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|---|--------------------------|
| Strengthening Environmental Rule of Law for Sustainability | Dr. Kariuki Muigua |
| The Role and Effectiveness of the Kenyan Institutional Framework in Protection Against Forced Evictions | Stephen Chege Njoroge |
| Transitional Justice and Racial Injustice: Complicity, Challenges, and Ways Forward | Dr. Kenneth Wyne Mutuma |
| Revisiting the legal debate on Genetically Modified Organisms (GMOs) in Africa: Which way for Kenya? | Michael Sang |
| Greenwashing: A hindrance to Achieving Sustainability? | Dr. Kariuki Muigua |
| Promoting Urban Resilience and Sustainability in Kenya's Cities and Towns | Caroline Jepchumba Kibii |
| Construction Adjudication in Kenya: The Need to Develop Legal Framework for Effective Construction Adjudication | Lucky Philomena Mbaye |
| Revisiting the Legal Debate on the Constitutionality of the Life Sentence in Kenya: The Case for Its Continued Relevance | Michael Sang |
| Renewable Energy, The Promised Land: Obligations Under the UNFCCC (1992) & Steps Towards Fulfilling Kenya Vision 2030 On Renewable Energy | Andrew Derrick |
| Separation of Powers and Judicial Overreach in Kenya: Legal Safeguards against Usurpation of Parliamentary Powers by Courts | Michael Sang |
| Book Review: Achieving Climate Justice for Development | James Njuguna |
| Review: Journal of Appropriate Dispute Resolution (ADR) and Sustainability, Vol. 1, Issue 1 (2023) | Mwati Muriithi |

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Strengthening Environmental Rule of Law for Sustainability

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Abstract

This paper critically discusses the concept of environmental rule of law. It defines environmental rule of law and examines its salient principles. The paper further examines progress made towards promoting environmental rule of law at the global, regional and national levels. It also explores some of the challenges facing the realization of environmental rule of law and suggests measures towards strengthening environmental rule of law for sustainability

1.0 Introduction

The rule of law has been defined as a phenomenon that comprises a number of principles of a formal and procedural character, addressing the way in which a society is governed¹. The formal principles concern the generality, clarity, publicity, stability, and prospectivity of the norms that govern a society². The procedural principles on the other hand concern the processes by which these norms are administered, and the institutions like courts and an independent judiciary that their

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¹ Waldron. J., 'The Rule of Law.' Available at <https://plato.stanford.edu/Entries/rule-of-law/> (Accessed on 12/09/2023)

² Ibid

administration requires³. On some accounts, the rule of law also comprises certain substantive ideals like a presumption of liberty and respect for private property rights⁴. The hallmarks of respect for the rule of law in a society include separation of powers of the executive, legislature, and judiciary; regular, free, and fair elections; an independent and impartial judiciary; free and independent media institutions; and equality of the people before the law⁵.

The United Nations defines the rule of law as a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards⁶. According to the United Nations, the rule of law requires measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness,

³ Ibid

⁴ Muigua. K., 'Rule of Law Approach for Inclusive Participation in Environmental, Social, and Governance (ESG) Accountability Mechanisms for Climate-Resilient Responses.' Available at <http://kmco.co.ke/wp-content/uploads/2023/09/Rule-of-Law-Approach-for-Inclusive-Participation-in-Environmental-Social-and-Governance-ESG-Accountability-Mechanisms-for-Climate-Resilient-Responses-1.pdf> (Accessed on 12/09/2023)

⁵ International Commission of Jurists., 'Democratic Governance & Rule of Law.' Available at <https://icj-kenya.org/what-we-do/democratic-governance-rule-of-law/> (Accessed on 12/09/2023)

⁶ United Nations., 'What is the Rule of Law.' Available at <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/> (Accessed on 12/09/2023)

and procedural and legal transparency⁷. The rule of law therefore essentially means that the law and regulation matters and that legal rights will have the backing of the state⁸. In addition, the rule of law infers that the state itself is constrained by law and cannot act unfairly or arbitrarily in relation to its own citizens and businesses⁹.

The rule of law is foundational to resilient democratic societies¹⁰. It has further been asserted that the rule of law is an enabler of justice and development¹¹. According to the International Development Law Organization (IDLO), the rule of law is inseparable from equality, from access to justice and education, from access to health and the protection of the most vulnerable¹². The IDLO further points out that the rule of law is crucial for the viability of communities and nations, and for the environment, that sustains them¹³. The importance of the rule of law is also recognized under the 2030 Agenda for Sustainable Development at its Sustainable Development Goals (SDGs)¹⁴.

⁷ Ibid

⁸ Lee. P., 'The Rule of Law and Investor Approaches to ESG: Discussion Paper.' Available at https://binghamcentre.biicl.org/documents/155_rule_of_law_and_investor_approaches_to_esg.pdf (Accessed on 12/09/2023)

⁹ Ibid

¹⁰ United States Agency for International Development., 'Democracy, Human Rights and Governance.' Available at <https://www.usaid.gov/democracy/rule-law> (Accessed on 12/09/2023)

¹¹ International Development Law Organization (IDLO), 'Rule of Law.' Available at <https://www.idlo.int/what-we-do/rule-law> (Accessed on 12/09/2023)

¹² Ibid

¹³ Ibid

¹⁴ United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' A/RES/70/1., Available at

SDGs 16 and 16.3 seeks to promote the rule of law at the national and international levels and ensure equal access to justice for all¹⁵.

According to the United Nations Environment Programme (UNEP), the rule of law is essential in all sectors of governance including the environment ¹⁶. Consequently, the idea of environmental rule of law has emerged¹⁷. This paper critically discusses the concept of environmental rule of law. It defines environmental rule of law and examines its salient principles. The paper further examines progress made towards promoting environmental rule of law at the global, regional and national levels. It also explores some of the challenges facing the realization of environmental rule of law and suggests measures towards strengthening environmental rule of law for sustainability.

2.0 Defining Environmental Rule of Law

Environmental law is a collective term encompassing all aspects of the law that provide protection to the environment ¹⁸. It

<https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 12/09/2023)

¹⁵ Ibid

¹⁶ United Nations Environment Programme., 'Promoting Environmental Rule of Law.' Available at <https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/promoting-environmental-rule-law> (Accessed on 12/09/2023)

¹⁷ Ibid

¹⁸ Conserve Energy Future., 'What is Environmental Law: Importance and Components.' Available at <https://www.conserve-energy-future.com/environmental-law-and-its->

entails a set of regulatory regimes and environmental legal principles which focus on the management of specific natural resources, such as land, wildlife and biodiversity, forests, minerals, water, fisheries and coastal and marine resources¹⁹. It has been observed that if human society is to stay within the bounds of critical ecological thresholds, it is imperative that environmental laws are widely understood, respected, and enforced and the benefits of environmental protection are enjoyed by people and the planet²⁰. Environmental rule of law offers a framework for addressing the gap between environmental laws as set out in text and in practice and is key to achieving the Sustainable Development Goals²¹.

Environmental rule of law is understood as the legal framework of procedural and substantive rights and obligations that incorporates the principles of ecologically Sustainable Development in the rule of law²². This concept integrates environmental needs with the essential elements of the rule of law, and provides the basis for improving environmental

components.php#:~:text=The%20two%20basic%20factors%20that,preserve%20and%20protect%20the%20environment (Accessed on 12/09/2023)

¹⁹ Ibid

²⁰ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Available at https://www.unep.org/news-and-stories/press-release/dramatic-growth-laws-protect-environment-widespread-failure-enforce?_ga=2.16775999.845015847.1694504989-17506007.1686563450 (Accessed on 12/09/2023)

²¹ Ibid

²² International Union for Conservation of Nature., 'IUCN World Declaration on the Environmental Rule of Law.' Available at <http://www2.ecolex.org/server2neu.php/libcat/docs/LI/MON-091064.pdf> (Accessed on 12/09/2023)

governance²³. It highlights environmental sustainability by connecting it with fundamental rights and obligations²⁴. It reflects universal moral values and ethical norms of behaviour, and it provides a foundation for environmental rights and obligations²⁵. Environmental rule of law therefore refers to an ideal where environmental laws are widely understood, respected, and enforced and the benefits of environmental protection are enjoyed by people and the planet²⁶.

According to the International Union for Conservation of Nature (IUCN), the concept of environmental rule of law is founded upon key elements of governance including development, enactment, and implementation of clear, strict, enforceable, and effective laws, regulations, and policies that are efficiently administered through fair and inclusive processes to achieve the highest standards of environmental quality; respect for human rights, including the right to a safe, clean, healthy, and sustainable environment; measures to ensure effective compliance with laws, regulations, and policies, including adequate criminal, civil, and administrative enforcement, liability for environmental damage, and mechanisms for timely, impartial, and independent dispute resolution; effective rules on equal access to information, public

²³ United Nations Environment Programme., 'Environmental Rule of Law.' Available at <https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/promoting-environmental-rule-law> 0#:~:text=Environmental%20rule%20of%20law%20is,with%20fundamental%20Rights%20and%20obligations (Accessed on 12/09/2023)

²⁴ Ibid

²⁵ Ibid

²⁶ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

participation in decision-making, and access to justice; environmental auditing and reporting, together with other effective accountability, transparency, ethics, integrity and anti-corruption mechanisms; and use of best-available scientific knowledge²⁷. It has been observed that despite most countries having established, to varying degrees, environmental laws and institutions to foster environmental governance, there is a growing recognition that a considerable implementation gap exists in both developed and developing nations between the requirements of environmental laws and their implementation and enforcement²⁸. UNEP in its global assessment of environmental rule of law finds weak enforcement to be a global trend that is exacerbating environmental threats, despite prolific growth in environmental laws and agencies worldwide over the past few decades²⁹. The goal of environmental rule of law is to bridge this gap and foster the implementation and enforcement of environmental laws³⁰.

IUCN posits that without the environmental rule of law and the enforcement of legal rights and obligations, environmental governance, conservation, and protection may be arbitrary,

²⁷ International Union for Conservation of Nature., 'IUCN World Declaration on the Environmental Rule of Law.' Op Cit

²⁸ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

²⁹ United Nations Environment Programme., 'Dramatic Growth in Laws to Protect Environment, But Widespread Failure to Enforce, Finds Report.' Available at https://www.unep.org/news-and-stories/press-release/dramatic-growth-laws-protect-environment-widespread-failure-enforce?_ga=2.16775999.845015847.1694504989-17506007.1686563450 (Accessed on 12/09/2023)

³⁰ Ibid

subjective, and unpredictable³¹. Therefore, environmental rule of law and robust institutions are essential to respond to increasing environmental pressures that threaten the ecological integrity of the Earth, in a way that respects fundamental rights and principles of justice and fairness³². Environmental rule of law is therefore an essential tool of environmental governance³³.

Environmental rule of law is central to Sustainable Development³⁴. The concept of Sustainable Development seeks to foster development that meets the needs of the present without compromising the ability of future generations to meet their own needs³⁵. It combines elements such as environmental protection, economic development and social concerns³⁶.

Environmental rule of law provides an essential platform underpinning the four pillars of Sustainable Development – economic, social, environmental, and peace³⁷. It seeks to

³¹ International Union for Conservation of Nature., 'IUCN World Declaration on the Environmental Rule of Law.' Op Cit

³² Ibid

³³ Muigua, K., 'Revisiting the Role of Law in Environmental Governance in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2019/06/Revisiting-the-Role-of-Law-in-Environmental-Governance-in-Kenya-Kariuki-Muigua-June-2019.pdf> (Accessed on 12/09/2023)

³⁴ United Nations Environment Programme., 'Environmental Rule of Law.' Op Cit

³⁵ World Commission on Environment and Development., 'Our Common Future.' Oxford, (Oxford University Press, 1987)

³⁶ Fitzmaurice, M., 'The Principle of Sustainable Development in International Development Law.' *International Sustainable Development Law.*, Vol 1

³⁷ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

integrate the fundamental principles of environmental law in environmental governance in order to realize Sustainable Development³⁸. These principles include the principles of intergenerational and intragenerational equity, the polluter-pays principle, the precautionary principle, the principle of public participation and the principle of international cooperation in the management of shared environmental resources³⁹. Environmental rule of law is thus vital in the attainment of the Sustainable Development agenda and the SDGs. UNEP asserts that the rule of law in environmental matters is essential for equity in terms of the advancement of the SDGs, the provision of fair access by assuring a rights-based approach, and the promotion and protection of environmental and other socio-economic rights⁴⁰.

It has been pointed out that without environmental rule of law, development cannot be sustainable⁴¹. However, the presence of environmental rule of law ensures that well-designed laws are implemented by capable government institutions that are held accountable by an informed and engaged public lead to a culture of compliance that embraces environmental and social values⁴². Strengthening environmental rule of law is thus vital in protecting the environmental, social, and cultural values and

³⁸ Muigua, K., 'Nurturing Our Environment for Sustainable Development.' Glenwood Publishers Limited, 2016

³⁹ Ibid

⁴⁰ United Nations Environment Programme., 'Environmental Rule of Law.' Op Cit

⁴¹ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

⁴² Ibid

to achieving ecologically Sustainable Development⁴³. It is therefore imperative that environmental rule of law should serve as the legal foundation for promoting environmental ethics and achieving environmental justice, global ecological integrity, and a sustainable future for all, including for future generations, at local, national, regional, and global levels⁴⁴.

The United Nations observes that environmental law is a foundation for environmental sustainability and the full realisation of its objectives is ever more urgent in light of growing environmental pressures⁴⁵. The world is facing increasing environmental problems including climate change, biodiversity loss, water scarcity, air and water pollution, soil degradation, among others, which contribute to poverty and to growing social inequalities⁴⁶. Conflicts over natural resources and environmental crimes are further intensifying these problems thus hindering sustainability⁴⁷. Environmental rule of law is vital in addressing these challenges by fostering sound environmental governance and realization of its principles including Environmental Justice and Environmental Democracy⁴⁸. Environmental Justice means the right to have

⁴³ International Union for Conservation of Nature., 'IUCN World Declaration on the Environmental Rule of Law.' Op Cit

⁴⁴ Ibid

⁴⁵ United Nations., 'Environmental Law.' Available at <https://www.un.org/ruleoflaw/thematic-areas/land-property-environment/environmental-law/> (Accessed on 12/09/2023)

⁴⁶ Earth. Org., '15 Biggest Environmental Problems of 2023.' Available at <https://earth.org/the-biggest-environmental-problems-of-our-lifetime/#> (Accessed on 12/09/2023)

⁴⁷ Ibid

⁴⁸ Muigua. K, Wamukoya. D, & Kariuki. F., 'Natural Resources and Environmental Justice in Kenya.' Glenwood Publishers Limited, 2015

access to natural resources; not to suffer disproportionately from environmental policies, laws and regulations; and the right to environmental information, participation and involvement in decision-making⁴⁹. It also refers to the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies⁵⁰. Environmental Justice is attained when every person enjoys the same degree of protection from environmental and health hazards and has access to the decision-making process to have a healthy environment⁵¹. The concept of Environmental Democracy focuses on how decisions are made, with a particular emphasis on the need for citizens, interest groups, and communities generally, to participate and have their voices heard⁵². It enshrines principles such as inclusivity, representativity, accountability, efficiency, and effectiveness, as well as social equity, justice and good governance⁵³. Environmental rule of law seeks to foster these principles by enhancing access to information, public participation, and access to justice and

⁴⁹ Ako. R., 'Resource Exploitation and Environmental Justice: the Nigerian Experience' Available at <https://www.elgaronline.com/display/edcoll/9781848446793/9781848446793.00011.xml> (Accessed on 12/09/2023)

⁵⁰ United States Environmental Protection Agency; 'Environmental Justice.' Available at <https://www.epa.gov/environmentaljustice> (Accessed on 12/09/2023)

⁵¹ Ibid

⁵² Muigua. K., 'Realising Environmental Democracy in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/REALISING-ENVIRONMENTAL-DEMOCRACY-IN-KENYA-4th-May-2018-1-1.pdf> (Accessed on 12/09/2023)

⁵³ Ibid

effective remedies in environmental matters⁵⁴. Environmental rule of law is therefore pertinent in fostering sound environmental governance by ensuring that the environment and natural resources are managed sustainably, transparently, and on the basis of the rule of law towards Sustainable Development, peace and justice⁵⁵. It is therefore vital to strengthen environmental rule of law for sustainability.

3.0 Global Trends in Environmental Rule of Law: Prospects and Challenges

The importance of environmental rule of law received global recognition during the first world conference on the environment being the 1972 United Nations Conference on the Human Environment held in Stockholm, Sweden⁵⁶. Participants at the conference adopted a series of principles for sound management of the environment including the Stockholm Declaration and Action Plan for the Human Environment and several resolutions⁵⁷. The Stockholm Declaration provides that the protection and improvement of the human environment is a major issue which affects the well-being of people and economic development throughout the world and it is the urgent desire of the people of the whole world and the duty of

⁵⁴ Ibid

⁵⁵ United Nations Environment Programme., 'Environmental Rule of Law.' Op Cit

⁵⁶ United Nations., 'United Nations Conference on the Human Environment, 5-16 June 1972, Stockholm.' Available at <https://www.un.org/en/conferences/environment/stockholm1972> (Accessed on 13/09/2023)

⁵⁷ Ibid

all Governments⁵⁸. The Declaration stipulates several principles that are vital in advancing environmental rule of law including the need to protect and improve the environment for present and future generations, careful planning and management of natural resources, halting and preventing environmental pollution, adoption of environmental laws and policies and adopt an integrated and the need to adopt a co-ordinated approach in development planning so as to ensure that development is compatible with the need to protect and improve environment⁵⁹. The Stockholm Declaration was an important milestone for the development of environmental rule of law across the globe since it was the first global document outlining the general principles for the management of natural resources and the environment⁶⁰.

Environmental rule of law was further enhanced following the United Nations Conference on Environment and Development also known as the 'Earth Summit', held in Rio de Janeiro, Brazil, from 3-14 June 1992⁶¹. The Earth Summit concluded that the concept of Sustainable Development was an attainable goal for all the people of the world, regardless of whether they were at

⁵⁸ United Nations Environment Programme., 'Stockholm Declaration.' Available at <https://wedocs.unep.org/bitstream/handle/20.500.11822/29567/ELGP1StockD.pdf> (Accessed on 13/09/2023)

⁵⁹ Ibid

⁶⁰ Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Op Cit

⁶¹ United Nations., 'United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3-14 June 1992.' Available at <https://www.un.org/en/conferences/environment/rio1992> (Accessed on 13/09/2023)

the local, national, regional or international level ⁶² . It also recognized that integrating and balancing economic, social and environmental concerns in meeting our needs is vital for sustaining human life on the planet and that such an integrated approach is possible⁶³. One of the major results of the Earth Summit was the adoption of *Agenda 21*⁶⁴ a daring program of action calling for new strategies to invest in the future to achieve overall sustainable development in the 21st century.

Agenda 21 affirms that integration of environment and development concerns and greater attention to them will lead to the fulfilment of basic needs, improved living standards for all, better protected and managed ecosystems and a safer, more prosperous future⁶⁵. It calls for international cooperation to accelerate Sustainable Development in developing countries and related domestic policies ⁶⁶ . Agenda 21 further acknowledges the importance of the rule of law in sustainability and provides that laws and regulations suited to country - specific conditions are among the most important instruments for transforming environment and development policies into action, not only through "command and control" methods, but also as a normative framework for economic planning and

⁶² Ibid

⁶³ Ibid

⁶⁴ United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992., 'Agenda 21.' Available at https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf?_gl=1*_9uipp7*_ga*MjA2NDk2MDMxMS4xNjcxMjU5NTEw*_ga_TK9BQL5X7Z*_MTY5NDU5NjE3MS41NS4xLjE2OTQ1OTgzODUuMC4wLjA. (Accessed on 13/09/2023)

⁶⁵ Ibid, Preamble

⁶⁶ Ibid, Chapter 2

market instruments⁶⁷. It further stipulates that it is essential to develop and implement integrated, enforceable and effective laws and regulations that are based upon sound social, ecological, economic and scientific principles in order to enhance sustainability⁶⁸. It also recognizes the importance of judicial and administrative procedures in advancing environmental rule of law and calls upon Governments and legislators, with the support, where appropriate, of competent international organizations, to establish judicial and administrative procedures for legal redress and remedy of actions affecting environment and development that may be unlawful or infringe on rights under the law, and should provide access to individuals, groups and organizations with a recognized legal interest⁶⁹. Agenda 21 is therefore vital in fostering environmental rule of law by calling upon countries to develop integrated strategies to maximize compliance with their laws and regulations relating to Sustainable Development. These strategies include enactment of enforceable, effective laws, regulations and standards that are based on sound economic, social and environmental principles and appropriate risk assessment, incorporating sanctions designed to punish violations, obtain redress and deter future violations; establishing mechanisms for promoting compliance; strengthening institutional capacity for collecting compliance data, regularly reviewing compliance, detecting violations, establishing enforcement priorities, undertaking effective enforcement, and conducting periodic evaluations of the

⁶⁷ Ibid, Chapter 8.13

⁶⁸ Ibid, Chapter 8.14

⁶⁹ Ibid, Chapter 8.18

effectiveness of compliance and enforcement programmes; fostering mechanisms for appropriate involvement of individuals and groups in the development and enforcement of laws and regulations on environment and development and national monitoring of legal follow-up to international instruments⁷⁰.

Another important legal instrument that was adopted during the Earth Summit which is vital in advancing environmental rule of law is the *Rio Declaration on Environment and Development*⁷¹. The Declaration sought to balance the interests of states in exploiting their natural resources for development and environmental conservation with the aim of achieving Sustainable Development⁷². The Declaration stipulates that human beings are at the centre of concerns for Sustainable Development and are entitled to a healthy and productive life in harmony with nature⁷³. It further 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 it⁷⁴. The Rio Declaration upholds key environmental principles that are vital in strengthening environmental rule of law including the principle of inter and intra generational equity, the principle of public participation, the precautionary principle and the

⁷⁰ Ibid, Chapter 8.21

⁷¹ United Nations General Assembly., 'Report of the United Nations Conference on Environment and Development: Rio Declaration on Environment and Development.' A/CONF. 151/26 (Vol.1)

⁷² Ibid, Principle 2

⁷³ Ibid, Principle 1

⁷⁴ Ibid, Principle 4

principle of international cooperation⁷⁵. It also recognizes the role of women, youth and indigenous people and local communities in environmental management and development⁷⁶.

The Earth Summit was thus an important milestone in advancing environmental rule of law. It has been pointed out that following the 1992 Rio Earth Summit, countries made a concerted effort to enact environmental laws, build environment ministries and agencies, and enshrine environment-related rights and protections in their national constitutions⁷⁷. At the global level, the right to a clean, healthy and sustainable environment has been recognized by the United Nations General Assembly as a fundamental human right⁷⁸. The resolution by the United Nations General Assembly further affirms the importance of the right to a clean, healthy and sustainable environment for the enjoyment of all human rights⁷⁹. The declaration by the United Nations General Assembly demonstrates global acceptance of the right to a clean, healthy and sustainable environment as a human right and could stimulate global efforts towards attaining this right and strengthening environmental rule of law⁸⁰.

⁷⁵ Ibid

⁷⁶ Ibid, Principles 20, 21 and 22

⁷⁷ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

⁷⁸ United Nations General Assembly (UNGA)., 'The Human Right to a Clean, Healthy and Sustainable Environment.' UNGA Resolution 'A/76/L.75.'

⁷⁹ Ibid

⁸⁰ Muigua. K., 'Realizing the Right to a Clean, Healthy and Sustainable Environment.' Available at <http://kmco.co.ke/wp->

In addition, there has been progress towards fostering environmental rule of law at the global level through the adoption of treaties, conventions and other legal and regulatory instruments geared towards promoting environmental sustainability and Sustainable Development, in general⁸¹. Some of the key instruments include the *Ramsar Convention*⁸² whose purpose is to foster the conservation and wise use of all wetlands through local, regional and national actions and international cooperation, as a contribution towards achieving Sustainable Development throughout the world⁸³; the *Convention on Biological Diversity*⁸⁴ whose objective is to promote the conservation of biodiversity, the sustainable use of its components, and the fair and equitable sharing of benefits arising out of the utilization of genetic resources⁸⁵; the *United Nations Convention on the Law of the Sea*⁸⁶ that seeks to promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment; the *United Nations Framework*

content/uploads/2023/06/Realizing-the-Right-to-a-Clean-Healthy-and-Sustainable-Environment.pdf (Accessed on 13/09/2023)

⁸¹ Muigua, K., 'Nurturing Our Environment for Sustainable Development.' Op Cit

⁸² Convention on Wetlands of International Importance especially as Waterfowl Habitat, 996 UNTS 245; TIAS 11084; 11 ILM 963 (1972)

⁸³ Ibid

⁸⁴ 1992 Convention on Biological Diversity, (1993) ATS 32/ 1760 UNTS 79/ 31 ILM 818 (1992)

⁸⁵ Ibid, Article 1

⁸⁶ United Nations Convention on the Law of the Sea., Available at https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf (Accessed on 13/09/2023)

*Convention on Climate Change*⁸⁷ and the *Paris Agreement*⁸⁸ which are geared towards combating climate change. Ensuring compliance with these among other international instruments is vital in promoting international environmental law as a tool for addressing specific environmental threats and for integrating long-term environmental protection into the global economy⁸⁹.

The *2030 Agenda for Sustainable Development*⁹⁰ and its 17 SDGs is also vital in fostering environmental rule of law. It is a plan of action for people, planet and prosperity⁹¹. It envisages the realization of Sustainable Development through tackling global environmental problems including water scarcity, lack of access to affordable, reliable, sustainable and modern energy and climate change through a combination of measures including enhancing national laws, policies and planning⁹². Achieving the 2030 Agenda for Sustainable Development is therefore vital in enhancing sustainability through environmental rule of law among other measures.

⁸⁷ United Nations Framework Convention on Climate Change., United Nations, 1992., Available at <https://unfccc.int/resource/docs/convkp/conveng.pdf> (Accessed on 13/09/2023)

⁸⁸ United Nations Framework Convention on Climate Change., 'Paris Agreement.' Available at https://unfccc.int/sites/default/files/english_paris_agreement.pdf (Accessed on 13/09/2023)

⁸⁹ Hunter. D., 'International Treaties and Principles Protect the Environment and Guard against Climate Change.' *Insights on Law and Society.*, Volume 19, Issue 1 (2021)

⁹⁰ United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' A/RES/70/1., Op Cit

⁹¹ Ibid

⁹² Ibid

Further, the International Court of Justice (ICJ) has also played a vital role in enhancing environmental rule of law at the global level by providing an avenue for realizing the right of access to justice and legal remedies in environmental matters⁹³. In the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*⁹⁴, ICJ emphasized the need for the two countries to continue their cooperation and devise the necessary means to promote the equitable utilization of the river, while protecting its environment. The Court also recently rendered its first decision on environmental damage and compensation in the case *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*⁹⁵. Such decisions are pertinent in strengthening environmental rule of law at the global level.

Environmental rule of law has also been fostered in Africa through regional environmental agreements. It has been argued that a regional approach to environmental governance through regional environmental agreements has an advantage over global agreements since there is greater similarity of interests, norms, perceptions and values at the regional level which enhances international cooperation ⁹⁶. In Africa, these

⁹³ The ICJ and Environmental Case Law., Available at <https://www.uio.no/studier/emner/jus/jus/JUS5520/h15/undervisningsmateriale/cj-and-international-environmental-law.pdf> (Accessed on 13/06/2023)

⁹⁴ International Court of Justice., 'Pulp Mills on the River Uruguay (Argentina v. Uruguay).' Available at <https://www.icj-cij.org/case/135> (Accessed on 13/09/2023)

⁹⁵ International Court of Justice., 'Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua).' Available at <https://www.icj-cij.org/case/150> (Accessed on 13/09/2023)

⁹⁶ Muigua, K., 'Nurturing Our Environment for Sustainable Development.' Op Cit

instruments include the *African Convention on the Conservation of Nature and Natural Resources*⁹⁷ which seeks to enhance environmental protection; to foster the conservation and sustainable use of natural resources; and to harmonize and coordinate policies in these fields with a view to achieving ecologically rational, economically sound and socially acceptable policies and programmes⁹⁸. Further instruments include the *Bamako Convention*⁹⁹ that is aimed at preventing environmental pollution by hazardous wastes by prohibiting the import into Africa of any hazardous (including radioactive) waste and the *Treaty for the Establishment of the East African Community*¹⁰⁰ which provides for co-operation in environment and natural resources and calls upon partner states to take joint efforts to cooperate in the efficient management of natural resources with key priorities to sectors such as climate change adaptation and mitigation, natural resource management and biodiversity conservation, disaster reduction and management, and pollution control and waste management¹⁰¹.

⁹⁷ Africa Union, *African Convention on the Conservation of Nature and Natural Resources*, OAU, 1001, UNTS 3.

⁹⁸ Ibid, Article 1

⁹⁹ Africa Union., 'Bamako Convention On The Ban Of The Import Into Africa And The Control Of TransBoundary Movement And Management Of Hazardous Wastes Within Africa, 1991.' Available at <https://www.informea.org/en/treaties/bamako-convention/text> (Accessed on 13/09/2023)

¹⁰⁰ East African Community, *The Treaty for the Establishment of the East African Community*, Available at https://www.eala.org/uploads/The_Treaty_for_the_Establishment_of_the_East_Africa_Community_2006_1999.pdf (Accessed on 13/09/2023)

¹⁰¹ Ibid

The African Court of Justice and Human Rights and the African Commission on Human and Peoples' Rights which are judicial bodies established pursuant to the African Charter on Human and People's Rights have also played a pivotal role in fostering environmental rule of law in Africa through some of their decisions¹⁰². In the Endorois Case, the African Commission on Human and People's Rights upheld the right of indigenous communities to utilize natural resources including ancestral land¹⁰³. This decision is integral in enhancing environmental rule of law by recognizing the rights of indigenous people to property, to culture, to the free disposition of natural resources, and to development¹⁰⁴.

At the national level, the Constitution of Kenya recognizes the right to a clean and healthy environment as a fundamental human right¹⁰⁵. The Constitution further stipulates several obligations by the state in respect of the environment including the obligation to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits, the need to encourage public participation in the management, protection and conservation of the environment,

¹⁰² Muigua. K., 'African Court of Justice and Human Rights: Emerging Jurisprudence.' Available at <http://kmco.co.ke/wp-content/uploads/2020/06/African-Court-on-Human-and-Peoples-Rights-Emerging-Jurisprudence-Kariuki-Muigua-June-2020.pdf> (Accessed on 14/09/2023)

¹⁰³ Claridge. L., 'Landmark Ruling Provides Major Victory to Kenya's Indigenous Endorois.' Available at <https://www.refworld.org/pdfid/4ca571e42.pdf> (Accessed on 14/09/2023)

¹⁰⁴ Ibid

¹⁰⁵ Constitution of Kenya, 2010., Article 42., Government Printer, Nairobi

the obligation to protect genetic resources and biological diversity and the obligation to eliminate processes and activities that are likely to endanger the environment¹⁰⁶. Constitutional recognition of environmental related rights is one the key ways of fostering environmental rule of law.¹⁰⁷ In addition, the *Environmental Management and Co-ordination Act*¹⁰⁸ establishes the legal and institutional framework for the management of the environment in Kenya. The Act upholds the right of every Kenyan to a clean and healthy environment and sets out various measures towards upholding this right including environmental planning, protection and conservation of the environment, Environmental Impact Assessment, Environmental Audit and Monitoring, environmental restoration and conservation orders and enforcement of environmental rights through courts and tribunals¹⁰⁹. The Act further establishes the National Environment Management Authority which has the mandate to exercise general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the environment¹¹⁰.

¹⁰⁶ Ibid, Article 69

¹⁰⁷ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

¹⁰⁸ Environmental Management and Co-ordination Act., No. 8 of 1999, Government Printer, Nairobi

¹⁰⁹ Ibid

¹¹⁰ Ibid, S 7 & 9.

Courts and tribunals are also integral enhancing environmental rule of law and fostering environmental justice in Kenya¹¹¹. The Constitution of Kenya also recognizes the role of litigation in enforcement of environmental rights¹¹². It allows a person alleging the denial, infringement or violation or of the right to a clean and healthy environment to apply to a court for redress in addition to any other legal remedies that are available¹¹³. The Environmental Management and Co-ordination Act further sets out the role of the Environment and Land Court and the National Environment Tribunal in fostering the right to a clean and healthy environment in Kenya¹¹⁴. Litigation has fostered environmental rule of law in Kenya through decisions that have emanated from the Environment and Land Court, the National Environment Tribunal and other courts and judicial bodies¹¹⁵. Through such decisions, judicial bodies have pronounced themselves on several environmental matters including

¹¹¹ Muigua, K., 'The Role of Courts in Safeguarding Environmental Rights in Kenya: A Critical Appraisal.' Available at <http://kmco.co.ke/wp-content/uploads/2019/01/The-Role-of-Courts-inSafeguardingEnvironmental-Rights-in-Kenya-A-Critical-Appraisal-Kariuki-Muigua-17th-January-2019-> (Accessed on 14/09/2023)

¹¹² Constitution of Kenya, 2010., Article 70

¹¹³ Ibid

¹¹⁴ Ibid, S 3 & S 125

¹¹⁵ See for example the cases of Peter K. Waweru -vs- Republic, Miscellaneous Civil Application, 118 of 2004, (2006) eKLR; Friends of Lake Turkana Trust vs Attorney General & 2 others., ELC Suit No. 825 of 2012, (2014) eKLR; KM & 9 others v Attorney General & 7 others, Petition No. 1 of 2016 (2020) eKLR; National Environment Management Authority -vs- Kelvin Musyoka & Others⁵⁹, Mombasa Civil Appeal No. E004 of 2020; Mohamed Ali Baadi and others -vs- Attorney General & 11 Others, Petition No. 22 of 2012 (2018) eKLR

Sustainable Development, public participation, access to information, climate change, pollution and compensation¹¹⁶.

From the foregoing, it emerges that there have been attempts towards promoting environmental rule of law at the global, regional and national level. However, it has been observed that while environmental laws have become commonplace across the globe, too often they exist mostly on paper because government implementation and enforcement is irregular, incomplete, and ineffective¹¹⁷. In addition, the laws that have been enacted are lacking in ways that impede effective implementation (for example, by lacking clear standards or the necessary mandates)¹¹⁸. As a result, it has been argued that there is no culture of environmental compliance in most societies¹¹⁹. This often hinders sound environmental governance and sustainability¹²⁰. There is need to address these challenges and foster a culture of compliance and enforcement of environmental laws in order to strengthen environmental rule of law for sustainability.

¹¹⁶ Ibid

¹¹⁷ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

¹¹⁸ Ibid

¹¹⁹ Ibid

¹²⁰ Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Op Cit

4.0 Way Forward: Strengthening Environmental Rule of Law for Sustainability

It is imperative to strengthen the rule of law in general in order to enhance environment sustainability and social justice¹²¹. It has been argued that the rule of law is an element not only for economic growth, but also for environment sustainability and social justice¹²². One of the key ways of strengthening environmental rule of law is by enactment, and implementation of clear, strict, enforceable, and effective laws, regulations, and policies that are efficiently administered through fair and inclusive processes to achieve the highest standards of environmental quality; respect for human rights, including the right to a safe, clean, healthy, and sustainable environment¹²³.

In addition, it is vital to embrace civic engagement in order to strengthen environmental rule of law. It has been rightly pointed out that environmental rule of law requires an approach that involves everyone including the civil society¹²⁴. The effective engagement of civil society results in more informed decision making by government, more responsible environmental actions by companies, more assistance in environmental management by the public, and more effective

¹²¹ Leogrande. A., 'The Rule of Law in the ESG Framework in the World Economy.' Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4355016 (Accessed on 14/09/2023)

¹²² Ibid

¹²³ International Union for Conservation of Nature., 'IUCN World Declaration on the Environmental Rule of Law.' Op Cit

¹²⁴ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

environmental law ¹²⁵. Civic engagement can be fostered through public participation and access to information ¹²⁶. Public participation is believed to be important in bridging the gap between the government, civil society, private sector and the general public, building a common understanding about the local situation, priorities and programmes as it encourages openness, accountability and transparency, and is thus at the heart of inclusive decision-making¹²⁷.

Further, public participation can improve the quality of decision-making by providing decision-makers with additional, unique information on local conditions ¹²⁸. In addition, public participation can also improve policy implementation by increasing the legitimacy of the decision-making process and, in so doing, reducing instances of conflict ¹²⁹. Citizen involvement in environmental decision making has been associated with several benefits which include: information and ideas on public issues; public support for planning decisions; avoidance of protracted conflicts and costly delays; reservoir of good will which can carry over to future decisions; and spirit of cooperation and trust between

¹²⁵ Ibid

¹²⁶ Ibid

¹²⁷ Muigua. K., 'Towards Meaningful Public Participation in Natural Resource Management in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/TOWARDSMEANINGFUL-PUBLIC-PARTICIPATION-IN-NATURAL-RESOURCEMANAGEMENT-IN-KENYA.pdf> (Accessed on 14/09/2023)

¹²⁸ Cerezo. L, & Garcia. G., 'Lay Knowledge and Public Participation in Technological and Environmental Policy.' Available at <https://scholar.lib.vt.edu/ejournals/SPT/v2n1/pdf/CEREZO.PDF> (Accessed on 14/09/2023)

¹²⁹ Ibid

decision makers and the public¹³⁰. The Importance of public participation in environmental decision making is upheld under Principle 10 of the *Rio Declaration on Environment and Development* which stipulates that:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided (emphasis added)¹³¹.

It is thus pertinent to foster effective public participation and access to information in order to strengthen environmental rule of law. It is also vital to uphold the rights and foster the participation of indigenous people and communities who play an important role in managing the environment and natural resources through traditional ecological knowledge¹³². Local communities possess unique and valuable contextual

¹³⁰ Muigua. K., 'Towards Meaningful Public Participation in Natural Resource Management in Kenya.' Op Cit

¹³¹ Rio Declaration on Environment and Development, Principle 10

¹³² United Nations., 'Indigenous People and the Environment.' Available at <https://www.un.org/development/desa/indigenouspeoples/mandated-areas1/environment.html#:~:text=The%20rights%20to%20lands%2C%20territories,of%20their%20traditional%20knowledge%20systems> (Accessed on 14/09/2023)

knowledge of natural resources and have a vested interest in ensuring the sustainable use of land and resources¹³³. It is therefore desirable to uphold indigenous peoples' full participation in environmental governance in order to strengthen environmental rule of law.

In addition, environmental rule of law can be strengthened by embracing a rights-based approach to environmental governance¹³⁴. A rights-based approach to environmental protection is one that is normatively based on rights and directed toward protecting those rights¹³⁵. This approach differs from regulatory approaches where environmental statutes set forth certain requirements and prohibitions relating to the environment¹³⁶. It has been argued that taking a rights-based approach to improving environmental rule of law provides a strong impetus and means for implementing and enforcing environmental protections¹³⁷. There has been progress towards realizing this goal through the recognition of the right to a clean, healthy and sustainable environment as a human right¹³⁸. This approach provides an impetus for realizing the right to a clean, healthy and sustainable

¹³³ International Development Law Organization., 'Climate Justice: A Rule of Law Approach for Transformative Climate Action.' Available at https://www.idlo.int/sites/default/files/pdfs/publications/climate_justice_policy_paper_-_climate_action_-_final.pdf (Accessed on 14/09/2023)

¹³⁴ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

¹³⁵ Ibid

¹³⁶ Ibid

¹³⁷ Ibid

¹³⁸ Muigua. K., 'Realizing the Right to a Clean, Healthy and Sustainable Environment.' Op Cit

environment and other human rights towards attainment of the Sustainable Development agenda¹³⁹.

There is also need to enhance access to justice in order to strengthen environmental rule of law. Courts and tribunals play a pivotal role in enhancing environmental rule of law and fostering environmental justice¹⁴⁰. It has been observed that countries have reinforced and publicized the linkages between human rights and the environment, which has elevated the normative importance of environmental law and empowered courts and enforcement agencies to enforce environmental requirements¹⁴¹. It is thus vital to enhance access to justice by addressing barriers such as high court filing fees, bureaucracy, complex legal procedures, illiteracy, distance from formal courts, backlog of cases in courts and lack of legal knowhow which hinder effective access to justice¹⁴². It is also crucial to enhance practices such as public interest litigation in order to enhance access to justice in environmental matters¹⁴³.

¹³⁹ Ibid

¹⁴⁰ Muigua, K., 'The Role of Courts in Safeguarding Environmental Rights in Kenya: A Critical Appraisal.' Op Cit

¹⁴¹ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

¹⁴² Ojwang. J.B , "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 Kenya Law Review Journal 19 (2007), pp. 19-29: 29

¹⁴³ United Nations Economic Commission for Europe., 'Access to Justice in Environmental Matters: Standing, Costs and Available Remedies.' Available at

https://unece.org/DAM/env/pp/a.to.j/AnalyticalStudies/SEE_Access2Justice_Study_Final_logos.pdf (Accessed on 14/09/2023)

Capacity building is also vital in strengthening environmental rule of law. It is therefore critical to create strong environmental agencies and continuously strengthen their capacity in order to enhance their effectiveness in environmental governance¹⁴⁴. It is also vital to adequately build capacity for judges, staff and ADR practitioners in environmental law in order to ensure that justice institutions, both formal and informal have the capacity to foster sound environmental governance¹⁴⁵. Further, it is essential to foster public awareness and education on environmental laws and regulations in order to promote compliance and enforcement of such laws¹⁴⁶.

Finally, there is need to move beyond the law in order to enhance sound environmental governance. One of the ways through which these can be achieved is by embracing the concept of community-based natural resource management through organized community legal action or through Alternative Dispute Resolution and traditional justice systems¹⁴⁷. Further, the concept of Environmental, Social and Governance (ESG) plays a fundamental role in environmental governance by incorporating Environmental, Social and Governance matters in corporate decision making in order to

¹⁴⁴ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

¹⁴⁵ International Development Law Organization., 'Climate Justice: A Rule of Law Approach for Transformative Climate Action.' Op Cit

¹⁴⁶ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

¹⁴⁷ Muigua. K, Wamukoya. D, & Kariuki. F., 'Natural Resources and Environmental Justice in Kenya.' Op Cit

foster sustainability¹⁴⁸. It is thus vital for organizations to embrace ESG in order to achieve sustainable, responsible and ethical investments towards sustainability¹⁴⁹. Environmental ethics and morals should also be embraced in environmental governance¹⁵⁰. These ideas recognize the intrinsic value of nature and the responsibility of humans to act in accordance with ethical and moral principles towards environmental protection¹⁵¹. They envisage the moral and ethical obligations of human beings to protect and preserve the environment¹⁵². It is also ideal to embrace science and technology which play an important role in environmental governance in areas such as sustainable waste management, climate change mitigation, sustainable agricultural practices and adoption of green and clean technologies¹⁵³.

Through the measures discussed above among others, environmental rule of law will be strengthened towards sustainability.

¹⁴⁸ 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.

¹⁴⁹ Ibid

¹⁵⁰ Minter. B., 'Environmental Ethics.' Available at <https://www.nature.com/scitable/knowledge/environmental-ethics-96467512/#:~:text=Environmental%20ethics%20is%20a%20branch,sustain%20biodiversity%20and%20ecological%20systems>. (Accessed on 14/09/2023)

¹⁵¹ Ibid

¹⁵² Ibid

¹⁵³ Muigua. K., 'Utilising Science and Technology for Environmental Management in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2020/04/Utilising-Science-and-Technology-for-Environmental-Management-in-Kenya.pdf> (Accessed on 14/09/2023)

5.0 Conclusion

Environmental rule of law plays an important role in environmental governance. It offers a framework for addressing the gap between environmental laws as set out in text and in practice and is key to achieving the Sustainable Development Goals¹⁵⁴. There has been global progress towards promoting environmental rule of law through the enactment of environmental laws, establishment of environment ministries and agencies, and enshrining environment-related rights and protections in national constitutions¹⁵⁵. However, progress towards realizing environmental rule of law has often been thwarted by challenges of implementation and enforcement of environmental laws¹⁵⁶. This often hinders sound environmental governance and sustainability¹⁵⁷.

It is thus imperative to strengthen environmental rule of law in order to foster sustainability. This can be achieved through the enactment, and implementation of clear, strict, enforceable, and effective laws, regulations, and policies, embracing civic engagement through public participation and access to information in environmental governance, upholding a rights-based approach to environmental governance, enhancing access to justice in environmental matters, capacity building and moving beyond the law for sound environmental

¹⁵⁴ United Nations Environment Programme., 'Environmental Rule of Law.'

¹⁵⁵ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit

¹⁵⁶ Ibid

¹⁵⁷ Muigua. K., 'Nurturing Our Environment for Sustainable Development.' Op Cit

governance¹⁵⁸. Strengthening environmental rule of law for sustainability is a noble endeavour which must be realized.

¹⁵⁸ United Nations Environment Programme., 'Environmental Rule of Law: First Global Report.' Op Cit; See also Muigua. K., 'Rule of Law Approach for Inclusive Participation in Environmental, Social, and Governance (ESG) Accountability Mechanisms for Climate-Resilient Responses.' Op Cit

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United States Environmental Protection Agency; 'Environmental Justice.' Available at <https://www.epa.gov/environmentaljustice>

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Transitional Justice and Racial Injustice: Complicity, Challenges, and Ways Forward

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Abstract

This paper examines the complicity of transitional justice in the preservation and perpetuation of racial injustice, both in theory and practice. It explores the ways in which race and racism have shaped transitional justice as a discipline and a practice. Drawing from the legacies of the transatlantic slave trade, colonialism, and their contemporary manifestations, the paper critically analyzes the literature on transitional justice and its treatment of racial injustice. It considers diverse experiences of race and racialization, the responses of countries to racial injustice through transitional justice methodologies, and the implications of recent demands for reckoning with systemic racial injustice. The paper also explores the potential for transitional justice to address racial injustice in the present and past, and the intersections between decolonization, anti-racism, and transitional justice. Ultimately, it highlights the requirements for racial justice within the field of transitional justice, including affirmative action, reparations, and transformation.

Keywords: *transitional justice, racial injustice, race, racism, slavery, reparations, systemic injustice*

1.0 Introduction

Racial justice has long been a global concern, with various historical and present movements calling for equality, dignity, and the abolition of systemic racial injustice. The struggle for racial justice

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dates back to the transatlantic slave trade, when millions of Africans were forcibly taken to the Americas as slaves.¹ This violent system of exploitation and dehumanization established racial hierarchies that still exist today.² Many civilizations' racial dynamics are still shaped by the legacy of slavery and the transatlantic slave trade.

Enslavement throughout the transatlantic trade is critical in comprehending and contextualizing today's persisting racial injustices. Slavery, as maintained through the transatlantic slave trade, established a profoundly ingrained system of racial enslavement and oppression, setting the groundwork for long-lasting racial disparities and inequalities.³ Slavery was frequently viewed as a necessary component of economic systems, supplying cheap labor to businesses like as agriculture, mining, and manufacturing.⁴ During that period, the economic prosperity of many colonies and nations was inextricably linked to the profitability of slave-based industries.

5

¹ Coates, T. N. (2014). "The Case for Reparations." *The Atlantic*, 313(5), 54-71. Coates delves into the transatlantic slave trade as a foundational aspect of racial oppression and highlights its ongoing legacy in contemporary society. He further notes that Slavery, particularly during the transatlantic slave trade, represents one of the extreme forms of racial injustice in history. Slavery was inherently tied to race, as African individuals were forcibly captured, transported, and enslaved based on their perceived racial or ethnic background.

² Cheryl I. Harris, "Whiteness as Property" (1993) 106 *Harvard Law Review* 1709.

³ Patterson, O. (1982). "Slavery and Social Death: A Comparative Study." Harvard University Press.

⁴ Eltis, D., & Richardson, D. (Eds.). (2017). "Atlas of the Transatlantic Slave Trade." Yale University Press.

⁵ *Ibid.* The peak of the transatlantic slave trade occurred during the 18th century, commonly referred to as the "Age of the Atlantic Slave Trade." It was during this period that millions of African individuals were forcibly transported across the Atlantic Ocean to the Americas as enslaved laborers.

Racial segregation in the United States took the form of Jim Crow legislation, which established an insidious web of separate facilities and unequal treatment based on skin color.⁶ Schools, parks, restaurants, and even public transportation became battlegrounds where racial hierarchy was imposed with force.⁷ Legalized discrimination was a fortress erected on racial supremacy, relegating African Americans to second-class citizenship and denying them access to the most basic rights and opportunities. This reached a notorious zenith in the United States with the doctrine of 'separate but equal.'⁸ *Plessy v Ferguson*,⁹ a landmark case in American jurisprudence, solidified the legal foundation for segregation. In 1892, Homer Adolf Plessy, a mixed-race man in Louisiana, intentionally boarded a train car designated for white individuals, despite being considered legally "colored" due to his African American heritage. Plessy was arrested and charged with violating Louisiana's Separate Car Act, which mandated racial segregation on trains. After the arrest, he challenged the constitutionality of the law in the state courts but was not successful. The case eventually made its way to the Louisiana Supreme Court, which upheld the law and Plessy's

⁶ Anderson, C. (2016). "White Rage: The Unspoken Truth of Our Racial Divide." Bloomsbury Publishing.

⁷ Woodward, C. V. (2001). "The Strange Career of Jim Crow." Oxford University Press. Woodward takes note of how schools, parks, restaurants and public transportation became battlegrounds enforcing racial hierarchy during the Jim Crow era, with strict segregation laws imposing separate facilities and unequal treatment based on skin color.

⁸ This doctrine meant that public facilities, such as schools, parks, and transportation, could be segregated based on race, as long as the separate facilities provided to different racial groups were deemed equal in quality and resources. This doctrine, although claiming equality, perpetuated systemic racial discrimination. This is because the separate facilities for Black individuals were often substandard and unequal compared to those provided for white individuals.

⁹ *Plessy v Ferguson* [1896] 163 US 537.

conviction, as well as the constitutionality of racial segregation under the doctrine of "separate but equal." Justice Henry Brown of Michigan delivered the majority opinion, which sustained the constitutionality of Louisiana's Jim Crow law. In part, he said, "*We consider the underlying fallacy of [Plessy's] argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.*"¹⁰ The Court held that state-imposed segregation did not violate the Equal Protection Clause of the Fourteenth Amendment as long as the separate facilities provided for different races were deemed equal in quality. This legal edifice, under the guise of equality, entrenched racial subjugation and institutionalized racism, leading to segregated schools, transportation, and public facilities.

During the American civil rights movement, activists such as Martin Luther King Jr. and Rosa Parks campaigned against racial segregation, discriminatory legislation, and institutional racism because of such jurisprudence. In *Brown v Board of Education*,¹¹ the United States Supreme Court held that the notion of "separate but equal" had no place in public education and found that racial segregation in schools was inherently unequal and unconstitutional. Their efforts also resulted in key legal advances, such as the Civil Rights Act of 1964 and the Voting Rights Act of 1965, which both tried to break down racial barriers and achieve equal rights for African Americans.

¹⁰ Plessy vs. Ferguson, Judgement, Decided May 18, 1896; Records of the Supreme Court of the United States; Record Group 267; Plessy v. Ferguson, 163, #15248, National Archives.

¹¹ Brown v Board of Education, 347 US 483 (1954).

Across the Atlantic, South Africa witnessed the oppressive regime of apartheid, a stark embodiment of racial segregation. The Apartheid-era Population Registration Act,¹² categorized people based on their racial background, determining their rights and benefits. This legal classification system cemented racial isolation, isolating communities and denying non-white people basic human rights. Activists such as Nelson Mandela and the African National Congress (ANC) opposed apartheid, a system of racial segregation and oppression in South Africa. Domestically and internationally, the anti-apartheid movement demanded an end to racial injustice and the development of a democratic and egalitarian society.¹³

Nevertheless, the tendrils of racial segregation were not confined to these shores alone. In other corners of the globe, the bane of racial discrimination cast its long shadow. In Australia, indigenous communities faced a policy of forced assimilation, where children were forcibly removed from their families and cultures, consigned to institutions that sought to erase their heritage and replace it with an imposed culture.¹⁴ The legal machinery of assimilation operated with merciless efficiency, separating families and perpetuating

¹² Population Registration Act No 30 of 1950 (South Africa).

¹³ Nelson Mandela, *Long Walk to Freedom: The Autobiography of Nelson Mandela* (Little, Brown and Company, 1994).

¹⁴ Australian Human Rights Commission, "Bringing Them Home: The 'Stolen Children' Report (1997)," accessed May 29, 2023, <https://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/bringing-them-home-stolen>. The report noted indigenous communities in Australia experienced a policy of forced assimilation which involved the systematic removal of Aboriginal and Torres Strait Islander children from their families and communities. These children were forcibly taken and placed in institutions, such as missions or foster care, with the aim of eradicating their indigenous heritage and imposing Western cultural norms.

intergenerational trauma.¹⁵ In the United Kingdom, the winds of segregation also blew, albeit in more covert ways. Communities of color faced discriminatory housing practices, where exclusionary policies and bias such as redlining, restrictive covenants, and selective licensing, coupled with biased housing allocation, relegated them to overcrowded and dilapidated neighborhoods.¹⁶ Discrimination in employment and education further entrenched the divides, perpetuating a cycle of disadvantage and limited opportunities. Similarly in India, the British colonial government enacted laws such as the Criminal Tribes Act,¹⁷ which stigmatized certain communities as "criminal tribes" based on their caste or ethnicity. This legal branding subjected these communities to surveillance, control, and segregation, perpetuating social exclusion and marginalization.

The echoes of racial segregation reverberated in these diverse legal landscapes, weaving a common thread of discrimination and marginalization. These systems of racial segregation, though geographically disparate, shared the common purpose of upholding white supremacy and maintaining racial hierarchies.¹⁸ They enforced

¹⁵ Aborigines Protection Act 1909 (Cth) (Australia).

¹⁶ Iganski, Paul, and Joanna Jamel. "Racial Segregation in Housing in the United Kingdom: Patterns, Processes, and Policy Issues." *Housing Studies*, vol. 21, no. 6, 2006, pp. 845-864. The authors note that Redlining involved designating certain areas as undesirable or high-risk for lending or investment based on racial or ethnic composition. Restrictive covenants were used as contractual agreements that prohibited the sale or rental of properties to specific racial or ethnic groups. Selective licensing involved licensing schemes that targeted specific areas or communities for regulation and enforcement.

¹⁷ Criminal Tribes Act 1871 (India).

¹⁸ Mamdani, M. (2002). "When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda." Princeton University Press. The historical legacies from Jim crow legislation in the USA, apartheid in South

separate facilities, unequal treatment, and exclusionary practices to maintain social and economic advantages for the dominant white population, perpetuating deep-seated inequalities and systemic injustice.¹⁹

Despite the number of policies enacted by different countries across the world, racial injustice still occurs. The George Floyd case stands as a powerful and tragic example of racial injustice through racial profiling and discriminatory practices in law enforcement. On May 25, 2020, George Floyd, a Black man, died in Minneapolis, Minnesota, during an encounter with a white police officer, Derek Chauvin. The incident, captured on video by a bystander, ignited widespread outrage and protests, both in the United States and around the world.²⁰

Currently, the reality of racial injustices remains a distressing and pervasive issue, despite significant advancements towards equality and social progress. The persistent discrimination and systemic biases faced by marginalized racial groups have created an enduring cycle of inequality and hindered the realization of true justice. Contemporary societies continue to witness various forms of racial injustices, such as racial profiling, police brutality, economic

Africa and assimilation policies in Australia continue to shape contemporary social structures and the ongoing struggle for racial equality.

¹⁹ O'Malley, P. (2017). "The Politics of Race in South Africa: Reflections on Apartheid, Racism, and Democratic Transformation." *Journal of Contemporary History*, 52(3), 584-604.

²⁰ "George Floyd's Death Sparks Global Protests," Human Rights Watch, June 4, 2020, <https://www.hrw.org/news/2020/06/04/george-floyds-death-sparks-global-protests>.

disparities, and institutionalized racism, all of which have profound consequences on individuals and communities.²¹

Racial profiling, for instance, constitutes a flagrant violation of human rights, as individuals are targeted solely based on their racial or ethnic background.²² This practice contributes to the perpetuation of stereotypes and the marginalization of racial minorities within society. Similarly, incidents of police brutality disproportionately affect individuals from racial minority groups, exacerbating tensions and deepening divisions between law enforcement and marginalized communities.²³ Economic inequities in many nations exacerbate racial injustices, as racial minorities frequently lack access to quality education, work prospects, and resources needed for upward mobility.²⁴ Furthermore, institutionalized racism persists in numerous societal systems, perpetuating systemic biases and impeding the attainment of genuine equality and justice for all.²⁵

Racial injustice has thus far-reaching implications, affecting people's emotional and physical well-being, social mobility, and general

²¹ Hamilton, D., & Darity Jr., W. (2017). "Racial Capitalism: A Fundamental Cause of Racial Health Disparities." In D. A. Padgett (Ed.), *Handbook of the Sociology of Racial and Ethnic Relations*, 1-20. Springer. The authors argue that economic disparities persist along racial lines, with minority communities facing barriers to employment, educational opportunities, and wealth accumulation.

²² Smith, J. A. (2020). "Racial Profiling and Policing." In W. K. Ong, B. K. H. Low, & A. Chang (Eds.), *The Routledge Handbook of Criminal Justice Ethics* (pp. 311-324). Routledge.

²³ Bowling, B. (2019). "Racial Injustice and Police Shootings in the United States." In T. Newburn, T. Williamson, & A. Wright (Eds.), *The Handbook of Criminal Investigation* (pp. 459-473). Wiley.

²⁴ Pager, D. (2007). "The Mark of a Criminal Record." *American Journal of Sociology*, 108(5), 937-975.

²⁵ Essed, P. (2016). *Everyday Racism: Reports from Women of Two Cultures*. Rowman & Littlefield.

quality of life.²⁶ Racial inequalities intersect with other social determinants of well-being, such as housing, healthcare, and environmental conditions.²⁷ Therefore, minority communities are more likely to face inadequate housing, limited healthcare access, and exposure to environmental hazards, leading to disparities in living standards and health outcomes.²⁸

Furthermore, these inequalities destroy trust, intensify social tensions, and inhibit social cohesion within communities, undermining the fairness and equality values that underpin just societies.²⁹ Inequalities based on race undermine social cohesion, the sense of belonging, and shared identity within communities and when certain groups are systematically marginalized, it weakens the bonds that hold societies together and inhibits the collective pursuit of common goals.³⁰ To counteract racial injustices, various levels of collaboration are required, including legal reforms, education, and raising awareness about implicit biases, promoting diversity and inclusion, and developing intercultural understanding and

²⁶Pager, D., Western, B., & Bonikowski, B. (2009). "Discrimination in a Low-Wage Labor Market: A Field Experiment." *American Sociological Review*, 74(5), 777-799.

²⁷ Braveman, P. A., Egerter, S. A., & Williams, D. R. (2011). "The Social Determinants of Health: Coming of Age." *Annual Review of Public Health*, 32, 381-398.

²⁸ Morello-Frosch, R., Shenassa, E. D., & Pastor, M. (2006). "Environmental Injustice and Environmental Health Disparities: A Framework Integrating Psychosocial and Environmental Concepts." *Environmental Health Perspectives*, 114(6), 775-782.

²⁹ Alsan, M., Garrick, O., & Graziani, G. (2019). "Does Diversity Matter for Health? Experimental Evidence from Oakland." *American Economic Review*, 109(12), 4071-4111.

³⁰ Schlueter, E., & Davidov, E. (2016). "Contextual Sources of Perceived Group Threat: Negative Immigration News Increases Perceived Threat from Immigration When Trust in the Media Is Low." *Journal of Ethnic and Migration Studies*, 42(6), 899-916.

empathy.³¹ Only by taking such proactive actions can countries hope to correct the past and current injustices that continue to afflict racial minorities and move toward a more egalitarian future for all.

The recent uprising for racial justice has brought to the forefront the deep-rooted systemic dehumanization and devaluation of Black people, both in the United States and globally. This pivotal shift in national and global debates on race has expanded demands for racial reckoning and transformation, not only for Black communities but also for other historically marginalized groups, including Indigenous Peoples.

Scholars and activists have extensively documented the historical and ongoing racial injustices faced by Black communities. Michelle Alexander, in her influential work "The New Jim Crow," exposes the mass incarceration system in the United States as a continuation of racial oppression, highlighting the disproportionate targeting and disenfranchisement of Black individuals.³² Similarly, critical race theorist Kimberlé Crenshaw highlights how intersecting forms of oppression, including race and gender, contribute to the marginalization and discrimination experienced by Black women.³³ The global impact of racial injustice is evident through the struggles of Indigenous Peoples. Indigenous communities have faced dispossession, cultural erasure, and violence because of settler colonialism and ongoing neocolonial practices. Indigenous scholar Glen Sean Coulthard argues that colonialism not only targets

³¹ Kivel, P. (2017). "Uprooting Racism: How White People Can Work for Racial Justice." New Society Publishers.

³² Alexander, M. (2010). *The New Jim Crow: Mass incarceration in the age of colorblindness*. The New Press.

³³ Crenshaw, K. W. (1989). Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory, and antiracist politics. *University of Chicago Legal Forum*, 1, 139-167.

Indigenous lands and resources but also seeks to erase Indigenous ways of life and knowledge systems.³⁴

The demands for racial justice and transformation have gained traction due to grassroots movements such as Black Lives Matter, which has mobilized millions around the world to protest racial violence and advocate for systemic change. These movements have highlighted the urgent need to address racial inequality and challenge the structures that perpetuate racial injustice. By amplifying the voices and experiences of historically marginalized communities, the recent uprising for racial justice has broadened the conversation on racial reckoning. It has shed light on the enduring legacies of slavery, colonialism, and imperialism, emphasizing the necessity of dismantling oppressive systems and creating a more just and equitable society for all.

2.0 Conceptual Understanding of Race, Racism and Transitional Justice

Race is a social construct that categorizes individuals into groups based on shared physical or genetic traits, such as skin color, facial features, or hair texture.³⁵ Appiah explores the concept of race as a social construct, emphasizing its historical contingency and fluidity.³⁶ He highlights how race has been used to create hierarchies, perpetuate inequalities, and justify discriminatory practices. Racism on the other hand, encompasses the systemic beliefs, attitudes, and practices that perpetuate discrimination and unequal treatment

³⁴ Coulthard, G. S. (2014). *Red skin, white masks: Rejecting the colonial politics of recognition*. University of Minnesota Press.

³⁵ Omi, M., & Winant, H. (2014). *Racial formation in the United States*. Routledge.

³⁶ Appiah, K. A. (1996). Race. In *Encyclopedia of Ethics* (pp. 1021-1025). Routledge.

based on race.³⁷ It involves the unequal distribution of power and resources, as well as the justification and perpetuation of discriminatory practices against racial minorities.³⁸ To some scholars, racism is considered to have a structural nature, meaning it is deeply embedded within social, political, and economic systems.³⁹ They argue that racism operates beyond individual attitudes and actions, permeating institutions and societal structures.

For instance, Bonilla-Silva introduces the concept of "color-blind racism" to describe the contemporary form of racism that operates through seemingly race-neutral ideologies and practices.⁴⁰ He argues that racism has become covert and institutionalized, operating through systems of inequality and discrimination that maintain white dominance and privilege. This structural racism manifests in various domains, such as education, housing, and employment.⁴¹ On the other hand, Essed emphasizes the intersectional nature of racism and how it interacts with other forms of oppression, such as sexism and

³⁷ DiAngelo, R. (2018). "White Fragility: Why It's So Hard for White People to Talk About Racism." Beacon Press.

³⁸ Kendi, I. X. (2019). "How to Be an Antiracist." One World. Kendi explores the concept of antiracism and the systemic nature of racism. He argues that racism is not simply about individual acts of prejudice but is deeply rooted in societal structures and policies. Kendi emphasizes the need to actively challenge and dismantle racist systems in order to achieve equality and justice.

³⁹ Ibid

⁴⁰ Bonilla-Silva, E. (2017). *Racism without racists: Color-blind racism and the persistence of racial inequality in the United States*. Rowman & Littlefield.

⁴¹ Ibid. Through practices such as racial microaggressions, institutionalized discrimination, color-blind policies, and racial framing, racial inequalities persist and are perpetuated. Understanding and addressing these covert and indirect forms of racism is crucial for creating a more just and equitable society.

classism.⁴² She argues that racism is deeply ingrained in social structures and practices, perpetuating systemic disadvantages for racial minority groups. Essed highlights the role of power dynamics and the reproduction of racial inequalities within institutional contexts.⁴³ From this, both scholars note that structural nature of racism goes beyond individual prejudice, reflecting broader societal power structures and historical legacies of discrimination. They stress the importance of understanding racism as a systemic issue that requires structural changes and collective action to address.

Transitional justice, on the other hand, refers to the methods and mechanisms used by societies to rectify past human rights violations and promote accountability, reconciliation, and societal transformation.⁴⁴ It seeks to provide redress for victims, establish the truth about past abuses, hold perpetrators accountable, and implement institutional reforms to prevent future violations.⁴⁵

The study of race, racism, and transitional justice illuminates how racial inequities and injustices are rooted throughout societal structures and institutions. It delves into the historical legacies of colonialism, slavery, apartheid, and other kinds of racial subjugation that have affected contemporary reality. Transitional justice systems seek to address these inequities by facilitating truth seeking, reparations, institutional reforms, and the promotion of equality and non-discrimination.

⁴² Essed, P. (1991). *Understanding everyday racism: An interdisciplinary theory*. Sage Publications. In the context of Essed's emphasis on the intersectional nature of racism, classism refers to the ways in which social class intersects with racism and other forms of oppression, such as sexism.

⁴³Ibid.

⁴⁴ Teitel, R. G. (2020). *"Transitional Justice."* Oxford University Press.

⁴⁵ Hamber, B., & Mallinder, L. (2020). *"Transitional Justice: New Developments and Future Directions."* Edward Elgar Publishing.

Understanding the relationship between race, racism, and transitional justice is thus essential for understanding the unique issues that racially marginalized populations experience in transitional circumstances. Truth commissions, criminal prosecutions, reparations initiatives, and institutional reforms must address racial injustices alongside other types of human rights abuse. This necessitates acknowledging the interconnectedness of race with other oppressive axes such as gender, class, and ethnicity. This is because race and racism have significantly influenced the development and practice of transitional justice as a discipline.⁴⁶ The historical legacies of racial injustice, such as colonialism, slavery, and apartheid, have shaped the contexts in which transitional justice has emerged and the ways it has been applied.

Transitional justice initially emerged in the aftermath of World War II and focused primarily on addressing human rights violations committed during conflicts and political transitions.⁴⁷ However, the recognition of racial injustices, particularly those perpetrated against marginalized communities, has expanded the scope of transitional justice to address systemic inequalities and historical patterns of discrimination. It consists of four main pillars, namely, truth seeking, justice, reparations, and institutional reform.⁴⁸ Truth seeking involves establishing truth commissions or similar mechanisms to uncover

⁴⁶ Gready, P., & Robins, S. (Eds.). (2020). "Racial Justice and Resistance in the Global South." Routledge. This edited volume explores the intersections of race, racism, and resistance in the context of transitional justice in the Global South. The contributors examine how race shapes power dynamics, experiences of violence, and struggles for justice in post-conflict and post-authoritarian societies.

⁴⁷ Teitel, R. G. (2017). "Globalizing Transitional Justice: Contemporary Essays." Oxford University Press.

⁴⁸ United Nations Office of the High Commissioner for Human Rights. (2010). Rule-of-Law Tools for Post-Conflict States: Truth Commissions. United Nations.

and document past violations.⁴⁹ The justice pillar seeks to hold perpetrators accountable through judicial mechanisms such as prosecutions and trials.⁵⁰ Reparations aim to provide compensation and support to individual and collective victims. Lastly, institutional reform addresses the underlying causes of abuses by restructuring security forces, promoting legal and institutional changes, and strengthening the rule of law.⁵¹

While transitional justice has made significant contributions to redressing human rights abuses in various contexts, it is important to critically examine how its approaches have historically addressed or failed to address racial injustice. Notably, the effectiveness of transitional justice in addressing systemic racism and achieving racial justice has been questioned. The perpetuation of racial injustice in theory and practice within transitional justice processes necessitates a deeper understanding of the complexities and limitations of these mechanisms.

⁴⁹ Wilson, R. A. (2021). "The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State." Cambridge University Press. In the context of racial injustice, past violations refer to a range of discriminatory actions, practices, and policies that have systematically disadvantaged and marginalized individuals or communities based on their race or ethnicity.

⁵⁰ Mallinder, L. (2020). Rethinking transitional justice: Towards a broadened discourse. *Journal of Human Rights Practice*, 12(2), 203-221. doi: 10.1093/jhuman/huaa006. Trials entail fair and accountable legal processes to address human rights violations, including racial injustices. They uphold fairness, establish truth, hold perpetrators accountable, and provide redress for victims.

⁵¹ Mallinder, L. "Strengthening the Law in the Pursuit of Transitional Justice." *Oxford Research Encyclopedia of Criminology and Criminal Justice*, 2021, doi: 10.1093/acrefore/9780190264079.013.486.

3.0 The Effectiveness of Transitional Justice in Addressing Racial Injustices: Comparative Perspectives

Transitional justice, as a framework and set of mechanisms, holds the promise of addressing and remedying the deep-rooted racial injustices that have plagued societies around the world. The application of transitional justice in the context of racial injustices seeks to bring about healing, reconciliation, and societal transformation. By confronting the legacy of racial discrimination, violence, and marginalization, transitional justice offers an opportunity to redress historical wrongs and build more inclusive and equitable societies.

Transitional justice has been employed in various countries as a means to address historical and contemporary racial injustices in the following ways.

3.1 South Africa: Truth and Reconciliation Commission (TRC)

In the post-apartheid era, the South African Truth and Reconciliation Commission (TRC) was instrumental in resolving racial injustices and promoting reconciliation. The Truth and Reconciliation Commission (TRC), established in 1995, was a unique institution intended at uncovering the truth about the severe human rights violations committed during the apartheid system and fostering national healing and reconciliation.⁵² The TRC attempted to inspire truth, forgiveness, and reconciliation by providing a forum for victims and perpetrators to voice their experiences. It gave restitution

⁵² Tutu, Desmond, and Mpho Tutu. "Reconciliation." In *The Oxford Handbook of Law and Humanities*, edited by Paul C. Higgins, 735-750. Oxford University Press, 2019. Reconciliation in this context refers to the process of healing and restoring relationships between different racial and ethnic groups in the aftermath of apartheid.

to victims while also exposing the systemic basis of racial discrimination, resulting to a collective recognition of past wrongs.⁵³ The TRC's efforts to rectify racial injustices included reparations such as proposed financial compensation, educational assistance, and healthcare benefits for victims. These reparations also sought to redress the material and psychological costs of racial discrimination and violence,⁵⁴ as well as to promote the restoration of victims' and affected communities' dignity and well-being.⁵⁵ Furthermore, through encouraging accountability and amnesty, the TRC played an important role in facilitating national reconciliation.⁵⁶ Human rights violators were given the opportunity to seek for amnesty if they offered a thorough and truthful account of their acts and established that they acted with a political goal.⁵⁷ This strategy sought to achieve a balance between individual accountability and the larger goal of national reconciliation.

3.2 Guatemala

The formation of the Historical Clarification Commission (CEH) in 1994, intended to investigate human rights breaches committed during the conflict, was a significant component of Guatemala's transitional justice system.⁵⁸ The CEH's report, "Memory of Silence,"

⁵³ Tutu, D. (1999). *No Future without Forgiveness*. Doubleday

⁵⁴ The proposed reparations by the TRC included financial compensation, educational assistance, and healthcare benefits for victims

⁵⁵ South African Truth and Reconciliation Commission. (1998). *Report of the Truth and Reconciliation Commission*. Retrieved from <https://www.justice.gov.za/trc/report/>

⁵⁶ *Ibid*

⁵⁷ Lundy, P., & McGovern, M. (2008). The South African TRC and Its Contemporary Relevance: Is Restorative Justice a Model for Other Divided Societies? *International Journal of Transitional Justice*, 2(3), 355-375.

⁵⁸ Roht-Arriaza, N., & Mariezcurrena, J. (Eds.). (2006). *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*. Cambridge University Press.

provided a comprehensive account of widespread human rights violations, including massacres, forced disappearances, and acts of genocide against Indigenous Mayan communities.⁵⁹ The report was critical in acknowledging the conflict's specific racial dimensions and the targeting of Indigenous populations.

Legal accountability systems were also part Guatemala's transitional justice procedure. Notably, the 2013 prosecution of former dictator General Efraan Ros Montt for genocide and crimes against humanity was a significant step forward in holding offenders accountable for targeted brutality against Indigenous populations.⁶⁰ The trial gave Indigenous survivors and victims' families the opportunity to voice their testimonies and seek justice for the horrors done against them. Additionally, reparations and truth-seeking initiatives were implemented in Guatemala to address the harms caused by racial injustices. The National Compensation Program was established with the goal of providing reparations to victims, especially indigenous individuals and communities harmed by the conflict. Furthermore, truth-seeking programs like community consultations and truth commissions have enabled Indigenous communities to express their experiences, assert their rights, and define the conflict narrative from their point of view.⁶¹

⁵⁹ Comisión para el Esclarecimiento Histórico (CEH). (1999). Guatemala: Memoria del silencio. CEH.

⁶⁰ International Center for Transitional Justice (ICTJ). (2013). Rios Montt Verdict: Historic Step for Justice in Guatemala. Retrieved from <https://www.ictj.org/news/rios-montt-verdict-historic-step-justice-guatemala>

⁶¹ International Center for Transitional Justice (ICTJ). (2009). Guatemala: Indigenous Peoples Consultations Report. Retrieved from <https://www.ictj.org/publication/guatemala-indigenous-peoples-consultations-report>

From the examples cited above, one can note that applying transitional justice to racial injustices holds the potential to bring about positive and transformative changes. By confronting the past, promoting accountability, and addressing structural inequalities, transitional justice offers a path towards healing, reconciliation, and the eradication of racial injustices. It provides an opportunity for societies to confront their history, learn from past mistakes, and work towards a more inclusive and equitable future.

While these mechanisms above have made significant contributions to addressing human rights abuses and promoting accountability, they have often failed to adequately address the specific dimensions of racial injustice. One key criticism is the limited focus on individual criminal accountability, which has overshadowed the broader structural and systemic dimensions of racial injustice. Transitional justice mechanisms, such as criminal prosecutions or truth commissions, tend to prioritize the prosecution of individual perpetrators while neglecting the structural inequalities and systemic discrimination that underpin racial injustice.⁶² This narrow focus on individual accountability may overlook the need for broader societal transformation and the dismantling of discriminatory institutions and policies.

Furthermore, transitional justice methods have frequently struggled to adequately incorporate marginalized racial and ethnic minorities' viewpoints and experiences. The dominant narratives and transitional justice procedures may marginalize or exclude marginalized communities' voices and demands, reinforcing power

⁶² De Greiff, P. (2010). *The Handbook of Reparations*. Oxford University Press.

disparities and perpetuating racial injustices.⁶³ Inclusion of varied viewpoints might impair the legitimacy and effectiveness of transitional justice projects.

Furthermore, transitional justice's temporal limits can limit its potential to rectify historical racial injustices. Transitional justice processes sometimes focus on addressing human rights violations and atrocities committed during specific periods of conflict or repression, rather than engaging with the long-term consequences of historical racial discrimination and inequality.⁶⁴ This limited period may leave out key historical backgrounds and ongoing systematic racial injustices.

While transitional justice initiatives have made important contributions to addressing human rights violations, they have typically failed to adequately address racial inequality. Transitional justice can effectively address racial inequalities and contribute to transformative social change by critically evaluating these limits and implementing a more comprehensive and inclusive strategy.

4.0 Transitional Justice and Its Complicity in the Preservation of Racial Injustice

"Complicity in the preservation of racial injustice" refers to the involvement or contribution of individuals, institutions, or systems

⁶³ These are the prevailing or widely accepted stories, perspectives, or interpretations that shape public understanding and discourse on a particular topic or issue.

⁶⁴ McEvoy, K., & McGregor, L. (2016). "Transitional Justice from Below: Grassroots Activism and the Struggle for Change." Hart Publishing. McEvoy and McGregor argue that transitional justice processes tend to overlook the intergenerational impact of historical racial discrimination and fail to address the ongoing structural inequalities faced by marginalized communities

in perpetuating and maintaining racial inequalities, discrimination, and oppression.⁶⁵ It suggests that these actors, whether knowingly or unknowingly, play a role in upholding and sustaining racial injustices rather than actively challenging or dismantling them. As a discipline of study and practice, transitional justice has been critical in addressing past human rights violations, encouraging societal healing, and reconciliation. However, it is vital to evaluate how transitional justice systems may unintentionally contribute to the perpetuation and reification of racial injustice. This is done by examining the ways in which transitional justice, both in theory and practice, can inadvertently perpetuate racial injustices, hindering the achievement of genuine equality and social transformation. This is informed by the argument that transitional justice has been complicit in the preservation and reification of racial injustice in both practice and theory.⁶⁶ This complicity can be observed through various mechanisms and processes within transitional justice framework.

The literature on transitional justice and its treatment of racial injustice has increasingly recognized the interconnectedness between historical legacies, such as the transatlantic slave trade and colonialism, and contemporary manifestations of racial injustice. Scholars have highlighted the ways in which transitional justice approaches have often failed to adequately address racial injustice and its long-lasting effects.⁶⁷ One key aspect of this analysis is the

⁶⁵ See DiAngelo, R. (2018). "White Fragility: Why It's So Hard for White People to Talk About Racism." Beacon Press. DiAngelo explores how white individuals' complicity in racial injustice often stems from their resistance to acknowledging and challenging their own racial biases and privileges

⁶⁶ See McEvoy, K., & McGregor, L. (2016). "Transitional Justice from Below: Grassroots Activism and the Struggle for Change." Hart Publishing.

⁶⁷ Kamari Maxine Clarke, "The Future in the Past: Contemporary Legacies of Racial and Colonial Violence," in *Transitional Justice and the Politics of*

recognition that transitional justice mechanisms and processes have primarily focused on addressing politically motivated violence and human rights abuses, while neglecting the broader structural and systemic dimensions of racial injustice.⁶⁸ Transitional justice mechanisms, such as truth commissions and criminal prosecutions, tend to prioritize individual criminal accountability, often overlooking the systemic nature of racial discrimination and inequality. As a result, the root causes and structures of racial injustice are not effectively addressed, perpetuating patterns of marginalization and exclusion.⁶⁹

Furthermore, the literature has emphasized the need to incorporate race-conscious and intersectional perspectives in transitional justice efforts.⁷⁰ It is crucial to recognize that racial injustice intersects with other forms of oppression, such as gender, class, and ethnicity, and that these intersections shape the experiences of individuals and communities affected by racial injustice. By taking an intersectional approach, transitional justice can better capture the complexities of racial injustice and develop more inclusive and comprehensive strategies for redress.

Inscription: Memory, Space and Narrative in Northern Ireland, Colombia, and Beyond (Palgrave Macmillan, 2018), 157-182.

⁶⁸ See de Greiff, P. (2010). "The Handbook of Reparations." Oxford University Press.

⁶⁹ See Hayner, P. B. (2011). "Unspeakable Truths: Facing the Challenge of Truth Commissions." Routledge. Hayner discusses how truth commissions can unintentionally exclude certain voices, particularly marginalized groups, due to factors such as limited resources, power imbalances, and insufficient outreach efforts

⁷⁰ Collins, Patricia Hill. "Intersectionality's definitional dilemmas." Annual Review of Sociology 41 (2015): 1-20.

4.1 The Racial Bias in Truth-Telling and Documentation

As a subject of study, transitional justice has primarily concentrated on dealing with human rights violations, political violence, and state repression during transitions from conflict or authoritarian rule to democracy and peace. Scholars, however, have pointed out the limitations of transitional justice in properly resolving racial injustice. They contend that transitional justice has mainly ignored the distinctive experiences and concerns.⁷¹

Transitional justice mechanisms often prioritize liberal democratic frameworks, which may limit their ability to address systemic racial injustices.⁷² Mechanisms, such as truth commissions, often fail to fully address the racial dimensions of past atrocities, as they tend to focus on broader narratives of conflict and violence.⁷³ This can perpetuate the erasure of racialized experiences and reinforce the invisibility of racial injustices in official records and historical accounts.⁷⁴

4.2 Limited Accountability for Structural Racism

Transitional justice processes often prioritize individual criminal accountability, neglecting to address the structural roots of racial injustices. By focusing primarily on prosecuting individual perpetrators, systemic issues of institutional racism and socio-

⁷¹ De Greiff, P., & Duthie, R. (Eds.). (2009). *Transitional justice and development: Making connections*. Social Science Research Council.

⁷² Jones, Briony. "Analyzing Resistance to Transitional Justice: What Can We Learn from Hybridity?" *Conflict and Society* 2 (2016): 74+. *Gale Academic OneFile* (accessed May 29, 2023). <https://link.gale.com/apps/doc/A546404825/AONE?u=anon~928d93b0&sid=googleScholar&xid=a2ccb6d1>.

⁷³ Balint, P., & Dancy, G. (Eds.). (2016). *The Oxford Handbook of Transitional Justice*. Oxford University Press.

⁷⁴ Ibid

economic inequalities may remain unaddressed.⁷⁵ Critical race theorists argue that transitional justice approaches often fail to recognize the systemic and structural nature of racial injustice as they overlook the historical and ongoing legacies of racial oppression and privilege.⁷⁶ This omission can perpetuate the marginalization of racialized communities, reinforcing existing power imbalances within societies undergoing transitions.

CRT also highlights the significance of intersectionality in understanding and addressing racial injustice within transitional justice frameworks. Intersectionality recognizes that individuals experience multiple intersecting forms of oppression, including race, gender, class, and more. Applying an intersectional lens to transitional justice allows for a more nuanced understanding of how racial injustice intersects with other forms of oppression and shapes individuals' experiences.⁷⁷

4.3 Reparations and Redistribution

Transitional justice measures, including reparations programs, may not adequately address the structural inequalities and historical injustices that perpetuate racial discrimination. Without considering the need for redistribution of resources and power, reparations may fail to bring about meaningful change and perpetuate existing power

⁷⁵ Kabeer, N., & Subramanian, A. (2014). Institutions, Relations, and Outcomes: A Framework and Case Studies for Gender-aware Planning. *World Development*, 64, 97-112.

⁷⁶ Ndulo, M. (2004). Transitional justice, gender, and cultural traditions. *Yale Human Rights and Development Journal*, 7(1), 51-89.

⁷⁷ Collins, P. H. (2015). Intersectionality's definitional dilemmas. *Annual Review of Sociology*, 41, 1-20.

imbalances.⁷⁸ An example of reparations for racial injustice can be seen in the case of the United States and its historical enslavement of African Americans. The concept of reparations for African Americans has gained significant attention in recent years, with discussions focusing on addressing the enduring legacy of slavery, segregation, and systemic racism. In this context, proposals for reparations including measures such as financial compensation, educational initiatives, community investment, and systemic reforms to combat racial inequality have not been effective.⁷⁹ The aim of providing redress for the historical injustices endured by African Americans and to address the ongoing disparities and disadvantages faced by the community as a result of systemic racism seems defeated because while there have been proposals for reparations have been put forth, it does not appear that compensation has been made by the US government.⁸⁰ Issues such as the psychological trauma and social-well beings of the victims are not properly catered for in the transitional justice system.

⁷⁸ Nino, C. (2019). Transitional Justice and Economic Justice: A Comparative Study of Reparations Programs in Colombia and Peru. *International Journal of Transitional Justice*, 13(1), 38-55.

⁷⁹ Maddison, S. and Shepherd, L. J. (2014). Peacebuilding and the postcolonial politics of transitional justice. *Peacebuilding*, 2(3), 253-269. Maddison and shepherd thus argue for an extension of the concept of transition, to enable proper accounting for colonial violence. In this way, they propose a post-colonial re-visioning of transitional justice that offers possibilities for deep social transformation at both the national and international levels.

⁸⁰ HRW. (2008). *Reparations for Historical Injustices in the United States: The Domestic Reparations Movement and the Unfinished Work of the Civil Rights Era*. Retrieved from <https://www.hrw.org/report/2008/07/28/reparations-historical-injustices-united-states/domestic-reparations-movement>

4.4 Marginalization of Minority Groups

Transitional justice processes can exclude or marginalize the voices and experiences of racial minority groups, particularly when they lack representation in decision-making bodies and institutions.⁸¹ This can result in the perpetuation of racial inequalities and the failure to address the specific needs and concerns of marginalized communities.⁸²

Similarly, when transitional justice processes such as truth commissions do not take into account the historical, social, and cultural contexts of racial minority communities, they may fail to address their unique experiences and needs. The truth commission in Guatemala for example, faced criticism for its limited engagement with indigenous communities.⁸³ The commission's focus on high-profile cases and the dominant narrative of the armed conflict overlooked the historical and systemic marginalization of indigenous populations, who suffered disproportionately from state-sponsored violence and discrimination.

5.0 Advancing Racial Justice in Transitional Justice: Pathways and Imperatives

Within the field of transitional justice, addressing racial injustice requires a comprehensive and transformative approach that goes beyond mere acknowledgement of past atrocities. This is because

⁸¹ These institutions can include judicial bodies, truth commissions, reparations programs, memorialization initiatives, and other relevant mechanisms established to address the legacies of widespread human rights violations and systemic injustices

⁸² Zehr, H., & Mika, H. (Eds.). (2013). *The Little Book of Restorative Justice for People in Prison: Rebuilding the Web of Relationships*. Skyhorse Publishing.

⁸³ Grandin, G. (2004). *The Last Colonial Massacre: Latin America in the Cold War*. University of Chicago Press.

renewed focus on the causes and consequences of global systemic racism has shown the contemporary human rights system's failure to address racist and colonial legacies, as well as institutions and policies that have perpetuated racial subordination.⁸⁴

Transitional justice processes implemented in conflict, post-conflict, and authoritarian situations have similarly consigned racial prejudice to a secondary concern rather than confronting it full on, contributing to the recurrence of atrocities in numerous parts of the world.⁸⁵ These ambitious framings of transitional justice in the contexts of historical colonial and racial oppression opened it up to the critique that it served to legitimize continuities of inequality and structural violence.⁸⁶ Its focus on universal human rights norms has often centered on physical abuses, overlooking systemic violence and neglecting social, economic, and cultural rights that are equally important like the civil and political rights advocated.⁸⁷

Horne⁸⁸ also notes the complexities and challenges in achieving transitional justice goals while maintaining social trust by examining whether lustration⁸⁹ helps repair or undermine social trust in these societies. Her article highlights that while lustration policies may

⁸⁴ Global initiative for Justice, Truth and reconciliation <https://gijtr.org/wp-content/uploads/2021/12/Racism-Ethnicity-and-TJ-final.pdf>

⁸⁵ van der Merwe, Hugo, and M. Brinton Lykes. "Racism and Transitional Justice." *International Journal of Transitional Justice*, vol. 14, no. 3, pp. 415–22, Silverchair, 2020, doi:10.1093/ijtj/ijab001.

⁸⁶ Ibid

⁸⁷ Ibid

⁸⁸ HORNE, CYNTHIA M. "Lustration, Transitional Justice, and Social Trust in Post-Communist Countries. Repairing or Wresting the Ties That Bind?" *Europe-Asia Studies* 66, no. 2 (2014): 225–54. <http://www.jstor.org/stable/24533967>.

⁸⁹ the process of purging individuals associated with the previous communist regime

initially serve as mechanisms for accountability and addressing past injustices, their long-term impact on social trust and reconciliation is uncertain.

To solve some of these challenges, Davidovic draws out key characteristics of transformations of non-guarantees (GNRs) including the norm's various contents and contexts, stressing its exceptional future-oriented nature in international law and upcoming pillar in transformational justice.⁹⁰ In terms of structural formations of transitional justice processes, Laidisch argues that any meaningful changes to laws and policies or institutional reforms must be grounded in a recognition and understanding of the society's past atrocities and its connection to present-day injustices, grievances, and violence.⁹¹

However so, there is still a gap in terms of collection of quality of race-based data to combat racial injustices in the world in the best sustainable way. As of July 2021, Twenty of the 38 Organization for Economic Co-operation and Development (OECD) countries failed to collect little/no racial or ethnic identity data.⁹² This may hinder the effectiveness of transitional justice efforts. Without accurate and comprehensive data on racial disparities, discrimination, and systemic inequalities, it becomes challenging to identify patterns, assess the impact of policies, and develop targeted interventions to

⁹⁰<https://academic.oup.com/ijtj/advance-article-pdf/doi/10.1093/ijtj/ijab011/38694709/ijab011.pdf>

⁹¹ <https://www.ictj.org/publication/color-justice-transitional-justice-and-legacy-slavery-and-racism-united-states>

⁹² Amanda Shendruk, "Missing Data: Are You Even Trying to Stop Racism If You Don't Collect Data on Race?", Quartz, July 8, 2021, Available at: <https://qz.com/2029525/the-20-countries-that-dontcollect-racial-and-ethniccensus-data/>.

address racial injustices.⁹³ In light of this gap, sustainable data collection can be embraced in the following ways:

5.1 Promotion of Technology Proficiency Among the Youth

Technology can make it easier to collect, analyze, and use race-based data to discover inequities, track progress, and inform policymaking.⁹⁴ It has the potential to enable the creation of sophisticated databases and analytical tools that provide insights into racial disparities in areas such as education, employment, healthcare, and criminal justice. For a long time, youth have often been characterized as "digital natives" to denote that they are proficient in using technology and have a high level of digital literacy. Similarly, youth have been recognized for bringing fresh perspectives and lived experiences that provided valuable insights into the realities of racial injustices.⁹⁵ However, according to a report by UNESCO, there are challenges related to the nature of technology that can hinder its potential to address racial injustices. These challenges include limited access to technology infrastructure, lack of digital literacy skills, and socioeconomic disparities, which in turn may hinder sustainable data collection.⁹⁶

During the UN Security Council's open debate on transitional justice in 2020, member states identified youth inclusion as a critical aspect

⁹³ Crenshaw, K. (2018). Twenty Years of Critical Race Theory: Looking Back to Move Forward. *Connecticut Law Review*, 50(5), 1587-1607.

⁹⁴ UNESCO. (2018). I'd Blush if I Could: Closing Gender Divides in Digital Skills Through Education. Retrieved from <https://unesdoc.unesco.org/ark:/48223/pf0000262957>

⁹⁵ United Nations Department of Economic and Social Affairs. (2017). Youth and Transitional Justice: Processes and Practices.

⁹⁶ UNESCO. (2020). I'd Blush if I Could: Closing Gender Divides in Digital Skills Through Education. Retrieved from <https://unesdoc.unesco.org/ark:/48223/pf0000262957>

in transitional justice systems' success and hence pledged support to them.⁹⁷ This can be done by implementation of resource allocation in less developed countries to youth by investing in broadband connectivity, computer labs, internet access, and mobile devices in schools, community centers, and marginalized areas to improve technology infrastructure hence easier data collection by the youth.⁹⁸ In more developed countries, privacy and data protection measures can be developed to regulate the collection of sensitive information concerning race.⁹⁹ These countries should also establish robust legal frameworks and protocols to safeguard the privacy and confidentiality of individuals involved in the data collection process.¹⁰⁰ Involving the youth in data collection ensures the long-term viability of anti-racial injustice actions. By giving young people the opportunity to participate actively in transitional justice procedures; they become champions for data collecting and social change, contributing to a long-term commitment to resolving racial injustices.

6.0 Conclusion

This paper has shed light on the complicity of transitional justice in perpetuating racial injustice while also exploring its potential to address and redress such injustices. It has examined the ways in which race and racism have influenced the field of transitional justice,

⁹⁷ <https://www.ictj.org/news/landmark-unscc-discussion-transitional-justice>

⁹⁸ UNESCO. (2017). *Digital Skills for Youth: Policies, Practices, and Frameworks*. Retrieved from <https://unesdoc.unesco.org/ark:/48223/pf0000260516>

⁹⁹ Hinton, A. L., & Sharlach, L. (2019). *Data Collection for Transitional Justice: Practical Guidance*. The International Center for Transitional Justice (ICTJ). Retrieved from <https://www.ictj.org/sites/default/files/ICTJ-DataCollectionPracticalGuidance-2019.pdf>

¹⁰⁰ strong privacy frameworks demonstrate a commitment to ethical and responsible data practices, promoting transparency and accountability in the handling of sensitive racial data.

emphasizing the need for a critical and inclusive approach. It has also highlighted the importance of recognizing the historical legacies of the transatlantic slave trade and colonialism, as well as their contemporary manifestations, in understanding racial injustice. By analyzing existing literature, this paper considers the effectiveness of transitional justice in addressing racial injustice. The discussion has encompassed diverse experiences of race and racialization, and the responses of different countries to racial injustice through transitional justice mechanisms.

Furthermore, the paper has underscored the requirements for racial justice within the field of transitional justice. However, there is a notable gap in the collection of data on race, which poses a risk of complicity in perpetuating systemic discrimination. Efforts such as promotion of technology proficiency among the youth must be made to enhance the collection and utilization of race-based data to inform transitional justice processes effectively. Privacy and data protection measures can also be formulated to aid collecting sensitive information concerning race.

Overall, this examination of transitional justice and racial injustice calls for a comprehensive and critical reevaluation of the field. By embracing a more inclusive and transformative approach, transitional justice can become a powerful tool in dismantling racial injustices and contributing to the creation of more equitable and just societies. In order to achieve meaningful progress, it is crucial for policymakers, practitioners, and scholars to continue engaging in interdisciplinary dialogue, centering the voices and experiences of marginalized communities, and striving for transformative change within the field of transitional justice.

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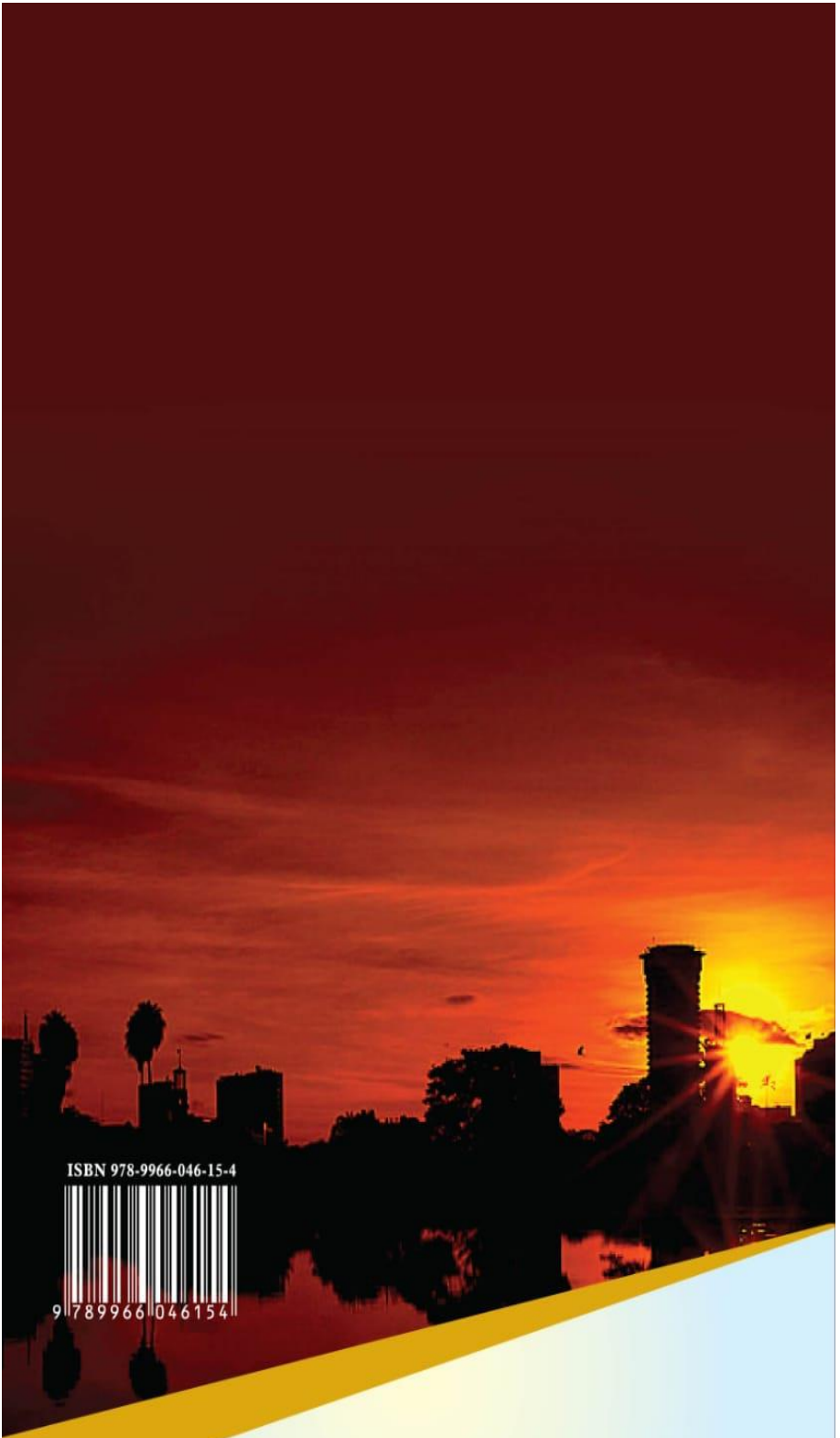
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