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Editor's Note

Journal of Conflict Management and Sustainable Development

We are pleased to launch another issue of the *Journal of Conflict Management and Sustainable Development,* Volume 9, No. 2.

The Journal is focused on disseminating knowledge and creating a platform for scholarly debate on pertinent and emerging areas in the fields of Conflict Management and Sustainable Development.

Sustainable Development has emerged as arguably the most important goal in the 21st century. It is geared towards meeting the needs of both the present and future generations. The Sustainable Development goals represent a shared blueprint for achieving global peace and prosperity. The Journal analyses some of the current concerns and proposes interventions towards attaining Sustainable Development. It also discusses the role of Conflict Management in the quest towards Sustainable Development.

The Journal is peer reviewed and refereed in order to adhere to the highest quality of academic standards and credibility of information. Papers submitted to the Journal are taken through a rigorous review by our team of internal and external reviewers.

This issue contains papers on key thematic areas of Conflict management and Sustainable Development including *Embracing Environmental, Social and Governance (ESG) Principles for Sustainable Development in Kenya; Kenya's Legal Viaduct to Environmental Sustainability; Impact of Contemporary Weapons and Technology on International Humanitarian Law: A Case for Consideration; Right to Health: Critical Analysis of Kenyan Legal Framework; Biodiversity Mainstreaming for Food and Nutrition Security in Kenya; Law History and Politics in Developing Societies: A Comparative Analysis of Constitution Making Process in Australia and United Arab Emirate; Money Laundering and The Role of the Advocate - A Comparative Analysis of Kenyan and South African Law and Exploring Poverty in South Sudan through the Lens of Multidimensional Poverty Approach*. It also contains a book review for the book titled *Exploring*

Conflict Management in Environmental Matters and a journal review for the *Alternative Dispute Resolution Journal Volume 10 Issue 3.*

The Journal has witnessed significant growth since its launch and is now a widely cited and authoritative publication in the fields of Conflict Management and Sustainable Development. The Editorial Team welcomes feedback and suggestions from our readers across the globe to enable us continue improving the Journal.

I wish to thank the contributing authors, Editorial team, reviewers and everyone who has made this publication possible.

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

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

Dr. Kariuki Muigua, Ph.D., FCIArb, (C.Arb),
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Editor, Nairobi,
October, 2022.

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He became the first winner of the Inaugural CIArb (Kenya Branch) ADR Lifetime Achievement Award 2021. He was also the winner of the ADR Practitioner of the Year Award 2021 given by the Nairobi LSK and the ADR Publisher of the Year 2021 awarded by CIArb Kenya. He was the winner of the African Arbitrator of the Year 2022 award at the 3rd African Arbitration Awards held at Kigali Rwanda beating other competitors from Egypt, Mauritius, Ethiopia, Nigeria and Kenya. The African Arbitrator of the Year award is the highest and most prestigious ADR and Arbitration Award in Africa.

He is an Advocate of the High Court of Kenya of over 30 years standing and practicing at Kariuki Muigua & Co. Advocates, where he is also the senior advocate. His research interests include environmental and natural resources law, governance, access to justice, human rights and constitutionalism, conflict resolution, international commercial arbitration, the nexus between environmental law and human rights, land and natural resource rights, economic law and policy of governments with regard to environmental law and economics. Dr. Muigua teaches law at the Centre for Advanced Studies in Environmental Law and Policy (CASELAP), Wangari Maathai Institute for Peace and Environmental Studies (WMI) and the School of Law, University of Nairobi.

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Matai Muon is an emerging South Sudanese career researcher with over three years of experience in development practice and over five years of commentaries on politics, development and the governance spheres focusing on Eastern Africa with keen lens on South Sudan and Rwanda. He did his undergraduate thesis on the governance-development nexus in Africa using the Rwandan model as a key insight for the continent.

Muon has widely published opinionated pieces on politics, international relations, human rights, development, and governance across multiple media spaces in South Sudan. A development essayist, Muon was the World Bank's #Blog4Dev country winner in 2020, an in-country continental level

development competition organized annually to invite African youth to weigh on a given development topic in Africa.

He successfully completed a one-year internship program with the Human Rights Watch and recently completed a four-months graduate attachment program with the British Institute in Eastern Africa whose core aim is to conduct and support innovative research in the Humanities and Social Sciences across Africa for over six decades. In this role, Muon worked with accomplished research leaders on thematic issues of interest ranging from electoral politics in Kenya, poverty, governance, and development in South Sudan to contributing towards getting the displacement politics right. He obtained a Bachelor of Arts degree in International Studies from the University of Nairobi and currently an MPhil Candidate reading for Development Studies at the Oxford Department of International Development, University of Oxford.
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Embracing Environmental, Social and Governance (ESG) Principles for Sustainable Development in Kenya

By: ***Kariuki Muigua****

Abstract

The paper critically examines the extent to which Environmental, Social and Governance (ESG) principles have been embraced in Kenya. It argues that ESG has emerged as arguably the most important tool of corporate governance. ESG seeks to shape corporate decision making by advocating for sustainable, responsible and ethical investments. It analyses each of the ESG principles and the progress made towards embracing this concept in Kenya. The paper further addresses some of the ESG challenges in Kenya and suggests the way forward towards embracing ESG principles for sustainable development in Kenya.

1.0 Introduction

The growing threat of climate change and climate crisis has forced many investors to embrace sustainability as a key factor in investment decision-making[1]. At the same time, social concerns touching on issues such as human rights, diversity, consumer protection and welfare and protection of animals especially endangered species have led to many companies taking their social responsibilities and especially impact of their commercial activities on the local communities where they operate more seriously than ever[2]. The growth of social media has also increased the public risks associated with socially irresponsible behavior due to more scrutiny on companies and the

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[1] De Francesco. A.J., 'The impact of sustainability on the investment environment.' *Journal of European Real Estate Research* (2008).

[2] Cedric.R., 'Accountability of Multinational Corporations for Human Rights Abuses." *Utrecht Law Review* 14.2 (2018): 1-5.'

emergence of socially conscious consumers[3]. Further, there has been growing corporate governance awareness since the 2008 global economic recession which has led to increase shareholder and stakeholder activism in demanding more responsive management structure, better employee relations, and reasonable executive compensation in companies[4].

Consequently, how companies handle environmental, social and governance issues is increasingly becoming a major concern especially for investors and other key stakeholders. ESG is an acronym for Environmental, Social and (Corporate) Governance, the key aspects of sustainable, responsible or ethical investment[5]. It has been defined as "a generic term used in capital markets and used by investors to evaluate corporate behaviour and to determine the future financial performance of companies[6]. ESG "is a subset of non-financial performance indicators which include sustainable, ethical and corporate governance issues such as managing a company's carbon footprint and ensuring there are systems in place to ensure accountability[7]." ESG has also been defined as standing for the three broad categories, or areas, of interest for "socially responsible investors" who consider it important to incorporate their values and concerns (such as environmental concerns) into their selection of investments instead of simply considering the potential profitability and/or risk presented by an investment opportunity.[8]

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[3] Mariarosaria. S & Scarpato. D 'Sustainable Consumption: How Does Social Media Affect Food Choices?' *Journal of Cleaner Production* 277 (2020): 124036.

[4] Martin.C et al., 'Corporate governance and the 2008–09 Financial Crisis." *Corporate Governance: An International Review* 19.5 (2011): 399-404; See also Erkens. D.H, et al Corporate governance in the 2007–2008 financial crisis: Evidence from financial institutions worldwide." *Journal of corporate finance* 18.2 (2012): 389-411.

[5] Stuart. L.G et al., 'Firms and social responsibility: A review of ESG and CSR research in corporate finance.' *Journal of Corporate Finance* 66 (2021): 101889.

[6] The Financial Times Lexicon, Available at: *https://markets.ft.com/glossary/searchLetter.asp?letter=E* (accessed on 21/07/2022)

[7] Ibid

[8] CFI, ESG (Environmental, Social and Governance), Available at: *https://corporatefinanceinstitute.com/resources/knowledge/other/esg-environmental-social-governance/* (accessed on 21/07/2022)

Globally, the importance of Environmental, Social and Governance (ESG) issues is evidenced by the change in the legal and regulatory landscape to reflect the expectations of investors, customers, employees and other stakeholders. Increasingly, the investment decisions including assessment and valuation are incorporating ESG criteria with companies that are rated as having strong sustainability programs enjoying more preference from investors[9]. Issues touching on climate change and sustainability dominate current ESG focus. In addition, human rights and especially the rights of indigenous peoples and governance structures of companies are enjoying prominent attention [10]. Many projects investors and sponsors are also demanding more detailed identification and mitigation of environmental and social impacts of investment projects before making commitment or funding[11].

According to the Organisation for Economic Co-operation and Development (OECD), the growth of ESG approaches by investors has been driven by private and public sector initiatives to reach the objectives of the Paris Agreement and the Sustainable Development Goals (SDGs)[12]. This has seen the incorporation of climate transition factors into investment decisions and the growth of what has come to be known as ESG investing as a leading form of sustainable finance for long-term value and alignment with societal values. OECD defines ECG investing as generally referring to the process of considering Environmental, Social and Governance (ESG) factors when making investment decisions. Bloomberg estimates that the value of ESG investing around the world has risen to almost USD 40 trillion in 2021[13]. At

[9] Muigua.K., 'Introduction to ESG (Environmental, Social and Governance) available at *https://thelawyer.africa/2022/02/04/esg-environmental-social-and-governance/* (accessed on 22/07/2022)
[10] Ibid
[11] Norton Rose Fulbright, "Environmental, Social and Governance," Available at: *https://www.nortonrosefulbright.com/en/services/203f40d1/environmental-social-and-governance-esg* (accessed on 21/07/2022)
[12] OECD., 'Environmental Social and Governance (ESG) Investing' available at *https://www.oecd.org/finance/esg-investing.htm* (accessed on 21/07/2022)
[13] Ibid

the same time, as at 2020 ESG ratings were being applied to companies representing around 80% of market capitalization[14].

This paper seeks to critically examine the extent to which ESG principles have been embraced in Kenya. It analyses each of the ESG principles and the progress made towards embracing this concept in Kenya. The paper further addresses some of the ESG challenges in Kenya and suggests the way forward towards realising ESG tenets for sustainable development in Kenya.

2.0 Environment Social and Governance (ESG) Principles

The Environmental 'E' pillar of ESG is being increasingly used as a tool to align investments and capital flows with a low-carbon transition and to unlock valuable forward-looking information on firms' climate transition risks and opportunities[15]. The environmental considerations in areas such as climate risk, water scarcity, extreme temperatures and carbon emissions are now considered as key issues that can impact competitive positioning for businesses. Companies are expected to appreciate their role as stewards of the natural or physical environment and to take into account the utilisation of natural resources and the impact of their overall operations on the environment, both locally and across its global supply chains[16]. Companies are now required to take precautions against environmental incidents such as oil spills or pollution from mining operations as safeguards against damage to their reputation and shareholder value[17]. At the same time, more than 13,000 companies and 3,000 non-business signatories in 160 countries that are signatories of the United Nations Global Compact (UNGC), which helps businesses contribute positively toward some or all of the 17 United Nations (UN) sustainable development goals (SDGs) by 2030[18].

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[14] Ibid

[15] OECD (2021), ESG Investing and Climate Transition: Market Practices, Issues and Policy Considerations, OECD Paris, *https://www.oecd.org/finance/ESG-investing-and-climatetransition-Market-practices-issues-and-policy-considerations.pdf* (accessed on 21/07/2022)

[16] Ibid

[17] Ibid

[18] Ojiambo, S., "Leadership of the UN Global Compact: Message of CEO and Executive Director," Available at:

The COVID-19 pandemic, and its diverse implications including healthcare access, workplace safety, cybersecurity and other issues related to the communities that businesses , have proven to be a watershed moment for the often-underappreciated 'S' pillar of environmental, social and governance (ESG) considerations with the need to tackle the inequalities exposed and exacerbated by the pandemic becoming a key reason for investors to make allocations for socially conscious investments despite intangibility of social facts [19]. Companies are beginning to appreciate the role taking social responsibility can play in mitigating issues such data theft, worker strikes, litigation, workplace accidents and other people-related disruptions that can hurt a business reputation and finances. The repercussions of work-related injuries and deaths on families including on their financial security are also acknowledged as having a bearing on the United Nations Sustainable Development Goals (SDGs) of no poverty, zero hunger, good health and well-being, decent work and economic growth even as many investors are aligned with these goals[20].

The "G" Pillar in ESG is the oldest as governance has been an integral part of robust investment for ages [21]. However, what is considered effective governance keeps evolving and the speed of evolution has quickened as institutional investors' definition of stakeholders continues to broaden beyond shareholders[22]. While older forms of Governance focused on serving and protecting shareholders, the newer approaches stretch beyond basic dimensions related to financial and accounting misconduct as well as legal and regulatory non-compliance, such as transparency, corporate structures

https://www.unglobalcompact.org/about/governance/executive-director (accessed on 21/07/2022)

[19] Create Research, "Passive Investing 2021: Rise of the social pillar of ESG," Available at: *https://cdn.efundresearch.com/files/RcfPdrQdAaVI9tiBgrgLq4baO7Wciz6eepZTODEO.pdf* (accessed on 21/07/2022)

[20] Standard Chartered Singapore, "The S in ESG," Available at: *https://www.sc.com/sg/wealth/insights/the-s-in-esg/* (accessed on 21/07/2022)

[21] Muigua.K., 'Introduction to ESG (Environmental, Social and Governance) Op Cit

[22] RL360, "Governance-The G in ESG," Available at: https://www.rl360.com/row/funds/investment-definitions/g-in-esg.htm (accessed on 21/07/2022)

and ethics[23]. Investors are also aligning Governance with the 17 United Nations Sustainability Development Goals (SDGs), where governance issues include industry, innovation and infrastructure (Goal 9); peace, justice and strong institutions (Goal 16); and partnerships with public and private institutions (Goal 17)[24].

3.0 Environment, Social and Governance (ESG) Disclosure and Reporting Requirements in Kenya

The Nairobi Securities Exchange has developed an ESG Disclosure Manual to guide listed companies in Kenya on ESG reporting. The Manual (ESG Manual) provides that ESG reporting should be on a materiality basis[25]. In financial reporting, materiality is the threshold for influencing the economic decisions of those using an organisation's financial statements[26]. A similar concept is also important in ESG reporting. In ESG reporting, "materiality is the principle that determines which relevant topics are sufficiently important that it is essential to report on them[27]." It is necessary to undertake materiality analysis because not all ESG topics are of equal importance to an organization and an ESG report has to reflect their relative priority of the various topics[28].

The ESG Manual requires that listed companies have a structured, documented process on assessment of materiality for ESG disclosure topics[29]. It is recommended that a materiality assessment exercise be conducted at least on an annual basis and as part of every new ESG reporting

[23] Ibid

[24] United Nations, Department of Economic and Social Affairs, 'Sustainable Development' available at https://sdgs.un.org/goals (accessed on 21/07/2022)

[25] Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual', available at *https://sseinitiative.org/wp-content/uploads/2021/12/NSE-ESG-Disclosures-Guidance.pdf* (accessed on 21/07/2022)

[26] Ruth.J., 'The Convergence of Financial and ESG Materiality: Taking Sustainability Mainstream." *American Business Law Journal* 56.3 (2019): 645-702.'

[27] Muigua. K., 'What are the Material Issues for ESG Reporting in Kenya?' available at *https://thelawyer.africa/2022/06/05/material-issues-for-esg-reporting-in-kenya/* (accessed on 21/07/2022)

[28] Ibid

[29] Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual' Op Cit

season. The ESG Manual also requires that every organization discloses its approach to materiality within the ESG report[30]. The Global Reporting Initiative (GRI) gives guideline for what is material by providing that the ESG report should cover topics that Reflect the reporting organisation's significant economic, environmental, and social impacts; or substantively influence the assessments and decisions of stakeholders. In other words, for a topic to be relevant and potentially material, it should be based on only one of these dimensions[31].

It is recommended that a materiality assessment grid be used as a structured guide in prioritizing ESG topics to report on[32]. That way, by applying an internally developed rating criteria, organisations can plot ESG topics on a grid or heat map indicating the assessed level of importance considering both dimensions of materiality[33]. In that regard, materiality is dependent on whether a topic is of low or high importance to the stakeholders and the significance of ESG impacts on economy, environment and/or society. GRI gives detailed guidance that listed companies can refer to when identifying material topics[34]. The starting point is using the sector standards to understand the sector's content and then deduce the organization content from it[35].

The next step is to consider the topics and impact as described in the sector standard and then identify the actual and potential impact to the organization stakeholders, economy, environment and society[36]. It takes the engagement

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[30] Ibid

[31] Global Reporting Initiative., 'ESG Standards, Frameworks and Everything in Between' available at *https://www.globalreporting.org/media/jxkgrggd/gri-perspective-esg-standards-frameworks.pdf* (accessed on 21/07/20220

[32] Ibid

[33] Ibid

[34] GRI., 'The Global Standards for Sustainability Reporting' available at *https://www.globalreporting.org/standards/* (accessed on 21/07/2022)

[35] Ibid; See also Fonseca.A et al., 'Sustainability reporting among mining corporations: a constructive critique of the GRI approach." *Journal of cleaner production* 84 (2014): 70-83.'

[36] Ibid

of the relevant stakeholders and experts on ongoing basis to achieve assessment of the impact of the topics. In the aftermath, the material topics should be tested against the sector standard to prioritize the most significant impacts for reporting[37]. After this, the material topics should be tested with experts and information users to determine and come up with a comprehensive list of material topics for ESG reporting for the respective organization.

The approach applied for each step will vary according to the specific circumstances of the organisation, such as its business model; sector; geographic, cultural and legal operating context; ownership structure; and the nature of its impacts[38]. Given these specific circumstances, the steps should be systematic, documented, replicable, and used consistently in each reporting period. The organisation should document any changes in its approach together with the rationale for those changes and their implications. The organisation's highest governance body should oversee the process and review and approve the material topics[39].

The ESG Manual proposes mandatory ESG disclosures for NSE listed companies to help achieve comparability and to facilitate compliance with the CMA Code, relevant international treaties, ESG standards and local regulations[40]. Further, the Capital Markets Authority (CMA) Code of Corporate Governance Practices for Issuers of Securities to the Public in 2015 provides examples of topics that the Boards of listed companies should treat as material[41]. As per CMA code, material information means any information that may affect the price of an issuer's securities or influence investment decisions[42]. Listed firms are advised to refer to the Code when selecting material topics for disclosure[43]. The ESG Manual also recommends

[37] Ibid
[38] Muigua. K., 'What are the Material Issues for ESG Reporting in Kenya?' Op Cit
[39] Ibid
[40] Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual' Op Cit
[41] Capital Markets Authority., Code of Corporate Governance Practices for Issuers of Securities to the Public in 2015 , Legal Notice No. 1420
[42] Ibid
[43] Ibid

the Sustainable Development Goals (SDGs) as helpful guide in the identification of material topics and or impact as by aligning organisational objectives with the SDGs, organisations can identify significant impact areas that affect their contribution to the SDGs[44].

The concept of double-materiality is the latest introduction in the discussions around assessment of materiality in ESG reporting. According to the European Commission Guidelines on Non-financial Reporting, "double-materiality refers to assessing materiality from two perspectives, namely, the extent necessary for an understanding of the company's development, performance and position" and "in the broad sense of affecting the value of the company"; and environmental and social impact of the company's activities on a broad range of stakeholders[45]. The concept of double-materiality implies the need to assess the interconnectivity of the two.

A GRI research on how double-materiality is implemented in ESG reporting, and the benefits and challenges found that identification of financially materiality issues are incomplete if companies do not first assess their impacts on sustainable development[46]. The GRI white paper also revealed that reporting material sustainable development issues can enhance financial performance, improve stakeholder engagement and enable more robust disclosure[47]. Further, it was established that focusing on the impacts of organisations on people and planet, rather than financial materiality, increases engagement with the Sustainable Development Goals (SDGs)[48]. The ESG Manual thus encourages listed companies to assess impact of ESG issues to their organisations (such as climate change and human rights) in

[44] Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual' Op Cit
[45] European Commission 'Guidelines on Non-Financial Reporting', available at *https://ec.europa.eu/info/publications/non-financial-reporting-guidelines_en* (accessed on 21/07/2022)
[46] Adams, C.A., Alhamood, A., He, X., Tian, J., Wang, L. and Wang, Y. (2021) The Double-Materiality Concept: Application and Issues, published by the Global Reporting Initiative (GRI) as a White Paper, Available at: *https://www.globalreporting.org/media/jrbntbyv/griwhitepaper-publications.pdf* (accessed on 21/07/2022)
[47] Ibid
[48] Ibid

addition to their organisations own ESG impacts to society (such as material resource use and emissions) when determining material ESG impacts for disclosure. ESG reporting is thus essential in promoting sustainable development.

4.0 The ESG Reporting Frameworks Applicable in Kenya

In addition to the ESG Disclosure Manual formulated by the Nairobi Securities Exchange, there are several other organizations that have adopted ESG reporting requirements relevant to listed companies in Kenya[49]. These include the Capital Markets Authority, the United Nations Global Compact, various investment groups, the Carbon Disclosure Programme (CDP) and industry level reporting requirements like those imposed by the Central Bank of Kenya touching on the operations of licensed Banks[50]. This part explores the basics of each of these ESG reporting requirements and how listed companies in Kenya comply with them.

4.1 The Capital Markets Authority

The Capital Markets Authority (CMA) published the Code of Corporate Governance Practices for Issuers of Securities to the Public in 2015[51]. It requires listed companies to explain in their annual reports how they have applied the recommendations contained in the Code[52]. Within the Code, the CMA also provides examples of topics that the Boards of listed companies should treat as material[53]. The ESG Manual gives guidelines on how the ESG reporting approach suggested in it can be used to meet the reporting requirements of the CMA code[54]. These include by identifying the CMA as a key stakeholder for listed companies within the situational analysis and

[49] Muigua.K., 'The ESG Reporting Frameworks Applicable in Kenya' available at *https://thelawyer.africa/2022/06/05/esg-reporting-frameworks-applicable-in-kenya/* (accessed on 21/07/2022)
[50] Ibid
[51] Capital Markets Authority., Code of Corporate Governance Practices for Issuers of Securities to the Public in 2015, Legal Notice No. 1420
[52] Ibid
[53] Ibid
[54] Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual' Op Cit

stakeholder engagement phases[55]. Second, it involves analysing the CMA's expectations of the organisation and the reporting requirements contained in the CMA Code[56].

Third, complying with the CMA code under the ESG Manual means including disclosures requirements on the Code as part of the assessed material ESG topics for disclosure[57]. These have been proposed as a mandatory disclosure topic for all listed companies, that is, governance under general disclosure topics. In addition, it takes generating content on the organisation's performance around these topics using the guide proposed in this manual and reference to the GRI Standards on governance disclosures. It also entails submitting extracts or the full ESG report discussing performance on these indicators to the CMA within the agreed timelines with the CMA. In this case, the ESG report should be published within the reporting timelines required for CMA submissions.

4.2 Investor groups

As a way of managing assessed environmental and social risk in debt and equity investments, some institutional investors typically require the implementation of an environmental and social management system[58]. Thus, depending on the assessed risk profile, beneficiary organisations are required to report at least annually on performance on several pre-identified environmental and social performance metrics[59]. Through such reporting process, investors should be able to develop content around the organisation's approach to these topics and demonstrate performance during the reporting period[60]. It is noteworthy that environmental and social risk management is one of the mandatory ESG topics proposed for all listed

[55] Ibid; See also Magale. E., 'Developing a green bond market in Kenya: perspectives from practitioners and lessons from developing markets.' *Journal of Sustainable Finance & Investment* (2021): 1-18.
[56] Ibid
[57] Ibid
[58] Muigua.K., 'The ESG Reporting Frameworks Applicable in Kenya' available at *https://thelawyer.africa/2022/06/05/esg-reporting-frameworks-applicable-in-kenya/* (accessed on 21/07/2022)
[59] Ibid
[60] Ibid

companies. The International Finance Corporation (IFC) Performance Standards on Environmental and Social Sustainability is one example of ESG indicators and metrics that investors commonly refer to when evaluating investments[61].

4.3 United Nations Global Compact

There are more than 200 Organisations in Kenya, including some listed companies, that are participants of the Global Compact Network Kenya, the local arm of the United Nations Global Compact (UNGC)[62]. The UNGC has developed a set of 10 principles that organisations can voluntarily adopt and integrate into their own strategies and operations[63]. These principles cover four issue areas including Human Rights, Labour, Environment and Anti-corruption[64]. In turn, the Ten Principles of the United Nations Global Compact is a key guideline in that regard.

The UNGC encourages participants to self-assess, prepare, and submit a Communication on Progress report to the UNGC on their performance around these four topical areas[65]. According to the UNGC, the Communication on Progress report should be fully integrated into a company's main stakeholder communications, most often the annual or sustainability report[66]. By developing an annual ESG report discussing organisational performance around these topics, listed companies can submit an extract of the ESG report to fulfil the requirements of the annual

[61] International Finance Corporation., 'Performance Standards on Environmental and Social Sustainability' available at *https://www.ifc.org/wps/wcm/connect/c02c2e86-e6cd-4b55-95a2-b3395d204279/IFC_Performance_Standards.pdf?MOD=AJPERES&CVID=kTjHBzk* (accessed on 21/07/2022)

[62] United Nations Global Compact: available at https://www.unglobalcompact.org/engage-locally/africa/kenya (accessed on 21/07/2022)

[63] Ibid

[64] Ibid; See also Global Compact Network Kenya., 'The Ten Principles of the United Nations Global Compact' available at *https://www.globalcompactkenya.org/what-we-do/ten-principles* (accessed on 22/07/2022)

[65] Ibid

[66] Ibid

Communication on Progress report submissions to the UNGC. Further, applying the Global Reporting Initiative standards ensures compliance to the Communication on Progress reporting requirements[67]. Organisations can also refer to the UNGC guidance document on Using GRI's Guidelines to Create a CoP.

4.4 The Carbon Disclosure Project (CDP)

The CDP is a non-profit charity helps in promoting transparency in environmental reporting by cities and companies around the world[68]. Signatory companies provide performance data on climate change, water security and deforestation on a self-disclosure basis[69]. This self-reported data is then used by investors and other stakeholders to make informed data driven decisions with regards to the reporting company's environmental impacts[70]. For example, investors can use data in the CDP database to calculate the carbon intensity of their portfolio[71]. Investors can also select entities that demonstrate climate resilience by evidenced implementation of strategies that future proof their organisations against climate related polices and regulations[72]. There is need to consider that the CDP and GRI use common metrics on reporting on carbon emissions. ESG reporting can be used to collect and report data to the CDP. Organisations can select any or all the disclosure topics as part of their materiality assessment exercise and build reporting content within the ESG report that meets the CDP self-disclosure requirements.

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[67] Muigua.K., 'The ESG Reporting Frameworks Applicable in Kenya' Op Cit

[68] Carbon Disclosure Project, available at https://www.cdp.net/en (accessed on 21/07/2022)

[69] Ibid; See also Matisoff.D et al., 'Convergence in environmental reporting: assessing the Carbon Disclosure Project." *Business Strategy and the Environment* 22.5 (2013): 285-305.'

[70] Ibid

[71] Muigua.K., 'The ESG Reporting Frameworks Applicable in Kenya' Op Cit

[72] Ibid

4.5 Industry level reporting

Certain industry groups in Kenya have developed voluntary ESG related guidelines for consideration by member organisations. For example, in the banking sector in Kenya, the Kenya Bankers Association, the trade association for banks in Kenya, has developed the Sustainable Finance Initiative (SFI) industry principles for the banking sector[73]. Further, recently the Central Bank of Kenya (CBK) has developed Guidance on Climate Related Risk Management for the banking sector[74]. The aim of the Guidance is to sensitize the banking sector on mitigation of climate-related risks and harnessing of opportunities[75]. It also offers guidance on the development and implementation of appropriate climate-related strategies and policies[76]. Given the current trajectory of ESG and emphasis placed by investors on ESG integration, it is expected that more trade associations and industry groupings in Kenya will develop specific ESG guidelines for adoption by their members. Industry guidelines provide relevant insights on ESG issues impacting the industry and listed companies can refer to such guidelines when identifying material ESG topics for disclosure using the framework proposed in this manual.

5.0 ESG Concerns in Kenya

The concept of ESG acknowledges some of the Environmental, Social and Governance concerns that arise from the activities of corporations. From an environmental perspective, the activities of corporations have resulted in direct and indirect greenhouse gas emissions contributing to the climate change menace[77]. Further, the activities of multinational corporations

[73] Sustainable Finance Initiative, available at https://sfi.kba.co.ke/ (accessed on 22/07/2022)

[74] Central Bank of Kenya., *'Guidance on Climate-Related Risk Management'* October 2021, available at *https://www.centralbank.go.ke/wp-content/uploads/2021/10/Guidance-on-Climate-Related-Risk-Management.pdf* (accessed on 22/07/2022)

[75] Ibid

[76] Ibid

[77] Peterdy.K., 'ESG (Environment, Social and Governance): A Framework for Understanding and Measuring How Sustainably an Organization is Operating' available at *https://corporatefinanceinstitute.com/resources/knowledge/other/esg-environmental-social-governance/* (accessed on 21/07/2022)

especially those involved in the exploration of natural resources have resulted in environmental concerns such as environmental degradation, extinction of biodiversity, contamination and destruction of soil and air pollution affecting the socio-economic lives of indigenous populations[78].

In the social context, ESG acknowledges some of the challenges that organization's face in their relationship with stakeholders. Some of these challenges include unfair labour practices and standards. In Kenya, there have been accusations of human right abuses such as killings, rape, and other forms of sexual and gender-based violence, bad labour practices and land injustices against the neighbouring communities perpetrated by certain multinational corporations[79]. The activities of an organization can also impact the communities where such an organization operates resulting in social concerns such as land injustices and displacement of people.

Governance challenges have also impacted the profitability and sustainability of organizations. These challenges include mismanagement of organizations, lack of transparency, accountability by the board of directors, conflict of interest and poor internal controls[80]. These challenges have resulted in failure of some of the leading organizations in Kenya. ESG acknowledges these challenges and seek to integrate good governance practices in the affairs of organizations.

6.0 Way Forward

There is need for corporations to embrace the concept of ESG in Kenya in order to promote sustainable development. According to the Nairobi Securities Exchange, listed companies in Kenya have a general awareness of

[78] Ajibade, L.T & Awomuti, A.A. 'Petroleum Exploitation or Human Exploitation? An Overview of Niger Delta Oil Producing Communities in Nigeria' *African Research Review Vol. 3 (1), 2009. Pp. 111-124*

[79] Kenya Human Rights Commission., 'Heavy price for Kakuzi's egregious human rights violations' available at *https://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/737-heavy-price-for-kakuzi-s-egregious-human-rights-violations.html* (accessed on 21/07/2022)

[80] Seth.A., 'Corporate governance challenges in emerging economies." *Corporate Governance: An International Review, Forthcoming* (2017).

ESG issues and corporate sustainability but there is need for capacity building on how to integrate ESG into business strategies of listed companies and how to report ESG performance in a consistent, transparent and principle-based approach that meets stakeholder expectations[81]. The ESG Disclosures Guidance Manual (ESG Manual) is thus designed to guide listed companies in Kenya and other organizations interested in ESG reporting on how to collect, analyse, and publicly disclose important ESG information in a way that meets international sustainability reporting standards[82].

The ESG Manual is proposed to act as a guide on how to progressively integrate ESG in strategy, operations, and performance management. It recommends the adoption of the Global Reporting Initiatives (GRI) Standards as the common framework for ESG Reporting for listed companies in Kenya to help reduce uncertainties[83]. For an organization to claim that it has prepared information in accordance with the GRI Standards, it is required to have applied the GRI Reporting Principles. This is a set of reporting principles which guide organizations in ensuring the quality and proper presentation of the reported information[84]. The principles include accuracy, balance, clarity, comparability, completeness, sustainability context, timeliness and verifiability[85].

According to a 2020 Global Survey on Sustainability reporting conducted by KPMG, the GRI Standards are the most widely used framework for sustainability reporting[86]. The listed companies on the NSE that were reporting on ESG performance had already settled on and were using the GRI standards as their preferred framework for ESG Reporting even before the ESG Manual[87]. The ESG Manual proceeds to propose a common set of

[81] Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual' Op Cit
[82] Ibid
[83] Ibid
[84] GRI., 'The Global Standards for Sustainability Reporting' Op Cit
[85] Ibid
[86] KPMG, "The Time has Come: The KPMG Survey on Sustainability Reporting 2020," Available at: *https://assets.kpmg/content/dam/kpmg/be/pdf/2020/12/The_Time_Has_Come_KPMG_Survey_o* (accessed on 22/07/2022)
[87] Ibid

ESG metrics for reporting by all listed companies to help facilitate comparability of ESG performance of listed companies in Kenya. It is also projected that over time, upon maturity of the ESG disclosures, it will become possible for stakeholders to correlate financial performance with specific ESG indicators such diversity and air emissions[88].

Further, applying the ESG Manual is expected to assist listed companies comply with reporting requirements for other organizations such as the Carbon Disclosure Project (CDP) and UN Global Compact (UNGC). The manual also includes a guide on how to meet corporate governance reporting requirements contained in the Capital Markets Authority (CMA) Corporate Governance Code. The ESG Manual also includes examples of sector specific ESG disclosures for reference by listed companies in its Annex 6[89]. The ESG Manual is expected, with time, to make it possible to compare the ESG performance of organizations reporting within the same sectors including adopting common reporting framework for the respective sectors. The ESG Manual also seeks to support future plans for a responsible investment index by the Nairobi Securities Exchange (NSE).

The ESG criteria proposed in the Manual is also anticipated to be applied in investment selection given the momentum the trend has gained in recent years which is expected to continue in the future[90]. According to the Manual, along with national policies and directives, ESG considerations in investments have become the most important driving force for ESG integration and disclosure in capital markets. As such, companies seeking to attract responsible investors are incentivized to ensure that they adopt the top ESG metrics commonly sought by investors[91]. These include having an overarching ESG policy, assigning ESG management responsibility, having a Corporate code of ethics, presence of litigation on matters touching on environmental, social and ethical affairs, the presence or absence of People

[88] Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual' Op Cit
[89] Ibid
[90] Muigua.K., 'The Need and Benefits of ESG Reporting in Kenya' available at *https://thelawyer.africa/2022/06/04/benefits-of-esg-reporting-in-kenya/* (accessed on 22/07/2022)
[91] Ibid

diversity among employees, Board and management, net employee composition including ratio of part-time and full-time employees, having formal environmental policy and estimation of carbon footprint, data and cybersecurity incidents if any that can put the company at risk and health and safety events that affect ability to provide safe working environments for employees, contractors and the wider value chain[92].

The expected benefits for Listed Companies adopting the ESG Manual include ensuring transparency in ESG disclosures which helps in building integrity and trust in the capital markets thus enhancing competitiveness to attract investment to the capital markets. The adoption and promotion of ESG reporting by the NSE is expected to enhance trust and integrity of the capital markets in Kenya by providing valuable information that is of increasing importance to investors, thus contributing to more efficient capital allocation [93] . Other key benefits of integrating and disclosing ESG performance by listed companies in Kenya include the fact that it ensures investors can assess and preferentially invest in issuers that demonstrate better ESG linked financial performance, resulting in more efficient capital allocation[94]. Further, implementation of the ESG Manual is geared to ensure that organisations that demonstrate responsible investment practices are able to access new sources of capital from sustainability conscious investors such as Development Finance Institutions (DFIs) and Private Equity firms[95].

In addition, a holistic view of corporate value facilitates product innovation by enabling consideration and management of the embodied environmental and social impacts of products and services. Measuring and reporting ESG performance also enables organisations embed circularity in their operating models and achieve operational efficiencies by optimizing energy and raw

[92] Broderick, S., "The Top 10 ESG Metrics Private Equity Funds Should Collect," IHS Markit, 2019; Available at: *https://cdn.ihsmarkit.com/www/pdf/0720/ESGTop10-Digital-Final-HiRes.pdf* (accessed on 22/07/2022)
[93] Muigua.K., 'The Need and Benefits of ESG Reporting in Kenya' Op Cit
[94] Ibid
[95] Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual' Op Cit

costs in production[96]. By adding and demonstrating ESG integration into their supply chains, production systems and service delivery, the listed companies applying the manual will benefit from preferential access to new markets. ESG value creation framework also helps organisations to proactively address non-financial but critical environmental and social risks, thereby preserving and creating long term value for stakeholders. ESG integration enhances regulatory compliance and helps anticipate the impact of future ESG related regulations and policies. Finally, organizations are perceived as responsible corporate citizens and achieve brand value enhancement by systematically identifying and responding to stakeholder needs and expectations[97].

The implementation timelines of the ESG Manual for listed companies on the NSE includes the requirement of issuing a public report on their ESG performance at least annually[98]. The steps outlined in the ESG Disclosures Guidance Manual are expected to guide such reporting. In addition, the manual is also made available as a public good for other organisations in Kenya that would be interested in ESG reporting. On their part, listed companies have been given a grace period of one year from the date of issuance of the guidelines (29th November 2021) to interact and familiarize themselves with the ESG reporting steps contained in these guidelines for implementation[99]. Thus, listed companies will after 29th November 2022 be expected to include a sustainability/ESG report in their annual integrated reports[100]. The Sustainability/ESG Report under the NSE ESG Manual must at minimum contain the mandatory ESG disclosures discussed in Chapter 6 of the manual. Issuers can also choose to publish a separate ESG/sustainability report. Adopting and adhering to the ESG manual will thus be an important step in promoting ESG in Kenya.

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[96] Ibid

[97] Ibid; See also Africa Sustainability Matters., 'What do ESG guidelines mean for corporates?' available at *https://africasustainabilitymatters.com/what-do-esg-guidelines-mean-for-corporates/* (accessed on 22/07/2022)

[98] Ibid

[99] Nairobi Securities Exchange, 'ESG Disclosures Guidance Manual' Op Cit

[100] Ibid

7.0 Conclusion

Environment, Social and Governance (ESG) has emerged as arguably the most important tool of corporate governance in the current era. It acknowledges the environmental, social and governance concerns faced by corporations and seeks to integrate these concerns in corporate decision making in order to promote sustainable, responsible and ethical investments. There is need for organizations to continue embracing ESG in order to promote corporate sustainability. Embracing ESG as a pillar of sustainable development is an ideal whose time has come.

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https://www.ifc.org/wps/wcm/connect/c02c2e86-e6cd-4b55-95a2-b3395d204279/IFC_Performance_Standards.pdf?MOD=AJPERES&CVID=kTjHBzk

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Kenya's Legal Viaduct to Environmental Sustainability

By: ***Polycarp Moturi Ondieki****

Abstract

The environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.[1] *Environmental law is defined as the norms and rules that control the conduct of humans to ensure that their conduct does not weaken the natural balance. This law is primarily concerned with the behavior of humans.*[2] *Sustainable development has been defined as development that meets the needs of the present without compromising the ability of future generations to meet their own needs.*[3] *Sustainable development clearly explains the theory of utilitarianism which demands that each action be judged by its utility, that is to say, its usefulness in bringing about consequences of a certain kind to achieve* "the greatest good of the greatest number" *and that* "that action is best which procures the greatest happiness for the greatest numbers".[4]

Kenya being part of the global community, it's striving to achieve sustainability. The protection and the conservation of the environment in

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[1] Lyster, R., Lipman, Z., Franklin, N., Wiffen, G. and Pearson, L., n.d. Environmental and Planning Law In New South Wales.

[2] Kenyalawresourcecenter.org.2020.EnvironmentalLaw.[online]Availableat*:<http://www.kenyalawresourcecenter.org/2011/07/environmental-law.html>* [Accessed 20 October 2020].

[3]ARE, F., 2020. 1987: Brundtland Report. [online] Are.admin.ch. Available at: *<https://www.are.admin.ch/are/en/home/sustainable-development/international-cooperation/2030agenda/un-_-milestones-in-sustainable-development/1987--brundtland-report.html>* [Accessed 4 October 2020].

[4] Said Juma Chitembwe v Edward Muriu Kamau & 4 others, Civil Application No. Nai 95 Of 2010 (Ur 70/2010); [2011] Eklr.

Kenya from a legal perspective became to fruition a decade ago after the promulgation of the new constitution. Before 2010, a few environmental protection laws and authorities existed.[5] *Sustainability was an illusion in Kenya before 2010. Many law practitioners only applied the principles of contract law and tort to advocate for environmental rights and sustainability.*[6] *The enforcement of rights under the previous constitution was very difficult. The Constitution of Kenya since its promulgation in 2010 now focuses on the right to a sustainable environment as a fundamental right and freedom.*[7] *Many laws, agencies, and policies have since been enacted and created to ensure this baby, sustainability, does not starve to death.*

1. Introduction

Man, as a creature of the Almighty God, has some of the qualities of the Creator. One of such is intelligence. Another is reasoning power.[8] This includes the power to create laws that govern society. Law reflects the values of the society, it dictates the structure, boundaries, rules, and processes within which governmental action takes place[9].

The environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.[10] Environmental law is defined as the norms and rules that control the conduct of humans to ensure that their conduct does not weaken the

[5].Sang, B., 2013. Tending Towards Greater Eco-Protection in Kenya: Public Interest Environmental Litigation and Its Prospects Within the New Constitutional Order. Journal of African Law, 57(1).

[6] Sang, B., 2013. Tending Towards Greater Eco-Protection in Kenya: Public Interest Environmental Litigation and Its Prospects Within the New Constitutional Order. Journal of African Law, 57(1).

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natural balance. This law is primarily concerned with the behavior of humans.[11]

For a long time, the country did not have defined environmental laws. Policymaking and the whole planning process always tended to fall short of expectations hindering the attainment of sustainability.[12] Environmental matters were strictly private matters and were never a concern of the public. Worse still, Kenya's environmental law regime was dominated by a myriad of sectoral laws that dealt with the natural resource sector.[13] These laws were ill-structured and scattered over several ministries leading to jurisdictional overlaps hence making implementation an enforcement an uphill task.[14] Attaining sustainability was almost impossible. With the confusion caused by these sectoral laws, it was realized that there was a requirement in creating, one central point that would coordinate various activities and policies and give the government informed decisions on matters of environmental management.[15] The attention in the protection of the environment from the legal perspective gained prominence, some years ago with the enactment of the Environmental and Management Coordination Act of 1999, and the promulgation of the new constitution in 2010.[16] Many laws, agencies, and policies have since been enacted and created to deal with the environment hence sustainability.

[11] Kenyalawresourcecenter.org.2020.EnvironmentalLaw.[online]Availableat:<*http://www.kenyalawresourcecenter.org/2011/07/environmental-law.html*> [Accessed 20 March 2020].
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[13] Muigua, K. and Kariuki, F., 2013. Towards Environmental Justice in Kenya. (1).
[14] Sang, B., 2013. Tending Towards Greater Eco-Protection in Kenya: Public Interest Environmental Litigation and Its Prospects Within the New Constitutional Order. Journal of African Law, 57(1).
[15] Sang, B., 2013. Tending Towards Greater Eco-Protection in Kenya: Public Interest Environmental Litigation and Its Prospects Within the New Constitutional Order. Journal of African Law, 57(1).
[16] Sang, B., 2013. Tending Towards Greater Eco-Protection in Kenya: Public Interest Environmental Litigation and Its Prospects Within the New Constitutional Order. Journal of African Law, 57(1).

The Judicature Act sets out the various sources of law that are to be applied in Kenya. They include: the Constitution, Acts of Parliament, Acts of Parliament of the United Kingdom; where no written law exists, the substance of the common law, the doctrines of equity, statutes of general application in England as at 12th august 1897 and in so far as they are acceptable in Kenya and customary law.[17]

This paper will contextualize and conceptualize how Kenya's legal system has been able to attain sustainability. The laws that have since been enacted, the cases that have been decided and the agencies that have been created to ensure the attainment of sustainability in Kenya will also be discussed. In addition to that, the paper will show how the various principles of sustainable development have been achieved in Kenya through the existing legal system. Finally, the paper will conclude on whether Kenya has achieved sustainability.

2. Legal Provisions on Environmental Law and Sustainability in Kenya

2.1. Constitution of Kenya,2010

Since the promulgation of the new constitution in 2010,[18] there has been a paradigm shift towards the implementation of environmental rights and the principles of sustainable development.[19] There has been a significant expansion of the scope of elementary rights and freedoms and their enforcement mechanisms.[20] Particularly, the recognition of sustainable development in the bill of rights.[21]

In its preamble, the Constitution recognizes the principle of sustainability by stating that, "the people of Kenya should be respectful of the environment,

[17] Judicature Act, Section 3.
[18] Africa Research Bulletin: Political, Social and Cultural Series, 2010. KENYA: Constitution Voted In. 47(8), pp.18495A-18498C.
[19] Sang, B., 2013. Tending Towards Greater Eco-Protection in Kenya: Public Interest Environmental Litigation and Its Prospects Within the New Constitutional Order. Journal of African Law, 57(1).
[20] Sang, B., 2013. Tending Towards Greater Eco-Protection in Kenya: Public Interest Environmental Litigation and Its Prospects Within the New Constitutional Order. Journal of African Law, 57(1).
[21] Constitution of Kenya 2010, Articles 10, 42, 43 and 69.

which is our heritage, and determined to sustain it for the benefit of future generations." [22] Further, Article 2 (5) and (6) of the Constitution, acknowledge the general rules of international law as being part of the Kenyan laws and any treaty or convention ratified by Kenya also forms part of the laws of Kenya respectively.[23] Through this, the many treaties and conventions that embrace the principle of sustainability apply in Kenya. Some of the treaties and conventions that form part of the laws of Kenya include: the Bamako Convention, the Langkawi Declaration on the Environment, African Convention on the Conservation of Nature and Natural Resources, the Coolum Declaration, the African Youth Charter, Vienna Convention for Protection of the Ozone Layer, United Nations Framework Convention on Climate Change.[24]

In Chapter 5, the Constitution discusses issues of land and the environment.[25] Article 69 sets forth the role of the state in promoting sustainable development and ensuring equitable utilization, exploitation, and management of the environment and natural resources.[26] Particularly, it obligates the state to strive to achieve a ten percent tree cover, which is a worldwide goal in curbing climate change.[27] Moreover, it obligates the estate to ensure the promotion of traditional knowledge and the role of indigenous communities in the conservation of genetic resources and biological diversity of the communities.[28] Through the promotion of this knowledge, future generations can use it in different inventions and innovations that are economically and environmentally viable.

Additionally, Article 69, entitles the state with the responsibility of encouraging public participation in the management, protection, and conservation of the environment.[29] Public participation is one of the

[22] Constitution of Kenya 2010, Preamble.
[23] Constitution of Kenya 2010, Article 10.
[24] Kenyalaw.org. 2020. *NCLR Home Page | Treaties Database*. [online] Available at: <*http://kenyalaw.org/treaties/*> [Accessed 2 June 2020].
[25] Constitution of Kenya 2010.
[26] Constitution of Kenya 2010.
[27] Constitution of Kenya 2010, Article 69 (1)(b).
[28] Constitution of Kenya 2010, Article 69 (1)(c).
[29] Constitution of Kenya 2010.

important principles of sustainable development and with its recognition in the constitution, it means the country is in the right direction towards achieving sustainability. The state should also protect genetic resources and biological diversity.[30] Article 69 obligates the state to create systems of Environmental Impact Assessment, environmental audit, and monitoring of the environment.[31] Through these systems, the state will have achieved the precautionary principle and the polluter pay principle which are the core principles of sustainable development. Lastly, Article 69, places a duty on every person to cooperate with the state and other persons in protecting and conserving the environment and ensuring ecologically sustainable development and use of natural resources.[32] This is a sign of good governance a core principle of sustainability.

Sustainable development is recognized as one of the national values and principles of governance.[33] In Article 10, the Constitution elucidates the principles of good governance, transparency, accountability, public participation, and equality as national values and principles of governance.[34] These principles bind all state organs and persons and they are the main principles of sustainability.[35]

In Article 42, the Constitution recognizes the right to a clean and healthy environment which includes the right to have the environment protected for the benefit of the present and future generations.[36] It through this recognition that the principles of inter and intra-generational equity have been respectively embraced.

The Constitution not only recognizes sustainable development rights and environmental rights but also provides for mechanism through which these rights can be enforced. Any person whose environmental rights have been

[30] Constitution of Kenya 2010, Article 69 (1)(e).
[31] Constitution of Kenya 2010.
[32] Constitution of Kenya 2010.
[33] Constitution of Kenya 2010.
[34] Constitution of Kenya 2010, Article 10 (2).
[35] Constitution of Kenya 2010, Article 10 (1).
[36] Constitution of Kenya 2010.

threatened, infringed, denied, or violated can petition the court for redress.[37] Various other rights regarding access of justice have also been recognized in the constitution and they include, right to access justice,[38] right to fair administrative action,[39] economic and social rights, and right to access information.[40] Along the same lines, the constitution created a special court, the Environment and Land Court, with the status of the high court to specifically deal with land and environment matters.[41]

The Constitution creates two levels of governments; the national government and the county governments.[42] The fourth schedule provides for the distribution of functions between the two levels of government. The national government is responsible for protection of the environment and natural resources to establish a durable and sustainable system of development, including, fishing, hunting, and gathering, protection of animals and wildlife and energy policy.[43] On the other hand, the county governments are responsible for control of air pollution, noise pollution and implementation of the national laws and policies regarding natural resources and environmental protection.[44] The two levels of government should always work in harmony through consultation and cooperation to achieve the constitutional goals.[45] This a sign of good governance and the principle of intergenerational equity is achieved through preservation of natural resources.

Article 113 of the Constitution acknowledges the importance of physical planning as being essential to the efficient and sustainable utilization and management of land and land-based resources. Physical planning helps in proper integration of economic, environmental and social matters in development hence attaining the goal of sustainable development.

[37] Constitution of Kenya 2010, Article 70.
[38] Constitution of Kenya 2010, Article 48.
[39] Constitution of Kenya 2010, Article 47.
[40] Constitution of Kenya 2010, Article 43.
[41] Constitution of Kenya 2010, Article 162(2)(b); Environment and Land Court Act.
[42] Constitution of Kenya 2010, Article 6.
[43] Constitution of Kenya 2010, Fourth Schedule, Section 22.
[44] Constitution of Kenya 2010, Article 6.
[45] Constitution of Kenya 2010, Article 6(2).

2.2. Environmental Management and Coordination Act (EMCA)

This is an Act of parliament that was established with the main purpose of creating the necessary legal and institutional framework for environmental management.[46] This Act consolidated power and responsibility which had been disseminated by the various sectoral laws in many government departments. These sectoral laws made coordination towards the protection of the environment difficult.[47]

Section 3 of the Act echoes the provisions of Articles 42 and 70 of the Constitution with regards to the right to a clean and healthy environment and access to justice respectively.[48] In Section 3A, the right to access information has been eloquently elucidated.[49] Through this Section, every person has a right to access information that is important to the management and protection of the environment. Access to information is one of the principles of good governance and when tied with public participation, sustainability is easily achieved. Section 108 of EMCA provides for the issuance of environmental restoration orders on any person by National Environmental Management Authority(NEMA) or by a court of law.[50] When issued, such an order would, *inter alia*, requires restoration of the environment to the condition it was before the degrading action and award compensation o any person harmed by the degrading action. In this case, the perpetrator of the degrading action is liable to meet the full cost. This an example of the polluter pays principle of sustainability reflected in this law.

The Act is complemented by subsidiary legislations that ensure proper management of environmental matters and attainment of sustainability. The Environmental (Impact Assessment and Audit) Regulations, 2003; the Constitution in Article 69(f) obligates the state to create environmental impact assessment and audit systems. Environmental Impact Assessment

[46] Environmental Management and Coordination Act 1999.
[47] Muigua, K. and Kariuki, F., 2013. Towards Environmental Justice in Kenya. (1).
[48] Environmental Management and Coordination Act 1999; Constitution of Kenya 2010.
[49] Environmental Management and Coordination Act 1999; Constitution of Kenya 2010.
[50] Environmental Management and Coordination Act 1999; Constitution of Kenya 2010.

(EIA) helps in the anticipation and reduction of the injurious effects of development.[51] The aspect of EIA arose from increased population growth, urbanization, and industrialization which paused a big threat to natural resources through degradation and pollution.[52] Regulation 4 puts restrictions on the implementation of projects that may have negative impacts on the environment. [53] Through EIA, the precautionary principle is realized. Further, it states that "no licensing authority should issue a license for any project for which an Environmental Impact Assessment is required under the Act...." [54] Where there has been no such EIA, an injunction can be sought in court to restrain the activity.[55] Additionally, the regulations provide for Environmental Audit (EA) which is the systematic documentation, periodic and objective evaluation of activities and processes of an ongoing project.[56] The goal of EA is to establish if proponents are complying with environmental requirements and enforcing legislation. This aims to achieve the principles of good governance, hence achieving sustainability.

The Environmental Management and Co-ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing), 2006, states that no person should be allowed to engage in activities that may cause damage to the ecosystem, lead to the introduction of alien species and/or lead to the unsuitable use of natural resources.[57] Alien species in most cases have been a menace in many ecosystems, hence hindering sustainability. An example is the introduction of an alien species, *Prosopis Juliflora,* around 1984 at the shores of Lake Bogoria.*[58]* This plant has caused wanton destruction of the natural ecosystem and even causing death to animals that feed on it. These Regulations are now in place to curb such vices that lead to the destruction of the natural ecosystem. The

[51] Environmental (Impact Assessment and Audit) Regulations 2003, Regulation 2.
[52] Muigua, K. and Kariuki, F., 2013. Towards Environmental Justice in Kenya. (1).
[53] Environmental (Impact Assessment and Audit) Regulations 2003.
[54] Environmental (Impact Assessment and Audit) Regulations 2003, Regulation 4.
[55] Nzioka & 2 Others v Tiomin Kenya Ltd, Civil Case No. 97 of 2001.
[56] Environmental (Impact Assessment and Audit) Regulations 2003, Regulation 31.
[57] Environmental Management and Co-ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) 2006, Regulation 4.
[58] Swallow, B. and Mwangi, E., 2008. Prosopis julifloraInvasion and Rural Livelihoods in the Lake Baringo Area of Kenya. Conservation and Society.

regulations also state that any person who wants to get a genetic resource from Kenya must get permission from the National Council for Science and Technology.[59] This helps in sustainability as it prevents unwarranted use of genetic resources and ensures that the resources are available for use by future generations.

Environmental Management and Co-ordination (Waste Management) Regulations, 2006. These Regulations apply to all classes of wastes including, Industrial wastes, Pesticides, and toxic substances, Biomedical wastes, Radio-active substances, and Hazardous and toxic wastes.[60] It is through these Regulations that proper handling, transportation, and disposal of all these categories of wastes are outlined.[61] With proper handling and disposal of wastes, pollution is avoided and in turn, the society, economy and natural environment will tremendously thrive thus achieving to sustainability.

2.3. Forest Conservation and Management Act

This Act was enacted for the principal purpose of ensuring proper management and sustainable use of forests and forest resources.[62] It provides for the rational use of forest resources to ensure the socio-economic development of the nation at large.[63] The Act establishes the Kenya Forestry College which offers forestry education, technical and vocational training courses in forest conservation, management and sustainable utilization of forest.[64] It also offers short courses to communities, private forest owners, and forest industries in the protection of forests and allied natural resources. Education is an important aspect of the attainment of sustainability and for individuals to achieve any goal in life, they always need to have good

[59] Environmental Management and Co-ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) 2006, Regulation 9.
[60] Environmental Management and Co-ordination (Waste Management) Regulations, 2006.
[61] Environmental Management and Co-ordination (Waste Management) Regulations 2006, Regulation 18.
[62] Forest Conservation and Management Act 2016.
[63] Forest Conservation and Management Act 2016, Section 5.
[64] Forest Conservation and Management Act 2016, Section 17.

knowledge of the subject matter. Besides, the Act creates the Kenya Forest Service which is a body corporate whose mandate is to ensure the conservation of forest resources both at the national and county levels in an equitable manner for the benefit of the present and future generations.[65]

2.4. Wildlife and Conservation and Management Act

The Act creates the Kenya Wild Service (KWS) which is a body mandated to enforce the Act through conservation of flora and fauna.[66] It is also mandated to manage national parks and game reserves sustainably by preventing illegal activities such as poaching. This helps in the achievement of the principle of inter-generational equity.

2.5. Mining Act

This Act controls the mining industry through the provision of licences and mining permits. It provides for compulsory EIA in any prospective mining activity and compensation to parties affected by mining activity.[67] The Act also helps in preventing illegal and unsustainable mining activities. This helps in achieving the precautionary principle and polluter pays principle of sustainable development.

2.6. Public Health Act

This Act prohibits anyone from causing a nuisance that is dangerous to human beings and the environment.[68] It also obligates county governments to protect all water supplies in their jurisdictions from any form of pollution.[69] This elaborates the precautionary principle as it encourages individuals to take measures to avoid causing danger to the environment which might lead to negative economic and social effects.

2.7. Penal Code

It provides for sanctions that will be applied to any person who commits environmental offenses. Section 192 states that any person who vitiates the

[65] Forest Conservation and Management Act 2016, Section 7.
[66] Wildlife Conservation and Management Act 2013, Section 6.
[67] Mining act 2016, Section 78.
[68] Public Health Act 1921, Section 115.
[69] Public Health Act 1921, Section 129.

atmosphere in any space so as to make it noxious to the environment or the neighborhood is guilty of a misdemeanor.[70] Section 191 states any person who voluntarily contaminates water to make it unfit for ordinary use is guilty of a misdemeanor.[71]

Other important statutes that are important in achieving sustainability include: Physical and Land Use Planning Act, which provides for regulation, management and proper use of land in to attain sustainability;[72] Climate Change Act, provides for regulatory framework necessary in combating climate change. It also provides for mechanisms that help in achieving low carbon climate development;[73] Access to Information Act, which gives effect Article 35 of the Constitution[74] and helps in achieving administrative justice which is an important aspect in attaining sustainability;[75] Protected Areas Act which prevents illegal entry into protected areas.[76] This helps in preservation of important flora and fauna for the future generations; And Fair Administrative Action Act which helps in seeking environmental justice.[77]

2.8. Policies

2.8.1. National Environment Policy, 2013

The goal and objective of this policy are to provide a better life for the present and future generations through the sustainable management of the environment and the use of natural resources.[78] It ensures that the linkage between the environment and poverty reduction is integrated into all government activities and agencies. This is aimed at the realization of sustainable development at all levels in the context of the green economy by enhancing social inclusion, improving human welfare, and creating

[70]Penal Code, Cap 63.
[71] Penal code, Cap 63.
[72] Physical and Land Use Planning Act
[73] Climate change Act
[74] Constitution of Kenya 2010.
[75] Access to information Act
[76] Protected Areas Act
[77] Fair Administrative Action Act
[78] National Environmental Policy 2013,

opportunities for employment and maintaining the healthy functioning of the ecosystem.

2.8.2. Vision 2030

This is a blueprint that is aimed at helping the country achieve its goal of becoming a middle-income country with the highest quality of life to all its citizens by 2030.[79] The blueprint incorporates all the Millennium Development Goals which are important in achieving sustainable development in the country.[80] The blueprint is also guided by three important pillars which are the economic, social, and environmental pillars.[81] These pillars are core in achieving sustainability. Most importantly, it focusses on environmental governance, conservation of naturals resources and pollution, and waste management.[82] Through this blueprint sustainable cities like Konza and Tatu cities are coming up. The blueprint aims at helping the country achieve the Sustainable Development Goals.[83]

2.9. Authorities and Agencies

2.9.1. Ministry of Environment, Water and Natural Resources

This office is created through Section 5 of the EMCA.[84] It is headed by the Cabinet Secretary in charge of the environment and natural resources.[85] This is the highest policy-making body under EMCA. The ministry is responsible

[79]Vision2030.go.ke. 2020. [online] Available at: *<http://vision2030.go.ke/inc/uploads/2018/05/Vision-2030- Popular-Version.pdf>* [Accessed 2 May 2020].
[80] Vision2030.go.ke. 2020. [online] Available at: *<http://vision2030.go.ke/inc/uploads/2018/05/Vision-2030-Popular-Version.pdf>* [Accessed 17 May 2020].
[81] Vision2030.go.ke. 2020. [online] Available at: *<http://vision2030.go.ke/inc/uploads/2018/05/Vision-2030-Popular-Version.pdf>* [Accessed 17 May 2020].
[82] Vision2030.go.ke. 2020. [online] Available at: *<http://vision2030.go.ke/inc/uploads/2018/05/Vision-2030-Popular-Version.pdf>* [Accessed 17 May 2020].
[83] Vision2030.go.ke. 2020. [online] Available at: *<http://vision2030.go.ke/inc/uploads/2018/05/Vision-2030-Popular-Version.pdf>* [Accessed 17 May 2020].
[84] Environmental Management and Coordination Act 1999.
[85] Environmental Management and Coordination Act 1999.

for policy formulation and directions for the EMCA. It sets national goals and objectives and promotes cooperation among both public and private organizations engaged in environmental protection programmers.[86]

2.9.2. National Environment Management Authority

The National Environment Management Authority (NEMA) is a government agency established under Section 7 of the EMCA.[87] Its mandate is to exercise general supervision and coordination over all matters relating to the environment. The Authority is the principal instrument through which the government implements all policies relating to the protection of the environment.

2.9.3. National Environment Tribunal

The National Environment Tribunal (NET) is established under Section 125 of the EMCA. The function of NET is to hear appeals from administrative decisions by organs responsible for enforcement of environmental standards.[88] The proceedings of NET are quite flexible, and they do not follow the strict laws of evidence. This makes it easier and fast in the determination of issues hence making access to justice easier.

2.9.4. National Environmental Complaints Committee

The National Environmental Complaints Committee (NECC) is established under Section 31 of the EMCA.[89] The NECC is concerned with the investigation of complaints relating to environmental damage and degradation generally.[90] NECC has powers to investigate complaints against any person or even against NEMA concerning the condition of the environment in Kenya.[91] It is also required to report to the cabinet secretary periodically on its development.[92] This is a sign of good governance a principle aimed at achieving sustainability.

[86] Environmental Management and Coordination Act 1999.
[87] Environmental Management and Coordination Act 1999.
[88] Environmental Management and Coordination Act 1999.
[89] Environmental Management and Coordination Act 1999.
[90] Environmental Management and Coordination Act 1999.
[91] Environmental Management and Coordination Act 1999.
[92] Environmental Management and Coordination Act 1999.

2.10. Conservation Programs

The government allows some conservation programs to run hence ensuring the protection of endangered species such as the Elephants, Hirola, and Rhinos.[93] It allows private conservancies that work closely with the Kenya Wildlife Service to ensure protection and conservation of wildlife.[94] An example is the Ole Pejeta conservancy which is home for the white Rhinos. The government, through KWS also encourages community-based programs that allow local communities to help in the management and conservation of the neighboring game reserves.[95] This is a sign of good governance aimed at the preservation of flora and fauna for the present and future generations.

2.11. International Laws

2.11.1. Convention On Biological Diversity

The main objectives of this convention are to conserve biodiversity, sustainably use the components of biodiversity and share equitably, the resources that arise from the use of genetic resources.[96] Through this, future generations can enjoy the fruits of the existing genetic resources.

2.11.2. United Nations Framework Convention for Climate Change

This Convention was created with the sole purpose of the realization of the effects of climate change and the need to employ measures to prevent the adverse effects of climate change.[97] In article 3, the Convention states its principles and encourages countries to protect climate change for the sake of present and future generations.[98] State parties should also take precautionary measures to minimize the causes of climate change and ensure that the lowest cost possible is applied.

[93] Wildlife Conservation and Management Act 2013, Section 40.
[94] Wildlife Conservation and Management Act 2013, Section 12.
[95] Wildlife Conservation and Management Act 2013, Section 12.
[96] Convention on Biological Diversity of 5 June 1992 (1760 U.N.T.S. 69).
[97]United Nations Framework Convention for Climate Change.
[98] United Nations Framework Convention for Climate Change.

2.11.3. Ramsar Convention On Wetlands

It aims at protecting land as a habitat through conservation and wise use of wetlands by national action and international cooperation to achieving sustainable development throughout the world.[99]

2.11.4. The African Convention on the Conservation of Nature and Natural Resources

The objectives of this convention are to encourage conservation, utilization, and development of soil, water, flora, and fauna for the present and future welfare of mankind, from an economic, nutritional, scientific, educational, cultural, and aesthetic point of view.[100] Through the realization of the objectives of this convention, Kenya will be able to achieve sustainability.

3. Cases

3.1. Pre-2010 Cases

In the case of Wangari Maathai v Kenya Times Media Trust,[101] the Plaintiff moved to court seeking an injunction to restrain the Defendant from constructing a complex on Uhuru Park which is a public recreational site in the middle of the city.

The Court stated that the Plaintiff had no *locus standi* to institute proceedings on behalf of the public. Only the Attorney General could institute proceedings on behalf of the public and a private individual could only institute proceedings against the public where they could show that they sustained injury arising from the public wrong.

In the case of Kenya Ports Authority v East Africa Power & Lighting Company,[102] the Respondent was operating a power station next to the Appellant's premises. In the process, a pipe was damaged and there was oil

[99] African Convention on The Conservation of Nature and Natural Resources.
[100] African Convention on The Conservation of Nature and Natural Resources.
[101] Wangari Maathai v Kenya Times Media Trust, Civil Case No 5403 Of 1989; [1989] eKLR.
[102] Kenya Ports Authority v East African Power & Lighting Company Ltd, Civil Appeal No. 41 Of1981**;** [1982] eKLR.

leakage into the ocean waters. The Appellant being wary of the possible effects, she cleaned up the waters and sued for compensation.

The court held that damage was only caused to the ocean waters and the Appellant did not own the waters as they were *res nullius.* There was no damage to the Appellant's property and his claims of negligence and breach of the rule of Rayland v. Fletcher were misplaced.[103] The suit was dismissed.

In the case of Nairobi Golf Hotels Ltd v Pelican Engineering & Construction Co. Ltd,[104] the Plaintiff owned a golf course and a hotel in which land, a lot of indigenous trees grew. At the center of the land, a River Gatharani flowed and as a riparian owner, the Plaintiff was allowed by the Water Apportionment Board (WAB) to use the water for the river for watering the golf course and hotel activities. The Defendant without permission from WAB erected a concrete wall upstream and erected a temporary reservoir pending construction of the dam.

The Plaintiff filed a suit restraining the Defendant from constructing the dam as it would affect the natural vegetation in the golf course and other ecological lives downstream. The court held that the Plaintiff had no *locus standi* as the river belonged to the government.

With the enactment of the EMCA in 1999, the jurisprudential approach towards environmental rights took a different positive approach. In the case of Rodgers Muema Nzioka & 2 other v Tiomin Kenya Limited, [105] the Plaintiffs sought an injunction on behalf of the local inhabitants of Kwale District against a company that was accruing out mining of titanium in the area. They argued that the mining would cause massive environmental degradation and health effects to the locals.

[103]Rylands v Fletcher UKHL 1, (1868) LR 3 HL 330.
[104] Nairobi Golf Hotels Ltd v Pelican Engineering & Construction Co. Ltd, Civil Case 706 of 1997;[1997] eKLR.
[105] Rodgers Muema Nzioka & 2 other v Tiomin Kenya Limited, Civil Case No 97 of 2001; [2001] Eklr.

The court took a liberal approach by stating that, in cases where a person's right to a clean and healthy environment is being violated, the person need not show interest in the property that is being invaded.

3.2. Post-2010 Cases

In the case of Save Lamu & 5 Others v NEMA & Amu Power Company Limited,[106] the Kenya National Environmental Tribunal set aside an EIA license that had been issued by NEMA to Amu Power Co. for the construction of a coal power plant. The coal plant would the first coal-powered plant in Kenya. The Tribunal stated that NEMA had ignored public participation rules in granting the EIA license. The Tribunal continued to state *inter alia* that"….these environmental impacts are not restricted to the ecological effects alone, but extend to the wide areas that affect their lives like the health impacts to them and their facilities, to their livelihood and economic opportunities, socio-cultural and heritage traditions.…" [107]Additionally, in considering the precautionary principle and issues of climate change, the Tribunal noted that the EIA carried by Amu Power Co. was incomplete and scientifically inadequate hence in violation of the EIA regulations.

In the case of Joseph Leboo & 2 Others v Director Forest Services & Another,[108] the Plaintiffs made application to the court for an injunction to bar the Defendants from harvesting trees without seeking prior and informed consent from the neighboring community members. Among the issues of determination were whether the community had the locus standi to commence legal proceedings against the alleged irregular harvesting and whether public participation was necessary for the management of forests.

The Court held that the community had a right in the management and sustainable use of the forest. Additionally, there was a need to involve the community in public participation before the harvesting of forest resources.

[106] Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another, Tribunal Appeal No. Net 196 of 2016 [2019] eKLR.
[107] Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another,Tribunal Appeal No. Net 196 of 2016 [2019] eKLR
[108] Joseph Leboo & 2 others v Director Kenya Forest Services & another**,** Environment and Land Case No. 273 of 2013; [2013] eKLR.

The court further held that the purported act of harvesting the forest resources would lead to environmental degradation in the area. The application was upheld, and the Respondents were ordered to stop the harvesting of trees.

In the case of Friends of Lake Turkana Trust v Attorney General & 2 Others,[109] the government of Kenya entered into a contract to purchase 500 megawatts of electricity from the government of Ethiopia. The electricity would be sourced from dams that were to be built along the Omo river which is the source of water for Lake Turkana.

The Plaintiffs filed a suit alleging that the construction and operation of the dams would greatly lead to a reduction of waters in Lake Turkana which is the source of economic wellbeing and cultural livelihoods for the surrounding community. They, Plaintiff further claimed that they were not consulted by defendants in brokering the contract. Additionally, the Defendants refused to produce information to the Plaintiffs about the power purchase agreement.

Although the project continued as it was on a different jurisdiction, the court held that the government of Kenya had a duty to protect and conserve the environment and ensure sustainable use of natural resources. The Court elaborated on the principle of sustainable development and the precautionary principle by stating that, "…the respondents must establish that no environmental harm arises from (electricity) agreements and projects [with the Ethiopian government."[110] The court continued to stated that " [the respondents] as trustees of the environment and natural resources owe a duty and obligation to the petitioner to ensure that the resources of lake Turkana are sustainably managed, utilized and conserved, and to exercise necessary precautions in preventing environmental harm that may arise from the agreements and projects entered into with the government of Ethiopia in this regard."[111]

[109] Friends of Lake Turkana Trust v Attorney General & 2 Others, ELC suit No 825 of 2012; [2014] eKLR.
[110] Friends of Lake Turkana Trust v Attorney General & 2 Others, ELC suit No 825 of 2012; [2014] eKLR. para 15.
[111] Friends of Lake Turkana Trust v Attorney General & 2 Others, ELC suit No 825 of 2012; [2014] eKLR. para 16.

Accordingly, the court ordered the Respondents to provide every bit of information about the power purchase agreement and ensure that all steps necessary are taken to ensure the resources of lake Turkana are conserved and protected regarding any agreement entered with the government of Ethiopia.

It is exceedingly evident that there has been a good improvement in the way courts have dealt with issues to deal with sustainability. With the introduction of the EMCA in 1999 and the promulgation of the new Constitution in 2010, courts have positively embraced sustainability.

4. The Place of Sustainability in Kenya; Analysis of The Sustainability Principles with Regards to The Laws

4.1. Precautionary Principle

This principle originated in Germany as environmental policy in the 1970s. The precautionary principle(*vorsorgeprinzip*) was adopted to help in the control of environmental degradation through careful and well-calculated planning.[112] With the rise of acid rain, pollution, and global warming, Germany placed this requirement of industry operators to use the available technology to prevent further pollution.[113]

The principle has since gained traction in the international arena and it's now documented in Principle 15 of the Rio Declaration which stated that "to protect the environment, the precautionary approach should be widely applied by states according to their capabilities. Where there are threats of damage to the environment, whether serious or irreversible, lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[114] This means that, through synchronized and comprehensive research, any threat to the

[112] Jan Glazweski and Lisa Plit, 'Towards the Application of the Precautionary Principle in South African Law' (2015) 26 Stellenbosch Law Review 190.
[113] Jan Glazweski and Lisa Plit, 'Towards the Application of the Precautionary Principle in South African Law' (2015) 26 Stellenbosch Law Review 190.
[114] Www2.ecolex.org. 2020. [online] Available at: <*http://www2.ecolex.org/server2neu.php/libcat/docs/LI/MON-091033.pdf*> [Accessed 18 May 2020].

health of the environment should be avoided in advance. This should be done with the absence of any ascertained scientific understanding notwithstanding.[115]

Kenya being part of the global community, it has made several legal strides in trying to achieve this principle. With the recognition of the principle of sustainable development in the Constitution,[116] EMCA, and the various policies as illustrated hereinabove, Kenya has made an important step in ensuring sustainability is achieved. Sustainable development incorporates various principles including the precautionary principle.[117] Particularly, Kenya has promulgated EIA regulations to help in the development of various projects that may be influencing the environment.[118]

Additionally, Kenya controls the use of private land uses through police power.[119] This is the legal authority of the government to limit private rights to protect the environment and public interests such as health.[120] EMCA grants NEMA considerable power to control the use of private land for the benefit of environmental management and sustainable development.[121] The case of Republic V The National Environmental Tribunal & 2 Others is a good example where the court upheld an order given by NEMA preventing a leaseholder from constructing a game lodge next to Maasai Mara game reserve.[122] The order would preserve the neighboring cheetah breeding ground and crucial for the conservation of the black rhino.

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[115] Jan Glazweski and Lisa Plit, 'Towards the Application of the Precautionary Principle in South African Law' (2015) 26 Stellenbosch Law Review 190.
[116] Constitution of Kenya 2010, Article 69.
[117]Peter P Rogers, Kazi F Jalal and John A Boyd, *An Introduction to Sustainable Development* (Earthscan Publications Ltd 2007).
[118] Environmental (Impact Assessment and Audit) Regulations 2003.
[119] RAYMOND A HAIK, 'Police Power Versus Condemnation' (1974) 7 Natural Resources Lawyer 21.
[120] RAYMOND A HAIK, 'Police Power Versus Condemnation' (1974) 7 Natural Resources Lawyer 21.
[121] Environmental Management and Coordination Act 1999, Section 9.
[122]Republic V The National Environmental Tribunal & 2 Others, Miscellaneous Application 111 Of 2008; [2010]eKLR.

The ban on plastic bags is one of the major steps Kenya has taken towards preventing future environmental degradation. These plastic bags were major pollutants of the environment. They clogged up drainage systems and even led to flooding during the rainy season.[123] A study by NEMA indicated that 50% of animals near urban areas had plastic bags in their stomachs.[124] Stringent fines were introduced with the ban hence making the ban effective.[125]

Unfortunately, despite all these good laws and policies, for many years Kenya has not been able to address the problem of historical land injustices.[126] The issue has been a serious problem since Kenyan gained independence and all the governments have always ignored them despite being incorporated in various reports.[127]The land injustices have always led to increased squatter problem in the country hence leading to unsustainable use of land which in turn lead to the destruction of the environment. Through the unresolved land problems, there has been increased encroachment of forest and wildlife areas.[128] This has led to the destruction of natural forests and escalated the issue of human-wildlife conflicts. Additionally, most rural-urban migration has been caused by this problem, leading to increased slum dwellings in urban areas. Consequently, pollution due to poor sewage disposals in the slum areas has increased.

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[123] Irungu, S., 2020. National Environment Management Authority (NEMA) - Plastic Revolution. [online] Nema.go.ke. Available at: <*http://www.nema.go.ke/index.php?option=com_content&view=article&id=275&Itemid=426*> [Accessed 18 May 2020].

[124] Irungu, S., 2020. National Environment Management Authority (NEMA) - Plastic Revolution. [online] Nema.go.ke. Available at: <*http://www.nema.go.ke/index.php?option=com_content&view=article&id=275&Itemid=426*> [Accessed 18 May 2020].

[125] Environmental Management and Coordination (Plastic Bags and Management) Regulations,2018.

[126] Kenyalaw.org. 2020. [online] A Report of the Land Commission of Inquiry into the Illegal or Irregular Allocation of Land 2004.pdf Available at: <*http://kenyalaw.org/kl/fileadmin/CommissionReports/* > [Accessed 18 May 2020].

[127] Kenyalaw.org. 2020. [online] A Report of the Land Commission of Inquiry into the Illegal or Irregular Allocation of Land 2004.pdf Available at: <*http://kenyalaw.org/kl/fileadmin/CommissionReports/* > [Accessed 18 May 2020].

[128] Sessional Paper No. 3 of 2009, National Land Policy 2009

4.2. Polluter Pays Principle

The principle was introduced in the 1970s by the organization for economic cooperation and development as an economic principle.[129] Its main objective was to prevent distortions in international trade. The principle was later incorporated in principle 16 of the Rio Declaration which requires the polluter shall bear the cost of pollution caused to the environment.[130]The cost should be reflected generally in all the goods and services that cause pollution and environmental degradation.

In Kenya, the principle has been incorporated in several laws including the Constitution.[131] Particularly, Section 142 of EMCA states that in imposing pollution penalties, "…the court may direct a person to pay the full cost of cleaning up the polluted environment and of removing the pollution; clean up the polluted environment and remove the effects of pollution to the satisfaction of the Authority.."[132]

In implementing these laws, the government through NEMA has been working tirelessly in identifying polluters. Most factories discharging raw sewage to Nairobi river have had their licenses revoked and their officials arrested and prosecuted in courts.[133] This way, the factories will incur an extra cost of pollution as they will be forced to pay for the new licenses. Additionally, without production, the factories will run into losses hence indirectly paying for their sins. In 2019, NEMA identified 78 facilities on riparian reserves and 25 of these facilities were demolished as they were causing pollution to the rivers.[134]

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[129] Rowena Maguire, 'Incorporating International Environmental Legal Principles into Future Climate Change Instruments' (2012) 2012 Carbon & Climate Law Review 101.

[130]*www2.ecolex.org. 2020*. [online] Available at: *<http://www2.ecolex.org/server2neu.php/libcat/docs/LI/MON-091033.pdf>* [Accessed 18 May 2020].

[131] Constitution of Kenya 201, Article 69.

[132] Environmental Management and Coordination Act 1999.

[133] Daily Nation. 2020. Nema Shuts Down 25 Factories. [online] Available at: *<https://www.nation.co.ke/news/Nema-to-close-down-25-factory-in-Nairobi-River-cleanup/1056-5116302-b2o0shz/>* [Accessed 18 May 2020].

[134] Irungu, S., 2020. National Environment Management Authority (NEMA) - Factories Closed, Owners Arrested For Polluting Environment. [online]

4.3. Principle of Intragenerational and Intergenerational Equity

The preservation of the environment is important in achieving the equity of generations and without it, the achievement of sustainability will be a nightmare.[135] The present generations should hold the environment in trust for future generations. Sustainability is achieved through the integration of social development, economic equitable development, and sound environmental protection. Through this, the principles of bother intergenerational and intrageneration equity are achieved.

Despite the recognition of these principles in various Kenyan laws, and policies, the country is still grappling to achieve them. The recent evictions from the Mau forest are one of the major steps the government has taken in ensuring the present and future generation benefit in equal measure.[136] Mau forest in one of the largest water catchment areas in the East Africa region as it is the source of many rivers that flow into Lake Victoria. Over the years, the forest has faced wanton destruction and deforestation hence threatening many lives not only in Kenya but those that depend on Lake Victoria.[137]

On the other hand, principle 4 of the Rio Declaration states that" …in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it'. Surprisingly, Kenya has always ignored this view; the country has been embracing the Kuznets's theory.[138] This is a

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Nema.go.ke. Available at: *<http://www.nema.go.ke/index.php?option=com_content&view=article&id=298:factories-closed-owners-arrested-for-polluting-environment&catid=10:news-and-events&Itemid=454>* [Accessed 18 May 2020].

[135] Barral, V., 2012. Sustainable Development in International Law: Nature * and Operation of an Evolutive Legal Norm. European Journal of International Law, 23(2), pp.377-400.

[136] Environment.go.ke. 2020. Ministry Of Environment And Forestry » Blog Archive » Second Phase Of Mau Evictions To Kick Off Soon. [online] Available at: *<http://www.environment.go.ke/?p=6844>* [Accessed 18 May 2020].

[137] M. Chrisphine, u. and A. Maryanne, O., 2015. Assessment of Hydrological Impacts of Mau Forest, Kenya. Journal of Waste Water Treatment & Analysis, 07(01).

[138]Peter P Rogers, Kazi F Jalal and John A Boyd, *An Introduction to Sustainable Development* (Earthscan Publications Ltd 2007).

cornucopian approach which submits that the environment will always take care of itself and economic development proceeds.[139] In the recent past, Kenya has embarked on economic developments at the expense of the environment. This can be witnessed in mega-projects like the standard gauge railway that cut through Nairobi national Park causing ripple effects to the entire ecosystem; the construction of an expressway from Jomo-Kenyatta International Airport to Westlands area. The road was designed to cut through Uhuru Park which is the largest public recreation area within the city; the construction of Lamu Port-South Sudan-Ethiopia-Transport (LAPSSET) Corridor project which has caused massive destruction of mangrove forests and sea creatures along the Lamu coast. The project incorporates the construction of the largest coal plant in Kenya. Although environmental impact assessments were carried out, it is outrightly clear that they carried out as a matter of formality but in the real sense, the projects would cause massive effects to the environment hence affecting the lives of both the present and future generations.

4.4. Principle of Good Governance

Kenya has tried to move miles in achieving this principle in different ways. Article 10 of the Constitution recognizes the principle of governance and obligates all state organs and officers to apply it.[140] The constitution further obligates both the national government and the county governments to work together harmoniously and in consultation with each other to achieve efficiency and effectiveness in service delivery.[141] Devolution has helped in the equitable distribution of resources to different parts of the country hence leading to uniform development in the country. This has been achieved through annual budgetary allocation to the county governments.[142] With the development in the county governments, poverty eradication is easily achieved, inclusivity and rural-urban migration are curtailed. Chapter 6 of the Constitution also talks about leadership and integrity. Through this Kenyan has been able to fight corruption which has always been a stumbling

[139] Peter P Rogers, Kazi F Jalal and John A Boyd, *An Introduction to Sustainable Development* (Earthscan Publications Ltd 2007).
[140] Constitution of Kenya 2010.
[141] Constitution of Kenya 2010, Article 6.
[142] Constitution of Kenya 2010, Articles 217 & 219.

block in achieving sustainable development. Inclusivity has also been embraced with the new Constitution dispensation hence helping women and people with disabilities to be part of the governance and decision-making environment.[143]

Astonishingly, with all the legal provisions on good governance, Kenya is still lagging on the issue of good governance. Rule of law has not been fully embraced in Kenya. Separation of powers between three arms of the government is still a problem. The executive for a long time has dominated the other arms of government and even effecting budget cuts to the judiciary.[144] This has crippled access to justice and propelled corruption. Disregard of courts is the order of the day in Kenya. An example is the Endorois Case where Kenya forcefully evicted the indigenous community from their ancestral land even after receiving an order from the African Court of Justice not to do so.[145] Well-orchestrated corruption activities with state officers have also seen a rise in poaching activities. This can be witnessed with the recent killing of the white giraffe a rare species in northern Kenya and extinction of the white rhino.[146]

4.5. Principle of Shared but Differentiated Responsibilities

States have a common duty to protect the environment at the national, regional, and international levels. The ability of a state to prevent and control environmental degradation is always taken into consideration.[147]

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[143] Constitution of Kenya 2010, articles 54, 55,97,100 and 232.

[144] Africa Check. 2020. *Budget Cuts Hit Kenya'S Judiciary – But There'S No 'Global Funding Target' | Africa Check*. [online] Available at: <*https://africacheck.org/reports/budget-cuts-hit-kenyas-judiciary-but-theres-no-global-funding-target/*> [Accessed 4 June 2020].

[145]Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya,276/203 African Commission on Human and People's Rights.

[146]allAfrica.com. 2020. Rare White Giraffes Killed in Kenya. [online] Available at: <*https://allafrica.com/view/group/main/main/id/00072326.html*> [Accessed 18 May 2020].

[147] Christina Voigt, *Sustainable Development as a Principle of* International *International Law* (Brill 2009) <*http://gen.lib.rus.ec/book/index.php?md5=fb8827a2454876e3d82b4ddbd348d6f6*> accessed 18 May 2020.

Kenya has embraced this principle through the enactment of laws that help in curbing environmental degradation. The banning of plastic papers,[148] the increased crackdown on environmental polluters[149] , and reclaiming forests such as the Mau forest through massive evictions are examples of ways through which Kenya is striving to achieve this principle.[150]

Conversely, with good legal progress in achieving its responsibility, the country is still struggling to achieve sustainability. Kenya has not been able to balance economic development and environmental protection. Despite the good laws, policies, and regulations, Kenya still embraces the Kuznets theory in development.[151] An example is the construction of a railway line through a national park and entering into a hydro-electric power-sharing agreement with Ethiopia which is constructing dams that will have massive environmental and social effects of Lake Turkana.[152] This dam is likely to cause effects such as the one experienced in Uzbekistan and Kazakhstan where the world's fourth-largest inland water body was turned into dry barren land. The Aral Sea turned into Aralkum Desert due to unsustainable upstream activities on the rivers that fed the sea.[153] Another example is the

[148] Irungu, S., 2020. National Environment Management Authority (NEMA) - Factories Closed, Owners Arrested For Polluting Environment. [online] Nema.go.ke. Available at: *<http://www.nema.go.ke/index.php?option=com_content&view=article&id=298:factories-closed-owners-arrested-for-polluting-environment&catid=10:news-and-events&Itemid=454>* [Accessed 18 May 2020].

[149]Irungu, S., 2020. National Environment Management Authority (NEMA) - Plastic Revolution. [online] Nema.go.ke. Available at: *<http://www.nema.go.ke/index.php?option=com_content&view=article&id=275&Itemid=426>* [Accessed 18 May 2020].

[150]Environment.go.ke. 2020. Ministry of Environment And Forestry » Blog Archive » Second Phase Of Mau Evictions To Kick Off Soon. [online] Available at: *<http://www.environment.go.ke/?p=6844>* [Accessed 18 May 2020].

[151] Peter P Rogers, Kazi F Jalal and John A Boyd, *An Introduction to Sustainable Development* (Earthscan Publications Ltd 2007).

[152] Friends of Lake Turkana Trust v Attorney General & 2 Others, ELC suit No 825 of 2012; [2014] eKLR.

[153] Atlas Obscura. 2020. Why It's So Hard to Study The Toxic Dust Blowing From Earth's Youngest Desert. [online] Available at: *<https://www.atlasobscura.com/articles/aralkum-worlds-newest-desert?utm_medium=atlas-page&utm_source=facebook.com>* [Accessed 18 May 2020].

Belo Monte hydroelectric dam effects on the Amazon River to the local indigenous community.[154]

Additionally, the proposed construction of a nuclear power plant. Nuclear plants do not burn fuel and they do not emit air pollutant emissions. Nevertheless, they use uranium, a non-renewable raw material for nuclear energy production.[155] Abandoned uranium mines contaminated with high-level radioactive waste can continue to pose radioactive risks for as long as 250,000 years after closure.[156] Nuclear energy often subjects minority and low-income groups to disproportionate environmental and health risks when it comes to uranium mining, enrichment, and waste disposal.[157] Kenya being a developing country, with unsophisticated control measures, it might not be able to control leakage from a nuclear power plant. This might lead to effects like the ones caused by the Chernobyl accident of 26th April 1986 where there was a sudden uncontrollable power surge, in the nuclear power plant destroying the reactor and fire, which caused a prolonged release of radioactive materials into the environment.[158]

[154] Watts, J., 2020. Poorly Planned Amazon Dam Project 'Poses Serious Threat to Life'. [online] the Guardian. Available at: <*https://www.theguardian.com/environment/2019/nov/08/death-of-a-river-the-ruinous-design-flaw-in-a-vast-amazon-rainforest-dam*> [Accessed 18 May 2020].
[155] Eia.gov. 2020. Nuclear Power and The Environment - U.S. Energy Information Administration (EIA). [online] Available at: <*https://www.eia.gov/energyexplained/nuclear/nuclear-power-and-the-environment.php*> [Accessed 18 May 2020].
[156] Eia.gov. 2020. Nuclear Power and The Environment - U.S. Energy Information Administration (EIA). [online] Available at: <*https://www.eia.gov/energyexplained/nuclear/nuclear-power-and-the-environment.php*> [Accessed 18 May 2020].
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5. Conclusion

From the foregoing, it is crystal clear that the legal and regulatory framework regarding sustainability is indisputably developing and encouraging. There are express references for sustainable development in many laws and regulations, but they less occur as one would anticipate. However, there is a mismatch between the good laws and policies and their implementation process. Laws can create rights and duties which are apparent and self-evident; nevertheless, they cannot robotically implement themselves. Travelling in the legal ship to sustainability requires a lot of determination, respect for the rule of law, proper implementation, and enforcement of the laws and regulations, something that Kenya needs to serious embrace for it to cross the sustainability bridge.

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Impact of Contemporary Weapons and Technology on International Humanitarian Law: A Case For Consideration

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

Abstract

The principles and rules of IHL have always sought to ensure that there is fairness between combatants and that its primary role of protecting civilians is achieved. The world today is experiencing rapid developments in nearly every sphere of human life including the means and methods of warfare. Artificial intelligence technology has dramatically informed the tactics and strategies of warfare. In the present day and age, there are autonomous artillery and armaments, unmanned aircraft, militarized drones and other novel weapons. This precipitates a new legal issue in International Humanitarian Law. Besides, IHL is yet to develop to adequately and comprehensively address the legal and ethical issues caused by the contemporary emergence of these new weapons and technologies. This is because the antecedent rules, principles and conventions were suited for the previous context that was characterized by the traditional or conventional means of warfare. The emerging issues are not captured well in the prevailing international humanitarian legal regime on regulation of warfare. Besides, while article 36 of the Additional Protocol 1 speaks to the employment of new weapons, means and methods of warfare, it does not comprehensively address the emerging challenges. This is because top military giant States Parties have sought to defy the obligation under the article which requires States Parties, when developing or acquiring new

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weapons, to assess whether such weapons comply with the laid rules and principles of IHL. Moreover, autonomous weapons might not have emotions like a human combatant, to enable them observe the customary international humanitarian law principles of distinction, unnecessary suffering, prohibition of indiscriminate attacks, humanity and others. They may fail with unimagined implications in the aftermath particularly where the autonomous weapons are very lethal by their design. It is against this background that this paper makes an assessment of the effectiveness and efficiency of existing IHL rules and conventions in addressing the issues precipitated by the contemporary technologies and weapons in the context of armed hostilities. The paper offers recommendations in its conclusion which, when adopted, would make the IHL rules not only relevant but also effective and adequate in addressing the existing challenges posed by new technologies and weapons.

1.0 Introduction

On the 22nd of September 2016, key government representatives of various States met in Seoul to discuss the challenges associated with the new technology and weapons concerning the International Humanitarian Law.[1] Approximately 60 persons, including agents of their respective governments, some members of academia in International Humanitarian Law, and ICRC's legal experts from across the Asia-Pacific region, attended a two-day conference organized by the ICRC. This was the fifth meeting on International Humanitarian Law held in the region and was designed to revamp comprehension of the challenges posed by the novel technologies adopted in armed combat in the interpretation and application of international humanitarian law. Technological advancements in this information age have resulted into the emergence of autonomous weapons, armed drones, unmanned military aircraft, weaponized androids, sentry weapons and surveillance controls, with the consequence of arousing novel and revolutionary fears on the adequacy of the existing IHL rules and principles in addressing the challenges precipitated by such new warfare

[1]The Conference offered a chance for discussions regarding the impact of new technology which the rules of IHL do not effectively regulate. See *https://www.icrc.org/en/document/asia-new-weapons-international-humanitarian-law* , for the details of the conference.

technologies.[2] However, with regard to article 36 of the Additional Protocol 1, States Parties are required to ensure that they satisfy the test of IHL when acquiring or developing new weapons.[3] Therefore, a State Party can only validate weapons which comply with IHL rules and principles. However, the very States mandated to observe and uphold the rules and principles of IHL have been at the core of building weapons which contravene the IHL rules. This has been done especially by military giants such as the US, Russia, South and North Korea and Japan.

Besides, there was a consensus among the participants in Seoul that the rapid advancements and developments in science and technology over the past few decades had culminated into development of new warfare means, tactics and strategies. Such strategies include cyber-attacks, armed drones and robots and these precipitated significant humanitarian and legal problems. The participants conceded that it is essential to conduct regular consultations on the obstacles caused by the novel warfare technology, particularly those that are heavily reliant on communication networks, artificial intelligence and nanotechnology.[4]

An Associate Professor at the University of Queensland Law School, Rain Liivoja stressed the importance of consistent interaction between legal experts, policy-makers, and the developers and users of the emerging warfare technologies. ICRC's legal adviser for the East Asia region, Richard Desgagne stated that the sovereign states ought to evaluate their compliance with the international humanitarian law.[5] He emphasized the need for states to take into consideration the established rules and satisfy themselves that they are unequivocal when considered against the background of the emerging warfare technologies and its potential implications. However, the

[2] International Committee of the Red Cross, 'Impact Of New Technologies And Weapons On International Humanitarian Law' (*International Committee of the Red Cross*, 2022) <*https://www.icrc.org/en/document/asia-new-weapons-international-humanitarian-law*> accessed 6 October 2022.
[3] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1) (Adopted 08 June 1977, entered into force 07 December 1979).
[4] Ibid
[5] Ibid.

representative of ICRC in the Republic of Korean, Gianni Volpin, noted that greater emphasis should be placed on employing the warfare technologies in a manner that is consistent with International Humanitarian Law, rather than whether or not they are inherently good or bad.[6]

Therefore, going by comments of the participants of the Seoul conference, new technologies and weapons pose an enormous novel threat to the underlying principles of IHL, a threat which the existing conventional rules of IHL cannot remedy. This paper will therefore assess the effectiveness of IHL rules with regard to contemporary technologies and weapons. Besides, it offers recommendations through its conclusion for ensuring competence of the existing rules as against these new weapons.

2.0 Conceptualizing Contemporary Weapons And Technology

There is no universally accepted definition of "contemporary weapons and technology". Macksey defines contemporary weapons and technology as the concepts, methods, and military technology that have come into use during and after the first and second World Wars.[7] However, this definition is too general making its adoption and application problematic.[8] Arkin describes modern weapons as those that have arisen from modern technology. Modern technology can be assimilated to the 21st systems of technology which have improved the 20th century methods and means of warfare.[9] These weapons have more devastative and far reaching effects. Besides, they are more effective and efficient in terms of operations. Their effectiveness has seen States adopt them to avoid being left behind and also avoid surprises during hostilities. The rationale underlying the concepts and methods of 19th and 20th century's complex warfare which is highly influenced by rapid advancements in information technology is that there is a need for combatants to harness the emerging technologies to ensure that their war

[6] Ibid.
[7] Kenneth Macksey, 'Technology in War: The Impact of Science on Weapon Development and Modern Battle' (May 31,1986) Prentice Hall Press.
[8] Ronald Arkin, 'Lethal Autonomous Systems and the Plight of the Non-combatant: The Political Economy of Robots' (2018)Palgrave Macmillan 317-326.
[9] Ibid

tactics and methods are effective for combat.[10] This has therefore been the key reason for the advancements of new technologies in military warfare thus the emergence of complex weapons capable of displacing human personnel on the ground.

3.0 Contemporary Weapons in Warfare

3.1 Sentry Weapons

Sentry weapons use sensors to detect harm, then automatically aim and fire at targets. Once an object that is unwarranted appears, the weapon automatically starts firing by use of the implanted sensors. Other sentry weapons are triggered by touch and once an object tampers with the physical position of the weapon, it starts firing at random. Some of the sentry weapons in the world today include the Samsung SGR-A1. This weapon is designed to replace human counterparts in the demilitarized or neutral zone at the South and North Korean border. It is a stationary system developed by the Samsung defense subsidiary - Samsung Techwin.[11]

Sentry weapons are mostly triggered by the very powerful sensors capable of detecting any foreign object within their environment. These weapons however pose a novel danger to IHL especially on the principles of humanity, distinction, unnecessary suffering and cannot distinguish between clear targets and civilians. Besides, combatants who have been rendered hors de combat cannot be spared by such machines since they do not possess full human intelligence.

3.2 Armed Drones

Armed drones are also known as unmanned **combat aerial vehicles** (**UCAV**), combat **drones,** or simply **drones.** These are unmanned aerial vehicles (UAV) that are used to launch drone strikes and primarily ferry aircraft military ordinances including missiles, sensors and target

[10] Supra note 9

[11] Alexander Valez-Green, 2015. *The Foreign Policy Essay: The South Korean Sentry—A "Killer Robot" to Prevent War*. [online] Lawfare. Available at: *<https://www.lawfareblog.com/foreign-policy-essay-south-korean-sentry%E2%80%94-killer-robot-prevent-war>* [Accessed 1 October 2022].

designators. Normally, the aircrafts do not have human pilots on-board. The drones are guided autonomously by a remote control with varying degrees of autonomy.[12] They are used in drone strikes.[13] The operators of the unmanned aircrafts use remote terminals to control the drones and therefore equipment such as cockpit, armor, ejection seat, flight controls, and environmental controls for pressure and oxygen which are meant for use by human pilots are needless hence absent. Effectively, the armed drones are relatively lighter and smaller than aircrafts manned by human pilots.

As of December 2015, only the United States, Israel, China, Iran, Italy, India, Pakistan, Russia and Turkey have manufactured operational UCAV.[14] However, these are the few known ones. There are several other countries who possess and manufacture unmanned UAV. Without human intervention, the UAV can autonomously initiate an attack. While the UAV can possibly react more quickly and without bias, they lack human sensibility.[15] As observed by Heather Roff, the Lethal Autonomous Robots (LARs) may be inappropriate for complex conflicts and there is a possibility of an angry backlash from the targeted populations.[16] Mark Gubrud posits the arguments that since drones are autonomous and not subject to human control, they are susceptible to hacking. He states that because drones are semi-autonomous,

[12] Luan Yichun, Xue Hongjun, and Song Bifeng, 'The Simulation of the Human-Machine Partnership in UCAV Operation' College of Aeronautics, Northwestern Polytechnic University, Xi'an 710072, China. Accessed October 1, 2022.
[13] *Caroline Kennedy and James Rogers,*'Virtuous drones?'(2015) 19(2) *The* International Journal of Human Rights,211–227.
[14] *Baykar Technologies (17 December 2015). "17 Aralık 2015 – Tarihi Atış Testinden Kesitler" – via YouTube.*
[15] Joshua Foust, *Why America Wants Drones That Kill Without Humans* (October 8, 2013).
<https://www.defenseone.com/technology/2013/10/ready-lethal-autonomous-robot-drones/71492/#:~:text=The%20U.S.%20wants%20smarter%2C%20more,By%20Joshua%20Foust&text=Scientists%2C%20engineers%20and%20policymakers%20are,range%20and%20better%20staying%20power> accessed October 1, 2022.
[16] Ibid

in the event that they are hacked, human controllers would intervene and take control.[17]

Other commentators have argued that the moral responsibilities that human beings have at every stage of warfare should not be obscured by autonomous weapons' technological capabilities.[18] Currently, a discourse is underway regarding the appropriateness of the existing International Humanitarian legal regime in apportioning responsibility in the context of the use of autonomous weapons. It is feared that the existing four principles namely, military necessity, distinction between military and civilian objects, prohibition of unnecessary suffering and proportionality are inadequate to regulate the ethics of warfare where the modern warfare technologies are in use.[19]

In 2009, the *Guardian Newsletter* reported that six Israeli unmanned aerial vehicles or drones caused at least 48 fatalities in Gaza involving all of them being civilians.[20] These reports were investigated by the Human Rights Watch which established that the Israeli forces failed to take all reasonable precautions to verify that the targets were combatants or that they failed to make the distinction between civilians and combatants.[21]

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[17] Joshua Foust, *The Science Fiction of Dronephobia*, (2022) Joshua Foust. <*https://joshuafoust.com/writing/essays/the-science-fiction-of-dronephobia/*> [Accessed 29 September 2022].

[18] Susanne Burri, 'What Is the Moral Problem with Killer Robots?' In Bradley Jay Strawser, Ryan Jenkins, and Michael Robillard (eds) *Who Should Die? The Ethics of Killing in War (Oxford Academic* (Online edn. 2017) <*https://doi.org/10.1093/oso/9780190495657.003.0009*> accessed 5 Oct. 2022.

[19] Ibid.

[20] Clansy Chassay, 'Cut to Pieces: The Palestinian Family Drinking Tea In Their Gaza City Courtyard' (*the Guardian*, 2009) <*https://www.theguardian.com/world/2009/mar/23/gaza-war-crimes-drones*> accessed 23 September 2022.

[21] Human Rights Watch, 'Precisely Wrong: Gaza Civilians Killed by Israeli Drone-Launched Missiles'(June 2001) <*http://www.hrw.org/*> Accessed 828 September2022.

The US drone program in Afghanistan is also alleged to have violated the warfare ethics particularly failing to comply with the principle of distinction. For instance, in a 2010 US military operation in Uruzgan Province in Afghanistan, at least 10 civilian passengers were attacked by a military drone that was remotely controlled by the US military. These were innocent civilians going about their normal business and they included women, children, infants and adolescents.[22]

In 2009, The Bureau for Investigative Journalism claimed that nearly 146 non-combatants, 9 of whom were children had lost their lives to drone strikes in 2011. Similar allegations of killing of civilians by drone strikes were reported by the Colombia Law School's Human Rights Clinic and the Pakistani Organization Pakistan Body Count. All these civilian casualties have been documented at the New America Foundation. In the Obama administration alone, there were between 150 to 500 drone casualties.[23]

4.0 The Legal Framework for New Technology and Weapons

4.1 The Additional Protocol 1

Lack of regulation of the new weapons and warfare technologies necessitated the creation of the Ad Hoc Committee of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts (CDDH). The committee was designed to explore adequacy of the existing legal framework on the use of new weapons. The Committee's performance in this role was boosted by two conferences organized by the ICRC at Lugano in 1974 and Lucerne in 1976.[24]. The proposal by the committee birthed Article 36 which provides that in light of its obligations under the International Humanitarian Law, a state should put in place a mechanism to keep watch on the development of

[22] David Cloud, 'Anatomy of An Afghan War Tragedy' (*Los Angeles Times*, 2011) <*https://www.latimes.com/archives/la-xpm-2011-apr-10-la-fg-afghanistan-drone-20110410-story.html*> accessed 28 August 2022.
[23] Daniel Byman, 'Why Drones Work: The Case for Washington's Weapon Of Choice' (*Brookings*, 2013) <*https://www.brookings.edu/articles/why-drones-work-the-case-for-washingtons-weapon-of-choice/*> accessed 30 September 2022.
[24] Justin McLeod, The review of weapons in accordance with Article 36 of Additional Protocol I

armaments. States would monitor the development of weapons by reference to its obligations under international humanitarian law.

However, it was feared that the article was inadequate which led to the creation of the 1980 United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (CCW). This convention brought about two important features. The first was the mechanism for surveilling the fatality of weapons and the second was a framework convention. The latter has provisions that specifically address issues pertaining the use of weapons of particular concern to the international community. However, compliance with the IHL rules and principles by States is still problematic.[25] States such as the US, Russia, Japan and North Korea have since remained adamant to stand by the provisions of these laws.[26]

4.2 Additional Protocol II

Some form of incentive was essential to ensure compliance with the CCW and the CDDH. The landmine issues which were extensively explored in the First Review Conference provided such an incentive with regards to the CCW. This conference led to the development and adoption of the Additional Protocol II.[27] The Additional Protocol proscribes the deployment of booby traps, mines and related devices in cases of armed conflict. However, this is inadequate to control the use of contemporary autonomous weapons.

4.3 Ottawa Convention

The Additional Protocol II was then followed relatively quickly thereafter by the Ottawa Convention.[28] This convention regulates the use, stockpiling,

[25] Ibid
[26] Ibid
[27] Ibid.
[28] The 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction is the international agreement that bans antipersonnel landmines (Adopted 3 December 1997, entered into force on 1 March 1999).

production and transfer of anti-personnel mines destructive to humans. Current developments within the CCW have seen the continuation of discussions on mines, as well as the emergence of the issue of explosive remnants of war. Just like the Additional Protocol 1, the Ottawa convention however does not fully regulate new weapons and technologies. The International Humanitarian Law on regulation of the means of warfare, also known as ICRC's SIrUS Project was essential in rejuvenating the assessment of weapons.

4.4 The ICRC's SIrUS Project

The SIrUS Project, an ICRC conference on "The Medical Profession and the Effects of Weapons" held in Montreux in March 1996, established the essence of objectively defining which particular weapons were inherently repugnant and which ones occasioned superfluous injury and unnecessary suffering. The conference served as an impetus for the development of the SIrUS Project.[29] The project's name SIrUS derives from the proscription on employing "weapons, projectiles and material and methods of warfare of a nature to cause **S**uperfluous **I**njury **or U**nnecessary **S**uffering".[30]

Fundamentally, the SIrUS Project's approach to the weapons issues is premised on the understanding that since weapons' lethality depends on their respective designs, their impact is reasonably foreseeable. The project gives paramount consideration to the effects of weapons over and above nature, and the weapons typology or technology. A thorough examination of the data gathered from hospitals by the ICRC led to formulation of criteria for determining whether or not the design-dependent effects of weapons fall into the category of superfluous injury or unnecessary suffering. That is whether the impact of the weapons led to:

[29] Robin M Coupland, *The Sirus Project : Towards A Determination Of Which Weapons Cause "Superfluous Injury Or Unnecessary Suffering"* (International Committee of the Red Cross 1997).

[30] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1) (Adopted 08 June 1977, entered into force 7 December 1979), art. 35(2).

a. a specific disease, specific abnormal physiological state, specific abnormal psychological state, specific and permanent disability or specific disfigurement; or

b. field mortality of more than 25% or a hospital mortality of more than 5%; or

c. Grade 3 wounds as measured by the Red Cross wound classification scale; or

d. effects for which there is no well-recognized and proved treatment

However, this test had a lot of flaws and did not in any way relate to the regulation of contemporary technology sufficiently. At a meeting of government experts in Jongny-sur-Vevey, Switzerland, criticisms emerged in relation to the test of a medical and legal nature.[31] The legal concerns and criticism caused the greatest unease. The proposal in the SIrUS Project ignored the requirement to balance such medical factors as those contained in the criteria above against the military necessity to use a particular weapon. Without determining what is militarily necessary, it will not be possible to establish whether injuries are superfluous or whether the suffering is unnecessary. Therefore, it solved only half the equation. Therefore, the IHL rules remain, by far, insufficient to handle the current crisis associated with contemporary technology and weaponry.

[31] Isabelle Daoust, 'ICRC Expert Meeting On Legal Reviews Of Weapons And The Slrus Project' (2001) 83 International Review of the Red Cross *<https://international-review.icrc.org/sites/default/files/S156077550010584Xa.pdf>* accessed 28 September 2022.

5.0 The Key Principles of IHL With Regard to Contemporary Weapons and Technology

5.1 The Principle of Distinction

The premier rule of customary international law is that the parties engaged in armed conflict must at all times make a distinction between civilians and combatants and that the attacks in the context of armed conflict must be directed only to combatants not to civilians. This rule has been entrenched by state practices as a rule of customary international humanitarian law with wide application in cases of both international and transnational armed conflict.[32]

This rule may be broken down into three distinct but interrelated constituent components. The state practice relating to each component either reinforces or diminishes the validity of the others. In this context, the phrase combatant is given its general meaning – a person not enjoying the protection given to civilians. However, it does not include or imply the right to combatant status or prisoner-of-war status. The rule must also be read and understood in light of the proscription on attacks against persons recognized as *hors de combat*[33] and the rule protecting civilians from attack unless the civilians are directly and actively participating in combat.[34]

The principle of distinction between combatants and civilians is now entrenched in Protocol I and no reservations have been made to it.[35] The Protocol defines "attacks' as "acts of violence against the adversary, whether in offense or in defense."[36] However, this principle has been defined by new weapons and technologies. *The Guardian* in March 2009, alleged that 48 civilians of Palestinian descent had suffered death due to strikes by

[32] International Committee of the Red Cross, Customary International Humanitarian Law (CIHL), Rule 1.
[33] Ibid, Rule 47.
[34] Ibid, Rule 6.
[35] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1) (Adopted 08 June 1977, entered into force 7 December 1979), art. 35(2), articles 48, 51(2) and 52(2).
[36] Ibid, art. 49.

Israeli UAVs armed with missiles. Among the casualties, according to the reports, were two small children in the field and a group of young women and girls walking along an empty street.[37]

5.2 The Principle of Unnecessary Suffering

The principle of superfluous injury and unnecessary suffering is entrenched in the customary International Humanitarian Law under Rule 70. This principle is closely related to the principle of necessity and allows parties to inflict only the harm that is necessitated by war in an attempt to debilitate the enemy. Effectively, the principle prohibits the use of means and methods of warfare that are likely to cause superfluous injury or unnecessary suffering.[38]. This is also codified in article 35 of the Additional Protocol 1.[39] Unnecessary suffering might include shooting at combatants already rendered *Hors de combat.* Indiscriminate attacks might include misdirection as to the clear target or over-attacking thereby causing harm to civilians and other protected persons under IHL.

The principle of superfluous injury and unnecessary suffering is also encoded in various treaties including the prohibition of the use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering is set forth in a large number of treaties, including early instruments such as the Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. (St. Petersburg Declaration) and the Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (the Hague Declaration). The ban on the employment of chemical and biological weapons in the is premised prohibition on the use of chemical and biological weapons in the Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gasses, and of Bacteriological Methods of Warfare is premised on this principle. In addition to Protocols I and II and the Additional Protocol II, the principle of superfluous injury and unnecessary suffering is also reaffirmed in the 1997

[37] Supra note 20.
[38] Rule 70 of the CIHL
[39] Article 35 of the Additional Protocol 1

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (The Ottawa Convention), and the Rome Statute of the International Criminal Court. This reaffirmation particularly in the recent treaties demonstrates the principle's continued relevance to date.

The principle is also incorporated in several military manuals. For example, Sweden's IHL Manual (1991) expressly prohibits warfare methods and tactics that are likely to cause superfluous injury and unnecessary suffering. Several states, through their domestic legislation, have also criminalized any violation of this principle.[40] This is demonstrated in various domestic case-laws.[41] The principle has also been reaffirmed in some of the UN General Assembly resolutions[42] and various international forums.[43]

Several states including Egypt, Ecuador, France, Indonesia, Islamic Republic of Iran, Mexico, Samoa, Sweden, United Kingdom, United States, New Zealand, Lesotho, Japan, Italy, Marshall Islands and Netherlands, affirmed the principle in their oral pleadings and written submissions in the *Nuclear weapons case*.[44] In this advisory opinion, the ICJ affirmed as a cardinal principle of international humanitarian law, the rule prohibiting the use of means and methods of warfare that cause superfluous injury and unnecessary suffering.[45]

[40] See the relevant domestic legislations of Azerbaijan, Belarus, Canada , Colombia , Congo , Georgia , Ireland , Italy , Mali , New Zealand , Nicaragua , Norway , Spain , United Kingdom , United States , Venezuela and Yugoslavia ; and the draft legislation of Argentina , Burundi and Trinidad and Tobago.
[41] See for example Shimoda et al. v. the State (District Court, Tokyo Japan, Japan).
[42] See the UN General Assembly Resolutions 3076 (XXVIII), 3102 (XXVIII), 3255 (XXIX), 31/64, 32/152, 33/70.
[43] See the 22nd International Conference of the Red Cross, Res. XIV; 26th International Conference of the Red Cross and Red Crescent, Res. II; Second Review Conference of States Parties to the Convention on Certain Conventional Weapons, Final Declaration; African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Final Declaration.
[44] Legality of the Threat or Use of Nuclear Weapons [1996] ICJ.
[45] Ibid.

However, if the incident involving the use of drones in Gaza is anything to go by, the merging autonomous weapons pose a grave danger to the relevance of IHL in armed conflict. This is because the artificial intelligence used in such warfare technologies does not have the rationality to apply the distinction principle. They do not have the capacity to make the distinction between *Hors de combat* and fighting combatants.

5.3 The Principle of Proportionality

The principle of proportionality constitutes Rule 14 of Customary International Humanitarian Law. The thrust of this principle is that it restricts attacks which by their nature would reasonably be expected to cause incidental loss of life of a civilian (s), inflict injury on civilians, damage to civilian objects or a combination thereof that would be disproportionate. Parties are allowed to use only as much force in attack as is necessary to give them concrete and direct military advantage.[46] The principle appreciated the inevitability of causing incidental harm to civilian objects in the context of armed hostilities. However, it imposes a limit on the extent of the harm on civilian objects. It involves the principle of necessity and humanity to prohibit parties from the use of excessive and needless force. Besides being a rule of customary international humanitarian law, the principle of proportionality is encoded in articles 51(5) (b) and 57 of the Additional Protocol I.

There were diverse views among the negotiating parties regarding the utility and appropriateness of article 51 of the Additional Protocol I. France felt that article 51 was very complex and would potentially hamper the conduct of defensive military operations against an invader and prejudice the inherent right of legitimate defense. Consequently, it voted against the article at the Diplomatic Conference where the Additional Protocols were adopted. [47]

[46] International Expert Meeting 22–23 June 2016, 'The Principle of Proportionality in The Rules Governing the Conduct of Hostilities Under International Humanitarian Law' (International Committee on Red Cross 2022) *<http://file:///C:/Users/pc/Downloads/4358_002_expert_meeting_report_web_1.pdf>* accessed 6 October 2022.

[47] Jean-Marie Henckaerts and Louise Doswald-Beck, 'Proportionality in Attack (Rule 14)', *In Customary International Humanitarian Law (pp. 46-50)* (1st edn,

However, upon ratification of the protocol, France subsequently accepted the provision without any reservations. On the other hand, at the same Diplomatic Conference, Mexico emphasized the significance of the article 51 and therefore, it would be wrong for any party to subject it to any reservations.[48] Mexico argued that doing so would contravene the protocol's principle and underlying basis, aim and purpose.[49] The United Kingdom held the view that the principle was gaining wide acceptance among states going by their state practice and therefore its codification in the protocol was essential and constituted a confirmation of its customary status in International Humanitarian Law. Several other states including Hungary, Poland, Romania, and Syrian Arab Republic expressed their fears that the principle encapsulated in article 51 would raise significant challenges in protecting the civilian population in the context of armed hostilities. However, the states did not suggest alternative solutions to address the issue of the potential incidental damage of the attacks on lawful targets on civilian objects.[50] While the principle is a genuine attempt to protect civilian life and civilian objects from incidental damage in armed conflict, its application may be limited and problematic where contemporary computerized technology is used. This is particularly so in the case of hacking or malfunctioning.

5.4 The Principle of Humanity

According to the Kantian perspective on the rational basis of humanity, owing to their rational nature, human beings have an inherent worth and dignity. Effectively, they ought to be treated as ends rather than means to an end. By doing so, Kant argues that you recognize their rationality, a factor that distinguishes human beings from animals. The Kantian perspective thus informs the substantive content of the principle of humanity. The principle is premised on the reasoning that due to their rational nature, human beings have the capacity and ability to show respect to all fellow human beings, including their enemies at war. Effectively, the principle prohibits parties

Cambridge University Press 2013) <*http://doi:10.1017/CBO9780511804700.008*> accessed 6 October 2022.

[48] Ibid.

[49] Ibid.

[50] Ibid.

from inflicting suffering, injury or destruction that is unnecessary for achieving the legitimate purpose of a conflict.[51]

The principle is entrenched under the famous *Martens Clause.*[52] It provides that:

> *"Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience".*

Therefore, according to this principle, human beings form the basic subject of protection in the event of hostilities. All this to say that rules of IHL must be complied with by State Parties. New weapons and technologies however, are not keen at complying with such ideologies since they are machines controlled by human beings. They may not give desired results in the event of failure and breakdown and are therefore unreliable in upholding the rules of IHL.

6.0 Conclusion

This paper set out to examine the adequacy of the prevailing international humanitarian rules and principles in addressing the legal, ethical and normal challenges precipitated by the emerging means and methods of warfare technology. The contemporary dynamics of war have been significantly impacted by the developments in technology. Particularly, artificial intelligence technologies have led to development of autonomous and semi-autonomous weapons for use in armed hostilities. These contemporary

[51] Dean Richard, The Value of Humanity in Kant's Moral Theory, Oxford Scholarship Online, 2006

[52] Rupert Ticehurst, 'The Martens Clause and The Laws Of Armed Conflict' (*ICRC*, 2022) *<https://www.icrc.org/en/doc/resources/documents/article/other/57jnhy.htm>* accessed 6 October 2022.

weapons and technologies include sentry weapons, and armed drones. The prevailing regulatory regime in IHL include the Geneva Conventions of 1949 and their additional Protocols, the Ottawa Convention, and the ICRC's SIrUS project. Since the prevailing regime was developed in the context of the traditional or conventional means and methods of warfare there are concerns in the existing scholarly commentary regarding the adequacy of IHL's rules and principles to ensure the ethics of warfare are upheld. The problem arises specifically because the various rules and principles such as the principles of necessity, proportionality, distinction, and humanity, of IHL require a human sensitivity to ensure that they are applied in a satisfactory manner. The paper found that due to their autonomous and semi-autonomous nature, the contemporary weapons are unable to appreciate and comply with the IHL principles of distinction, the principle of necessity, the principle of proportionality, and the principle of humanity. This was demonstrated by the civilian casualties caused by drones in Israel and the United States. This paper recommends reforms to the existing IHL framework to create obligations for the human combatants who employ the use of weapons. This will address the liability gap in the use of contemporary weapons and warfare technologies. For example, the IHL regime can invoke other areas of law such as torts and the law of state responsibility to apportion liability hence address the liability gap. The tort principle of strict liability would be a valuable avenue for establishing liability. The human combatants who employ autonomous and semi-autonomous weapons resulting in abnormally ultra-hazardous harm should be strictly liable for the conduct.

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Right to Health: Critical Analysis of Kenyan Legal Framework

By: ***Limlim Thomas Elim****

Abstract

This paper traces the legal concept of health and its association to the right to health by analysing the Kenyan legal framework to health. It has analysed from global sphere all the way to domestic one. It has critically examined 10 international authorities, 3 regional instruments and 5 municipal ones. The basis of this analysis is the constitution which acknowledges both international law and domestic law. It has taken a journey through the historical happenstance in the course of development of the law particularly the international human right. The paper has established that right to health is essentially holistic from its conceptualization but in practice, it is been misinterpreted narrowly hence denying the citizenry the optimal enjoyment of this right. From the analysis, it is the position of this paper that right to health ought to be implemented on the basis of human-animal-ecosystem approach. Consequently, the paper has proposed legal reforms for the appropriate actualization of the right as per the constitutional and international law intendment.

1. Introduction

Right to health is a common knowledge concept that is as old as the existence of mankind. It is therefore a universal right and all the major religions in the world namely Christianity, Islam and Buddhism acknowledge it. Within the context of Christian faith, right from the biblical Garden of Eden where the genesis of man is believed to have started, the right to health and its enjoyment is conspicuous in the life of Adam. It is on this premise that this paper will delve into the critical analysis of Kenyan legal framework that guides the implementation of enjoyment of this right and find out whether it aligns to the legal doctrine or not. First, the paper will lay the global perspective using the international authorities. Second, it will look at the regional. Third, it will examine the municipal domain. Fourth, it

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will draw conclusion and finally, make recommendation on reforms. The common thread will be both legal manifestation as well as the institutional.

2. Global Perspective

A number of international legal apparatus provide for the right to health. These includes the United Nations Charter (UN Charter),[1] The Universal Declaration of Human Rights of 1948.

(UDHR),[2] The International Covenant on Economic, Social and Cultural Rights (ICESCR)[3] and its Optional Protocol adopted in on December 10th 2008.[4] It also includes CESCR General Comment No. 14, the right to the highest attainable standards of Health,[5] the World Health Organization Constitution[6] and other instruments which include UN Agenda 2030[7] for Sustainable Development Goals which aims at transforming the world, Global Health Security Agenda 2024 Framework.[8]

2.1 Health in the Context of the UN Charter 1945

Out of the 111 Articles of the charter, a minimum of 17 articles have made reference to health explicitly or implicitly or both. Three Articles namely 13(1)(b), 57, and 62(1) have expressively mention health while the preamble and articles 1(3)(4), 17(a)(d)(e), 74, 76,83,88,91,92, 98 and 103 have implied. Articles 55,56,58 and 60 have both overt and covert imputations. The repetition of the words economic and social in several parts of the

[1] Charter of the United Nations and Statute of the International Court of Justice 1945 54.

[2] 'Universal Declaration of Human Rights, 1948' (*Humanium*) <*https://www.humanium.org/en/universal-declaration/*> accessed 12 June 2022.

[3] 'International Covenant on Economic, Social and Cultural Rights | Treaties Database' <*http://www.kenyalaw.org/treaties/treaties/873/International-Covenant-on-Economic-Social-and-Cultural*> accessed 12 June 2022.

[4] 'Optional Protocol To The International Covenant On Economic, Social And Cultural Rights'.

[5] 'General Comment No. 14: The Right to the Highest Attainable'.

[6] World Health Organization, *Basic Documents* (49th ed, World Health Organization 2020) <*https://apps.who.int/iris/handle/10665/339554*> accessed 17 March 2022.

[7] DPI UN, 'A/RES/70/1 Transforming Our World: The 2030 Agenda for Sustainable Development'.

[8] 'The Global Health Security Agenda (GHSA): 2020-2024' 3.

document is so conspicuous. A myriad of observation comes to the fore upon examination of this charter. Firstly, the cardinal observation is on the background of development of this charter in this particular epoch and its relationship to health as a legal phenomenon. It was contemporaneous with the advent of the end of World War 2(1939-1945). Second, term of the members of the Economic and Social Council is 3 years compared with that of non-permanent members of the Security Council which is actually 2 years. Third, the number of the members of the council is greater than that of the Security Council. Fourth, the election of the members to the council is immediately as opposed to the security council and the other councils of the organization. This is also evident in the phraseology of trusteeship system where health is one of the justifications of performing the functions in trust-territories. Fifth, in terms of the organs, the General Assembly has the ultimate responsibility which gives the higher prominence compared to other functions. Finally, the nomenclature of the council. These five aspects point to the criticality of health as a concept and the imperativeness of social determinants in shaping the meaning of health and the right to health in its altruistic perception. It is imperative to note that health has not been defined in the charter. Therefore, from this charter and the fact that it is above all the other treaties, it is succinct that right to health is all encompassing and ought to be interpreted as such and its implementation need to be holistic.

2.2 Universal Declaration of Human Rights of 10th December 1948 (UDHR)

Hot in the heels of the Charter was this document acknowledging the charter and owing its fidelity to it. It makes make both implied and express reference to the health in at least 8 articles and its preamble. From the outset, it provides for the promotion of social progress and better standards of life in larger freedom. Article 25 directly mentions health and goes further to provide its components while articles 3, 22, 23(1),27, 28, 29(2) and 30 have implicit connotation to health. It is this non-binding document that has given rise to the two legal covenants and their protocols. Once more economic and social aspects are prominent leitmotif in this document.

2.2.1 The International Covenant on Economic, Social and Cultural Rights of 16th December 1966

It came into force in on 3rd January 1976. It alludes to the UN Charter and UDHR as well as the International Covenant on Civil and Political Rights. It has a minimum of 18 articles out of the total 31 articles making overt, covert or both emphasis on health in addition to its preliminary. Two articles namely 7 (b) and 12 expressly mention health. Articles 1(1), 2(1),3, 6(2), 8,15,16,17,18,19,20,21,22 and 23 have implied reference to health. Articles 10 and 11 have both express and implied reference to health. Again, health is not defined but it is within the ambit of economic, social and cultural rights.

Overall, a number of pertinent observations come to the fore in as far as this treaty is concerned. One, the treaty is open to signature by any state member of UN, member of any of its specialized agencies, by any state party to the International Court of Justice as per the provision of its article 26. This is significant in light of the limitation provided for UN membership which requires approval of UN Security Council. Two, amendment to this treaty is not as stringent as that of UN Charter as per article 29(2) hence flexibility which allows for adaptability. Adaptability is a cardinal principle in health spheres. Three, article 11 and 12 of the covenant are very comprehensive compared to other articles in the covenant hence lends credence to the uniqueness of the right to health and its interpretation. Four, for close to a half a century, the covenant operated without an optional protocol in comparison to its counterpart on civil and political rights which had two optional protocols within a span of two decades (in 1966 and 1987) into its operation. The covenant got its first optional protocol in 2008 establishing a Committee on Economic, Social and Cultural Rights as a compliant mechanism. It is interesting to note that this protocol acknowledges and reaffirms the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms. It has 22 articles which is also significant to note. Article 10 of the protocol is interesting in the sense that it provides an expeditious (a maximum of 6 month between conflicting state parties) way of resolving economic, social and cultural issues. Health is within the socio-economic domain.

The CESCR provides communication such as General Comment No. 14 which has provided clearest appreciation of history of the ICESCR under paragraphs 4 and 8 in as far as Article 12 of the covenant is concerned. Paragraph 9 provides the dual elements of the highest attainable standard of Health namely individual's biological and socio-economic preconditions as well as the state's available resources. Thus, right to health has to encompass necessary conditions; variety of facilities; variety of goods; and variety of services. Hence, it is an inclusive right as provided for under paragraph 11 and implied in paragraph 10.

2.2.2 Other International Authorities

These are authorities such as Article 5(e)(iv) of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965[9], articles 11.1 (f) and 12 of Convention on Elimination of All forms of Discrimination Against Women of 1979[10], and Convention on the Rights of the Child 1989[11] and Principle 1 of Stockholm Declaration of 1972.[12] Recently, there is Global Health Security Agenda 2024 Framework[13] which as considered health as an aspect of security. In all these, health is an overwhelming theme and its rightly given a broader view.

[9] 'OHCHR | International Convention on the Elimination of All Forms of Racial Discrimination: 50 Years of Fighting Racism' (*OHCHR*) <*https://www.ohchr.org/en/treaty-bodies/cerd/international-convention-elimination-all-forms-racial-discrimination-50-years-fighting-racism*> accessed 12 June 2022.

[10] DPI UN, 'Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979' (*OHCHR*) <*https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women*> accessed 12 June 2022.

[11] 'Convention on the Rights of the Child' (*OHCHR*) <*https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child*> accessed 12 June 2022.

[12] United Nations, 'United Nations Conference on the Human Environment, Stockholm 1972' (*United Nations*) <*https://www.un.org/en/conferences/environment/stockholm1972*> accessed 12 June 2022.

[13] 'The Global Health Security Agenda (GHSA): 2020-2024' (n 8).

2.3 The WHO Constitution of 22nd June 1946

It is important to note that this body was formed by 61 states 1 year after the UN Charter.[14] It has 82 Articles while the charter has 111 articles. It has defined health unlike the charter. It is more comprehensive on the concept of health for all people in article 1. It has mentioned environmental hygiene in article 2. Its preamble acknowledges the ideals of the charter as the benchmark of the 7 principles of the document. It has formed agreement with 12 other intergovernmental organizations handling different disciplines as well as a framework of engagement with non-state actors in article 2(b)(i)(j). What does this imply? It means that right to health must be conjunctively be seen from consortium of environmental, economic and social underpinnings.

2.4 Resolution

The UN Agenda 2030 for Sustainable development Goals provides for the transformation of the World. The preamble enunciates people, planet and posterity as fundamental aspirations in the 17 Goals that are integrated and indivisible and balance the triple dimensions of Sustainable Development Goals namely economic, social and environment as provided in paragraph 2 of the declaration. The vision, shared principles and commitment in paragraph 7,9,10,11,12 and 19 reaffirm the centrality of purposes of the UN Charter, UDHR, International Human Right Treaties and other earlier resolutions. Paragraphs 14,17,18, 26,27 and 18 expressly cites global health threats and calls for an integrated approach. This is reflected in the 17 SDGs which calls for win-win cooperation. Further, the resolution mentions climate change in paragraph 31, human health and environment in paragraph 34 and paragraph 35 implies both.

It is notable that out of the 17 SDGs, a minimum of 7 provide overtly or covertly for health. SDG 3 is explicit and detailed on health while 2,6,8,11,13

[14] World Health Organization (n 6). The Constitution was adopted by the International Health Conference held in New York from 19 June to 22 July 1946, signed on 22 July 1946 by the representatives of 61 States (Off. Rec. Wld Hlth Org., 2, 100), and entered into force on 7 April 1948. Amendments adopted by the Twenty-sixth, Twenty-ninth, Thirtyninth and Fifty-first World Health Assemblies (resolutions WHA26.37, WHA29.38, WHA39.6 and WHA51.23) came into force on 3 February 1977, 20 January 1984, 11 July 1994 and 15 September 2005 respectively and are incorporated in the present text.

and 15 are implicit. The underpinning theme is health is part and parcel of sustainable development and hence its broad meaning in my view ought to suffice. It is notable that Kenya played a critical role.[15] Is this reflected in the practice? Non-affirmative answer prevails.

In a nutshell, the global perspective is that right to health is inherently attached to social determinants and social determinant go along with transdisciplinary approach to conceptualization of health. All the instruments poignantly point to this fact. The question then is whether this is reflected in practice or not. Based on the institutionalization, it is clear that implementation of right to health is characterised by isolationist worldview and has been narrowed to human health for instance World Health Organization is concern with promotion of human health yet environmental health and animal health heavily influence human health. The latter two are handled by different institutions. Without realization of these later two aspects, then right to health is a mirage at least and a misconception at best in the current prevailing circumstance at the global level. The good news is that, there is a demonstratable evidence that integrated implementation of right to health is concretizing as evidence by the Tripartite Partnership involving FAO, WHO and WOAH[16] in advancing the concept of one health approach.[17]

3. Regional View

3.1 The European Convention on Human Rights

The preamble acknowledges the UDHR adopted on 10th December 1948. Out of the 59 articles, a minimum of 9 articles make reference to health and

[15] 'Secretary-General's Remarks to Press Conference on the Outcome Document of the Post-2015 Development Agenda'.
[16] 'Home' (*WOAH - World Organisation for Animal Health*) <*https://www.woah.org/en/home/*> accessed 13 June 2022.
[17] 'Tripartite Partnership of FAO, WHO, and OIE Highlights the Importance for Strengthened Work at the Human–Animal–Ecosystem Interface' <*https://www.fao.org/ag/againfo/home/en/news_archive/AGA_in_action/2013_Tripartite_partnership_at_the_human-animal-ecosystem_interface.html*> accessed 13 June 2022.

right to health (4 articles mention it directly while 5 are implied).[18] Protocol No.1 and 4 under articles 2 and 2(3)(4) provides for health interventions indirectly and directly respectively. It is importantly to highlight that this document was adopted by the union 5 years after the UN Charter and 2 years after UDHR.

3.2 American Convention on Human Rights 1969

The Convention came to force on 18th July 1978.[19] Its preamble acknowledges the Charter of Organization of American States, The American Declaration of the Rights and Duties of Man and the UDHR as well as reaffirming and refining other international instruments that have worldwide and regional scope in terms of economic social and cultural rights. It has a minimum of 13 articles out of total 82 covering health matters. Articles 5,12(3),15,16(1)(2) and 22(3)(4) are express provisions while articles 1(1),2,3,4,21(1)(2),25(1), 26 and 27(2) have implied connotations. Notably, environment has not been explicitly mentioned in the document. The application of this instruments was a matter of an historic advisory opinion in 2017 before Inter-American Court of Human Rights. The court observed that Article 26 of the convention which provides for progressive realization of economic, social and cultural rights includes an autonomous right to a healthy environment and it's related to right to life and personal integrity which is the very essence of existence of humankind.[20]

3.3 The African (Banjul) Charter on Human and People's Rights[21]

The charter has both explicit and implicit provisions for health. There are a minimum of 12 articles out of the total 68 that cover health directly or

[18] EU, 'European Convention on Human Rights' <European Convention on Human Rights>.

[19] 'American Convention on Human Rights' (*ICNL*) <https://www.icnl.org/resources/library/american-convention-on-human-rights> accessed 12 June 2022.

[20] *Advisory Opinion on the Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity—Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights) OC 23/17* 8.

[21] African Union, 'African (Banjul) Charter on Human and Peoples' Rights | Treaties Database' <*http://www.kenyalaw.org/treaties/treaties/11/African-Banjul-Charter-on-Human-and-Peoples-Rights*> accessed 12 June 2022.

indirectly as well as the preamble. The preamble covers health in the following ways. First, it provides for dignity as one of the essential objectives for achievement of the aspirations of the African peoples. Second, it stipulates due regards to the UN Charter and UDHR. Third, it acknowledges economic social and cultural rights reinforced by acknowledgement of universality principle.

There are 4 articles (11,12,16 and18) that have expressly provided for health while 8 articles (4,5,14,20,22,24,26 and 27) have implied. Article 11 explicitly provides for the limitation of right to assembly based on the ground of health. The right to freedom of movement under article 12.2 is limited by the interest of public health. Under the enunciation of article 16, the right to the best attainable state of physical and mental health as well as compelling of state parties to protect the health of the people and ensure they receive medical attention when they fall sick. Finally, the proclamation of article 18.1 ensures the physical health and morals of the family as a natural unit and basis of the society.

There are 8 articles that have covertly provide for health. First, article 4 stipulates the entitlement to respect for life and the integrity of his person while article 5 enunciates the entitlement to respect of dignity inherent in a human being. Second, the proclamation of article 14 on limitation of property right on the basis of public or community interest in accordance with the appropriate laws. This thread is palpable under article 27.2 where proclamation of collective security, morality and common interest duty of an individual is mandated. Third, economic and social development is compulsory provided under the article 20.1 as an ingredient of self-determination while the support to all people in the struggle against economic or cultural foreign dominion is assured in 20.3. The same theme is reflected in article 22.1. Fourth, the right to a general satisfactory environment favourable to people's development is provided under article 24. Fifth, the duty to guarantee of the independent court and establishment and improvement of the national institutions to protect and promote freedoms guaranteed by the charter under article 26 is cardinal.

Summarily, the fundamental observation here is the economic, social, cultural and environmental aspects are provided in the realization of health. Two, the historical context of this document alludes to health as a problem from foundation of this charter. Conspicuously present is the holistic implication of the perception of health and the medical aspect being a subset. The regional perspective provides the following observation. One, health concept is non-existence if it is devoid of the social determinants as evidenced by the nomenclature. Two, the international legal instruments are essential and inherent ingredients in elaboration of health concept.

Third, progressively, there is an emerging expressive inclusion of environment as an influencer of health. Fourth, the nomenclature of economic, social and cultural is palpable through all the regional legal authorities. Mark you, health is part and parcel of these terms. This leads us to the critical question-whether the state parties to this instrument live as per the dictates of the authorities? Institutionally, there is no health regional body instead, the international bodies such as WHO have regional offices and hence the isolationist approach from the global perspective is cascaded down to the regional level. Overall, the framing in naming denotes association and interconnectedness of different systems hence multi-disciplinarity is noticeable. Therefore, it is the submission of this paper that regional concept of right to health ought to manifest in the form of human-animal-ecosystem approach to health as opposed to the current dominant isolationist approach.

4. Municipal Perspective

4.1 National Constitution of Kenya 2010

The Constitution of Kenya[22] has health as a cardinal function in three ways. First, in the preamble, health is implied by invoking respect for environment for posterity. It also recognizes social justice as well as commitment to nurturing and protecting the wellbeing of family, individual communities and nation. Second, a minimum of nine[23] out of the total 18 chapters have

[22] 'Kenya Law: The Constitution of Kenya' <*http://kenyalaw.org/kl/index.php?id=398*> accessed 12 June 2022.
[23] Ibid. Chapters 2,4,5,7,8, 9, 10,11, and 17.

health implied, express or both. Third, a minimum of fifty- seven[24] articles out of 260 have health as a theme and at least one schedule[25] of the Constitution. Closer analysis of articles further reveals that a whooping 43 articles have an implicit expression of health while 6 (articles 181,43,145,144,150 and 204) are explicit about health while 8 (20,21,26,27,46,56 and 191) have both implied and express regards to it. The numerous articles that are implicit in reference to health is an area to explore and discover the hidden message. The word health in itself apparently appears mostly together with public order, economic and social development, national security, environment and morality. Why are these observations critical? This provides a presentation perspective as well as the framing overview which requires an in-depth examination.

Besides presentation, there is a second facet that is developed in the articles. This is what can be called effect triggers. First, it is curious to note that the Independent Kenya Human Right and Equality Commission is the only commission that the constitution allows to replicate to two or more commissions. This is in light of the fact that health falls within economic and social rights which the constitution mandates the commission to monitor, investigate and report. Why?

Second, health has permeated and acquired prominence in leadership cycles particularly in the state offices. It is a common ground for all the officers to be removed from office as a result of physical or mental incapacity. Its prominence is even of higher threshold when it comes to the office of the President and Deputy President. The tribunal for removal on this basis has 3 unique attributes namely, three of its 5 members ought to be medical practitioners; the report of the tribunal is final and cannot be appealed before a court and the report is adopted by the national assembly by simple majority and no provision for the senate. This is non-political when it is compared with removal vide impeachment. No wonder, in my observation, the health

[24] Articles of the constitution of Kenya that have health prominence: 10, 19,20,21,22,23,24,25,26,27,28,29,30,31,32,35,41,42,43,46,50,53,54,55,56,57,58,59,60,66,68,69,70,72,91,95,131,132,144,156,157,158,159,160,168,175,176,181,185,186,187,189,191, and 204.

[25] Fourth Schedule part 2 paragraph 2.

of the president as of right is considered from a holistic perspective and that office being representative of the nation and its standard, it goes without saying the right to health given to the president ought to be the golden standard for right to health for the entire citizenry. Is that the case? The simple answer is a negative. Equalization fund in the constitution also has overtones of health particularly on regards to health facilities and provision of water. Other effects include the impeachment of the presidency on the grounds of non-observances of ratified international conventions and treaties; and declaration of a state of emergency. These kind of effect raises legal inquisitiveness which touches at minimum legal concept and practices. Finally, the fourth Schedule as per the provisions of Articles 185(2); 186 (1) as well as 187 (2) provides county health[26] in an inclusive approach that exhibit human-animal-ecosystem interface.

Within the province of institutionalization, the constitution has provided for the two levels of Government and the Independent Commission as avenues of ensuring enjoyment of right to health. This is a clear demonstration of the inter-connectedness and it ought to be ingrained in the regulatory framework.

4.2 Enabling Laws

4.2.1 The Health Act No. 21 of 2017

This 112-secioned and 4-scheduled Act[27] is the primary legislation on matters right to health and in its preamble, it proclaims establishment of a unified health system at both levels of government. It is important to note that when it comes to definition of term disease and health, the law adopts a broad meaning and when it comes to health care services; health facility and health systems, it adopts a narrow interpretation by centralizing it to human as opposed to human-animal-ecosystem approach. Summarily, there are a minimum of eleven sections that prescribe right to health including right to

[26] Ibid.
[27] 'No. 21 of 2017' *<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2021%20of%202017>* accessed 12 June 2022.

health care providers[28] and at least 13 provisions establishing and conferring power to the institutions.

A number of critical observations emerged from a closer look at the statute. First, though health and disease have been defined broadly, implementation of right to health has been given narrow interpretation[29] in as far as health facilities; services and systems[30] are concerned as evidenced in section 2 of the act and hence recreating a legal mismatch. Second, promotion and prevention in terms of arrangement of achieving the enjoyment of standards of right to health always come first compared to curative, palliative and rehabilitative services.[31] Animal health and health of the environment as well as economic health are part and parcel of promotion and prevention and thus, it is a disserves to lock them out by application of narrow reasoning. At the moment, much of the health services are geared on curative, palliative and rehabilitative[32] which are in my view secondary. Third, the law has expressly provided for public and environmental health[33] as well as collaboration of the fields.[34] However, this flies off in the face of granting primacy[35] to the Cabinet Secretary of health who is inadvertently and presumably constrained by narrow interpretation dictated by state practice. Finally, the institutions stipulated by the act are limited to narrow construction of health at both levels of government for instance Cabinet Secretary[36], Director General[37] and the minimum five directorates[38] of health at National domain.

[28] Ibid Section 12.
[29] Ibid n.22 Sections 22 and 23.
[30] Ibid n. 22 First Schedule (Classification of health facilities).
[31] Ibid n.22 Section 5.
[32] Ibid no.25 The first schedule of the Health Act provides classification of Health facilities. These are basically and impliedly for curative, palliative and rehabilitative purposes.
[33] Ibid n.22 Sections 68 and 12 (1)(b).
[34] Ibid n.22 Section 108.
[35] Ibid n. 22 Section 106.
[36] Ibid n. 22 Section 15.
[37] Ibid n.22 Sections 16-17.
[38] Ibid n. 22 Section 18.

At devolved units, County Executive Committee (CEC) member and County Director[39] in charge of health are provided for. The same thread is palpable in Health Sector Intergovernmental Consultative Forum[40] as well in National Health Research Committee[41] and Kenya Medical Research Institute.[42] These institutions are clearly non-inclusive to warrant the constitutional dictates[43] of enjoyment of right to health in as far as they are devoid of health interest obedient to human-animal-ecosystem character.

4.2.2 The Public Health Act (Cap 242)

This 169-sectioned law[44] composed of fifteen parts stipulate in its preamble that it is an act of Parliament for securing and maintaining health. This act bestows health authority to the municipality and Cabinet Secretary for health. It introduces meat inspector, stock and veterinary officer in its definition provided in section 2. Curiously missing is environmental related definition. However, it is the most comprehensive law and seemingly meets the constitution dictates in as far as right to health is concerned save for the institutional part. The element of human-animal-ecosystem approach is largely succinct. The Central Board of Health[45] which is the cardinal institution is non-inclusive since it is within the domain of narrow interpretation in terms of its composition. Second, from part II-XII, it is mainly related with prevention of diseases when they have reached the humans. This in my view is self-defeatist. Why not focus at the primary level of protection before it reaches mankind? This is where environment and animal ecosystem are key component of right to health

[39] Ibid n.22 Section 19.
[40] Ibid n.22 Section 26.
[41] Ibid n. 22 Sections 93-94.
[42] Ibid n.22 Section 97.
[43] Articles 42 and 43 principally.
[44] 'CAP. 242' *<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20242>* accessed 12 June 2022.
[45] Ibid Section 3.

4.2.3 Environmental Management and Coordination Act (EMCA) No.8 of 1999

The 148-sectioned and 3-scheduled law[46] proclaims in its preamble that environment is foundational constitution of national economic, social, cultural and spiritual advancement. It must be born in mind that right to health is part of socio-economic rights. It overtly prescribes entitlement to a clean and healthy environment for recreation, education, health, spiritual and cultural purposes.[47] It also calls for proper management and rational utilization of environmental resources.[48] Within the province of institutionalization, the Cabinet Secretary for environment,[49] National Environment Management Authority[50] headed by the Director General[51] are provided for at the National level. This is a further demonstration of isolationism approach in play.

4.2.4 Others laws relevant to Right to Health

These include 3-sectioned Meat Control Act Cap 356 which confers exercise of control over meat for human consumption as well as the premises such as slaughter houses and provides for export and import control of meat and meat product. It prescribes for collaboration between the minister responsible for veterinary services and the one responsible for health. Clearly, here health has been delinked from veterinary services instead of health incorporating veterinary services. Moreover, there is Veterinary Surgeons and Veterinary Paraprofessionals Act No.29 of 2011 providing for matters relating to animal health services. In this Act under the 3rd Schedule which provides for the oath, it stipulates commitment to promotion of public health.

5. Conclusion and Reforms

Briefly put, there is an interesting pattern developed in framing of legal instruments from the global spheres up to the domestic sphere. The

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[46] 'No. 8 of 1999' <*http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%208%20of%201999*> accessed 12 June 2022.
[47] ibid Section 3 of EMCA No.8 of 1999.
[48] Ibid n.41 Section 9 (2)(a) of EMCA No.8 of 1999.
[49] Ibid n.41 Section 5 of EMCA.
[50] Ibid n. 41 Section 7 of EMCA.
[51] Ibid n.41 Section 10 of EMCA.

Constitution and all the enabling laws have conferred the courts particularly the Magistracy and the Environment and Land Court the power to enforce right to health as evidenced in Public Health Act and EMCA. Clearly, health has been legally given interconnected prominence with other disciplines hence integration of diverse aspects. The legal guidance to enjoyment of right to health must therefore be consistent with human-animal-ecosystem approach which in practice appears to not being the case.

The constitution has provided a holistic right to health but the enabling laws have not as demonstrated by the conspicuous isolationist approach. The legal definition of health and disease captures the spirit of right to health but implementation is devoid of the letter and the spirit of the same. There is a categorization of right to health in terms of health, public health and environmental health and the order of arrangement seems to confer the order of prominence and importance. This should not be the case. Finally, there is a prominent dichotomy in enjoyment of right to health in the sense that standards of right to health enjoyed by the President as a representative of the people and nation seems to be diametrically different from that of the citizenry. This defeats the logics of representation of the people and of that office being a standard bearer of the nation.

There is need for reform to entrench human-animal -ecosystem approach into law in order to realize the constitutional right to health. First, an independent commission in charge of matters relating to enforcement of right to health holistically need to be established as per article 59(4). The commission so formed be inclusive of all the facets of health and establish monitoring and evaluation mechanisms are consistent with the broader interpretation of health and right to health. This will grant the nation the benefit of having the right status of its health system. Second, the presidential standard in terms of right to health should be made reference for enjoyment of right to health since the office represent the nation and the people. Third, all the enabling laws should be amended or repeal to align them to the constitutional dictates in as per as conceptualization of right to health is concerned. Fourth, abolish the categorization of health into health, public, and environmental and instead make them the subset of health with equal prominence in as far as enjoyment of right to health is concerned.

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Biodiversity Mainstreaming for Food and Nutrition Security in Kenya

By: ***Kariuki Muigua****

Abstract

The United Nations Sustainable Development Goals aims to not only achieve biodiversity conservation but to also mainstream such measures into efforts towards achieving food and nutrition security. This is due to the important role that biodiversity plays in achieving food and nutrition security. This paper makes a case for some of the ways that Kenya can mainstream biodiversity conservation debates into measures geared towards achieving food and nutritional security.

1. Introduction

The global population is predicted to reach 8.6 billion by 2030, necessitating the protection of a finite and diminishing quantity of natural resources, since the livelihoods of billions of people employed in the agricultural value chain are at risk.[1]

Providing enough, safe, and nutritious food to all people has always been a major worldwide challenge, even in the twenty-first century, where food availability, access to food, food use/utilization, and food stability are the four elements that most people think of when they think of food security.[2] The Food and Agriculture Organization of the United Nations (FAO) describes food security in following terms: "Food security exists when all people, at all times, have physical, social and economic access to sufficient,

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[1] 'Innovations for Sustainable Food Systems' (*Farming First*) <*https://farmingfirst.org/food-systems/*> accessed 21 December 2021.

[2] Anand S, 'The Role of Science, Technology and Innovation in Ensuring Food Security by 2030'.

safe and nutritious food which meets their dietary needs and food preferences for an active and healthy life".[3]

The Constitution of Kenya guarantees the right of every person to be free from hunger and thirst: Every person has the right— (c) to be free from hunger, and to have adequate food of acceptable quality; (d) to clean and safe water in adequate quantities.[4] Conservation of biodiversity for securing food and nutrition security in Kenya thus becomes an important step towards guaranteeing human rights of all.

Biological diversity affects agricultural and livestock output, as well as the structure and function of agroecosystems, in both good and negative ways.[5] The Convention on Biological Diversity (CBD) of 1992, for example, recognized the link between biodiversity, agriculture, and nutrition, and has called for greater mainstreaming of agricultural biodiversity into policies and practices aimed at food and nutrition security, as well as increased coordination between the environment, agriculture, and nutrition sectors, as far back as 2006 CBD, COP 8 Decision VIII/23.[6] The second and third objectives of the Convention on the sustainable use of biodiversity and its components, as well as the fair and equitable sharing of the benefits emerging from the use of genetic resources, for example, contain various pertinent clauses. Articles 6 (b), 10 (a) (c), 14, 11, 7 (c), and 8(l) of the Convention further call for biodiversity to be mainstreamed.[7] COP 26 side activities on November 3, 2021, for example, underlined that feeding humanity required a systemic transformation to build climate change

[3] Brief, FAO Policy. "June 2006." *Food security issue* 2 (2017): 1.
[4] Article 43, Constitution of Kenya 2010.
[5] Karl S Zimmerer, 'Biological Diversity in Agriculture and Global Change' (2010) 35 Annual Review of Environment and Resources 137 <*https://www.annualreviews.org/doi/10.1146/annurev-environ-040309-113840*> accessed 21 December 2021.
[6] Beltrame, D., Gee, E., Guner, B., Lauridsen, N., Samarasinghe, W.L.G., Wasike, V., Hunter, D. and Borelli, T., 'Mainstreaming Biodiversity for Food and Nutrition into Policies and Practices: Methodologies and Lessons Learned from Four Countries' (2019) 29 ANADOLU Ege Tarımsal Araştırma Enstitüsü Dergisi 25, at 25.
[7] Unit B, 'Biodiversity Mainstreaming' (16 November 2021) <*https://www.cbd.int/mainstreaming/*> accessed 21 December 2021.

resilience and safeguard soils, water, ecosystems, and farmers, which is fundamentally different from the "green revolution." [8] Innovative technologies and approaches being developed and applied around the world will be critical in making our food systems more sustainable. These technologies must generate cash and create jobs in order to be economically viable. They must include impoverished and vulnerable communities and lower hunger and malnutrition levels in order to be socially sustainable. They must help us protect water, soil, and air quality while reducing greenhouse gas emissions, food loss, and waste in order to be environmentally sustainable.[9]

This paper critically discusses the place of biodiversity mainstreaming in achieving food and nutrition security for the people of Kenya, in line with the aforementioned sustainability goals.

2. Place of Biodiversity in Achieving Food and Nutrition Security: International and Domestic Regulatory Framework

The link between biodiversity and food security can be seen in a variety of ways, from genes to species, landscapes, and biomes, making biodiversity a valuable resource for humanity.[10]

Biodiversity in food and agriculture refers to the diversity of living species that contribute to food and agriculture, as well as the forestry and fisheries industries. [11] Many of the adaption techniques required in food and

[8] Hub ISK, 'COP 26 Events Aim to Support Negotiations on Food Systems | News | SDG Knowledge Hub | IISD' <*https://sdg.iisd.org:443/news/cop-26-events-aim-to-support-negotiations-on-food-systems/*> accessed 21 December 2021.

[9] 'Innovations for Sustainable Food Systems - Farming First' <*https://farmingfirst.org/food-systems#home*> accessed 21 December 2021.

[10] Cramer, W., Egea, E., Fischer, J., Lux, A., Salles, J.M., Settele, J. and Tichit, M., 'Biodiversity and Food Security: From Trade-Offs to Synergies' (2017) 5 Regional Environmental Change 1257, at 1257.

[11] FAO, 'Climate Change and Biodiversity for Food and Agriculture,' Technical Background DocumentFrom The Expert Consultation Held on 13 to 14 February 2 008, p.1. Available at *http://www.fao.org/uploads/media/FAO_2008a_climate_change_and_biodiversity_02.pdf*

agriculture will be based on the sustainable use of genetic resources for food and agriculture.

Plants and animals that are crucial for food security may need to adapt to abiotic changes such as heat, drought, floods, and salinity in order to adapt to climate change.[12]

Local communities, breeders, and researchers employ genetic resources to adapt to shifting socioeconomic requirements and environmental problems. Maintaining and utilizing a diverse genetic pool in the face of climate change is regarded as a critical insurance policy for the food and agriculture industries.[13] Indeed, this is so important that during COP 26, the UN Food and Agriculture Organization hosted a number of side events aimed at assisting countries in climate negotiations, particularly through boosting action linked to food and agriculture, ecosystems, and biodiversity, as well as working with countries to secure climate finance.[14]

Crop genetic diversity is regarded as a source of ongoing improvements in yield, pest resistance, and quality, and it is commonly believed that increased varietal and species diversity will enable agricultural systems to maintain output under a variety of conditions.[15] It has been stated that maintaining and improving crop genetic variety is becoming increasingly important to ensure the resilience of food crop supply, especially in light of climate change issues.[16]

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[12] *Ibid*.
[13] *Ibid*, p.3.
[14] Hub ISK, 'COP 26 Events Aim to Support Negotiations on Food Systems | News | SDG Knowledge Hub | IISD' <*https://sdg.iisd.org:443/news/cop-26-events-aim-to-support-negotiations-on-food-systems/*> accessed 21 December 2021.
[15] Carpenter, Janet E., "Impact of GM crops on biodiversity," *GM crops* 2, no. 1 (2011): 7-23, p.7.
[16] *Ibid*, P.7.

2.1. International Convention on Protection of New Plant Varieties

The *International Convention on Protection of New Plant Varieties* [17] established the International Union for the Protection of New Varieties of Plants (UPOV) as an intergovernmental organization with headquarters in Geneva (Switzerland), to provide and promote an effective system of plant variety protection, with the aim of encouraging the development of new varieties of plants, for the benefit of society. [18] The UPOV Convention encourages and rewards the ingenuity and creativeness of breeders developing new varieties of plants.[19] The UPOV system establishes basic legal principles of protection by providing the breeders exclusive rights to their plant invention for a specific period of time, while making available the genetic material to others to use in their breeding programs.[20]

2.2. Convention on International Trade in Endangered Species of Wild Fauna and Flora

The *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES) [21] was adopted in March 1973 to regulate worldwide commercial trade in wild animal and plant species in order to ensure that international trade does not threaten the survival of any species.[22] CITES is a legally binding Convention on state parties to the convention, which are obliged to adopt their own domestic legislation to implement its goals.[23] CITES assigns each protected species to one of three lists namely;

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[17] International Union for the Protection of New Varieties of Plants, *International Convention for the Protection of New Varieties of Plants of December 2, 1961*, as Revised at Geneva on November 10, 1972, on October 23, 1978, and on March 19, 1991, UPOV Publication no: 221(E).

[18] 'International Union for the Protection of New Varieties of Plants (UPOV)' <*https://www.upov.int/portal/index.html.en*> accessed 5 June 2021.

[19] 'International Convention for the Protection of New Varieties of Plants (UPOV)' <*https://www.uspto.gov/ip-policy/patent-policy/international-convention-protection-new-varieties-plants-upov*> accessed 5 June 2021.

[20] *Ibid*.

[21] United Nations, *Convention* on *International Trade* in *Endangered Species* of *Wild Fauna* and *Flora*, March 3rd, 1973, 993 U.N.T.S. 243.

[22] 'Convention on International Trade in Endangered Species | Description, Members, & Provisions' (*Encyclopedia Britannica*) <*https://www.britannica.com/topic/Convention-on-International-Trade-in-Endangered-Species*> accessed 6 June 2021.

[23] *Ibid*.

Appendix I lists endangered species that are at risk of extinction and these species require both import and export permits approved by the "management authority and scientific authority" of the nations involved; Appendix II species are those that are not threatened with extinction but that might suffer a serious decline in number if trade is not restricted and their trade is thus regulated by permit; and Appendix III species are protected in at least one country that is a CITES member and that has petitioned others for help in controlling international trade in that species.[24]

2.3. International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)

The *International Treaty on Plant Genetic Resources for Food and Agriculture*[25] was adopted in 2001 with the objectives of conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security.[26] The sustainable use of plant genetic resources for food and agriculture may include such measures as, *inter alia*: strengthening research which enhances and conserves biological diversity by maximizing intra- and inter-specific variation for the benefit of farmers, especially those who generate and use their own varieties and apply ecological principles in maintaining soil fertility and in combating diseases, weeds and pests; and supporting, as appropriate, the wider use of diversity of varieties and species in on-farm management, conservation and sustainable use of crops and creating strong links to plant breeding and agricultural development in order to reduce crop vulnerability and genetic erosion, and promote

[24] Kathryn A Saterson, 'Government Legislation and Regulations in the United States' in Simon A Levin (ed), *Encyclopedia of Biodiversity (Second Edition)* (Academic Press 2013) <*https://www.sciencedirect.com/science/article/pii/B9780123847195001866*> accessed 6 June 2021; 'Convention on International Trade in Endangered Species | Description, Members, & Provisions' (*Encyclopedia Britannica*) <*https://www.britannica.com/topic/Convention-on-International-Trade-in-Endangered-Species*> accessed 6 June 2021.

[25] United Nations, International Treaty on Plant Genetic Resources for Food and Agriculture, Food and Agriculture Organization of the United Nations 13 December 2006, 2400 (p.303).

[26] *Ibid*, Article 1.1.

increased world food production compatible with sustainable development.[27]

There is a need for countries to use this Treaty in crop production for food security, as applied genetics mixed with practical plant breeding is a potent instrument in agricultural development and food security, and biodiversity provides the foundation for effective use of these genomic techniques.[28]

2.4. COP 10 Decision X/2, Strategic Plan for Biodiversity 2011-2020

The *COP 10 Decision X/2, Strategic Plan for Biodiversity 2011-2020*[29], with its *Aichi Targets*[30], were adopted by the United Nations where Parties and other Governments, with the support of intergovernmental and other organizations, as appropriate, were urged to implement the Strategic Plan for Biodiversity 2011-2020 whose main mission is to: "take effective and urgent action to halt the loss of biodiversity in order to ensure that by 2020 ecosystems are resilient and continue to provide essential services, thereby securing the planet's variety of life, and contributing to human well-being, and poverty eradication. To ensure this, pressures on biodiversity are reduced, ecosystems are restored, biological resources are sustainably used and benefits arising out of utilization of genetic resources are shared in a fair and equitable manner; adequate financial resources are provided, capacities are enhanced, biodiversity issues and values mainstreamed, appropriate policies are effectively implemented, and decision-making is based on sound science and the precautionary approach."[31]

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[27] *Ibid*, Article 6.2 (b)(f).

[28] Louwaars, N.P., Thörn, E., Esquinas-Alcázar, J., Wang, S., Demissie, A. and Stannard, C., 'Access to Plant Genetic Resources for Genomic Research for the Poor: From Global Policies to Target-Oriented Rules' (2006) 4 Plant Genetic Resources 54 <*https://www.cambridge.org/core/journals/plant-genetic-resources/article/abs/access-to-plant-genetic-resources-for-genomic-research-for-the-poor-from-global-policies-to-targetoriented-rules/DC2B65BA1B3230D9A6BFFA9C6CD6A3C4*> accessed 21 December 2021.

[29] 'The Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets' <https://www.cbd.int/kb/record/decision/12268> accessed 3 June 2021.

[30] Biosafety Unit, 'Aichi Biodiversity Targets' (18 September 2020) <*https://www.cbd.int/sp/targets/*> accessed 3 June 2021.

[31] *Ibid*.

The Plan was meant to provide an overarching framework on biodiversity, not only for the biodiversity-related conventions, but for the entire United Nations system and all other partners engaged in biodiversity management and policy development.[32]

2.5. COP 8 Decision VIII/23, Agricultural biodiversity: Cross-cutting initiative on biodiversity for food and nutrition

The *COP 8 Decision VIII/23 on Agricultural biodiversity*[33], urged Parties and other Governments to integrate biodiversity, food and nutrition considerations into their national biodiversity strategies and action plans and other national plans and activities, including national plans of action for nutrition and strategies for achievement of the Millennium Development Goals.[34]

As an Annexture, it provided for a *Proposed Framework For A Cross-Cutting Initiative On Biodiversity For Food And Nutrition*, whose overall aim was to promote and improve the sustainable use of biodiversity in programmes contributing to food security and human nutrition, as a contribution to the achievement of Millennium Development Goal 1, Goal 7 and related goals and targets and, thereby, to raise awareness of the importance of biodiversity, its conservation and sustainable use.[35]

In promoting integration of biodiversity, food and nutrition issues into research and policy instruments, Element 2 thereof called for mainstreaming of the conservation and sustainable use of biodiversity into agendas, programmes and policies related to nutrition, health, agriculture and hunger and poverty reduction.[36]

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[32] Biosafety Unit, 'Strategic Plan for Biodiversity 2011-2020, Including Aichi Biodiversity Targets' (21 January 2020) <https://www.cbd.int/sp/> accessed 3 June 2021.

[33] United Nations, "COP 8 Decision VIII/23, Agricultural biodiversity: Cross-cutting initiative on biodiversity for food and nutrition", *Decision Adopted by The Conference of the Parties to The Convention On Biological Diversity at Its Eighth Meeting*, UNEP/CBD/COP/DEC/VIII/23, 15 June 2006.

[34] Ibid, Preamble, para. 5.

[35] Ibid, Annex, para. 2.

[36] Ibid, Element 2.

2.6. A/RES/70/1 - Transforming our world: the 2030 Agenda for Sustainable Development

The 2030 Agenda for Sustainable Development, under Goal 2, aims to end hunger, achieve food security and improved nutrition and promote sustainable agriculture:-

By 2030, end hunger and ensure access by all people, in particular the poor and people in vulnerable situations, including infants, to safe, nutritious and sufficient food all year round; By 2030, double the agricultural productivity and incomes of small-scale food producers, in particular women, indigenous peoples, family farmers, pastoralists and fishers, including through secure and equal access to land, other productive resources and inputs, knowledge, financial services, markets and opportunities for value addition and non-farm employment; By 2030, ensure sustainable food production systems and implement resilient agricultural practices that increase productivity and production, that help maintain ecosystems, that strengthen capacity for adaptation to climate change, extreme weather, drought, flooding and other disasters and that progressively improve land and soil quality; By 2020, maintain the genetic diversity of seeds, cultivated plants and farmed and domesticated animals and their related wild species, including through soundly managed and diversified seed and plant banks at the national, regional and international levels, and promote access to and fair and equitable sharing of benefits arising from the utilization of genetic resources and associated traditional knowledge, as internationally agreed; increase investment, including through enhanced international cooperation, in rural infrastructure, agricultural research and extension services, technology development and plant and livestock gene banks in order to enhance agricultural productive capacity in developing countries, in particular least developed countries.

2.7. Aichi Target 13

By 2020, the genetic diversity of cultivated plants and farmed and domesticated animals and of wild relatives, including other socio-economically as well as culturally valuable species, is maintained, and strategies have been developed and implemented for minimizing genetic erosion and safeguarding their genetic diversity.

2.8. The Crops Act 2013

Under Section 8 of the Crops Act 2013, the Authority is to: in consultation with the National Biosafety Authority, advise the government on the introduction, safe transfer, handling and use of genetically modified species of plants and organisms in the country; establish experimental stations and seed farms for the development of varieties suitable to the agro-climatic conditions of the area and markets that will provide greatest value added to scheduled crops.

The Genetic Resources Research Institute (GeRRI), under the Kenya Agricultural and Livestock Research Act of 2013, and a semi-autonomous research Institute, is responsible for conserving plant genetic resources, animal and microbial genetic resources.

Under the Food Security Bill, 2015, the National and county governments shall to the extent of their constitutional mandate promote the physical and economic access to adequate food of acceptable quality; in ensuring that, the National government fulfils its obligations under subsection (l), the Authority shall promote traditional and other practices and technologies of food production that ensure the conservation of biodiversity. Notably, the structure of the food economy as a whole, as well as its components including agricultural output, technology, food processing diversity, markets, and consumption, all have an impact on food system resilience.[37]

The functions of the Authority shall be to-promote measures to improve security and access to land and water resources and the optimum and sustainable utilization of these resources promote diversification and the use of alternative methods of agriculture and livestock Systems and the production of diverse food crops to mitigate against drought and other climatic conditions that negatively impact food production;

The functions of a county food security committee shall be to initiate, undertake and participate in the collection, preparation, production and dissemination of data and information on food security and nutrition in the county.

[37] Brief, FAO Policy. "June 2006." *Food security issue* 2 (2017): 1.

2.9. National Food and Nutrition Security Policy, 2011

The government policy objective is to increase the quantity and quality of food available and accessible in order to ensure that all Kenyans have an adequate, diverse and healthy diet. This will be achieved by working towards sustainable production increases for food that is diversified, affordable and helps meet basic nutrition requirements.

2.10. National Horticulture Policy, 2012

Over the last few decades, horticulture has emerged as one of the leading sub-sectors in the agricultural sector in terms of foreign exchange earnings, food security, employment creation, and poverty alleviation. The importance of this policy in enhancing agriculture's contribution towards the projected economic growth of 10 percent per annum over the next 20 years, as stipulated in the Kenya Vision 2030, cannot be over-emphasised.

2.11. Agriculture and Food Authority (AFA) 2016-2021 Strategic Plan

This strategic plan is a blueprint against which the strategic direction of AFA is documented. It is premised on the context introduced by the AFA Act 2013 and Crops Act 2013 and the operating environment that the Authority operates.

It takes into account the institutional frameworks, economic indicators, government policies and agriculture sub sector performances that are likely to impact on the Authority's future operations.

It also takes cognisance of the fact that a wide range of investors are involved in the agricultural sector and policies should aim at increasing private investment in agriculture as well as ensuring that investments are sustainable. AFA aims at ensuring that policies, laws and regulations are well designed and effectively implemented to ensure that such investments bring both economic and social benefits to the country while guaranteeing a sustainable use of natural resources.

This strategic plan also takes into account the relationship between policies and productivity and sustainability outcomes and seeks to provide a platform where such issues such as innovation, structural change, and access to and

impact on natural resources and climate change as key drivers of productivity growth and sustainability are addressed.

2.12. Constitution of Kenya 2010

The Constitution of Kenya 2010[38] took bolder steps than its predecessor to not only incorporate environmental conservation and sustainable development issues as a stand-alone chapter but also notably puts emphasis on a rights-based approaches to conservation which require such conservation measures to also focus on the livelihoods and rights aspects of projects, programmes, and activities.[39] It has been argued that adopting rights-based approaches to conservation serves to ensure that the protection of rights and biodiversity conservation are mutually reinforcing.[40] These rights are both procedural and substantive.[41]

The Constitution outlines favourable legislative protection of biodiversity as envisaged in Chapter Five on Land and the Environment, where there is the emphasis on sustainable use of land and other natural resources, including biodiversity as a key principle.[42]

Article 69 of the Constitution is relevant in the quest for biodiversity conservation especially in relation to the obligations of the State in respect of the environment and natural resources management.[43] The provisions of Article 69(1) are notably comprehensive, addressing a number of cross-

[38] The Constitution of Kenya, 2010.
[39] See Preamble; Article 10; and Chapter Five of the Constitution of Kenya 2010.
[40] 'Rights-Based Approaches to Conservation' (*IUCN*, 14 December 2015) *<https://www.iucn.org/theme/governance-and-rights/about/our-work/governance-and-rights-based-approaches/rights-based-approaches-conservation>* accessed 4 June 2021.
[41] Joshua Gellers and Chris Jeffords, 'Procedural Environmental Rights and Environmental Justice: Assessing the Impact of Environmental Constitutionalism' [2015] SSRN Electronic Journal; Dinah Shelton, 'Developing Substantive Environmental Rights' (2010) 1 Journal of Human Rights and the Environment 89; UN Environment, 'What Are Environmental Rights?' (*UNEP - UN Environment Programme*, 2 March 2018) *<http://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/what>* accessed 7 June 2021.
[42] The Constitution of Kenya 2010, Article 60, 69.
[43] The Constitution of Kenya 2010, Article 69(1).

sectoral biodiversity concerns outlined by the CBD including issues of benefit sharing, traditional knowledge, elimination of activities harmful to biodiversity and the role of the community in conservation and sustainable use of biodiversity.[44] However, it is worth pointing out that 'every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources'.[45]

The Constitution also altered the legal landscape in Kenya by introducing a devolved system of governance in Kenya, with authority, roles and responsibilities split between the national government and the 47 county governments.[46] Regarding the environment and biodiversity conservation, the National Government is charged with: use of international waters and water resources; protection of the environment and natural resources with a view to establishing a durable and sustainable system of development, including, in particular-(a) fishing, hunting and gathering; (b) protection of animals and wildlife; (c) water protection, securing sufficient residual water, hydraulic engineering and the safety of dams; and (d) energy policy; agricultural policy; and capacity building and technical assistance to the counties.[47]

As for the county governments, they are charged with: Agriculture, including—(a) crop and animal husbandry; (b) livestock sale yards; (c) county abattoirs; (d) plant and animal disease control; and (e) fisheries; control of air pollution, noise pollution, other public nuisances and outdoor advertising; implementation of specific national government policies on natural resources and environmental conservation, including-- (a) soil and water conservation; and (b) forestry; and ensuring and coordinating the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and

[44] *Ibid*.
[45] Article 69 (2), Constitution of Kenya, 2010.
[46] Fourth Schedule to the Constitution of Kenya 2010 on Distribution of functions between National and the county governments.
[47] Fourth Schedule, Part 1, Constitution of Kenya, 2010.

participation in governance at the local level.[48] However, Counties may perform other functions assigned through an Act of Parliament. Notably, some of the functions related to environmental conservation fall within the shared jurisdiction of both national and county levels of government and should, therefore, be performed in a cooperative way.[49]

2.13. Kenya's Vision 2030

The Vision 2030[50] was launched in 2008 as 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".[51] The Vision 2030 is grounded on three development pillars namely: economic, social and political pillars.[52] The development blueprint acknowledges the environment and all its aspect as an important part of achieving sustainable development and calls for conservation and sustainable use of these resources. The Vision 2030 acknowledges that invasive alien species and lack of a biodiversity inventory and inadequate procedures for access and benefit-sharing for biodiversity resources remain key challenges for the country.[53]

The Social Pillar of the Vision 2030 seeks to invest in the people where it has been pointed out that 'Kenya's journey towards widespread prosperity also involves the building of a just and cohesive society that enjoys equitable social development in a clean and secure environment'.[54] Notably, the Political pillar of Vision 2030 also envisions "a democratic political system that is issue based , people-centred, result-oriented and accountable to the

[48] Fourth Schedule, Part 2, Constitution of Kenya, 2010 on distribution of functions between National and the county governments; see also Section 5 of the County Governments Act (2012) which outlines the functions of County Governments.
[49] Article 186, 189, Constitution of Kenya.
[50] Sessional Paper 10 of 2012 on Kenya Vision 2030, Government of Kenya.
[51] 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.
[52] 'About Vision 2030 | Kenya Vision *2030' <http://vision2030.go.ke/about-vision-2030/>* accessed 1 May 2021.
[53] Chapter 4.6, Vision 2030.
[54] 'Social Pillar | Kenya Vision 2030' *<http://vision2030.go.ke/social-pillar/>* accessed 1 May 2021.

public" and 'a country with a democratic system reflecting the aspirations and expectations of its people, in which equality is entrenched, irrespective of one's race, ethnicity, religion, gender or socio-economic status; a nation that not only respects but also harnesses the diversity of its people's values, traditions and aspirations for the benefit of all'.[55]

2.14. Seeds and Plant Varieties Act, Cap 326

This is an Act of Parliament to confer power to regulate transactions in seeds, including provision for the testing and certification of seeds, for the establishment of an index of names of plant varieties, to empower the imposition of restriction on the introduction of new varieties, to control the importation of seeds, to authorize measures to prevent injurious cross-pollination, to provide for the grant of proprietary rights to persons breeding or discovering and developing new varieties, to establish a national centre for plant genetic resources and to establish a Tribunal to hear appeals and other proceedings and for connected purposes.[56]

This Act establishes a National Plant Genetic Resources Centre which shall be responsible for the conservation and sustainable utilization of plant biodiversity in Kenya.

2.15. Biosafety Act, 2009

Biosafety Act, 2009[57] is an Act of Parliament to regulate activities in genetically modified organisms, to establish the National Biosafety Authority, and for connected purposes.

The objectives of this Act include to facilitate responsible research into and minimize the risks that may be posed by genetically modified organisms; to ensure an adequate level of protection for the safe transfer, handling and use of genetically modified organisms that may have an adverse effect on the health of the people and the environment and to establish a transparent, science-based and predictable process for reviewing and making decisions

[55] 'Foundation for The Pillars | Kenya Vision 2030' *<https://vision2030.go.ke/enablers-and-macros/>* accessed 1 May 2021.
[56] Preamble, Seeds and Plant Varieties Act, Cap 326, Laws of Kenya.
[57] Biosafety Act (No. 2 of 2009), Laws of Kenya.

on the transfer, handling and use of genetically modified organisms and related activities.[58]

2.16. Environmental Management and Co-Ordination (Conservation of Biological Diversity and Resources, And Access to Genetic Resources and Benefits Sharing) Regulations, 2006

The *Environmental Management and Co-Ordination (Conservation of Biological Diversity and Resources, And Access to Genetic Resources and Benefits Sharing) Regulations, 2006*[59] are to apply to access to genetic resources or parts of genetic resources, whether naturally occurring or naturalised, including genetic resources bred for or intended for commercial purposes within Kenya or for export, whether in in-situ conditions or ex-situ conditions.[60] The Regulations shall, however, not apply to- the exchange of genetic resources, their derivative products, or the intangible components associated with them, carried out by members of any local Kenyan community amongst themselves and for their own consumption; access to genetic resources derived from plant breeders in accordance with the Seeds and Plant Varieties Act, Cap 326; human genetic resources; and approved research activities intended for educational purposes within recognized

[58] See also United Nations, *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*, Montreal, 29 January 2000, United Nations, *Treaty Series*, vol. 2226, p. 208. Article 1 thereof outlines the objective of the Protocol as follows:

> *In accordance with the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development, the objective of this Protocol is to contribute to ensuring an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health, and specifically focusing on transboundary movements.*

[59] Environmental Management and Co-Ordination (Conservation of Biological Diversity and Resources, and Access to Genetic Resources and Benefits Sharing) Regulations, Legal Notice No. 160 of 2006, Laws of Kenya.

[60] 'National Environment Management Authority (NEMA) - Biodiversity Regulations' *<https://www.nema.go.ke/index.php?option=com_content&view=article&id=30&Itemid=170>* accessed 3 June 202.

Kenyan academic and research institutions, which are governed by relevant intellectual property laws.[61]

The Regulations require Environmental Impact Assessment for activities that may: have an adverse impact on any ecosystem; lead to the introduction of any exotic species; or lead to unsustainable use of natural resources.[62] The Regulations also require the National Environment Management Authority (NEMA), in consultation with the relevant lead agencies, to impose bans, restrictions or similar measures on the access and use of any threatened species in order to ensure its regeneration and maximum sustainable yield as a way to conserve threatened species.[63] NEMA is also tasked with, in consultation with the relevant lead agencies, to identity and prepare an inventory of biological diversity of Kenya, which should include threatened, endangered, or rare species.[64]

2.17. Kenya Plant Health Inspectorate Service Act, 2012

The Kenya Plant Health Inspectorate Service Act[65] is an Act of Parliament to establish the Kenya Plant Health Inspectorate Service as a regulatory body for the protection of plants, seeds and plant varieties and agricultural produce, to be responsible for administering several other written laws and for matters incidental thereto or connected therewith.

3. Challenges in Biodiversity Mainstreaming for Food and Nutrition Security

Food security is threatened by interacting changes in biodiversity and its inherent biophysical structures and processes with changes in biodiversity and its inherent biophysical structures and processes, as has been correctly pointed out. Thus, solutions for reconciling biodiversity and food security

[61] Environmental Management and Co-Ordination (Conservation of Biological Diversity and Resources, and Access to Genetic Resources and Benefits Sharing) Regulations, 2006, sec. 3.
[62] *Ibid*, Regulation 4(1).
[63] *Ibid*, Regulation 5.
[64] *Ibid*, Regulation 6.
[65] Kenya Plant Health Inspectorate Service Act, No. 54 of 2012, Laws of Kenya.

require more than just controlling the environmental footprint of food production.[66]

Biodiversity conservation in developing countries is affected by several challenges which include, *inter alia*, slow economic development, high levels of poverty, unequal land distribution, a highly segmented society, high population increase as well as commercial interests in natural resource extraction. [67] Kenya's National Environment Management Authority (NEMA) highlights *drivers of biodiversity loss* as including *both direct and indirect causes* where direct threat includes land use change, habitat destruction, and introduction of invasive alien species, among others, while indirect threats are economic system and policy of the country; unsustainable exploitation of resources and weak management system; gaps in spatial information, and lack of public awareness, to mention but a few (Emphasis added).[68]

This is also highlighted in the country's Sixth national report to the Convention on Biological Diversity[69] dated January 2021 which points out that 'while the Government of Kenya has been making efforts towards biodiversity conservation, land degradation and ecosystem destruction are still witnessed through increasing siltation of water bodies and rivers, waste management, air and water pollution in most of our urban centers mostly due to rapid population growth and urbanization. [70] Efforts to improve the management and conservation of environment and natural resources are affected by impacts of climate change, increasing population, as well as

[66] Cramer, W., Egea, E., Fischer, J., Lux, A., Salles, J.M., Settele, J. and Tichit, M., 'Biodiversity and Food Security: From Trade-Offs to Synergies' (2017) 5 Regional Environmental Change 1257, at 1258.

[67] Regina Birner and others, 'Prospects and Challenges for Biodiversity Conservation in Guatemala' [2005] Valuation and Conservation of Biodiversity: Interdisciplinary Perspectives on the Convention on Biological Diversity 285.

[68] NEMA, 'Threats to Biodiversity – Biodiversity Clearing House Mechanism' <*http://meas.nema.go.ke/cbdchm/major-threats/*> accessed 31 July 2021.

[69] Government of the Republic of Kenya, *Kenya Sixth national report to the Convention on Biological Diversity*, Ministry of Environment and Forestry, 2020 < *www.environment.go.ke/wp-content/uploads/2021/01/FINAL-REPORT-MOEF-CBD-SIXTH-NATIONAL-REPORT-January-2021.docx*> accessed 31 July 2021.

[70] *Ibid*, p. 15.

expansion of agriculture and settlements into fragile and water towers ecosystems.[71]

It is, therefore, arguable that unless these challenges are addressed, any efforts towards sustainable use of environmental resources for biodiversity conservation will remain a mirage.

4. Promoting Biodiversity Mainstreaming for Food and Nutrition Security

Biodiversity mainstreaming is defined as ensuring that biodiversity and the services it offers are correctly and adequately included into policies and practices that rely on and affect it.[72]

4.1. Adoption of Climate-Smart Agriculture

Plant productivity varies due to variances in inherent soil fertility, climate and weather, and chemical inputs and agricultural methods, resulting in patterns of biological diversity linked to the agricultural component of economic productivity.[73]

One of the ways of promoting food security in the face of climate change is adoption of climate smart agriculture. FAO defines Climate-Smart Agriculture (CSA) as an approach that helps to guide actions needed to transform and reorient agricultural systems to effectively support development and ensure food security in a changing climate.[74] CSA aims to tackle three main objectives: sustainably increasing agricultural productivity and incomes; adapting and building resilience to climate change; and reducing and/or removing greenhouse gas emissions, where possible. CSA is an approach for developing agricultural strategies to secure sustainable

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[71] *Ibid*, p. 15.
[72] Unit B, 'Biodiversity Mainstreaming' (16 November 2021) <*https://www.cbd.int/mainstreaming/*> accessed 21 December 2021.
[73] Michael Huston, 'Biological Diversity, Soils, and Economics' (1993) 262 Science 1676 <https://www.science.org/doi/abs/10.1126/science.262.5140.1676> accessed 21 December 2021.
[74] 'Climate-Smart Agriculture | Food and Agriculture Organization of the United Nations' <*http://www.fao.org/climate-smart-agriculture/en/*> accessed 7 June 2021.

food security under climate change. CSA provides the means to help stakeholders from local to national and international levels identify agricultural strategies suitable to their local conditions.[75]

4.2. Protection of Pollinators

Pollinators are an important part of the food supply chain and must be protected. Climate change, according to experts, will have a significant impact on insects' physiology (how they live and reproduce), behavior, and morphological characteristics, as well as their connections with other species (like host plants and natural enemies).[76] As a result, huge changes in insect population dynamics, abundance, and geographic distribution are expected. In terms of vulnerability to insect-transmitted diseases and availability of key services supplied by insects such as pollination and pest regulation, these changes will have both beneficial and negative consequences for people, livestock, and crops.[77] Thus, this must form part of the wider debate in the quest for food and nutrition security.

4.3. Embracing Production and Consumption of Traditional and Indigenous Food Varieties

To face the problem of feeding the world's population of about nine billion people by 2050, it has been suggested that we should consider not just producing enough food responsibly, but also working toward diverse nutrition, which implies providing a good diet for everyone.[78] Traditional dietary patterns are being phased out, which is having significant nutritional effects for rural Indigenous peoples, who are already suffering from nutritional deficiencies and excesses. Traditional food consumption and

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[75] FAO, "Climate-Smart Agriculture," available at *http://www.fao.org/climate-smart-agriculture/en/*

[76] 'Insects and Climate Change | Icipe - International Centre of Insect Physiology and Ecology' <*http://www.icipe.org/news/insects-and-climate-change*> accessed 7 June 2021.

[77] International Centre of Insect Physiology and Ecology *(icipe), 'Insects and Climate Change,'* available at http://www.icipe.org/news/insects-and-climate-change Accessed on 6/06/2021.

[78] 'New Agricultural Biodiversity Project to Improve Nutrition and Food Security Worldwide | GEF' <*https://www.thegef.org/newsroom/press-releases/new-agricultural-biodiversity-project-improve-nutrition-and-food-security*> accessed 21 December 2021.

production practices can help to increase nutritional security by smoothing out dietary transitions, supplying nutrients, and increasing agricultural resilience.[79] Traditional agriculture practices assist healthy ecosystems by restoring biodiversity.[80]

Native foods are thought to have untapped potential to help the 26% of Kenyan children who suffer from chronic undernutrition (which impairs development and growth), as well as the 4.1 percent who are overweight or obese, mostly in urban areas.[81] A lack of established market channels, poor agronomic practices, and limited information about the production, consumption, and marketing of traditional plants have also been reported as hurdles to increasing nutrition status, food security, and overall wellbeing in Kenyan families.[82] As a result, a grassroots strategy is required in Kenya, where stakeholders can perform cooperative plant research and coordinate school, policymaker, and farmer meetings in order to boost productivity and establish an enabling policy and market environment for underutilized crops.[83]

Projects like the Biodiversity for Food and Nutrition Project, which is funded by the Global Environment Facility and led by the UN Environment Programme and the UN Food and Agriculture Organization, are taking steps in the right direction to promote traditional foods in Kenyan homes and schools, and they should be supported and expanded especially within the rural areas.[84]

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[79] Deaconu, A., Mercille, G. and Batal, M., 'Promoting Traditional Foods for Human and Environmental Health: Lessons from Agroecology and Indigenous Communities in Ecuador' (2021) 7 BMC Nutrition 1.
[80] Ibid.
[81] Beltrame, D., Gee, E., Guner, B., Lauridsen, N., Samarasinghe, W.L.G., Wasike, V., Hunter, D. and Borelli, T., 'Mainstreaming Biodiversity for Food and Nutrition into Policies and Practices: Methodologies and Lessons Learned from Four Countries' (2019) 29 ANADOLU Ege Tarımsal Araştırma Enstitüsü Dergisi 25, at 29.
[82] Ibid, 29.
[83] Ibid, 29.
[84] 'Root Vegetables: Kenyan Schools Embrace Indigenous Foods' (UNEP, 18 November 2020) <*http://www.unep.org/news-and-stories/story/root-vegetables-kenyan-schools-embrace-indigenous-foods*> accessed 21 December 2021; see also

4.4. Promoting Biological Pest Control Approaches

Biological control is a part of a comprehensive pest management plan. It is described as the use of natural enemies to reduce pest populations, and it usually involves human involvement.[85] In terms of the quantity of species and agricultural uses, agricultural habitats and landscapes serve as a diversity reservoir (pollination, recycling of organic matter, amongst others). Agricultural intensification, on the other hand, puts this variety in jeopardy.[86] The use of mineral fertilisers and synthetic pesticides, as well as the "simplification" of agricultural landscapes due to a decline in the diversity of production systems, are said to have contributed to an increase in cultivated area productivity.[87] Agricultural intensification has thus been cited as one of the key drivers of global biodiversity decrease, despite the fact that it has helped humanity to feed a growing global population.[88]

Mineral fertilizers and pesticides can degrade habitat quality at the local-field level, while the conversion of perennial habitats (grassland) to arable fields, as well as the destruction of field boundaries and hedges, results in the loss of semi-natural habitats and simplification at the landscape level, including changes in the distribution and supply of resources for many species and the food webs that depend on them.[89] Biodiversity is valued at

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'New Agricultural Biodiversity Project to Improve Nutrition and Food Security Worldwide | GEF' <*https://www.thegef.org/newsroom/press-releases/new-agricultural-biodiversity-project-improve-nutrition-and-food-security*> accessed 21 December 2021.

[85] 'What Is Biological Control?' <*https://biocontrol.entomology.cornell.edu/what.php*> accessed 21 December 2021.

[86] 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.1.

[87] Ibid, p.2.

[88] 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.

[89] 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.

all scales of the agricultural landscape, from soil bacteria that assist cycle nutrients and decompose organic matter, to wasps and bats that help decrease crop pests, to birds and insects that pollinate high-value crops.[90] Not only does maintaining biodiversity aid crop productivity, but many organisms and species have evolved to rely on specific agricultural environments for their very survival. Agriculture, in other words, both supports and is supported by biodiversity preservation.[91] To this end, biological pest control in arable fields is a vital ecosystem service given by high-diversity landscapes and species-rich enemy populations, but it is vulnerable to agricultural intensification.[92]

5. Conclusion

Law and regulations are key tools in the conservation of environmental and biological resources because they define rights and responsibilities and function as a deterrent to individuals who would engage in actions that harm these resources.[93] The law establishes the required framework within which all stakeholders can collaborate in the conservation of natural resources, both for the sake of the environment and to meet human needs. The international and regional legal instruments on biodiversity conservation recognize biodiversity's potential to aid in the achievement of various Sustainable

[90] GRACE Communications Foundation, Biodiversity, available at *http://www.sustainabletable.org/268/biodiversity*.

[91] Ibid.

[92] 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.

[93] Richardson BJ and Wood S, 'Environmental Law for Sustainability'; Prip C, 'The Convention on Biological Diversity as a Legal Framework for Safeguarding Ecosystem Services' (2018) 29 Ecosystem Services 199; Van Dyke F (ed), 'The Legal Foundations of Conservation Biology', *Conservation Biology: Foundations, Concepts, Applications* (Springer Netherlands 2008) <https://doi.org/10.1007/978-1-4020-6891-1_3> accessed 15 September 2021; Fischer F, 'The Importance of Law Enforcement for Protected Areas: Don't Step Back! Be Honest - Protect!' (2008) 17 GAIA - Ecological Perspectives for Science and Society 101; McDonald, J., McCormack, P.C., Dunlop, M., Farrier, D., Feehely, J., Gilfedder, L., Hobday, A.J. and Reside, A.E., 'Adaptation Pathways for Conservation Law and Policy' (2019) 10 Wiley Interdisciplinary Reviews: Climate Change e555; de Klemm, C. and Shine, C. (1993), *Biological Diversity Conservation and the Law*, IUCN, Gland, Switzerland and Cambridge, UK. xix + 292 pp.

Development Goals (SDGs), particularly those related to food systems, as it is clear that global food production improvements are failing to meet human nutrition needs and feed the planet in a healthy, sustainable, and environmentally friendly manner.[94]

This paper explored ways in which countries can embark on mainstreaming biodiversity conservation issues as part of their response to food and nutrition security challenges. The preservation of biodiversity is a prerequisite for attaining long-term development. As a result, it must be mainstreamed into all sectors and across sectors.[95]

Dietary diversity, which is based on a variety of farming techniques, results in better nutrition and health, as well as benefits to human productivity and livelihoods.[96] It is imperative that the focus on food security also shifts to biodiversity conservation and exploring the link between the two areas as part of enhancing the mutual benefits that arise from this approach. Biodiversity is mainstreamed to ensure that meeting development demands and safeguarding the environment are not mutually exclusive, but that development is accompanied by the sustainable use of natural resources.[97]

Investing in research and innovation as well as diversification and embracing traditional foods for enhancing dietary needs of communities in Kenya are bold steps that would move the country closer to achieving SDGs on food

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[94] Beltrame, D., Gee, E., Guner, B., Lauridsen, N., Samarasinghe, W.L.G., Wasike, V., Hunter, D. and Borelli, T., 'Mainstreaming Biodiversity for Food and Nutrition into Policies and Practices: Methodologies and Lessons Learned from Four Countries' (2019) 29 ANADOLU Ege Tarımsal Araştırma Enstitüsü Dergisi 25, at 25.

[95] 'Mainstreaming Biodiversity' (*IUCN*, 8 February 2016) <*https://www.iucn.org/theme/global-policy/our-work/mainstreaming-biodiversity*> accessed 21 December 2021.

[96] 'New Agricultural Biodiversity Project to Improve Nutrition and Food Security Worldwide | GEF' <*https://www.thegef.org/newsroom/press-releases/new-agricultural-biodiversity-project-improve-nutrition-and-food-security*> accessed 21 December 2021.

[97] 'Mainstreaming Biodiversity' (*SANBI*) <*https://www.sanbi.org/biodiversity/science-into-policy-action/mainstreaming-biodiversity/*> accessed 21 December 2021.

and nutritional security as well as biodiversity conservation for the sake of present and future generations.

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Law History and Politics in Developing Societies: A Comparative Analysis of Constitution Making Process in Australia and United Arab Emirate

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Abstract

Comparative politics is one of the most dynamic and deeper ways of understanding politics. Some new perspectives are gleaned from the exercise of comparing two States. Politics deal with the issue of how societies decide to organize themselves. Some of the practices will be housed in a document such as a constitution. Constitutions are not made in a vacuum. They are made to either alter, define or redefine the existing societal organization. It is very important to study the process leading to the creation of a constitution. One of the best tools for understanding constitution making process is studying comparative politics from two States. Such a study makes such a scholar more adept with the philosophy history and politics of any clause contained in a constitution. This is such an enriching exercise since a healthier understanding of different political practices and processes are inescapable. This paper seeks to compare the politics surrounding the constitution making in Australia and United Arab Emirates. The paper will consider the claims made as to how these two States came up, how they manage their politics, mainly as contained in their respective Constitution making process and political practices. The paper will begin by bringing out the uniqueness of each State then bring out the similarities. At the end it is hoped that it will illuminate the reader's attention to benefit of a comparative political study.

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Introduction

All the way from the classical period it is evident that comparative politics was being carried out. Harry Eckstein[1] claims that Aristotle's thoughts pointed toward the direction of comparative politics which was later developed by Machiavelli, Montesquieu, Hobbes and Smith as progenitors. Mark Irvin Lichback et al[2] argue that to study comparative politics three dimensions are important. These are rationality in decision making, culture and structure. The suggestion is that with these dimensions, one can analyze the different political systems and gainfully compare two different States. Joel Migdal[3] argues that the make-up of state is comprised of both ideas of the enlightenment and a response to modern day capitalism. To explain the State, one would have to consider the cultural perspective. With this approach it becomes clear that the State is a complex organization that is pulled in different directions with culture as a glue that made the state stick together[4]. From the structural perspective Midgal[5] argues that the States crack due to financial emergency, severe elite division and political and propensity for popular groups to mobilize themselves. The rationalist perspective argues that politicians hold certain preferences that establish consciously and not simple random acts. These perspectives will be employed in analyzing, comparing, and explaining the context of constitution making in the Australia and UAE.

Political Systems in Australia

a) Australia's Demography

The Commonwealth of Australia is located on approximately land mass of 7,692,024 square kilometers (approximately 2,696,907 square miles).

[1] Harry Eckstein " A perspective on Comparative Politics, Past and Present" in Harry Eckstein and David E Apter Eds, *Comparative Politics; A Reader.* New York: The Free Press of Gleoncoe. 1963
[2] Mark Irving Lichbach and Alan S Zuckerman *Comparative Politics; Rationality, Culture and Structure*. Cambridge University Press 1997
[3] Ibid pp 208- 231
[4] Mark Irving Lichbach and Alan S Zuckerman *Comparative Politics; Rationality, Culture and Structure*. Cambridge University Press 1997
[5] Ibid

Approximately 39% of the land mass lies on the tropics. The distance occupied by Australia from East to West is approximately 3,782 Kilometers[6]. The climatic condition is more tropical with variations from different parts of the commonwealth. It is a relatively fertile land in terms of the soil and land use. Majority of the population is considered to be European even though there has been migration from Asia since 1970s[7]. Agriculture is one of the main sources of export for Australia. Mining of gold[8], iron ore[9], black coal[10] and bauxite among other minerals form part of Australia's economic power[11]. As at 2012 mining activities contributed to 8.4% of the Gross Domestic Product (GDP)[12]. Most of the products that are mined are exported to Japan and South Korea. Although Australia has petroleum resources, it still needs to import about one-third of its domestic oil and petroleum needs.

b) Australia's Medieval History

One of the most contested aspects in terms of Australia's history is the origin of group called the Aborigines. One school of thought suggests they are among the first group of people to leave Africa in search of new lands between 49 to 65 thousand years ago[13]. Another school of thought suggest that human settlement in Australia began about 40 thousand years ago. This school argues that the Aborigines from India and China through the Timor Sea[14]. Another school of thought insist that the first Australians would have sailed through Southeast Asia since sailing was difficult everywhere else due to sea levels that were a lot low[15]. Yet another school of thought suggests that the Aboriginal are related to indigenous population of New Guinean.

[6] Juliet Love, "*The Far East and Australia 2013"* 44th Ed, Routledge, Taylor and Francis Group London and New York, 2012. pp. 69
[7] Ibid
[8] Approximately 240 metric tons as at 2009/10
[9] Approximately 423,393 metric tons as at 2009/10
[10] Approximately 471,089 metric tons as at 2009/10.
[11] Ibid
[12] Ibid pp. 88
[13] Hans Villarica *"Aborigines: The First Out of Africa, the First in Asia and Australia"* (2011)
[14] Stuart Macintyre, "*The Far East and Australia 2013"* 44th Ed, Routledge, Taylor and Francis Group London and New York, 2012. pp. 69
[15] Ibid

Some DNA can be traced from New Guinean. Aboriginals are diverse with different customs and traditions. They could also be traced from India. From the literature reviewed thus far, it appears that there is no consensus on their origin.

Most scholars however are in agreement that on arrival in Australia, the Aborigines had to adapt to the environmental conditions. Also, there is general agreement that they engaged in agriculture as their main economic activity. There is also agreement that at independence the Aborigines were excluded from the right to citizenship and also denied right to vote[16]. In addition, they were largely and deliberately ignored in the Constitution making. The Commonwealth of Australia Constitution Act provided that they should not be counted[17]. One of the arguments has been that the Aborigines contestations with the British over its occupation placed them in an awkward position[18]. William Cooper, an Aboriginal leader sought to enforce the initiative by King George V for Aboriginal people to be represented in Parliament[19]. The study of the Aborigines is an ongoing concern due to the neglect by the colonial government and successive regimes[20].

[16] The Commonwealth Franchise Act of 1902.

[17] Article 127 provides that *"In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted".*

[18]In a commentary on the Constitution it is argued that the first century and a half of British-Aboriginal relations in Australia can be characterized as a period of dispossession, physical ill-treatment, social disruption, population decline, economic exploitation, discrimination, and cultural devastation. For the Aboriginal people, this was a period of dispossession from their homelands followed by dispossession from family, culture and life as they knew it. https://aiatsis.gov.au/exhibitions/aboriginal-natives-shall-not-be-counted Seen on 25th November 2019 at 7.07pm

[19] Jessa Rogers; "Photostory and Relatedness Methodology: the Beginning of an Aboriginal–Kanaka Maoli Research Journey (part two)" *Australian Aboriginal Studies Journal* Australian Aboriginal Studies (2019) Issue 1,

[20] Ibid

c) Colonial Period

The Portuguese may have visited Australia shores as early as sixteenth century[21]. In the seventeenth century the Dutch governor general of East Indies Anthony Van Demien authorized an expeditious that pieced together the map outline of the continent[22]. This continent at that time was called New Holland. The Dutch did not become the colonizers because they thought the continent was apparently barren. The British adventurer William Dampier had explored some of the Northwest Australia coast around 1688 and concurred with earlier assessment of the Dutch[23]. Sometime in August 1786 the London Gazette published that *"Adventure in the South Pacific LT Cook Set Sail n endeavor Bark"* to observe the transit over at Tahiti in search of unchartered waters[24]. Stuart argues that it is this voyage that led the British to declare sovereignty over Australia Continent in 1770[25]. This British flag was hoisted in Australia by James Cook the world's greatest explorer of the time which in effect declared the territory to belong to King George III[26].

Several claims have been made as to the exact interest of the British. Charles de Brosse for instance suggested that New Holland could be used for placement of foundlings, vagabonds, paupers and criminals[27]. This was not to be a farfetched idea after all. In 1786 Captain Arthur Philips received a command from the British Government to establish and govern the colony of New South Wales as a penal settlement[28]. On 22nd January 1788 the New

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[21] Stuart Macintyre, "*The Far East and Australia 2013"* 44th Ed, Routledge, Taylor and Francis Group London and New York, 2012. pp. 70
[22] Charles De Brosse *History of Navigation to Southern Lands* (1975)
[23] Stuart Macintyre, "*The Far East and Australia 2013"* 44th Ed, Routledge, Taylor and Francis Group London and New York, 2012. pp. 70
[24] *https://upload.wikimedia.org/wikipedia/commons/5/52/DIEU_ET_MON_DROIT_._On_heraldic_shield_of_the_LONDON_GAZETTE_Monday_August_26%2C_1768_-_Fitzroy_Gardens_Melbourne_AU_29_Oct2010_sRGB_web.jpg* Document viewed on Monday 25th November 2019 at 7.20 pm
[25] Stuart Macintyre, "*The Far East and Australia 2013"* 44th Ed, Routledge, Taylor and Francis Group London and New York, 2012. pp. 70
[26] Alan Atkinson Conquest, in the Australia's Empire Schreuder D.M (2008), Oxford University Press, New York
[27] Charles De Brosse *History of Navigation to Southern Lands* (1975)
[28] Ibid

South Wales was proclaimed a Crown Colony of the British Monarch by King George III. Some claim that this was not possible because King George had mental frailty on the same year. However, this is countered by the fact that the centenary of the glorious revolution was in this same year[29]. The cost of war with France of independence with the former colony America left Britain with no dumping ground for convicted felons in addition to the prospects of flax and timber for naval supplies. This led to the creation of New Holland as a dumping ground for convicts[30]. Stuart also argues that at the end of the Napoleonic Wars in 1815 an increased number of convicts who were sent to new mainland In Western Australia and Southern Australia.

This seems to be the predominant argument about the appalling strength of British Civilization and the strength of the people appeared to have clung to the faith and the very raiment of the giant according to Adam Smith[31]. There is a suggestion that with this foundation the British Empire needed to take two approaches. On the one hand an authoritarian government which ensured domination by the colonial office and on the other hand a more liberal approach as proposed by Adam Smith[32]. These two approaches were to later present themselves in the Political activities. Since Australia was established for penal purposes, an authoritarian government was firmly established. For instance, it is claimed that there was a gulf that separated the elite on the one hand and the population of exiled prisoners as well as indigenous inhabitants on the other hand[33]. Due to the brevity of time this paper will accept that the Australia was established as a penal colony of Britain.

The economic activity that escalated the British scramble for Australia was the Victorian gold rush which had coincided with claims from the

[29] Brian Gillian et al *Australia and Globalization; The experience of two Centuries (2001)* Cambridge University Press
[30] Stuart Macintyre, "*The Far East and Australia 2013"* 44th Ed, Routledge, Taylor and Francis Group London and New York, 2012. pp. 71
[31] Adam F (1886) *Australian Essay.* Melbourne W. Inglis
[32] Brian Gillian et al *Australia and Globalization; The experience of two Centuries (2001)* Cambridge University Press
[33] Ibid

Australians for self-rule and demands for greater consultations[34]. There was a rapid influx of newcomers and the population of non-aboriginals increased. This increase led to competition for the minerals available. The British were slowly losing control over the vast lands that were being occupied by pastoralist[35]. Stephen Roberts argues that the British attempted to make a virtue out of the loss of local control by introducing mining license and license agents[36]. This was to later appear in the Commonwealth Constitution of Australia under Article 91[37]. This was a prohibition from continuous looting of the scarce minerals as illustrated in this background.

The debates between Karl Marx and Max Weber on the cause of class struggle presented itself in Australia as well. There was a growth in urban concentration as a consequence of the prohibition on land occupation and ownership. For instance the Victorian Capital Melbourne expanded to about 420,000 inhabitants, Sidney 360,000, Adelaide 115,000, and Brisbane 86,000[38]. This led to the decrease in the cost of production of goods for exports. Consequently the labor force that was available began formation of union among workers among the pastoralist, mining and transport sector[39].

The workers unions advanced ideas such as lock outs and strikes which the colonial government responded to by supporting volunteer labor which would be protected by the volunteer militia. Unfortunately these strikes led to the decline of the economy[40]. This gave rise to the labor movements and subsequently the founding national party called the National Labor Party.

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[34] Stuart Macintyre, "*The Far East and Australia 2013"* 44th Ed, Routledge, Taylor and Francis Group London and New York, 2012. pp. 73
[35] Ibid
[36] Stephen H. Roberts, *History of Australian Land Settlement, 1788-1920* (1924) Melbourne
[37]Article 91 provides "Nothing in this Constitution prohibits a State from granting any aid to or bounty on mining for gold, silver, or other metals, nor from granting, with the consent of both Houses of the Parliament of the Commonwealth expressed by resolution, any aid to or bounty on the production or export of goods".
[38] Stuart Macintyre, "*The Far East and Australia 2013"* 44th Ed, Routledge, Taylor and Francis Group London and New York, 2012. pp. 73
[39] Ibid
[40] Stuart Macintyre, "*The Far East and Australia 2013"*

The main idea was to ensure that the colonies would come together to take responsibility for defense and external affairs[41]. A meeting was held in Melbourne led by a colonial statesman Sir Henry Parkes the premier of New South Wales with a view to consolidate defense forces. Out of this meeting a push for federation was birthed and it would be captured in the Commonwealth Constitution Act in the preamble[42].

d) Australia's Independence

Australia's colonies began to gained self-governance around1850s. All the self-governing colonies had constitutional documents setting out the broad details and legislative powers of their popular assemblies[43]. Authority rested with the imperial government through mainly the settlers who had arrived in Australia. However, governors were empowered to make regulations for the colonies. Since the governors had powers, there was a rising feeling that the governors wielded more powers. This led to the establishment of the legislative council. For instance, in New South Wales in 1823 the legislative council was established[44]. This council established a bicameral legislature which was inaugurated by the 1855 Constitution Act.

The government institutions of the commonwealth grew out of debates and constitutional conferences that took place in the 1890s[45]. The series of conventions held during this period were attended by representatives of the colonies. Before the Constitution came into effect, its terms were largely approved, by the people of New South Wales, Victoria, Queensland, Western Australia, South Australia, and Tasmania. Leading politicians participated in the drafting of the constitution and for most colonies delegates were elected

[41] Ibid
[42] The Preamble provides that WHEREAS the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:
[43] Ibid
[44] Hawker, Geoffrey *The Parliament of New South Wales 1856-1965* Ultimo NSW, Government Printers (1971)
[45] The Australian Constitution

to participate in the process. The draft constitution was adopted after a popular referendum before being sent to London for formal ratification by the Westminster parliament[46]. The Australian nation-state was constructed through deliberative political process of consensus building negotiations and institutional design that required both political and popular support. This led to the formation of a federal government. The federation was built upon a popular nationalist sentiment evident in local communities from the 1870 that reached the heights in 1888 which was the anniversary of the centenary of British colonization[47].

Internal Arrangement in Australia

a) New South Wales.

New South Wales is claimed to be the premier state[48]. It was the governing colony. There are several dimensions that make it the premier state. Firstly, it is argued to be the convict settlement which defined it as the original state. It has the old wealth from the rich historical underpinnings and the new wealth is ostentatiously displayed in its architecture[49]. Secondly it is the largest population and the greatest wealth. Thirdly, its proximity to the center and has the highest representation. Lastly part of its dominance is the policy processes which is more innovative that other states within the commonwealth[50]. At the start of the twentieth century the position of New South Wales as the most populous and wealthy state seems assured. This has been maintained by way of accidental events as well as by design. It has sometimes been the leader in certain matters as well as a follower of others depending on the debate. The extent to which New South Wales remains a

[46] Ibid
[47] Brian Gillian et al *Australia and Globalization; The experience of two Centuries (2001)* Cambridge University Press pp 62
[48] Rodney Smith. *New South Wales:* in Jeremy Moon and Campbell Sharman, Australian Politics and Government The commonwealth, The States and The Territories, Cambridge University Press, (2003) pp 41-73
[49] Hirst, John *The Strange Birth of Colonial Democracy; New South Wales 1848-1884,* Sidney: Allen & Unwin (1988)
[50] Hughes Colin A *The Proliferation of Portfolios, Australian Journal of Administration (1984) Ppp 257-74*

Labor state under question[51]. There is a claim that at the time of taking possession of Australia the principle of *terra nullius* in international law is used to permit occupation. This was important for the British so that they could declare that Australia did not have occupants i.e. the Aborigines.

b) Queensland

Queensland is located on the Northeastern side of Australia and was initially part of the New South Wales. There was a contentious separation of the State of Queensland from New South Wales. Initially it was referred to as East Coast of Australia. In 1859 after several debates the colony was declared independent from New South Wales[52]. Queensland is a vegetation rich area with attractive transport as a result of the internal transportation of convicts that ended in 1842. Under the self-government rule in 1859 Queensland was administered under an Order in Council issued from New South Wales. The Governor was empowered to make laws for peace, welfare and good governance of the colony. Queensland passed its own Constitution Act albeit in the form of conventional British colonial Constitution[53].

c) South Australia

South Australia capital is the city of Adelaide. It was not populated and was economically disadvantaged due to lack of minerals. The colonial beginning in 1836 projected a penal model which was the foundation for its administration. When self-governance was granted in 1856, it was claimed to be the most democratic pioneering state in the British Empire[54]. The

[51] Rodney Smith. *New South Wales:* in Jeremy Moon and Campbell Sharman, Australian Politics and Government The commonwealth, The States and The Territories, Cambridge University Press, (2003)
[52] John Wanna. *Queensland:* in Jeremy Moon and Campbell Sharman, Australian Politics and Government The commonwealth, The States and The Territories, Cambridge University Press, (2003) pp 74-103
[53] John Wanna. *Queensland:* in Jeremy Moon and Campbell Sharman, Australian Politics and Government The commonwealth, The States and The Territories, Cambridge University Press, (2003) pp 41-73
[54] Howell P,A. *South Australia, Federalism and the 1890s; The Making of a Federation* In Andrew Parkin (ed) *South Australia, Federalism and Public Policy.* Canberra Federalism Research Center, Australian National University (1996)

political leaders were some of the leading contributors to the thinking that brought about federal movement in 1890s. South Australia was a unique colony since it was founded on a parliamentary statute as opposed to the Constitution. Authority was divided between the governor who was responsible for general government and Colonization Committee. This committee was responsible for land distribution, town planning and migration. During the period of self-governance South Australia had a bicameral parliament. The labor party was the dominant party in South Australia.

d) Tasmania

Tasmania was founded as a convict settlement island in 1803. It was initially referred to as Van Diemen's Land after the first Dutch explorer who landed on the Island. Following the abolition of transportation of convicts in New South Wales, Tasmania became the destination for the convicts[55]. This was seen as the most isolated prison on earth. The movie the "last confession of Alexander Pierce" depicts the situation of the prisoners at Tasmania. It is based on a true story of Alexander Peirce who is said to have escaped prison several times and became a cannibal in the process. What was also interesting is that the prisoners who concluded their prison term opted to go to Victoria colony to the surprise of those at Melbourne in New South Wales State[56]. This was more so during the discovery of gold at Victoria. Like other Colonies Tasmania had its own constitution during the declaration of self-rule.

e) Victoria

Victoria was a colony found in Southeastern part of Australia and was at the time the smallest State in size all through Australia. It was named after Queen Victoria the same way Queensland was named after the Queen[57]. Initially it

[55] Aynsley Kellow *Tasmani* in Jeremy Moon and Campbell Sharman, Australian Politics and Government The commonwealth, The States and The Territories, Cambridge University Press, (2003) pp 131-153
[56] Aynsley Kellow *Tasmani*
[57] Gray Presland, *The First Residents of Melbourne's Western Region* (revised edition), (1997). Harriland Press,

formed part of the greater New South Wales colony. It is said to be the home of the Aboriginal people who lived a semi-nomadic life of fishing, hunting, gathering, and farming eels in Victoria[58]. The discovery of gold made it more prominent and attractive to many people. This is what is referred to as the gold rush[59]. It has been argued that this is the best display of the injustice occasioned to the Aborigines since they were the initial natives of Victoria. With Melbourne as its capital Victoria was to become the main hub for several activities in Australia. The new Commonwealth Parliament, federal administrative agencies, security and intelligence organizations and the Australian Industrial Relations Commission are all located in Victoria. Melbourne is argued to be the home of protectionism as a way of encouraging manufacturing, industrial growth and national economic development[60]. It would be expected that its size would determine the number of representatives to the commonwealth parliament. Surprisingly under the commonwealth constitution of Australia it was allocated 23 members[61].

f) Western Australia

It is arguably the largest colony state in terms of land mass in Australia with a total land area of 2,529,875 square kilometers (976,790 square miles). It was a support colony to the New South Wales in terms of offering convict-supported settlement[62]. Western Australia was the last colony to decide to join the federation since it was the last one to gain self-government. This was because there was a clamor by the Western Australia to recognize the

[58] Economou et al *Victoria* in Jeremy Moon and Campbell Sharman, Australian Politics and Government The commonwealth, The States and The Territories, Cambridge University Press, (2003) pp 155-181
[59] Ibid
[60] Ibid
[61] Economou et al *Victoria*
[62] Knibbs, G.H. "The Creation of the Several Colonies". *Official Year Book of the Commonwealth of Australia*. 4. Melbourne: Commonwealth Bureau of Census and Statistics. (1911). p. 16

Aboriginal population in the section 70 of their constitution[63]. The rest of the Commonwealth was not keen on this clamour. This was aimed at ensuring that the Aboriginals were able to access social welfare services. The British were not very pleased with this move. From its founding by the Dutch, West Australia has been strongly shaped by distance and isolation that other states. The population is dispersed in a few moderately sized centers and many farming communities, mining, and fishing[64].

g) Northern Territory

The process of the constitutional development of Northern territory began in 1863 when the colonial office of Great Britain vested control to South Australia[65]. In 1888 the Southern Australia government constituted the territory as a single tow-member electorate district of South Australia. With the coming of the British, there were four early attempts to settle the harsh environment of the northern coast, of which three failed in starvation and despair[66]. On 1 January 1911, a decade after federation, the Northern Territory was separated from South Australia and transferred to federal control[67].

h) Australian Capital Territory

This is the newest state in Australia. It is the smallest of the nine self-governing states in Australia. It became a state in 1989 making it a city state. Its capital Canberra has a vision of being the cleanest city in the world. Labor party politics are at the center of politics in this city. Governance is fluid, relations with other states is dynamic, and coalition building seem to be the ideals adopted for politics in this state.

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[63] Jeremy Moon and Campbell Sharman, *Western Australia* in Ed. Australian Politics and Government The commonwealth, The States and The Territories, Cambridge University Press, (2003) pp 155-181
[64] Ibid
[65] Dean Jaensch, *Nothern Territory* in Ed. Australian Politics and Government The commonwealth, The States and The Territories, Cambridge University Press, (2003) pp 155-181
[66] Ibid
[67] Ibid

Australian Constitution and System of Government

a) Prelude to Governance

From the onset it was clear that a federation was the government system to be adopted in Australia. Sir William Stawell a Victorian Governor suggested that a federation would be established before it could be proclaimed[68]. Consensus among historians suggest that the federal government making process for its day was the most democratic model of constitution making process[69]. However, others argue that some sections of the Australian population participated in the drafting of the constitution[70]. The clamor for constitution making began with the push for self-government by the locals. This was followed by the idea that interest for to self-govern would adopt the Westminster principles as early as 1850s. Previously, the colonies were managed by the colonial office in collaboration with the local administrators. This to some extent appeared effective and needed not much change. The need for a change of governance was prompted by the attempt to introduce additional convict transportation in 1840s which sparked riots across the colonies[71]. Sir John Pakington gave permission to the colonies to draw up constitution for self-government at the behest of gold diggers such as Ballarat in 1854[72]. It has been argued that this did not have any bearing on the Australians since the colonial system was already working well. The different colonies came up with their Constitutions with ease except Western Australia.

[68] Dean Jaensch, *Nothern Territory*
[69] Gilligan B *A Federal Republic: Australia Australia's Constitution system of Government Cambridge*; Cambridge University *Press (1995).* Irving, H. *To constitute a Nation: A Cultural History of Australia's Constitution* Cambridge University Press (1997). La Nauze J. A *The Making of the Australian Constitution* Melbourne University Press (1972)
[70] William, G. *Human Rights under the Australian Constitution* Melbourne; Oxford University Press (1999)
[71] Robert Hughes, The Fatal Shore: A History of the Transportation of Conflicts to Australia 1787-1868, (1987) London
[72] Schreuder D.M et al *Australia's Empire* (2008), Oxford University Press. pp143

b) Constitution Making Process

The first governments under these arrangements were largely authoritarian and autocratic. Free settlers were determined to exert their influence in the management of the territories of the colonies. The British government-maintained control over defense and external relations while the bicameral parliament controlled the internal aspects. There was relative stability in the colonies and the ideas of federation began to be floated in the mid-19th Century. This was even more poignant because of the fear of influx of Asians. As soon as the Constitution was ratified the new parliament approve a legislation that denied Asians entry into Australia to balance the interests of the British in trade in the East.

As stated earlier the constitution making process was marked by a series of activities. A federal convention was held in 1891 which produced a draft constitution[73]. This convention proposed a system of government that was relatively federal which heavily copied the American model[74]. The first draft constitution was never implemented for a number of reasons. Firstly, it lacked popular support locally. Secondly the colonial government had not found favorable support to its initiatives. Thirdly the rise of the labor movement globally and the demand locally for the removal of colonial barriers[75]. This led to the second initiative at constitution making process in 1897 and 1897. This was as a result of individuals such as Andrew Inglis Clerk the Attorney general of Tasmania, Charles Kingston of South Wales, Edmund Barton, who pushed for meetings that took place in Queen Victoria. This was arguably a better attempt since representatives from the colonies were sent to the conferences. Some colonies such as New South Wales, Queensland and West Australia did not manage to gather the required support base hence the referendum was not held in their respective

[73] Brian Gillian et al *Australia and Globalization; The experience of two Centuries (2001)* Cambridge University Press pp 62
[74] Ibid
[75] Brian Gillian et al *Australia and Globalization; The experience of two Centuries (2001)* Cambridge University Press pp 62

colonies[76]. From this conference the second constitution was proposed which was more democratic taking after the American model. The democratic character of the constitution process and the constitution itself adopted the spirit of people of Australia[77]. Compromise became the tool used to make the Australian Constitution.

c) Promulgation of a Federal Constitution

The Australian Constitution was then passed as part of a British Act of Parliament in 1900 and took effect on 1 January 1901. A British Act was necessary because before 1901 Australia was a collection of six self-governing British colonies and ultimate power over those colonies rested with the British Parliament. In reality, however, the Constitution is a document which was conceived by Australians, drafted by Australians and approved by Australians. Since that time, Australia become an independent nation.

The Constitution has been argued to have been comprehensive statement of the powers of a national government. The Commonwealth Constitution accepted almost without dispute the British system of parliamentary government. The commonwealth government had to retain majority in the House of Representatives from whom most ministers would be drawn. The prime minister would be the leader of largest party and would maintain its support. Although this cannot be found in the founding Constitution, the executive powers of the commonwealth were vested in the governor general as the agent if the monarch. The system of government was not without controversy on matters of representation in parliament. The smaller state was concerned that New South Wales and Victoria would dominate parliament. They proposed a two-tier house which was a replica of the American constitution. Since this was a hybrid model adopting American and British model it was certainly going to introduce a contradiction.

[76] Ibid
[77] Ibid

d) System of Governance under Federal Constitution

The British parliamentary system and the concept of responsible government without question would not sit in properly with a federal government with an upper house with greater power and authority than the British model[78]. There were some clauses in the Constitution that are claimed to have offered the equilibrium to these stalemates[79]. Australia adopted a system of single member electoral district for the House of Representatives with a first past the post method of election. This was to be balanced by the system of proportional representation adopted by senate in 1949. Politics in Australia are organized around the labor party and anti-labor parties. The labor party is the oldest with its existence being traced back to 1891. The conservatives have dominated the remaining part of the history of Australians independence. The judiciary was established under Section 71 of the Constitution with judicial power being vested in the Federal Supreme Court.

e) Modern Politics in Australia

From 1907, Australia was accorded the status of dominion with the British Empire. This was however not unanimous since some individuals opposed the idea of dominion and were pushing for complete autonomy[80]. During the Great War (World War 1), it was already clear that the role of foreign relations was the preserve of the federal parliamentary powers. Australia aligned itself greatly with British government and considered itself as British admiralty. There were continued internal clamor for complete autonomy until 1926 when the Statute of Westminster conceded these demands recognizing Australia as a political equal of United Kingdom[81]. Australia retained the Monarch as the head of state. The transition period between this war and the next one was marked with realignment and internal political

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[78] Galligan Brian *A Federal Republic: Australia Constitutional System of Government,* Cambridge: Cambridge University Press (1995)
[79] Paul W and Jenny F. *The Commonwealth:* in Jeremy Moon and Campbell Sharman, Australian Politics and Government The commonwealth, The States and The Territories, Cambridge University Press, (2003) pp 16-19
[80] Paul W and Jenny F. *The Commonwealth:* in Jeremy Moon and Campbell Sharman, Australian Politics and Government The commonwealth, The States and The Territories, Cambridge University Press, (2003) pp 16-19
[81] Ibid

turmoil in Australia. For the Second World War the Prime Minister Menzies confirmed that Australia would support Britain. He is said to have stated that since Britain was at war with German Australia was also at war. Australia has continued to participate in the global discourses adopting political alignments that were strategic.

United Arab Emirates

The coastline of seven United Arab Emirates extends to about 650 Kilometers (400 miles) from Oman to Qatar also known as the Arabian or Gulf Peninsula. The gulf water contains fish which informs the history of the UAE as we know it today. The climate is arid with very high temperatures. The total area is estimated to be 77,700 Square Kilometers which is small compared to Saudi Arabia and Oman. The official language is Arabic however the Arabs are outnumbered by the migrant workers.

a) Context of Studying United Arab Emirates

According to Landen Robert there are several themes that have been adopted to study United Arab Emirates. Firstly, the Trucial States and British Imperial Interests which surveys of the period of British political supremacy between 1882 and 1971. Secondly, the Internal changes which is a treatment of domestic developments within the several regional states. Thirdly, the western neighbors of the Trucial States where the focus is on a discussion of boundary negotiations between the leading emirates that is, Abu Dhabi, and Saudi Arabia. Fourthly, the relations between Britain, Persia, and the Trucial States. Fifthly, the Britain, Muscat, and the Trucial State Boundaries. Lastly the boundary questions and naturally, presented from a pro-Emirates (and British) point of view. This appears to be an emphasis on the chronology, political occurrences, frontier disputes, and the role of Abu Dhabi in regional affairs[82]. This was going to play a significant role on UAE going forward and more significantly on the control of Britain. For the sake of comparison with Australia, this paper will focus on the constitution making politics around the formation of the federation known as United Arab Emirates.

[82] Landen, Robert G. "Muhammad Morsy Abdullah, *The United Arab Emirates: A Modern History* (London: Croom Helm, and New York: Barnes and Noble, 1978). Pp. 365." *International Journal of Middle East Studies* 12, no. 4 (1980)

b) History of UAE

Settlement in the UAE began during the Bronze Age on the culture of Umm an Nar which was practiced in modern day Abu Dhabi[83]. In the classical period Persia and Greece were dominant influences including to Middle East. In 1498 the Portuguese arrived in the Middle East with a view to take control of the trade between Europe and Far East. They gained monopoly in the Middle East and for instance in 1506 conquered Julfa (modern day Ras al Khaimah) and thereafter built a fort[84].

Around the same time there were pirates who would attach vessels attempting to proceed to the Far East. These pirates around 1453CE were Turks who occupied the territory as an extension of the Ottoman Empire[85]. At the time the Pope had stopped trading with the East and tradesmen started to look toward India. It is claimed that Vasco Da Gama went through UAE on his way to India[86]. Around 1600 CE Qatar which was part of the greater United Arab Emirates is first mentioned as being involved in pearl trade. The Pearls were found in the ocean by fishermen. The pearl divers are now part of the native's elite because they used to dive holding their breath to get pearls. It is claimed that the fishermen who turned to be pearls men began could stay at sea for up to three months. For a long period there was the center of focus as an economic activity.

The British were interested in ensuring that they stop piracy that was occurring in the peninsula[87]. The Gulf became a protectorate of the British around mid-17th Century. This led to an invasion by the British who were interested in offering protection for purpose of ensuring that their route to trade with India was safe about 1800 CE. In 1830 CE the Turks started taxing the Qatar. Around 1873 the British were now in control of UAE as a

[83] Gerd Nonneman " The United Arab Emirates Abu Dhabi Dubai Sharjah Ras Al Khaimah Umm al-Qaiwan, Ajman Fujairah" in Lucy Dean The Middle East and North Africa 2008 (London: Routledge 2008) p 1207
[84] Ibid
[85] Landen, Robert G. "Muhammad Morsy Abdullah, *The United Arab Emirates: A Modern History*
[86] Ibid
[87] Ibid

protectorate as an outpost for their interest in the trade happening in India. There was a clash between the pirates, the British and Al Qasimi vessels introduced various challenges between the leaders in the United Arab Emirates[88]. The British made an expeditions to protect British-Indian trade and interests around Ras al-Khaimah. This led to campaigns against the harbors along the coast from1809 CE and more fiercely in1819CE[89]. The next year, 1820, a peace treaty was signed to which all the Sheikhs of the coast adhered[90]. The peace treaty did not succeed as expected. There were skirmishes, conflicts and raids by the British which continued sporadically. This continued until 1835 CE when the sheikhs agreed not to engage in hostilities at sea and Sharjah, Dubai, Ajman and Abu Dhabi signed a renewed treaty banning hostilities during the pearling season. This gave birth to the trucial states.

The historian Frauke Heard Bey[91] argues that as a result of negotiation a truce was reached in 1820. It is argued that Sheikh Saeed Bin Tahnun Al Nahyan was the Ruler of Abu Dhabi, one of the Trucial States between 1845–1855[92]. Subsequently and a number of other short treaties were made, culminating with the ten-year truce of June 1843[93]. Feeling the benefit of peaceful pearling and trade, the coastal Sheikhs from these trucial states signed the Perpetual Treaty of Maritime Peace in 1853. The peace pact enabled the emirates to continue with pearl trade which was a booming business worldwide. They gained markets in Europe, Asia and America. It was clear that in 1930 Japan came up with pearls which are claimed to be not as authentic[94]. This led to the downward spiral on pearl trade in United Arab

[88]Charles E. Davies The Blood-red Arab Flag: An Investigation Into Qasimi Piracy, 1797-1820 (1997) University of Exeter Press
[89] Charles E. Davies " The Blood-red Arab Flag: pp 20-24
[90] Ibid
[91] Heard-Bey, Frauke, *From Trucial States to United Arab Emirates: a society in transition*. London: Motivate (2005).
[92] Said., Zahlan, Rosemarie *The Origins of the United Arab Emirates : a Political and Social History of the Trucial States*. Taylor and Francis. (2016). p. 241
[93] Heard-Bey, Frauke, *From Trucial States to United Arab Emirates: a society in transition*. London: Motivate (2005).
[94] Ibid

Emirates. This period was the genesis of the little activity in the Gulf[95]. Elsewhere the world was getting involved with the events leading to and getting out of the Great War commonly referred to as World War 1[96].

c) Growth of UAE

In 1820 several treaties had been signed between several states in Europe recognizing four Sheikhdoms (Khalifa, Bahrain, Qatar and Dubai). The Sheikh wielded power to the different spheres of influence. This was as a result of the influence of Islam following the collapse of the Roman Empire. Each Sheikhdom was treated by the British as a unique province. When the Sheikh would not manage the certain places in the Sheikhdom the British would develop it into a different province. For instance, when the Sheikh of Sharjah was not able to control Fujairah, the British made it a province[97]

d) Discovery of Oil in UAE

The history of Iran's oil industry began in 1901, when British speculator William D' received a concession from Iran to explore and develop southern Iran's oil resources[98]. The discovery of oil on May 26, 1908, led to the formation in 1909 of the London-based Anglo- Asian Oil Company (APOC)[99]. By purchasing a majority of the company's shares in 1914, the British government gained direct control of the Iranian oil industry, which it would not relinquish for 37 years[100]. After 1935 the APOC was called the Anglo- Iranian Oil Company (AIOC). A 60-year agreement signed in 1933 established a flat payment to Iran of four British pounds for every ton of crude oil exported and denied Iran any right to control oil exports[101].
A dispute arose from Saudi Arabia's longstanding claim, made in 1949, of sovereignty over a large part of Abu Dhabi territory where oil was suspected to be present and an area in a 20-mile circle around the center of the Buraimi

[95] Ibid
[96] Ibid
[97] Gerd Nonneman " The United Arab Emirates p 1208
[98] Curtis, Glenn E, Eric J Hooglund. *Iran: A Country Study*. Washington, DC: Federal Research Division, Library of Congress: (U.S. G.P.O, 2008).160–163
[99] Curtis, Glenn E, Eric J Hooglund. *Iran: A Country Study*.
[100] Ibid 160–163
[101].Ibid 160–163

Oasis. The claim arose after a geological party from the Arabian American Oil Company (Aramco) crossed the 'Riyadh line'. This was a border line negotiated in 1935 by the Oman on behalf of Oman and Abu Dhabi with Saudi Arabia, which the latter had rejected[102]. The Saudis responded by extending their territorial claim to include the right to negotiate with the Sheikhs of the entire Buraimi/Al Ain Oasis and areas of the southern and western part of Abu Dhabi[103].The Saudis relied on historical precedent (the oasis was under Wahhabi influence on a number of occasions in the period between 1800–1869) for their claims, which were countered by arguments from Abu Dhabi and Muscat based on more recent events.

The argument led to the 1950 'London Agreement' whereby all exploration and troop movements would cease in the area until the issue of sovereignty was resolved. Despite ongoing negotiations, the Saudis attempted to take back the oasis[104]. Meanwhile, Saudi Arabia embarked on a campaign of bribery to obtain declarations of tribal loyalty on which its case was to be based[105]. In 1955 arbitration proceedings began in Geneva only to collapse when the British arbitrator, objected to Saudi Arabian attempts to influence the tribunal and withdrew one of the two judges to resign, the other being the Belgian President. Given these breaches of the agreement, the British government decided to unilaterally abrogate the Standstill Agreement and take the oasis in1955[106]. Following this dispute the British decided to split the territory of Buraimi Oasis and gave part of it Buraimi to Oman and the territory under Sheikh Zayed, including the village of Al Ain, to Abu Dhabi[107].

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[102] Quentin. Morton, Michael (2013). *Buraimi: the Struggle for Power, Influence and Oil in Arabia*. London: I.B. Tauris.
[103] Hawley, Donald (1970). *The Trucial States*. London,: Allen & Unwin. p. 188
[104] Morton, Michael Quentin (2013). *Buraimi: The Struggle for Power, Influence and Oil in Arabia*. London: IB Tauris. p. 304
[105] Edward, Henderson, (1993). *This strange eventful history: memoirs of earlier days in the UAE and the Sultanate of Oman*. Dubai, UAE: Motivate Pub. p. 20
[106] De Butts, Freddie, (1995). *Now the dust has settled: memories of war and peace, 1939-1994*. Padstow, Cornwall: Tabb House. p. 175
[107] Said. Zahlan, Rosemarie *The Origins of the United Arab Emirates: a Political and Social History of the Trucial States*. (Taylor and Francis 2016). . p. 193.

This resolved the dispute and created a boundary of Abu Dhabi as part of UAE. However, tribal factions as previously identifiable are claimed to still be in existent even today. Feuds, rivalries, petty jealousies and pride associated with the old system have are said to be on the decline in the long term are likely to be completely shed their old shapes and emerge sideways in the new guise of guised as nationalism that is likely to appear as an autocratic right wing called progressive movements[108].

e) The Family Union

To understand the current constellation of UAE it is important to study the idiosyncrasies of the lead brothers. Sheikh Shakbout who took over rein of Abu Dhabi in 1928 was not interested in development. Sheikh Sayeed on the other hand who was in charge of Dubai was outgoing and open minded who was favorite of westerners[109]. In 1966 Sheikh Zayeed took over the development of Emirates. Zayeed was outgoing and very popular. Dubai came up as an investment hub with foundation being the trade of Gold. It is argued that the English left emirates for several reasons among them decolonization global push, economic model critics, imperialism was ending, and the British government was interested in saving money to sustain the military. This left the UAE in the hand of a family union which were originally pearl farmers.

Constitutions making Theories

There are several dimensions that have been suggested by scholars to analyze constitutions. The texualism theorist argue that the consideration must be had on the text its meaning and import[110].The textualist will analyze the structure of the text consider the words as they would sound in the mind of a skilled, objectively reasonable user of words[111]. For instance, in Australia texualism was influential and particularly prominent in the interpretative approach of

[108]Kristian C, U. *The United Arab Emirates; Power, Politics, and Policymaking* New York, NY 10017 (2017)

[109] James O. *Britain and the Gulf Shaikhdoms, 1820–1971: The Politics of Protection.* Center for International and Regional Studies (2009)

[110] Easterbrook, Frank H. *"The Role of Original Intent in Statutory Construction"*. Harv. J.L. & Pub. Pol'y. **11**: 59(1988). [p. 65].

[111] Ibid

Sir Garfield Barwik[112] in the debate on the amendments to the Australia's Interpretation Act of 1901. It has been claimed he rejected key elements of texualism, stating that statements made in the Second Reading speech by Ministers introducing an Act may be used in the interpretation of that act[113]. For instance, there is unanimity in the two Constitutions (Australia and UAE) that the interpretation of the text should be done by the Court[114].

Diametrically opposed to texualism is the orignialist theory. The idea flows from considering the original intent of the Constitutional framework. The common phrase among the orignialist is the idea of looking at the imaginations of the founding fathers of the nation. The founding theorists argued that under this theory the idea is to look at the functional and motivation intent of the text[115]. From this one can understand the true intent of the Constitution. One of the criticisms of this theory it presumes that there is a single, unified intent behind a text. This challenge is compounded by the fact that in any constitution making process the lawmakers either have no intent, one intent, or multiple intents. But these multiple intents are always consistent, otherwise the law can have no meaning.

The other two approaches to constitution making are the formalism and structuralism. Formalists insists that any text stands on its own as a complete entity, apart from the writer who produced it[116]. The challenge with this approach is it reduces the importance of a text's historical, biographical, and cultural context. Structuralism on the other hand argue that a particular sphere of culture may be understood by means of a structure that is distinct both from the organizations of reality and those of ideas or the

[112]Sir Garfield Barwik was an Australian judge. He was the seventh and longest was serving Chief Justice of Australia, in office from 1964 to 1981.
[113] Ibid
[114] Article 76 of Australia Constitution and Article 99 of United Arab Emirates Constitution
[115] Paul Brest, Sanford Levinson, J.M. Balkin and Akhil Reed Amar, Reva B. Siegel, Processes of Constitutional Decision-Making, New York: Aspen, 5th ed., 2010 B. Boyce, *"Originalism and the Fourteenth Amendment"*, 33 *Wake Forest L. Rev.* 909
[116] Cain, Mary Ann. "Problematizing Formalism: A Double-Cross of Genre Boundaries." *College Composition and Communication*. 51:1 Sept 1999. 89-95

imagination[117]. This methodology implies that rudiments of human culture are implicit by way of their relationship to a broader, overarching system or structure[118]. It works to uncover the structures that underlie all the things that humans do, think, perceive, and feel. This can be used in explaining how for instance Constitutions come up.

There is no unanimity on the best approach to compare constitution making politics. What matters is how one looks at the constitution. For the purpose of this paper we consider constitutions we consider the historical perspective and orignialist and the structuralism theory can best explain the existing environment. Constitution making is a multi-disciplinary and multi-dimensional activity. It contains both internal or domestic factors as well as external or international factors. Analysis must be had on both since one is able to discern the culture that irrigates the constitution making process as an imperative for understanding how it operates. By so doing it is hoped that the differences and similarities of the Australian and United Arab Emirates will emerge.

Constitution Making Process in United Arab Emirates

As soon as the United Kingdom terminated all existing treaties with the trucial states, a treaty of friendship was made between Abu Dhabi, Dubai, Sharjah, Umm al Quwain, Ajman, and Fujairah. Ras Al Khaiman did not initially join this treaty since it wanted to be in equal footing with Abu Dhabi. However, on considering the economics of military spending it decided to join the treaty[119]. The glue that made the federation stick was the generosity of Sheikh Zayed the ruler of Abu Dhabi who was passionate about the federation. These federation approved a provisional (draft) constitution which was to expire after five years however it was renewed successively

[117] Deleuze, Gilles. 2002. "How Do We Recognise Structuralism?" In *Desert Islands and Other Texts 1953-1974*. Trans. David Lapoujade. Ed. Michael Taormina. Semiotext(e) Foreign Agents ser. Los Angeles and New York: Semiotext(e), 2004. 170–192

[118] Ibid

[119] Gerd Nonneman " The United Arab Emirates p 1208

until 1996 when a draft was adopted as the Constitution. UAE also submitted its application for membership to the Arab League and the United Nations
Prior to this seamless flow of Constitutional order there was a season of negotiations between the trucial states. In 1969 a meeting was held by the union of Supreme council to discuss the 'constitutional shape' of the union[120]. Abu Dhabi, Dubai, Bahrain, and Qatar set the principal issues on the agenda including selection of a president and prime minister, the location of a capital and the structure and selection of the federation's advisory assembly [121] . In early 1970, following two years of unproductive negotiations, the emergence of a union of nine sheikhdoms seemed remote. It appeared that the rulers continued to not to be committed to a federation of nine, yet their behavior suggested otherwise. In late 1969, each of the four larger sheikhdoms Abu Dhabi, Bahrain, Dubai, and Qatar began creating separate state institutions that indicated they were preparing for independent statehood[122]. It would later emerge that the rulers of Bahrain and Qatar were not ready or willing to succumb to a ranked structure of a state unless they could be assured they would be the ruler that would dominate it. This was a potential for disaster as observed by Ibn Khaldun[123]. Rather than join a federation of nine sheikhdoms dominated by a rival, Bahrain and Qatar opted for independence that was guaranteed by the relationship that existed with Saudi Arabia. At the time, the rulers of Bahrain and Qatar possessed the economic resources to independently sustain their shaykhly authority.

[120] Brandon Friedman, "From union (ʾittihād) to united (muttahida): the United Arab Emirates, a success born of failure", *Middle Eastern Studies*, (2017) Vol 53:1, pp 112-135
[121] Taryam, p.118; and, for a draft copy of the agenda items in English, see US Department of State Telegram, Dhahran to Washington, 10 May 1969, Dhahra 00401 101110Z, RG 59.
[122] Brandon Friedman, "From union (ʾittihād) to united (muttahida):
[123] "solidarity maintained by egalitarian ethics is doomed when it is transformed into a hierarchically arranged structure the state"

The Constitution clearly demarcates the responsibilities between these two levels of government [124] . The Federal government comprises the conventional executive, the legislative and the judicial branches. It is a presidential style of government. The President is aided by the Council of Ministers, which is headed by the Prime Minister, and includes all ministers and state ministers. The Supreme Council of Rulers is the prime policy-making body. It comprises the seven Rulers of seven Emirates. Under the Constitution, the members of this Council elect the President, from amongst its members, for a period of five years. All constitutions are highly correlated to each other, but taking any one constitutional characteristic, we are likely to find exceptions [125] . Consequently, if constitutions matter, they matter thanks to nonlinearities small differences leading to important results. This is why the issue of nonlinear interactions among characteristics has to be taken a lot more seriously, and why Acemoglu's critique focusing mostly on OLS issues, misses the target (by comparison, these are relatively minor problems)[126]. The federal state is divided in provinces. It is a system where seven emirates' rulers are the supreme council of rules. They are followed by the President and Deputy. There is also a council of ministers. A national council and judiciary.

Internal Domestic factors

At the time of constitution making in both Australia and UAE the existing environment was greatly influenced by the British Empire rise and collapse. The Napoleonic wars had an influence on the second British Empire. This greatly influenced the perception interest to control large parts of the world where there were contests such as Australia. The constitution that emerged from these was a pragmatic. It did not transform the existing structure to differ significantly from the existing order. This is effectively what gave rise

[124] Sarker, A. E., & Al Athmay, A. A. A. R. A. *The Changing Facets of Public Administration in the United Arab Emirates. International Journal of Public Administration,* (2017) *41(10), 832–844*

[125]Lord Wright, *Memories of 1971: A Historic Year In The Emirates*, Asian Affairs, (2011) 42:2, 300-308

[126] Tarko, V. *The challenge of empirically assessing the effects of constitutions. Journal of Economic Methodology*, (2015) *22(1), 46–76.*

to a federal system of governance with the provinces. The complete decline of the British Empire came about after the end of the Second World War. This coincided with the clamor for the independence of United Arab Emirates from being a protectorate to complete autonomy. The politics around the creation of a union United Arab Emirates was predominantly influenced by the internal environment in Qatar and Bahrain as well as Oman.

External Factors

A comparative overview of international influence on constitution-making on the emergence, evolution, and distribution of international constitutional norms offers a better understanding. While most research on international norms explains the creation and expansion of specific norms in the actions of particular agents, in some cases norms may spread globally regardless of the type of action taken by the agents who aim to implement them[127]. For instance, United States Constitution became a point of reference for how the Constitution of Australia came about with a bicameral parliament.

Contemporary Politics

a) United Arab Emirates

In modern day United Arab Emirates, the Constitution already settled that the President would be appointed by the Supreme Council which consists of the Rulers of all the Emirates composing the Union[128]. However, the Supreme Council has not been seamless as imagined. When Sheikh Zayed died at the age of eighty-six on 2004 after a period of declining health the Presidency of the UAE and Ruler ship of Abu Dhabi passed smoothly to his oldest son and designated successor, Sheikh Khalifa bin Zayed Al Nahyan. While Sheikh Khalifa had been heir apparent for more than three decades since his appointment as Crown Prince of Abu Dhabi in 1966, his uncontested assumption of power in 2004 took some external observers by

[127] Hanna Lerner, Amir Lupovici, Constitution-making and International Relations Theories, *International Studies Perspectives*, Volume 20, Issue 4, November 2019, Pages 412–434
[128] Article 46 United Arab Emirates Constitution

surprise. The primary reason for such uncertainty over the management of the leadership transition lay in a (misreading) of familial dynamics among the many sons of Sheikh Zayed. United Arab Emirates continue to attract attention for the upcoming iconic architecture and buildings such as Burj Khalifa the tallest building in the world. In 2009 there was a big economic decline but was able to reemerge.

b) Australia

Kenyan Senator in Australia

Under Article 57 of the Australian Constitution when there is disagreement through a stalemate between the bicameral houses there is something referred to as double dissolution. In Australia there has been 7 dissolutions in 1914,1951,1974,1975, 1983, 1987 and 2016. In a double dissolution sometimes, there is a joint sitting to try and resolve the stalemate. The double dissolution provision comes into play if the Senate and House twice fail to agree on a piece of legislation which is referred to as trigger events. The conditions stipulated by section 57 of the Constitution are when a trigger bill originated in the House of Representatives and three months elapsed between the two rejections of the bill by the Senate. The context is that the Senate's failure to pass the bill, or to the Senate passing it with amendments to which the House of Representatives will not agree. The challenge is that there is no constitutional provision for resolving the deadlock to this stalemate.

The attention of the world was captured by the election of a Kenyan female Senator of South Australia province. She was the first black African born Senator in the history of Australia. Lucy Muringo Gichuhi a humble girl from Kiraga Village in Nyeri County was an accountant in Kenya having graduated from University of Nairobi. In 1999 she decided to migrate to Australia for greener pastures when at the time Australia was looking labor workforce globally through the skilled migration program. The Constitution of Kenya at the time did not permit dual citizenship. According to the Immigration Act a Kenyan who applied for citizenship of another State automatically lost Kenyan citizenship. By assuming Australian Citizenship Lucy lost her Kenyan citizenship and became a naturalized Australian.

Senator Lucy Muringo became a lawyer having finalized her law degree at university of Adelaide and at the time she was interested in getting a Job as a lawyer. She got a job with a lawyer working for Senators. Subsequently double dissolution of parliament occurred in 2016. This led to the declaration of the election for both houses. The qualification of electors of senators are well captured in the Constitution. It provides that such electors shall be in each State that which is prescribed by the Constitution, or by the Parliament, as the qualification for electors of members of the House of Representatives; but in the choosing of senators each elector shall vote only once[129]. She declared that she would contest for Senate seat together with his partner under the Family First Party.

Party politics in Australia

Australian politics is centered on Parties. It is claimed that the senator ran as a second candidate and under the electoral system the party must determine who is the main candidate and a number two. She ran on the Family First Party ticket as second to Mark. who got some financial troubles and was declared no qualified to contest even though they had won. The Family First party managed to get the position 12 in the elections of the Senator for South Australia. The Australian Constitution permits 12 senators for South Australia. Mark won the seat but soon thereafter became bankrupt and was disqualified from assuming the seat due to bankruptcy allegations. Mark was declared not entitled to be in the ballot in the first place. This automatically meant that Senator Lucy. After fierce court battles the Court declared Senator Lucy to have been entitled to the South Australian province under the Family first party.

Since Australian politics is party led, the win by Family first party with two candidates makes it clear that the second can become the Senator. In Senator Lucy case, she contested as a second candidate and the voters are eligible to elect their candidate of choice or the party. When the party wins the first candidate gets the position. If there is difficulty the second gets or when the electorate decided. There was a challenge that she was not entitled to be a

[129] Article 8 of the Australian Constitution

Senator because claims that she was not Australian. The conservative party challenged her participation to the election and the Australian Court overruled the challenge and permitted her to proceed with the challenge for the position of Senate. The election of the Family First Party was equally challenged in Court and the Court ordered a recount of her votes and here victory was confirmed in 2016.

Several years later the Family first party was dissolved after being absolved by the Conservative party. This meant that Senator Lucy had to decide whether to join Conservatives following the Family first party or the Liberal party. In 2018 she declared that she could not going to join the Conservative party at all and insisted that she was liberal to the core and hence join the Liberal Party. She was welcomed by the Prime Minister to the Liberal party. In 2019 she contested for nomination for a ticket at Liberal party and only managed to get the 3rd having garnered 2500 Liberal Party votes. This meant that her tenure at the Senate came to an end on 30th June 2019.

Conclusion

This paper sought to establish the constitution making politics in Australia. It is founded and comparative theory of politics with the hope that better understanding would be gained from Australia and United Arab Emirates politics. The common thread has been the British. For Australia the State emerged at the time when the British was losing control of what was the British Empire. The State began as a penal colony and grew to be a model that would influence the region called Australian Continent. It has emerged as a powerhouse in what is could down under. Australia continues to place allegiance to the Queen of England even after gaining independence. The constitution appears to be transformational and progressive permitting the migration culture so that a Kenyan born Senator could be elected and sit in Senate. The fact that the Senator could migrate, gain citizenship, gain elective post is the hallmark of a well thought out political system.

The current reality for Australia is very dynamic. Although the constitution-writers saw each level of government as having a role to fill, hopefully for all time, their optimistic words about the division of power in a federal state

have not been borne out. An important, if not always appreciated, point is the part that perspective has played in shaping the different levels of government in the years since 1901. Commonwealth governments have tended to focus on their own needs, policies and preferences before those of the states or territories, with an implicit assumption that the national view is the one that should be preferred in times of debate and argument. State concerns have often been pushed aside. Similarly, state and territory governments have seen policy through the prism of their regional needs, often seemingly unable to see that there might be a need greater than the satisfaction of their own community.

United Arab Emirates emerged as a protectorate of British. It began as a state that was concerned with pearl trade. Due to global trends and growth of Japan as a hegemony, the pearl trade came to an end. The Constitution that came about was a product of seasons of downward economic trends as well as discovery of oil. This introduced the challenge as to how the Emiratis would govern themselves after the British decided that UAE was to cease being a protectorate. Ibn Khaldun suggests that solidarity maintained by egalitarian ethics is doomed when it is transformed into a hierarchically arranged structure the state. There was a clamor for a federation with what is known now as UAE and Bahrain and Qatar. The rulers of Bahrain and Qatar were unwilling to submit to a hierarchical structure of a state unless they could be assured they would be the ruler that would dominate it. At the time, the rulers of Bahrain and Qatar possessed the economic resources to independently sustain their shaykhly authority. Dubai's position was more precarious because its economic resources were not on a par with Bahrain's or Qatar's at the time.

Political relations between sheikhdoms were really relations between individual sheikhs, studies of protection-seeking customs at the individual level are relevant to the study of regional political relations in the Gulf'. Shaykh Zayid's firm leadership, characterized by personal attributes like patient consultation and generosity, may not have made Shaykh Rashid's or Shaykh Saqr's decision to accept political subordination to Abu Dhabi easier, but it did ultimately make the federated, hierarchical structure of the

UAE possible. The UAE was thus formed under this premises. It can be concluded from the above that the UAE stands today at a crossroads where it faces a number of internal and external challenges. However, dealing with these challenges is no longer a matter of choice because the way they are addressed will determine the country's future security and development.

What has emerged is that the British had significant influence on both Australia and UAE. The different approaches to the different contexts show how the great super power Britain declined. Unlike United States, Australia and UAE continued allegiance to British has not permitted them to rise beyond them. To this end Britain remains an important factor for the development of these two States. The Constitution making process thus produced an allegiant attitude by these two countries toward the British. The States are very diverse in their political system with UAE being a federal monarchy and the Australia being e federal constitutional state. At the center of their political system is the existence of the power dynamics within the state and externally with their neighbors.

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Money Laundering and The Role of the Advocate - A Comparative Analysis of Kenyan and South African Law

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Abstract

Advocates in Kenya are not reporting institutions as far as money laundering is concerned. This is despite recommendations by the Eastern and South Africa Anti-Money Laundering Group (EASAAMLG), of which Kenya is a member, for advocates to be designated reporting institutions. This paper explores the basics of money laundering and the role of the advocate in Kenya, in comparison with the role of the South African attorney. The paper refers to the Proceeds of Crime and Anti-Money Laundering Act No. 9 of 2010 Laws of Kenya as well as the Financial Intelligence Centre Act No. 38 Laws of South Africa. The paper uses the desktop methodology to explore the findings of various writers on the topic and to draw insight from these. The paper concludes that the Kenyan lawyer is an important part of the fight against money laundering, and should be included as a reporting entity. Contrary to the fears and inhibitions that have hampered the inclusion of the Kenyan advocate as a reporting entity, such inclusion will only formalize existing requirements and will enhance anti-money laundering efforts in Kenya.

1.0 Introduction

1.1 What is money-laundering

Money laundering has been defined as the disguising of proceeds of crime to enable their utilisation without the detection of the illegal activity that produced them.[1] It is also "the manipulation of illegally acquired wealth to

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[1] US Department of Treasury Financial Crimes Enforcement Network (FInCEN) Advisory March 1 (1996) Vol. 1 Issue 1 available at

obscure its true source or nature, which is achieved by performing several transactions that leave the illegally derived proceeds appearing as the product of legitimate investment or transactions".[2] It is also the processing of proceeds of illegal activity to disguise their origin[3] to safeguard them from confiscation.[4]

The crimes from which such proceeds of crime emanate are known as predicate offences, which produce funds or property that is then concealed and disguised, hence laundered. Predicate offences may include fraud (including computer fraud), insider trading, prostitution rings,[5] tax evasion, drug trafficking, corruption, illegal arms trading, extortion, robbery, smuggling, human trafficking,[6] child and drug trafficking, corruption, tax evasion,[7] and also environmental crimes against natural flora and fauna.[8]

http://www.fincen.gov/news_room/rp/advisory/html/advissu1.html (accessed 18 Feb 2022).

[2] South Africa Law Reform Commission 'Money Laundering and related matters' Report Project NO. 104 August 1996 available at *http://www.justice.gov.za/salrc/reports/r_prj104_1996aug.pdf* (accessed 18 Feb 2022).

[3] Definition accepted by Financial Action Task Force (FATF), Available at *https://www.fatf-gafi.org/faq/moneylaundering/* (Accessed 18 Feb 2022).

[4] Aleksoski, S. & Aleksoski, O. (2015). Money Laundering as a Type of Organised Crime. Journal of Process Management- New Technologies International, Vol. 3, No. 3 44-54

[5] FATF website as in note 3 ibid.

[6] Lilley, P. (2006. Dirty Dealing: The Untold Truth about Global Money Laundering. International Crime and Terrorism. Hereafter Lilley P (2006).

[7] Speech by President Uhuru Kenyatta delivered on 12th December 2018. Available at *https://www.nation.co.ke/kenya/news/president-kenyatta-s-full-speech-on-jamhuri-day-2018-117816* (accessed 18 Feb 2022).

[8] United Nations Convention against Transnational Organized Crime, General Assembly resolution 55/25 of 15 November 2000. Available at *https://www.unodc.org/documents/middleeastandnorthafrica/organised-*crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf (Accessed 18 Feb 2022)

Following the events of September 11 2001, the AML regime was expanded to include combating the financing of terrorism. [9]

Depending on their scale, these offences produce large amounts of money, which the criminals seek to utilise without raising suspicion. This they do by covering up the illegal sources of the funds, changing their form, and injecting them back into the legitimate financial system so they can utilise them. This is what constitutes the process of money laundering.[10]

1.2 Stages of money-laundering

There are three stages of money laundering, which are placement, layering and integration.[11]

1.2.1 Placement

Placement is where the perpetrators of predicate crimes put illegally obtained money into the legitimate financial system. In this stage, the 'dirty' money is incorporated into the legitimate financial system, hence obscuring its link with the criminal activity that generated it.[12] The criminal may do this by dividing the large sums of money into smaller amounts and giving them to individuals- referred to as '*smurfs'*- who then deposit them into banks or other agents in the financial system. This is done to prevent the said agents, who are mandated to report suspicious transactions, from detecting and reporting the same. The '*smurfs'* can also be shell companies- incorporated for the sole purpose of facilitating the laundering of illegal proceeds.

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[9] See the additional 9 special recommendations of the Financial Action Task Force (FATF adopted in additional to the initial 40 recommendations towards combating money-laundering. Available at *http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf* (Accessed 18 Feb 2022)

[10] FATF website, note 3 ibid.

[11] Schneider F. Money Laundering: Some Preliminary Empirical Findings. Paper Presented at the Conference: Tackling Money Laundering (2007) Available at https://www.uibk.ac.at/economics/bbl/bblpapierews0708/schneider.pdf (Accessed 18 Feb 2022).

[12] Aleksoski S. & Aleksoski O. (2015).

A characteristic feature of shell companies is to have nominee directors; thus their beneficial owners are shielded by the corporate veil and are difficult to trace in case of a money-laundering investigation. Shell companies are also used by terrorist financiers to avoid raising queries as to the purpose of cash sent to a particular jurisdiction. The perpetrators of predicate offences remit money obtained from unlawful activities into the shell company only to 'borrow' it back and use it, hence disguising its initial source of the funds, and making it look legitimate.[13] Such shell companies are often set up in off-shore countries for purposes such as granting loans to the parent company in their own country, which makes no business sense. [14] It is usually an attempt to establish a complex network of transactions to move money [15] or to facilitate trade-based money laundering.[16]

Placement usually occurs close to the criminal activity that generated the funds.[17] This is due to the need to begin processing the said funds to make the money available to the criminal for his/her use. The placement stage is the riskiest for the launderer since it is the most discoverable. The risk arises

[13] See 'What is money Laundering' available at *http://www.slate.com/articles/news_and_politics/explainer/1999/09/what_is_money_laundering.html* accessed 18 Feb 2022).

[14] Shell companies have been identified by the FATF as risk area for legal practitioners. See the FATF RBA 'Guidelines for Legal Professionals' 23 October 2008 29 available at *http://www.fatf-gafi.org/media/fatf/documents/reports/RBA%20Legal%20professions.pdf*. See also the FATF 'Misuse of corporate vehicles including trusts and company service providers 13 October 2006 available at *http://www.fatf-gafi.org/media/fatf/documents/reports/RBA%20Legal%20professions.pdf* (both accessed 18 Feb 2022).

[15] Thus forming a complex mesh of transactions which cannot be traced back to the launderers.

[16] Refers to the laundering of money through the movement of goods. This can be done through overpricing or under-pricing of goods, as well as misrepresenting the quality and/or quantity of goods exported or imported. 'Trade Based Money Laundering' available at *http://www.fatf-gafi.org/topics/methodsandtrends/documents/trade-basedmoneylaundering.html* (accessed 18 Feb 2022).

[17] FATF website ibid.

with the introduction of large sums of money into the financial system, transfer of the same within the said systems, and ultimately outside the borders of the launderer's country/area of operation.

At this stage, the role of banks and other financial institutions is key, in carrying out their obligations to detect, flag and report activities suspected to be linked to money laundering. The said institutions' roles range from scrutiny during account openings, large transactions, small interrelated transactions, lotteries and insurance transactions. [18]

1.2.2 Layering

This is where numerous transactions are performed to obscure the source of 'dirty' money. At this stage, the laundering intends to conceal and cover the tracks created during placement, in terms of documentation. Hence, the funds are moved through numerous banks in different countries and offshore accounts, making them difficult to trace. This may be done through false transactions and invoices, as well as the purchase of stocks/shares, activities that may seem legitimate investments.[19]

The transactions are preferably undertaken in jurisdictions or locations with poor anti-money laundering systems that are referred to as off-shore locations. The destinations of the funds may however be developed economies that provide solid business infrastructure. [20]

1.2.3 Integration

Integration is where the money is injected back into the legitimate economy, thus making it look like 'clean' money.[21] Here, the illegally acquired funds will be intermingled with legitimately acquired funds and returned to the launderer to use legally for their personal needs. The launderers at this stage may purchase items like jewellery, cars, paintings, gold, casino chips and foreign currencies, and obtain valid documentation. [22] Purchases of property

[18] Aleksoski S. & Aleksoski O. (2015).
[19] Aleksoski S. & Aleksoski O. (2015).
[20] FATF website ibid.
[21] South Africa Law Reform Commission 'Money Laundering and related matters' Report, ibid.
[22] Aleksoski S. & Aleksoski O. (2015).

may also be made in other economies, both developed and developing, without raising queries as to the source of the said funds, thanks to the sophisticated methods used at the layering stage.

2.0 The Legal framework of anti-money laundering laws in Kenya

2.1 Historical Background

The term money-laundering was first used in the USA in the 1970s, to refer to bank secrecy laws. The Bank Secrecy Act[23] was enacted to prevent banks from being used by criminals to hide their ill-gotten funds. The said Act required financial institutions to keep records and make reports of suspicious activities involving their customers.[24] Money- laundering was however not criminalised until 1986, following the enactment of the Money Laundering Control Act of 1986 in the USA. This Act imposed both criminal and civil sanctions for failing to detect or prevent money laundering.[25]

These developments in the USA set the stage for the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention), [26] which was the first international instrument to sanction dealing with proceeds of drug offences. The Vienna Convention set out activities and conduct that constitutes money laundering (without using the term) and urged member states to come up with laws to criminalise the said conduct.[27]

Following the Vienna Convention was the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Strasbourg

[23] Also known as the Currency and Foreign Transactions Reporting Act, 1970 (31 U.S.C. 5311 et seq) USA enacted in 1970.

[24] Federal Insurance Deposit Corporation Manual of Examination Policies. Available at *https://www.fdic.gov/regulations/safety/manual/section8-1.pdf* (Accessed 18 Feb 2022)

[25] Pub. L. 99-570—OCT. 27, 1986; 18 U.S.C. ss.1956 and 1957.

[26] 1988. Entered into force on 11 November 1990 and Kenya ratified it on 19 October 1992
https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6 (accessed 18 Feb 2022).

[27] Article 1(b) and (c) of the Convention, ibid.

Convention).[28] This Convention promoted international collaboration in combating money laundering, thereby advancing jurisdiction to combat money laundering beyond the country of the offence. It urged states to legislate and criminalise activities leading to money laundering as well as promote confiscation of illegally obtained assets. [29]

The United Nations Convention against Transnational Organised Crime and the Protocols Thereto (Palermo Convention)[30] subsequently proscribed money laundering, by urging states in mandatory terms to legislate and criminalise the laundering of proceeds of crime. Key to highlight also was the International Convention for the Suppression of the Financing of Terrorism (Anti-Terrorism Convention),[31] which deals with anti-terrorism measures.

2.2 International Obligations with regards to money-laundering

Of the above-mentioned Conventions, Kenya has ratified the Vienna Convention, the Palermo Convention and the Anti-Terrorism Convention. These Conventions set the stage for domestic legislation in Kenya against money laundering, and are applicable in Kenya as part of Kenyan law. This is under Article 2(5) and (6) of the Constitution of the Republic of Kenya, [32] which provides for the application of international rules, conventions and treaties as part of the laws of Kenya.

[28] Passed by the European Council on 8th November 1990.

[29] Kenya is not a member of FATF but is bound by its recommendations as a member of the international community. Lack of cooperation with FATF may lead to economic sanctions against a country.

[30] Entered into force on 25 December 2005 ratified by Kenya on 5th January 2005. Available https://www.unodc.org/pdf/convention_1988_en.pdf (accessed 18 Feb 2022).

[31] Entered into force on 10 April 2002 and ratified by Kenya on 27 June 2003. Available at https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-11&chapter=18&clang=_en (accessed 18 Feb 2022).

[32] Entered into force on 17th August 2010. Available http://extwprlegs1.fao.org/docs/pdf/ken127322.pdf (accessed 18 Feb 2022).

There are several international and regional bodies which were established to combat money- laundering, one of which is the Financial Action Task Force (FATF). FATF is an inter-governmental body established in 1989 by the G-7 countries and the European Union, to set standards to promote the effective implementation of anti-money laundering measures and countering of financing of terrorism (CFT).[33] FATF comes up with standards in the form of recommendations on AML and CFT measures to be implemented by states.[34]

FATF's goals, include prevention, to deter criminals from utilising individuals and institutions to convert or move proceeds of crime; and enforcement, which involves the criminalisation of money laundering leading to the investigation, prosecution, conviction and punishment of offenders. In addition, it ensures international cooperation which ensures that cross-border crime does not go unpunished. [35] Even though these recommendations constitute non-binding obligations, they are usually enforced against all states, both members and non-members of the FATF.[36] Although Kenya is not a member of FATF, it is a member of the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG), which is a regional body formed to combat money laundering by implementing the FATF standards. The ESAAMLG conducts periodic mutual evaluations or

[33] A recent addition to the mandate of the FATF is the combating of financing of proliferation of weapons of mass destruction. *See http://www.fatf-gafi.org/media/fatf/documents/recommendations/Guidance-UNSCRS-Prolif-WMD.pdf* (accessed 18 Feb 2022).

[34] FATF 40+9 recommendations on measures to counter money laundering and the financing of terrorism. 2012 revision available at *http://www.fatf-gafi.org/topics/fatfrecommendations/documents/internationalstandardsoncombatingmoneylaunderingandthefinancingofterrorismproliferation-thefatfrecommendations.html* (accessed 18 Feb 2022).

[35] Goredema, C. (2007). Confronting money laundering in South Africa: An overview of challenges and milestones in Goredema, C. (2007) Confronting the Proceeds of Crime in Southern Africa: An Introspection. ISS Monograph series No. 132 (2007) 75-76. Hereafter Goredema C (2007).

[36] The United Nations Security Council in Resolution 1617 of 2005 which urged all states to implement the FATF recommendations. The FATF enforces AML and CFT against non-member states by the imposition of economic sanctions by member states against non-compliant states.

reviews of the status of member countries on promoting anti-money laundering and counter-terrorism financing regimes in their jurisdictions. Member countries are required to give yearly reports on steps taken to address deficiencies in combating money laundering and terrorism financing. [37]

2.3 Domestic Laws on Money Laundering in Kenya

In addition to and in compliance with its international obligations, Kenya has enacted laws to deal with money laundering. The major legislation in this respect is the Proceeds of Crime and Anti-Money-laundering Act No. 9 of 2010 (POCAMLA). The POCAMLA does not define the term 'money laundering', but it establishes offences that constitute money laundering under several provisions; which are set out below:-

Section 3, criminalises *transacting* with and *concealing* property which constitutes proceeds of crime among other acts. It provides as follows:

> *A person who knows or who ought reasonably to have known that property is or forms part of the proceeds of crime and—*
> *(a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether that agreement, arrangement or transaction is legally enforceable or not; or*
> *(b) performs any other act in connection with such property, whether it is performed independently or with any other person, whose effect is to— (i) conceal or disguise the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or (ii) enable or assist any person who has committed or commits an offence, whether in Kenya or elsewhere to avoid prosecution; or (iii) remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence, commits an offence.*

[37] See the mutual evaluation reports available on the ESAAMLG via https://www.esaamlg.org/index.php/Countries/readmore_members/Kenya (Accessed 18 Feb 2022).

The term 'proceeds of crime' is defined under Section 2 of POCAMLA as:

> *… any property or economic advantage derived or realized, directly or indirectly, as a result of or in connection with an offence irrespective of the identity of the offender and includes, on a proportional basis, property into which any property derived or realized directly from the offence was later successively converted, transformed or intermingled, as well as income, capital or other economic gains or benefits derived or realized from such property from the time the offence was committed.*

Section 4 on the other hand criminalises the *use* of proceeds of crime, by providing as follows:

> *A person who— (a) acquires; (b) uses; or (c) has possession of, property and who, at the time of acquisition, use or possession of such property, knows or ought reasonably to have known that it is or forms part of the proceeds of a crime committed by him or by another person, commits an offence.*

Section 5 then criminalises *wilfully failing* to comply with monitoring and reporting obligations by a reporting institution or officer. Other offences include financial promotion of an offence (Section 7), tipping off (Section 8), false representation (Section 9), malicious reporting (Section 10) Conveyance of monetary instruments (Section 12), misuse of information (Section 13) and hindering a person exercising powers or carrying out duties under the Act (Section 15).

The penalties for the offences above-mentioned are provided for in Section 16 of POCAMLA. The penalties are divided between those for natural persons and corporate bodies. The penalties range from fines up to 5 million shillings in default up to 14 years imprisonment for natural persons; and from 25 million or the value of the property involved, for bodies corporate. Section 16(6) provides for separate prosecution of an officer, director or secretary of a body corporate who connives to commit an offence with the body corporate. Hence both such officer and the body corporate are liable to face

charges for money laundering and related offences. Notably, the highest penalties provided for in the Act relate to the offences directly termed to constitute money laundering, which is proscribed under Sections 3, 4 and 7 of the POCAMLA.

The POCAMLA also establishes two bodies, one being the Financial Reporting Centre (FRC) and the other being the Asset Recovery Agency (ARA). The FRC is established under Section 21 of POCAMLA, and its mandate is to assist in identifying proceeds of crime and overall combating money laundering and financing of terrorism. It does this through sharing of information and promoting international best practices for combating money laundering.[38] The FRC is the body to which suspicious transactions must be reported by reporting institutions, [39] which per the Act are financial institutions and designated non-financial businesses and professions.[40]

The POCAMLA has conferred powers to the FRC, which include the power to issue rules and directives to reporting institutions,[41] to impose both civil penalties and to take administrative action against reporting institutions which do not comply with the act.[42] The Act has also empowered the FRC to supervise and regulate reporting institutions, as well as to obtain search warrants and orders to enforce compliance with the Act.[43] The Act has placed obligations on reporting institutions that include customer identification, maintaining customer records, maintaining internal reporting procedures and registering with the FRC, in addition to reporting suspicious transactions.[44]

The ARA on the other hand is established under Section 53 of the Act, and it is mandated to recover property acquired as a direct or indirect benefit of

[38] Section 23 of the Proceeds of Crime and Anti-Money laundering Act No. 9 of 2009 (POCAMLA)
[39] Section 24 POCAMLA
[40] Section 2 POCAMLA
[41] Section 24A POCAMLA
[42] Section 24B and C POCAMLA
[43] Section 37 and 39 POCAMLA
[44] Sections 44, 45,46, 47 and 47A respectively

a money laundering or predicate offence. This can be done through confiscation and restraint orders, provided for in Section 56 of POCAMLA.[45] Confiscation proceedings can either be after an offender is tried and convicted (referred to as conviction-based forfeiture)[46] or without conviction of an offender (referred to as non-conviction-based forfeiture).[47] In both of these proceedings, the ARA is a major actor, having been empowered by POCAMLA to perform all acts relating to asset recovery.

Domestic laws in Kenya have also legislated against predicate offences which usually produce funds that are laundered. These Acts include the Prevention of Terrorism Act (POTA) No. 30 of 2012,[48] the Anti-Corruption and Economic Crimes Act (ACECA) No. 3 of 2003,[49] and the Narcotics and Psychotropic Substances (Control) Act No. 4 of 1994,[50] the Penal Code Cap 63 Laws of Kenya[51] among others. It is worth noting that in Kenya and the international scene, the offence of money laundering covers not only the perpetrator of the predicate offence but also other persons who participate in the concealing, disguising or hiding of the proceeds of crime; even if they had nothing to do with the predicate crime. [52]

[45] These are Civil Proceedings.
[46] Section 61 POCAMLA
[47] Section 82 POCAMLA
[48] Sections 5-8 provide for offences regarding property used or linked to terrorism acts.
[49] Part V (Sections 38-48) provides for offences under the ACECA as well as the attendant penalties. Section 55 is also note-worthy, providing for forfeiture of unexplained assets.
[50] Section 7 provides for conviction-based forfeiture of land on which prohibited plants have been cultivated, while Section 36 provides for forfeiture of proceeds of crime on application by the Director of Public Prosecutions.
[51] The law that provides for the majority of offences in Kenya, including but not limited to offences with economic benefit such as theft, burglary, extortion, fraud and obtaining by false pretences. Sections 24(f) and 29 of the Penal Code provide for forfeiture as a form of punishment for offences.
[52] Camp, P. (2009). Solicitors and Money Laundering: A Compliance Handbook (3rd ed). Law Society (Great Britain) 4. Hereafter Camp P (2009).

3.0 The gains and opportunities

Kenya has made marked developments in establishing a successful anti-money laundering and Counter-Financing of Terrorism regime. One of the major gains includes a legal framework that supports AML and CFT efforts. Enforcement however remains a challenge.

In the year 2010, Kenya had been listed on the FATF's grey list as a potential money-laundering hub. This was attributed to the lack of counter-terrorism law and a lack of a Financial Intelligence Unit.[53] Subsequently, Kenya took steps to reform its legal and regulatory anti-money laundering framework, leading to its removal from the FATF's monitoring list in the year 2014.[54] Specifically, Kenya enacted the Prevention of Terrorism Act No. 30 of 2012 and established the Financial Reporting Centre by amending the POCAMLA. It has also undertaken periodic reviews of these and other laws as recommended by the annual mutual evaluations by the ESAAMLG.

It has been argued, however, that a lot more needs to be done for Kenya to achieve the ideal anti-money laundering regime. Kenya has been identified as vulnerable to money laundering, as per the 2019 International Narcotics Control Report.[55] The report identified the use of unregulated cash transfers including mobile money and '*hawaladars'*[56] to transfer large amounts of money as rendering it difficult for the government and financial institutions to flag and track suspicious transactions.

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[53] Financial Services Volunteer Corps, 2011-2014 Report on Kenya, available at https://www.fsvc.org/wp-content/uploads/2018/01/FSVC-AML-Success-Story-Kenya-2011-2014.pdf (Accessed 18 Feb 2022)

[54] FATF website, available at *http://www.fatf-gafi.org/countries/a-c/argentina/documents/fatf-compliance-june-2014.html* (Accessed 18 Feb 2022).

[55] US Department of State Report Vol. II available *at https://www.state.gov/wp-content/uploads/2019/03/INCSR-Vol-INCSR-Vol.-2-pdf.pdf* (Accessed 18 Feb 2022)

[56] Persons who provide money transfer services without actually moving money under the hawala system. The hawala system is based on trust and is referred to as 'underground banking'. This system is in wide usage in the Islamic countries. Information obtained from *https://www.investopedia.com/terms/h/hawala.asp* (Accessed 18 Feb 2022).

The report identified good governance and combating corruption as key areas to be addressed if the country is to achieve an effective and efficient Anti-money laundering regime. Another challenge highlighted in the Kenya ESAAMLG report covering 2016-2017 was the failure to include lawyers, notaries, other independent legal professionals as well as Trust and Company Service Providers as reporting institutions. This deficiency was still noted in the subsequent ESAAMLG report covering 2017-2018, where it was noted that the issue had not been sufficiently covered, and the same was carried forward to the next reporting period.

In Kenya, banking secrecy is upheld, and investigators must obtain court orders to obtain bank records. According to the above-mentioned report by the United States Department of State, the confidentiality of this process is often compromised, tipping off the launderers, who then move the funds. In some cases, given the drastic effect of freezing/ restraint orders, the courts usually deny *ex-parte* orders to officers who must then notify the suspects of their application and invite them to make their reply. Such action, even if well-intentioned will ultimately sabotage effects to recover such assets, as once notified, the suspects will move the funds. Provisions such as Section 22 of the Narcotics and Psychotropic Substances Act are progressive in this regard, as it allows the Director of Public Prosecutions to make *ex-parte* restraint orders against a suspect of a Narcotics Offence.[57]

It is notable that despite having a poverty index of 36.1% in the year 2018,[58] it was also reported that Kenya had been ranked fourth in making dollar millionaires, within the same period, between 2016 and 2019.[59] This growth rate has been attributed to the government's policies that made it possible for

[57] Act No. 4 of 1994 ibid.

[58] UNDP Kenya Annual Report 2018, Available at *file:///C:/Users/user/Downloads/UNDP%20Kenya%20AR%202018_INTERACTIVE.pdf* (Accessed 18 Feb 2022).

[59] See the Knight Frank Wealth Report-2019, available at https://content.knightfrank.com/resources/knightfrank.com/wealthreport/2019/the-wealth-report-2019.pdf, the numbers have tapered off as is noted in the 2020 report, but the growth rate of high net worth individuals remains. The 2020 report is available at https://content.knightfrank.com/content/pdfs/global/the-wealth-report-2020.pdf (Accessed 18 Feb 2022).

a few individuals to thrive on bagging tenders, while the drop in numbers between 2018 and 2020 has been attributed partially to the crackdown on corruption.[60]

It has been said that behind every great fortune, there is a crime.[61] This seems to be true in the Kenyan situation, given the relationship between millionaire-minting and anti-corruption measures. The anti-money laundering and counter financing of terrorism measures adopt this view, raising suspicion when there are sudden, unexplained riches. Given their strategic positioning, therefore, all institutions handling cash and other valuable property for clients are by law required to be especially careful 'when confronted with complex, unusual large transactions'.[62]

The reporting institutions have been listed on the Financial Reporting Centre website to include, commercial banks, microfinance institutions, foreign exchange bureaus, stockbrokers, fund managers, casinos, non-governmental organisations, accountants, real estate agents, motor vehicle dealerships, precious metal and precious stones dealers among others.[63] Failure of the said institutions, to detect suspicious transactions has been identified as one of the major challenges to tackling money laundering.[64]

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[60] Omondi D. Article in The Standard Newspaper, available at https://www.standardmedia.co.ke/entertainment/local-news/2001363278/baffling-statistics-on-rise-in-number-of-kenyan-dollar-millionaires (Accessed 18 Feb 2022).

[61] Honoré de Balzac, a French novelist and playwright (1799 – 1850) quoted by Lilley P (2006) ix.

[62] See FATF Recommendation 11 available *at http://www.un.org/en/sc/ctc/docs/bestpractices/fatf/40recs-moneylaundering/fatf-rec11.pdf* (accessed 18 Feb 2022).

[63] Available at http://frc.go.ke/registration/reporting-institutions.html (Accessed 18 Feb 2022)

[64] Niloloska, S. & Simonovski, I. (2012). Role of Banks as an entity in the system for preventing money laundering in Macedonia. Procedia-Social and Behavioural Studies Vol 44 453-459 available at https://reader.elsevier.com/reader/sd/pii/S1877042812011718?token=10D21B682391D84717663CADF2586D1496813908D2DEE63D7E545A3A2C21EE8D3786D223B14295F685CEF0AF37E9FD90&originRegion=eu-west-1&originCreation=20220411125639 (accessed 1 March 2022).

Other challenges have been identified as bribery, tax evasion, weak anti-money laundering regulations, absence of automatic tracking systems, lack of incentive for financial institutions to report suspicious transactions and liberalisation of banks without sufficient checks and balances.[65]

4.0 The role of lawyers in combating money laundering – Lessons from the South African attorney

Lawyers are susceptible to money laundering through designing corporate vehicles, buying and selling of assets, and financial transactions among other services that they offer.[66] The increase in technology especially electronic transactions through Automatic Teller Machines and online banking render customer identification, record-keeping and reporting of suspicious transactions difficult.[67] Rogue customers do many transactions that fall just below the reporting obligations with different financial institutions, thus making it difficult for the financial institutions to detect illegality. Lawyers would detect such conduct better than financial institutions.[68]

Unlike in South Africa where attorneys are listed as reporting institutions, [69] lawyers in Kenya are not listed as such. This is despite that the ESAAMLG has twice recommended ESAAMLG such inclusion, through its mutual evaluation reports of 2016-2017 and 2017-2018. Attempts to include lawyers in Kenya as reporting institutions were undertaken in 2007, 2018 and 2019, without success.[70] The amendment to POCAMLA that sought to introduce the obligation faced opposition from Advocates who lobbied against it in parliament, leading to its failure to pass. The major point raised by

[65] Gilmour, N. (2016). Understanding the Practices Behind Money Laundering- A Rational Choice Interpretation. International Journal of Law, Crime and Justice 1-3.
[66] Pambo, K.O. (2020). Designating Lawyers as Reporting Entities under the Kenyan Anti-Money Laundering Regime. Journal of Money laundering Control, Nairobi 23-3 637-649. Hereafter Pambo KO (2020). Available at https://doi.org/10.1108/JMLC-07-2019-0063 (Accessed 1 March 2022).
[67] Ibid page 640.
[68] Ibid page 640.
[69] See Schedule 1 of Financial Intelligence Centre Act No. 38 of 2001 Laws of South Africa (FICA) that came into effect on 1 July 2003.
[70] Pambo KO (2020) page 637.

parliamentarians was the fear that the said listing would affect advocate/client privilege and would constitute double reporting.[71]

In South Africa, attorneys are considered important professionals as far as anti-money laundering efforts are concerned, being vulnerable to be used-whether knowingly or unknowingly-to facilitate complex money laundering transactions. This led to their being recognised among the accounting institutions, with duties in the fight against money laundering and financing of terrorism. [72] Their duties include the following:

4.1 Duty to report suspicious transactions

Attorneys in South Africa are under a duty to report to the Financial Intelligence Centre (FIC)[73] any unusual or suspicious transactions that could indicate the involvement of their clients in money laundering or terrorist financing.[74] Such a report should be in a prescribed format and should contain details of the client and/or the suspicious transaction.[75] The report must be made within 15 days of knowledge of facts raising the suspicion.[76] Generally, suspicion as envisaged by money laundering legislation does not have to be supported by evidence of money laundering.[77] It is enough that

[71] See Mwere D, (2019). MPs Oppose Proposed Law on Financial Reporting by Lawyers, Daily Nation 18 September 2019 available at https://www.nation.co.ke/kenya/news/mps-oppose-proposed-law-on-financial-reporting-by-lawyers-204954 (Accessed 18 Feb 2021).

[72] See the speech of the director of the FIC Mr Murray Mitchell during the signing of memoranda of understanding between the FIC and the law societies of South Africa on 25 July 2013 available at *https://www.fic.gov.za/DownloadContent/NEWS/PRESSRELEASE/LSSA%20Media%20Statement%20%20-%20final.pdf* (accessed 18 Feb 2021).

[73] The Financial Intelligence Centre is a government public administration body established under s. 195 of the constitution of South Africa and by s. 2 of FICA. Its purpose as per s. 3 FICA is to combat money laundering and terrorist financing activities in South Africa.

[74] S. 29(1) FICA.

[75] R. 22 & 23 Regulations in Terms of the Financial Intelligence Centre Act Gazette No. 7541 of 2002. Hereafter FICA Regulations.

[76] R. 24 FICA Regulations.

[77] Camp P (2009), 163 quoting the UK Law Society's Anti-money Laundering Practice Note of October 2012 available at *http://www.lawsociety.org.uk/advice/practice-notes/aml/* (accessed 18 Feb 2021).

the circumstances in question merely suggest the existence of money laundering or terrorist financing[78], probably due to the involvement of unusual amounts.[79] The involvement of a large sum of money, especially where the same exceeds the normal range of the client's business should trigger suspicion by an attorney.[80]

Suspicion may also be raised by the nature of a client's instruction, for example where a client gives instructions to a lawyer to set up a company in an off-shore centre, whose business sense is not apparent.[81] Mauritius is one such centre, where foreigners can set up companies and investments while incurring low tax obligations.[82] While offshore companies are not illegal per se, they have been for long been used by money launderers,[83] who establish shell companies to conceal laundering activities.

The attorney may only fail to report such a transaction/instructions where he or she is satisfied that its purpose is not to facilitate money laundering.[84]

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[78] S. 29(2) FICA & s. 4(3) Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 2004 Laws of South Africa (POCDATARA).

[79] Suspicion-based and threshold-based reporting. See Van Zyl F 'South Africa money laundering legislation –the way ahead' Journal of Money Laundering Control (1997) Vol. 1 Iss. 1 102.

[80] Schlenther, B (2012). The taxing business of Money Laundering: South Africa. Journal of Money Laundering Control Vol. 16 No. 2 134; quoting British Bankers' Association (2008) Money Laundering and Terrorist Financing Reporting Officer's Reference Guide 2008/9 BBA Enterprises (MHA Group), London.

[81] S. 29(1) (*a*) (*ii*) of FICA lists transactions with no apparent business purpose as suspicious transactions.

[82] See 'Mauritius as an offshore business centre' available at http://www.maurinet.com/busoff1.html (accessed 18 Feb 2021). Information on how to set up an offshore company in Mauritius is readily available on the internet. See *http://www.offshorecompanyexperts.com/en/offshorecompany/mauritius-offshorecompany.html* (accessed 18 Feb 2021).

[83] Reuter, P. & Truman, E. M (2009). Chasing Dirty Money: The Fight against Money Laundering (2004) 30-31. Hereafter Reuter and Truman (2004). See also Camp P (2009) 169.

[84] Camp P (2009) 5 & 164-5 discusses the formation of (overseas) subsidiaries where there seems to be no commercial purpose as well as purchase of companies using suspect funds as examples of instances where particular caution should be taken by attorneys.

Under the Financial Intelligence Centre Act, No. 38 of 2001 Laws of South Africa (FICA), failure to report such suspicion constitutes an offence and attracts a fine or a prison sentence.[85]

Although reporting institutions are not explicitly required to establish their clients' sources of funds or net worth[86] they should take steps to ascertain the legitimacy of funds, especially in transactions involving large amounts of cash.[87]

4.2 Customer due diligence

Attorneys in South Africa are also under a duty to obtain and verify the identity of clients with whom they deal.[88] They must obtain sufficient identification of all clients at the beginning of business transactions as well as obtain all relevant information where a transaction poses a high risk of facilitating money laundering.[89]

4.3 Duty to keep records

South African attorneys are required by law to keep records of all transactions carried out on behalf of their clients,[90] which include the identity of the client and details of all transactions carried out on behalf of the said client. Such records must be kept for at least 5 years[91] and should be availed to officials of the FIC if so requested.[92] Failure to keep the said records constitutes a crime which attracts a prison sentence of up to 15 years or a fine of up to R10 million(over Kshs 71 million).[93]

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[85] S. 52 FICA. S. 68 provides the penalty as a prison sentence of 15 years or a fine of R 10 million.
[86] De Koker, L. (2002). Money Laundering Trends in South Africa. Journal of Money Laundering control Vol. 6 No. 1. See also Camp P (2009) 19.
[87] R. 2193 FICA Regulations provides a requirement to obtain information on the source of funds involved in a transaction suspected to involve money laundering. See also Camp P (2009) 5.
[88] S. 21 FICA.
[89] R. 21(2) FICA Regulations.
[90] S. 22 FICA. The failure to keep such records is an offence according to s. 46(2) of FICA and it attracts a penalty of imprisonment or a fine as per s. 68 FICA.
[91] S. 23 FICA.
[92] Ss. 26 & 27 FICA.
[93] Ss. 47 & 68 FICA.

Where an attorney fails to provide such records, the FIC is enabled to obtain the same pursuant to an order of the court against the particular law firm.[94] Such records are then admissible in court, both in proceedings against the money-launderer and against the lawyer who aids such laundering.[95]

5.0 Attorney-Client Privilege in light of the reporting duties of attorneys

The lawyer-client privilege is a component of the right to a fair trial as entrenched in the bill of rights in the constitution of Kenya. The right to a fair trial as provided in Article 50(2) includes the right of an accused person to choose his counsel or to have counsel appointed for him by the state at the state's own expense where substantial injustice would otherwise result.[96] This principle is protected by common law as well and is an indispensable tool in upholding the rights of accused persons. Where a client contacts the attorney to obtain legal advice, such communication is subject to legal professional privilege.[97]

Section 134(1) of the Evidence Act Cap 80 Laws of Kenya prohibits advocates from disclosing advocates-client communication, both in terms of documentation as well as advice rendered. It is also a requirement of the Law Society of Kenya Advocates Code of Conduct that communication between an advocate and his/her client should not be disclosed.[98] Legal professional privilege has also been upheld by the ACECA,[99] in its Section 28(10). Section 18 of the POCAMLA of Kenya protects privileged communication between an advocate and his/her client. Such communication can only be disclosed pursuant to a court order and in furtherance of an investigation. Section 137 of the Evidence Act provides for confidentiality of communications between an advocate and his client.

[94] S. 35 (4) FICA provides that such an order may be made ex-parte.
[95] S. 39 FICA.
[96] Art 50(2)(h).
[97] S v Kearney 1964 (2) SA 495 (A) at 499–500.
[98] Rule 7 of the Law Society of Kenya Advocates Code of Conduct 2016 (Available at http://kenyalaw.org/caselaw/cases/view/118365/ accessed on 19/2/2021)
[99] See note 49 ibid.

The doctrine of confidentiality is an equitable one that gives rise to an obligation not to disclose the information or use it for unauthorised purposes.[100] It has been argued that requiring lawyers to report requirements is cumbersome, costly and unworkable, constitutes double reporting and equates to transferring law enforcement obligations to advocates.[101] In addition, the benefit of confidentiality outweighs any negative effects on society and ensures high-quality legal advice.[102]

Legal professional privilege and confidentiality do not however protect communications made in furtherance of illegality. An advocate may disclose such communication to prevent the commission of a crime.[103] This position was upheld in the case of *Mohamed Salim Balala & Anor Vs Tor Allan Safaris Ltd,*[104] where the Court of Appeal held that advocate-client privilege can only be breached where the communication between an advocate and the client furthers an illegal purpose or where the advocate observes that the client used the privilege to commit a crime. It is also not protected where it goes against the public interest.[105]

Similarly, in South Africa, lawyer-client privilege is a component of the right to a fair trial as entrenched in the bill of rights in the constitution of South Africa. It includes the right of an accused person to choose his counsel or to have counsel appointed for him by the state at the state's own expense.[106] In the case of *S v Safatsa & others*[107] it was noted that privilege is a fundamental right to which inroads should not be liberally made. This has also been

[100] Njaramba, E.G. (2020). The Conflict Between Anti-Money Laundering Reporting Obligation And The Doctrine of Confidentiality in Kenya. Journal of Money Laundering Control Vol. 24 No. 3, pp. 607-620. https://doi.org/10.1108/JMLC-05-2020-0055.
[101] Ibid page 614.
[102] Ibid page 616.
[103] Section 134(1(a) &(b) Evidence Act Cap 80 Laws of Kenya
[104] (2015) eKLR.
[105] Njaramba EG (2020) 609.
[106] S. 35 (2) (*b*) & (*c*) Constitution of South Africa Act No. 108 of 1996 (Available at https://www.gov.za/sites/default/files/images/a108-96.pdf accessed on 19/2/2021). See also s. 35(3) (*f*) & (*g*) FICA.
[107] 1988 (1) SA 868 (A) 643-4.

provided in FICA, which excludes the duty of advocates to report where communications are protected by legal professional privilege. This is in the case of ongoing litigation, or for advice concerning contemplated litigation.[108]

South African law places an obligation to attorneys to be careful when advising clients as such advice could facilitate the smuggling of cash. Due to increased scrutiny of large cash amounts by financial institutions, money launderers [and terrorist financiers] result to smuggling of cash across borders to avoid detection,[109] and this can be facilitated by advice from attorneys to carry amounts falling just below the reporting threshold, which is illegal under South African law.[110] It is also illegal for an attorney to give legal advice while knowing or suspecting that this advice could facilitate the acquisition and dealing in proceeds of crime or facilitating terrorism.[111]

Both in the Kenyan and South African situations, professional privilege is sacred; but does not entirely waive an attorney's duties with respect to the combating of money laundering and terrorist financing. South African law is however specific as to the duty of the lawyer when a money laundering crime has been, is being or is likely to be committed, and the consequences of failing to uphold the said duty. A lawyer who fails to report a suspicious transaction and who gives the advice to facilitate money laundering is likely to incur personal criminal liability.

In Kenya, the POCAMLA provides for reporting any conveyance to or from Kenya of money or a monetary instrument of $10,000 or more. It doesn't however place an obligation on advocates to avoid giving advice that allows avoidance of reporting obligations. It also does not impose reporting obligations on them. Advocates in Kenya have not however been left to their own devices, as there are obligations imposed on the Kenyan lawyer to combat money-laundering imposed on them both by the Law Society of

[108] Section 37(2) FICA
[109] Reuter & Truman (2004) 28.
[110] Transactions carried out with an intention to avoid reporting obligations are sanctioned by s. 29(1) (*a*) (*iii*) FICA.
[111] S. 29(2) FICA. S. 4(3) POCDATARA. Also Camp P (2009) 8.

Kenya Advocates Professional Code of Ethics, as well as the Law Society Anti-Money Laundering Guidelines for legal practitioners. [112] These guidelines impose similar obligations as on other reporting institutions to combat money laundering.

It is therefore this paper's view that no harm would be done by a legal provision formalising the obligations of advocates, by making them reporting institutions. The objections raised to the POCAMLA Amendment Bill to make advocates reporting institutions should be weighed against the possible gains. As has been discussed above, such inclusion would not affect legal professional privilege, which cannot be used to conceal or facilitate any crime, including money laundering. The limits of such reporting would be stipulated, to only apply to transactions that exceed a certain limit, and those that raise suspicion to the advocate, given previous dealings with the particular client.[113] If anything, it would still be upon the advocate to exercise his judgment to determine what he/she should report.

On the second concern advocates' inclusion would constitute double reporting, this paper posits that the move would assist anti-money laundering and counter financing of terrorism efforts. It would make it impossible for offenders to escape detection, and close the gap where other institutions fail in their duty to report. Advocates should not rely on the reporting obligations of other players, including financial institutions, accountants and real estate agents, but should themselves join the efforts to combat money laundering.

6.0 Conclusion

Even if Kenya has made marked and considerable progress in anti-money laundering efforts, there remains a duty to enforce the raft of its laws and regulations against money laundering and counter financing of terrorism. In

[112] Available at *https://lsk.or.ke/Downloads/LSK%20AML-CFT%20Guidelines%20-%20Draft%20MWB%20FINAL%20Rev%20Clean.pdf* (Accessed 19/2/2021)

[113] Ole Maika S-Director General the Financial Reporting Centre, Role of Lawyers in Curbing Money Laundering, Daily Nation 24 August 2019 Available at *https://www.nation.co.ke/kenya/blogs-opinion/opinion/role-of-lawyers-in-curbing-money-laundering-197598* (Accessed 18 Feb 2021).

combating those challenges, and considering the vulnerabilities presented by the role of advocates, it is ideal that they are included as reporting institutions if the war against money laundering is to be won.

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Journal Review: Alternative Dispute Resolution Journal Volume 10 Issue 3

By: ***Mwati Muriithi****

Published in August 2022, The Alternative Dispute Resolution Journal Volume 10 Issue 3 covers pertinent and emerging issues across all ADR mechanisms including arbitration, mediation, negotiation, adjudication and traditional justice systems. It provides a platform for scholarly debate and in-depth investigations into both theoretical and practical questions in Alternative Dispute Resolution.

It is a publication of the Chartered Institute of Arbitrators, Kenya Branch and it is edited by the African Arbitrator of the Year 2022, Dr. Kariuki Muigua, PhD who has earned his reputation as a distinguished legal practitioner in Kenya and a leading environmental scholar in Africa and the world. It is now one of the most cited publications in the fields of ADR and Access to Justice in Kenya and across the globe.

The first article *'Evaluating the Role of ADR Mechanisms in Resolving Climate Change Disputes'* by Dr. Francis Kariuki and Vianney Sebayiga examines the conflicts and disputes that arise from the impacts of climate change and the various mechanisms for their resolution. It argues that litigation which has been traditionally used to resolve climate change conflicts has proven inadequate due to, *inter alia,* case backlogs and delays. The authors assess the appropriateness of Alternative Dispute Resolution (ADR) mechanisms in managing climate change conflicts and disputes. Finally, it highlights the opportunities presented by climate change to ADR practitioners.

Dr. Kariuki Muigua Ph.D has demonstrated his prowess and sound understanding of ADR in his article *'The Evolving Alternative Dispute Resolution Practice: Investing in Digital Dispute Resolution in Kenya'.* It makes a case for African countries to embrace digital dispute resolution

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mechanisms in addressing the emerging disputes related to digital commerce, in a timely and cost-effective manner, through putting in place responsive legal and institutional infrastructure.

'The Place of Mediation in Resolving Disputes in the Built Environment' by Dr. Kenneth Wyne Mutuma examines the use of mediation in the resolution of disputes in the built environment or otherwise referred to as the construction industry. It explores the nature and causes of disputes that arises from the contracting stage as well as those that occur during the implementation of the contract. It analyzes the place of Mediation in construction disputes and delves into its suitability for the same finally provides recommendations on the way forward with regard to the proper implementation of Construction Mediation in Kenya.

Dr. Wilfred A. Mutubwa in *'The Overriding Objective in English Arbitration Act: Some Key Lessons'* examines the case of *AIC Ltd v Federal Airports Authority of Nigeria*. With regard to this case, it analyses the basis on which the courts should review and vary judgments and orders made but not sealed and the application of the Denton Test on relief of sanctions.

'Alternative Dispute Resolution and Arbitrability of Public Procurement Proceedings Disputes in Kenya: A Feasibility or Pious Aspirations?' by Ibrahim Kitoo and Dr. Kariuki Muigua interrogates the provisions of the Public Procurement and Asset Disposal Act, 2015 on public procurement proceedings disputes and to what extent (if any) it encompasses and facilitates ADR/arbitration. It examines and gauges ADR's/arbitration efficacy, acceptability and applicability in resolving public procurement proceedings related disputes.

Austin Ouko in '*Exceptions to the Duty of Confidentiality in Arbitrations'* discusses the implied duty of confidentiality in arbitrations through a comprehensive review of the Constitution of Kenya, Legislations and Court decisions. It argues that the duty is not absolute and is subject to several exceptions under certain circumstances.

'Reflections on the Unfolding Significance of Sports Mediation' by Jacqueline Waihenya is a reflection on what sports mediation mounts to as well as some of its inherent dynamics in an evolving space. It notes that a quiet revolution has been occurring particularly at the Court of Arbitration of Sports (CAS) since the adoption of the CAS Mediation Rules in 1999 with statistical estimates indicating that almost 85% of CAS disputes are determined via mediation.

Dr. Kariuki Muigua in '*Promoting Professional Conduct, Ethics, Integrity & Etiquette in ADR'* discusses the need for promoting professional conduct, ethics, integrity and etiquette in Alternative Dispute Resolution (ADR). It critically addresses some of the ethical concerns in ADR that can potentially hinder the efficacy of the various mechanisms as well as attempts towards enacting rules of ethics in ADR by various institutions and national laws. It concludes by suggesting solutions towards promoting professional conduct, ethics, integrity and etiquette in ADR.

'Case Review: Alternative Dispute Resolution is an Imperative in Public Procurement Disputes Constitutional Petition No. E488 of 2021 Consolidated with Petition No. E465 of 2021' by Dr. Wilfred A. Mutubwa notes that the Constitution explicitly provides for Alternative Dispute Resolution and creates specialized bodies and entities to deal with specific disputes.

Jack Shivugu in '*A Critical Examination of the Doctrine of Public Policy and its Place in International Commercial Arbitration'* critically discusses the doctrine of public policy and its place in international commercial arbitration. The paper argues that there is ambiguity over the definition, nature and scope of public policy in international commercial arbitration. The paper argues that this ambiguity has hindered the growth of international commercial arbitration. It analyses various definitions and typologies of public policy in international commercial arbitration. The paper further discusses the judicial approach towards public policy as a ground for setting aside and refusal of recognition or enforcement of arbitral awards. Through this discussion, the paper proposes a pro enforcement policy of arbitral

awards in line with the spirit of the New York Convention with the doctrine of public policy being applied in limited circumstances.

'*Disciplined Dissent - Distinguishing Arbitral Awards from Judgments'* by Suzanne Rattray tracks the genesis of the dissenting opinion in international arbitration by examining the Model Law provisions. It analyses dissenting opinions and current African legislation by examining Uniform Laws adopted by Regional Groups. It discusses Current practice of dissenting opinions in commercial arbitration in Africa and offers
suggestions for practitioners.

'*Traditional Dispute Resolution Mechanisms in the Kenyan Justice System: Which Way Forward?'* by Mwangi Patience and Kibet Brian explores the sustainability of Traditional Dispute Resolution Mechanisms (TDRMs) in Kenya. It seeks to examine the policies and innovations that courts have set in a bid to develop TDRMs as the go to form of dispute resolution. It highlights the need for an appellate process for TDRMs and attempt to devise one. The paper contends that if access to justice is to be attained in a diverse Republic like Kenya, a multi door approach to access justice must be availed. One of these doors is the TDRM that an individual may choose to adopt.

The last article, '*Mediating Workplace Conflicts'* by Maryanne Mburu examines the sources of conflicts in the workplace. It analyses the use of workplace mediation to resolve these conflicts. It interrogates the use of mediation in addressing workplace disputes, suggests the appropriate procedures for facilitating workplace mediation and discusses the benefits and limitations of using mediation at the workplace.

Exploring Poverty in South Sudan through the Lens of Multidimensional Poverty Approach

By: ***Matai Muon****

Abstract

This paper focuses on the nature, patterns and measurement of poverty in South Sudan through the lens of multidimensional poverty approach. In so doing, it reviews the existing body of knowledge using a variety of tools and methodologies from both the income-based and the multidimensional-based approaches. The first part of the paper analyzes the levels, trends and determinants of income-based poverty with the aim of identifying strengths, weaknesses and gaps. Evidence confirms that the income-based approach of $1.90/day provides a scanty picture of South Sudan's poverty scene. The second part of the paper zeroes into the multidimensional poverty measure with a keen eye on what difference it makes to employ this tool. It is observed that the use of the multidimensional poverty index in South Sudan provides a bigger-picture perspective to understanding poverty as it lays bare details of deprivations for each respective indicator across the three dimensions. As a result, it is recommended that South Sudan develops a national multidimensional poverty index in order to better understand its poverty profile and subsequently, identify areas for effective interventions.

Keywords: *Poverty; South Sudan; Income-based Approach; Multidimensional Approach*

1. Introduction

Prior to the secession of Southern Sudan from Sudan in July 2011, there were many challenges that trapped the population of the South.[1] The country's social sector was poorly built with limited-service delivery owing to the long civil conflicts (1955–1972 and 1983–2005), climatic changes and natural

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[1] Khalid Siddig & Adam Ahmed & Somaia Jaafar & Ali Salih, "The Prevalence of Poverty and Inequality in South Sudan: The Case of Renk County," EcoMod2013 5454, EcoMod. July 2013.

disasters. Consequently, the adult illiteracy rate stood at 75% of total population with primary school enrolment being only 20%.[2] Only 27% of the population had access to safe drinking water and only 16% had access to sanitation facilities.[3] The signing of the Comprehensive Peace Agreement in 2005 silenced the guns but poverty continued to characterize the South whose economy was left in dilapidation after decades of unrest. Following a successful vote of nationhood in July 2011, South Sudan's socio-economic problems persisted as the divorce proved ugly.[4] Severe economic shocks and crises resulting from fluctuations in international oil prices, exports revenue and civil conflict challenged the new nation.[5] According to the World Bank, the December 2013 conflict has downgraded development gains achieved since independence.[6] As a result, the country's gross domestic product per capita declined from $1,780 in 2013 to an estimated $748 at the end of 2020.[7]

Due to lower oil exports, limited government revenues, and disrupted agricultural production, the economy contracted by an estimated 5.4 percent in FY2020/21, while 4 in 5 individuals remain under the international poverty line.[8] Living standards are generally poor as violence, displacement and climate shocks continue to challenge concerted international effort and trigger socioeconomic deprivation for the most vulnerable.[9] Inequalities and severe poverty are visible across a large swathe of the population in particular, among the internally displaced persons where access to clean drinking water, proper sanitation, and housing poses a significant

[2] See Khalid et al 2013

[3] Guvele, Cesar, Faki, Hamid, Nur, Eltahir, Abdelfattah, Abdelaziz and Aden Aw-Hassan, Poverty Assessment Southern Sudan. The Center for Agricultural Research in the Dry Areas. ICARDA, Aleppo, Syria.vi + 55 pp. 2009.

[4] The Guardian, Was South Sudan a mistake? January 2014. Available at *https://www.theguardian.com/world/2014/jan/08/south-sudan-war-mistake*

[5] See the World Bank South Sudan Overview 2022. Available at *https://www.worldbank.org/en/country/southsudan/overview*

[6] Ibid

[7] World Bank, South Sudan Overview, October 2020.

[8] Ibid

[9] African Development Bank Group, South Sudan Economic Outlook. Accessed at *https://www.afdb.org/en/countries/east-africa/south-sudan/south-sudan-economic-outlook*

development concern. [10] At the same time, the country's Human Development Index (HDI) in 2019 was one of the lowest in the world - standing at 0.433 in 2019.[11] In the global Multidimensional Poverty Index (MPI), the country scored 91.9% on the index in 2021. Furthermore, South Sudan failed to achieve[12] almost all the Millennium Development Goals (MDGs), and progress towards achieving the Sustainable Development Goals (SDGs) remains discouraging.[13]

The Government of South Sudan initiated different programmes to address poverty and socioeconomic deprivations.[14] These programmes include the Interim Country Strategy Paper 2011-2013 which the government adopted as an approach to fight poverty, the Institutional Capacity Building for Poverty Reduction and Good Governance Project (2007-2014), the Constituency Development Fund (CDF), Vision 2040 with its subsequent National Development Strategies (revised 2018-2021, 2021-2024) respectively, and the international support mechanism to reduce poverty in the country.[15] While these development plans provided some clarity on how to get the development right, the impacts on job creation, poverty reduction, and human development have been dismal. Despite the existence of a National Social Protection Policy Framework approved in 2015 for example, the social protection initiatives in the country are almost exclusively financed by donors, which constrains sustainability.[16]

In this context, this paper attempts to avail a comprehensive assessment of poverty in South Sudan using both the monetary and the multidimensional approaches, with emphasis on the dynamics and determinants of poverty. It also discusses the MPI as an effective policy offer for poverty reduction

[10] World Bank, Poverty & Equity Brief. April 2021
[11] UNDP, The Next Frontier: Human Development and the Anthropocene
[12] Nhial T, Tutlam, Where is South Sudan in achieving UN Millennium Development Goals? Sudan Tribune. November 2013. Available at *https://sudantribune.com/article47971/*
[13] Sustainable Development Report. "Rankings". Available at *https://dashboards.sdgindex.org/rankings*
[14] Mabior, Michael, Determinants of poverty in South Sudan: a case study of Greater Bor in Jonglei State. Thesis. University of Nairobi. 2015
[15] Ibid
[16] UN Economic and Social Council Draft Note. June 2022, p.2

efforts, explores gaps, draws conclusions and lastly, policy recommendations. The first section of the paper, therefore, discusses the discourse analysis on the representation of poverty in South Sudan focusing more generally on how poverty has been presented in the country over time. The second part assesses the income-based approach, levels, trends and determinants, analyzing changes and trends. The third part looks at the multidimensional approach with a keen interest in how it can be used as a poverty reduction policy tool in South Sudan. Fourth, the paper draws conclusions from the discussion utilizing the two approaches. Finally, it provides a blueprint for policy implications as far as poverty alleviation is concerned in the context of South Sudan.

2. Discourse Analysis on the Representation of Poverty in South Sudan

Understanding discourses is an important way to confront poverty. Olsen et al (2010) states that "Discourses are combinations of communicative acts that fit together."[17] A discourse is a context-specific local set of rules or norms that kick in when people are interacting or communicating.[18] Olsen et al noted that discourses do shape how we communicate about poverty. Accordingly, these set of local rules constraint how we talk and approach poverty, presenting poverty as a phenomenon of classes where one can't both 'target' the poor and 'be' poor at the same time! He writes:

> *"Poor people don't talk about poverty, as they are (by definition, within poverty discourse) too busy scratching out a living somewhere. The speaker about poverty is constructed as a heroic, non-poor, figure, who is doing something about a problem."*[19]

[17] Olsen, W. K., & Boran, A. Poverty as a Malaise of Development: A Discourse Analysis in its Global Context. In Poverty: Malaise of Development? (pp. 33-65). University of Chester Press. (Ed.) (2010).
[18] Ibid, p.4
[19] Ibid, p.4

Table 1: Typical Images of Poverty

	Charity Discourse	Social Inclusion Discourse	Economics of Poverty Discourse
Typical Photo Images	Orphan, hungry child, wrinkled older person	Crowds, meetings, white and black people together	Summary bullet points of achievements
Typical Graphical Images	A form to fill in for donating money	Pie chart of voting percentages (voting being a liberal notion of inclusion)	Bar charts

Source: Olsen et al (2010) "Poverty as a Malaise of Development"

Poverty has traditionally been and is still widely considered as a lack of income and is measured via income- or consumption-based indices, predominantly using the Foster–Greer–Thorbecke (FGT) [20] class of decomposable poverty measures developed by Foster, Greer and Thorbecke (1984).[21] This approach has been operationalised and popularized by the World Bank and UN organizations and widely adopted by countries worldwide. In recent years, poverty has been increasingly viewed from a human development perspective, relying mainly on Amartya Sen's capabilities approach, which argues that income is only a 'means to an end'[22]

Now widely understood as multidimensional, new measures of poverty go beyond income alone and focus more on 'the end', encompassing various aspects of wellbeing including, for example, quality of health, education, and living standards.[23] This multidimensional notion of poverty is exemplified by the United Nations' adoption of the SDGs – 17 goals in itself – and the explicit targets of ending both monetary and multidimensional poverty as

[20] For contextual understanding, see "Measurement of Foster-Greer-Thorbecke Index Using MS Excel" accessed at *https://www.youtube.com/watch?v=VSdoSYmAU6I*

[21] Andrianarison, F., Housseini, B., and Oldiges, C.: 'Dynamics and Determinants of Monetary and Multidimensional Poverty in Cameroon', OPHI Working Paper 141, University of Oxford. 2022

[22] Sen, A. Commodities and Capabilities, Amsterdam: North-Holland. 1985.

[23] IMF, Women in Economics: Sabina Alkire: Tackling Poverty Beyond the Idea of Material Wealth.

laid out in SDG targets 1.11 and 1.22.[24] As per Sen (1997) contention, the poverty experience is indeed, a function of opportunities, i.e., what people can do or be in a given context relative to possibilities for others.[25] Alfred Marshall, writing in 1925 noted that "The study of the causes of poverty is the study of the causes of degradation of a large part of mankind."[26]

3. Empirical results: levels, trends and determinants of poverty

In this section, I present and discuss levels, trends, and determinants of monetary and multidimensional poverty. I begin by analyzing monetary poverty over time, followed by multidimensional poverty.

3. 1 Monetary Poverty Analysis: Results and Discussion

Generally, South Sudan has approached poverty from an income-based lens. [27] The country performed its most recent national representative household survey on poverty in 2009. Thus, South Sudan knew very little about welfare and livelihoods prior to sovereignty in 2011.[28] In 2016, more than 4 in 5 South Sudanese lived on US$1.90 PPP (2011) per capita per day. The poverty headcount ratio meanwhile was equal to 82 percent that year, with a 95 percent confidence interval. Poverty grew considerably from 51 percent in 2009 to 66 percent in 2015 in addition to the most recent rate of 82 percent.[29] The surge in deprivation happened between 2015 and 2016, consequent upon simultaneous onset of near hyperinflation and escalation of the conflict.

Between 2009 and 2015, the annualized average growth rate of the poverty headcount was approximately 2.5 percentage points per year or 15 percentage points over the entire period. Yet, on the other hand, between 2015 and 2016 the poverty headcount grew by 16 percentage points in a

[24] Ibid, p.2
[25] Amartya Sen, "On Economic Inequality," Oxford: Clarendon Press, 1997
[26] Marshall, A. "Principles of Economics", eighth edition, p.3. 1925.
[27] Ahmed E, Ahmed et al, Poverty Determinants of South Sudan. The Case of Renk County. 2014
[28] World Bank, The Impacts of Conflict and Shocks on Poverty: South Sudan Poverty Assessment 2017. Poverty & Equity Global Practice, Africa, June 2018.
[29] Ibid p.24

calendar year.[30] The worsening economic conditions has pushed many impoverished households further towards destitution. These levels of poverty make South Sudan one of the poorest states in the world. The country's poverty headcount ratio is, indeed, much higher than the average estimates of other countries at the same stages of development.[31]

The incidence of poverty is more common in rural areas than in urban areas albeit with a closing gap. South Sudan has always reported a large disparity between urban and rural poverty. In 2009, for instance, 3 in 5 rural residents were poorer compared to 1 in 4 urban residents (25 and 58 percent respectively). Rural poverty skyrocketed to about 9 in 10 and urban poverty to 2 in 3 (85 and 65 percent respectively in 2016. Nonetheless, the gap between urban and rural poverty has narrowed over time despite the lasting and marked differences (Figure 1-2). This decrease results partly from conflict that have dogged urban areas, with many of the deadlier conflict events ragging on in more populous, and urbanized regions. Nevertheless, rural destitution is more pronounced than urban poverty.

Figure 1.1: Poverty headcount in LICs and LMICs

Figure 1.2: Poverty headcount[32]

Source: World Bank (2018)

[30] Ibid
[31] Ibid
[32] Note: Figure 1-2 includes low-income countries (LICs) and lower middle-income countries (LMICs) with poverty data post-2008. (SSD: South Sudan)

As such, the rural poor continues to experience a deeper poverty than urban residents, with a higher poverty gap and poverty severity.[33] South Sudan's poverty breadth and welfare deprivation have a direct positive correlation with worsening political landscapes and the resulting poor macroeconomic situations in the county.

Although the country has a history of high poverty levels coupled with severe cases of underdevelopment, recent changes in its poverty profiles are without a doubt, intimately linked to the shocks from the conflicts. Poverty and hunger have risen over the past decades to warrant the need to act with urgency in order to restore food security thus, preventing the consequences of malnutrition and a large-scale child stunting. According to the World Bank, doing such would ensure access to nutritious food, an extremely important short-term intervention to prevent a catastrophe.[34] Furthermore, the Bank suggests, arriving at a significant poverty alleviation level in South Sudan calls for ending the incidence of armed violence as well as reducing the political and macroeconomic risks.[35] Once that is achieved, the government needs to portray a credible commitment to development objectives as a way of regaining institutional loyalty.[36]

Table 2: State-level predictions of poverty headcount (%)

	Poverty (survey)	Poverty (predicted)	Poverty Rural (survey)	Poverty Rural (predicted)	Poverty Urban (survey)	Poverty Urban (predicted)
Central Equatoria	80	76	84	84	17	63
Eastern Equatoria	95	91	97	94	28	42
Jonglei		92		95		17
Lakes	84	86	86	89	29	47
Northern Bahr el Ghazal	90	90	91	93	12	68
Unity		92		95		17
Upper Nile		92		95		36
Warrap	86	89	90	92	43	65
Western Bahr el Ghazal	90	88	95	92	38	70
Western Equatoria	53	68	61	74	39	31
Total	**83**	**92**	**86**	**92**	**66**	**77**

Source: World Bank Report (2018)

[33] Ibid
[34] Ibid p.38
[35] World Bank, How conflict and economic crises exacerbate poverty in South Sudan. n
[36] Ibid 28

Household survey carried out between 2016-17 indicated lower national poverty headcount (76.4%) with large gaps across living standards.[37] Rural poverty on the other hand, showed a poverty headcount of 79.6% higher than urban areas (54.2%), a variation of 26%.

Table 3: Key indicators

Distribution among groups: 2016	International Poverty Line(%)		Relative group (%)	
	Non-Poor	Poor	Bottom 40	Top 60
Urban population	46	54	21	79
Rural population	20	80	43	57
Males	24	76	40	60
Females	23	77	40	60
0 to 14 years old	20	80	43	57
15 to 64 years old	27	73	38	62
65 and older	39	61	28	72
Without education (16+)	20	80	43	57
Primary education (16+)	38	62	30	70
Secondary education (16+)	42	58	25	75
Tertiary/post-secondary education (16+)	57	43	12	88

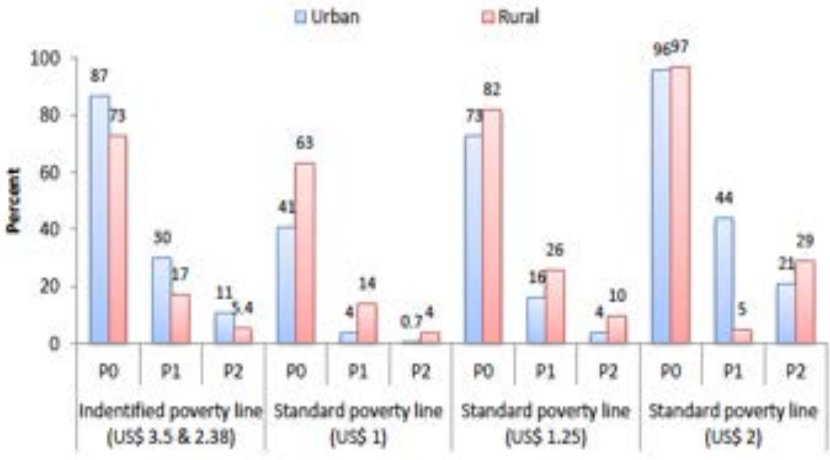
Source: World Bank using HFS-W3/SSAPOV/GMD

Ahmed et al (2013) in his analysis of poverty and inequality prevalence in Renk County of Upper Nile region found that "87% and 73% of the urban and rural households respectively fall below our calculated poverty lines."[38] Poverty incidence, gap and severity are more apparent among urban households than those of the rural households, which could be explained by the high influx of Internally Displaced People (IDPs) and refugees during the civil war period and the limited employment opportunities in the County.[39] These differences in poverty incidence between urban and rural may be explained by differences in income, failure of agricultural seasons, scarcity of off-farm generating income activities, and internal displacement of people (IDPs) migration from rural areas to the relatively safe Renk County.[40] According to the three standard lines, poverty Incidence, gap and severity are found to be mostly higher among rural households. Results of

[37] See World Bank, Poverty & Equity Brief
[38] See Ibid 1
[39] Ibid p. 14
[40] Ibid p.15

the rural households show that 63%, 82% and 97% fall below poverty lines if the three standard lines (US$ 1, 1.25 and 2), respectively are applied (Figure 2).

Figure 2: Poverty incidence, gap and severity in Renk County



Source: Ahmed et al (July 2013)

Ahmed concluded that poverty in Renk County is high in both urban and rural areas, and recommended that policy makers in the country may need to assure people's access to "basic needs" in order to alleviate poverty among the poorest residents.[41] Developing and implementing complementary programs between the Agricultural Bank, International Fund for Agricultural Development (IFAD) and other relevant NGOs involved in microfinance loans and credit to outreach the poorest of the poor.[42] Pape & Parisotto (2019) conducted an extremely detailed picture of welfare and livelihoods for the South Sudanese population between 2015 and 2017.[43] The paper utilized the Rapid Consumption Methodology combined with geo-spatial

[41] Ibid p.19
[42] Ibid p.20
[43] U Pape & Luca Parisotto, Estimating Poverty in a Fragile Context The High Frequency Survey in South Sudan. HiCN Working Paper 305. Institute of Development Studies, University of Sussex, May 2019.

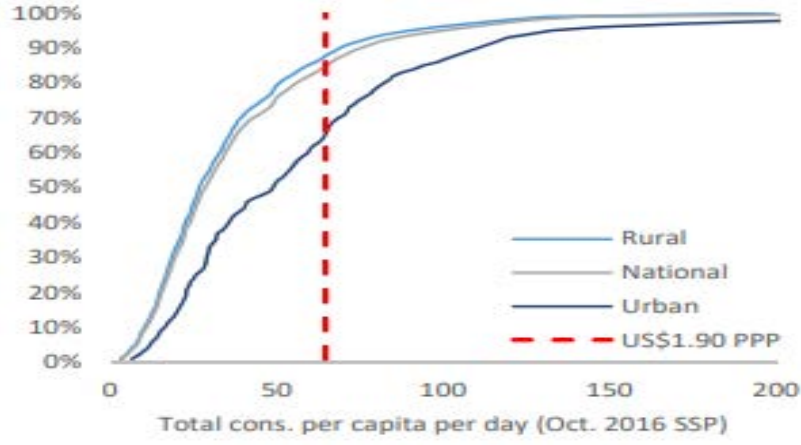
data for inaccessible survey areas. Their paper found that the incidence of poverty is much more widespread in rural areas compared to urban areas.

Table 4: Poverty headcount and average consumption per strata for the seven HFS covered states, 2016.

	Poverty headcount ratio				Mean consumption				
	Mean	Standard Error	[95% CI]		Mean	Standard Error	[95% CI]		N
National	0.83	0.01	0.80	0.86	73.30	2.68	67.99	78.60	1,848
Rural	0.86	0.02	0.83	0.89	67.36	2.70	62.03	72.70	1,281
Urban	0.65	0.02	0.60	0.70	113.99	5.59	102.94	125.05	567
Warrap	0.86	0.05	0.77	0.95	63.98	7.13	49.88	78.08	135
Northern Bahr El Ghazal	0.90	0.03	0.84	0.95	62.63	5.64	51.49	73.77	299
Western Bahr El Ghazal	0.90	0.02	0.87	0.94	60.17	6.33	47.66	72.68	310
Lakes	0.84	0.02	0.80	0.88	71.22	3.46	64.38	78.06	232
Western Equatoria	0.53	0.04	0.46	0.61	130.51	7.45	115.79	145.23	300
Central Equatoria	0.80	0.05	0.70	0.90	86.53	8.27	70.18	102.88	311
Eastern Equatoria	0.95	0.01	0.93	0.98	43.88	3.58	36.80	50.96	261

Source: Pape & Parisotto (May 2019)[44]

Figure 3: Cumulative consumption distribution.



Source: Pape & Parisotto (May 2019)

[44] Note: Standard errors estimated through linear regressions; all estimates weighted using population weights.

Rural poverty was equal to 86 percent in 2016 compared to 65 percent in urban areas. The rural poor also experienced deeper poverty than urban residents, with a higher poverty gap and poverty severity. In 2016, the urban poverty gap was equal to 31 percent compared to 50 percent for the rural poverty gap. A similar pattern can be observed for poverty severity, the urban severity index was equal to 19 percent and the rural index equal to 33 percent.

Mabior (2013) analyzed the determinants of poverty in South Sudan's Greater Bor, Jonglei State area and found that at 95% confidence interval, education levels, gender of the head of the household, marital status and sector of economy employed significantly reduced the probability of being poor while age of the head of the household, household size, distance to the nearest health facility and the poor status of the road network significantly increased the probability of being poor.[45] The study thus recommended cash transfers to senior citizens, establishment of healthcare facilities closer to people, family planning awareness as well as building proper road networks.

Other studies collaborate this finding; Mugo et al (2015) in his evaluation of maternal and child health in South Sudan revealed that the country's health care sector remains under-resourced and severely limited in terms of preparedness which, their paper argues, exposes it to vulnerabilities such as higher morbidity rates, and unskilled primary health workers. [46] They subsequently proposed that a sustained, multi-layered, and dependable support are required if maternal and child health were to be achieved.

[45] See Mabior, Determinants of Poverty in South Sudan, 2013

[46] Mugo et al, Maternal and Child Health in South Sudan: Priorities for the Post-2015 Agenda. Sage Journals. Retrieved from Google scholar. 2015

Table 5: Summary Statistics

VARIABLE	N	Mean	SD.	Min	Max
Poverty Status	200	0.876	0.153	0	1
Age of household head	200	47.71	8.223	22	68
Education level (complete years)	200	6.658	4.472	1	18
Employment status	200	0.208	0.134	0	1
Gender of household head	200	0.631	0.346	0	1
Household size	200	7.23	4.103	2	25
Household residence	200	0.775	0.230	0	1
Marital status	200	0.725	0.498	0	1
Distance to the nearest Health care facility	200	8.742	5.498	1	25
Sector of economy employed	200	0.743	0.119	0	1
Land Ownership	200	0.781	0.137	0	1
Status of Road Network	200	0.667	0.252	0	1
Access to safe water	200	0.236	0.124	0	1
Access to credit	200	0.292	0.163	0	1

Source: Mabior (2013)[47]

Table 6: South Sudan—Key Indicators/Trends in Maternal, Newborn, and Child Health (2000-2010).[48]

	2000[a,b]	2006	2010
Maternal mortality ratio (per 100,000 live births)	763[c]	2,054	Not included
Infant mortality rate (per 1,000 live births)	82[c]	102	75
Under-five mortality rate (per 1,000 live births)	132[c]	135	105
Children below 5 moderately or severely underweight	Not included	32.8%	27.6%
Children below 5 severely underweight	Not included	14.1%	12.2%
Contraception usage by women married or in union	Not included	3.5%	4%
Use of improved drinking water sources	5.4%-91.3%[d]	48.3%	68.7%
Use of sanitary means of excreta disposal	48%[e]	6.4%	7.4%
GPI (primary school)	Not included	0.85 GPI	0.79 GPI
	(Federal Ministry of Health, Central Bureau of Statistics, & UNICEF, 2006)	*(Government of Southern Sudan Ministry of Health & Southern Sudan Commission for Census, 2007)*	*(Ministry of Health & National Bureau of Statistics, 2013)*

Source: Mugo et al (2015)

[47] Ibid

[48] Note: GPI=Gender Parity index

UNICEF in a briefing in May 2020 raised a similar alarm on how poverty was robbing children suffering from malnutrition of their medicine.[49] The UN's Children Agency noted that about 1.3 million children in South Sudan were on the verge of facing acute malnutrition that year alone. On the other hand, Shimeles and Verdier-Chouchane (2016) focusing their analysis on the role of education in reducing poverty in South Sudan found that education levels came with increases in earning powers and thus, could be a way of tackling income poverty.[50] They recommended that the government, despite its existing welfare policy, would need to focus attention on the rural poor where poverty challenges are salient.

Table 7: Percentage of additional earning by level of education as compared to the reference group (no education)

Level of education	%
Primary education	36.5
Lower than secondary education	49.9
Vocational training	136.1
University	188.6

Source: Shimeles & Verdier-Chouchane (2016)[51]

3.2 Multidimensional Poverty Analysis, Results and Discussion

In this section, I present levels, trends, and determinants of multidimensional poverty. I begin by analyzing MPI measures over time, followed by a policy recommendation based on the gaps identified.

Poverty, as discussed, used to be viewed as a monetary deprivation. Most of the focus – be it in academic or policy circles – was on income, and the most common global yardstick for measuring progress was the World Bank's poverty line, currently defined as living on an income below $1.90 a day.[52]

[49] UNICEF, Medicine sharing is threatening children's lives. May 2020. Available at *https://www.unicef.org/southsudan/stories/medicine-sharing-threatening-childrens-lives*

[50] Shimeles & Verdier-Chouchane, The Key Role of Education in Reducing Poverty in South Sudan.

[51] Ibid, p.8

[52] Oxford Department of international Development, Broadening the global understanding of poverty. y

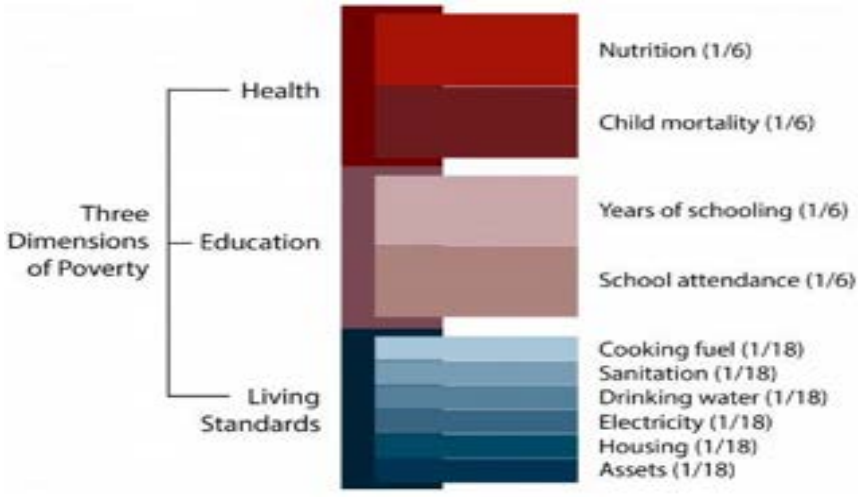
Since the 90s, with Southeast Asia on the lead, millions have been moved out of poverty. But then, something remarkable happened on the way to declaring victory over poverty. More and more countries began to realize that although income poverty was decreasing, the poor were still poor.[53] In the late 2000s, the Oxford Poverty and Human Development Initiative (OPHI) and others (notably, UNDP) developed a rigorous, policy-sensitive methodology, the Alkire Foster (AF) method,[54] to understand and measure multidimensional poverty.[55] And by 2010, it developed the first global multidimensional poverty index (MPI) jointly with the UNDP. A Multidimensional Poverty Peer Network (MPPN) emerged with leadership from Mexico and Colombia guided technically by the OPHI. Other countries followed suit having realized that their strategic response to poverty was missing key ingredients.

In 2015, the OPHI's poverty assessment received the global recognition it badly needed when the UN's Sustainable Development Goals (SDGs) declared in its goal 1 "to end poverty in all its forms everywhere.'[56] The Global Multidimensional Poverty Index (MPI) is an index of acute multidimensional poverty that covers over 100 developing countries.[57] The MPI is the single most important measure in as far as the global poverty assessment is concerned as Alkire (2016) elucidated:

> *It provides a vivid picture of how and where people are poor, within and across countries, regions and the world, enabling policymakers to better target their resources at those most in need through integrated policy interventions that tackle the many different aspects of poverty together.*[58]

[53] Ibid 43
[54] The Alkire-Foster (AF) method, developed by Sabina Alkire and James Foster at OPHI, is a flexible technique for measuring poverty or wellbeing.
[55] OPHI, Policy and the Alkire-Foster method. Available at *https://ophi.org.uk/policy/alkire-foster-methodology/#:~:text=The%20Alkire%2DFoster%20(AF),used%20in%20several%20different%20ways.*
[56] The United Nations, Goal 1: End poverty in all its forms everywhere. /
[57] Alkire, OPHI Global Multidimensional Poverty Index 2016. Research Gate. 3
[58] Ibid, p.3

Figure 4: Global Multidimensional Poverty Index: dimensions and indicators of poverty



Source: OPHI Publication (2018

Table 8: Global MPI – Dimensions, Indicators, Deprivation Cutoffs, and Weights

DIMENSIONS OF POVERTY	INDICATOR	DEPRIVED IF LIVING IN A HOUSEHOLD WHERE....	WEIGHT	SDG AREA
Health (1/3)	Nutrition	Any person under 70 years of age for whom there is nutritional information is **undernourished**.	1/6	SDG 2: Zero Hunger
	Child mortality	A child **under 18** has **died** in the household in the five-year period preceding the survey.	1/6	SDG 3: Health and Well-being
Education (1/3)	Years of schooling	**No** eligible household member has completed **six years of schooling**.	1/6	SDG 4: Quality Education
	School attendance	Any school-aged child is **not attending** school **up to** the age at which he/she would complete **class 8**.	1/6	SDG 4: Quality Education
Living Standards (1/3)	Cooking fuel	A household cooks using **solid fuel**, such as dung, agricultural crop, shrubs, wood, charcoal, or coal.	1/18	SDG 7: Affordable and Clean Energy
	Sanitation	The household has **unimproved** or **no** sanitation **facility** or it is improved but **shared** with other households.	1/18	SDG 6: Clean Water and Sanitation
	Drinking water	The household's source of **drinking water** is **not safe** or safe drinking water is a **30-minute** or **longer walk** from home, roundtrip.	1/18	SDG 6: Clean Water and Sanitation
	Electricity	The household has **no electricity**.	1/18	SDG 7: Affordable and Clean Energy
	Housing	The household has **inadequate** housing materials in **any** of the three components: **floor**, **roof**, or **walls**.	1/18	SDG 11: Sustainable Cities and Communities
	Assets	The household does **not own more than one** of these **assets**: radio, TV, telephone, computer, animal cart, bicycle, motorbike, or refrigerator, and does not own a car or truck.	1/18	SDG 1: No Poverty

Source: OPHI Publication (2018)[59]

[59] Ibid 50

Evidence suggests that poverty in South Sudan is a multi-sided issue that is not simply defined by an income-based statistic. Literacy, health care and food security are all causes of poverty in South Sudan.[60] With only 17% of children fully immunized, the population is severely disabled when it comes to combating diseases, and recommendations have included a fully vaccinated population, and provision of access to safe water in order to eradicate poverty.[61]

Worse still, South Sudan's MPI indices are scarce owing to the fact that the MPI[62] is fairly a new measure coupled with limited multi-level poverty indices in the country as a result of inadequate data on the demographic distribution of poverty.[63] The most recent survey data that were first publically available for South Sudan's MPI estimation refer to 2010.[64] This study revealed that 89.3 percent of the population are multidimensionally poor while an additional 8.5 percent live near multidimensional poverty. The breadth of deprivation (intensity) in South Sudan, which is the average of deprivation scores experienced by people in multidimensional poverty, is 61.7 percent. The MPI, which is the share of the population that is multidimensionally poor, adjusted by the intensity of the deprivations, is 0.551.

[60] Sophie Casimes, Bringing Stability: The Top Causes of Poverty in South Sudan. The Borgen Project. /

[61] Ibid

[62] MPI at glance: The MPI has 3 dimensions (health, education and living standards) and 10 indicators (nutrition, child mortality, years of schooling, school attendance, cooking fuel, sanitation, drinking water, electricity, housing and assets); A person is identified as multidimensionally poor (or 'MPI poor') if they are deprived in at least one third of the dimensions. The MPI is calculated by multiplying the incidence of poverty (the percentage of people identified as MPI poor) by the average intensity of poverty across the poor. So, it reflects both the share of people in poverty and the degree to which they are deprived. The Global and national MPIs show not just which people are poor and where, but how they are poor – in which indicators they are deprived simultaneously. It reveals different intensities of poverty, as some people are disadvantaged in more indicators than others. And it can be disaggregated to reveal the levels and trends of poverty within a country, or between ethnicities, castes or other social groups.

[63] Ibid. See UN Economic and Social Council Note

[64] UNDP, Work for Human Development: Briefing note for countries on the 2015 Human Development Report/South Sudan. Human Development Report 2015.

Table 9: The most recent MPI for South Sudan relative to selected countries

	Survey year	MPI value	Head-count (%)	Intensity of deprivations (%)	Population share (%)			Contribution to overall poverty of deprivations in (%)		
					Near poverty	In severe poverty	Below income poverty line	Health	Education	Living Standards
South Sudan	2010	0.551	89.3	61.7	8.5	69.6		14.3	39.3	46.3
Benin	2011/2012	0.343	64.2	53.3	16.9	37.7	51.6	24.8	33.1	42.1
Lesotho	2009	0.227	49.5	45.9	20.4	18.2	56.2	33.8	14.8	51.4

Source: UNDP HDR (2015)[65]

Table 9 compares multidimensional poverty with income poverty, measured by the percentage of the population living below 2011 PPP US$1.90 per day. It shows that income poverty only tells part of the story. The multidimensional poverty headcount is 49.2 percentage points higher than income poverty. This implies that individuals living above the income poverty line may still suffer deprivations in health, education and/or standard of living. Table 9 also shows the percentage of South Sudan's population that lives in severe multidimensional poverty. The contributions of deprivations in each dimension to overall poverty complete a comprehensive picture of people living in multidimensional poverty in South Sudan.

In their 2015 paper titled "Multidimensional Poverty in Sudan and South Sudan" Ballon, and Duclos, utilizing the National Baseline Household Surveys (NBHS) of 2009 for both countries, reported a more severe and more prevalent multidimensional poverty in South Sudan than in Sudan.[66] In addition, regional and geographical disparities emerged with Khartoum and Western Equatoria as the states with the least poverty, and Northern Darfur, and Warrap as the states with the greatest poverty.[67] As a consequence, their research recommended a recognition of the poverty profile differences across age groups, geographical areas and dimensions.

[65] Ibid, p.6
[66] Ballon, P. and Duclos, J.-Y. "Multidimensional Poverty in Sudan and South Sudan."OPHI Working Papers 93, University of Oxford. 2015
[67] Ibid

Table 10: Multidimensional Poverty Indices, by State

	Panel A				Panel B			
	Adults aged 15+				Children aged 6 -14 years old			
	Head Count ratio (%)				*Head Count ratio (%)*			
State	Education	Consumption	Private assets	Public assets	Education	Consumption	Private assets	Public assets
Sudan	**38.3**	**41.0**	**41.9**	**40.7**	**30.2**	**54.9**	**51.4**	**55.1**
Northern	25.3	32.5	18.8	8.2	16.4	45.1	24.1	14.1
River Nile	28.9	29.9	30.7	16.2	15.1	39.2	41.2	28.8
Red Sea	41.7	44.0	46.1	26.5	23.3	59.4	55.8	32.6
Kassala	54.7	32.8	58.9	58.5	48.8	41.7	67.4	68.3
Al-Gadarif	50.5	44.2	48.0	52.3	38.3	60.0	52.6	62.5
Khartoum	19.3	22.3	11.2	8.7	13.2	33.4	17.0	15.7
Al-Gezira	35.7	33.3	28.4	31.8	25.0	46.6	32.5	38.8
White Nile	39.4	52.6	50.3	49.2	29.5	60.0	52.2	55.0
Sinnar	45.0	41.1	48.1	47.1	36.7	50.7	54.8	52.6
Blue Nile	53.9	52.3	52.3	52.3	30.7	63.5	59.9	57.2
Northern Kordofan	50.7	52.4	63.7	70.5	39.4	69.1	68.5	86.0
Southern Kordofan	50.6	57.7	55.3	77.8	38.1	65.8	62.4	84.3
Northern Darfur	38.7	69.1	74.7	49.2	25.9	77.4	74.2	58.3
Western Darfur	55.3	48.9	71.5	76.9	42.4	62.5	78.4	82.5
Southern Darfur	43.1	53.4	58.3	54.4	36.1	65.4	68.0	76.7
South Sudan	**73.8**	**49.1**	**54.9**	**53.5**	**54.7**	**51.8**	**57.4**	**55.3**
Upper Nile	56.0	26.0	51.7	58.6	38.7	25.3	51.7	58.0
Jonglei	84.4	46.4	78.3	78.4	55.0	48.6	79.7	81.1
Unity	75.3	66.6	55.2	55.7	58.6	69.2	55.4	56.7
Warap	84.6	63.8	67.7	78.2	74.1	63.4	73.8	78.3
North B.Al Ghazal	80.4	74.5	53.5	61.8	62.9	77.4	55.1	61.5
West B.Al Ghazal	66.8	39.6	28.8	49.5	57.9	47.8	33.8	54.7
Lakes	83.2	49.2	46.7	47.8	65.0	48.3	43.0	48.7
Western Equatoria	67.9	39.6	29.8	10.0	30.4	47.0	24.8	8.9
Central Equatoria	55.9	40.3	32.7	15.2	36.7	48.0	39.3	17.8
Eastern Equatoria	81.3	47.2	74.7	59.1	68.9	54.6	78.8	64.7

Source: Ballon & Duclos (2015)[68]

Table 11: Multidimensional Poverty Profiles

Panel A

Adults aged 15+ (k >=2)

	Sudan		South Sudan
MP indices - national			
M0	0.35	<	0.53
H	49%	<	73%
A	72% * 3 dim	=	74% * 3 dim
By dimension			
Greatest dim. poverty	Private assets		Education
Least dim. poverty	Education		Consumption
By area of residence			
Greatest values			
M0		<	
H	Rural	<	Rural
A		=	
By state			
Greatest values			
M0	Western Darfur	<	Jonglei
H	Northern Darfur	<	Jonglei
A	Western Darfur	<	Warap
Lowest values			
M0	Khartoum	<	Western Equatoria
H	Khartoum	<	Central Equatoria
A	Khartoum	<	Western Equatoria

Panel B

Children aged 6 to years old (k >=2)

	Sudan		South Sudan
MP indices - national			
M0	0.44	<	0.5
H	59%	<	70%
A	74% * 3 dim	=	72% * 3 dim
By dimension			
Greatest dim. poverty	Public assets		Private assets
Least dim. poverty	Education		Consumption
By area of residence			
Greatest values			
M0		=	
H	Rural	=	Rural
A		=	
By state			
Greatest values			
M0	N. Kordofan and W.Darfur	<	Warap
H	N. Kordofan and W.Darfur	<	Warap
A	Kassala	=	Warap
Lowest values			
M0	Khartoum	<	Western Equatoria
H	Khartoum	<	Western Equatoria
A	Khartoum	<	Western Equatoria

Source: Ballon & Duclos (2015)

[68] Ibid p.21

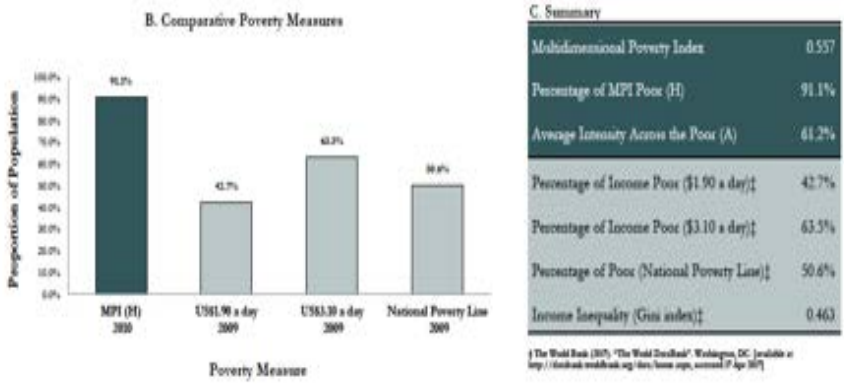
The multidimensional analysis of poverty among adults (results summarized in Table 11) shows that multidimensional poverty, as measured by the adjusted headcount ratio, is higher in South Sudan than in Sudan. This is mainly explained by the higher incidence rate of 73% in South Sudan, compared to 49% in Sudan. The sub-group poverty profiles by area of residence are higher among adults residing in the rural areas of each country. The cross-country comparison of rural poverty indicates that prevalence of multidimensional poverty is higher among South-Sudanese adults residing in rural areas compared to Sudanese ones.

Khartoum and Western Equatoria, on the one side, and that Western Darfur and Jonglei, on the other side, are the states with the lowest and highest multidimensional poverty values in Sudan and South Sudan respectively.[69] Thus, this finding corroborates with the evidence already discussed which points to the fact that rural MPI is higher than the urban MPI in South Sudan. Additionally, it confirms the need to broaden poverty measurement as R. Morel and R. Chowdhury (2015) found in their work.[70] In ``Reaching the Ultra-Poor" their study confirmed that the use of multidimensional poverty approach to measure progress was an effective intervention particularly in the targeting process.

The OPHI in its 2017 country briefing also compared both the MPI and other measures. It discovered that MPI was indeed, higher than the income poverty, indicating that South Sudan's existing national poverty measure was wanting.[71] Other countries in SSA such as Kenya (MPI poor: 39.9%, $1.90 a day: 33.6), Uganda (MPI poor: 69.9%, $1.90 a day: 34.6%), Niger (MPI poor: 89.3%, $1.90 a day: 45.7%) assessed in the same year confirm that multidimensional poverty measure provides a bigger picture perspective than the later approach.

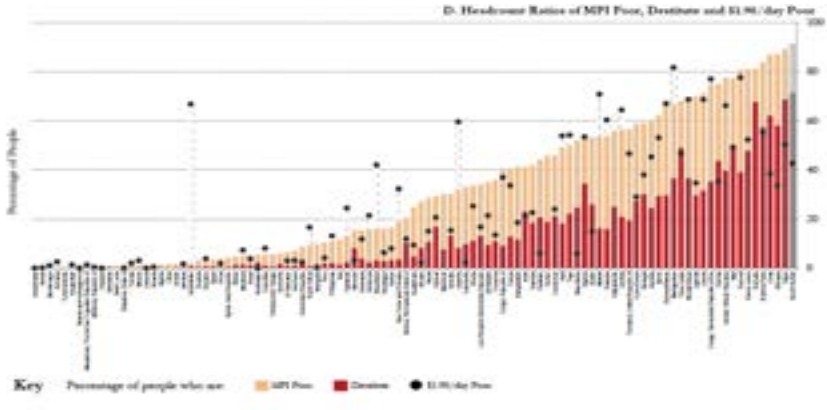
[69] Ibid p.31
[70] R. Morel and R. Chowdhury, Reaching the ultra-Poor: Adapting Targeting Strategy in the Context of South Sudan. Journal of International Development
[71] Oxford Poverty and Human Development Initiative, "South Sudan Country Briefing", Multidimensional Poverty Index Data Bank. OPHI, University of Oxford. 2017.

Figure 5: Comparing the MPI with Other Poverty Measures



Source: OPHI Country Briefing (2017)

Figure 6: Comparing the Headcount Ratios of MPI Poor and $1.90/day Poor



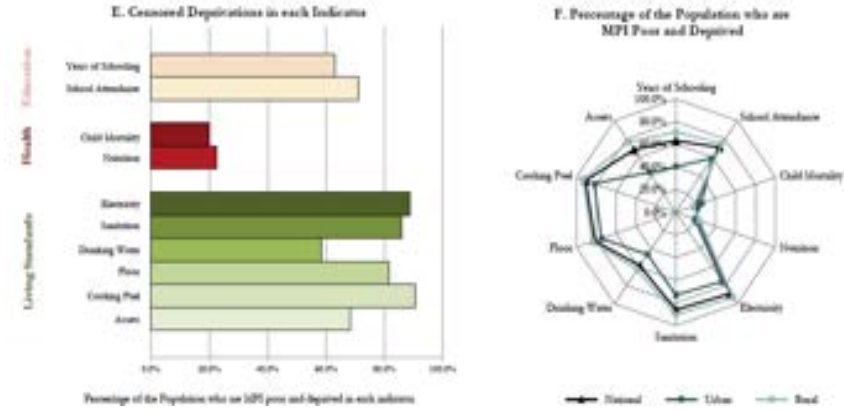
Source: OPHI Country Briefing (2017)[72]

In the incidence of deprivation by indicator (Percentage of the Population who are MPI poor), the OPHI found that cooking fuel, electricity, sanitation, school attendance, and floor are more deprived than the rest of indicators.

[72] The column denoting this country is in grey, with other countries shown in color. The percentage of people who are MPI poor is ordinarily shown in orange, and the percentage of people who are also destitute is shown in red.

This was an indicator of a destitute since the country was deprived in multiple indicators.

Figure 7: Incidence of Deprivation in Each of the MPI Indicators



Source: OPHI Country Briefing (2017)[73]

Corroborating this finding, the United Nations' Economic and Social Council Draft Note (2022) on South Sudan revealed the following statistics:

> *About 86 per cent of the population is not using safely managed water and 63 per cent of drinking water at households is contaminated with E. coli. Only 2 percent of households reported having access to a protected water source. Some 75 per cent of households practice open defecation, with only 10 per cent having an improved sanitation facility.*[74] *An estimated 59 per cent (2.8 million) children aged 3–17 years were out of school in 2020, of whom 53 per cent were girls.*[75]

Comparatively, a study by the African Development Bank in 2013 noted that "access to improved water and sanitation is also very low and less than half the average for Sub-Saharan countries."[76] Additionally, the Study revealed:

[73] Ibid 56, p.3
[74] UN Economic and Social Council, Draft Country Program Document: South Sudan. 2
[75] Ibid p.9
[76] African Development Bank, South Sudan: An Infrastructure Action Plan. 2013.

"Only 16% of females and 40% of males are literate, compared with 53% and 70% for Sub-Saharan Africa while it adds that "less than half of the 6-13 year old children are enrolled in primary school."[77]

Table 12: Selected Socio-economic Indicators

Indicator	South Sudan	Low income income countries	Lower middle income countries	Sub-Saharan Africa
Education				
Adult literacy rate (% of 15 years and above)				
Female	16	50	93	53
Male	40	71	85	70
Net primary enrollment ratio (%)	48	78	93	66
Ratio of girls to boys in primary school (%)	59	87	99	86
Students per teacher	52	42	22	48
Health status				
Under five mortality rate (per 1,000)	135	114	39	163
Infant mortality rate (per 1,000)	102	75	31	96
Underweight children under 5 years (%)	34		13	30
Maternal mortality rate (per 100,000 live births)	2 054	684	163	921
Access to improved water and sanitation				
% of population with access	27	75	82	56
% of population with access	16	38	57	37

S*ource: World Bank, World Development Indicators, various issues.*
SSCCSE, Key Indicators for Southern Sudan, February 2011[78]

Furthermore, South Sudan is energy poor. Based on the finding by the International Switch Energy Case Competition, the country has one of the lowest electrification rates in the world.[79] Only 1% of South Sudan is electrified.[80] Whiting et al (2015) recommended, among other, to incorporate other primary energy sources to the electricity mix and support the government plan to divert some crude oil into electricity generation, and to prioritize emergency stockpiling, especially given the existing socio-political tension and being a landlocked country, the lack of access to ports.[81] A recent Energy report by the Rift Valley Institute (2020) also made the same conclusion, urging for more efforts—both national and international—to

[77] Ibid, p.24
[78] Ibid p.26
[79] International Switch Energy, Energy Poverty in South Sudan. 2021.
[80] Whiting et al, South Sudan: A Review of the Challenges and Prospects in the Development of Sustainable Energy Policy and Practices. April 2015.
[81] Ibid

improve access to clean and affordable energy sources, which are fundamental to the health and wellbeing of both people and environment.[82]

Table 13: South Sudan's Power Capacity

Electricity	total	South Sudan per capita	USA per capita
Own consumption	391.80 m kWh	35.00 kWh	11,842.76 kWh
Production	412.80 m kWh	36.88 kWh	12,428.52 kWh
Crude Oil	**Barrel/day**	**South Sudan per capita**	**USA per capita**
Production	150,200.00 bbl	0.013 bbl	0.033 bbl
Export	147,300.00 bbl	0.013 bbl	0.004 bbl

Source: International Switch Energy (2021)

In computing the MPI across the sub-national regions of South Sudan, the OPHI found that Warrap, Northern Bhar El Ghazal, Jonglei and Unity and Lake states to be severely impoverished compared to the more developed, and better educated Greater Equatoria region.[83] It also found that rural MPI poverty (94%) was higher than urban MPI poverty (82%). Interestingly, Bonaneri (2013) found that multidimensional poverty indices were higher in Kenya's marginalized counties (West Pokot, Wajir, and Samburu) while the study reported lower indices in comparatively higher income counties of Nairobi, Nakuru and Kiambu.[84]

[82] Rift Valley Institute, Fuelling Poverty The challenges of accessing energy among urban households in Juba, South Sudan. 2020.
[83] OPHI Country Briefing, 2017
[84] Bonaneri S., Measuring Multidimensional Poverty in Kenya: An Application of Alkire-Foster Methodology.Master Thesis, University of Nairobi. November 2019.

Table 14: Multidimensional Poverty across Sub-national Regions

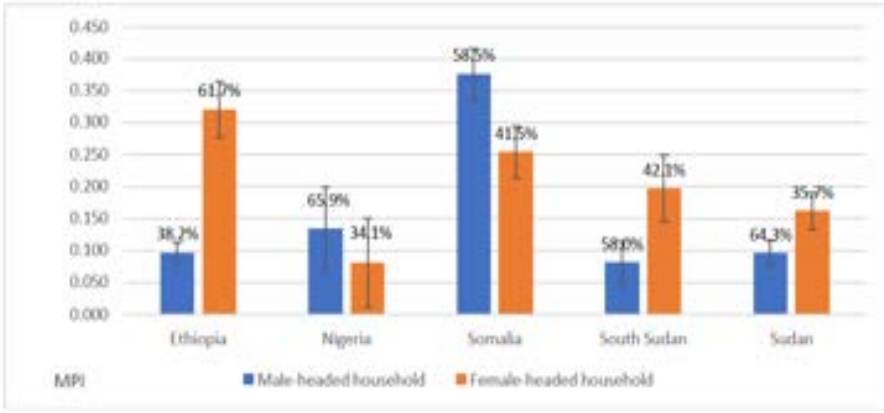
Region	MPI (H x A)	H (Incidence) k = 33.3%	A (Intensity)	Percentage of Population: Vulnerable to Poverty 20%-33.3%	In Severe Poverty k = 50%	Destitute	Inequality Among the MPI Poor	Population Share
South Sudan	0.387	91.3%	61.2%	6.9%	71.8%	71.4%	0.202	100%
Urban	0.439	82.8%	88.7%	10.5%	83.2%	-	-	28.3%
Rural	0.991	94.6%	63.8%	5.4%	77.2%	-	-	74.7%
Central Equatoria	0.291	75.6%	51.7%	17.4%	39.2%	39.7%	0.171	13.6%
Western Equatoria	0.456	85.2%	53.5%	11.5%	53.2%	50.8%	0.155	8.3%
Western Bahr el Ghazal	0.491	84.9%	57.9%	11.2%	62.1%	57.0%	0.175	4.1%
Upper Nile	0.503	86.3%	58.3%	10.0%	61.2%	62.5%	0.190	12.4%
Eastern Equatoria	0.561	92.5%	60.7%	7.0%	71.5%	75.3%	0.208	11.4%
Lakes	0.605	96.9%	62.5%	2.5%	81.6%	80.9%	0.174	7.4%
Jonglei and Unity	0.627	97.5%	64.4%	2.2%	84.9%	86.1%	0.160	20.4%
Northern Bahr el Ghazal	0.632	97.4%	66.9%	2.5%	86.9%	87.0%	0.192	10.1%
Warrap	0.661	98.7%	67.0%	1.3%	89.3%	88.4%	0.186	12.3%

Source: OPHI Country Briefing (2017)[85]

In "A Multi-Country Analysis of Multidimensional Poverty in Contexts of Forced Displacement" Admasu, Y., et al (2022) laid bare the evidence for complementary measures when assessing deprivations among people in contexts of displacement.[86] Relying on household survey data from selected areas of Ethiopia, Nigeria, Somalia, South Sudan, and Sudan, the paper disclosed significant differences across displaced and host communities in all countries except Nigeria. "In Ethiopia, South Sudan, and Sudan, female-headed households have higher MPIs," reported their findings. They also examined mismatches and overlaps in the identification of the poor by the MPI and the $1.90/ day poverty line and concluded that there was a need to use multiple measures in order to better assess patterns of deprivations across countries.[87] "Our findings," the study offers, "indicate that differentiation by gender of the household head, displacement status and subgroups of headship have implications for policy and targeting."[88]

[85] Ibid 59, p.5
[86] Admasu, Y., et al. A Multi-Country Analysis of Multidimensional Poverty in Contexts of Forced Displacement. No. 140, Oxford Poverty and Human Development Initiative (OPHI), 2022, pp. 1–39.
[87] Ibid
[88] Ibid p.32

Figure 8: MPI for male- and female-headed households by country



Source: Admasu, Y., et al (2022)[89]

When disaggregated by displacement status, the study found that female-headed households in displaced communities were higher than the host in terms of proportion in Ethiopia (51.4 % of refugees vs 32.2% of hosts), South Sudan (53.3% of IDPs vs 43.6% of non-IDPs), and Sudan (47% IDPs vs 30% non-IDPS).

4. Conclusion and Policy Implications

This paper is concerned with exploring poverty in South Sudan using the lens of multidimensional poverty approach. It goes beyond monetary poverty and considers non-income-based poverty. For this purpose, I utilized the existing literature evidence on poverty measurements in South Sudan first by reviewing unidimensional poverty measures to explore the gaps if any and second, by zeroing into the multidimensional poverty measure with the aim of understanding the breadth of poverty spread and occurrence in South Sudan. For monetary poverty, it uses total per capita consumption as employed by the World Bank whereas for multidimensional poverty, it employs the Alkire-Foster - the Multidimensional Poverty index to analyze the existing body of knowledge.

[89] Ibid p.20

4. 1 Unidimensional Poverty:

Levels, patterns and the distribution analysis of income-based welfare across South Sudan indicates that poverty rates are more pronounced and widespread among the rural population in South Sudan, than are in the Urban populations. Although in some instances, urban poverty tends to rise higher than the rural poverty rates, the general conclusion is that the South Sudanese poor are found in its remote areas. In addition, there has been a notable trend during the years of civil war, an indication that conflict has had a negative impact on per capita incomes of the population. Regional disparities also emerged with conflict-affected Greater Upper Nile having been more impoverished than the relatively peaceful Greater Bhar El Ghazel and the more educated, less-conflict prone Greater Equatoria regions. Evidence also avers that income poverty decreases with higher levels of education which suggests that higher education could be an effective poverty eradicating tool. It also shows a very diverse poverty profile across ages, sub-groups and regions. In addition, the impact of conflict on poverty patterns has been notably higher in recent years following the 2013 crisis.

4. 2 Multidimensional poverty:

It is observed that poverty in South Sudan is a multi-sided issue. The multidimensional analysis of poverty in South Sudan exhibits a higher MPI poverty levels than its unidimensional poverty. Thus, the country needs to develop a National MPI in order to better understand both the incidence and intensity of its poverty profile. In addition, the findings confirm that South Sudan encounters multiple deprivations fueled by lower-than-average human development indices. It is also observed that South Sudan's HDI and the MPI indices were poorer than the Sub-Saharan African countries averages.

4. 3 Policy implication:

As shown, poverty in South Sudan is multidimensional. Therefore, it requires a multidimensional approach. A multidimensional poverty measure can act as a focal point for policy integration given its flexibility and ease of disaggregation by regions, sub-groups and by individuals. The indicators of multidimensional poverty index arm policy makers with the tools to locate possible areas for action, and deeper analysis breaking down each country's

MPI for deeper insights as well as disaggregating it by section. This benefits the country in question in targeting measures. However, to arrive at this level, South Sudan should develop a strategic poverty reduction plan that can be used to construct a national multidimensional poverty index. Since the national MPI is a construct of an easily decomposable measure of the national poverty profile, it can act as a useful tool for fast implementation and monitoring of South Sudan's poverty alleviation effort.

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Book Review: Exploring Conflict Management in Environmental Matters - Kariuki Muigua, Ph.D., FCIArb, (C. Arb), Glenwood Publishers, 2022

By: ***Jack Shivugu****

The relationship between environment and conflicts is well documented especially in Africa. The resource-curse phenomenon explains the paradox where countries with abundance of natural resources experience less economic growth or underdevelopment. This is often attributed to a number of factors especially the use and governance of natural resources. The environment-conflict nexus is thus a fundamental concern in Kenya, Africa and the world at large. Environmental conflicts affect the social, economic, cultural and political spheres in areas where such conflicts arise.

Environmental conflict management is thus more important than ever. In light of the Sustainable Development agenda adopted by the United Nations, effective management of conflicts in environmental matters is crucial in spearheading economic and social development across the globe. Sustainable Development goal 16 acknowledges the role of peace in promoting environmental conservation and attaining the other sustainable development goals. Conflict management is therefore a critical tool of environmental management in the quest towards attainment of Sustainable Development.

In lights of these concerns, the book *Exploring Conflict Management in Environmental Matters* by Dr. Kariuki Muigua is timely. The book acknowledges the relationship between conflicts and environment. It is informed by the need to address the adverse effects of conflicts on environmental matters. The book explores the link between conflict management and environmental governance, challenges arising therefrom and suggests practical recommendations towards addressing them. The book is informed by several themes on Conflict Management and Environmental

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Governance including Sustainable Development; Access to Justice; Alternative Dispute Resolution and Acess to Justice and Environmental Democracy.

Dr. Kariuki Muigua has demonstrated his prowess and sound understanding of pertinent issues and concerns in the fields of Conflict Management and the Environment in this book. The book is written in a clear and concise language and the author maintains high standards of intellectual diligence and critical analysis of issues throughout the book. It opens the mind of the reader and draws them to an ideal world where effective conflict management is a subset of sound environmental governance. The book is divided into ten chapters that are well connected with each chapter focusing on specific concerns in relation to the overall theme of the book.

In the first chapter, the author introduces the reader to the concept of conflict management in environmental matters. It explores the environment-conflict nexus and further discusses the need to manage such conflicts. The chapter lays a solid foundation for the rest of the book and helps the reader appreciate the sensitivity of environmental conflicts and the need to effectively and efficiently manage such conflicts.

In chapter two, the author explores the causes and manifestations of environmental conflicts. The chapter argues that environmental conflicts manifest in various forms including conflicts relating to access to environmental resources and conflicts relating to side effects of economic activity. It further analyses various types of environmental conflicts biodiversity conflicts and land and water conflicts. The reader is also able to understand the causes of conflicts; stages of conflicts and costs of conflicts. The chapter also presents an interesting idea about the benefits of conflicts. It argues that conflicts can trigger people out of complacency and inspire them to take positive action. This chapter is important since an understanding of the causes and manifestations of conflicts is crucial in creating interventions towards addressing them.

Chapter three discusses the institutional and methodological approaches towards management of environmental conflicts. It succinctly discusses the

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legal framework for managing environmental conflicts in Kenya including the Courts, the National Environment Tribunal (NET), National Environmental Complaints Committee, Arbitral tribunals, statutory tribunals and customary justice systems. The chapter analyses the strengths and weaknesses of these institutions and proposes reforms. It also discusses the role of Alternative Dispute Resolution (ADR) in the management of environmental conflicts. On this issue, the chapter presents the advantages of ADR in the management of environmental conflicts, challenges and reform measures towards enhanced use of ADR in environmental conflict management.

Chapter four focuses on best practices in conflict management and the environment. It analyses the international environmental law framework and environmental conflict management. Under this part, the chapter discusses the role of multilateral environmental agreements, customary international environmental law and soft law instruments and scholarly commentaries in environmental management. It explores the strengths and weaknesses of this framework. The chapter further focuses on the African situation and analyses the concept of peace building and conflict management in Africa. It critically discusses challenges facing environmental conflict management in Africa and suggests recommendations towards addressing these challenges.

In chapter five, the author discusses effective conflict management as tool for entrenching environmental rights. The chapter presents a right –based approach to environmental conflicts management and argues that human rights are inextricably linked to the environment. Environmental concerns such as land use, environmental quality, water allocation, waste disposal and natural resource management have a human rights perspective. The chapter explores this link under the concept of environmental democracy which is crucial in the realization of environmental rights. The chapter further analyses principles of effective conflict management such as participation, inclusion, empowerment, cultural sensitivity, equity and the Sustainable Livelihoods Approach (SLA).

Chapter six focuses on the place of conflict management in the sustainable development agenda. The chapter discusses the place of the environment in

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the sustainable development agenda and argues that most of the sustainable development goals are anchored in the environment. These include goal number 2 geared towards achieving food security, goal 6 towards sustainable management of water and sanitation, goal 12 towards sustainable production and consumption and goal 13 towards combating climate change. The chapter also discusses the economic and social dimensions of sustainable development. The author also critically discusses the concept of Environment, Social and Governance (ESG) and proposes measures towards attainment of ESG for sustainable development. On this basis, the chapter argues that effective environmental conflict management is a critical component towards attainment of sustainable development.

Chapter seven narrows down to Kenya and discusses environmental conflicts management from a Kenyan perspective. It analyses the emergence of environmental conflicts in Kenya and various means through which these conflicts are managed. The chapter further explores the idea of effective peace building towards environmental conflict management in Kenya.

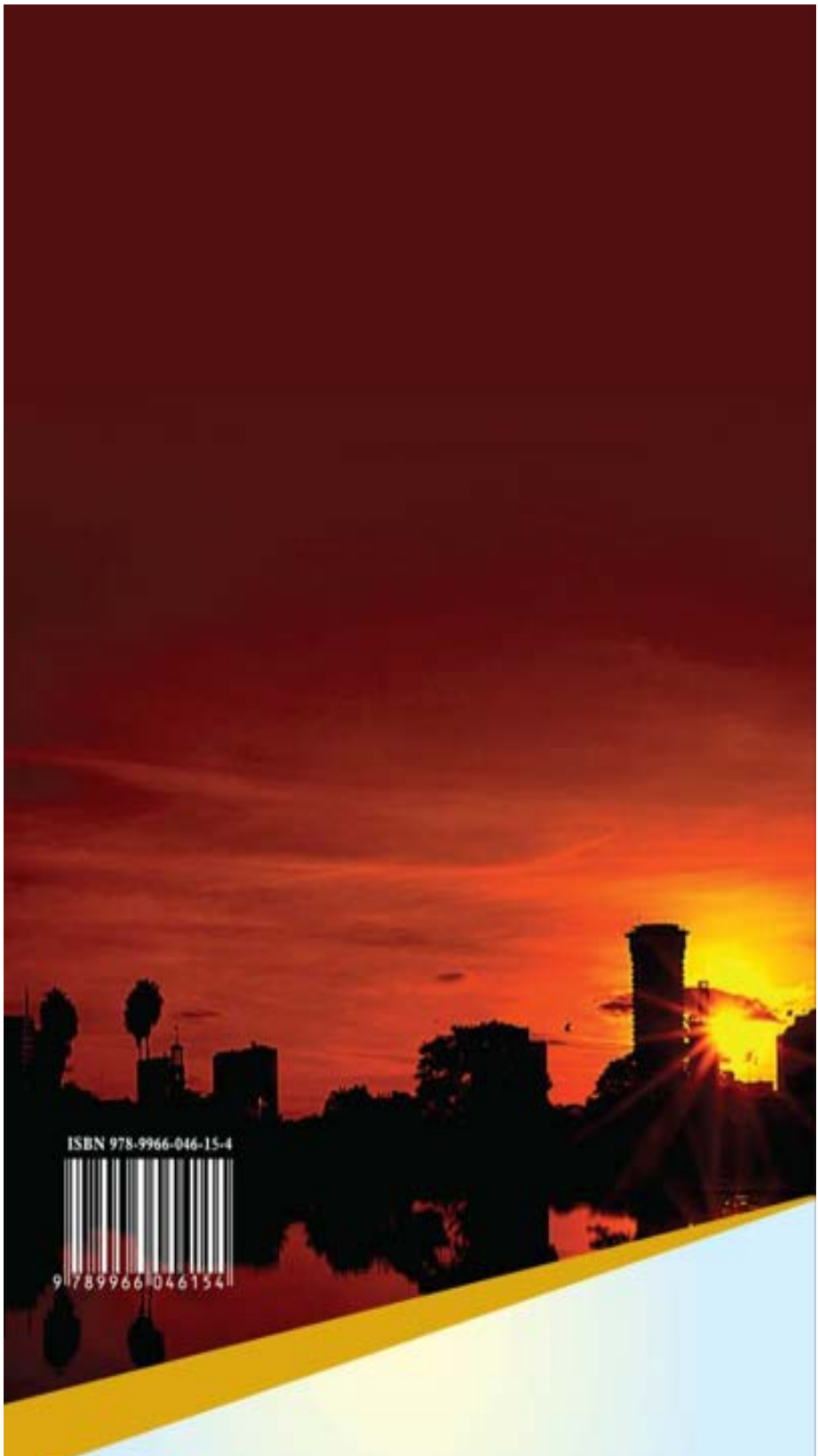
Chapter eight discusses the role of state agencies and communities in achieving effective management of environmental conflicts. It argues that the state plays an important role in management of the environment in Kenya as envisioned under article 69 of the Constitution. The chapter further argues that management of natural resources in Africa through community-based approaches has gained popularity. It explores ways through which this has been achieved. The chapter further discusses the role of the state and communities in addressing environmental conflicts.

Chapter nine analyses contemporary issues in conflict management and environmental matters. These issues include gender and conflict management, Traditional Ecological Knowledge and its role in environmental and conflict management, the role of science and technology in environmental management, climate change as a catalyst for environmental conflicts and international investments and the environment. The chapter discusses how these issues affect environmental conflict management and the need for conflict management to be considered within the larger lens of sustainable development.

Chapter ten is the final chapter of the book. It recaps the entire discussion and reiterates the need for effective environmental conflict management in the quest towards sustainable development. The chapter concludes by offering viable recommendations towards promoting effective environmental governance and conflict management in environmental matters.

Exploring Conflict Management in Environmental Matters by Dr. Kariuki Muigua bridges the gap in the fields of Conflict Management and Environmental Governance in Kenya. It is premised on the current legal framework and brings out challenges and areas for reform in environmental conflict management in Kenya. The book has undertaken a Political, Economic, Sociological, Technological, Legal and Environmental (PESTEL) analysis of key issues and concerns in conflict management and environmental matters in Kenya and lays a basis for necessary interventions towards effective environmental conflict management for sustainable development.

The book is a useful resource for policy makers, legislators, practitioners, lecturers, students and the public at large. It contains a rich reservoir of knowledge in the fields of Conflict Management and Environmental Governance and its launch is going to be a game changer in these fields. It is hoped that future editions of the book will track the progress towards implementation of the recommendations suggested in the book. *Exploring Conflict Management in Environmental Matters* by Dr. Kariuki Muigua is a must read. Get yourself a copy and let us embark on this journey towards effective management of environmental conflicts toward Sustainable Development.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