO PDR”

< http://pdf.wri.org/mekong_governance_mreg_eri.pdf> accessed 21 July 2021.

Eric Toussaint, ‘The World Bank, the IMF and the Respect of Human Rights’ (*CADTM*, 23 July 2021) <<https://www.cadtm.org/The-World-Bank-the-IMF-and-the-respect-of-human-rights>> accessed 24 July 2021.

Flávia Piovesan, ‘Active, Free and Meaningful Participation in Development’ (2013) 25 Office of the High Commissioner for Human Rights, *Realizing the Right to Development: Essays in Commemoration of* <<https://www.ohchr.org/Documents/Issues/Development/RTDBook/PartIIChapter6.pdf>> Accessed 16 July 2021.

Giles Mohan, ‘Participatory Development’ [2002] *The companion to development studies* 49.

Ginsburg, A., Stephens, A., Tau, M., Botts, E., & Holness, S., ‘Biodiversity Mainstreaming in South Africa’s Production Landscapes: Lessons and Achievements’ [2020] *International Grassland Congress Proceedings* <<https://uknowledge.uky.edu/igc/22/2-15/1>> accessed 24 July 2021.

Global Impact Investing Network and Open Capital Advisors, *The Landscape for Impact Investing in East Africa* (ETHIOPIA 2015).

Ian Thomson and Susan Joyce, ‘The Social Licence to Operate: What It Is and Why Does It Seem So Difficult to Obtain?’, *Prospectors and Developers Association of Canada Convention, Toronto, Ontario, Canada* (2008).

Jack Donnelly, 'Human Rights, Democracy, and Development' (1999) 21 Human Rights Quarterly 608.

Junquera-Varela, R. F., Verhoeven, M., Shukla, G. P., Haven, B., Awasthi, R., & Moreno-Dodson, B., *Strengthening Domestic Resource Mobilization: Moving from Theory to Practice in Low-and Middle-Income Countries* (The World Bank 2017).

Kathleen Wilburn and Ralph Wilburn, 'Achieving Social License to Operate Using Stakeholder Theory' (2011) 4 J. Int. Bus. Ethics 3.

Kwemo AB, 'Making Africa Great Again: Reducing Aid Dependency' (*Brookings*, 20 April 2017) <<https://www.brookings.edu/blog/africa-in-focus/2017/04/20/making-africa-great-again-reducing-aid-dependency/>> accessed 8 September 2021.

Lain Dare, Jacki Schirmer and Frank Vanclay, 'Community Engagement and Social Licence to Operate' (2014) 32 Impact Assessment and Project Appraisal 188.

Mant, R., Perry, E., Heath, M., Munroe, R., Väänänen, E., Großheim, C., & Kümper-Schlake, L., 'Addressing Climate Change—Why Biodiversity Matters' [2014] UNEP-WCMC: Cambridge, UK.

Martin, 'Global Partnerships' (*United Nations Sustainable Development*) <<https://www.un.org/sustainabledevelopment/globalpartnerships/>> accessed 8 July 2021.

Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR.

Munang, R., Thiaw, I., Alverson, K., Mumba, M., Liu, J. and Rivington, M., 'Climate Change and Ecosystem-Based Adaptation: A New Pragmatic Approach to Buffering Climate Change Impacts' (2013) 5 Current Opinion in Environmental Sustainability 67.

OECD (2019), *Biodiversity: Finance and the Economic and Business Case for Action*, report prepared for the G7 Environment Ministers' Meeting, 5-6 May 2019.

Republic of Kenya, Constitution of Kenya 2010 (Government Printer, Nairobi, 2010).

Republic of Kenya, *Kenya national action plan on business and human rights For the Implementation of the United Nations Guiding Principles on Business and Human Rights*, June 2019 <https://www.ohchr.org/Documents/Issues/Business/NationalPlans/2019_FINAL_BHR_NAP.PDF> accessed 23 July 2021.

Robert Joumard, 'The Free Trade Agreements: Contempt for Citizens, Sovereignty for Multinationals' (CADTM, 23 July 2021) <<https://www.cadtm.org/The-free-trade-agreements-contempt>> accessed 24 July 2021.

Ronald Phillips, 'Impact Investing and Community Development' (2016) 25 Maine Policy Review 63.

Shelton Dinah, 'Protecting Human Rights in a Globalized World', *Human Rights and Corporations* (Routledge 2017).

Smith, T., Beagley, L., Bull, J., Milner-Gulland, E.J., Smith, M., Vorhies, F. and Addison, P.F., 'Biodiversity Means Business: Reframing Global Biodiversity Goals for the Private Sector' (2020) 13 Conservation Letters e12690.

Treaty Making and Ratification Act, No. 45 of 2012, Laws of Kenya.

UN General Assembly, *Declaration on the Right to Development: resolution / adopted by the General Assembly*, 4 December 1986, A/RES/41/128.

Unit B, 'Aichi Biodiversity Targets' (18 September 2020) <<https://www.cbd.int/sp/targets/>> accessed 8 September 2021.

United Nations Development Programme, ‘The Future We Want: Biodiversity and Ecosystems—Driving Sustainable Development.’ (Biodiversity and ecosystems global framework 2012–2020, 2012).

United Nations, “Biodiversity at the Heart of Sustainable Development”, *Input to the 2018 High-level Political Forum on Sustainable Development (HLPF)*, Secretariat of the Convention on Biological Diversity (CBD), 27 April 2018.

United Nations, *Convention on Biological Diversity*, Rio de Janeiro, 5 June 1992, United Nations, *Treaty Series*, vol. 1760, p. 79; and depositary notification C.N.29. 1996.TREATIES-2 of 18 March 1996.

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

Vignola, R., Locatelli, B., Martinez, C., & Imbach, P., ‘Ecosystem-Based Adaptation to Climate Change: What Role for Policy-Makers, Society and Scientists?’ (2009) 14 *Mitigation and adaptation strategies for global change* 691.

Yamada K, ‘Financing Sustainable Development with Enhanced Domestic Resource Mobilization: Transitional Role of International Cooperation’ (2017) 23 *Asia-Pacific Development Journal* 61.

Yue M and WANG CN, ‘Debt-For-Nature Swaps: A Triple-Win Solution for Debt Sustainability and Biodiversity Finance in the Belt and Road Initiative (BRI)? – Green Belt and Road Initiative Center’ <<https://green-bri.org/debt-for-nature-swaps-in-the-belt-and-road-initiative-bri/>> accessed 8 September 2021.

Zhan JX and Santos-Paulino AU, ‘Investing in the Sustainable Development Goals: Mobilization, Channeling, and Impact’ (2021) 4 *Journal of International Business Policy* 166.

The Test and Place of Public Participation in Kenya's Governance

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Abstract

This paper examines the test and place of Public Participation in Kenya's governance. It is based on an evaluation of findings and key pronouncements by Kenyan courts while determining cases filed before them challenging decisions made by public entities in absence of adequate public participation. The author's reliance on precedents is necessitated by the recognition that there is no stand-alone law on Public Participation in Kenya. However, as it will emerge from the discussion, there have been significant milestones made by Kenyan Parliament towards enactment of a Public Participation Law. Moreover, the author highlights on the practical challenges hindering meaningful public participation at both national and County levels and concludes that the absence of a guiding legal and policy framework is the springboard of all the bottlenecks in conducting effective of public participation in Kenya.

1.0 Introduction

The promulgation of the Constitution of Kenya 2010 ushered in a paradigm shift in governance by placing people at the centre of public administration.¹ This marked a significant departure from the old order which adopted a top-down approach where government decisions were made by policy makers

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¹ National Assembly Reports, 2020, *A report of the Committee on Parliamentary Broadcasting and Library on the Consideration of the Public Participation Bill 2019.*

without citizens' input.² Right from the Preamble of the Constitution 2010, the Principle of Public Participation is well encapsulated and transcends all aspects of governance with Kenyans aspiring for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. Further, in exercise of their sovereign and inalienable right to determine the form of governance of their country and participating fully in Constitution making process, Kenyans adopted and enacted the Constitution 2010 for themselves and their future generations.³ Consequently, the introduction of a devolved system of governance coupled with mandatory requirement for public participation in decision making ensures that Kenyans participate in governance not only in electing their representatives but also in policy formulation, law making and implementation of government programs.⁴

Public participation traces history from the origins of democracy. As the underlying and founding principle of democracy is 'rule by the people', true democracy places people at the centre of decision making.⁵ The history of early struggle for citizen driven governance can be seen from the history of various democracies around the world, for example, during the American Revolution and French Revolution. During the American Revolution (between 1765 and 1791), for example, there was a clamour for a government led by people where ordinary citizens expressed interest in politics while political elites advocated for and defended a popular government.⁶ There

² GOK, Intergovernmental Relations Technical Committee, *The Status of Public Participation in National and County Governments* Available at <https://countytoolkit.devolution.go.ke/sites/default/files/resources/27.%20The%20Status%20of%20Public%20Participation%20in%20National%20and%20County%20Governments%20.pdf> {Accessed on 16th May 2022}.

³ Preamble, Constitution 2010.

⁴ GOK, Intergovernmental Relations Technical Committee, *Ibid*.

⁵ Open Society Initiative for Eastern Africa, "Kenya: Democracy and Public Participation" A review by Afrimap, Open Society Initiative for Eastern Africa and the Institute for Development Studies (IDS), University of Nairobi 2014. Available on [file:///C:/Users/pc/Downloads/kenya-democracy-political-participation-20140514%20\(1\).pdf](file:///C:/Users/pc/Downloads/kenya-democracy-political-participation-20140514%20(1).pdf) (Accessed on 7th June 2022).

⁶ Jackson Turner Main, 'Government by the People: The American Revolution and the Democratization of the Legislatures', 1966 available on <https://www.jstor.org/stable/1919237> {Accessed on 5th May 2022}.

was an ideological shift as Americans were disappointed by the British government due to lack of direct representation hence decisions passed by colonial legislatures negatively impacted on American affairs. Undeniably, the American struggle for independence and the Civil Rights Movement was characterized by a 'ladder of increasing citizen influence and authority' over government decision making. This American aspiration for a citizen centred governance was not without struggle as there was division with some quarters doubting whether public participation would really achieve equality and inclusion or rather exacerbate class and racial differences.⁷ Since the American and French Revolution, public participation in decision making has evolved to become a key feature in governance worldwide.⁸ Indeed, the principle of public participation has found room in international legal instruments such as the Universal Declaration of Human Rights(UDHR),⁹ International Covenant on Civil and Political Rights(ICCPR),¹⁰ United Nations Convention Against Corruption, Declaration on the Right to Development, African Charter on Human and People's Rights(the Banjul Charter), the Aarhus Convention among others.¹¹

Kenya attained independence from Britain in 1963. The post-independence Kenya maintained a centralized governance structure where all government functions were conducted by the central government.¹² An attempt to

⁷ D.P. Moynihan, 'Maximum Feasible Misunderstanding: Community Action in the War on Poverty' 1969 *Free Press*, 866 Third Avenue, New York, N,Y 10022. Available on <https://eric.ed.gov/?id=ED035806> (Accessed on 7th June 2022).

⁸ Bingham et al., 'The New Governance: Practices and Processes for Stakeholder and Citizen Participation in the Work of Government' 2005 *Public Administration Review*, Available at https://www.researchgate.net/publication/249398666_The_New_Governance_Practices_and_Processes_for_Stakeholder_and_Citizen_Participation_in_the_Work_of_Government/link/605b78eb299bf1736768585b/download (Accessed on 7th June 2022).

⁹ Article 21,UDHR.

¹⁰ Article 25, ICCPR.

¹¹ GOK, Intergovernmental Relations Technical Committee, op.cit.

¹² Margaret Monyani, 'One Party State: Is it good or Bad for Governance' 2018 *E-International Relations* ISSN2053-8626, available at <https://www.e-ir.info/2018/05/25/one-party-state-is-it-good-or-bad-for-governance/> (Accessed on 9th June 2022).

dismantle the centralized system of governance was made post-independence through establishment of regional governments(*majimbo*) but this attempt failed as the regional governments were stripped of their powers, financial support and eventually abolished in 1966.¹³ A centralized governance structure was characterized by bureaucracy, exploitation and dictatorship as public participation was only exercised at the ballot. The policy makers were not obligated to consult with the public in policy formulation hence most of the laws and policies were passed without undergoing public participation.¹⁴ Public participation was minimal as direct sovereignty of the people was only practiced at the ballot whereby Kenyans voted to choose their representatives.

The independent Constitution did not place much importance on participatory democracy as there were no provisions to enable Kenyans to fully participate in public decision making.¹⁵ This was worsened by a constitutional amendment which declared Kenya a one party state in order to curb the attempted coup in 1982.¹⁶ During the one party rule period, there were many incidents of human rights violations as the government of the day repressed dissenting voices who were opposed to unfair government policies and dictatorship.¹⁷

¹³ David M. Anderson, 'Yours in Struggle for Majimbo: Nationalism and the Party Politics of Decolonization in Kenya', 2005, *Journal of Contemporary History* Vol.40, No.3 July 2005 , pp547-564, *Sage Publications Inc.*, available on <https://www.jstor.org/stable/30036342> (Accessed on 9th June 2022).

¹⁴ Jennifer A. Widner., *The Rise of a Party-State in Kenya*,1993 *University of California Press*, University of California, available at <https://publishing.cdlib.org/ucpressebooks/view?docId=ft9h4nb6fv;chunk.id=0;doc.view=print> (Accessed on 9th June 2022).

¹⁵ Research Directorate, Immigration and Refugee Board, Canada, 'Restoration of Multiparty Government and Kenyans of Somali Origin', 1st March 1992, Canada. Available on <https://www.refworld.org/docid/3ae6a80a28.html> {Accessed on 5th May 2022}.

¹⁶ This amendment made KANU the one and only ruling party in Kenya.

¹⁷ Odinge Odera, 'Jaramogi's Struggle for Multi-Party Politics and Failed Dream to lead Kenya', 2010 *The Standard Business*, May 27th 2010, available at <https://www.standardmedia.co.ke/business/business/article/2000010306/jaramogis-struggle-for-multi-party-politics-and-failed-dream-to-lead-kenya> {Accessed on 5th May 2022}.

However, in 1990, there was a new wave for a change in style of governance from one party state to a multi-party state with a view to enable Kenyans form political parties and affiliations of their choice. Consequently, the repeal of section 2(a) of the independent Constitution birthed a new era of multiparty democracy with the first multi-party elections in 1992.¹⁸ The achievement of multi-party democracy provided an opportunity to enhance rights and freedoms hence ushering in a new space in which citizens could participate in public affairs and hold leaders to account.¹⁹ Although the attainment of multiparty democracy was a milestone in Kenya's history, it did not achieve the full ideals of democracy as there was no change of administration hence some of the negative aspects of one party rule persisted.²⁰ Due to the need for a more concrete foundation for a people centred governance, Kenyans undertook a consultative constitutional reforms dialogue between the 1990s and 2000s which took almost two decades to be completed. The Kenyan constitutional making process was a complex democratic process that culminated into the enactment and promulgation of the Constitution of Kenya 2010. The Constitution 2010 replaced the independent constitution introducing salient entitlements, *inter alia*, a constitutional requirement for citizen involvement in decision making. Consequently, any decision that requires public participation must be subjected to public participation and lack of it or inadequacy thereof renders the decision null and void.

1.1 The Principle of Public Participation

Public participation in governance involves direct or indirect involvement of stakeholders in decision-making about policies, plans or programs in which

¹⁸ The repeal of section 2(a) removed legal impediments to formation of political parties which saw the formation and recognition of parties such as the National Development Party and Forum for Restoration of Democracy(FORD).

¹⁹ Open Society Initiative, op.cit.

²⁰ Njogu W. Kiarie, 'Language and Multiparty Democracy in a Multiethnic Kenya', 2004 *Africa Today*, 50(3): 55-73,

available at

https://www.researchgate.net/publication/236770350_Language_and_Multiparty_Democracy_in_a_Multiethnic_Kenya (Accessed on 9th June 2022).

they have an interest.²¹ The term ‘stakeholders’ may be construed as persons, groups or organizations that may influence or be affected by policy decisions or place a claim on an organization or other entity’s attention, resources or outputs.²² Public participation cannot be equated to mere consultation. According to Black’s Law Dictionary ‘consultation’ is defined as *‘the art of asking the advice or opinion of someone* while ‘participation’ is defined as *‘the act of taking part in something, such as partnership...hence participation* more generally refers to the process of engagement.²³ Governance encompasses formal and informal processes of decision-making and management of domains of collective community interest or concern.²⁴ Therefore, democratic governance requires more public participation in governance over and beyond representation by elected representatives. Public participation is a key aspect of modern democracy as the people are accorded an opportunity to shape the discourse of policy formulation, law making and implementation of public programs.

In most legislations as well as academia, the term ‘citizen participation/engagement’ has been used interchangeably with public participation. However, the use of the term ‘citizen participation/engagement’ renders a narrow interpretation of public participation as it seems to suggest that only citizens have a right to be involved in public decision making, hence locking out other stakeholders like Civil Society Organizations who are not natural persons.

The Constitution 2010 does not define Public Participation but in the Public Participation Bill 2019, public participation is defined *as the involvement and consultation of the public in decision making processes of the relevant State Organs and Public Offices*; while ‘public’ comprises the citizens of

²¹ Kathryn S. Quick and John M. Bryson, ‘Public Participation’, 2016, in the *Handbook in Theories of Governance* Jacob Torbing and Chris Ansell(eds.), Edward Elgar Press, Chapter 12.

²² Kathryn S.Quick and John M.Bryson., *ibid*.

²³ See the definition of ‘consultation’ and ‘participation’ in the Black’s Law Dictionary.

²⁴ Kathryn S.Quick and John M.Bryson, *ibid*.

Kenya and any professional, civic, non-governmental, private or public body.²⁵

From case law, the South African Court in *Doctors for Life International vs. Speaker of the National Assembly and Others*²⁶ construed “public involvement” to mean *the process of allowing the public to participate in the decision-making process* where to “involve” includes to ‘bring a person into a matter’ while ‘participation’ refers to ‘taking part with others (in an action or matter)’; thus public involvement regards the active involvement of members of a community or organization in decisions which affect them. In addition, the court opined that the phrase ‘facilitate public involvement’ is a broad concept, which relates to the duty to ensure public participation in decision making process.²⁷

From the various definitions, the common denominator in public participation is the involvement of the public/people in decision making to the effect that members of public are accorded an opportunity to participate freely in decision making and their views are considered. Public participation may therefore be construed as a process of engagement in governance where people deliberate and take collective action on various interests that affect them.²⁸ This is based on the rationale that citizens are important stakeholders in a functioning democracy and must therefore be accorded an opportunity to participate in formulation, adoption and implementation of laws, policies and programs.

In public participation, there are two principal duties of public entities which are; the duty to provide meaningful opportunities for public participation and the duty to take measures to ensure that people have the ability to take

²⁵ National Assembly of Kenya, *Public Participation Bill No.2 of 2019*.

²⁶ CCT12/05 [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)

²⁷ *Doctors for Life Case*, ibid.

²⁸ Antony Mbithi, Damiana Ndambuki and Fredrick Owino Juma, ‘Determinants of Public Participation in Kenya County Governments’, 2018, *Journal of Asian and African Studies*. Available on <https://journals.sagepub.com/doi/full/10.1177/0021909618794028> (Accessed on 7th June 2022).

advantage of the opportunities provided. Thus, public participation is a continuum that ranges from providing information and building awareness, to partnering in decision-making.²⁹ The centrality of the 'public' in public participation was underscored by Odunga J. in *Robert N. Gakuru & Others vs Governor Kiambu County & 3 Others*³⁰ where he stated as follows:

"Therefore public participation is not a mere cosmetic venture or a public relations exercise. In my view, whereas it is not to be expected that the legislature would be beholden to the public in a manner which enslaves it to the public, to contend that public views ought not to count at all in making a decision whether or not a draft bill ought to be enacted would be to negate the spirit of public participation as enshrined in the Constitution. In my view public views ought to be considered in the decision making process and as far as possible the product of the legislative process ought to be true reflection of the public participation so that the end product bears the seal of approval by the public. In other words, the end product ought to be owned by the public"

2.0 Legal Framework on Public Participation in Kenya

Currently there is no stand-alone law on public participation in Kenya. This void has left to speculation many aspects of meaningful public participation such as the questions as to what constitutes adequate public participation, nature of participation that meets constitutional threshold, effective public participation mechanisms and processes, etc.³¹ Nevertheless, the Parliament has taken fundamental steps towards enactment of a legislation to govern implementation of the principle of public participation in Kenya and this effort has culminated into enactment of the Public Participation Bill 2019 which is currently pending at the National Assembly. Similar efforts have been made by various County Governments which have enacted laws on public participation although implementation remains a challenge largely due to lack of regulations to operationalize them, inadequate institutional set up and budgetary constraints.

²⁹ *Doctors for Life Case*, op.cit.

³⁰ (2014)eKLR.

³¹ GOK, Intergovernmental Relations Technical Committee, op.cit

Consequently, in determining cases challenging lack of public participation, courts have invoked the provisions of the Constitution 2010, statutes such as the County Government Act, 2012 and sectoral laws that embody provisions on public participation as well as precedents.

2.1 The Constitution 2010

The Constitution 2010 establishes the normative framework for public participation, prescribes mandatory provisions for public participation in policy formulation and law making, establishes institutions for public participation and directs on the enactment of legislation and establishment of statutory agencies for effective public participation.³² Within the Constitutional dictates and international law, public participation has been construed as a right of the people to participate in governance.³³ This right confers the public with an entitlement to participate in decision making where their interests may be affected and any breach thereof is enforceable by courts of law or tribunals. In order to sufficiently safeguard the public's right to give inputs in decision making, the Constitution has identified key areas where public participation must be undertaken including, governance,³⁴ law and policy making processes, involvement of persons with disabilities,³⁵ environmental management,³⁶ petitioning Parliament,³⁷ public finance management (budgeting and development of finance bills), planning, infrastructural developments, service delivery etc.

In recognition of the fact that public participation is embedded on the sovereignty of the people, Article 1 of the Constitution provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution. Indeed, the courts have reiterated this by observing that public participation is anchored on the principle of the

³² GOK, *ibid*.

³³ Muigua Kariuki, 'Towards Meaningful Public Participation in Natural Resources Management in Kenya', 2014 available on https://kmco.co.ke/?page_id=1464 (Accessed on 1st July 2022).

³⁴ Constitution 2010, Article 10

³⁵ Constitution 2010, Articles 54, 55, 56, and 57

³⁶ Constitution 2010, Article 69

³⁷ Constitution 2010, Article 119,

sovereignty of the people “that permeates the Constitution and in accordance with Article 1(4) of the Constitution is exercised at both national and county levels”. Under Article 10, public participation has been entrenched as a national value and a principle of governance which binds all State organs, State Officers, Public Officers and all persons whenever any of them—(a) applies or interprets the Constitution;(b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions.³⁸

In order to empower people to participate in the law making process, Article 118 of the Constitution obligates Parliament to conduct its business in an open manner, ensure that its sittings and those of its committees are open to the public and facilitate public participation and involvement in the legislative and other business of Parliament and its committees.

Other provisions for public participation under the Constitution 2010 include Article 201 which enumerates public participation as one of the principles of public finance, Article 221(5) which requires the National Assembly budget committee to undertake public participation in discussing and reviewing annual budgetary estimates and Article 232 where public participation is listed as one of the values and principles of public service. Further, under Article 174, one of the objects of devolution is to give powers of self-governance to the people and enhance their participation in governance as well as empowering communities to manage their own affairs. Article 196 enjoins County Assemblies to facilitate public participation and involvement in the legislative process as well as other business of the County Assembly and its Committees.

2.2 County Governments Act, 2012

In the Fourth Schedule of the Constitution 2010, County Governments are tasked with ensuring and coordinating participation of communities in

³⁸ The national values and principles of governance under Article 10 include; (a) patriotism, national unity, sharing and devolution of power, the rule of law, *democracy and participation of the people*; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; (c) good governance, integrity, transparency and accountability; and (d) sustainable development.

governance and building their capacities to get involved in meaningful public participation.³⁹ The County Governments Act 2012 provides for the principle of public participation and processes of participation at the County level and has dedicated Chapter VIII as the framework for public participation at the County level. To this end, sections 87 to 115 provides for the principle of public participation and stipulates the mechanisms and processes for effective public participation at the Counties.⁴⁰

2.3 Public Finance Management Act, 2012

The Public Finance Management Act 2012(PFMA) provides mechanisms through which citizens can engage the national and county governments on matters concerning public finance. Section 10(2) enjoins the Parliamentary Budget Office to undertake public participation in the budgeting process while section 137 establishes County Budget and Economic Forum which is mandated to provide a means for consultation in development of County plans, County Fiscal Strategy Paper and County Budget review and Outlook Paper.

2.4 Intergovernmental Relations Act, 2012

The purpose of this Act is to establish mechanisms for consultation and cooperation between the National and County Governments pursuant to Articles 6 and 189 of the Constitution. Under section 3, public participation is stated as one of the objects of the Act so as to provide for consultation between the two levels of government through their representatives subject to consultation with the public. Section 4 reiterates public participation as one of the national values and principles of governance under Article 10 of the Constitution and as a principle of intergovernmental relations. Other provisions for public participation in various matters under the Act include sections 5(d), 20(g), 29 and 38.

³⁹ Constitution 2010, Fourth Schedule.

⁴⁰ See generally Chapter VIII of the County Government Act, 2012 which embodies provisions on principles of citizen participation in counties; citizen rights to petition and challenge; duty to respond to citizen's petitions or challenge; matters subject to local referenda and establishment of modalities and platforms for citizen participation.

2.5 Sectoral Laws and Policies

As a principle of good governance, public participation has been entrenched in sectoral laws such as the Wildlife Conservation and Management Act, 2013(WCMA), Environmental Management and Coordination Act 1999(EMCA), Forests Conservation and Management Act 2016(FCMA), Urban Areas and Cities Act, 2012, etc.

2.6 Public Participation Bill, 2019

The objective of this Bill is to give effect to the provisions of the Constitution regarding public participation,⁴¹ provide for the parameters for public participation and define the obligations of State Organs and Public Offices in conducting public participation and connected purposes.

Under section 5, the guiding principles for public participation are well stipulated. Accordingly, in conducting public participation a State Organ or Public Office shall be guided by the following principles, (a) the need to provide timely access to relevant information relating to Public Offices and State Organs policy formulation and implementation; (b) the national values and principles of governance as provided for under Article 10 of the Constitution; (c) the values and principles of public service as set out under Article 232 of the Constitution; (d) principles of public finance as set out under Article 201 of the Constitution; (e) recognition and promotion of the role of non-state actors participation in decision making processes; (f) the values and principles of leadership and integrity under Chapter Six of the Constitution; (g) promotion of partnerships between Public Offices and State Organs and the non-state organs in decision making processes; and (h) the participation of the women, youth and persons with disabilities in decision making processes.

Section 6 stipulates the obligations of State Organs and Public Offices in regard to public participation which include: establishing structures for public participation as may be required for effective participation; ensuring

⁴¹ Articles 10(2) (a), 69(1) (d), 118, 174 (c), 184(1) (c), 196(1) (b), 201(a) and 232 (1) (d) of the Constitution 2010 makes provisions for public participation in various aspects of governance.

that public participation activities are inclusive and not limited to sector stakeholders; providing the public with information on how public participation is to be undertaken and how decisions shall be made; allocating adequate financial resources for undertaking public participation; ensuring that clear and reasonable timelines are established for public involvement at every stage of decision making and inform the public on the timelines.

Moreover, State Organs and Public Offices are required to: establish a monitoring and evaluation framework for public participation processes; enhance participation through civic education for purposes of creating an enlightened and empowered citizenry; request by formally inviting sector stakeholders to make submissions through memoranda on issues under deliberation; implement set standards and guidelines regarding public participation and publish notices inviting the public to provide input on comments on a matter under deliberation in accordance with section 10.

Further, public institutions should ensure that public inputs are analyzed and the decision made is communicated to the public including a summary of the inputs made and the reasons for the decisions within reasonable timelines; ensure that all persons have fair and equal access to the public participation processes; ensure timely access to information by the public on the subject matter under deliberation and the issues to be addressed and that information on public participation is tailored to meet the needs of persons with disabilities, older members of the society and the less educated citizens and may include the use of Braille and local languages.

Under Section 8, the Bill provides for the rights of the members of public to attend public participation fora; make presentations either orally or by way of written submission to a State Organ or Public Office, to be accorded a reasonable time to make a presentation and to make presentations without interruption or influence by a State or Public Officer.

Section 11 provides for notification to the public where State Organs or Public Offices are obligated to ensure that a notice of at least twenty one days is given to the public through advertisement in at least two local dailies of wide circulation in the country, radio or any other mechanisms for

dissemination of information. Under section 12, public institutions are required to take affirmative measures to ensure that marginalized groups participate in policy formulation including creating mechanisms that ensure that marginalized groups have timely access to information relating to Public Offices and State Organs. The right of review is provided for under section 13 which states that a person aggrieved by a decision of a State Organ or Public Office on any matter relating to public participation may petition a State Organ or Public Office for review of the decision while section 14 invalidates decisions made in absence of public participation.

Under the Bill, it is an offence for a public institution to fail to adhere to the principles and obligations of public participation, punishable by a fine not exceeding three hundred thousand shillings or imprisonment for a term not exceeding six months or to both.

3.0 The Test of Public Participation in Kenya: An Analysis of Case Law

Since the promulgation of the Constitution 2010, questions of the rationale, scope and application of public participation as a principle of governance has been subject of litigation resulting in landmark decisions by Kenyan courts. The legal conundrums in public participation involve major questions as to what constitutes legitimate and meaningful public participation, who should be involved in public participation (matters of representation, inclusivity, power and authority/control), knowledge and information dynamics as well as challenges of designing adequate public participation processes.

In the landmark ruling of *Odunga J in Robert Gakuru Case*, the Judge dealt with some of these questions as follows;

“In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply “tweet” messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in

general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many fora as possible such as churches, mosques, temples, public barazas national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action."

In terms of the qualitative and quantitative aspects of public participation the Judge observed;

"the yardstick for public participation is that a reasonable opportunity has been given to the members of the public and all interested parties to know about the issue and to have an adequate say. It cannot be expected of the legislature that a personal hearing will be given to every individual who claims to be affected by the laws or regulations that are being made. What is necessary is that the nature of concerns of different sectors of the parties should be communicated to the law maker and taken in formulating the final regulations. Accordingly, the law is that 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."⁴² The reasonableness test as propounded by Odunga J above requires that a reasonable opportunity and facilitation to participate is accorded to the public. By this test, it is not mandatory that views so generated must prevail. From South African jurisprudence in *Merafong Demarcation Forum and Others vs. President of the Republic of South Africa and Others*⁴³, the court

⁴² In arriving at this decision the judge cited the judgement of South African Court in *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others*.

⁴³ (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC)

was of the view that being involved does not mean that one's views must necessarily prevail especially where they are in direct conflict with government policies. A similar position was taken by Lenaola J. in *Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others v County of Nairobi Government & 3 Others*⁴⁴ where he stated that public participation is not the same as saying that public views must prevail. From the judgement of Odunga J above, the reasonableness test depends on the circumstances of each case. Majanja J. concurs with this view in *Commission for The Implementation of the Constitution vs. Parliament of Kenya & Another & 5 Others*⁴⁵ where stated that "the National Assembly has a broad measure of discretion in how it achieves the object of public participation. How this is effected will vary from case to case but it must be clear that a reasonable level of participation has been afforded to the public."

Similarly, in *Independent Electoral and Boundaries Commission (IEBC) vs National Super Alliance(NASA) Kenya & 6 others*⁴⁶, the court observed that allegations of lack of public participation must be considered in the peculiar circumstances of each case and the mode, degree, scope and extent of public participation should be determined on a case by case basis. The court expressed the need for the public to be informed as to the length of consultations and the issues for consultation as well as provision of mechanisms to enable the widest reach possible to the public.

Essentially, what the Courts are saying is that whereas the views expressed by the public are not necessarily binding on the public institutions, due consideration must be given to them before they are dismissed. In terms of the degree of participation the test is that of reasonableness which is an objective standard sensitive to the facts and circumstances of a particular case.

⁴⁴ Petition No. 486 of 2013.

⁴⁵ Petition No.454 of 2012(2013) eKLR

⁴⁶ Civil Appeal No. 224 of 2017; [2017] eKLR

Supreme Court Jurisprudence

The Supreme Court of Kenya is the highest court in the country and its judgements are binding to lower courts in accordance to the Constitutional hierarchy and the doctrine of *Stare Decisis*⁴⁷. The Supreme court of Kenya has dealt with appeals from lower courts challenging decisions made in absence of adequate public participation and in discharge of its mandate, the Supreme Court in *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) vs. Cabinet Secretary of the Ministry of Health & 4 Others*⁴⁸ delimited the guiding framework for public participation in Kenya to guide lower courts in determining cases challenging decisions made in absence of public participation.

In this case, the appellant vide a petition dated 31st March 2017 appealed against the judgment of the Court of Appeal in *Civil Appeal No. 112 of 2016* for upholding the judgment of the High Court in High Court Petition No. 143 of 2015, *British American Tobacco Kenya Limited vs. Cabinet Secretary for Ministry of Health & 4 Others*. At the High Court, the applicant alleged that the Cabinet Secretary for Health and the Tobacco Control Board did not consult with the tobacco industry stakeholders in developing the Tobacco Control Regulations 2014 and that where there was such engagements, the same were limited and entirely unsatisfactory.

Briefly, the facts of the case was that upon enactment of the Tobacco Control Regulations 2014, the appellant who is a stakeholder in the tobacco sector was aggrieved by the provisions of the Regulations and filed a petition in the High Court on 15th April 2015, challenging the lawfulness of the Regulations and section 7(2) of the Tobacco Control Act 2007 on the grounds, *inter alia*, that they were enacted in contravention of the provisions of Statutory Instruments Act(SIA) and violated the Constitutional requirement of public participation. The High Court, through Mumbi J, held that there was

⁴⁷ *Stare Decisis* means 'to stand by things decided' and is essentially the doctrine that courts will adhere to precedent in making their decisions.

⁴⁸ *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v. Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party)* Sup Ct. Pet. 5 of 2017; [2019] eKLR.

sufficient public participation and consultation in the formulation of the Tobacco Control Regulations 2014⁴⁹ and that, except for Regulations 1, 13(b) and 45, the provisions were neither unconstitutional nor unlawful nor did they violate any right of the appellant, the affected party or the tobacco industry players.⁵⁰

Having not been satisfied with the judgement of the High Court, the appellant filed their memorandum of appeal to the Court of Appeal raising 17 grounds of appeal. In its judgement delivered on 17th February 2017, the Court of appeal concurred with the High Court that there was sufficient public participation and consultation conducted in developing the Regulations and buttressed that public participation is a mandatory requirement in the process of making legislation including subsidiary legislation.

The appellant case before the Supreme Court was anchored on Article 163(4)(a) of the Constitution claiming that the matter involved issues of constitutional interpretation and application. The appellant alleged breach of section 5(1)⁵¹ and 6⁵² of the Statutory Instruments Act(SIA) and Article 10 of the Constitution. In regard to SIA, the appellant submitted that there was non-compliance with section 5(1) SIA which requires that where a proposed Regulation is likely to have a substantial direct or indirect impact upon business or restrict competition, the regulatory authority is required to consult with persons likely to be affected. In reliance to section 6 of the SIA,

⁴⁹ Published in the Kenya Gazette 5th December 2014 as Legal Notice No. 169 (Legal Supplement No. 161). These Regulations were enacted pursuant to Section 53 of the Tobacco Control Act, 2007 which gives the Cabinet Secretary powers to make Regulations prescribing or prohibiting anything required by the Act to be prohibited, or for the better carrying out of the objects of the Act.

⁵⁰ See High Court ruling in High Court Petition No. 143 of 2015, *British American Tobacco Kenya Limited v Cabinet Secretary for the Ministry of Health & 4* for details.

⁵¹ Section 5(1) of the Statutory Instruments Act(SIA) requires a Regulation making authority to make appropriate consultations with persons who are likely to be affected by a proposed statutory instrument before making the statutory instrument.

⁵² Section 6 of the SIA imposes an obligation on a Regulation making authority to prepare a Regulatory Impact Statement if a proposed Regulation is likely to impose significant costs on the community or part of a community.

the appellant submitted that the implementation of the Regulations would impose significant costs on the tobacco industry and the community at large yet there was no Regulatory Impact Statement obtained by the Board pursuant to section 6 of the Statutory Instruments Act.

The petition raised 15 points of law⁵³ from which the Supreme Court delimited five issues for determination. Regarding public participation, the Supreme court was called upon to determine *whether the process leading to the making of the Tobacco Control Regulations 2014 was unconstitutional for lack of public participation.*

On 26th November 2019, the Supreme Court upheld the judgement of the Court of appeal by finding that there was adequate public participation in the making of Tobacco Control Regulations 2014 as evidence adduced indicated that *the stakeholder meetings, discussions and communications undertaken constituted adequate public participation under the Constitution of Kenya 2010.*

Guiding Principles

In this case, the Supreme Court in exercise of its mandate under section 3 of the Supreme Court Act delimited a framework for public participation based on the following guiding principles:

1. *As a constitutional principle under Article 10(2) of the Constitution, public participation applies to all aspects of governance.*
2. *The Public Officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.*

⁵³ The following points of law were raised as regards public participation__1.What do the principles of 'public participation' under Article 10 of the Constitution and 'appropriate consultations' under Section 5 of the Statutory Instrument Act 2013 (SIA) require in respect of the development of the Regulation?, 2.Was there compliance with the requirement for consultation under the SIA and/or public participation under the Constitution in making the Regulations?, and 3.What is the effect of non-compliance with the requirements for public participation and consultation; and/or the preparation of a proper RIS on the Regulations?

3. *The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.*
4. *Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to 'fulfill' a constitutional requirement.*
5. *There is need for both quantitative and qualitative components in public participation.*
6. *Public participation is not an abstract notion; it must be purposive and meaningful.*
7. *Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.*
8. *Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.*
9. *Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.*
10. *Components of meaningful public participation include the following:*
 - a. *clarity of the subject matter for the public to understand;*
 - b. *structures and processes (medium of engagement) of participation that are clear and simple opportunity for balanced influence from the public in general;*
 - d. *commitment to the process;*
 - e. *inclusive and effective representation;*
 - f. *integrity and transparency of the process;*
 - g. *capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter.*

In conclusion, the test of public participation in Kenya therefore is the *reasonability test/test of reasonableness* which depends on the circumstances of each case. This reasonability test has been applied widely by Kenyan courts including the Supreme Court in the recently concluded appeal challenging the legality of Constitutional amendments proposed in the Constitution of Kenya (Amendment) Bill 2020, popularly known as the Building Bridges Initiative (BBI).⁵⁴

4.0 The Role of Public Participation in Governance

Public Participation is a fundamental tenet of a functioning democracy. Such democracy must be founded on sound decisions that correspond to the needs of the society and a reasonable level of involvement in decision making. Sovereignty of the people comprises all citizens and requires citizen participation in order to achieve legitimate objectives. Indeed, public participation arises out of necessity for the need to promote the overall good amidst multiple interests. This section discusses the key roles of public participation in promoting good governance in Kenya.

4.1 Safeguarding the Sovereignty of the People

In *British American Tobacco Case*, the Supreme Court observed that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of sovereignty of the people. Through public participation, Kenyans are empowered to continue to find their sovereign place in governance which they have delegated to both the National and County Governments. The role of public participation in safeguarding the sovereignty of the people was aptly captured by Supreme Court while reiterating the words of the Retired Chief Justice, Dr. Willy Mutunga who stated as follows;

“ In the entire history of constitution-making in Kenya, the participation of the people was a fundamental pillar. That is why it has been argued that the making of Kenya's Constitution 2010 is a story of ordinary citizens striving to overthrow, and succeeding in

⁵⁴ See generally the Supreme Court judgement in *Supreme Court Petition No.12 of 2021, Attorney General & 20 Others vs. David Ndii & 79 Others*, para.582 and 583.

overthrowing the existing social order, and then defining a new social, economic, political, and cultural order for themselves. It is, indeed, a story of the rejection of 200 Parliamentary amendments by the Kenyan elite that sought to subvert the sovereign will of the Kenyan population. Public participation is, therefore, a major pillar, and bedrock of our democracy and good governance. It is the basis for changing the content of the State, envisioned by the Constitution, so that the citizens have a major voice and impact on the equitable distribution of political power and resources. With devolution being implemented under the Constitution, the participation of the people in governance will make the State, its organs and institutions accountable, thus making the country more progressive and stable. The role of the Courts, whose judicial authority is derived from the people of Kenya, is the indestructible fidelity to the value and principle of public participation.⁵⁵

Indeed, as Mwilu DCJ observed in *Supreme Court Petition No.12 of 2021, Attorney General & 2 Others vs. David Ndii & 79 Others*, public participation enables the people to safeguard their sovereignty by participating in all aspects of governance. In her words;

“[577] A common thread that emerges is that under our constitutional dispensation, the sovereignty of the People takes a vital centre stage. Since all sovereign power belongs to the people, they must play a significant constitutional role as contemplated under the Constitution. Participation of the people is one of the recognised national values and principles of governance listed in Article 10 of the Constitution. Public participation permeates the sphere of governance and legislative processes, public access and participation including conduct of Parliament and County Assembly business must all have a measure of public participation.”

⁵⁵ See the Supreme Court judgement in *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v. Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party)* Sup Ct. Pet. 5 of 2017; [2019] eKLR

4.2 Compliance with Laws and Regulations

In Kenya, public participation is a legal requirement both under the Constitution 2010 and certain statutes. Thus, State Organs and Public Offices must discharge their legal obligation of undertaking public participation in matters that the Constitution or statutes require to be subjected to public participation. A breach of this obligation renders the decision null and void. In *Republic vs. Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others*⁵⁶ the court of Appeal emphasized on the need to comply with public participation under Article 10 of the Constitution by stating, “Article 10 (2) of the Constitution is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in Article 10 (2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles..., the reading of the express provisions of Section 3 of the Public Procurement and Asset Disposal Act, 2015 as read with Articles 10 (2)(b) and 227 of the Constitution lead us to find that as a general principle (subject to limited exceptions) public participation is a requirement in all procurement by a public entity.”

The need for compliance with the law on public participation was also buttressed by Supreme Court in *Communications Commission of Kenya & 5 others vs. Royal Media Services Limited & 5 others*⁵⁷ as follows;

“Public participation is the cornerstone of sustainable development and it is so provided in the Constitution...Public participation calls for the appreciation by State, Government and all stakeholders implicated in this appeal that the Kenyan citizenry is adult enough to understand what its rights are under Article 34. In the cases of establishment, licensing, promotion and protection of media freedom, public participation ensures that private “sweet heart” deals, secret contracting processes, skewed sharing of benefits-generally a contract and investment regime enveloped in non-disclosure, do not happen. Thus, threats to both

⁵⁶ No. 378 of 2017; [2017]

⁵⁷ [2014] eKLR

political stability and sustainable development are nipped in the bud by public participation. Indeed, if they did the word and spirit of the Constitution would both be subverted."

4.3 Enhancing Legitimacy and Responsiveness of Public Institutions

The consideration and inclusion of views of the public in decisions is an indicator that public institutions are responsive to the needs of the people. This way, government institutions are accountable to the public. Through public participation, public institutions are able to respond to the needs of the people rather than imposing their own ideas. In *Doctors for Life International vs. Speaker of the National Assembly and Others*⁵⁸ the South African court was of the view that participation by the public on a continuous basis provides vitality to the functioning of representative democracy as it encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made and enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of.

4.4 Achieving Ideals of Democracy

A meaningful participation of citizens in governance is the distinguishing feature of a democratic society which is judged by the extent to which it provides opportunities for citizen participation and the space accorded to hold governments accountable.⁵⁹ Democracy requires that people have a right to determine what affects them hence public participation leads to responsive and democratic governance as public ideas, values and issues are considered in decision making.⁶⁰ Through involvement of the people in decision making process, public agencies are able to work directly with the people by ensuring that public concerns and aspirations are understood and considered in decision making. This empowers the people as the decision making power is derived from them. Therefore, by involving the public in

⁵⁸ [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC).

⁵⁹ Open Society Initiative, op.cit.

⁶⁰ Jordy Horntvedt, 'Five Reasons to involve Others in Public Decisions', 2022, University Of Minnesota Extension Available at <https://extension.umn.edu/public-engagement-strategies/five-reasons-involve-others-public-decisions> {Accessed on 27th May 2022}.

decision making, public institutions become more legitimate due to close links with citizens hence increased reputation and opportunities for active public engagements.⁶¹

4.5 Entrenching Social Justice

Involvement of the public in projects that affect the society ensures equity and fairness in decision making as the members of the society are accorded an opportunity to give their input. Given the complexities of community issues, collaborative decision making ensures that the decision making agencies are able to understand community needs and aspirations rather than imposing unilateral decisions that may not lead to sustainable solutions.⁶² Moreover, well designed public participation mechanisms and processes ensures consultation with marginalized groups into the mainstream decision making hence strengthening social cohesion and inclusivity.⁶³

4.6 Facilitating Oversight, Checks and Balances on Public Institutions

Public participation gives an opportunity to members of the public to play a watchdog role in public administration hence ensuring transparency and accountability in governance. This reduces instances of corruption and bad governance. Through public participation, decision making agencies are open to public scrutiny as to the objectives and considerations for making various decisions hence entrenching transparency and accountability in the process.⁶⁴ Similarly, through public participation people are informed of various aspects and consideration in decision making and provided with the relevant information, they are empowered to challenge outcomes that fall short of effective public participation, for instance where public views are unjustifiably ignored. Public participation therefore supplements the formal centralized means of conducting checks and balances by ensuring that

⁶¹ Involve.Org, 'The True Cost of Public Participation' 2005 available on https://www.involve.org.uk/sites/default/files/field/attachemnt/True-Costs-Full-Report2_3.pdf (Accessed on 27th May 2022).

⁶² Oliver Bates, 'Six Reasons Why Public Participation and Community Engagement are Important', 2019, available on <https://www.socialpinpoint.com/blog/6-reasons-to-participate-community-engagement/> {Accessed on 27th May 2022}.

⁶³ Involve.Org., op.cit.

⁶⁴ Oliver Bates., op.cit.

oversight over decision making on public matters is conducted at the community level.⁶⁵

4.7 Informing the Public

Through public participation, members of the public are provided with balanced and objective information that is fundamental in understanding problems, alternatives, opportunities and solutions.⁶⁶ Public Participation promotes moral and intellectual growth of citizens due to their active involvement in decision making and levels the playing ground by granting citizens an equal opportunity to influence decisions. This was noted by the South African Constitutional Court in *Poverty Alleviation Network and Others vs. President of the Republic of South Africa & 19 Others*⁶⁷ where the court stated:

“... engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears, and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision.”

4.8 Understanding Public Problems and Generating Mutually Agreeable Solutions

Through meaningful public participation, public interests, values, expectations and needs are identified and considered in decision making process. Similarly, public participation forums gives an opportunity to public agencies to understand a problem more deeply from a perspective of affected groups as well as the role and contributions of the community towards generating solutions.⁶⁸

⁶⁵ Involve.Org.,op.cit.

⁶⁶ Government of New Zealand, ‘Benefits and Disadvantages of Public Participation’ available on <https://www.doc.govt.nz/Documents/science-and-technical/sfc308a.pdf> {Accessed on 27th May 2022}.

⁶⁷ CCT 86/08 [2010] ZACC 5.

⁶⁸ Wouters M.,et.al., ‘Evaluating Public Input in National Management Plan Reviews: Facilitators and Barriers to Meaningful Public Participation in Statutory Processes’, 2011 available on

4.9 Giving Legitimacy to Public Decisions

The top-down approach to decision making reduces the legitimacy of decisions as the public are informed of the decision 'after the event' hence they can easily boycott such unilateral decisions. On the other hand, decisions reached through public participation are appreciated and accepted by the public hence reducing conflicts; are sufficiently informed and there is public support and good will hence ease of implementation and cooperation and trust between the public body and citizens.⁶⁹ Through public participation, public agencies are able to tap on a wide variety of skills and experiences from the members of the public hence enriching decisions.

Moreover, involvement of the public in project design to implementation ensures that the public understand the objectives and purpose of government projects and programs. Ultimately, programs and projects established pursuant to adequate public participation bears the approval and ownership of the people hence sustainability and successful implementation. Once projects are owned by the people, public institutions are able to save on cost and time as there are reduced instances of conflicts and unnecessary litigation. At the individual level, public participation promotes patriotism and trust in public administration.⁷⁰

Illustratively, in *Doctors for Life International vs. Speaker of the National Assembly and Others*⁷¹ it was observed that in the legislative process "If legislation is infused with a degree of openness and participation, this minimizes dangers of arbitrariness and irrationality in the formulation of legislation. The objective in involving the public in the law-making process is to ensure that the legislators are aware of the concerns of the public. And if legislators are aware of those concerns, this will promote the legitimacy, and thus the acceptance, of the legislation. This not only improves the quality

https://www.researchgate.net/publication/294520100_Evaluating_public_input_in_national_park_management_plan_reviews_Facilitators_and_barriers_to_meaningful_participation_in_statutory_processes {Accessed on 27th May 2022}.

⁶⁹ Muigua Kariuki, op.cit.

⁷⁰ Anthony Mbithi., op.cit.

⁷¹ (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC).

of the law-making process, but it also serves as an important principle that government should be open, accessible, accountable and responsive. And this enhances our democracy.”

4.10 Promoting Equitable Distribution of Resources

In a top-down approach to governance, there is wastage of public resources as public investments are made in projects or areas that are not viable to the needs of the people. Public participation in budget making process plays important roles of setting and aligning government priorities, projects implementation, monitoring and evaluation and impact assessment.⁷² By involving the public in resource allocation, they are able to understand the rationale for prioritizing one project over another, issues of resource constraints, benefits and other considerations hence reducing the likelihood of conflicts regarding resource allocation.

5.0 Challenges in Implementing Public Participation in Kenya

5.1 Lack of an Enabling Legal, Policy and Institutional Framework

Lack of an enabling policy, legal and institutional framework is the major setback against achieving meaningful public participation in Kenya. This is because the absence of prescribed norms and standards for effective public participation hinders effective implementation of constitutional requirements for public participation. Similarly, this gap has largely affected enforcement of the constitutional right of the people to participate in decision making as courts have had to rely on precedent to give life to the word and spirit of the Constitution.

5.2 Inadequate Civic Education

Civic education equips the public with knowledge and skills to enable them participate actively in decision making. Currently, there is low civic education at the County level which accounts for low turnout in public

⁷² GOK, Intergovernmental Relations Technical Committee, op.cit.

participation fora since members of the public have not been sensitized on the importance of public participation and mechanisms for participation.⁷³

5.3 Inadequate Capacity

Lack of adequate capacity to undertake meaningful public participation concerns many aspects such as lack of financial capacity, human resource, inadequate institutional capacity, etc. The capacity of institutions to conduct meaningful public participation can be enhanced through partnerships between both levels of government, development partners and the private sector.

5.4 Corruption

One of the major roles of public participation is to curb corruption by entrenching transparency and accountability in decision making. Conversely, some dishonest public officers have been involved in acts of corruption in public participation forums whereby money is advanced to certain individuals with a view to rubber stamp the process.

5.5 Unfavorable Cultural Attitudes and Practices

In some communities, public participation by women is minimal as cultural norms require them to occupy themselves with domestic matters rather than public affairs. Indeed, it has been reported from some counties that women who attend public participation forums cannot raise their voices due to fear of speaking in public. To empower women to have their voices heard, counties have been encouraged to enact affirmative action policies to ensure that women are capacitated to air their views. Moreover, there are mixed attitudes towards public participation with critics arguing that public involvement in policy making disrupts the operation of the social system, is costly, time consuming, disregards private interests and triggers conflicts.

⁷³ Ndegwa S.N and Minja D., 'The Influence of Civic Education on Public Participation in Governance of Devolved Governments: The Case of Naivasha Sub County, Nakuru County, Kenya', 2018 *The Strategic Journal of Business & Change Management* December 27, 2018 Volume 5, Issue 4, Article 144, pg 2246-2258.

5.6 Inadequate Information

Members of the public often have little access to critical information needed for effective public participation such as information concerning policy, plans, budgets, programs and services to be subjected to public consultations.⁷⁴ In addition, information on matters such as legislation may be provided in advanced language which may sound intimidating to ordinary members of public hence hindering effective participation. Thus, it is the duty of public agencies to provide relevant information on a timely manner and in a form that is easily understood by the public.⁷⁵ The centrality of Access to Information in public participation was underscored by Mrima J. in *KAPs Limited Parking & Another vs. County Government of Nairobi & Another*⁷⁶ where he stated as follows;

“The manner in which public participation is carried out depends on the matter at hand. There is no straight jacket application of the principle of citizen participation. However, any mode of undertaking public participation which may be adopted by a public entity must factor, in the minimum, the following four parameters. First, the public be accorded reasonable access to the information which they are called upon to give their views on. In other words, the mode of conveying the information to the public reigns. Second, the people be sensitized or be made to understand what they are called upon to consider and give their views on. In this case, the language used in conveying the information to the public becomes of paramount importance. For instance, if those affected by the intended decisions or the legislation are mostly illiterate, then such realities must be factored in deciding the mode and manner of conveying the information. Third, once the public is granted reasonable access to the information and is made to understand it, the public must then be accorded time to interrogate the information and to come up with its views. Fourth, there must be a

⁷⁴ Ministry of Devolution and Planning, Kenya, ‘Devolution and Participation in Kenya’, 2016 *Civic Education Handout for Participants*, 2016. Available on https://countytoolkit.devolution.go.ke/sites/default/files/resources/CIVIC_EDUCATION_TRAINERS_MANUAL_FOR_LEARNING_INSTITUTIONS_6_WEEKS_PROGRAMME.pdf {Accessed on 27th May 2022}.

⁷⁵ Ministry of Devolution and Planning, .ibid.

⁷⁶ Nairobi High Court Constitutional Petition No.104 of 2020.

defined manner in which the public or stakeholders will tender their response on the matter.”

From this judgement, it is clear that the role of access to information is critical in achieving meaningful public participation.

5.7 Time Constraints

Due to the high cost of living, many Kenyans spend time on earning a living rather than participating in matters of governance. In addition, it has been argued that due to the need to consult multifaceted groups, it is difficult to reach a consensus hence rendering the process a vicious cycle of disagreements. However, there is need for Kenyans to be sensitized on their civic duty of public participation so that they can create time to attend and participate. This is because decisions on governance affect their day to day lives hence the need to be involved. In terms of issuing notices for public participation fora, public agencies should provide sufficient notice to enable members of the public prepare to attend the meetings.

5.8 Inaccessibility of Venues

Most public participation forums are held in town centres hence it becomes difficult and costly for the rural folk to participate as they incur costs and time accessing venues. In addition, some venues are not physically accessible for persons living with disabilities.

5.9 Expectation of Payment

There has been a trend in most public participation forums for the members of public to expect compensation from public agencies. This undermines the objectives and purpose of public participation as members of the public are not eager to contribute to matters at hand.⁷⁷

⁷⁷ Ministry of Devolution and Planning.,ibid

5.10 Elite Capture

Due to low awareness by the ordinary members of the public, most public participation forums are dominated by the elite who end up influencing the direction of decision making to secure their interests.⁷⁸

Conclusion

Public participation is critical for good governance in Kenya. Whereas the Constitution 2010 as well as a number of statutes have embodied provisions on public participation, there is no national law to provide a framework for implementation of this fundamental constitutional principle. The courts have done their part by delimiting a guiding framework for determining cases challenging lack of public participation but the buck stops with Parliament to enact a 'one-stop shop' law on public participation. As discussed above, the Parliament has made significant milestones in enacting the Public Participation Bill 2019 but there is an urgent need for the Bill to crystalize into law. Until this is done, the implementation of public participation remains a contentious topic as there are no parameters to guide public institutions on how to undertake meaningful public participation.

⁷⁸ County Government Toolkit, "Challenges of Public Participation" Available on <https://countytoolkit.devolution.go.ke/challenges-of-public-participation> (Accessed on 7th June 2022).

References

International Legal Instruments

1. Universal Declaration of Human Rights
2. International Covenant on Civil and Political Rights (ICCPR)
3. United Nations Convention Against Corruption
4. Declaration on the Right to Development
5. African Charter on Human and People's Rights (the Banjul Charter),
6. Aarhus convention

National Laws

1. Constitution of Kenya 2010
2. County Governments Act, 2012
3. Public Finance Management Act, 2012
4. Intergovernmental Relations Act, 2012
5. Public Participation Bill No.1 of 2019
6. Public Participation Bill No.2 of 2019
7. Environmental Management & Coordination Act 1999 (EMCA)
8. Wildlife Conservation and Management Act 2013
9. Forest Conservation and Management Act 2016

Case Laws

1. *Robert N. Gakuru & Others vs Governor Kiambu County & 3 Others* (2014) eKLR
2. *Doctors for Life International vs. Speaker of the National Assembly and Others* CCT12/05 [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC).
3. *Merafong Demarcation Forum and Others vs. President of the Republic of South Africa and Others* (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC)
4. *Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others v County of Nairobi Government & 3 Others* Petition No. 486 of 2013

5. *Commission for the Implementation of the Constitution vs. Parliament of Kenya & 5 Others* Petition No.454 of 2012(2013) eKLR
6. *Independent Electoral and Boundaries Commission (IEBC) vs National Super Alliance(NASA) Kenya & 6 others* Civil Appeal No. 224 of 2017; [2017] eKLR
7. *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) vs. Cabinet Secretary of the Ministry of Health & 4 Others* Sup Ct. Pet. 5 of 2017; [2019] eKLR
8. *Attorney General & 2 Others vs. David Ndi & 79 Others* Supreme Court Petition No.12 of 2021
9. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*[2014] eKLR
10. *Poverty Alleviation Network and Others vs. President of the Republic of South Africa & 19 Others* CCT 86/08 [2010] ZACC 5.
11. *KAPs Limited Parking & Another vs. County Government of Nairobi & Another Nairobi High Court Constitutional Petition No.104 of 2020.*

Articles and Online Sources

National Assembly Reports, 2020, *A report of the Committee on Parliamentary Broadcasting and Library on the Consideration of the Public Participation Bill 2019.*

GOK, Intergovernmental Relations Technical Committee, *The Status of Public Participation in National and County Governments* Available at <https://countytoolkit.devolution.go.ke/sites/default/files/resources/27.%20The%20Status%20of%20Public%20Participation%20in%20National%20and%20County%20Governments%20.pdf> {Accessed on 16th May 2022}.

Open Society Initiative for Eastern Africa, ‘Democracy and Public Participation’ A review by Afrimap, *Open Society Initiative for Eastern Africa and the Institute for Development Studies (IDS), University of Nairobi* 2014. Available on file:///C:/Users/pc/Downloads/kenya-democracy-political-participation-20140514%20(1).pdf (Accessed on 7th June 2022).

Jackson Turner Main, 'Government by the People: The American Revolution and the Democratization of the Legislatures', 1966 available on <https://www.jstor.org/stable/1919237> {Accessed on 5th May 2022}.

D.P. Moynihan, 'Maximum Feasible Misunderstanding: Community Action in the War on Poverty', 1969 Free Press, 866 Third Avenue, New York, N.Y. 10022. Available on <https://eric.ed.gov/?id=ED035806> (Accessed on 7th June 2022).

Bingham et al., 'The New Governance: Practices and Processes for Stakeholder and Citizen Participation in the Work of Government', 2005 *Public Administration Review* Available at https://www.researchgate.net/publication/249398666_The_New_Governance_Practices_and_Processes_for_Stakeholder_and_Citizen_Participation_in_the_Work_of_Government/link/605b78eb299bf1736768585b/download (Accessed on 7th June 2022).

GOK Intergovernmental Relations Technical Committee, *The Status of Public Participation in National and County Governments* Available at <https://countytoolkit.devolution.go.ke/sites/default/files/resources/27.%20The%20Status%20of%20Public%20Participation%20in%20National%20and%20County%20Governments%20.pdf> {Accessed on 16th May 2022}.

Margaret Monyani, 'One Party State: Is it good or Bad for Governance', 2018 *E-International Relations* ISSN 2053-8626, available at <https://www.e-ir.info/2018/05/25/one-party-state-is-it-good-or-bad-for-governance/> (Accessed on 9th June 2022).

David M. Anderson, 'Yours in Struggle for Majimbo: Nationalism and the Party Politics of Decolonization in Kenya', 2005 1955-64" *Journal of Contemporary History* Vol.40, No.3 July 2005, pp547-564, *Sage Publications Inc.*, available on <https://www.jstor.org/stable/30036342> (Accessed on 9th June 2022).

Jennifer A. Widner, *The Rise of a Party-State in Kenya*, 1993 *University of California Press*, University of California, available at

<https://publishing.cdlib.org/ucpressebooks/view?docId=ft9h4nb6fv;chunk.id=0;doc.view=print> (Accessed on 9th June 2022).

Research Directorate, Immigration and Refugee Board, Canada, 'Restoration of Multiparty Government and Kenyans of Somali Origin', 1st March 1992, Canada. Available on <https://www.refworld.org/docid/3ae6a80a28.html> {Accessed on 5th May 2022}.

Odinge Odera, 'Jaramogi's Struggle for Multi-Party Politics and Failed Dream to lead Kenya', 2010 *The Standard Business*, May 27th 2010, available at <https://www.standardmedia.co.ke/business/business/article/2000010306/jaramogis-struggle-for-multi-party-politics-and-failed-dream-to-lead-kenya> {Accessed on 5th May 2022}.

Njogu W. Kiarie, 'Language and Multiparty Democracy in a Multiethnic Kenya', 2004 *Africa Today*, 50(3): 55-73, available at https://www.researchgate.net/publication/236770350_Language_and_Multiparty_Democracy_in_a_Multiethnic_Kenya (Accessed on 9th June 2022).

Kathryn S. Quick and John M. Bryson, 'Public Participation' 2006 in *Handbook in Theories of Governance*, Jacob Torbing and Chris Ansell(eds.), Edward Elgar Press, Chapter 12.

Antony Mbithi, Damiana Ndambuki and Fredrick Owino Juma, 'Determinants of Public Participation in Kenya County Governments', 2018, *Journal of Asian and African Studies*. Available on <https://journals.sagepub.com/doi/full/10.1177/0021909618794028> (Accessed on 7th June 2022).

Jordy Horntvedt, 'Five Reasons to involve Others in Public Decisions', 2022, *University Of Minnesota Extension* Available at <https://extension.umn.edu/public-engagement-strategies/five-reasons-involve-others-public-decisions> {Accessed on 27th May 2022}.

Involve.Org., 'The True Cost of Public Participation', 2005 available on https://www.involve.org.uk/sites/default/files/field/attachemnt/True-Costs-Full-Report2_3.pdf (Accessed on 27th May 2022).

Oliver Bates, 'Six Reasons Why Public Participation and Community Engagement are Important', 2019, available on <https://www.socialpinpoint.com/blog/6-reasons-to-participate-community-engagement/> {Accessed on 27th May 2022}.

Government of New Zealand, "Benefits and Disadvantages of Public Participation" available on <https://www.doc.govt.nz/Documents/science-and-technical/sfc308a.pdf>

Wouters M.,et.al., 'Evaluating Public Input in National Management Plan Reviews: Facilitators and Barriers to Meaningful Public Participation in Statutory Processes', 2011 available on https://www.researchgate.net/publication/294520100_Evaluating_public_input_in_national_park_management_plan_reviews_Facilitators_and_barriers_to_meaningful_participation_in_statutory_processes {Accessed on 27th May 2022}.

Muigua Kariuki, 'Towards Meaningful Public Participation in Natural Resources Management in Kenya', 2014 available on https://kmco.co.ke/?page_id=1464 (Accessed on 1st July 2022).

Ministry of Devolution and Planning, Kenya, 'Devolution and Participation in Kenya' 2016, *Civic Education Handout for Participants, 2016*. Available on https://countytoolkit.devolution.go.ke/sites/default/files/resources/CIVIC_EDUCATION_TRAINERS_MANUAL_FOR_LEARNING_INSTITUTIONS_6_WEEKS_PROGRAME.pdf {Accessed on 27th May 2022}.

County Government Toolkit, 'Challenges of Public Participation' Available on <https://countytoolkit.devolution.go.ke/challenges-of-public-participation> (Accessed on 7th June 2022).

Book Review: Stephen David Krasner "Sovereignty: Organized Hypocrisy" 1999, Princeton University Press

By: Henry Kinyanjui Murigi*

Book Summary

This is a book review of *Sovereignty; Organized Hypocrisy* authored by Stephen David Krasner. This book review seeks to analyze the man, message, meaning, and method adopted by the author in the book in arriving at the catchy title *organized hypocrisy*. First the man, Stephen David Krasner is the Graham H. Stuart Professor of International Relations and a Senior Fellow in the Institute for International Studies at Stanford University. Stephen was born in 1942, became an academic and a practicing diplomat in the United States¹. He is the author of *Defending the National Interest: Raw Material Investments and U.S. Foreign Policy* (Princeton) and *Structural Conflict: The Third World Against Global Liberalism* and is the editor of *International Regimes*². He was the Director of Policy Planning in the State Department nominated the former Secretary of State Condoleezza Rice. He has been regarded as a realist whose contribution has travelled along way the international relations landscape introducing concepts such as punctuated equilibrium, regime theory, hegemonic stability theory and critical juncture theory³. Robert Keohane, one of his contemporaries, considers him as the subversive *realist* an *institutional theorist* and *constructivist* who show that these three ideas are not mutually exclusive⁴. To this end, international

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¹ Department Of State. The Office of Electronic Information, Bureau of Public Affairs. "Krasner, Stephen". 2001-2009.state.gov.

² See back page

³ Benjamin J. Cohen "International Political Economy : An Intellectual History"

⁴ (Keohane 2013)

relations scholars and enthusiasts would find it extremely difficult to ignore the ideas put forward in the book.

The Message

Second, the message of sovereignty is contained in eight chapters running from page 3-238 of exiting discourse that should be read out, internalized, and analyzed by all the international relations students at all academic levels. Chapter one⁵ is perhaps one of the most interesting chapters as it discusses the idea of sovereignty and its discontent. Chapter two⁶ discusses the theories of institutions in the context of international politics pitting together the debates between realist, liberalist and all their contemporary discourses. The idea of sovereignty is considered alongside minority rights and human rights where the book considers the idea of the ruler and the ruled⁷. In terms of international political economy, the issue of lending and borrowing has attracted the attention in the book by considering sovereign debt and the challenges that it poses especially for developing countries⁸. Chapter six and seven consider the debates on constitutional structures of states in the 19th century and after 1945. For the chess enthusiast, the book concludes with an interesting discussion with the imagery of the game of chess, summarizing the debates raised in the chapters of the book.

The Meaning

Third, the book brings out very curious ideas on the meaning sovereignty which is to be understood as being grouped into (1) domestic⁹, (2) interdependence¹⁰, (3) international legal¹¹ and Westphalian sovereignty¹² and how it has been practiced (pg.5). The focus is largely on the last two which are more prominent in the rest of the book. The central argument

⁵ Page 3-42

⁶ Page 43-72

⁷ Chapter 3 and 4

⁸ Chapter 5

⁹ Relates to the public authority within a state and ability of the State to have control over its territory.

¹⁰ This refers to the ability of states to control the movement across its borders

¹¹ Here the idea of recognition by other nation states within the international society.

¹² Where there is exclusion of external actors from entering into domestic authority.

made in the book is found in the sociologist James March and Johan Olsen¹³ idea that in the international system, the logic of consequences is dominated by the logic of appropriateness. In other words, states do what is appropriate regardless of the consequences and that they are not as sovereign as they ought to. The assumption made is that first, the ruler is the head of state, and they are the decision makers within the state¹⁴(pg.7). Second, the ruler wants to stay in power with the aim of promoting security, prosperity, and values of their constituent. With this in mind, the book argues that the ruler (the main actor), is driven by local factors more than the international system.

The ruler may by invitation or intervention allow the idea of sovereignty to be easily compromised. Allowing external actors (institutional or otherwise) makes it easy for rulers to make choices that allow multiple norms that in some instances does not allow maximization of the utility of the state. To this end, the ruler ends up making decisions that have consequences within the international system, but are driven by calculated material and ideational interest, not to be taken for granted by some overarching structure which is what is referred to as organized hypocrisy. In other words, some rulers will be whipped into a position by the international system without knowing the consequence of what happens locally (as hoped in the Westphalia sovereignty).

Some of the discontents of sovereignty are based on several compromises that leaders enter into including contracts, convention, coercion, and imposition. Although a ruler is bound by conventions in the international law, they may enter into contracts by way of coercion or imposition. This makes it a quagmire for the ruler to assert sovereignty based on the contingent factors such as actions by previous rulers that bound the states.

¹³ March, James G.; Olsen, Johan P. (2011). "The Logic of Appropriateness". In Goodin, Robert E. (ed.). *The Oxford Handbook of Political Science*. Oxford University Press. March, James G.; Olsen, Johan P. (1996). "Institutional Perspectives on Political Institutions". *Governance*. 9 (3): 247–264. doi:10.1111/j.1468-0491.1996.tb00242.x. ISSN 1468-0491.

¹⁴ This is one of the arguments that would not sit well with the Liberalist

The book then adopts a constructivist angle to consider the idea of minority and human rights as occupying a critical role in the international financial institutions. The debate on minority rights has been aptly demonstrated in age of international financial institutions. The idea is that political leaders have not always honored international egal sovereignty as they should and have treated violation to it in a cavalier manner as such not exploiting its potential.

The Method

The method deployed in arriving at these finding is equally fascinating. Since Krasner focuses on the Westphalia sovereignty, he deploys a creative and convincing historical approach to the Ottoman empires and how they were extinguished. The book navigates the lackluster approach adopted by international relations scholars with historical clarity and precision to account for the need to live the ideals of Westphalia¹⁵. Second, the book exploits an excellent combination of theoretical and practical approach toward sovereignty while adopting empirical data through case studies. Here the author considers instances where states are coerced into accepting intervention while they ought to be sovereign. Third, thematic approach to sovereignty has been explored to a great extent focusing on the ruler which appears to be a Hobbesian approach to power. The idea of Westphalia came before Hobbes and Locke but as correctly pointed out by Krasner, most forget that the 1648 treaty related to the end of the Roman Empire and was a new constitution for the Catholic Church¹⁶. This thematic approach points to the idea that rulers play a critical part in the formulation of practice of sovereignty. Although in the Hobbesian state of nature power is with an absolute monarch¹⁷, the relationship between the ruler and ruled according to Krasner is one of collegiality and compromise where the ruler does what the ruled aspires (benevolent dictator).

¹⁵ (Joffe 1999)

¹⁶ (Krasner, Sovereignty 2001)

¹⁷ (Hobbes 1588-1679)

Fourth, the theoretical and practical methodological approach gives prominence to the discussion on logic of consequences (theory) which explains why leaders act as they do (sovereignty in practice). This gives a challenge to the dominant theory on logic of consequences that focuses mainly on identities, roles, and norms as the main shapers of foreign policy behavior. Instead, Krasner contends that power and interest in international relations explain the appropriateness of actions taken by states (practice) as opposed to the norms and institutions of international system (culture and tradition) as the main influencer to behavior (theory). In other words, he argues that the practice of international relations cannot be explained only by considering norms and institutions.

Critical Appraisal

Although the book is well written and congruently organized, there are some areas that can be challenged successfully. First, the book places premium on the individual actor (ruler) and gives prominence to their role without considering that rulers may vary in different context, personality, predilections, and predisposition. In other words, there may be instances where different variables influence the leaders view of sovereignty based on context or personality. There are different frames for analyzing the ruler as an actor including the rational actor model, bureaucratic model, and actor-specific model¹⁸. Although this is not what the book set out to do, it would offer better and deeper analytical frameworks as opposed to sweeping commitments to a general view of rulers.

Second, there is an abundance of evidence that the author is a realist presenting himself as a neorealist. The consistent reference to interest and power are the hallmark of realist. Although he uses constructivist frames when considering the minority rights and human rights perspective, the end result is that the state has not maximized sovereignty (power). The organizing principle under the realist frames is power¹⁹. The book falls in the

¹⁸ Valerie M. Hudson "Foreign Policy Analysis: Actor-Specific Theory and the Ground of International Relations" *Foreign Policy Analysis* (2005) 1, 1 – 30

¹⁹ (Waltz, *Man State and War* 1959) (Keohane 2013) (Waltz, *Theory of International Politics* 1979)

trap most realists fall into by placing the individual at the center of all activities of state and in his case sovereignty. This view ignores that there are other approaches to reality including institutions help frame the conversation of the individual and cooperation is the currency of liberalism. Although the book was written about 20 years ago, the idea of power then as it is now is not necessarily domiciled in the ruler only. Since sovereignty is a social construct as admitted by Krasner, each individual ruler adopts one style or the other not merely based on the coercive powers that exist in the international system.

Third, the book fails to consider the difference between certain concepts which would have enriched the discourse more. These include influence and authority where the latter focuses on the rights, obligations and status of States which creates the norms for sovereignty and the former is more on leadership²⁰. It must be pointed out that sovereignty is not absolute and is often circumscribed by political expediency and the exercise of power is not particularly enlightening²¹. For one to be sovereign they would be willing to accept certain constraints otherwise they would not be sovereign. The constraints are viewed by Krasner as being a violation of the Westphalian model of sovereignty. The fact that states are autonomous does not indeed mean that when they act in a particular way they are violating the idea of sovereignty. This challenge arises because of the lack of distinction between authority and autonomy that is dominated in the book.

Another area that is undeveloped is the term organized hypocrisy. Although these are very attractive attributes of international relations discourse for realists, they are not given prominent attention. For instance, the organizing principle in the international system is anarchy²², which would explain the word organized. While hypocrisy would explain the reason why the international system positively discriminates.

²⁰ (Kingsbury 2000) (Oros 2000)

²¹ (Goldsmith 2000)

²² (Waltz, *Man, State and War* 1959)

Fourth, as correctly pointed out the sovereignty project is a continuous one that ought to be tested in as many domains of knowledge as possible. These include the area of recognition which is one of the building blocks of sovereignty. Recognition is however not an automatic indicator of sovereignty as it could exist without governance or autonomy and the converse governance without recognition and autonomy²³. Krasner argues that the idea of sovereignty is not going to be influenced/affected by globalization and those who hold such view take lightly the idea of an autonomous State²⁴. The idea here is that contending with the idea of sovereignty is not flogging a dead horse especially because it cannot be ignored nor is it the final authority on all matters to do with statehood. However, globalization is admittedly changing the control of sovereignty which is a nightmare for the realist adherent who insist on domains such as power and interests, a problem that Krasner's thought cannot surmount.

Conclusion

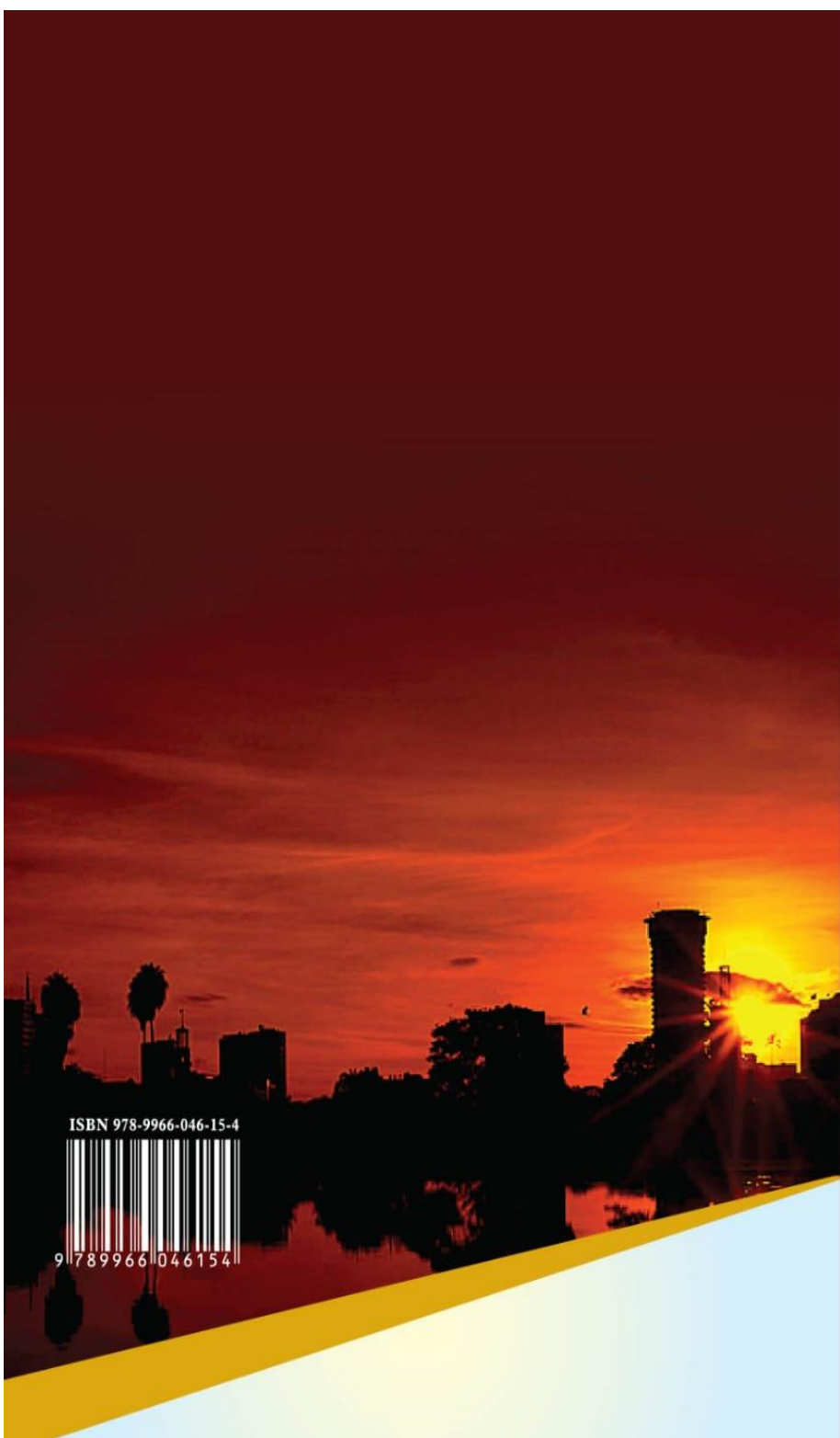
The discussions that Krasner introduced in the field of international relations continue to dominate the study of international relations to date. Although sovereignty was a major subject for discussion in the nineteenth century, Krasner judiciously delineates four meanings of the term sovereignty as has been employed in the international relations and law literatures. The discourse in the book does not conclude the debate on sovereignty however, it contributes to the discourse of international relations.

²³ (Krasner 2013)

²⁴ (Krasner, Sovereignty 2001)

References

- Goldsmith, Jack. 2000. "Sovereignty, International Relations Theory, and International Law Reviewed Work." *Stanford Law Review* 959-986.
- Hobbes, Thomas. 1588-1679. *Leviathan*. Baltimore : Penguin Books .
- Joffe, Josef. 1999. "Rethinking the Nation-State: The Many Meanings of Sovereignty- A Review of Sovereignty :Organised Hypocrisy ." *Foreign Affairs* 122-127.
- Keohane, Robert. 2013. "Stephen Krasner: Subversive Realist." In *Back to Basics: State Power in a Contemporary World*, by Martha Finnemore and Judith Goldstein. Oxford : Oxford University Press . doi:DOI: 10.1093/acprof:oso/9780199970087.001.0001.
- Kingsbury, Benedict. 2000. "Article Review Sovereignty: Organised Hypocrisy ." *The American Journal of International Law* 591-595.
- Krasner, Stephen D. 2013. *Reckoning: Organised Hypocrisy*. London : Cambridge University Press .
- Krasner, Stephen D. 2001. "Sovereignty ." *Foreign Policy* 20-29.
- Oros, Andrew. 2000. "Book Reviews ; Stephen D. Krasner, Sovereignty: Organized Hypocrisy." *Japanese Journal of Political Science* 157-172.
- Waltz, Kenneth. 1959 . *Man State and War* . New York: Columbia University Press .
- . 1979. *Theory of International Politics* . Long Groove : Waveland Press .
- Wivel, Ander. 2014. "Back to basics: state power in a contemporary world ." *International Affairs* 702-703.



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