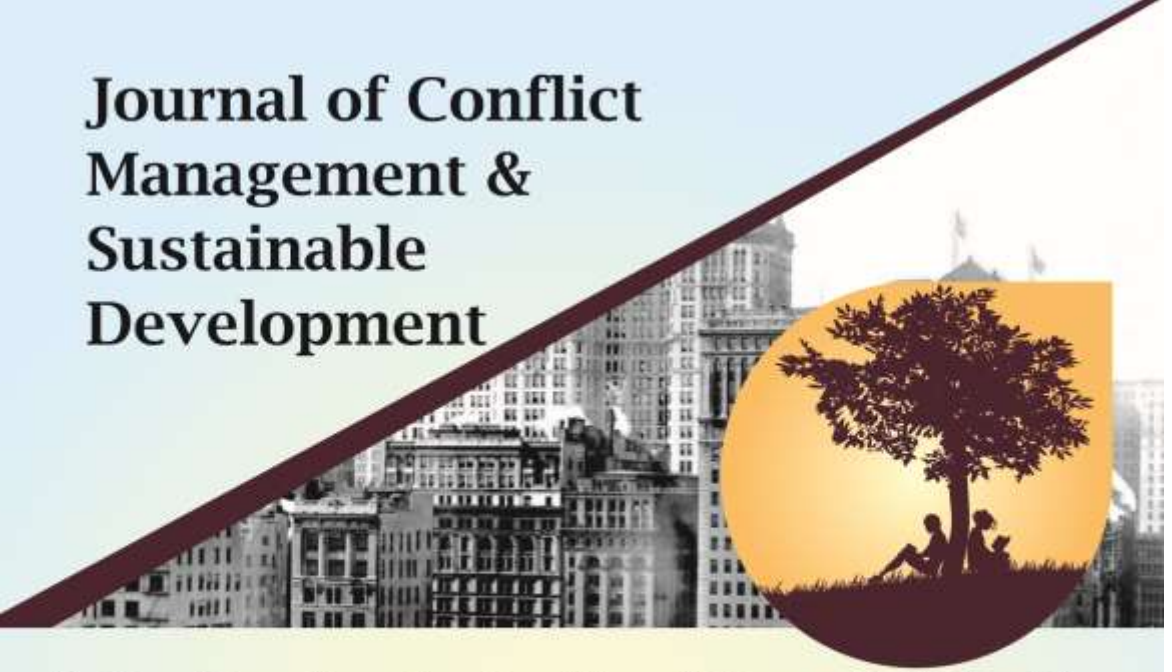
Journal of Conflict Management & Sustainable Development



Volume 2 Issue 2 2018

ISBN 978-9966-046-15-4

Journal of Conflict Management and Sustainable Development

Volume 2 Issue 2 **2018**

Journal of Conflict Management and Sustainable Development
is a journal published twice a year

Typesetting by:
New Tech Edge Solutions Ltd,
P.O. Box 60561 – 00200,
Tel: +254 721 262 409/ 737 662 029,
Nairobi, Kenya.

Printed by:
Mouldex Printers
P.O. Box 63395,
Tel – 0723 366839,
Nairobi, Kenya.

Published by:
Glenwood Publishers Limited
P.O. Box 76115 - 00508
Tel +254 2210281,
Nairobi, Kenya.

© Glenwood Publishers Limited Kenya

All rights reserved. No article published in this journal may be reproduced, transmitted in any form, stored in any retrieval system of any nature without prior written permission of the copyright holder. The views expressed in each article are those of the contributors and not necessarily those of the Glenwood Publishers, Kenya.

Editorial Board

Kariuki Muigua
Managing Editor

Ngararu Maina
Endoo Dorcas Chepkemei
Faith Nguti

Editorial Team
Anthony Luganje
Grace Chelagat-Tanah
Anne Wairimu Kiramba
James Ngotho Kariuki

Advisory Board
James Ndung'u Njuguna
Brian Kinyua Machina
Abdirazak Mohamed
George Osanjo
Silver Andrew Ouma

This Journal should be cited as (2018) 2 (2) Journal of cmsd

ISBN 978-9966-046-15-40

Editor's Note

This is the second issue of volume two (Journal of Conflict Management and Sustainable Development).

The Journal continues to capture debate on conflict management and sustainable development agenda.

Conflict management and sustainable development must be pursued hand in hand for the sake of human and ecological well-being.

There can be no meaningful development without proper and efficacious conflict management mechanisms.

The articles in this issue cover topics such as: the principle of finality in arbitral proceedings; nexus between human security and human rights; the concept of legitimate expectation in International Investment Law; evictions in Kenya; and gender issues in the development process.

We continue to receive feedback on the content of the Journal. The editorial team aims to continually improve the Journal and will take on board all comments and views received.

We are grateful to the team that makes it possible to produce this Journal. This includes the Editorial Board, the Editor, the Reviewers and the individual writers who contribute articles to the Journal.

Dr Kariuki Muigua, **PhD, FCIArb, Chartered Arbitrator, Accredited Mediator.**
Managing Editor, July 2018

Journal of Conflict Management and Sustainable Development

A Journal Published Twice a Year – Volume 2 Issue 2

The Nexus Between Human Security and Human Rights: Some Wayside Remarks

By: ***David Otieno Ngira****

Abstract

The first part of this paper explores the definitions, scope of dimensions of human rights and human security. It identifies the problematic aspects of each definition and embraces a more nuanced conception which locates both human security and human rights within the doctrine of equality, dignity and freedom. The second part of this paper explores how in the face of strong opposition, from critics, the human security doctrine can be used to promote and enhance the realization of socio-economic rights. This part also examines the interrelationship between civil rights and human security and concludes by exploring how the latter can contribute to the realization of the former. The paper further explores the different ways in which the doctrine of Responsibility to Protect has evolved along the lines of human security and what contribution the language of rights can make to its foundation. It concludes by making a case for the development of a program that integrates human rights and human security.

1.0 Human Security and Socio-economic Rights

Defining Human security and Human Rights

The definitions of human security are as varied as the number of scholars who engage with the subject. According to Mack, human security is the protection of individuals and communities from war and other forms of violence.[1] This definition, though moving away from the traditional state-centric approach to security is inadequate because it focuses on freedom from fear which is only one element of human security. Thakur, in a

* PhD Candidate, Utrecht University School of Law and a former Commonwealth Scholar, Warwick University School of Law. Tel +254729306509 Email:otienongira@gmail.com

I acknowledge the helpful comments of Ms Shiro Shilako Mogeni which helped enrich this paper.

[1] Kerr Pauline, 'Human Security' in Collins, Alan. (ed). *Contemporary security studies* (Oxford University Press ,2013) p 106.

broader approach argues that human security is the protection of people from critical life threatening dangers, originating from natural events, human activities, state and or international practices, whether structural or direct.[2] This definition, though broader, overemphasises danger and ignores the fact that the absence of life threatening danger doesn't necessarily imply the presence of security. This article will therefore define human security as the protection of all human lives in ways that advance human freedoms and human fulfilment. This is because human security goes beyond the safety of the individual into their ability to secure and hold basic goods and services.[3]

The definition of human rights has been characterised by an on-going socio-political, philosophical and academic contest. On one hand, scholars like Rawls consider human rights to be those fundamental human attributes whose violations justifies foreign (military) intervention.[4] In other words, human rights are seen as standards that set the limit of state sovereignty. In a similar context, Waldron considers human rights to be:

> *'..;a right is properly described as a human right if the appropriate response to its violation by an otherwise sovereign state is armed interference by an outside state or an international organization aimed at remedying or punishing or preventing the continuance of the sovereign state's violation.'*[5]

Other scholars like Talbot have considered human rights to be those entitlements that a state needs to guarantee its citizens to give it moral legitimacy.[6] This view resonates with the underlying assumption in human rights treaties that the state is the guarantor of human rights and therefore obligated with both positive and negative duties to human rights realization. Other scholars have veered off from this statist conception of rights and considered human rights either as moral entitlement backed by strong reason, as those things that human beings need to live a life of fulfilment or dignity or as an individual's shield against the immense and oppressive

---

[2] Ibid.

[3]See Mahbub Al Haq cited in Gasper, Des, 'Securing humanity: Situating 'human security' as concept and discourse.' 2005 (6) 2 Journal of Human Development,221, 223.

[4] See John Rawls, *Law of the People*, (Harvard University Press, 1993).

[5] Waldron, Jeremy, "Human Rights: A Critique of the Raz/Rawls Approach" (2013). New York University Public Law and Legal Theory Working Papers. P 4 accessed from http://lsr.nellco.org/nyu_plltwp/405.

[6] William Talbott, 'Consequentialism and Human Rights,' 2013 (8) Philosophy Compass, 1030.

powers of the state and the society.[7] Within this context, human rights are seen as counter hegemonic tools that can be used to guarantee human emancipation and well-being.[8] John Tasioulas sees human rights as those entitlements possessed by human beings by virtue of being human and inhabiting a social world that is subject to the conditions of modernity.[9] Within this context, human rights are seen as the necessities that human beings are entitled to so as to live a life of dignity, freedom and equality. These entitlements emanate from our identity as human beings, are inalienable and cannot be taken away.[10] This is the context in which human rights will be viewed in this paper.

2.0 Human Security and Human Rights

In the tradition conception of security, the state was the main point of reference and the individual was only considered to be secure for as long as the state was also secure. However Human security is a bottom up approach that has the individual as the main object to be secured.[11] Advocates of the human security doctrine observe that the security of the state is futile if the security of the individual is not guaranteed.[12] Thus the security of the state would be futile unless the security agencies start by focusing on the security of the individual. Since the security of the individual is multifaceted and has physical, psychological, social and economic dimensions, the human security approach provides a more comprehensive and realistic approach to the promotion of human well-being. For instance climate change has been cited as a security threat to the state, but this threat only reaches the state through the individual.[13] Barnett and Adger

[7] For such a view see Hunt Alan, 'Rights and Social Movements: Counter-Hegemonic Strategies' 1990 (17) 3 'Journal of Law and Society, 309,325.

[8] See also Michael Ignatieff, 'The Attack on Human Rights'2001 (80) 6 Foreign Affairs, 102, 108.

[9] John Tasioulas,' The Moral Reality of Human Rights in Ethical and Human Rights Dimension of Poverty: Towards a new Paradigm in the fight against poverty, (UNESCO Poverty Project, 2003).

[10] Williams Lucy, 'Towards an Emerging International Poverty Law', in Williams Lucy(ed) *International Poverty Law: An Emerging Discourse (*Zed Books, 2006).

[11] See Kaldor Mary, Human *Security*: *Reflection on Globalization and Intervention* (Polity Press, 2007) p 182 Gasper,Supra note 4 at 222-224.

[12] Barnett, Jon & Adger, Neil, 'Environmental Change, Human Security, and Violent Conflict' 2007 (26) Political Geography, 639, 646-647.

[13] Ibid.

argue that climate change leads to chronic poverty, and vulnerabilities which eventually weaken the capability of the state to guarantee state security, as most of its resources are diverted to mitigating the impacts.[14]At the same time, the vulnerability caused by climate change results into 'personal mitigation and response initiative' which often lead to conflict over water ,grazing land, cattle rustling and other forms of crime. This is because the human survival instincts often compel him to adjust to any adverse situation even if the same involves violence. Attempts to guarantee state security must therefore start with the security of the individual. Ken Booth has disputed this view, arguing that human security is an end in itself, and must not be looked at as a means of securing the state.[15] He laments that a focus on state security actually erodes the philosophical foundation of human security.[16] However, whether deliberately or by default, it is clear that the attainment of human security will not only reduce internal threats to state security but may not eradicate the external security threats. Human security is thus both a means and an end in itself.[17]

3.0 Human Security and Socio-economic Rights

Human security is not only an academic discourse. Rather, it is a form of practice that has now gained credence with many implementation agencies. Accordingly, human security is one of the latest approaches put forth by the UN to address security issues in the face of globalization which is threatening not only national but also international stability.[18] Human security is based on the premise that an individual needs to be free from want, free from fear, and freed to take action towards improving his life.[19] Since human security is about controlling vulnerabilities, and poverty, as well as promoting livelihoods and human freedoms, a call for human security is essentially a call for human right.[20] For instance, to a human rights advocate, the eradication of poverty is a way of promoting human wellbeing which is

[14] Ibid at 643.
[15] Booth Ken, 'Security and Emancipation' in Hughes, Christopher & Lai Meng Security *studies: A reader* (Routledge, 1991), p 36.
[16] Ibid.
[17] See Kaldor Supra note 11 at 191.
[18]Gasper supra note 4 at 221-222.
[19] Ibid.
[20] Barnett and Adger Supra note 12 at 643- 644, See also Kerr Supra note 1 at 107.

an essential component of human rights.[21] That is, the poor health and environmental conditions under which a vulnerable person lives not only violates human security (conceived as freedom from want) but also violates human rights (conceived as a right to dignity). Accordingly, socioeconomic rights enthusiasts like Ngira and Clair have argued that poverty, characterised by lack of education, food, shelter and health are an assault on human dignity.[22] Thus, eradication of factors that undermine human dignity is necessary for an individual to achieve full personal development-human right. Moreover, other human rights enthusiasts like Amatya Sen argue that eradication of poverty is one of the conditions necessary for the realization of other civil and political rights.[23] To this end, the eradication of poverty is premised on the principle of dignity which not only anchors human well - being but is also an indivisible component of human rights, both in the legal and moral sense

As a human security issue poverty eradication can be looked at in 2 dimensions. First, it can be seen as freedom from want.[24] This conception is based on the premise that and individual cannot be safe if he is considered to be in a state of want. Want within this context is given a reductionist approach which limits it to basic needs .Indeed the Commission on Human Security (CHS) cites health security, food security, environmental security, security of political freedoms, income security and identity security, as the key areas of focus in human security and encourages security agents, both at the national and international level to work towards their eradication.[25] Human security, according to the CHS, includes eradication of all threats to human wellbeing, an issue that has made critics such as Paris to refer to human security as inscrutable, and a moral aspiration rather than an

[21] See generally, Williams Supra note 6.

[22] See Clair Asuncion, 'How Can Human Rights Contribute to Poverty Reduction? A philosophical Assessment of the Human Development Report, 2000 in Williams Lucy (ed), *International Poverty Law: An Emerging Discourse, Zed* Books2006), pp 16-18 See also Ngira David, Repositioning socio-economic Rights as Real Rights: A response to sceptics 2017 2(1) MKU Law Journal,1,99.

[23] Sen, Amatya, Development *as freedom* (Knopf,1999).

[24] Gasper Supra note 4 at 225.

[25] Commission on Human Security, *Human security now*. (2003) accessed from http://www.unocha.org/humansecurity/chs/finalreport/Outlines/outline.pdf on 28th/03/2018

enforceable doctrine.[26] Paris's contention is that this broad conception of human security makes it difficult to select (or handle) all the causes of human insecurity, therefore making it impossible to achieve any security conceived in this context.[27]

Paris' contention raises the question of whether human beings are naturally in a state of security (which would imply that all the causes of human insecurity are external) or whether human beings are naturally in a state of insecurity (which would imply that human security is brought to the individual)**.** The human rights conception of needs addresses this grey area. According to Upenda Baxi, human rights are often characterised by obligations that is; if someone proceeds from the point of view that health is his right he creates the obligation on someone else to provide it.[28] This therefore implies that good health (perceived as a right) is not natural to the individual; rather it must be provided by external actors. However, whether health is conceived as a right (creating the need for someone to provide it), or a security issue (requiring protection from poor health) the underlying reality is that both human security and human rights discourses are about the same thing: improving human well-being through adequate health. The two approaches can therefore easily reinforce each other.

Secondly, poverty can be looked at as a precondition for physical insecurity (thus a cause of fear).[29] Borrowing heavily from Maslow's hierarchy of needs, Kerr argues that the pillar of human security is physical security since an individual may not attain all the other forms of human security if his physical security is not guaranteed.[30] Moreover, poverty may compel one individual to be a cause of physical insecurity to others. For instance, Poverty among the youth, characterised by massive youth unemployment predisposes them to drug abuse and recruitment into gangs and terrorist groups.[31] These gangs and terrorist groups engage in criminal activities which not only threaten other people's security but may also become a

[26] Paris Roland, 'Human Security' in Hughes, Christopher and Lai Meng, *Security studies: A reader*. (Routledge,2011), pp71-72.
[27] Ibid.
[28] See Baxi Upenda, Re-Thinking Human Rights: Preliminary Reflections Concerning Human Rights thoughts and Folkways (Unpublished, 2012).
[29] Commission for Human security, Supra note 25.
[30] Kerr Supra note 1 at pp 10-111.
[31] Ibid.

threat to the very foundation of the state. Increased poverty and vulnerabilities also creates a high risk of communal conflict over resources, such as has been observed in the DRC Congo and Eastern and Northern Kenya. Such conflicts, which sometimes manifests themselves as civil wars or ethnic conflicts often result into refugees and internally displaced people, thus creating massive human suffering through disease, malnutrition, illiteracy and even death in refugee camps. Poverty is thus not only an issue of human rights, but also a threat to human security (conceived both as freedom from want and as freedom from fear) as well as a threat to state security (perceived in the traditional state-centric conception of security).

Both Human rights and human security are concerned with human capabilities.[32] Capabilities in this context refer to the capacity of the individual to act in a way that would improve his life. From a human rights perspective, this capacity is a right needed by the individual for his own development.[33] For instance, the right to education increases ones choices in life and improves his general well-being. Pursuing this line of thought Clair argues that to socio-economic rights are positive liberties that are required to enable an individual secure what he needs for a fulfilling life a view also held by James Nickel who argues that human rights must ensure that people can have minimally good lives, must be of high priority, and must be supported by strong reasons that make plausible their universality and high priority.[34] The basic assumption in this rights conception of capabilities is that they must be provided by external actors, and that they don't naturally occur to the individual. However, this raises the immediate question of the specific entity responsible for these rights. Some critics therefore dismiss socio-economic rights as ''real rights'' on grounds that the specific duty bearer cannot be identified.[35] However, Baxi and Clair point to a generally unfair global distributive system that fails to adequately guarantee these

[32] See Commission on human security supra note 25 pp 2-3 and United Nations Development Programme *Human Development and Human Rights: Reports of the Oslo Symposium*, (UNDP,1998).

[33] See generally Sen supra note 23.

[34] Nickel, James, "Human Rights", *The Stanford Encyclopaedia of Philosophy* (Summer 2013 Edition), Edward N. Zalta (ed.), forthcoming URL = <http://plato.stanford.edu/archives/sum2013/entries/rights-human/> See also Clair supra note 22, p 17.

[35] Sengupta Arjun, 'On the Theory and Practice of the Right to Development,' 25 24 (4) Human Rights Quarterly 837.

rights, and note that those who have benefited from this system bear the greatest responsibility to build the capacity of the poor and vulnerable.[36] This, they argue, is one way of building the capabilities and reducing the vulnerability of poor people in developing countries. Onei'll has however rejected this view and noted that even in the few cases where duty bearers of socio-economic rights, such as freedom from poverty, can be identified, this duty can never be philosophically justified.[37] Other critics have noted that a right, in the proper sense, denotes liberty and that, things like food, housing, and can be justified on the basis of morality or ordinary virtues but not rights.[38] This political disagreement over the nature and content of socio-economic rights, and their place in the reduction of vulnerability and improvement in human well-being has led scholars like Martha Nussbaum to advocate for the replacement of the politicised rights language with that of human security and capability.[39]

Capability from a human security perspective: Whereas most advocates of human security agree that capability is important, they disagree on whether capabilities is inherent in the individual (implying that security agencies must protect the person from incapability from external actors) or whether, the individual is in a natural state of incapability (implying that the security agencies must provide capability).[40] Take the example of education as a capability. One approach would be to argue that very huge financial requirement is an obstacle to the attainment of education (thus a source of human incapability) and that the solution lies in empowering the individual to meet the financial requirements. The second approach would be to argue that the individual is naturally capable of achieving the highest level of education, if left alone, and that the easiest option is to scrap off all the financial requirements (insecurity) in the education system and let the

[36] See Baxi supra note 28 and Clair supra note 22.

[37] O'neill , Onora, *Faces Of Hunger: An Essay on Poverty, Justice and Development*, (Allen and Unwin,1986).

[38] See Tasioulas, supra note 9, see also Ignatieff Michael, '*The Ordinary Virtues: Moral Order in a Divided World*' (Harvard University Press, 2017).

[39] Nussbaum, Martha, 'Human Capabilities, Female Human Beings' in Martha Nussbaum and Jonathan Glover (eds.), *Women, Culture, and Development: A Study of Human Capabilities*, Clarendon Press, 1995).

[40] Baldwin Da, The Concept of Security in Hughes, Christopher, & Lai, Meng Security *studies: A reader* (Routledge, 2011), pp71-72, pp 25-27, See also Gasper supra note at 225.

person to acquire knowledge naturally (free education). The key question that arises here is: Does capability imply empowering the individual to deal with the source of human insecurity or does it imply eradicating the source of human insecurity and letting the individual achieve his best level of personal development? Both Ken Booth and CHS seem to advance the latter approach, while other scholars like Nussbaum advocate for an approach that empowers the individual to deal with the cause of insecurity.[41] However, it is arguable that human security requires an integrated approach that marries the two dimensions. Thus, whereas improving capabilities to enable the individual to handle or eradicate the source of insecurity by himself is necessary, a number of human insecurity concerns like conflicts require elimination of the source of insecurity by security agencies to enable the individual exploit his capabilities.[42]

Although there is a disagreement on the best approach in the promotion of human security, there is at least a tacit consensus on who is responsible for human security. The responsibility clearly lies with all agencies concerned with security key among them the state, national and International security bodies.[43] This is contrary to the human rights regime where the question of obligation is still unresolved, with sceptics using this as a reason for dismissing socioeconomic rights as real rights.[44] The human security approach can thus be used as an implementation framework for socio-economic rights.

Another area of focus is prioritization. To the human rights regime, human rights are interdependent and indivisible, thus cannot be prioritized.[45] The recognition and or achievement of human rights is considered to be holistic, with most scholars arguing that they must be achieved to the highest level possible.[46] This principle, coupled with resource constrains and ideological differences create the problems of feasibility and practicality in

[41] Nussbaum cited in Gasper Supra note 1 at 233, see also See Commission on Human Security, supra note 22 See also Booth supra note 13 at p 39.
[42] Kaldor Supra note 8 at 185-187.
[43] See Gasper Supra note 4 at 234.
[44] See Onei'll supra note 37.
[45]Donnelly, Jack, *Universal human rights in theory and practice*, (Cornell University Press, 1989), pp 10-13.
[46] Ibid.

implementation of human rights thus compromising their realization.[47] On the other hand, the human security approach allows for prioritization. The Commission on Human security lists the areas of focus of human security which include; protection of people in conflict, protecting people from proliferation of arms, education, health, identity, and fair trade in order to benefit the poor, provision of at least minimum living standards and improving people's life choices.[48] Thus since socio-economic rights address these same issues, but faces the challenge of prioritization, the human security agenda can be used to escape the obstacle of prioritization and fulfil the principles behind socio-economic rights, which is the improvement of human dignity.

Despite the fact that the human rights approach emphasizes dignity and equality while the human security approach focus on basic needs and human safety, both have a big role to play in empowering and promoting human well-being and can thus be used to reinforce each other.

4.0 Human Security and Civil and Political Rights

The philosophical principle behind civil and political rights is basically that the individual is fundamentally free and that the human rights regime should protect him against the coercive powers of the state.[49] The assumption here is that the state is the (potential) violator of these rights. However, critics argue that these rights are sometimes experienced outside the public arena and that tying them to the state delinks them from their social settings.[50] They note that non-state actors are also violators can therefore play an important role in the realization of these rights, by for instance, fulfilling their negative obligations.[51] However, advocates of civil rights hold that the 'statist' view of civil rights (that the state is the guarantor and possible violator of rights) is valid since the state has both a negative duty (to abstain

[47] Buergenthal, Thomas 'The Normative and Institutional Evolution of International Human Rights' 1997(19), Human Rights Quarterly, 703.
[48] See Commission on Human Security, Supra note 25 at 4.
[49] See Donnelly Supra note 45 at 35.
[50] Nickel, Supra note 34.
[51] See Nicolás Carrillo-Santarelli, *Direct International Human Rights Obligations of non-State Actors*, (Wolf Legal Publishers,2017) p 10.

from violating civil rights) and a positive duty to prevent non-state actors from interfering with an individual's rights.[52]

Thus, civil and political rights are essentially based on non-interference of the individual and equal treatment. The paradox in the human rights regime is that the state (which is perceived as the main violator) is still given the absolute obligation over protection of civil and political rights (whether committed by state or non-state agents). Due to lack of an enforcement mechanism, the human rights bodies, including the UN Human Rights council have no way of compelling the state to uphold human rights.[53] The interventionist approach advocated for by John Rawls and Joseph Raz, although intelligible has proved impossible and undesirable.[54] In fact scholars like Waldron have observed that at the very best, it could protect the society against widespread violations but is basically impractical in cases where states violate the rights of a minimal number of people.[55] In the face of all these difficulties human rights enforcement agencies at the international level have largely been reduced to whistle-blowers.

From a human security perspective, non-interference implies that an individual is essentially free to exercise his freedoms.[56] The state, conceived as a violator of the individual's freedom would be perceived as a source of insecurity, therefore creating the need for it to be stopped from this interference (by external security bodies).[57] To the human security movement, civil rights are therefore conceived as freedom from fear. The assumption here is that the individual is naturally secure and safe to exercise his freedoms and that any attempt at curtailing these freedoms causes fear which must be stopped or eradicated. The obligation to remove the fear

[52] See Donnelly Supra note 45 at 34.

[53] Kampeas Ron, 'U.S. rips U.N. Human Rights Council for 'disproportionate' Israel focus, Jewish *Telegraphic Agency. (March 19th,2013)* Accessed from http://www.jta.org/2013/03/19/news-opinion/united-states/u-s-rips-u-n-humanrights-council-for-disproportionate-israel-focus on 28th/04/2018.

[54] For the interventionist approach to human rights see Raz, Joseph, Human Rights without Foundations (March 2007). Oxford Legal Studies Research Paper No. 14/2007. Available at SSRN: https://ssrn.com/abstract=999874 or http://dx.doi.org/10.2139/ssrn.999874 See also John Rawls, supra note 4.

[55] Waldron Jeremy supra note 5 at 11-13.

[56] See Kerr, supra note 1 at 107-110.

[57]Thomas Caroline, 'Globalization and Human Security in Anthony', McGrew and Nana Poku (Eds) *Globalization, Development and Human Security* (Polity Press,2007) p 113.

and restore safety within this conception lies with the agencies dealing with national, regional and or international security.[58] Thus if the state security apparatus is part of the violators (and cause insecurity to the individual), then the international security apparatus is brought into perspective.[59] This argument acts as the underlying principle behind merging security doctrines such as the responsibility to protect which has anchored many international military interventions.[60] Unlike the international human rights bodies such as the Human Rights Council that rely on the goodwill of member states to prepare and submit national human rights reports (and to follow through with the implementation of their recommendations) the international security apparatus, such as the Security Council have a comparatively stronger enforcement mechanism.[61] For instance, the Security Council can use sanctions, or pass resolutions that allow for military interventions or other measures that would stop the violation of human security.[62] Conceiving civil and political rights as fundamental freedoms within the human security framework is therefore one way of ensuring that they are protected. However, this doesn't mean that the rights regime is of no use: It is still important because it gives the moral justification for all the freedoms.[63]

5.0 Human Security, Human Rights and the Responsibility to Protect

According to the Commission on Human Security, Protection of people in conflict and post conflict situation similarly falls within the human security parameter since security involves freedom from physical harm and freedom from fear.[64] The assumption is that individuals in conflict situations are very vulnerable and therefore needs protection. This conception of human security revisits the question of whether the doctrine of Responsibility to

[58] See Kerr Supra note 1 at 111.
[59] Ibid.
[60] McClean Emma, 'The Responsibility to Protect: The Role of International Human Rights Law' 2008 (13) 1(1) Journal of Conflict and Security Law, 123.
[61] Hough Peter, *Understanding Global Security* (Routledge,2005), p 96.
[62] Ibid.
[63] See generally Tasioulas supra note 9.
[64] See Commission of Human Security, Supra note 25 at pp. 2-4.

Protect (R2P)[65] is part of the human security framework. If the above assumption is considered to be true (and I think it is), then it can be argued that intervening to protect the individual should involve peaceful means (to avoid causing more harm/fear) but doesn't necessarily exclude violent means, such as the use of armed forces.[66] The justification of R2P as part of the human security programme would be based on the premise that, the individual is under threat of insecurity, that the state is either unwilling or unable to provide the security and that the international community is intervening to restore the individual's security.[67] Unlike in the human rights arena, where the focus is on encouraging the state to guarantee human rights, the human security arena allows for international security apparatus to by-pass the state if it fails in its protection responsibilities.[68] State sovereignty, within the human security arena, is thus considered as a responsibility and not a right or control hence can be violated if the individuals within the state are under any threat.[69] Additionally, whereas the protection of freedom from want(basic human needs) are limited to partnership between the state and international actors, freedom from fear has been given immense significance in international law because R2P allows external human security agencies to act even without the state's approval or involvement.

Lastly R2P comes with the responsibility to rebuild.[70] The underlying premise here is that intervening to protect the individual from harm or fear may cause more fear and or harm, hence the need to rebuild the individual and societal safety after the intervention. This implies that if the intervening body premises its intervention on grounds of a threat to human security, it must only leave that country after restoring the human security, otherwise

[65] R2P is a doctrine that emerged from the UN in the year 2001 based on the premise that the role of the state is to protect individuals and thus the international community could intervene if the state fails to perform this role. For details see The International Commission on Intervention and State Sovereignty, ' The *Responsibility To Protect* (2001) Accessed from http://responsibilitytoprotect.org/ICISS%20Report.pdf on 28th/04/2018 at 10.00 pm.

[66] See Kerr Supra note 1 at 111-112.

[67] See Stahn, Carsten, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' 2007 101 (1) American Journal of International Law, 99.

[68] Ibid at 113.

[69] Ibid at 112.

[70] See Kerr Supra note 1 at 113.

it will be conceived as a cause of further human insecurity.[71] What is troubling is that the responsibility to protect, in cases where the state is by-passed because it is either too weak or unwilling to co-operate often involves rebuilding the state machinery itself.[72] This "statist" approach makes it difficult for critics to see any fundamental difference between the previous state-centred security framework and human security.[73] However, it is arguable that, rebuilding the state is informed by the need to ensure that in the future, the state is strong enough to protect its people against violations by powerful non-state actors. The only controversial dimension would be a scenario in which the intervention is warranted by the violation caused by the state itself. In this context, restoration of security through R2P may involve creating a room for the replacement of, or replacing the entire regime with a new regime that is capable and willing to respect and protect people's human security.[74] Sadly and unjustifiably, critics have capitalised on this to argue that R2P, is just "old wine in new bottles"[75], thus ignoring the broader conception of human security that come with R2P.

6.0 Conclusion

Whereas their philosophical points of justification are different, human rights and human security are similar in that they both have the same point of reference, (the individual) and are focused on achieving the same end results- the improvement in human well-being. Human security and human rights can thus be integrated into a more cost effective and efficient programme for the promotion of human well-being and alleviation of human suffering. This project must start by utilizing the rich philosophical scholarship on human rights to enrich the moral foundation of rights protection and the strong implementation framework of the security regimes to enforce human security. This initiative must also demystify the static conception of security and embrace a more people centred security approach that is anchored on dignity, equality and well-being.

---

[71] Joyner, Christopher, 'The Responsibility to Protect': Humanitarian Concern and the Lawfulness of Armed Intervention 2007 (47) 3 Virginia Journal of International Law, 693.
[72] Ibid at 714.
[73] See Paris, Supra note 26 pp 71-73, see also Stahn supra note 67 at 111.
[74] See Joyner, Supra note 71, at 712-714.
[75] See Stahn Supra note 67 at 111-112.

Attaining Gender Equity for Inclusive Development in Kenya

By: ***Kariuki Muigua***

Abstract

This paper critically examines the concept of gender equity and the role it can play in achievement of inclusive development in Kenya. Despite its importance and constitutional recognition, gender equity is an ideal that is yet to be realized. Arguably, the country's efforts towards achieving sustainable development require the concerted efforts of both men and women. This is because the two groups have different but complementary needs that any efforts towards inclusive national development must address. If this is to be achieved effectively, then there is need for evaluating the role of gender equity in the development discourse. This discussion makes a case for enhanced role of gender equity for the realisation of meaningful and participatory national development through proposing ways of promoting empowering both gender for the same.

1.0 Introduction

The role of gender in the national development discourse and particularly sustainable development in Kenya is pertinent. The current Constitution of Kenya 2010 places great emphasis on the equality of both gender and their participation in the country's development agenda.[1] However, gender equity

* PhD in Law (Nrb), FCIArb (Chartered Arbitrator), LL. B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); Dip. In Arbitration (UK); MKIM; Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; Advocate of the High Court of Kenya; Senior Lecturer at the University of Nairobi, School of Law.

[1] Article 1 of the Constitution emphasizes that all sovereign power belongs to the people while Article 10 sets out democracy and participation of the people and inclusiveness as some of the national values and principles of governance in Kenya; Article 27 prohibits either the State or any person from discriminating against any person on any of these grounds including: race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth; Article 59 thereof establishes the Kenya National Human Rights and Equality Commission whose functions include *inter alia* promoting gender equality and equity generally and to coordinate and facilitate gender mainstreaming in national development. Article 69(2) also obligates every person to cooperate with State organs and other persons to protect and conserve

is an ideal that is yet to be fully realized owing to various factors that are discussed in this paper. The author herein examines the legal and institutional framework on gender equity and human rights with a view to making a case for the practical empowerment of both gender for national development.

Arguably, this cannot be achieved without the cooperation of both gender. This paper makes both a legal and moral argument in support of the need for full participation of both gender in the sustainable development efforts. Thus, the author does not only advocate for the empowerment of men and women as an end in itself but as a means of ensuring that there is cooperation between them in achieving inclusive development in Kenya.

2.0 Gender Equity and Equality

The term "gender" is used to refer to the set of social norms, practices and institutions that regulate the relations between women and men (also known as "gender relations").[2] It has also been defined as a social construct that ascribes different qualities and rights to women and men regardless of individual competence or desires.[3] It is noteworthy that gender does not mean 'women' or 'girls' – although the word is frequently (mis)used as shorthand for women, women's empowerment, women's human rights, or, more broadly, for any initiative that is geared towards girls or women.[4]

---

the environment and ensure ecologically sustainable development and use of natural resources. Further, Article 175 (c) provides that one of the principles of principles of devolved government is that no more than two-thirds of the members of representative bodies in each county government should be of the same gender; See also Article 197.

[2]United Nations, "The Role of Men and Boys in Achieving Gender Equality," *Women 2000 and Beyond,* December 2008. p.4. Available at http://www.unwomen.org/~/media/headquarters/media/publications/un/en/w2000menandboyseweb.pdf [Accessed on 03/04/2015].

[3] G. J. Latham, "A study on gender equality as a prerequisite for sustainable development," *Report to the Environment Advisory Council*, Sweden 2007:2, p. 17. Available at http://www.uft.oekologie.unibremen.de/hartmutkoehler_fuer_studierende/MEC/09-MEC-reading/gender%202007%20EAC%20rapport_engelska.pdf [Accessed on 03/04/2015].

[4] UNICEF, "Promoting Gender Equality: An Equity-Focused Approach to Programming," *Operational Guidance Overview*. p. 10. Available at http://www.unicef.org/gender/files/Overarching_Layout_Web.pdf [Accessed on 03/04/2015].

Gender equity is used to denote the equivalence in life outcomes for women and men, recognising their different needs and interests, and requiring a redistribution of power and resources.[5] According to the European Commission, gender equity entails the provision of fairness and justice in the distribution of benefits and responsibilities between women and men, while recognising that women and men have different needs and power and that these differences should be identified and addressed in a manner that rectifies the imbalances between the sexes.[6] Equity is generally regarded as a state of fairness and justness and it requires that the specific needs of particular groups are considered separately and acted upon accordingly.[7]

From the foregoing, it is noteworthy that gender equity strives towards ensuring that the different gender are not only included in development but also that their special needs that may be attributed to inevitable differences are also adequately addressed. Equity is thus important since it ensures that even where both gender are afforded equal opportunities, the enjoyment and benefits accruing from those opportunities effectively address the needs and desires of each group.

Efforts to introduce gender-sensitive approaches to national development have not been quite successful because even as legislative measures are put in place, they fail to address the underlying norms and customs that define gender relations and power dynamics in the society. The power imbalance that defines gender relations influences women's access to and control over

---

[5] H. Reeves and S. Baden, "Gender and Development: Concepts and Definitions," *Prepared for the Department for International Development (DFID) for its gender mainstreaming intranet resource*. Institute of Development Studies, Report No 55, February 2000, p. 10.

[6] European Commission, *Gender equality – glossary*, available at http://ec.europa.eu/justice/gender-equality/glossary/index_en.htm[Accessed on 19/05/2015].

[7] NSW Health Department, 'Gender Equity in Healthcare,' *State Health Publication No: (HSP) 000015,* April 2000. p.2. Available at http://www0.health.nsw.gov.au/pubs/2000/pdf/gender_equity.pdf [Accessed on 19/05/2015]; See also Canadian Association for the Advancement of Women and Sport and Physical Activity (CAAWS), "What is Gender Equity?" Available at http://www.caaws.ca/gender-equity-101/what-is-gender-equity/ [Accessed on 19/05/2015].

resources, their visibility and participation in social and political affairs, and their ability to realize their fundamental human rights.[8]

Gender inequality has been defined as the differential treatment and outcomes that deny women the full enjoyment of the social, political, economic and cultural rights and development. It is the antithesis of equality of men and women in their human dignity, autonomy and equal protection.[9] Gender equality is however not a 'women's issue' but refers to the equal rights, responsibilities and opportunities of women and men, girls and boys, and should concern and fully engage men as well as women.[10] It is also used to refer to the equal participation of women and men in decision-making, equal ability to exercise their human rights, equal access to and control of resources and the benefits of development, and equal opportunities in employment and in all other aspects of their livelihoods.[11]

It is noteworthy that gender equity has been defined differently in diverse contexts. However, this paper adopts a definition that describes it as the presence of a gender perspective in decision-making of all kinds and those women's interests are given the same consideration as men's in terms of rights and the allocation of resources to fully address their specific needs and desires.[12] In the Kenyan context, this definition encompasses what the Bill of Rights in the Constitution of Kenya 2010 provides for.[13] The Constitution provides for equality of all persons and prohibits any form of

---

[8] R. Strickland and N. Duvvury, "Gender Equity and Peacebuilding," *From Rhetoric to Reality: Finding the Way*, International Center for Research on Women Discussion Paper, 2003. p. 5. Prepared for the Gender Equity and Peacebuilding Workshop with a grant from the International Development Research Centre (IDRC), Ottawa, Canada. Available at http://www.icrw.org/files/publications/Gender-Equity-and-Peacebuilding-From-Rhetoric-to-Reality.pdf [Accessed on 16/05/2015].

[9] N. Baraza, 'Lost Between Rhetoric and Reality: What Role for the Law and Human Rights in Redressing Gender Inequality?' *Kenya Law Reform* Vol. II [2008-2010] page 1.http://www.kenyalaw.org/klr/index.php?id=874 Accessed on 15/05/2015].

[10] See generally 'Universal Declaration of Human Rights - In six cross-cutting themes' Available at <http://www.ohchr.org/EN/UDHR/Documents/60UDHR/Stories_on_Human_Right_PressKit_en.pdf> [Accessed on 1/04/2015]

[11] FAO Training Guide, "Gender and Climate Change Research in Agriculture and Food Security for Rural Development," 2nd Ed., 2013, p.9. Available at http://www.fao.org/docrep/015/md280e/md280e.pdf

[12] G. J. Latham, *op cit,* p. 17.

[13] Chapter 4 (Articles 19-59).

discrimination on any ground, including sex.[14] It provides that equality includes the full and equal enjoyment of all rights and fundamental freedoms.[15] Further, it states that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.[16]

The Constitution envisages a society where women and men participate equally and competitively in national development. It is important to note that the national values and principles of governance as envisaged in the current Constitution of Kenya bind all State organs, State officers, public officers and all persons whenever any of them—applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.[17] The most significant of these values and principles are participation of the people, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised.[18] Indeed, some of these are captured in the Preamble to the Constitution which provides that one of the pillars of the current Constitution is the recognition of the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.

Gender equality is seen as a shared vision of social justice and human rights and one that requires concerted efforts from all to achieve.[19] The effect of this is that the foregoing values and principles ought to inform any development deliberations and move towards achievement of gender equality in Kenya.

3.0 International Framework on Gender Equity and Equality

3.1 Universal Declaration of Human Rights, 1948

The *Universal Declaration of Human Rights*, 1948(UDHR) recognizes that the inherent dignity and of the equal and inalienable rights of all members of the

[14] Article 27(4).
[15] Article 27 (2).
[16] Article 27 (3).
[17] Article 10 (1).
[18] Article 10(2) (b) (c).
[19] See generally, *Beijing Declaration and Plat form for Action Beijing+5 Political Declaration and Outcome,* United Nations 1995.

human family is the foundation of freedom, justice and peace in the world.[20] Further, it provides that all are equal before the law and are entitled without any discrimination to equal protection of the law.[21]The Universal Declaration of Human Rights acknowledges that men and women are not the same but insists on their right to be equal before the law and treated without discrimination.[22] To this end, the Declaration recognises the important role of equity in ensuring that all persons are not only afforded equal opportunities but are also able to take advantage of such opportunities in a fair manner.

The Declaration thus requires that all persons, men and women, should enjoy the human rights equally and also demands that all should be protected by law from any form of discrimination. In light of the foregoing, the current Constitution of Kenya provides for equality of all persons and non-discrimination on any ground as well as equal protection of the law.[23]

The Declaration is important not only for pushing for the promotion of the rights of all persons but also for correction of any violation of the said rights.[24] The UDHR thus forms the benchmark against which many laws on human rights around the world are pegged. The universal acceptance of its values and principles means that every state, Kenya included, should work towards achieving the ideal world of equity and equality as contemplated in the Declaration. It is noteworthy that the Declaration recognises the equal dignity of all human beings, both men and women. Arguably, this is one of the main ways of ensuring that both men and women can meaningfully pursue the aspirations of freedom, justice and peace in the world. This is in fact captured in the Constitution of Kenya which states that the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.[25] The focus

---

[20] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Preamble. Article 1 thereof also emphasizes on equality of all.

[21] Article 7.

[22] Article 2

[23] Article 27.

[24] For instance, Article 22(1) of the Constitution of Kenya gives every person the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened; See also Article 70 thereof.

[25] Constitution of Kenya, Article 19(2).

is therefore on the humanity as a whole where efforts go towards ensuring that all persons are fully empowered to realise their potential and consequently promote national development.

3.2 1995 United Nations World Conference in Beijing

The Governments participating in the Fourth World Conference on Women in Beijing China declared *inter alia,* that women's empowerment and their full participation on the basis of equality in all spheres of society, including participation in the decision-making process and access to power, are fundamental for the achievement of equality, development and peace.[26] They went further to state that equal rights, opportunities and access to resources, equal sharing of responsibilities for the family by men and women, and a harmonious partnership between them are critical to their well-being and that of their families as well as to the consolidation of democracy.[27]

It is noteworthy that this Conference came at a time when women were still oppressed and its outcome has gone a long way in boosting the empowerment efforts for the female gender. It is however worth mentioning that the Conference was not all about women but it was an effort towards achieving gender equity. This is reflected in their deliberations as captured above where the participants stated that equal rights, opportunities and access to resources, equal sharing of responsibilities for the family by men and women, and a harmonious partnership between them are critical to their well-being and that of their families as well as to the consolidation of democracy. The outcome of the Conference should therefore not be seen as an effort towards emancipation of one gender at the expense of the other but should be used to promote gender equity for inclusive national development.

[26] United Nations, *Report of the Fourth World Conference on Women*, Beijing, 4-15 September 1995, A/CONF.177/20/Rev.1. para. 13 Annex I.
[27] Para. 15.

3.3 The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

The *Convention*[28]notes in its Preamble that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity.

Further, it requires that States Parties should condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake *inter alia*: to embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle.[29] The Convention is thus an effort towards ensuring that women and men participate meaningfully and productively in the national development discourse.

The Convention thus advocates for the active participation of both men and women in an equal manner in the political, social, economic and cultural life of their countries. The Convention arguably provides the basis for realizing equity between women and men through ensuring women's equal access to, and equal opportunities in, political and public life -- including the right to vote and to stand for election -- as well as education, health and employment.[30] To this end, Kenya has performed impressively as far as framework laws are concerned, considering that the principles of non-discrimination, social equity and equality, amongst others feature prominently in the Constitution. The Constitution also obligates the State to take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed

[28] UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.
[29] Article 2 (a).
[30] Articles 10 & 11.

under Article 43.[31] What is now required is ensuring that this is actually done and it does not remain in text, so as to ensure that both men and women meaningfully participate in national development and especially in realizing the country's development blueprint, Vision 2030.

3.4 The International Covenant on Economic, Social and Cultural Rights (ICESCR)

The *Convention on Economic, Social and Cultural Rights*[32] was adopted in 1966, but it entered into force 1976. It commits states parties to promote and protect a wide range of economic, social and cultural rights, including rights relating to work in just and favourable conditions, to social protection, to an adequate standard of living, to the highest attainable standards of physical and mental health, to education and to enjoyment of the benefits of cultural freedom and scientific progress. It obliges states parties to respect and ensure that all individuals subject to their jurisdiction enjoy all the rights included in the ICESCR, without discrimination.

ICESCR provides a framework for creating gender sensitive indicators for measuring government accountability for commitments adopted under the ICESCR, and the extent to which women's full participation is reflected in decision making in the legal, political, economic, social, and familial spheres. Article 3 of the ICESCR promotes equal rights to men and women. The Covenant thus promotes gender equity and inclusive enjoyment of the human rights. The Constitution of Kenya reflects the spirit of this Covenant as it provides for economic and social rights of all persons.[33] Indeed, it goes further to state that the state should give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals.[34]

---

[31] Article 21(2). Article 43 provides for economic and social rights of every person in Kenya.

[32] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

[33] Article 43.

[34] Article 20(5) (b).

4.0 Regional Framework Gender Equity and Equality

4.1 The African Charter on Human and Peoples' Rights

The *African Charter on Human and Peoples' Rights* (Charter)[35] guarantees that all peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.[36] In its Preamble, the Charter *inter alia* reaffirmed, in light of the Charter of the Organization of African Unity, that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples.

The Charter also reiterates that every individual is entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.[37] This provision thus prohibits any form of discrimination on either men or women in all spheres of life. The Charter also guarantees every individual's right to receive information and the right to express and disseminate their opinions within the law.[38] In the context of this discussion, this right would include the right to receive and share information which would facilitate participation of all persons in sustainable development efforts. As such, in a bid to achieve gender equity for an all inclusive approach to national development, states should also promote other rights which would facilitate enjoyment of the foregoing rights and this would include ensuring that all the citizens are empowered.

The Charter further guarantees every individual's right to work under equitable and satisfactory conditions, and receive equal pay for equal work.[39]It has been acknowledged that poverty hampers achievement of sustainable development. One of the ways of addressing poverty is economic empowerment of both women and men which can be done by

[35]African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.
[36] Article 22(1).
[37] Article 2.
[38] Article 9.
[39] Article 15.

way of promoting the right to work for all in order to give them a source of income.[40] It is also important to note that all peoples have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. States have the duty, individually or collectively, to ensure the exercise of the right to development.[41] Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.[42] Gender equity comes in to ensure that all benefit fairly in exploitation of the available opportunities.

4.2 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol)

The Maputo Protocol[43] reaffirms in its Preamble the principle of promoting gender equality as enshrined in the Constitutive Act of the African Union as well as the New Partnership for Africa's Development, relevant Declarations, Resolutions and Decisions, which underline the commitment of the African States to ensure the full participation of African women as equal partners in Africa's development.

The Protocol provides that States Parties should combat all forms of discrimination against women through appropriate legislative, institutional and other measures.[44] In this regard, it requires that they should integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life.[45]Further, as a corrective measure, it obligates States Parties to commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of

[40] Article 41(1) of the Constitution of Kenya guarantees every person's right to fair labour practices.
[41] Constitution of Kenya, Article 22.
[42] Constitution of Kenya, Article 27(3).
[43] African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003.
[44] Article 2(1).
[45] Article 2(1) (c).

the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men. The Protocol reaffirms that women and men are equal before the law and should have the right to equal protection and benefit of the law.[46]

In addition to the foregoing, the Protocol states that States Parties are to take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures to ensure that *inter alia*, women are equal partners with men at all levels of development and implementation of State policies and development programmes.[47] In a move that reflects the foregoing, the Constitution of Kenya provides that all State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.[48] Indeed, it goes further to state that the State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.[49] These provisions create opportunity for the country to adopt international's best practices for realisation of gender equity and also mobilising all persons to promote gender equity for inclusive national development in Kenya.

With regard to Right to Sustainable Development, the Protocol provides that women have the right to fully enjoy their right to sustainable development.[50] To facilitate this, the Protocol provides for several measures. It requires the States Parties to introduce the gender perspective in the national development planning procedures. They are also to ensure participation of women at all levels in the conceptualisation, decision-making, implementation and evaluation of development policies and programmes. They are also to promote women's access to and control over productive resources such as land and guarantee their right to

[46] Article 8. This is also captured under Article 27 of the current Constitution of Kenya.
[47] Article 9(1) (c).
[48] Constitution of Kenya, Article 21(3).
[49] Constitution of Kenya, Article 21(4).
[50] Article 19.

property. Further, they are to promote women's access to credit, training, skills development and extension services at rural and urban levels in order to provide women with a higher quality of life and reduce the level of poverty among women. In addition to the foregoing, they are to take into account indicators of human development specifically relating to women in the elaboration of development policies and programmes. The Protocol also requires States Parties to ensure that the negative effects of globalisation and any adverse effects of the implementation of trade and economic policies and programmes are reduced to the minimum for women.[51]

Further, the Protocol requires that women should have the right to live in a healthy and sustainable environment.[52]In order to facilitate this, the Protocol requires that States Parties should take all appropriate measures to *inter alia*, ensure greater participation of women in the planning, management and preservation of the environment and the sustainable use of natural resources at all levels.[53]

In Kenya, this can be achieved through full implementation of the values and principles of governance in development matters in the country. If properly effected, the Maputo Protocol can go a long way in ensuring gender equity for inclusive development.

4.3 Declaration on Gender Equality in Africa

The *Declaration*[54] in its preamble takes cognizance of the adverse impact of gender inequality on the economic growth of Africa and the fact that African women bear a disproportionate burden of poverty. It also affirms the fact that extreme poverty cannot be addressed without concerted efforts to improve women's access to resources and that access to resources increases the level of spending, especially on food and children's education. The Declaration advocates for women's literacy and improved girls' education as this spins off a wide range of benefits including improving the welfare of the family and the quality of the labour force, increasing the tax base, and boosting levels of agricultural output. The overall benefit would be the realisation of all inclusive and beneficial development for all.

---

[51] Ibid.
[52] Article 18(1).
[53] Article 18(2).
[54]Adopted at the Third Ordinary Session of AU Assembly in Addis Ababa, Ethiopia, from 6-8 July 2004.

In order to achieve the foregoing, the participating states agreed to carry out a number of initiatives which included but not limited to strengthening the gender machineries in their countries and provide them with enough human and financial resources to enable them to carry out their responsibility of promoting and tracking gender equality. The Constitution of Kenya adopts this recommendation especially with regard to social and economic rights. It provides that in applying any right under Article 43, if the State claims that it does not have the resources to implement the right, it is the responsibility of the State to show that the resources are not available.[55] States are thus expected to demonstrate their genuine efforts towards achieving these rights for all persons.

5.0 Sustainable Development

Sustainable Development was defined by the *Brundtland Commission* as development that meets the needs of the present without compromising the ability of future generations to meet their own needs.[56] It has been observed that sustainable development, although a widely used phrase and idea, has many different meanings and therefore provokes many different responses. In broad terms, the concept of sustainable development is an attempt to combine growing concerns about a range of environmental issues, socio-economic issues to do with poverty and inequality and concerns about a healthy future for humanity. It strongly links environmental and socio-economic issues.[57]A key feature of sustainable development is that it comprises three elements: Environment, Society and Economy.[58] There are different approaches to sustainability and sustainable development which include environmental sustainability, economic sustainability, and social sustainability.

---

[55] Constitution of Kenya, Article 20(5) (a).

[56] *Our Common Future*, Report of the World Commission on Environment and Development, 1987 (Brundtland Report).

[57] B. Hopwood, *et al*, "Sustainable development: mapping different approaches." *Sustainable Development* Volume 13, Issue 1, pp.38–52, February 2005.p.39. Available at doi: 10.1002/sd.244 [Accessed on 3/04/2015].

[58] Shell Livewire, "Elements of Sustainable Development: Environment, Society and Economy," available at http://shell-livewire.org/business-library/employing-people/management/sustainable-development/Sustainable-development/ [Accessed on 3/04/2015].

Although reference has been made to the other elements of sustainability due to their intertwining nature, this discussion mainly focuses on the social aspect. Gender equity is a fundamental element of sustainable development. A socially sustainable system must achieve fairness in distribution and opportunity, adequate provision of social services including health and education, gender equity, and political accountability and participation.[59]This argument is concerned with the social component of sustainable development with a view to ensuring that both men and women are empowered and effectively participate in the achievement of all the other aspects of sustainable development. Arguably, social sustainability will not be achieved in a society where one gender is treated as superior to the other. It is therefore important to promote social justice and gender equity so as to achieve an inclusive and socially sustainable development.

5.1 Rio+20 - The United Nations Conference on Sustainable Development, Rio de Janeiro, Brazil, June 2012

At the Rio+20 Conference, world leaders, participants from governments, the private sector, NGOs and other groups, deliberated on how they can reduce poverty, advance social equity and ensure environmental protection.[60]

According to the Rio+20 outcome document,[61] member States agreed that sustainable development goals (SDGs) must *inter alia*: be based on *Agenda 21* and the Johannesburg Plan of Implementation; fully respect all the Rio Principles; contribute to the full implementation of the outcomes of all major summits in the economic, social and environmental fields; focus on priority areas for the achievement of sustainable development, being guided by the outcome document; address and incorporate in a balanced way all three dimensions of sustainable development and their inter inter-linkages; be coherent with and integrated into the United Nations development

[59] J.M. Harris, "Sustainability and Sustainable Development," International Society for Ecological Economics Internet Encyclopaedia of Ecological Economics, February 2003, p. 1. Available at http://www.isecoeco.org/pdf/susdev.pdf [Accessed on 20/04/2015].

[60] United Nations Conference on Sustainable Development, available at http://www.uncsd2012.org/about.html [Accessed on 17/05/2015].

[61] The Rio+20 Outcome Document, The Future We Want (Resolution 66/288, July 2012).

agenda beyond 2015; not to divert focus or effort from the achievement of the Millennium Development Goals; and include active involvement of all relevant stakeholders, as appropriate, in the process.[62] It is worth noting that one of the main outcomes of the Rio+20 Conference was the agreement by member States to launch a process to develop a set of Sustainable Development Goals (SDGs), which will build upon the Millennium Development Goals and converge with the post 2015 development agenda.[63] Further, the sustainable development goals focus on inequalities, economic growth, decent jobs, cities and human settlements, industrialization, energy, climate change, sustainable consumption and production, peace, justice and institutions.[64]

Indeed, it has been affirmed that people are at the centre of sustainable development and, in this regard, Rio+20 delegates promised to strive for a world that is just, equitable and inclusive, and committed to work together to promote sustained and inclusive economic growth, social development and environmental protection and thereby benefit all, in particular the children of the world, youth and future generations of the world without distinction of any kind such as age, sex, disability, culture, race, ethnicity, origin, migratory status, religion, economic or other status.[65] This is an all-inclusive approach that does not create any distinction between male and female but focuses on humanity as a whole.

5.2 2002 World Summit on Sustainable Development

The 2002 World Summit on sustainable Development in Johannesburg adopted a plan of implementation reiterating the Rio principles and establishing poverty eradication, sustainable consumption and production

[62] United Nations Department of Economic and Social Affairs, Division for Sustainable Development.

[63] United Nations Department of Economic and Social Affairs, "Sustainable development goals," available at https://sustainabledevelopment.un.org/topics/sustainabledevelopmentgoals [Accessed on 20/05/2015].

[64] United Nations General Assembly, "The road to dignity by 2030: ending poverty, transforming all lives and protecting the planet," *Synthesis Report of the Secretary-General on the post-2015 Sustainable development agenda*. A/69/700. para.45.

[65] United Nations, "Open Working Group proposal for Sustainable Development Goals," *op cit.*

patterns and protection of the natural resource base for economic and social development as the three prime objectives (Johannesburg Plan).
It has been contended that that human needs cannot be sufficiently met just by providing an ecologically stable and healthy environment, but that - if a society is indeed committed to sustainability - the equally legitimate social and cultural needs ought to be taken care of as well. Economic, social, and cultural conditions, efforts, and values are deemed to be resources that also need to be preserved for future generations. It has been opined that sustainable development, as defined in the *Brundtland Commission* Report, includes human development.[66] One of the ways of addressing poverty is focusing on human development which empowers people, both men and women, to contribute positively towards eradication of poverty without solely relying on the Government to do so. This Summit thus helped demonstrate the link between sustainable development and social development and showing that they must be mutually inclusive if development is to be considered effective. It is also important to point out that poverty affects males and females in varying ways and as such, any efforts geared towards its eradication should bring on board on the affected parties in order to come up with effective mechanisms that will not only reflect and address the needs of all but will also facilitate participation of all. This is also important as it helps generate social acceptance of the government's policies.

5.3 UN Conference on Environment and Development, Agenda 21

The Agenda 21[67]under chapter 23 calls for full public participation by all social groups, including women, youth, indigenous people and local communities in policy-making and decision-making. It is in recognition of the fact that unless all these groups are equitably and meaningfully involved in the decision making policies, especially those on sustainable development then the Government efforts would either fail or prove inadequate. This recognition of the important roles of various groups is important as it

[66] V. Costantini and S. Monni, "Measuring Human and Sustainable Development: an integrated approach for European Countries," *Working paper n. 41*, 2004. p. 8. Available at http://host.uniroma3.it/dipartimenti/economia/pdf/WP41.pdf [Accessed on 15/04/2015]
[67] United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992.

creates a chance for the government to appreciate and address the needs of these groups be they males or females.

5.4 Rio Declaration on Environment and Development

The United Nations Conference on Environment and Development, met at Rio de Janeiro from 3 to 14 June 1992, to reaffirm the Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm on 16 June 1972, and sought to build upon it.[68] They agreed on a number of Principles on environment and development.

Principle 1 thereof states that human beings are at the centre of concerns for sustainable development and are as such entitled to a healthy and productive life in harmony with nature. This means that apart from addressing the human needs, human beings must actively participate in the sustainable development agenda if the same is to be achieved. It is noteworthy that Principle 1 does not discriminate against men or women as it contemplates a society where both gender participate in the sustainable development efforts for a healthy and sustainable environment for everyone.

This implies that both should equally participate in sustainable development discourse. As a demonstration of this point, Principle 5 calls for all States and all people to cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world. It therefore seeks to improve the living standards of all persons without marginalization of men or women. Instead, it requires all to cooperate in efforts towards achieving sustainable development through such means as addressing the problem of poverty. This is affirmed in Principle 20 which states that women have a vital role in environmental management and development and their full participation is therefore essential to achieve sustainable development. The youth also form part of the community and Principle 21 agitates for their participation by providing that the creativity, ideals and courage of the youth of the world should be mobilized to forge a global partnership in order to achieve

[68] UN General Assembly, Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972, United Nations publication. A/CONF.151/26 (Vol. I).

sustainable development and ensure a better future for all. These Principles thus advocate for the equal and meaningful participation of all persons in promotion of sustainable development agenda.

5.5 Declaration on the Right to Development

The Declaration[69] in its preamble partly states that development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom. The Declaration also states that right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.[70]

It is noteworthy that the foregoing statement does not discriminate against women or men and it contemplates the equal and active and meaningful participation of *all individuals* (emphasis added). The Declaration is particular about equality of all and requires that States should undertake, at the national level, all necessary measures for the realization of the right to development and should ensure, *inter alia*, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Specifically, it states that effective measures should be undertaken to ensure that women have an active role in the development process. As such, it advocates for appropriate economic and social reforms to be carried out with a view to eradicating all social injustices.[71] Elimination of social injustices entails promoting gender equity as a way of ensuring that both men and women get fair opportunities for the realisation of their right to self-determination and contribution towards national development.

[69] A/RES/41/128.
[70] Article 1.
[71] Article 8(1).

6.0 Gender and Development-The Interface

The term 'development' is perceived differently by different people and countries and thus defined differently. It has been argued that in addition to improvements in incomes and output, it typically involves radical changes in institutional, social, and administrative structures as well as in popular attitudes and, in many cases, even customs and beliefs.[72] If this assertion is anything to go by, then development would also include attitudes towards gender and particularly stereotyped roles of men and women in any society. Any tangible development should also strive towards achieving gender parity in a given society. It has been observed that Gender equality, centred in human rights, is both a development goal on its own and a vital tool to accelerating sustainable development and unless women and girls are able to fully realize their rights in all spheres of life, an all-inclusive human development will not be advanced.[73]

The social dimension of sustainable development is a neglected area in such analyses and often, this places women at a disadvantage, since the social dimension affects gender-based rights and social position, which are key factors in determining women's access to resources, decision-making and the like.[74] For instance, gender equality is considered a critical element in achieving decent work for all women and men, in order to effect social and institutional change that leads to sustainable development with equity and growth.[75] As such, *gender equity, which goes beyond equality*, is necessary (emphasis added). It is noteworthy that the term 'development' is perceived differently by different people and countries and thus defined differently. That is probably the reason why there exists the 'developed' and 'developing' countries classification. There is therefore no single agreed definition of the concept of development. However, development has various angles to it and may be classified as economic development, human development, *inter alia.* However, development is not an exclusively

---

[72] M. Todaro, 'Economic Development' chapter 3, (2000, 7th ed.).

[73] UNDP, *Gender equality*, available at http://www.africa.undp.org/content/undp/en/home/ourwork/gender-equality/overview.html [Accessed on 02/04/2015].

[74] *Ibid*.

[75] International Labour Organisation, *Gender and Development,* available at http://www.ilo.org/global/topics/economic-and-social-development/gender-and-development/lang--en/index.htm [Accessed on 02/04/2015].

economic phenomenon but encompasses financial as well as reorganization and reorientation of entire economic and social systems. It has been argued that in addition to improvements in incomes and output, it typically involves radical changes in institutional, social, and administrative structures as well as in popular attitudes and, in many cases, even customs and beliefs.[76]

The dimensions of development are extremely diverse, including economic, social, political, legal and institutional structures, technology in various forms, the environment, religion, the arts and culture.[77] Development has been described as the upward movement of the entire social system, which encloses, besides the so-called economic factors, all non-economic factors, including all sorts of consumption by various groups of people; consumption provided collectively; educational and health facilities and levels; the distribution of power in society; and more generally economic, social, and political stratification."[78]

The *1987 Brundtland Report* observed in the foreword that "what is needed now is a new era of economic growth – growth that is forceful and at the same time socially and environmentally sustainable." The implication of this is that even as sustainable development efforts focus on economic development, regard has to be had on the aspects of environment and social development so as to ensure that economic development is not achieved at the expense of all these.

Thus, despite the differences in status or any other ground, the focus is on achieving some level playing ground for all in the form of gender equity, that appreciates the contribution of every man and woman in development of the country and ultimately satisfying the needs of every person. The goal of gender equity is considered to be moving beyond equality of opportunity by requiring transformative change with the recognition that women and men have different needs, preferences, and interests and that equality of outcomes may necessitate different treatment of men and women.[79] An

---

[76] M. Todaro, 'Economic Development' chapter 3, *op cit.*

[77] Sumner, 'What is 'Development'?' p. 11, available at http://www.sagepub.com/upm-data/18296_5070_Sumner_Ch01.pdf

[78] G. Myrdal, 'What Is Development?' *Journal of Economic Issues*, Vol. 8, No. 4 (Dec., 1974), pp. 729-736, pp. 729-730. Association for Evolutionary Economics, Available at http://www.jstor.org/stable/4224356

[79] H. Reeves and S. Baden, "Gender and Development: Concepts and Definitions," *op cit*, p.10.

equity approach implies that all development policies and interventions need to be scrutinized for their impact on gender relations and potential advantages or otherwise on men or women.[80]

Food and Agricultural Organisation (FAO) affirms that women manifest an impressive resilience and multifaceted array of talents, but they also face a range of constraints – particularly in their access to productive resources such as land, inputs, training and financial services – which prevent them from becoming equally competitive economic players, capable of creating better lives for themselves and their families, and contributing fully to the growth of their communities and countries.[81] Gender equity approach can address these challenges thus enabling men and women to participate equitably, competitively and meaningfully in the development agenda.

The centrality of equity in sustainable development can be best understood when one looks at the Kenyan constitution which provides that the State should ensure the sustainable exploitation, utilization, management and conservation of the environment and natural resources and ensure equitable sharing of the accruing benefits.[82] Understandably, the equity referred to means that it is not only the intergenerational that is pursued but also intragenerational equity. These components, namely intergenerational and intragenerational equity are part of sustainable development as popularly defined. To explore intragenerational equity, under which gender equity arguably falls, this paper conceptualizes sustainable development in terms of the satisfaction of economic, social, and security needs of both men and women now and in the future without undermining the natural resource base and environmental quality on which life depends on.[83] It has been argued that for development to be sustainable, the environment should be protected, people's economic situation improved, and social equity achieved.[84] It is important to point out that the

---

[80] *Ibid*.

[81] Food and Agriculture Organization of the United Nations, "FAO Policy on Gender Equality: Attaining Food Security Goals in Agriculture and Rural Development," Rome, 2013. *op cit* p. v.

[82] K. Muigua & F. Kariuki, "Sustainable Development and Equity in the Kenyan Context," p.4. Available at http://www.kmco.co.ke/attachments/article/104/A%20Paper%20on%20Sustainable%20Development%20and%20Equity%20in%20the%20Kenyan%20Context.pdf

[83] Ibid.

[84] Chapter 7, "The Sociology of Sustainable Development," p. 225.

discussion herein mainly concentrates on the social equity aspect of sustainable development.

7.0 Barriers to Gender Equity for Inclusive Development in Kenya

7.1 Uneven access to resources

With regard to protection of vulnerable groups, *Agenda 21* provides that the general objectives of protecting vulnerable groups are to ensure that all such individuals should be allowed to develop to their full potential (including healthy physical, mental and spiritual development); to ensure that young people can develop, establish and maintain healthy lives; to allow women to perform their key role in society; and to support indigenous people through educational, economic and technical opportunities.[85]

With restrained or limited access to resources including land based resources, it is hard or even impossible for women to participate actively and qualitatively in national development and ultimately sustainable development. The net effect is that women are denied the chance due to lack of capacity and resources to participate in national development. Further, left with limited resources with which to perform their critical role in society, they essentially become part of the problem instead of the solution in the fight against poverty. They are consequently relegated to a dependent position instead of becoming partners in the development efforts.[86]

7.2 Poverty

Poverty eradication has been marked as the greatest global challenge facing the world today and an indispensable requirement for sustainable development.[87] The Rio+20[88] outcome reiterated the commitment to

[85] Agenda 21, Objective 6.23.

[86] For instance, a recent study established that in the ongoing coal mining deliberations in Mui, Kitui. Kenya, women have been left out and are often not consulted. Daily Nation Newspaper, 19 May 2015.

[87] United Nations, "Open Working Group proposal for Sustainable Development Goals," available at https://sustainabledevelopment.un.org/sdgsproposal [Accessed on 15/04/2015].

[88] United Nations Conference on Sustainable Development (UNCSD) (Rio 2012, Rio+20 or Earth Summit, 2012).

freeing humanity from poverty and hunger as a matter of urgency.[89] Problems of environment and development are closely linked; degradation of ecosystem services harms poor people.[90] Indeed, among the poor there are those marginalised groups who suffer most thus adding to their misery. The Constitution of Kenya 2010 classifies women among the marginalised groups of people who may need affirmative action.[91] It has been argued that the lifestyles of women and men are rooted *inter alia* in economic conditions, power positions and gender, which inform people's perceptions of what welfare represents – and which in turn determine what people can and wish to consume.[92] It is also observed that the gender disparities in economic power-sharing are an important contributing factor to the poverty of women.[93]It has also been documented that the heavy burden of poverty falls disproportionately on women especially female-headed households whose proportion is increasing.[94]The contribution of rural women in Africa is critical in development. With poverty abounding amongst the economically challenged women, the role of women in achieving sustainability and sustainable development is thus undermined and even defeated. It has been recognized that women make crucial contributions in agriculture and rural enterprises and they play a key role in rural economies, where the fight against hunger and poverty is most

[89] United Nations, "Open Working Group proposal for Sustainable Development Goals," op cit.

[90] W.M. Adams, "The Future of Sustainability: Re-thinking Environment and Development in the Twenty-first Century," *The World Conservation Union Report of the IUCN Renowned Thinkers Meeting, 29-31 January 2006*. p. 7. Available at http://cmsdata.iucn.org/downloads/iucn_future_of_sustanability.pdf [Accessed on 15/04/2015].

[91] Constitution of Kenya 2010, Article 260.

[92] G. J. Latham, *op cit,* p. 44.

[93] "Women and Poverty", *The United Nations Fourth World Conference on Women*, Beijing, China – September 1995*, Action for Equality, Development and Peace*. Available at http://www.un.org/womenwatch/daw/beijing/platform/poverty.htm [Accessed on 15/04/2015].

[94] United Nations Economic Commission for Africa, *1990, Abuja Declaration on Participatory Development: The role of women in Africa in the 1990s*. Chapter 3.25. Adopted by the Fifth Regional Conference on Women, held at Dakar from 16 to 23 November 1994, E/CN.6/1995/5/Add.2 Distr. GENERAL, 29 December 1994.

pressing, as this is where the large majority of the world's poor live.[95] They are also central to family food security and nutrition, as they are generally responsible for food selection and preparation and for the care and feeding of children.[96]

7.3 Lack of Education

The right to education is a human right having major implications both for the individual as well as for social and economic development.[97] Indeed, it has rightly been pointed out that apart from its intrinsic value as a crucial development goal, education is also central to one's ability to respond to the opportunities that development presents.[98] The African [Banjul] Charter on Human and Peoples' Rights guarantees every individual's right to education.[99] Further, it provides for every individual's right to freely, take part in the cultural life of their community.[100] This is especially significant considering that community participation in development is envisaged under Principle 22 of the Rio Principles which states that indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States are to recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

It has in fact been argued that failing to meet the goal of gender equity in education will not only hurt the girls who lose an opportunity for an education, but also impose societal costs in terms of lower growth, higher

---

[95] Food and Agriculture Organization of the United Nations, "FAO Policy on Gender Equality: Attaining Food Security Goals in Agriculture and Rural Development," Rome, 2013. p. v.Available at http://www.fao.org/docrep/017/i3205e/i3205e.pdf [Accessed on 12/05/2015].

[96] *Ibid*.

[97]United Nations, *African Platform for Action*, E/CN.6/1995/5/Add.2. Adopted by the Fifth Regional Conference on Women, held at Dakar from 16 to 23 November 1994. Chapter 3.30.

[98] D.A. Ghaida and S. Klasen, "The Costs of Missing the Millennium Development Goal on Gender Equity," *Munich Economics Discussion paper* 2003-01, p.2. Available at http://www.ungei.org/infobycountry/files/univmunich_0301_klasen.pdf [Accessed on 16/05/2015]

[99] Article 17(1).

[100] Article 17(2).

fertility, child mortality, and malnutrition.[101] As such, promoting female education to close these gaps is not only intrinsically valuable for the girls who would benefit and would further an important aspect of gender equity in developing countries, but it would assist in the overall development of these countries as well.[102] Education promotes realization of environmental justice for all persons. Broadly defined, environmental justice entails the right to have 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-making.[103]

The *Aarhus Convention* establishes a number of rights of the public (individuals and their associations) with regard to the environment. The Convention provides for *inter alia*: the right of everyone to receive environmental information that is held by public authorities ("access to environmental information"); the right to participate in environmental decision-making ("public participation in environmental decision-making"); and the right to review procedures to challenge public decisions that have been made without respecting the two aforementioned rights or environmental law in general ("access to justice").[104]

It is important to note that it is not possible to enjoy the foregoing rights as envisaged by the *Aarhus Convention* without the basic education and knowledge.[105] Lack of basic education therefore means that women are left out in the sustainable development agenda and do not subsequently enjoy the right to environmental justice. *Aarhus Convention* is a powerful tool that can be used to promote citizenry education and consequently deal with the

---

[101] D.A. Ghaida and S. Klasen, "The Costs of Missing the Millennium Development Goal on Gender Equity," *op cit,* p.21.

[102] Ibid, p.22.

[103] R. Ako, 'Resource Exploitation and Environmental Justice: the Nigerian Experience,' in F.N. Botchway (ed), Natural Resource Investment and Africa's Development, (Cheltenham, UK: Edward Elgar Publishing, 2011), pp. 74-76.

[104] *Aarhus Convention,* Articles 4, 5, 6 & 9. Although the *UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, or Aarhus Convention,* is a European region legal instrument, its provisions have gained international recognition and approval especially considering the fact that it reflects Principle 10 of the Rio Declaration on Environment and Development.

[105] Articles 4 and 5 of the *Convention* concern environmental information.

barrier of lack of or inadequate education. Its main pillars have been captured in the Bill of Rights in the Constitution of Kenya under the right to information,[106] right of access to justice[107] and obligations of state and individuals in relation to the environment.[108] Under these provisions both men and women can play a great and synergetic role in realisation of the national development agenda.

7.4 Negative Cultural Practices and Beliefs

The Constitution of Kenya recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.[109] It goes further to state that every person has the right to use the language, and to participate in the cultural life, of the person's choice.[110] It nevertheless provides that any law, including customary law, which is inconsistent with the Constitution, is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.[111] The Constitution also states that a person should not compel another person to perform, observe or undergo any cultural practice or rite.[112]

The foregoing provisions were enacted in recognition of the fact that some of the cultural practices are oppressive on one gender, mostly women, while elevating the other, in most if not all cases men. It is noteworthy that that due to various reasons which include negative cultural beliefs, women in some communities have not been able to fully enjoy the benefits of education as girls are kept away from classrooms.

It is noteworthy that many men still have the rather stereotyped culturally defined role of women as the children's caretaker. This is supported by many community's culture as well as some of the major religions which view one gender as superior to the other. Thus, most women especially within the poor population struggle to fend for their families by way of gathering fuel (mostly firewood) to prepare food for the whole family and also walk

[106] Constitution of Kenya, Article 35.
[107] *Ibid,* Article 48.
[108] *Ibid,* Article 69.
[109] *Ibid,* Article 11(1).
[110] *Ibid,* Article 44(1).
[111] *Ibid,* Article 2(4).
[112] *Ibid,* Article 44(3).

long distances to look for water particularly in arid and semi-arid areas.[113] They mostly rely on resources that they do not control or own and more often than not they do not even have the means or incentive to improve them.[114] Thus environmental degradation mostly affects these women who are not even given a chance to participate in deliberations on how best to achieve sustainability and sustainable development in Kenya. With women left out of the discourse, it then becomes harder for the country to achieve sustainable development since it is impossible to tell them to practice sustainable utilization of resources while some of them barely have access to basic resources for survival.

On the other hand, it has been observed that gender differences can, however, also result in men being disadvantaged in certain societies, although presently, in most parts of the world, it is above all women that are victims of discrimination.[115] It is argued that although women are more likely to be disadvantaged and marginalised, the negative impact that gender inequality can have on men as well should not be ignored.[116] For example, it has been observed that societal norms regarding the appropriate behaviour for men tend to put them under pressure as regards the need to provide

---

[113] IRIN, *Kenya: Women Weighed Down by Culture,* available at http://m.irinnews.org/report/87063/kenya-women-weighed-down-by-culture#.VVutT9pRXFo [Accessed on 19/05/2015].

[114] See P. K. Mbote, "Women, Land Rights And The Environment: The Kenyan Experience," 49(3) *Development*(2006), p. 43-48, available at http://www.ielrc.org/content/a0605.pdf [Accessed on 20/05/2015]; See also generally R.M. Dick, *et al,* "Property Rights for Poverty Reduction," *2020 FOCUS BRIEF on the World's Poor and Hungry People,* October 2007.
Available at http://www.ifpri.org/sites/default/files/publications/beijingbrief_meinzendick2.pdf [Accessed on 20/05/2015]. It has also been documented that only 3% of women have title deeds in Kenya. UNDP-Kenya, Millennium Development Goals in Kenya-Ten Years of Implementation and Beyond: The Last Stretch Towards 2015, UNDP-Kenya, Nairobi, 2010, p.33.

[115] UNESCO, "Gender Equality and Equity," A summary review of UNESCO's accomplishments since the Fourth World Conference on Women (Beijing 1995), May, 2000. p.7.
Available at http://unesdoc.unesco.org/images/0012/001211/121145e.pdf [Accessed on 19/05/2015].

[116] "Difference between Gender Equality and Gender Equity," available at http://vcampus.uom.ac.mu/soci1101/432_difference_between_gender_equality_and_gender_equity.html [Accessed on 19/05/2015].

materially for their family, and also deny them opportunities of being more nurturing towards their children and wife.[117] Therefore, it is true to say that although women still suffer on a larger scale than men, both gender are susceptible to discrimination in the various spheres of development thus justifying the push for gender equity for inclusive national development.

8.0 Way Forward-Enhancing Role of Gender in Sustainable Development in Kenya

One of the national values and principles of governance as envisaged by the current Constitution of Kenya is sustainable development. Further, the country's national long-term development blue-print, *Vision 2030,*[118]advocates for equality of citizens and states that Kenya shall be a nation that treats its women and men equally without discriminating any citizen on the basis of gender, race, tribe, religion or ancestral origin.[119] The development of a nation should be carried out in partnership with the women and men and no one gender should be seen as either the senior or junior partner in the relationship.[120]

Gender equality is an essential component of sustainable economic growth and poverty reduction.[121] Some of the basic rights guaranteed in the Constitution of Kenya 2010 include the economic and social rights of every person. These rights include the right—to the highest attainable standard of health, which includes the right to health care services, including reproductive health care; to accessible and adequate housing, and to reasonable standards of sanitation; to be free from hunger, and to have adequate food of acceptable quality; to clean and safe water in adequate

---

[117] *Ibid.* See also Daily Nation Newspaper Editorial, "Rescue the Boy Child," Tuesday, 10 May 2015, p.12.

[118] Government of the Republic of Kenya, 2007.

[119] Vision 2030, p. 22.

[120] General Ibrahim Badamati Babangida, President of the Federal Republic of Nigeria, 'Extracts From the Opening Speeches,' *Abuja Declaration on Participatory Development: The Role of Women in Africa in the 1990*, United Nations Economic Commission for Africa. P.3. Adopted by the African Regional Conference on the Integration of Women in Development, Abuja, Nigeria, 6-10 November 1990 (4th meeting).

[121] Food and Agricultural Organization of the United Nations, *et al,* "Gender dimensions of agricultural and rural employment: Differentiated pathways out of poverty," Rome, 2010. p. x. Available at http://www.fao.org/docrep/013/i1638e/i1638e.pdf [Accessed on 13/5/2015].

quantities; to social security; and to education.[122] The World Bank observes that greater gender equality can enhance productivity, improve development outcomes for the next generation, and make institutions more representative.[123]

It is noteworthy that the foregoing rights affect both men and women and some arguably affect women more than men thus placing women in a strategic position that requires them to participate in decision making. It has been noted that equitable access to more and better jobs in rural areas enable rural women to become effective economic actors and engines of growth; as well as to produce or acquire the food, water, fuel and social services their families need.[124] Indeed, the quality of the care mothers are able to give to their children and other household members contributes to the health and productivity of whole families and communities and improves prospects for future generations.[125]

Due to the central position occupied by women in society, the realization of these rights which mostly fall within the social sustainability pillar of sustainable development requires active participation of women in order to achieve effectiveness. It has been correctly argued that the realization of the right to food has a direct impact on the right to an adequate standard of living and the right to health, and presupposes the existence of a clean and safe environment conducive to the sustainable development of food resources.[126]

Equitable gender participation in sustainable development efforts calls for empowerment of both gender which should include participation by people in decisions and processes shaping their lives; participating in the market

---

[122] Constitution of Kenya 2010, Article 43 (1).

[123] World Bank Group, *World Development Report 2012: Gender Equality and Development*, p. xx. Available at http://siteresources.worldbank.org/INTWDR2012/Resources/7778105-1299699968583/7786210-1315936222006/Complete-Report.pdf [Accessed on 13/5/2015].

[124] Food and Agricultural Organization of the United Nations, *et al,* "Gender dimensions of agricultural and rural employment: Differentiated pathways out of poverty," *op cit,* p.x.

[125] *Ibid*.

[126] United Nations Non-Governmental Liaison Service (NGLS), "Human Rights Approaches to Sustainable Development," *NGLS Roundup* 90, May 2002. p.5. Available at http://www.un-ngls.org/orf/pdf/ru90hrsd.pdf [Accessed on 17/04/2015]

economy; challenging inequality and oppression; the liberation of both men and women; and empowerment as bottom-up process which cannot be bestowed from the top-down.[127]

One of the ways of achieving sustainability as provided for by *Agenda 21*[128] is empowering communities. The Rio Conference participants agreed that sustainable development must be achieved at every level of society. Peoples' organizations, women's groups and non-governmental organizations are important sources of innovation and action at the local level and have a strong interest and proven ability to promote sustainable livelihoods.[129]As such, *Agenda 21* requires that Governments, in cooperation with appropriate international and non-governmental organizations, should support a community-driven approach to sustainability, which would include, *inter alia*: Empowering women through full participation in decision-making; and giving communities a large measure of participation in the sustainable management and protection of the local natural resources in order to enhance their productive capacity.[130]

It also requires that Governments should, with the assistance of and in cooperation with appropriate international, non-governmental and local community organizations, establish measures that will directly or indirectly implement mechanisms for popular participation - particularly by poor people, especially women - in local community groups, to promote sustainable development.[131] Education empowers individuals for full development of human personality, and participation in society though acquisition of knowledge, human values and skills. The right to education has close linkage with the right to development, and is a powerful tool in poverty reduction strategies.[132] The right to education entails some basic elements without which it cannot be fully enjoyed. These include: availability of education - ensuring free and compulsory education for all children; accessibility of education - education accessible to anyone irrespective of

[127] Chapter 2: *Development, Empowerment, and Participation*, available at http://www.google.com/search?ie=ISO-88591&q=Chapter=2%3A=development%2C=empowerment=and=participation=&btnG=Search [Accessed on 15/05/2015].
[128] United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992.
[129] *Ibid*, Objective 3.7.
[130] *Ibid*.
[131] Ibid, Objective 3.8(i).
[132] UNESCO (2008), 'The Right to Education', p.2.

race, gender, nationality, ethnic or social origin (elimination of discrimination); and acceptability of education - the quality of education should be guaranteed; adaptability of education - education that responds and adapts to the best interests of each child.[133]

Governments' obligations on the right to education are thus defined along these elements.[134] With regard to availability, they are to ensure compulsory and free education for all children in the country. To guarantee accessibility, they are to eliminate exclusion from education based on any grounds of discrimination (race, colour, sex, language, religion, opinion, origin, economic status, birth, social status, minority or indigenous status, disability).[135] The education must also be acceptable in that governments must define the minimum standards for education, including the medium of instruction, contents and methods of teaching, and to ensure their observance in all educational institutions. In relation to adaptability, governments must design and implement education for children precluded from formal schooling.[136] This would include children belonging to nomadic pastoralists and others who may not be able to access formal institutions of learning for one reason or the other. Education is key in eradication of poverty in communities. This is especially so in the dire case of the pastoralist communities who entirely rely on environment for their livelihood. With education, it is possible to have these communities empowered to participate meaningfully in the development of their locality and this extends to enabling them actively participate in reversing or mitigating the adverse effects on the environment in these areas.[137]

---

[133] Human Rights Education Associates, 'Right to Education', available at *http://www.hrea.org/index.php?doc_id=402#top* [Accessed on 14/05/2015].

[134] K.Tomasevski, 'Manual on rights-based education: global human rights requirements made simple'. Bangkok: UNESCO Bangkok, 2004. Collaborative project between the UN Special Rapporteur on the right to education and UNESCO Asia and Pacific Regional Bureau for Education. p.8. Available at http://www.hrea.org/erc/Library/display_doc.php?url=http%3A%2F%2Fwww.hrea.org%2Ferc%2FLibrary%2Fmanual_rightsbased.pdf&external=N [Accessed on 14/05/2015].

[135] Ibid, p. iv.

[136] Ibid, p. v.

[137] See A.Y. Abdi, Education, 'Conflict and Development: The Case of Northern Kenya', *Chapter 5:*
Analysis -The Role of Education in enhancing Development in Northern Kenya, A dissertation submitted in partial fulfillment of the requirement for the degree of

Principles of public participation in governance and environmental democracy as envisaged in the current Constitution of Kenya becomes easier to implement.[138]

Principle 8 of the *Rio Principles* states that to achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies. Further, Principle 10 thereof states that environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual is to 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. In order to realise this, States are to facilitate and encourage public awareness and participation by making information widely available as well as provide effective access to judicial and administrative proceedings, including redress and remedy. Arguably, this can only be achieved with the active and meaningful participation of all community members including men and women.

The National Gender and Equality Commission Act, 2011[139]establishes the National Gender and Equality Commission as a successor to the Kenya National Human Rights and Equality Commission pursuant to Article 59(4) of the Constitution.[140] The Act seeks to achieve gender mainstreaming. Gender mainstreaming means ensuring that the concerns of women and men form an integral dimension of the design of all policies, laws and administrative procedures including budgeting and budget implementation, and the monitoring and evaluation of programmes implementing such policies, laws and administrative procedures in all political, economic and

---

Masters of Arts (MA) in Education and International Development. Institute of Education, University of London, December 4, 2012. Available at *http://www.bsix.ac.uk/staff/research/ECD%20%20DissertationvFinalFinal.pdf* [Accessed on 16/05/2015].

[138] Article 69 of the Constitution obligates the State to *inter alia* encourage public participation in the management, protection and conservation of the environment. This obligation is reinforced by placing a duty on every person to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.

[139]Act No. 15 of 2011, Laws of Kenya.

[140] Preamble; s. 3.

societal spheres; so as to ensure that women and men benefit equally, and that inequality is not perpetuated.[141] Its main aim is thus to facilitate realisation of a just and equitable society where both men and women are treated fairly and equally.

This Commission can indeed go a long way in promoting gender equality in the country and facilitating active participation of both men and women in the country's agenda on achieving sustainable development. The right to equality means that both men and women should be empowered to effectively participate in the country's development. With regard to poverty eradication, the *Report of the Fourth World Conference on Women in Beijing China* states that eradication of poverty based on sustained economic growth, social development, environmental protection and social justice requires the involvement of women in economic and social development, equal opportunities and the full and equal participation of women and men as agents and beneficiaries of people-centred sustainable development.[142] The Conference also affirmed that there is need to encourage men to participate fully in all actions towards equality.[143] This is in recognition of the fact that gender equity requires the combined efforts of all persons if it is to be achieved.

The above is further supported by calls to ensure women's equal access to economic resources, including land, credit, science and technology, vocational training, information, communication and markets, as a means to further the advancement and empowerment of women and girls, including through the enhancement of their capacities to enjoy the benefits of equal access to these resources, *inter alia*, by means of international cooperation.[144] Under the current Constitution of Kenya, some of the Principles of land policy that should be upheld in order to ensure that land is held, used and managed in a manner that is equitable, efficient, productive and sustainable, include equitable access to land, security of land rights, and elimination of gender discrimination in law, customs and practices related to land and property in land.[145] If fully implemented, these principles can go a

[141] *National Gender and Equality Commission Act, 2011*, s.2; s.8.
[142] United Nations Report of the Fourth World Conference on Women Annex I, op cit, para. 16.
[143] *Ibid*, para. 25.
[144] *Ibid*, para. 35.
[145] Article 60(1).

long way in facilitating achievement of equitable access, use and control of natural resources by all persons for national development and self-actualisation.

In a bid to ensure empowerment through education for active and meaningful participation of both gender, the *Beijing Conference* affirmed the need to promote people-centred sustainable development, including sustained economic growth, through the provision of basic education, life-long education, literacy and training, and primary health care for girls and women.[146] This is reinforced by goal four of the *Sustainable Development Goals* which calls for inclusive and equitable quality education and promote lifelong learning opportunities for all.[147] Further, goal eight requires states to promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all.[148] These goals are synergetic since it is arguably not possible to implement goal 8 without ensuring that goal four is achieved for purposes of capacity building. Kenya should not be left behind in implementation of these goals as they will go a long way in facilitating achievement of an equitable society.

There is need for affirmative action[149] where necessary to ensure gender equity for development in Kenya. It is significant that this is already provided for under Article 27 relating to equality and freedom from discrimination. It provides that to give full effect to the realisation of the rights guaranteed under the Article, the State should take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.[150] Any measure taken under clause (6) should adequately provide for any benefits to be on the basis of genuine need.[151] In addition to the measures contemplated in clause (6), the State is to take legislative and other measures to implement the principle that not more than two thirds

---

[146] *Ibid*, para. 27.

[147] United Nations Department of Economic and Social Affairs, "Open Working Group proposal for Sustainable Development Goals," available at https://sustainabledevelopment.un.org/sdgsproposal [Accessed on 20/05/2015].

[148] *Ibid*.

[149] Article 260 of the Constitution of Kenya defines "affirmative action" to include any measure designed to overcome or ameliorate an inequity or the systemic denial or infringement of a right or fundamental freedom

[150] Article 27(6).

[151] Article 27(7).

of the members of elective or appointive bodies shall be of the same gender.[152] In particular, the State is to put in place affirmative action programmes designed to ensure that minorities and marginalised groups—participate and are represented in governance and other spheres of life; are provided special opportunities in educational and economic fields; are provided special opportunities for access to employment; develop their cultural values, languages and practices; and have reasonable access to water, health services and infrastructure.[153] These efforts should be geared towards ensuring that gender equity in national development matters becomes a reality in Kenya. There is however need to protect the boy child even as the girl child is uplifted. A balance should be struck so as to ensure that again the one gender is not empowered at the expense of the other because the main objective of affirmative action and all other efforts towards gender equity and equality is to facilitate fair participation of both gender in national development. The foregoing efforts facilitate *inter alia* gender equity for all and this can give people greater opportunities for protecting their fundamental human rights and fully participate and contribute towards achievement of national goals in development.

---

[152] Article 27(8); Article 81 of the Constitution provides that one of the general principles for the electoral system is that not more than two-thirds of the members of elective public bodies shall be of the same gender. Article 91(1)(f) goes further to state that one of the basic requirements for political parties is that they must respect and promote human rights and fundamental freedoms, and gender equality and equity. Under Article 175 which provides for principles of devolved government, County governments must ensure that no more than two-thirds of the members of representative bodies in each county government shall be of the same gender. Article 177(1) (b) provides that a county assembly consists of *inter alia* the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly is of the same gender. Under Article 197, County assembly should ensure that not more than two-thirds of the members of any county assembly or county executive committee are of the same gender. These provisions have been a subject of debate as to the mode of actualizing what has come to be known as the One Third Gender Rule. The Courts have even been invited to give their opinion on the matter as recorded in *The Matter Of The Principle Of Gender Representation In The National Assembly And The Senate* [2012] eKLR. The argument has been whether it should be progressive realisation of the same or immediate implementation. What however remains clear is that there is need for the implementation of these provisions so as to create a level playing ground that enables men and women to participate fairly in the development agenda of the country.

[153] Article 56.

9.0 Conclusion

It is not in dispute that gender inequality is one of the greatest problems of our time. Gender inequality remains embedded in the structures, instrumentalities and relations within the family, society, and the state. However, sustainable development in Kenya has to take cognizance of gender. Women and men are entitled to equity in the development agenda. Sustainable development will not be possible without the meaningful participation of both gender. Attaining gender equity for inclusive development in Kenya is possible. It is an ideal worth pursuing.

References

1. A.Y. Abdi, Education, 'Conflict and Development: The Case of Northern Kenya', *Chapter 5: Analysis -The Role of Education in enhancing Development in Northern Kenya*, A dissertation submitted in partial fulfillment of the requirement for the degree of Masters of Arts (MA) in Education and International Development. Institute of Education, University of London, December 4, 2012. Available at *http://www.bsix.ac.uk/staff/research/ECD%20%20DissertationvFinalFinal.pdf* [Accessed on 16/05/2015].
2. African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.
3. African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003.
4. B. Hopwood, *et al*, "Sustainable development: mapping different approaches." *Sustainable Development* Volume 13, Issue 1, pp.38–52, February 2005. Available at doi: 10.1002/sd.244 [Accessed on 3/04/2015].
5. *Beijing Declaration and Plat form for Action Beijing+5 Political Declaration and Outcome,* United Nations 1995.
6. Chapter 2: *Development, Empowerment, and Participation*, available at http://www.google.com/search?ie=ISO-88591&q=Chapter=2%3A=development%2C=empowerment=and=participation=&btnG=Search [Accessed on 15/05/2015].
7. Constitution of Kenya, 2010. Government Printer, Nairobi.
8. D.A. Ghaida and S. Klasen, "The Costs of Missing the Millennium Development Goal on Gender Equity," *Munich Economics Discussion paper* 2003-01. Available athttp://www.ungei.org/infobycountry/files/univmunich_0301_klasen.pdf [Accessed on 16/05/2015]
9. Daily Nation Newspaper, 19 May 2015. Nation Media Group, Nairobi.
10. Declaration on Gender Equality in Africa, Adopted at the Third Ordinary Session of AU Assembly in Addis Ababa, Ethiopia, from 6-8 July 2004.
11. Declaration on the Right to Development A/RES/41/128
12. "Difference between Gender Equality and Gender Equity," available at http://vcampus.uom.ac.mu/soci1101/432_difference_between_gender_equality_and_gender_equity.html [Accessed on 19/05/2015].
13. European Commission, *Gender equality – glossary*, available at http://ec.europa.eu/justice/gender-equality/glossary/index_en.htm[Accessed on 19/05/2015].
14. FAO Training Guide, "Gender and Climate Change Research in Agriculture and Food Security for Rural Development," 2nd Ed., 2013. Available at http://www.fao.org/docrep/015/md280e/md280e.pdf[Accessed on 16/05/2015].
15. Food and Agriculture Organization of the United Nations, "FAO Policy on Gender Equality: Attaining Food Security Goals in Agriculture and Rural Development," Rome, 2013. Available at http://www.fao.org/docrep/017/i3205e/i3205e.pdf [Accessed on 12/05/2015].

16. Food and Agricultural Organization of the United Nations, *et al,* "Gender dimensions of agricultural and rural employment: Differentiated pathways out of poverty," Rome, 2010. Available at http://www.fao.org/docrep/013/i1638e/i1638e.pdf [Accessed on 13/5/2015].
17. G. J. Latham, "A study on gender equality as a prerequisite for sustainable development," *Report to the Environment Advisory Council*, Sweden 2007:2. Available at http://www.uft.oekologie.unibremen.de/hartmutkoehler_fuer_studierende/MEC/09-MEC-reading/gender%202007%20EAC%20rapport_engelska.pdf [Accessed on 03/04/2015].
18. G. Myrdal, 'What Is Development?' *Journal of Economic Issues*, Vol. 8, No. 4 (Dec., 1974), pp. 729-736, Association for Evolutionary Economics, Available at http://www.jstor.org/stable/4224356 [Accessed on 02/04/2015].
19. H. Reeves and S. Baden, "Gender and Development: Concepts and Definitions," *Prepared for the Department for International Development (DFID) for its gender mainstreaming intranet resource*. Institute of Development Studies, Report No 55, February 2000.
20. Human Rights Education Associates, 'Right to Education', available at *http://www.hrea.org/index.php?doc_id=402#top* [Accessed on 14/05/2015].
21. I. Badamati Babangida, President of the Federal Republic of Nigeria, 'Extracts From the Opening Speeches,' *Abuja Declaration on Participatory Development: The Role of Women in Africa in the 1990*, United Nations Economic Commission for Africa. P.3. Adopted by the African Regional Conference on the Integration of Women in Development, Abuja, Nigeria, 6-10 November 1990 (4th meeting).
22. International Labour Organisation, *Gender and Development,* available a http://www.ilo.org/global/topics/economic-and-social-development/gender-and-development/lang--en/index.htm [Accessed on 02/04/2015].
23. IRIN, *Kenya: Women Weighed Down by Culture,* available at http://m.irinnews.org/report/87063/kenya-women-weighed-down-by-culture#.VVutT9pRXFo [Accessed on 19/05/2015].
24. J.M. Harris, "Sustainability and Sustainable Development," International Society for Ecological Economics, Internet Encyclopaedia of Ecological Economics, February 2003, available at http://www.isecoeco.org/pdf/susdev.pdf [Accessed on 20/04/2015].
25. K. Muigua & F. Kariuki, "Sustainable Development and Equity in the Kenyan Context," Available at http://www.kmco.co.ke/attachments/article/104/A%20Paper%20on%20Sustainable%20Development%20and%20Equity%20in%20the%20Kenyan%20Context.pdf
26. K.Tomasevski, 'Manual on rights-based education: global human rights requirements made simple'. Bangkok: UNESCO Bangkok, 2004. Collaborative project between the UN Special Rapporteur on the right to education and UNESCO Asia and Pacific Regional Bureau for Education. Available at http://www.hrea.org/erc/Library/display_doc.php?url=http%3A%2F%2Fwww.hrea.org%2Ferc%2FLibrary%2Fmanual_rightsbased.pdf&external=N [Accessed on 14/05/2015].
27. M. Todaro, 'Economic Development' chapter 3, (2000, 7th ed.)

28. N. Baraza, 'Lost Between Rhetoric and Reality: What Role for the Law and Human Rights in Redressing Gender Inequality?' *Kenya Law Reform* Vol. II [2008-2010] http://www.kenyalaw.org/klr/index.php?id=874 Accessed on 15/05/2015].
29. *National Gender and Equality Commission Act,* Act No. 15 of 2011, Laws of Kenya.
30. NSW Health Department, 'Gender Equity in Healthcare,' *State Health Publication No: (HSP) 000015,* April 2000. Available at http://www0.health.nsw.gov.au/pubs/2000/pdf/gender_equity.pdf [Accessed on 19/05/2015]; See also Canadian Association for the Advancement of Women and Sport and Physical Activity (CAAWS), "What is Gender Equity?" Available at http://www.caaws.ca/gender-equity-101/what-is-gender-equity/ [Accessed on 19/05/2015].
31. *Our Common Future*, Report of the World Commission on Environment and Development, 1987 (Brundtland Report).
32. P. K. Mbote, "Women, Land Rights And The Environment: The Kenyan Experience,"49(3) *Development* (2006), p. 43-48, available at http://www.ielrc.org/content/a0605.pdf [Accessed on 20/05/2015]
33. R. Ako, 'Resource Exploitation and Environmental Justice: the Nigerian Experience,' in F.N. Botchway (ed), Natural Resource Investment and Africa's Development, (Cheltenham, UK: Edward Elgar Publishing, 2011), pp. 74-76.
34. R.M. Dick, *et al,* "Property Rights for Poverty Reduction," *2020 FOCUS BRIEF on the World's Poor and Hungry People,* October 2007. Available at http://www.ifpri.org/sites/default/files/publications/beijingbrief_meinzendick2.pdf [Accessed on 20/05/2015].
35. R. Strickland and N. Duvvury, "Gender Equity and Peacebuilding," *From Rhetoric to Reality: Finding the Way*, International Center for Research on Women Discussion Paper, 2003. Prepared for the Gender Equity and Peacebuilding Workshop with a grant from the International Development Research Centre (IDRC), Ottawa, Canada. Available at http://www.icrw.org/files/publications/Gender-Equity-and-Peacebuilding-From-Rhetoric-to-Reality.pdf [Accessed on 16/05/2015].
36. Shell Livewire, "Elements of Sustainable Development: Environment, Society and Economy," available at http://shell-livewire.org/business-library/employing-people/management/sustainable-development/Sustainable-development/[Accessed on 3/04/2015].
37. Sumner, 'What is 'Development'? 'Available at http://www.sagepub.com/upm-data/18296_5070_Sumner_Ch01.pdf[Accessed on 02/04/2015].
38. The Rio+20 Outcome Document, The Future We Want (Resolution 66/288, July 2012).
39. UNDP, *Gender equality*, available at http://www.africa.undp.org/content/undp/en/home/ourwork/gender-equality/overview.html [Accessed on 02/04/2015].
40. UNDP-Kenya, Millennium Development Goals in Kenya-Ten Years of Implementation and Beyond: The Last Stretch Towards 2015, UNDP-Kenya, Nairobi, 2010.

41. 'Universal Declaration of Human Rights - In six cross-cutting themes' Available at<http://www.ohchr.org/EN/UDHR/Documents/60UDHR/Stories_on_Human_Right_PressKit_en.pdf> [Accessed on 17/04/2015].
42. UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Preamble.
43. United Nations, *Report of the Fourth World Conference on Women*, Beijing, 4-15 September 1995, A/CONF.177/20/Rev.1.
44. UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.
45. UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.
46. United Nations, *African Platform for Action*, E/CN.6/1995/5/Add.2. Adopted by the Fifth Regional Conference on Women, held at Dakar from 16 to 23 November 1994.
47. United Nations Conference on Sustainable Development, available at http://www.uncsd2012.org/about.html [Accessed on 17/05/2015].
48. UN General Assembly, Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972, United Nations publication. A/CONF.151/26 (Vol. I).
49. United Nations, "Open Working Group proposal for Sustainable Development Goals," available at https://sustainabledevelopment.un.org/sdgsproposal [Accessed on 15/04/2015]
50. United Nations Conference on Sustainable Development (UNCSD) (Rio 2012, Rio+20 or Earth Summit 2012).
51. United Nations Economic Commission for Africa, *1990, Abuja Declaration on Participatory Development: The role of women in Africa in the 1990s*. Adopted by the Fifth Regional Conference on Women, held at Dakar from 16 to 23 November 1994, E/CN.6/1995/5/Add.2 Distr. GENERAL, 29 December 1994.
52. United Nations Department of Economic and Social Affairs, "Sustainable development goals," available at https://sustainabledevelopment.un.org/topics/sustainabledevelopmentgoals [Accessed on 20/05/2015].
53. United Nations General Assembly, "The road to dignity by 2030: ending poverty, transforming all lives and protecting the planet," *Synthesis report of the Secretary-General on the post-2015 Sustainable development agenda*. A/69/700.
54. *UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)*
55. UNESCO, "Gender Equality and Equity," A summary review of UNESCO's accomplishments since the Fourth World Conference on Women (Beijing 1995), May, 2000. Available at http://unesdoc.unesco.org/images/0012/001211/121145e.pdf [Accessed on 19/05/2015].
56. United Nations Non-Governmental Liaison Service (NGLS), "Human Rights Approaches to Sustainable Development," *NGLS Roundup* 90, May 2002.

Available at http://www.un-ngls.org/orf/pdf/ru90hrsd.pdf [Accessed on 17/04/2015]

57. United Nations, "The Role of Men and Boys in Achieving Gender Equality," *Women 2000 and Beyond,* December 2008. Available at http://www.unwomen.org/~/media/headquarters/media/publications/un/en/w2000menandboyseweb.pdf [Accessed on 03/04/2015].
58. UNICEF, "Promoting Gender Equality: An Equity-Focused Approach to Programming," *Operational Guidance Overview*. Available at http://www.unicef.org/gender/files/Overarching_Layout_Web.pdf [Accessed on 03/04/2015].
59. V. Costantini and S. Monni, "Measuring Human and Sustainable Development: an integrated approach for European Countries," *Working paper n. 41*, 2004. Available at http://host.uniroma3.it/dipartimenti/economia/pdf/WP41.pdf [Accessed on 15/04/2015]
60. Vision 2030, Government of the Republic of Kenya, 2007.
61. W.M. Adams, "The Future of Sustainability: Re-thinking Environment and Development in the Twenty-first Century," *The World Conservation Union Report of the IUCN Renowned Thinkers Meeting, 29-31 January 2006*. Available at http://cmsdata.iucn.org/downloads/iucn_future_of_sustanability.pdf [Accessed on 15/04/2015]
62. "Women and Poverty", *The United Nations Fourth World Conference on Women*, Beijing, China - September 1995*, Action for Equality, Development and Peace*. Available at http://www.un.org/womenwatch/daw/beijing/platform/poverty.htm [Accessed on 15/04/2015] at
63. World Bank Group, *World Development Report 2012: Gender Equality and Development*. Available http://siteresources.worldbank.org/INTWDR2012/Resources/7778105-1299699968583/7786210-1315936222006/Complete-Report.pdf [Accessed on 13/5/2015].

Review of The Principle of Finality in Arbitral Proceedings Under Section 39 (3) (B) of The Arbitration Act, 1995

By: ***Melissa Ng'ania****

1.0 Introduction

The Arbitration Act, 1995 which governs the conduct of arbitral proceedings in Kenya is based on the Model Arbitration Law of the United Nations Commission on Trade Law ("UNICITRAL)[1]. The major reform to the Arbitration Act, 1995 was the introduction of section 10 which cushions arbitral proceedings from Court's interference.[2] The Arbitration Act, 1995 despite the amendments still exhibited some shortcomings; central to this is the fact that the Arbitration Act, 1995 did not provide for finality of an arbitral award. There was therefore need to amend the Arbitration Act, 1995 hence the Arbitration (Amendment) Act, 2009 which was assented to on 1st January, 2010 ("the Amending Act)[3]. This led to the introduction of section 32A of the Arbitration, Act, 1995.

Despite the amendment, the Arbitration Act still retained section 39 (3) (b) of the Arbitration Act, 1995[4] which allows appeal on points of law to the Court of Appeal either by agreement of the parties or with the leave of the

---

*Advocate of the High Court of Kenya; the author is grateful to Professor Paul Musili Wambua for his guidance and insight as I researched on this paper and Dr. Kariuki Muigua for constantly reminding me the value of hard work.

[1] United Nations Commission on International Trade Law (UNICITRAL), <https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> accessed on 6th December, 2017.

[2] Professor Paul Musili Wambua, 'The Challenges of implementing ADR as an alternative mode of access to justice in Kenya", (2013) 1 (1) Alternative Dispute Resolution Journal, <http://www.ciarbkenya.org/wpcontent/themes/mxp_base_theme/mxp_theme/assets/final-vol-1-issue-1.pdf>, p. 26. Accessed on 1st March, 2018.

[3] The Amending Act introduced a new Section 32A, which provides that an arbitral award is final and binding. This therefore introduces the principle of finality of arbitral proceedings that was lacking prior to the amendment.

[4] The section provides that it is an exception to the rule provided under section 10 and 35 of the Arbitration Act, 1995. It should also be noted that there is no similar provision in the UNICITRAL Model Law and this particular provision was adopted from the UK Arbitration Act, 1995.

Court of Appeal. This article therefore explores how the principle of finality of arbitral proceedings is undermined by the right of appeal to the Court of Appeal on points of law.

1.1 The Rationale for Arbitration and the Right of Appeal to the Court of Appeal on Points of Law

The main appeal of arbitration as a mode of dispute resolution is in its advantages over litigation. Prof. Musili Wambua, acknowledges that arbitration is the most preferred method of alternative dispute resolution that has found favour with most litigants because of the long delays experienced in litigation[5]. Arbitration is flexible, being a private and a consensual process, parties can agree on how they want it to be conducted and these rules can change at any time depending on the circumstances prevailing. There are no formal or unchangeable rules like those found in the Court rooms.[6] Arbitration has also been upheld because of its cost effectiveness which is achieved through the potentially timeous settlement and disposal of the matters before the tribunal.

The growth and popularity of arbitration, as an alternative to litigation, reflects its advantages it has over the limitations and disadvantages of the Court proceedings. This can be seen over the increasing use of arbitration in many Countries in the world and has even received Constitutional anchoring[7]. Arbitration offers advantages that litigation from its nature, may not provide. However, it is important to note that these advantages vary on a case to case basis.

The main advantages of arbitration are that it upholds the freedom of the parties to a contract to resolve their disputes and its finality over litigation. The principle of party autonomy runs through the arbitral proceedings. Parties are free to agree on the procedure they will adopt, the time the arbitral proceedings will take, how the award should look like, appointment of arbitrators among other aspects. The parties as such end up being the

[5] Ibid n. 2.

[6] Kariuki Muigua, "Settling Disputes Through Arbitration in Kenya, 3rd Edition, 2017, Glenwood Publishers Limited", P. 5-6.

[7] In Kenya, it is a requirement that inter-governmental disputes are resolved by alternative dispute resolution mechanisms and arbitration is one of them.

real "owners" of arbitration proceedings and they theoretically may create their own "code of arbitration proceedings."

The second most important attribute that Arbitration boasts over litigation is its finality. This feature remains undisturbed by the infiltration of courtroom tendencies. Most arbitration agreements expressly underscore that the decision of the arbitrator or tribunal is final. With finality, the persons to arbitration can therefore have a quick decision and thereby save time. This will also help benefit the court system by offloading it from an already overburdened cause list and backlog of cases.[8]

Allowing appeals to the Court of Appeal under section 39 of the Arbitration Act, 1995 underscores the attribute of arbitration being a fast process. Where an applicant files an application during the course of the arbitration before the High Court and since it is by agreement of the parties, the parties can consent to the stay of the proceedings before the arbitrator. The application will be heard by the High Court and any party dissatisfied by the decision of the High Court will appeal to the Court of Appeal[9]. The appeal will arise either as a result of the consent of the parties prior to the making of the award[10]or where the applicant satisfies the conditions under section 39 (3) (b) of the Arbitration Act, 1995. The application before the Court of Appeal will be filed by the applicant under Rule 5 (2) (b) of the Court of Appeal Rules, 2010[11]. Upon hearing the application, the Court of appeal will determine the question of law[12]. From the determination, the parties will go back to the arbitrator to continue with the proceedings from the point they had left. In case of an application arising from an award, the

---

[8] Alfred Mutubwa, "Consistency and Predictability of the Law versus Finality of the Arbitral Award: Juridical Juxtaposition of Sections 32A, 35 and 37 of the Kenyan Arbitration Act," (2017) 5(1) Alternative Dispute Resolution http://www.ciarbkenya.org/wpcontent/themes/mxp_base_theme/mxp_theme/assets/vol--5-issue-2--final-august-30th-.pdf Accessed on 24th February, 2018.

[9] Section 39 (3) of the Arbitration Act.

[10] Section 39 (3) (1) of the Arbitration Act.

[11] The applicant will have to demonstrate that the proceedings before the Court of Appeal will be rendered nugatory if the proceedings are not stayed. This is usually the situation after a party loses before the High Court and the parties had not consented that an appeal should lie to the Court of appeal. The applicant herein will thus be moving the Court of Appeal under section 39 (3) (b) of the Arbitration Act, 1995.

[12] Section 39 (2) (a) of the Arbitration Act, 1995.

procedure is the same save for the orders that the High Court or the Court of Appeal can make.

In case of the High Court, the award can be confirmed, varied or set aside or remit the matter to the arbitral tribunal or, where another arbitral tribunal has been appointed, to that arbitral tribunal for consideration[13]. Any party aggrieved by the decision of the High Court can appeal to the Court of appeal and the parties need not have consented to the appeal.[14] Where the appeal has been heard and determined by the Court of Appeal, the Court of Appeal can vary the award and the varied award shall have the same effect as that of the arbitral tribunal[15]. The procedure is the same for an application arising out of an award. The Court of Appeal can confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for re-considerations or where another arbitral tribunal has been appointed, to that arbitral tribunal for consideration.[16]

The above is an elaborate procedure that is even more prolonged than a hearing before the Court. It is even better for parties to institute proceedings in Court. With this kind of procedure, the arbitral proceedings become long, expensive, time wasting and complicated. It therefore underscores the rationale for arbitration.

1.2 The concept of finality in arbitral proceedings

Finality and binding nature of arbitral proceedings is at the centre of any arbitral proceedings. It is based on the fact that parties want to settle the dispute before the arbitral tribunal without subjecting the dispute to the Court system. It is the finality and binding nature of arbitral awards that make arbitration hailed as an advantage over litigation[17]. Parties that subject themselves to arbitration mainly do so with the expectation that the arbitral

[13] Section 39 (2) (b) of the Arbitration Act, 1995.
[14] Section 39 (3) (a) and (b) of the Arbitration Act, 1995.
[15] Section 39 (5) of the Arbitration Act, 1995.
[16] Section 39 (2) (b) of the Arbitration Act, 1995.
[17] P.W. Nguyo, "Arbitration in Kenya: Facilitating Access to Justice by Identifying and Reducing Challenges Affecting Arbitration" (University of Nairobi 2015) http://erepository.uonbi.ac.ke/bitstream/handle/11295/93192/Nguyo_Arbitration%20in%20Kenya:%20facilitating%20access%20to%20justice%20by%20identifying%20and%20reducing%20challenges%20affecting%20arbitration.pdf?sequence=3 Accessed on 29th May, 2018.

process will put an end to the matter. Finality is a fundamental characteristic of arbitration and a key factor that attracts many parties to choose arbitration when providing for a contractual dispute mechanism[18]. This is because with the minimum challenge of an arbitral award helps a party especially a Claimant to save valuable time and costs.[19] The finality of an award means that even if the award is challenged in Court, the Courts will not interfere with finding of facts by an arbitrator[20]. "Final" means that the parties can only call upon the Court in its supervisory capacity to oversee the administration of justice[21].

However, it is important to note that the Courts will not step in the shoes of the arbitrator nor will they act in the capacity of an appellate body. It also means that the parties cannot appeal a decision of the tribunal, unless the parties provide for. Further, an appeal to the Court of Appeal from the decision of the High Court, would have to be on a point of law, where there is leave provided by either the High Court or the Court of Appeal[22]. The finality of an arbitral award is linked with the authority of the principle of *res judicata* in litigation[23]. The principle of finality of arbitral proceedings in Kenya was not a concept enshrined in the Arbitration Act despite the fact that the Arbitration Act made an important contribution to arbitration law and practice in Kenya[24]. This necessitated the Amendment to the Arbitration Act through the Arbitration (Amendment) Act 2009 which saw the inclusion of Section 32A which provides that;

---

[18] Francesca Richmond, 'When is an arbitral award final?', Kluwer Arbitration Blog, September 10 2009, <http://arbitrationblog.kluwerarbitration.com/2009/09/10/when-is-an-arbitral-award-final/?print=pdf > pg 1. Accessed on 24th May, 2018.

[19] Ibid.

[20] Alvin Gachie, 'The Finality and Binding Nature of the Arbitral Award' Law Society of Kenya Journal, Volume 13(1) 2017 p. 86.

[21] Ibid p. 87.

[22] H.N Mboce, 'Enforcement of International Arbitral Awards: Public Policy Limitation in Kenya' (LLM Thesis, University of Nairobi 2014) 35

[23] Ivan Cisar & Slavomir Halla, 'The finality of arbitral awards in the public international law' Grant journal ISBN, <http://www.grantjournal.com/issue/0101/PDF/0101cisar.pdf> accessed on 25th May, 2018.

[24] This is mainly because the 1995 Act is substantially modeled on the provisions of the UNCITRAL Model Law of 1985 and as amended in 2006.

> *"Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act."*

With the introduction of Section 32A, the Courts have upheld the principle of finality of arbitral proceedings as being central and are reluctant to interfere. In the case of *Board of Governors Ng'iya Girls High School –vs- Meshack Ochieng' t/a Mecko Enterprises*[25], the Court held that when parties opt for arbitration, the parties are essentially telling the court that they want the process of resolving their disputes to be final and binding. In this way, they chose not to be engaged in the rigmaroles of litigation. The Court further noted that it was for that reason that the Arbitral Award is final and binding upon the parties as envisaged in Section 32 A of the Arbitration Act. Finality and binding nature of arbitral proceedings does not however means that the jurisdiction of the Court is ousted. The Court still has supervisory jurisdiction over Arbitration. This is provided for under Section 10 of the Arbitration Act.

In effect therefore, the Arbitration Act permits the Court to only interfere in arbitration matters where the Act provides. It is therefore erroneous for parties to mistakenly believe that finality and binding nature of the arbitration process is a complete restriction on the Courts from interfering with arbitration proceedings[26].This right cannot be taken away from the Court by parties to an Arbitration.

1.3 Analysis of the amendments to Section 39 of the Arbitration Act

The 2009 Amendments amended Section 39 of the Arbitration Act, 1995 as discussed above, the critical step that led to the amendment of the Arbitration Act in 2009 was in order to provide for finality and binding nature of arbitral proceedings. With that background, it is therefore paramount that an analysis of section 39 of the Arbitration Act, 1995 is seen in light of whether it has upheld the principle of finality and binding nature of arbitral proceedings.

[25] [2014] eKLR para 35 and 36.
[26] Ibid n. 20. P. 93.

The intervention of the Court under section 39 of the Arbitration Act, 1995 is twofold. Firstly, during the course of the arbitral proceedings and secondly after the award has been made. The section only applies to domestic arbitrations and it has to be by agreement of the parties or in the case of the Court of Appeal, where the Court is of the opinion that a matter of law of general importance is involved, the determination of which will substantially affect the rights of one or more of the parties[27]. The rationale for restricting appeals to only questions of law may be because the arbitral tribunals are the ones that sift through the evidence and are therefore in a better position to make awards.[28]

1.3.1 Appeals under Section 39 (1) of the Arbitration Act

There were no substantive amendments made to section 39 (1) of the Arbitration Act, 1995 by the 2009 Amendments. The only amendment was under clause (2) to make it mandatory for the High Court to grant the reliefs sought under sub section two. The section requires that parties to the arbitral proceedings consent that an application may be made to the High Court in the course of the proceedings before an arbitrator where a point of law arises or an appeal by any party arising out of the award. The application to the Court under Section 39(4) of the Arbitration Act is governed by the Rules of Court applicable. In this case, the Civil Procedure, 2010.

What is not however clear is how the application in the course of the arbitration is to be presented in Court noting that the proceedings are ongoing and a decision has not been made by the Arbitrator. Mustill[29] sets out four (4) conditions that a party filing the application has to set out in an affidavit; firstly, show the question of law in issue; what facts the parties are asserting; what facts are common grounds and what facts are to be assumed for the purpose of the determination. This has to be well set out especially

[27] Section 39, Arbitration Act,1995.

[28] Thige Muchiri, 'Revisiting the Right of Appeal to the Court of Appeal under the Arbitration act' (2018) 6(1) Alternative Dispute Resolution < http://www.ciarbkenya.org/wpcontent/themes/mxp_base_theme/mxp_theme/assets/volume-6-issue-1.pdf> accessed on 8th May, 2018.

[29] Sir Michael Mustill and Stewart C. Boyd "The Law and Practice of Commercial Arbitration in England', 2nd Edition, Butterworths.

noting that the Court of Appeal will rely on the High Court record in making its determination. Similarly, the applicant seeking the interpretation by the High Court has to satisfy the High Court that indeed a question of law arises and there is need for determination.
The appeals to the High Court under section 39(1) of the Arbitration Act, 1995 are necessary noting that all Arbitrators are not lawyers and as such may not be in a position to interpret the law as expected. The intervention under this section falls within the permissible purview of section 10 of the Arbitration Act. Without the support of the Court, arbitral proceedings may falter or be ineffective.

1.3.2 Appeals under Section 39 (3) (a) and (b) of the Arbitration Act
Section 39 (3) of the Arbitration Act, 1995 is an exception to the provisions of section 10 and 35 of the Arbitration Act. As a result, parties keen on frustrating arbitral proceedings can thus use this section to derail the process. It is against this background that this section interrogates the provisions of section 39 (3) of the Arbitration Act, 1995 noting that it expressly provides for appeals to the Court of Appeal.
Section 39 (3) of the Arbitration Act, 1995 provided as follows;

> *(3) Notwithstanding section 10 and 35 an appeal shall lie to the Court of Appeal against a decision of the High Court under subsection (2)-*
> *(a) if the parties have so agreed that an appeal shall lie; and*
> *(b) the High Court grants leave to appeal, or failing leave by the High Court, the Court of Appeal may exercise any of the powers which the High Court could have exercised under subsection (2).*

From the above, the parties could appeal the decision of the High Court if they had agreed whether to appeal or not. The time at which this agreement ought to have been made was not specified by the Arbitration Act, 1995. This therefore led parties to agree to appeal the decision of the High Court even after the decision of the High Court had been made and where only subjected to the timelines set out under the Court of Appeal Rules as provided by section 39(4) of the Arbitration Act, 1995. This undermined the principle of finality of arbitral proceedings in that it allowed a lot of uncertainties as to what point and time the agreement to appeal could be made. It is this loophole that the 2009 Amendments rectified by

providing the fact that the agreement should be made prior to the delivery of the arbitral award.[30]

The appeals to the Court of Appeal could also lie where the High Court granted leave or in cases where the High Court failed to grant leave, the Court of Appeal granted "special leave to appeal". This undermined the principle of finality of arbitral proceedings in that firstly, the application for leave ought to have been first made to the High Court, the High Court would decline then the same application be made to the Court of Appeal. The section never gave any grounds that the High Court ought to have considered in determining the application for leave to appeal to the Court of Appeal. This meant that the High Court had to exercise its discretion in determining whether or not to grant leave to Appeal.

Secondly, where the High Court declined to grant leave for appeal, the Court of Appeal could grant "special leave to appeal". The meaning of **"**special leave to appeal**?"** was never defined by the Arbitration Act, 1995 and the same was to be determined by the Court of Appeal. This therefore further undermined the principle of finality and binding nature of arbitral proceedings as it gave the Court of Appeal a wide discretion to consider.

The section further escalated the arbitral process in that the application for leave ought to first have been made in the High Court and upon the High Court refusal to grant leave to appeal that a party could file an application to the Court of Appeal. This undermined the principle of finality and binding nature of arbitral proceedings hence necessitating the amendments.

Section 39 (3) (a) and (b) was amended and a new section 39 (3) and (a) (b) enacted as follows;

> *(a) If the parties have so agreed that an appeal shall lie prior to the delivery of the award; and,*
>
> *(b) the Court of Appeal, being of the opinion that a point of law of general importance is involved the determination of which will substantially affect the rights of one or more of the parties, grants leave to appeal, and on such appeal the Court of Appeal may exercise any of the powers which the High Court could have exercised under subsection (2)***."**

[30] Section 29(b) of the Arbitration (Amendment) Act, 2009.

The right to appeal the High Court decision under section 39 (3) (a) and (b) of the Arbitration Act, 1995 arises under two different circumstances;

Firstly, the parties must have agreed, prior to the delivery of the arbitral award, that questions of law arising in the arbitral award will be appealable to the Court of Appeal.[31] This is premised on the consensual nature of arbitral proceedings and in line with the contractual theory upon which arbitral proceedings are founded. This position has been affirmed by the Court of Appeal in the case of *Anne Mumbi Hinga –vs- Victoria Njoki Gathara*[32] where the Court stated as follows;

> *'It is clear from the above provisions [section 39], that any intervention by the court against the arbitral proceedings or the award can only be valid with the prior consent of the parties to the arbitration pursuant to Section 39 (2) of the Arbitration Act 1995. In the matter before us there was no such advance consent by the parties. Even where such consent is in existence the consent can only be on questions of law and nothing else. Again an appeal to this Court can only be on matters set out in Section 39 (2) … or with leave of this Court. All these requirements have not been complied with and therefore the appeal is improperly before us and is incompetent".*

Secondly, the Court of Appeal will grant leave where it is of the opinion that a point of law of general importance is involved and that the point of law will substantially affect the rights of one or more parties[33]. The application under Section 39 (3) (b) of the Arbitration Act can be made by a party even without any agreement prior. What the applicant needs to satisfy the Court of Appeal is the fact that the matter raises "a law of general importance whose determination will substantially affect the rights of one or more of the parties. "The procedure for approaching the Court of Appeal is as provided for by the Court of Appeal Rules[34].

1.4 Finality of arbitral proceedings under Section 39 (3) (b) of the Arbitration Act.

Arbitral proceedings are founded on the contractual theory which is tied up with the concept of party autonomy. The parties have autonomy over the

[31] Section 39 (3) (a) of the Arbitration Act, 1995.
[32] [2009] eKLR p. 11.
[33] Section 39 (3) (b) of the Arbitration Act, 1995.
[34] Section 39 (4) of the Arbitration Act, 1995.

arbitrator and the process. The parties are also free to choose the panel of the arbitrators and decide how the process will be conducted[35].

In so far as appeals on point of law is concerned; the concept of party autonomy is well captured under Section 39 (1) of the Arbitration Act, 1995. This can only be possible subject to the agreement by the parties. The section is also very clear in that it provides that the agreement by the parties has to be entered into before the commencement of the arbitral proceedings with the arbitrator.

The same concept of party autonomy is further provided for and captured by section 39 (3) (a) of the Arbitration Act, 1995 which section gives the parties an opportunity to agree on whether an appeal should lie in the Court of Appeal. The agreement should be made prior to the delivery of the award. This in essence binds the parties and they agree to the fact that they are ready to proceed to the Court of Appeal on such an issue.

However, the concept of party autonomy is taken away from the parties by the Court of Appeal under section 39 (3) (b) of the Arbitration Act, 1995. The section gives the Court of Appeal the leeway to interfere with the powers of the parties by invoking the "opinion" of the Court of Appeal in determining whether to grant leave to the party seeking leave to appeal. This is absurd because the determination is based on "opinion" meaning that there are no hard and fast rules to help the Court of Appeal reach a decision whether to allow the application or not.

In making the opinion, the Court of Appeal is to be guided by the fact that the point of law whose determination substantially affect the rights of one or more parties. This section can be interpreted to mean that even third parties can raise issues that the point of law affects them. A reading of section 3 of the Arbitration Act, 1995 on the definition of a party buttresses this point. The section defines a party to mean;

> "*a party to an arbitration agreement and includes a person claiming through or under a party*".

The introduction of third parties to the purview of arbitral proceedings undermines the contractual and consensual nature of arbitral proceedings which underlies the fact that it is only parties that have agreed to the arbitration that can participate as they create their own private system of

[35] Ibid n 6p. 3.

justice[36]. These go against three (3) cardinal principles; firstly, the principle of the contractual nature of arbitration which principle has acquired an inviolate and sacrosanct arbitration rule. Secondly, there is a view that parties get what they have bargained for and as such third parties having made a considered view not to enter an arbitration agreement will have excluded themselves from the arbitration process. Thirdly, underscores the importance of confidentiality in arbitral proceedings which will thus be compromised by multi-party arbitration proceedings[37].

However, some authors have justified the involvement of third parties in arbitral proceedings arguing that third parties should be allowed especially where they are an integral part of the substantive background of the arbitration. This should be read with the "principle of equality of the parties" and the fact that when parties enter into an arbitration, they should be aware of surrounding circumstance more importantly that there are parties implicated in the commercial projects they are getting involved.[38]

Section 39 (3) (b) nor the Arbitration Act, 1995 does not define "what amounts to a point of law of general importance". The definition has since been settled by the Supreme Court of Kenyan in the case of *Hermanus Phillipus Steyn –vs- Giovanni Gnechi-Ruscone.*[39] . The applicant made an application seeking leave to appeal the decision of the Court of Appeal on grounds that the matter raises issues of general public importance as provided under article 163 of the Constitution. The Court noted that "a matter of general public importance" was a vital one since it determined whether the Supreme Court had the jurisdiction or not.

In defining what amounts to matters of public importance, the Court stated that it may vary in different situations – save that there will be broad guiding principles to ascertain the stature of a particular case. Besides, the comparative judicial experience shows that criteria of varying shades have been adopted in different jurisdictions. The general phraseology in the laws

---

[36] Margaret L. Moses, "The Principles and Practice of International Commercial Arbitration" Cambridge University Press, P. 17-18.

[37] Dr. Stavros Brekoulakis, "The Relevance of the Interests of Third Parties in Arbitration: Taking a closer look at the Elephant in the Room" p. 1171 <http://pennstatelawreview.org/articles/113%20Penn%20St.%20L.%20Rev.%201165.pdf > accessed on 15th June, 2018.

[38] Ibid p. 1184.

[39] [2013] eKLR.

of most jurisdictions is, "a point of law of general public importance"; but Kenya's Constitution, in Article 163 (4) (b) of the Constitution of Kenya, 2010 refers to "a matter of general public importance", as a basis for invoking the Supreme Court's appellate jurisdiction. In our opinion, the Kenyan phraseology reposes in the Supreme Court, in principle, a broader discretion which, certainly, encapsulates also the "point of law of general public importance".

The Court went ahead to establish the principles governing the interpretation of the concept of matters of general public importance and held as follows;

> *"where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest and that such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination."*

The Supreme Court in the above case noted that the general phraseology in the laws of most jurisdictions is, "a point of law of general public importance[40]" but the Constitution of Kenya, 2010 under Article 163 (4) (b) of the Constitution of Kenya, 2010 refers to "a matter of general public importance" which according to the Supreme Court encapsulates also "a point of law of general importance[41]."

The above definition by the Supreme Court is binding upon the Court of Appeal by dint of Article 163 (7) of the Constitution of Kenya, 2010. Thus in determining what amounts to a point of law of general importance, one has to follow the criteria set out by the Supreme Court above. The Supreme Court in equating general importance to public interest brought yet another wide concept to be considered when granting leave by the Court of Appeal and as such creating an avenue to undermine the principle of finality in arbitral proceedings. Public interest has not been defined by the Arbitration Act, 1995. The Black Laws Dictionary defines public interest as;

[40] Section 39 (3) (b) of the 1996 Act refers to "a point of law of general public importance."

[41] Which phrase is used under section 39(3) (b) of the Arbitration Act, 1995.

> *"The general welfare of the public that warrants recognition and protection, something in which the public as a whole has stakes especially that justifies governmental regulation."*

From the above definition, the categories constituting public interest are not closed and the burden is on the person seeking leave to satisfy the Courts that the question carries specific elements of real public interest and concern[42].

The Courts have thus interpreted public interest in different forms. In the case of *Kenya Shell –vs- Kobil Petroleum Limited*[43] the Court of Appeal considered the issue of public policy in light of the proposition that it is in the public interest that litigation must come to an end. The court held inter alia, as follows: "….in our view, public policy considerations may endure in favour of granting leave to appeal as they would discourage it. We think, as a matter of public policy, it is in the public interest that there should be an end to litigation and the Arbitration Act under which the proceedings in this matter were conducted underscores that policy." In the *Kenya Shell* case above, the Court of Appeal therefore interpreted public interest to include the fact that litigation must come to an end.

The uncertainty in law on what amounts to "public interest" will thus give rise to a myriad of applications under section 39 (3) (b) of the Arbitration Act, 1995. Abdullahi and Lubano suggest that commercial matters are unlikely to meet the test of "what amounts to matters of law of great public importance[44]". This may well be true but such an uncertainty and absurdity may be used by lawyers and parties who are bent on abusing the court process to clog the arbitration process. A simple issue is reduced into a complex legal affair and thereby undermining the principle of finality and binding nature of arbitral proceedings[45].

The uncertainty in law and procedure may result in conflicting decisions by the Courts to the detriment of the parties and the growth of arbitration in

---

[42] Ibid n. 22 p. 21.

[43] [2006] eKLR.

[44] Aisha Abdallah and Noella C. Lubano on their Chapter on Kenya in James H Carter, 'The International Arbitration Review' (June 2015) 6 <http://www.africalegalnetwork.com/wp-content/uploads/2016/01/Kenya-Chapter-International-Arbitration-Review.pdf> accessed on 24th February, 2018.

[45] Ibid n6 p. 184.

the Country[46]. Section 39 (3) (b) of the Arbitration Act, 1995 was enacted in 2009 way before the promulgation of the Constitution of Kenya 2010. The section therefore limited appeals to the Court of Appeal, which was the Highest Court in the land at the time. With the enactment of the Constitution, the Supreme Court was established[47]. Abdallah and Lubano have argued that matters before arbitration are of a commercial nature and such they are unlikely to reach the Supreme Court because of the jurisdiction of the jurisdiction as provided under Article 164 (b) of the Constitution, which jurisdiction, matters of commercial nature are unlikely to pass this test. For a person to invoke the jurisdiction of the Supreme Court, one has to establish the principles laid down in the *Hermanus Phillipus Steyn –vs- Glovanni Gnecchi-Ruscone* case discussed above. It would therefore not be possible to agree with Abdallah and Lubano's[48] generalized position and each case would have to be determined on its own merits. Section 39 (3) (b) of the Arbitration Act, 1995 does not bar a person to appeal to the Supreme Court. It is indeed such lacuna that Prof. Musili Wambua[49] proposes reform. Until that is done, section 39 (3) (b) of the Arbitration Act, 1995 has the potential of undermining finality and binding nature of arbitral proceedings.

The emerging issues in domestic arbitration is also likely to undermine the principle of finality and binding nature of arbitral proceedings. With the enactment of the Constitution of Kenya 2010, the Constitution is supreme and a party can file a constitutional case to challenge an arbitral award on grounds of due process. As Kariuki Muigua[50] rightly points out; the holding

[46] This can be seen from the interpretation of the Court of Appeal in Kenya Shell Limited –vs- Kobil Petroleum Limited (Civil Appeal No. 57 of 2006 (UR)) and Nyutu Agrovet Limited –vs- Airtel Networks Limited [2015] eKLR. Though the cases dealt with appeals under Section 35 of the Arbitration Act, the Court of Appeal in Kenya Shell held that there was a right of appeal to the Court of Appeal under Section 35. The Court of Appeal in the Nyutu case held that the Court of Appeal had no right to hear an application under Section 35 of the Arbitration Act. This shows how the Court can reach two different decisions when exercising discretion.

[47] The Supreme Court is superior in the hierarchy and appeals lie before it by virtue of article 163(4) of the Constitution of Kenya.

[48] Ibid n44.

[49] Ibid n 2.

[50] Kariuki Muigua, "Constitutional Supremacy over Arbitration in Kenya",

by Githinji J; in the *EPCO Builders Limited –vs- Adam S. Marjan*[51] cannot stand in this era of Constitutionalism under the current Constitution of Kenya 2010. A party must have their day in Court however frivolous an application may be; less the Court is accused of driving the litigant from the seat of justice. Thus undermining the principle of finality and binding nature of arbitral proceedings.

1.5 Recommendations

There is need to amend the Arbitration Act, 1995 in order to; First, align section 39 (3) (b) of the Arbitration Act, 1995 with the Constitution of Kenya, 2010 by providing that appeals under this section only lie to the Court of Appeal and not the Supreme Court; second, the grounds upon which an appeal should lie before the High Court should be stringent, extensive and profound. This will set a high threshold and as a result limiting appeals to the Court of Appeal and thereby upholding the principle of finality of arbitral proceedings.

The Courts should also borrow best practices especially those set by the Court in the United Kingdom. Appeals under section 69 of the United Kingdom Arbitration Act, 1996 rarely succeed. This was stated in the case of *NYK Bulkship (Atlantic) NV –vs- Cargill International SA*[52] where the Supreme Court of the UK found that the effect of section 69 of the UK Arbitration Act of 1996 was one of finality: according to this provision, no appeal may be raised unless there is either an agreement of all the other parties to the proceedings; or if the court gives leave to proffer the appeal. The agreement to appeal includes not only the claimant and the respondent, but also any third party involved in the claim. Further, where there are multiple claimants or multiple respondents, again, all the parties must be involved in the agreement to appeal.

---

http://www.kmco.co.ke/attachments/article/120/Constitutional%20Supremacy%20over%20Arbitration%20in%20Kenya_03_dec.pdf Accessed on 14th December, 2017.

[51] Civil Appeal No. 248 of 2005 (unreported).

[52] The Supreme Court [2016] UKSC 20. <https://www.latham.london/2016/07/supreme-court-upholds-finality-of-arbitral-awards/ > accessed on 29th June, 2018.

1.6 Conclusion

From the foregoing discussion, an appeal lies to the Court of Appeal upon agreement of the parties or where a party satisfies the Court of Appeal that a point of law is of "general importance". In considering whether the point of law is one of "general importance" whose determination substantially affect the rights of one or more parties, the Court of Appeal has to exercise discretion and each case has to be determined on its own particular facts. Leaving this determination to the discretion of the Court creates a lot of uncertainty as to what the position of the Court will actually be. This only goes to further undermine the principle of finality and binding nature of arbitral proceedings.

The above coupled with the enactment of the Constitution of Kenya, 2010 has led to a reconsideration of the principal of finality and binding nature of arbitral proceedings from the initial concept of a contractual arrangement which bound the parties even where a party received a bad bargain, it would be against the fundamentals of contract law for that party to back out of its commitment. Section 39 of the Arbitration Act, 1995 therefore needs to be reviewed in order that the principle of finality of arbitral process may be upheld.

Evictions in Kenya: Which way under The New Constitution and The Land Laws (Amendment) Act 2016?

By: ***Hon. Justice Oscar Amugo Angote ****

Abstract

Previously, Kenya had no legal framework governing eviction of people from certain parcels of land. Evictions then were characterized by inadequate, unreasonable or no eviction notices, violence, force and human rights violations. This led to local, national and international criticism against the way in which forced evictions were carried out leading to loss of lives, loss of property, family break-ups and homelessness calling for the need to enact a legislative framework on evictions. The promulgation of the 2010 Constitution of Kenya (Constitution) is heralded as a great step towards protecting affected persons during evictions. The Constitution not only protects the civil and political rights of the people, but for the first time, recognizes social - economic rights, including the right to adequate housing and the direct application of general rules of international law, treaties and convections ratified by Kenya as part of Kenyan law. In addition to the Constitution, and in heeding to the call to enact a legislative framework on evictions, the Land Laws (Amendment) Act, 2016 was enacted bringing forth radical changes on the law governing evictions in Kenya. The Land Laws (Amendment) Act, 2016 makes key amendments to the Land Act 2012, Land Registration Act 2012 (LRA) and the National Land Commission Act 2012 (NLC Act). This paper analyses and critically interrogates evictions under the Constitution and the Land Laws (Amendment) Act 2016.

1.0 Evictions in Kenya: Brief background

Eviction is the act of removing a person from a property on the ground that they have occupied the said land illegally. The Land Laws (Amendment) Act 2016 and Section 2 of the LRA defines eviction as, the 'act of depriving or removing a person from the possession of land or property which they hold unlawfully either executed upon a successful law suit or otherwise'. The evicted person must be an unlawful occupier. The 2012 Evictions and Resettlement Bill defined an unlawful occupier as, 'a person who takes

possession of land or structures without the tacit consent of the owner or without any right in law to take possession of such land or structure'.[1]

An eviction of unlawful occupier in itself is geared towards protecting the rights of a lawful owner from an unlawful occupier who has no proprietary interest in the subject property. Where the unlawful occupier refuses to willingly vacate a property after being served with an eviction notice, then he can be removed against his will. This is known as forced eviction. Forced eviction is:

> *The permanent or temporary removal against the will of the individuals, families and/or communities from the home and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.* [2]

Forced evictions in Kenya has not only attracted domestic condemnation, the international community has expressed its concern in the manner in which the forced evictions are carried out in an inhumane manner.[3] Evictions in Kenya are largely caused by: conflicts over land; non-payment of land and house rents; and urban development or redevelopment.[4] Forced evictions are normally caused by various and often complex but interconnected factors such as:

a) Tenure insecurity;
b) Development and infrastructural projects;
c) Environmental concerns;
d) Large international events, e.g. Olympic Games or World Cup or international conferences;
e) Urban redevelopment and beautification initiatives;
f) Property market forces and gentrification;
g) Absence of state support for the poor;

---

* Judge, Environment and Land Court, Machakos.

[1] Government of Kenya, *Eviction and Settlement Guidelines: Towards Fair and Justifiable Management of Evictions and Resettlements* (Ministry of Land 2010), s 2.

[2] UNGA, The Right to Adequate Housing (Article 11.1): Forced Evictions General Comment No. 7 20/5/97.

[3] Kefa M Otiso, 'Forced Evictions in Kenya's Cities' (2003) Singapore Journal of Tropical Geography 251.

[4] Kenya National Human Rights Commission (KNHRC), *Nowhere to Go: Forced Evictions in Mau Forest, Kenya* (KNHRC 2007).

h) Political conflict, ethnic cleansing and war; or
i) Planning initiatives; Discovery and extraction of natural resources, amongst others.[5]

The first recorded eviction in Kenya happened in 1904 when the colonial government razed an Indian bazaar in embryonic Nairobi on the grounds that it posed a health hazard. Since then, a number of evictions with adverse effects such as loss of life, property, human rights violations and homelessness has continued to occur in Kenya invoking local, national and international condemnation.[6] Where eviction is politically motivated, it leads to tribal animosity against the government. Economically, unlawful evictions lead to loss of livelihood and employment.

Majority of evictions in Kenya have been geared against informal settlements by the government to pave way for public use of the land. Since the 1990s, evictions of people living in informal settlements and demolitions has been on the rise. In 2004, the government announced mass evictions of people living in informal settlements on the ground that they were illegally situated on public land (rail reserves or areas under electrical power lines) or on land reserved for future road-construction'.[7]

Following this directive, 'Raila Village' in Kibera was the first informal settlement to be demolished and residents evicted affecting approximately 200 and 500 people from the neighbouring Soweto slum. [8] The government demolished schools, churches, clinics and houses without any redress mechanism in place. This attracted local, national and international criticism. Between 2004 and 2006 alone, the government carried out evictions in Majengo slums, Mukuru Ward, Ndundori in Lanet, Kibagare Uthiru Estate,

[5] Government of Kenya, *Eviction and Settlement Guidelines: Towards Fair and Justifiable Management of Evictions and Resettlements* (Ministry of Land 2010).
[6] Laurence Juma, 'Nothing But a Mass Of Debris: Urban Evictions And The Right Of Access To Adequate Housing In Kenya' Africa Human Rights Journal 470.
[7] 'Forced Evictions 2003-2006' <https://sarpn.org/documents/d0002751/3-Forced_evictions_COHRE_Dec2006.pdf >accessed 16 May 2005.
[8] Society for Threatened People, 'Campaign Against Forced Evictions in the Informal Settlements in Nairobi' http://www.gfbv.it/3dossier/africa/nairob-en.html accessed 16 May 2018.

Deep Sea Settlement in Westlands, Tudor Estate in Mombasa and Komora Slum.[9]

These evictions were done without following the established international norms on evictions that obligate governments to provide the affected persons with adequate and reasonable notice, genuine consultation, information on the proposed evictions and adequate housing or resettlement. There was no legislative framework on evictions and the general rules of international laws, treaties and conventions ratified by Kenya did not have a direct application in Kenya then. For instance, during the Komora Slum eviction, without any warning, the police set fire on shelters and bulldozed them.[10] The eviction was to pave way for a private developer who had acquired the land. The over 600 corrugated iron sheets shacks were demolished as early as 6.30 am when the residents were still sleeping. They were only given 10 minutes to vacate. They were not given adequate time to remove their household goods which were burnt during the demolition. Apart from leaving the residents homeless, they could not salvage their property.

Most of the informal settlement dwellers are subject to abject poverty. Forced evictions without giving them alternative accommodation or settlement exacerbates their poor living conditions. In most of the cases, these are persons who have lived on the said land for a long period of time without any alternative place to call home.[11] Even in cases where lawful evictions are carried out, informed by public interest and public policy, it is a requirement that these evictions be done in a humane manner.

In addition to forced evictions in informal settlements, the government has also carried out evictions of people living in forests for the purpose of conserving and protecting the environment. Forest evictions have occurred in Mau forest, [12] Embobut Forest,[13] Surura Forest, Mt. Elgon Forest, Karuri

[9] Centre on Housing Rights and Evictions (COHRE), 'Listening to the Poor: Housing Rights in Nairobi, Kenya, (COHRE 2005) 38-40.

[10] Fred Mukinda, 'Police Pull Down City Slum' https://www.nation.co.ke/news/1056-142382-mcyomuz/index.html accessed 16 May 2018.

[11] Peter Kavavi Mwangangi, Elections Related Evictions in Urban Slums: The Case of Mukuru Kwa Njenga Nairobi 1991-2013 (Masters Degree Thesis, University of Nairobi 2017).

[12] Matt Brown, 'Thousands of illegal settlers evicted from Kenyan forest'

Forest etc. These evictions have been characterized with violence, destruction of property and schools and without any adequate resettlement and protection of the rights of the indigenous communities like the Ogiek. In most of the forest evictions, the government officers usually burn homes, schools and destroy property without according the affected persons the opportunity to salvage their property. Even in cases where the government offers alternative settlements, in many cases, the affected persons are not consulted. For instance, in 2003 residents of informal settlements in Karuri Forest were given alternative land in the Sirimon Settlement scheme. However, they refused to leave on the ground that the area was already inhabited and was not fertile. In 2005, they were evicted from Karuri forest anyway and their homes burnt down. In January 2006, despite the government evicting more than 3000 residents from Mt. Elgon Forest, it blocked any attempts by volunteers to provide food to the evictees.[14]

1.2 Evictions in The New Constitutional dispensation

The promulgation of the Constitution heralded a new regime in governance and democracy in Kenya. The Constitution entrenches an expansive Bill of Rights, protects land ownership and establishes the NLC with the mandate of managing public land on behalf of the national and county government.[15] In its Preamble, the Constitution provides that it is committed to nurturing and protecting the well-being of the individual, the family, communities and the nation. It is imperative that even when forced evictions occur, the Constitution mandates the government to take into consideration the well-being of those evicted.

Even though the Constitution provides for expansive Bill of Rights, it does not have a provision relating to evictions. Unlike the Kenyan Constitution, the South African Constitution under Section 26 explicitly prohibits forced

---

<https://www.thenational.ae/world/africa/thousands-of-illegal-settlers-evicted-from-kenyan-forest-1.508063?videoId=5602327752001> accessed 16 May 2018.

[13] Forest People's Programm, 'Kenya Defies its Own Courts: Torching Homes and Forcefully Evicting the Sengwer from their Ancestral Lands' (22nd January 2014) https://reliefweb.int/report/kenya/kenya-defies-its-own-courts-torching-homes-and-forcefully-evicting-sengwer-their accessed 16 May 2018.

[14] COHRE and Hakijamii Trust, 'Forest Evictions: A Way Forward?' Kenya Housing Rights Update (Aug. 2006).

[15] CoK 2010, Chapter Five.

evictions in the absence of a court order after taking into consideration all the relevant circumstances. Article 26 of the South African Constitution in protecting the right to adequate housing to South Africans provides that:

> *(1) Everyone has the right to have access to adequate housing.*
>
> *(2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.*
>
> *(3)* ***No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions. (Emphasis Added.)***

In invoking Section 26(3) of the South African Constitution, the Court in the case of *Government of the Republic of South Africa and Others v Grootboom and Others*[16]affirmed that any lawful evictions must be carried out in a humane manner and in accordance with the values of the Constitution. The court held as follows:

> *The state had an obligation to ensure, at the very least, that the eviction was humanely executed. However, the eviction was reminiscent of the past and inconsistent with the values of the Constitution. The respondents were evicted a day early and to make matters worse, their possessions and building materials were not merely removed, but destroyed and burnt. I have already said that the provisions of section 26(1) of the Constitution burdens the state with at least a negative obligation in relation to housing. The manner in which the eviction was carried out resulted in a breach of this obligation.*

To implement the Constitutional provisions on eviction, the South African Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 1998 was enacted. Despite the lack of a constitutional provision on evictions in Kenya, victims of evictions after the promulgation of the Constitution have approached the Court seeking redress and invoking Constitutional provisions on human rights, applications of international principles and implementation of the Constitution. In a number of case law emerging after the promulgation of the Constitution, the Courts have affirmed that any eviction must abide by the rule of law and principles as

[16] (CCT11/00) [2000] ZACC 19.

anchored in the CoK.[17] In so doing, the Courts have invoked the application of the general rules of international law, human rights provisions and the principles enshrined in the Constitution to protect the people who have been evicted or are about to be evicted.

a) Article 2(5) and (6) of the Constitution of Kenya

Unlike the 1963 Independence Constitution, the 2010 Constitution under Article 2(5) and (6) recognizes the application of the general rules of international law, treaties and conventions ratified by Kenya to be part of the Kenyan law. In the absence of a legal framework on evictions, the Courts have invoked international treaties, guidelines and conventions ratified by Kenya. In the case of *Kepha Omondi Onjuro & others -v-Attorney General & 5 others,*[18] the High Court held as follows:

> *"…it is imperative at this juncture to appreciate that there is no legal framework existing in Kenya guiding evictions and demolitions…. However, Article 2 (5) and (6) of the Constitution provides that the general rules of international law shall form part of the law of Kenya and any treaty or convention ratified by Kenya is part of the law of Kenya…"*

Similarly, in the *Mitubell Welfare Society v Attorney General and Others (Mitubell Case)* the Court held that:

> *This country has yet to develop legislation and guidelines for eviction of persons occupying land which they are not legally entitled to occupy. However, as a member of the international community and a signatory to various United Nations treaties and conventions, it is bound by such international guidelines as exist that are intended to safeguard the rights of persons liable to eviction. Article 2(5) and (6) of the Constitution make the general rules of international law and any treaty or convention that Kenya has ratified part of the laws of Kenya. Consequently, the state, state organs and all persons, in carrying out evictions, should do so in accordance with the United Nations Guidelines on Evictions as enunciated by The United Nations Office of the High Commissioner for Human Rights in General*

[17] Joseph Letuya & 21 others v Attorney General & 5 others, Environment and Land Court Civil Suit No. 821 Of 2012 (OS), ELC at Nairobi [2014] eKLR.
[18] Petition Number 239 f 2014, High Court at Nairobi (2015) eKLR para 53.

Comment No. 7 "The right to adequate housing (Art.11.1): forced evictions: (20/05/97) CESCR General comment 7. (General Comments).[19]

In recognizing the application of international law, the Courts have invoked the application of the UN Covenant on Economic, Social and Cultural Rights (CESCR), General Comment No. 7, 'The Right to Adequate Housing (Art.11.1): Forced Evictions'. [20] This general comment requires that the State must in itself refrain from forced evictions. While the General Comment No. 7 on the right to adequate housing requires the State to refrain from forced evictions, this does not imply that any person can occupy land unlawfully. In this case, where the unlawful occupier refuses to move out, an eviction is necessary and legal. However, even when a forceful eviction is justified, it must be carried out in strict compliance with the law and in a humane manner.

In the case of *Symon Gatutu Kimamo & 587 others V East African Portland Cement Co. Ltd*[21] the Court, while relying on the UN General Comment No. 7 on the Right to Adequate Housing affirmed that: 'the prohibition of forced evictions does not, however, apply to evictions carried out by force in accordance with the law and in conformity with the provisions of the International Human Rights Covenants'.[22] The UN General Comment No. 7 provides for the procedural protection and due process to be followed during forced evictions which include:

a) an opportunity for genuine consultation with those affected;
b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;
c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected;
d) especially where groups of people are involved, government officials or their representatives to be present during an eviction;

[19] Petition No. 164 of 2011, High Court at Nairobi Constitutional and Judicial Review Division [2013] ekLR.
[20] UNGA, The Right to Adequate Housing (Article 11.1): Forced Evictions General Comment No. 7 20/5/97.
[21] [2011] eKLR.
[22] Ibid Para 52-53.

e) all persons carrying out the eviction to be properly identified;
f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise;
g) provision of legal remedies; and
h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.[23]

In invoking Article 2(5) and (6) of the Constitution, victims of forceful evictions have also sought to rely on the *UN Basic Principles and Guidelines on Development based Eviction and Displacement (UN Eviction Guidelines).*[24] The UN Eviction Guidelines require the State to ensure that evictions only occur in exceptional circumstances and any eviction must be:

(a) Authorized by law;
(b) Carried out in accordance with international human rights law;
(c) Undertaken solely for the purpose of promoting the general welfare;
(d) Reasonable and proportional;
(e) Regulated so as to ensure full and fair compensation and rehabilitation; and
(f) Carried out in accordance with the present guidelines. [25]

During evictions, the UN Guidelines on Eviction paragraph 45-51 explicitly provide that:

> *The procedural requirements for ensuring respect for human rights standards include the mandatory presence of governmental officials or their representatives on site during evictions. Evictions shall not be carried out in a manner that violates the dignity and human rights to life and security of those affected. States must also take steps to ensure that women are not subject to gender-based violence and discrimination in the course of evictions, and that the human rights of children are protected. Evictions must not take place in inclement weather, at night, during festivals or religious holidays, prior to elections or during or just prior to school*

[23] Ibid Para 15.
[24] UNGA, *UN Basic Principles and Guidelines on Development based Eviction and Displacement*, A/HRC/4/18
http://www2.ohchr.org/english/issues/housing/docs/guidelines_en.pdf
[25] Section 21.

> *examinations. States and their agents must take steps to ensure that no one is subject to direct or indiscriminate attacks or other acts of violence.*[26]

In the case of *Susan Waithera Kariuki & 4 Others v The Town Clerk, Nairobi City Council(Susan Waithera Case)* , the Court noted that the Nairobi City Council carried out evictions at night in contravention with the UN Eviction Guidelines.[27] In the *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 Others (Satrose Ayuma Case),* the Petitioners alleged that that the eviction notice was issued in the middle of a school year and subsequently affected accessibility of school going children to education and increased drop-outs in violation of the right to education as enshrined under Article 43 of the Constitution.[28] The Court, while relying on the UN Guidelines on Evictions and General Comment No. 7 on the Right to Adequate Housing found that indeed the demolitions were carried out in the wee hours and in the middle of the school term in contravention of the said laws and the rights of children.[29]

International Human Rights

It is required that in the case of forced evictions, this must not only be done in compliance with the law but also in a humane manner respecting the fundamental human rights of the affected persons.[30] The UN HABITAT has categorically stated that:

> *The international community has repeatedly stated that forced evictions are a gross violation of human rights, in particular the right to adequate housing. This statement recognizes that human rights are interdependent,*

---

[26] Housing and Land Rights Network and Youth for Unity and Voluntary Action, *Handbook on United Nations Basic Principles and Guidelines on Development-based Evictions and Displacement.* http://www.hicsarp.org/documents/Handbook%20on%20UN%20Guidelines_2011.pdf accessed 18 May 2018.

[27] Petition No 66 of 2010, High Court at Nairobi [2013] eKLR.

[28] Satrose Ayuma Case para 20.

[29] Ibid para 105.

[30] MR Salim and Ndungu wa Mungai, 'Forced Eviction in Bangladesh: A Human Rights Issue' (2016) 59(4) Sage Journals 1; Sean Romero, 'Mass Forced Evictions and the Human Right to Adequate Housing in Zimbabwe' (2007) 5(2) Northwestern Journal of International Human Rights 275.

> *indivisible and interrelated. In addition to being a violation of the prohibition on arbitrary or unlawful interference with the home, forced evictions all too often result in other severe human rights violations, particularly when they are accompanied by forced relocation or homelessness. For instance, if no adequate alternative housing is provided, victims of forced evictions are put in life and health threatening situations and often lose access to food, education, health care, employment and other livelihood opportunities. Indeed, forced evictions often result in losing the means to produce or otherwise acquire food or in children's schooling being interrupted or completely stopped.*[31]

Kenya has ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (Banjul Charter) that seek to protect the fundamental rights of persons. The Courts have relied on Article 2(5) and (6) of the Constitution in calling upon the State to protect the human rights of those affected during forced evictions. Article 17 of the ICCPR prohibits forced evictions. It provides that:

1. *No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*
2. *Everyone has the right to the protection of the law against such interference or attacks.*

When the Constitution was promulgated many Kenyans approached the Courts to protect and enhance their human rights.[32] Initially, Kenyans had lacked confidence in the judiciary.[33] However the promulgation of the Constitution gave them a new hope and expectations. In regard to forced

---

[31] UN HABITAT, *Forced Evictions* (Fact Sheet No. 25/Rev.1). <http://www.ohchr.org/Documents/Publications/FS25.Rev.1.pdf> accessed 18 May 2018.

[32] Willy Mutunga, 'The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court Decisions' (Inaugural Distinguished Lecture Series, University of Fort Hare 2014).

[33] Government of Kenya, '*Final Report of the Taskforce on Judicial Reforms* (Government Printer 2010)106-107. http://www.kenyalaw.org/Downloads/Final%20Report%20of%20the%20Task%20Force%20on%20Judicial%20Reforms.pdf accessed 26 February 2018.

evictions, the affected persons have approached the Court on the ground that their human rights have been violated during the evictions and asked the Courts to make appropriate orders or grant them redress. Indeed, every person has the right to institute court proceedings claiming that a right or fundamental freedom has been denied, violated, infringed or threatened.[34] If the Court finds that such a right has been infringed then, Article 23(3) of the CoK mandates it to grant appropriate reliefs including a declaration of rights, an injunction, conservatory order, compensation or judicial review.

In protecting affected persons during evictions, the following human rights have been considered as fundamental:

a) The right to inherent human dignity, Article 28;
b) The security of the person guaranteed by articles 29 (c), (d) and f;
c) Access to information, Article 35;
d) Equality and freedom from discrimination, Article 27;
e) Privacy, Article 31;
f) Protection of right to property, Article 40;
g) Right to accessible and adequate housing, reasonable standards of sanitation, health care services, freedom from hunger and the right to clean safe water under Article 43;
h) Fair administrative action, Article 47;
i) Rights to physical and mental health, and the fundamental right to physical and moral health of the family under articles 16 and 18 of the ACHPR read with article 2 (6) of the Constitution of Kenya 2010;
j) rights of children to basic nutrition, shelter and healthcare and protection from abuse, neglect and all forms of violence and inhuman treatment and to basic education guaranteed by article 53 (1) (b), (c), (d) and (2) read together with article 21 (3) of the Constitution of Kenya 2010 and article 28 of the ACHPR; and
k) respect and freedom from abuse and to receive reasonable care and assistance from the State guaranteed by article 57 (b) and (c).

The Courts have relied on the above provisions of the Constitution in ensuring that evictions are carried out in a humane manner and protect the fundamental rights of those affected by evictions. In this regard, the

[34] CoK 2010, Art 22.

recognition and protection of socio-economic rights and in particular the right to housing, has been invoked by those affected by evictions requesting the Courts to protect their rights to housing. In the *Satrose Ayuma case*, while the Court recognized the need to develop guidelines on evictions in Kenya, it affirmed the need to protect the right to adequate housing during forced evictions: The court held as follows:

> *At some particular point in time the tenants will have to move out of the estate but when that time comes, that ought to be done in a humane manner. The challenge of providing accessible and adequate housing as required under Article 43(b) of the Constitution is all evident. The problem of informal settlements in urban areas cannot be wished away, it is here with us. There is therefore need to address the issue of forced evictions and develop clear policy and legal guidelines relating thereto.*[35]

The need to protect and enhance the right to adequate housing has been recognized as fundamental during forced evictions in South Africa. In the case of *Tswelopele Non-Profit Organization & Others v City of Tshwane Metropolitan Municipality*,[36] the Court held that forced eviction is a violation of the right to have access to adequate housing as enshrined in article 26 (1) of the Constitution of the Republic of South Africa. The Court went further to state that in such a case, the proper remedy was the resolution of the *status quo ante* and ordered that the occupiers must get their shelters back and that the Respondents should, jointly and severally, be ordered to reconstruct them.

The Constitution further protects the rights of the indigenous communities during forced evictions. Article 56 of the Constitution requires the State to put in place affirmative action programmes to protect the rights of the minorities and marginalized groups. Article 63(d) of the Constitution further recognizes ancestral lands and lands traditionally occupied by the hunter-gatherer community as community land. However, despite the recognition of community held land in the Constitution, we have witnessed a number of forced evictions of indigenous communities from their ancestral land in contravention with the law. In an endeavor to protect and conserve the environment, the government has undertaken a number of forced evictions

[35] Ibid para 86.
[36] 2007 SCA 70 (RSA).

in designated and protected areas. However, human rights organizations have since the promulgation of the Constitution criticized the government's forced evictions of indigenous communities as an ineffective approach to bio-diversity. [37]

In 2014, the KFS carried out forced evictions of the Sengwer community from the Embobut forest despite a Court injunction from the Eldoret High Court in the case of *David Kiptum Yaror & 2 others v Attorney General & 4 others,*[38] prohibiting the Kenya Forest Service from carrying out forced evictions and burning homes of the Sengwer people. The Sengwer is an indigenous and marginalized ethnic group of hunter-gatherers. They have lived in the Cherangany Hills for centuries, and Embobut forest is their ancestral and communal land. In January 2014, the KFS and police officers forcefully evicted the community from Embobut forest using force, including the use of live bullets, and burnt houses of the members of the Sengwer community despite a court order restraining such an eviction. The eviction led to a violation of socio-economic rights,[39] rights of children,[40] cultural rights,[41] ancestral land, personal security,[42] property rights, [43]and human dignity[44] of the Sengwer community. In its defence, the government argued that it had granted the members of the Sengwer community kshs. 400,000 as compensation to vacate the forest. However, to the majority of the Sengwer community members, they were not ready to vacate their ancestral land and argued that the government had not consulted. In this regard, the need for the government in carrying out forced evictions of

[37] KNHRC, 'The Truth About Embobut Forest Evictions and A Way Forward' (Press Release 21 February 2014) <https://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/395-the-truth-about-embobut-forest-evictions-and-a-way-forward.html > accessed 16 May 2018.

[38] Environment and Land Court Petition 15 of 2013(Formerly Petition 6 of 2013), ELC at Eldoret [2015] eKLR.

[39] This included the right to adequate housing, health, food and water.

[40] The right to shelter, education and freedom from violence.

[41] The Embobut forest does not only provide a source of livelihood to the Sengwer community, it also contains their shrines and is integral to the community life.

[42] Article 29 of the Constitution grants every person the freedom and security of person which includes the right not to be subjected to any form of violence, torture, treated or punished in a cruel, inhuman and degrading manner.

[43] CoK 2010, Art 40.

[44] CoK 2010, Art 28.

indigenous community can only be effective if they engage the said communities and abide by the Constitution and the legal framework in place. The government, in ignoring court orders as was the case in the eviction of the Sengwer community, exacerbates the situation and should be held liable for violating the community's fundamental rights.

Despite the constitutional provisions, evictions in Kenya continued to be characterized with human rights violations. On the other hand, courts continued to implore Parliament to enact a law on evictions. This was informed by the widespread evictions coupled with lack of compensation and inadequate notice. In the *Satrose Ayuma* case, the court stated as follows:

> *I must lament the widespread forced evictions that are occurring in the country coupled with a lack of adequate warning and compensation which are justified mainly by public demands for infrastructural developments such as road bypasses, power lines, airport expansion and other demands. Unfortunately, there is an obvious lack of appropriate legislation to provide guidelines on these notorious evictions. I believe time is now ripe for the development of eviction laws.*[45]

Lenaola J (as he was then) therefore directed the government in consultation with other stakeholders to formulate laws on eviction. He stated as follows:

> *It is on this basis that it behoves upon me to direct the Government towards an appropriate legal framework for eviction based on internationally acceptable guidelines. These guidelines would tell those who are minded to carry out evictions what they must do in carrying out the evictions so as to observe the law and to do so in line with the internationally acceptable standards. To that end, I strongly urge Parliament to consider enacting a legislation that would permit the extent to which evictions maybe carried out. The legislation would also entail a comprehensive approach that would address the issue of forced evictions, security of tenure, legalization of informal settlements and slum upgrading. This, in my view, should be done in close consultation with various interested stakeholders in recognition of*

[45] Para 109.

> *the principle of public participation as envisaged in Articles 9 and 10 of the Constitution.*[46]

The UN Economic and Social Council expressed concerns over forced evictions in Kenya.[47] On 6th April 2016, the United Nation Economic and Social Council made an observation that:

> The Committee reiterates its concerns that pastoralist communities and persons living in informal settlements are under constant threat of eviction due to the **lack of legal security of tenure** and that forced evictions continue **without prior notice** and **provision of adequate alternative housing or compensation**. It is also concerned that the State party **has not yet enacted a legislative framework** to recognize and protect communities' right to land and **to explicitly prohibit forced evictions and define the circumstances and safeguards subject to which evictions may be carried out,** despite the decisions of its own domestic courts.[48] (Emphasis added).

The Committee then recommended that:

> …the State party **take concrete steps to guarantee security of tenure** for all, including residents of informal settlements. It also recommends that the State party **prioritize the enactment of the Community Land Bill and the Evictions and Resettlement Bill.** The Committee further recommends that the State party **implement judicial orders that provide remedies to victims of forced evictions** as a matter of priority and **adopt a moratorium on mass evictions at the national level** until adequate legal and procedural safeguards are in place.[49] (Emphasis added).

Following the call for a legislative framework on evictions, in 2016, the Land Laws (Amendment) Act was enacted.

---

[46] Ibid.

[47] United Nations Economic and Social Council, *Concluding Observations on the Combined Second*
to Fifth Periodic Reports of Kenya E/C.12/KEN/CO/2-5 6th April 2016.

[48] Ibid Para 47.

[49] Ibid Para 48.

1.3 Evictions under the Land Laws (Amendment) Act 2016

On 21st September 2016, the Land Laws (Amendment) Act 2016, came into force following the presidential assent of the Act on 31st August 2016. The Land Laws (Amendment) Act 2016 brings forth radical changes to the eviction regime in Kenya as it makes key amendments to the Land Act 2012, the Land Registration Act 2012 and the National Land Commission Act 2012. Before the enactment of the Land Laws (Amendment) Act 2016 and the promulgation of the Constitution of Kenya (Constitution), there was no legal framework governing evictions in Kenya. Before the Land Laws (Amendment) came into force, there was a Bill titled "The Evictions and Resettlement Bill 2012" that was pending in Parliament.

1.3.1 The Evictions and Resettlement Bill 2012: Brief Overview

The Evictions and Resettlement Bill, 2012 sought to set out appropriate procedures applicable to forced evictions; to provide protection, prevention and redress against forced eviction for all persons occupying land including squatters and unlawful occupiers. It defined forced eviction as:

> *…the permanent or temporary removal of persons, squatters or unlawful occupiers of land from their home or land which they occupy against their will without the provision of access to appropriate forms of legal or other protection.*[50]

The Bill further defined unlawful occupier as a person who takes possession of land or structures without the tacit consent of the owner or without any right in law to take possession of such land or structure.[51] A squatter was defined as: a person who has occupied land without the express or tacit consent of the owner or person in charge for a continuous period of at least six years without any right in law to occupy such land and that person does not have sufficient income to purchase or lease alternative land.[52] The Bill was not expected to apply to squatters as defined in the Bill or to any dispute relating to the occupation of landlord and tenant agreement, notwithstanding that such agreement are written or unwritten.[53] However,

[50] Government of Kenya, *The Evictions and Resettlement Bill 2012* (Government Printers 2012) s 2.
[51] *Ibid.*
[52] Ibid.
[53] Ibid s 3.

the Bill had explicit provisions on the procedure to be followed prior to evictions and during evictions.

a). Procedure prior to eviction

The Bill prohibited forced eviction unless a court order had been granted authorizing such an eviction and in accordance with the procedures as set out in Section 8 of the Bill. [54] If a person evicted another person without a court order, this would be a criminal offence liable to a fine not exceeding one million shillings or imprisonment for a term not exceeding two years, or both.[55] The Bill further envisaged the procedure to be taken prior to the eviction. These included consultation; adequate and reasonable notice of not less than three months; an environment assessment test; and legal redress.

The eviction notice contemplated in the Bill was to be in writing, and contain adequate information on the reasons for occupation and alternative purpose for which the suit property in question is to be used and advertised in the local media or public Barazas.[56] The essence of this provision was to curb forced evictions on short or no notices and without giving the affected persons the chance to look for alternative land.

To enhance public participation, the Bill called for the need for reasonable consultations through public hearings with affected persons or duly appointed representatives.[57] The Human Rights Committee on its concluding observations on forced evictions in Kenya has recognized the need to have meaningful consultations with affected persons prior to any evictions.[58] During such consultations, the affected persons must be provided with adequate information on the said evictions and any alternative recourse discussed. The UN Guidelines on Eviction requires that prior to evictions and 'during the planning processes, opportunities for dialogue and consultation must be extended effectively to the full spectrum of affected persons, including women and the vulnerable and marginalized

[54] Ibid s 3 and 8.
[55] Ibid s 5.
[56] Ibid S 6.
[57] Ibid.
[58] Human Rights Committee, concluding observations on the second periodic report of Kenya, CCPR/CO/83/KEN, para. 22.

groups, and, when necessary, through the adoption of special measures or procedures'.[59] Prior to carrying out the evictions, the Bill also required that special attention be given to special interest groups including people with disabilities, the elderly, youth, women and children and persons living with HIV/AIDS.

b). Procedure during eviction

The Bill contemplated that the eviction must be undertaken in strict compliance with the law. It provided for the following procedure:

a) twenty-one days' notice shall be given to the affected persons and the notice shall clearly state the modalities, day and time of the forced eviction;
b) full details of the proposed alternative, if any, shall be given to the occupiers of the land;
c) where no alternatives exist, a detailed explanation of all measures taken to minimize the adverse effects of evictions shall be given;
d) holding of public hearing with affected persons and other stakeholders to provide an opportunity to discuss alternative proposals for resettlement shall be done.

Where there is a stalemate or dispute, the Bill required that a person proposing to carry out the forced eviction must provide an opportunity to all the affected persons to seek legal address. The decision for the eviction was to be in a language understood by the affected persons.

c). The mandatory requirements during the evictions

Section 11 of the Eviction and Resettlement Bill further set out the mandatory requirements that were to be followed during the evictions which included that all evictions:

(a) be done in the presence of county government officials or their representatives;

(b) be preceded by the proper identification of those taking part in the eviction or demolitions;

[59] UN Eviction Guidelines Para 38.

(c) be preceded by the presentation of the formal authorizations for the action;

(d) be done transparently, openly and with full compliance with international human rights principles;

(e) not take place in bad weather, at night, during festivals or religious holidays, prior to an election or prior to or during national examinations;

(f) be carried out in a manner that respects the dignity, right to life and security of those affected;

(g) include special measures to ensure that women are not subjected to gender-based violence or any other forms of discrimination in the course of evictions, and that the human rights of children are fully protected;

(h) include special measures to ensure that there is no arbitrary deprivation of property or possessions as a result of the eviction; include mechanisms to protect property and possessions left behind involuntarily from destruction, arbitrary and illegal appropriation, occupation or use;

(j) respect the principles of necessity and proportionality during the use of force, and any national or local code of conduct consistent with international law enforcement and human rights standards; and

(k) give the affected persons the first priority to demolish and salvage their property.

These mandatory procedures are a replica of the UN Eviction Guidelines and whose objective is to ensure that evictions are carried out in a humane manner respecting the fundamental rights of the affected persons.

The Bill further envisaged that: the evictions and settlement procedures,[60]remedies,[61] resettlement,[62]was to be monitored and evaluated by the NLC and the KNHRC.[63] The Bill was therefore not only detailed but borrowed heavily from the UN Eviction Guidelines and General Comment No. 7 on the Right to Adequate Housing.

Whereas the Bill was a great step towards providing a legal framework on evictions, it was criticized on the ground that it sought to protect people who illegally encroached into private, public and community land. The Bill

[60] Eviction and Resettlement Bill 2012, s 12.
[61] Ibid s 13.
[62] Ibid s 14.
[63] Ibid s 15.

was not enacted into law. Instead, it was the 2016 Land Laws (Amendment) Act that was enacted.

1.3.2 The Land Laws (Amendment) Act 2016

One of the novel features of the Land Laws (Amendment) Act 2016 is the introduction of the procedure that governs evictions in Kenya which was lacking under the previous regime. It makes key amendments to the NLC Act and Land Act 2012.

a) National Land Commission Act

The Land Laws (Amendment) Act 2016, amended the NLC Act by recognizing forced evictions as a form of historical injustices. Politically motivated and conflict based eviction is now recognized as a claim for historical land injustice.[64] Other historical injustices include; colonial occupation; independence struggle; pre-independence treaty or agreement between a community and the government; development-induced displacement for which no adequate compensation or other form of remedy was provided, including conversion of non-public land into public land; inequitable land adjudication process or resettlement scheme; corruption or other form of illegality; natural disaster; or other cause approved by the Commission.

The recognition of evictions as a historical land injustice in itself grants those affected by eviction, whether lawful or otherwise, an avenue to seek redress as entrenched in the Constitution. The NLC has the mandate pursuant to Article 67 (3) of the Constitution to receive, admit and investigate all historical land injustices complaints and recommend appropriate redress. Once the NLC has carried out its investigation on political or conflict evictions, it can recommend a number of remedies. These remedies are stipulated under Section 15(9) of the NLC Act and include:

(a) restitution;
(b) Compensation, if it is impossible to restore the land;
(c) Resettlement on an alternative land;

[64] Government of Kenya, National Land Commission Act (NLA Act) No. 5 of 2012 (Government of Kenya 2012) s 15; Land Laws (amendment) Act s 38.

(d) Rehabilitation through provision of social infrastructure;
(e) Affirmative action programmes for marginalized groups and communities;
(f) Creation of way leaves and easements;
(g) Order for revocation and reallocation of the land;
(h) Order for revocation of an official declaration in respect of any public land and reallocation;
(i) Sale and sharing of the proceeds;
(j) Refund to bona fide third party purchasers after valuation; or

b). The Land Act No. 6 of 2012

The definition of terms is very fundamental as it provides a legal basis upon which a suit can be instituted. The Land Act does not define the term 'eviction'. The definition of the term "eviction" is captured under Section 2 of the Land Registration Act (LRA) which defines eviction as, the '*act of depriving or removing a person from the possession of land or property which they hold unlawfully either executed upon a successful law suit or otherwise*'. Though the LRA defines what amounts to eviction, the Eviction Bill 2012, had provided for what would amount to forced eviction. It defined forced eviction as:

> *…the permanent or temporary removal of persons, squatters or unlawful occupiers of land from their home or land which they occupy against their will without the provision of access to appropriate forms of legal or other protection.*[65]

It should be noted that the problem ailing Kenya is the way forced evictions are carried out and this is what led to the justifications of having a legislative framework. Therefore, the need to define forced evictions is very paramount. In the above definition, forced evictions will arise where unlawful occupiers or squatters are removed against their will without access to legal redress or any other protection.

Before the 2016 Amendments to the Land Act, the Act only provided for unlawful eviction in regard to eviction from a leased property under Section 77 which provides that:

[65] Eviction Bill 2012 s 2.

> *(1) A lessee who is evicted from the whole or a part of the leased land or buildings, contrary to the express or implied terms and conditions of a lease, shall be **immediately** relieved of all obligation to pay any rent or other monies due under the lease or perform any of the covenants and conditions on the part of the lessee expressed or implied in the lease in respect of the land or buildings or part thereof from which the lessee has been so evicted.*

The Land Laws (Amendment) Act 2016 amended the Land Act by introducing sections 152A to 152H which deals with the issue unlawful occupation of land and eviction.

i). Unlawful occupation of land prohibited

At the onset, only those who have ownership of land or property can claim rights over the said property. The right to protection of property as anchored under Article 40 of the Constitution can only be invoked where the person claiming deprivation has acquired an interest in the property in question. Any person in Kenya, either individually or in association with others, has the right to acquire and own property of any description and in any party of Kenya.[66] Evictions arise when a person unlawfully occupies private, public or community land. Section 152A explicitly prohibits unlawful occupation of land. In the case of *Veronica Njeri Waweru & 4 others v The City Council of Nairobi & others*,[67] Mumbi J held as follows:

> *The petitioners have readily conceded that they have been occupying public property, a road reserve, for the last ten years. They have licenses to operate businesses, but have no proprietary interest in the land. Clearly, therefore, their claim that their rights under Article 40 have been violated has no basis. They do not own the land and they therefore cannot be deprived of that which they have no rights over.*[68]

Though the Land Act does not define what will amount to unlawful occupier as was envisaged in the 2012 Eviction and Resettlement Bill, it was expected that the issue would be addressed in the Eviction Guidelines that were to

[66] CoK 2010, Art 40(1).
[67] Nairobi Petition No. 58 of 2011.
[68] Ibid para 29.

enacted by the Cabinet Secretary responsible for land matters. However, the 2017 Regulations[69] did not address that issue all.

ii) All evictions must be done in accordance with the law

Section 152(B) of the Land Act as amended by the Land Laws (Amendment) Act of 2016 prohibits unlawful occupation of private, community or public land. However, the section provides that any person who seeks to carry out any eviction must do so in strict compliance with the law, including complying with the Constitution; the treaties and conventions which Kenya has ratified and the general rules [principles] of international law.[70] This provision is very fundamental as it seeks to ensure that all evictions are carried out in a humane manner taking into consideration the rule of law.

iii) Eviction notice which is adequate and reasonable must be served to the affected persons

The first step in an eviction, is for the lawful owner to serve a notice of eviction in accordance with the law. Section 152B, 152C, 152D and 152E of the Land Act address the issue of eviction notice to unlawfully occupied land. Land in Kenya can either be owned as private,[71] public[72] or community.[73] The law provides for the procedure of serving eviction notice to occupiers of public, private or community land.

A. Public land

Article 62 of the Constitution stipulates what public land constitutes.[74] Section 152C of the Land Act 2012 as amended requires that where

[69] The Land Regulations, 2017: Legal Notice No. 280 of 24th November, 2017.

[70] It has been said that general principles of international law are norms recognised by the international community, whether the norm is derived from municipal law or not. However, they remain an ambiguous source of international law

[71] CoK 2010, Article 64.

[72] CoK 2010, Article 62.

[73] CoK 2010, Article 63.

[74] Public land is land: which at the effective date was unalienated government land; lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under the Private lease; transferred to the State by way of sale, reversion or surrender; which no individual or community ownership can be established by any legal process; and land which no heir can be

unlawful occupiers occupy public land, the NLC shall ensure that a decision for eviction of such occupiers is notified to all affected persons in writing by notice in the Gazette.[75] The eviction notice must be published in a one newspaper of nationwide circulation. To ensure that the eviction notice reaches everyone who might be affected by the said eviction, the Land Act stipulates that the NLC must ensure that the eviction notice is also announced on a radio in the local language where appropriate.[76] The duration of these notice should be at least three months before the eviction. Evictions from public land are the most common and are usually motivated either politics or public good.

B. Community land[77]

Community land is governed by the Constitution and the Community Land Act.[78]Community land is vested in and held by communities identified on the basis of ethnicity, culture or similar community interest.[79] Unregistered community land is held in trust by the County government on behalf of the community. The body entrusted with eviction of unlawful occupiers of community land is the County Executive Committee Member responsible for land matters. The CEC member is required by section 152 D of the Act to ensure that a decision to evict unlawful occupiers from unregistered community land is notified to all affected persons in writing and by notice in the Gazette. In addition, the unlawful occupiers should be notified of the impeding eviction in one newspaper with nationwide circulation and by radio announcement, in a local language, where appropriate, at least three months before the eviction.[80] This only applies to unregistered community

---

identified by any legal process. Further, all minerals and mineral oils, forests, roads and thoroughfares, rivers, lakes and other water bodies, territorial sea, exclusive economic zone and the sea bed; continental shelf; all land between the high and low water marks etc are public land. Most of the government evictions in Kenya have been as a result of unlawful occupation of public land.

[75] Land Act, s 152C.

[76] Ibid.

[77] Land Act 2012, s 152D.

[78] Government of Kenya, *Community Land Act No. 27 of 2016* (Government Printers 2016).

[79] CoK 2010, Article 63.

[80] Ibid.

land. Where registered community land is involved, Section 152E of the Land Act of 2012 applies. Such land is treated as a private poverty.

C. Private land[81]

Private land is registered land held by any person under any freehold tenure; land held by any person under leasehold tenure; and any other land declared private land under an Act of Parliament.[82] In cases where private ownership of land is proved, if the owner or the person in charge is of the opinion that '*a person is in occupation of his or her land without consent, the owner or the person in charge may serve on that person a notice, of not less than three months before the date of the intended eviction*'.[83] As earlier noted, where community land is registered, Section 152E of the Land Act is applied. Whereas eviction notice for public and unregistered community land should be published in the Gazette; in a newspaper of national circulation; and announced on radio in a local language, when it comes to private land and registered community land, the notice must be served on the persons affected. Eviction notices for private land and registered community land requires that:[84]

a) The eviction notice is in writing and in a national and official language. In Kenya, the national language is Kiswahili while the official language is English.[85] Whilst the Land Act does not stipulate the language to be used in the eviction notice for public and unregistered community land, it is reasonable that the eviction notice be in a language that the affected persons understand;
b) Where a large group of persons are affected, the eviction notice must be published in at least two daily newspapers of nationwide circulation;
c) The eviction notice must be displayed in not less than five strategic locations within the occupied land in the case of large group of persons;

[81] Land Act 2012, s 152E.
[82] CoK 2010, Art 64.
[83] Ibid.
[84] Land Act 2012, s 152E (2).
[85] CoK 2010, Art 7.

d) To ensure that property of the unlawful occupants is protected, the Land Act stipulates that the eviction notice must specify the terms and conditions as to the removal of buildings, the reaping of growing crops and other matters as the case may require; and

e) The eviction notice must be served on the deputy county commissioner in charge of the area as well as the officer commanding the police division of the area.

The law requires the eviction notices to be in writing. Secondly the eviction notice must be reasonable and adequate. The Eviction and Resettlement Bill 2012 had envisaged a 21 day notice. However, the Land Act now envisages that an eviction notice should not be less than three months (90 days). The reasons for an adequate and reasonable eviction notice is to grant the affected persons an opportunity to look for alternative land, invoke consultation or spur engagement. The UN Eviction Guidelines further require that the eviction notice should allow and enable those subject to the eviction to take an inventory so as to assess the value of their properties that may be damaged during evictions. In the *Mitubell Case,* the petitioners were given a seven day notice to vacate the suit property without any reasons given to them. In *Mitubell Case* paragraph 44, Mumbi J noted that,

> *It is unreasonable, unconscionable and unconstitutional to give persons in the position of the petitioners seven days' notice within which to vacate their homes, and then demolish their homes without giving them alternative accommodation. It exacerbates the violation when the eviction is carried out, as in this case, even after those affected have sought and obtained the intervention of the court. I therefore find and hold that the eviction of the petitioners from Mitumba Village after a 7 day notice was unreasonable.*

Apart from the eviction notice, the Land Act does not provide for the procedures to be followed prior to an eviction such as consultations as was envisaged under the Evictions and Resettlement Bill 2012.

iv) Persons affected by the eviction notice to seek court relief

The essence of serving an adequate and reasonable eviction notice is to give the persons affected an opportunity to seek relief in court. If any person or persons has received an eviction notice, they can apply to the Court for

relief against the notice. The Court, after considering the eviction notice may:[86]

a. confirm the notice and order the person to vacate;
b. cancel, vary, alter or make additions to the notice on such terms as it deems equitable and just;
c. suspend the operation of the notice for any period which the court shall determine; or
d. Order for compensation.

v) Any eviction must adhere to the mandatory procedures envisaged under Section 152G of the Land Act

These mandatory procedures are very important as they are the most violated during forced evictions. Any eviction must strictly adhere to the following procedures which are mandatory:

a) Be preceded by the proper identification of those taking part in the eviction or demolitions;
b) Be preceded by the presentation of the formal authorizations for the action;
c) where groups of people are involved, government officials or their representatives to be present during an eviction;
d) be carried out in a manner that respects the dignity, right to life and security of those affected;
e) include special measures to ensure effective protection to groups and people who are vulnerable such as women, children, the elderly, and persons with disabilities;
f) include special measures to ensure that there is no arbitrary deprivation of property or possessions as a result of the eviction;
g) include mechanisms to protect property and possessions left behind involuntarily from destruction;
h) respect the principles of necessity and proportionality during the use of force; and
i) Give the affected persons the first priority to demolish and salvage their property.[87]

[86] Land Act 2012, s 152F.
[87] Land Act 2012, s 152G.

This mandatory procedure seeks to ensure that the eviction is undertaken in compliance with the law and in a humane manner. The Land Act as amended seeks to protect the right to property of victims of forced evictions. The law therefore seeks to protect their property by requiring that mechanisms be put in place to ensure that the property and possessions left after forced evictions are protected. Most of the evictions that have occurred in Kenya have been characterized by violence and force.

The legal framework on eviction require that the affected persons must be given the first priority to demolish and salvage their property. However, this has not been the case in most of the evictions carried out. In the recent case of *John Mageto Nyachieo v John Kinyu*[88] the Court in granting an order for eviction held that the eviction must be done in accordance with the provisions of Section 152G of the Land Act 2012.

vi) Disposal of property left after eviction

The competent officer of the Commission or County Government, community owning a registered community land or owner of private land is required at least **seven days** from the date of the eviction, to remove or cause to be removed or disposed by public auction, any unclaimed property that is left behind after an eviction from private, community or public land.[89]

vii) Demolition of unauthorized structures

Where the erection of any building or execution of any works has commenced or been completed on any land without authority, the competent officer shall order the person in whose instance the erection or work began or was carried, to demolish the building or works, within such period as may be specified in the order.[90]

[88] ELC Case No. 236 of 2016, ELC at Nakuru [2017] eKLR.
[89] Land Act 2012, Section 152H.
[90] Land Act 2012, Section 152I.

viii) Relief to persons affected by evictions

The Land Act only provides for the reliefs that the court can grant in regard to an eviction notice. The Act does not address the reliefs that the court can grant after the eviction has taken place. This means that persons affected by forced evictions can only rely on the Constitution for redress under Article 23(3). **The 2012 Eviction and Resettlement Bill envisaged the following remedies for forced evictions:**

a) Declaration of rights, compensation, injunction or any other relief the court may deem;
b) Where an eviction is unavoidable and necessary for the promotion of the general welfare and the public interest, the Government must provide or ensure fair and just compensation for any losses of personal, real or other property or goods, including rights or interest in property and transport to the relocation site;
c) Where private or community land has been taken, the evicted persons should be compensated promptly, fairly and fully;
d) Consideration of the circumstances of each case shall allow provision of compensation for losses related to informal property such as slum dwellings;
e) Joint spousal compensation packages must be ensured;
f) Single women, widows and orphans shall be entitled to their own compensation.

Victims of forced evictions must be provided with relief. Article 8 of the **Universal Declaration of Human Rights and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross violations of International Human Rights Law and Serious Violations of International Humanitarian Law,** [91] states that a proper remedy for forced evictions is to return the victims as close as possible to the status quo ante.

[91] UNGA, *Universal Declaration of Human Rights and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross violations of International Human Rights Law and Serious Violations of International Humanitarian Law* Resolution 60/147 of 21/3/2005.

c). The Land Act Regulations, 2017[92]

The Land Act specifically provides that the Cabinet Secretary shall prescribe regulations to give effect to Section **152G**. The regulations were meant to give further details on the manner in which forced evictions should be carried and how the people who were to be evicted should be treated and settled, if at all.

Instead of issuing stand-alone Regulations under Section 152G of the Act, the Minister issued the 2017 Regulations[93] pursuant to Section 160 which gives him general powers to make Regulations under the Act. Under those Regulations, only a few clauses addressed the issue of evictions. The Regulations prescribed the notices that should be issued to the evictees in respect to public, unregistered community land and private land (Form LA 57) and provided the manner in which the people who are to carry out the eviction should identify themselves. Regulation 66 provides that the people participating in an eviction should produce: the original national identification cards; the official or staff identification cards; a letter of authorization from the owner; or a letter from the Commission in case of public land. Regulation 67(2) provides that the letters of authorization to carry out evictions must be copied to the national government administration in the county and to the Officer Commanding Police Division of the area in which the land is situated. Regulation 68 stipulates that eviction should be carried out between 6 am and 6pm while Regulation 70 provides the manner in which the notices should be served on the evictees.

1.4 Conclusion

The 2012 Evictions and Resettlement Bill had envisaged the procedures that were to guide the court proceedings during evictions. These elaborate procedures were not included in the Land Laws (Amendment) Act 2016. The Court plays a fundamental role in the implementation of the Constitution and the legal framework on eviction. As a guardian of the Constitution, Kenyans have high expectations in the Court as an avenue to justice. Judicial officers must rise to the occasion when eviction matters come before them for adjudication, and consider whether the said evictions

[92] Supra, n. 70
[93] Ibid

comply with the Constitution, the Treaties that the country has ratified and the international principles of international law. The Court must continue to assert its role in ensuring that forced evictions are carried out in compliance with the law.

There is need to amend the law and provide that an eviction notice should be issued only after the court has granted an order. This requirement forestalls a situation where people might be evicted on the pretext that they were served with notices. It is on that basis that the Constitution of South Africa specifically provides that evictions can only be carried out upon issuance of a court order.[94] This constitutional provision is supported by the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. Indeed, that what had been provided for under section 4 of the Evictions and Resettlement Procedures Bill, 2012 which states as follows:

> *"A person shall not be forcibly evicted from their home or have their property demolished without a court order authorizing the eviction or demolition."*

That seems to have changed with the 2016 amendments to the Land Act. Indeed, the amendments ignored completely to provide for the constitutional safeguards that should be put in place to facilitate forceful evictions in a humane manner that had been contemplated under the Bill[95], and which are recognised in international legal instruments like the *UN Basic Principles and Guidelines on Development based Eviction and Displacement (UN Eviction Guidelines).*[96]

---

[94] Section 26 of The Constitution of South Africa, 1996

[95] The Eviction and Resettlement Bill, 2012 at section 6(1) (c) provides that before eviction, an environmental, economic and social impact assessment shall be done and there should be put in place adequate resettlement plans etc.

[96] UNGA, *UN Basic Principles and Guidelines on Development based Eviction and Displacement*, A/HRC/4/18 http://www2.ohchr.org/english/issues/housing/docs/guidelines_en.pdf

References

1. 'Forced Evictions 2003-2006' <https://sarpn.org/documents/d0002751/3-Forced_evictions_COHRE_Dec2006.pdf >accessed 16 May 2005.
2. Brown M, 'Thousands of illegal settlers evicted from Kenyan forest' <https://www.thenational.ae/world/africa/thousands-of-illegal-settlers-evicted-from-kenyan-forest-1.508063?videoId=5602327752001> accessed 16 May 2018.
3. Centre on Housing Rights and Evictions (COHRE), 'Listening to the Poor? Housing Rights in Nairobi, Kenya (COHRE 2005).
4. COHRE and Hakijamii Trust, 'Forest Evictions: A Way Forward?' Kenya Housing Rights Update (Aug. 2006).
5. Forest People's Programm, 'Kenya Defies its Own Courts: Torching Homes and Forcefully Evicting the Sengwer from their Ancestral Lands' (22nd January 2014) https://reliefweb.int/report/kenya/kenya-defies-its-own-courts-torching-homes-and-forcefully-evicting-sengwer-their accessed 16 May 2018.
6. Government of Kenya, '*Final Report of the Taskforce on Judicial Reforms* (Government Printer 2010)106-107. http://www.kenyalaw.org/Downloads/Final%20Report%20of%20the%20Task%20Force%20on%20Judicial%20Reforms.pdf accessed 26 February 2018.
7. Government of Kenya, *Community Land Act No. 27 of 2016* (Government Printers 2016).
8. Government of Kenya, *Eviction and Settlement Guidelines: Towards Fair and Justifiable Management of Evictions and Resettlements* (Ministry of Land 2010), s 2.
9. Government of Kenya, *Eviction and Settlement Guidelines: Towards Fair and Justifiable Management of Evictions and Resettlements* (Ministry of Land 2010).
10. Government of Kenya, *National Land Commission Act (NLA Act) No. 5 of 2012* (Government Printers 2012)
11. Government of Kenya, *The Evictions and Resettlement Bill 2012* (Government Printers 2012) s 2.
12. Housing and Land Rights Network and Youth for Unity and Voluntary Action, *Handbook on United Nations Basic Principles and Guidelines on Development-based Evictions and Displacement* http://www.hic-sarp.org/documents/Handbook%20on%20UN%20Guidelines_2011.pdf accessed 18 May 2018.
13. Human Rights Committee, Concluding Observations on the Second Periodic Report of Kenya, CCPR/CO/83/KEN.
14. Juma L, 'Nothing But a Mass Of Debris: Urban Evictions And The Right Of Access To Adequate Housing In Kenya' Africa Human Rights Journal 470.
15. Kenya National Human Rights Commission (KNHRC), *Nowhere to Go: Forced Evictions in Mau Forest, Kenya* (KNHRC 2007).
16. KNHRC, 'The Truth About Embobut Forest Evictions and A Way Forward' (Press Release 21 February 2014) <https://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/395-the-truth-about-embobut-forest-evictions-and-a-way-forward.html > accessed 16 May 2018.

17. Mukinda F, 'Police Pull Down City Slum' https://www.nation.co.ke/news/1056-142382-mcyomuz/index.html accessed 16 May 2018.
18. Mutunga W, 'The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court Decisions' (Inaugural Distinguished Lecture Series, University of Fort Hare 2014).
19. Mwangangi PK, Elections Related Evictions in Urban Slums: The Case of Mukuru Kwa Njenga Nairobi 1991-2013 (Masters Degree Thesis, University of Nairobi 2017)
20. Otiso KM, 'Forced Evictions in Kenya's Cities' (2003) Singapore Journal of Tropical Geography 251.
21. Romero S, 'Mass Forced Evictions and the Human Right to Adequate Housing in Zimbabwe' (2007) 5(2) Northwestern Journal of International Human Rights 275.
22. Salim MR and Ndungu wa Mungai, 'Forced Eviction in Bangladesh: A Human Rights Issue' (2016) 59(4) Sage Journals 1.
23. Society for Threatened People, 'Campaign Against Forced Evictions in the Informal Settlements in Nairobi' http://www.gfbv.it/3dossier/africa/nairob-en.html accessed 16 May 2018.
24. UN HABITAT, *Forced Evictions* (Fact Sheet No. Rev.1)<http://www.ohchr.org/Documents/Publications/FS25.Rev.1.pdf> accessed 18 May 2018.
25. UNGA, The Right to Adequate Housing (Article 11.1): Forced Evictions General Comment No. 7 20/5/97
26. UNGA, The Right to Adequate Housing (Article 11.1): Forced Evictions General Comment No. 7 20/5/97
27. UNGA, *UN Basic Principles and Guidelines on Development based Eviction and Displacement*, A/HRC/4/18 http://www2.ohchr.org/english/issues/housing/docs/guidelines_en.pdf
28. UNGA, *Universal Declaration of Human Rights and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross violations of International Human Rights Law and Serious Violations of International Humanitarian Law* Resolution 60/147 of 21/3/2005.
29. United Nations Economic and Social Council, *Concluding Observations on the Combined Second to Fifth Periodic Reports of Kenya* E/C.12/KEN/CO/2-5 6th April 2016.

Legitimate Expectation of Investors in International Commercial Arbitration

By: ***Benard Kuria****

Abstract

The concept of legitimate expectations is an International Investment Law principle. The concept is not provided for directly in investment contracts or bilateral investment treaties. Arbitration tribunals consider the concept as inseparable element of fair and equitable treatment (FET) standard. The aim of legitimate expectations is to support stability and predictability of a host State policy. For investors to be treated fairly and equitably, the legitimate expectation of the investor should be proportionate to the interest and rights of host State.

1.0 Introduction

In the last few years, Kenya has seen establishment of many projects in the mining and energy sector. Many of these projects are run by the state in partnership with the foreign investors who have expertise in Investor-State contracts. The state has monopoly over the natural resources while the investor has control over expertise and capital. In *Walam Energy Inc. vs The Republic of Kenya*[1] and *Kinangop Windpark Ltd vs Republic of Kenya*[2], both investors have commenced arbitration proceedings against the Kenyan government seeking compensation amounting to billions of shillings.

In both cases, the investors have raised the issue of violation of their legitimate expectations. The nature and content of legitimate expectation in arbitration proceedings is of great importance. Legitimate expectation of an

*Advocate of the High Court of Kenya; LL.M (University of Nairobi); LL. B (Hons, CUEA); Dip. In law (Kenya School of Law); Accredited Mediator (MAC); State Counsel at Office of Attorney General and Department of Justice.

[1] WalAm Energy Inc. v. Republic of Kenya ICSID Case No. ARB/15/7Tribunal recently constituted: June 2, 2016.

[2] Kinangop Windpark Ltd vs Republic of Kenya, ICC Case 21728/TO. However, on July 2, 2018, the International Court of Arbitration seating in London, dismissed the claim against the Government of Kenya for over Sh31 billion that had been filed by Kinangop Wind Park Limited.

investor is a common law concept that seeks to protect foreign investors against changes of host State laws and policies.[3]

Legitimate expectation of investors is not an independent element in International Investment Law. However, it has been accepted as an inseparable part of Fair and Equitable Treatment (FET) standard in International Investment Law.[4] The issues that arise in this concept relates to degree of expectations and commitments imposed on host State. Legitimate expectation involves expression of protection of investors and their rights by granting them predictability of the legal environment in the host State.[5] Does it mean that the concept limits the State right to design policy and enact legislation? In instances where States experience abrupt economic and political changes, are they at liberty to change policy in the interest of general public? Do these actions violate the concept of legitimate expectations of an investor and FET standard?

The article attempts to discuss gaps surrounding the concept of legitimate expectations in recent arbitral tribunals. Reference is made to arguments advanced in *Walam Energy* and *Kinangop Windpark* Cases. Arbitral tribunals have taken different approaches in interpreting the concept of legitimate expectation. There is conflicting opinion on whether the concept takes into account decisions of an investor prior to investment, interests, and prevailing conditions of host State.

In *Kinangop Windpark Ltd vs Republic of Kenya*,[6] the investor commenced proceedings in International Chamber of Commerce seeking compensation for loss suffered in the venture. Kinangop Windpark Ltd (KWP) entered into power purchase agreement (PPA) with the Government of Kenya (GOK). KWP had sought support from the government in order to facilitate the implementation of the project and cushion them against anything that could derail the project including a political event. KWP claim that area politicians stirred up opposition towards the project which led to

[3] Schreuer, Christoph and Kriebaum, Ursula. At What Time Must Legitimate Expectations Exist? In: Werner, Jacques; Ali, Arif Hyder (eds.), A Liber Amicorum: Thomas Walde - Law Beyond Conventional Thoughts [online]. CMP Publishing, 2009, p. 265-276.

[4] Pandya, A.P. Interpretations and coherence of the fair and equitable treatment standard in investment treaty arbitration. The London School of Economics and Political Science (LSE), 2011.

[5] Ibid.

[6] Ibid Note 3.

several demonstrations against the project and investors. KWP argued that it relied upon GOK to remedy the political event while GOK argued that it did its best to reconcile KWP with the local community with no success. This was because matters in question were related to land rights which KWP had not addressed.[7]

GOK argument was that KWP was unable lawfully to implement and carry out the wind farm project and had failed to undertake an Environmental Impact Assessment as required by law. GOK further pleaded that the Kinangop's claim was founded on its own breach of statutory duty, disregard of the Constitutional rights of Kenyan citizens, failure to secure all relevant land rights from the local land owners, and a breach of the duty of good faith. In addition, the GOK advanced the argument that the facts and matters relied upon by KWP did not constitute a Political Event and consequently did not give rise to a compensation event or any legitimate expectation as KWP's loss was caused by its own failures.

The tribunal held that political interference did not frustrate the project and thus the claim was dismissed. The tribunal stated that there was no political event within the meaning of the letter of support.[8]

In *Walam Energy vs Republic of Kenya*[9], the investor commenced arbitration proceedings in International Centre for Settlement of Investment Disputes for cancellation of a geothermal licence. This was after the GOK establishing that the Walam Energy did not have the requisite capacity to explore geothermal resources in Kenya. GOK revoked the license in 2012 after reaching a conclusion that Walam energy had not performed its duties under the license. The claimant claims that the GOK breach it legitimate expectation by cancelling the license.

The idea of protection of investor expectations is not stated directly in most investment treaties. However, it has been identified by several arbitral tribunals as an essential element of fair and equitable treatment standard. Fair and equitable treatment is tied to the concept of legitimate expectation and is an essential element.[10]

---

[7] Ibid.

[8] Ibid.

[9] Ibid Note 2.

[10] Schill, S.W. Fair and equitable treatment under investment treaties as an embodiment of the rule of law.
Transnational Dispute Management (TDM), 3(5): 115-14, 2006.

2. Legitimate expectations of an investor in FET standard

Fair and equitable treatment standard safeguards treatment of investors through shifting times, in heterogeneous societies that have different political organizations.[11] States consider fairness and equity as fundamental values of a legal system. FET standard aim to safeguarding a foreign investor against subjective arbitrariness and misuse of power by the authorities.[12] The standard is presumed to reflect a common international level of treatment which parties to a treaty accept as positive law. [13]

What constitutes fair and equitable treatment has been difficult to define and interpret and case law on matter on the standard has been substantial in the last decade. This is because FET standard poses political, ethical and legal problem inherent in investment protection treaties.[14] The challenge is balancing the foreign investor interests with the sovereign right of the host country to regulate and govern its own territory. A wider interpretation of FET standard result in limitation on sovereign power and legislative will of the host state.[15]

The development of FET standard has led to alternative means of providing protection in disputes where there are no clear grounds for expropriation. According to Reinisch[16] FET standard is invoked in almost every investor–State arbitration. In order for investors to prove breach of FET standard, core elements must be established. The conduct of the State maybe "arbitrary, unjust, idiosyncratic, discriminatory and exposes the investor to sectional prejudice or involve lack of due process leading an outcome which offends judicial propriety."[17] In applying the FET standard, the treatment must be in breach of representation made by host State which were relied on by the foreign investor.

---

[11] Introduction to the Philosophy of Law", Pound (1922), cited in Knoph (1939) p. 4.
[12]Wouters, Jan and Duquet, Sanderijn and Hachez, Nicolas, International Investment Law: The Perpetual Seazrch for Consensus (2012).
[13] Ibid.
[14] Stephen Vasciannie, The Fair and Equitable Treatment Standard in International Investment Law and Practice, 70 BRIT. Y.B. INT'L L. 99 (1999).
[15] Ibid.
[16] Reinisch A., Standards of Investment Protection (Oxford: Oxford University Press, 2008) p 2.
[17] Waste Management Inc v. United Mexican states**.** Award, 30 April 2004.

The article will mainly focus on protection of legitimate expectation of an investor. Legitimate expectation of an investor is defined in *Thunderbird* case as follows;

> *"A situation where a contracting party conduct create reasonable and justifiable expectation on part of the investor to act in reliance on said conduct, such that failure by party to honour those expectations could cause the investor to suffer damage."*[18]

The extent of the concept of legitimate expectation is not clear and its content varies in arbitral practice. The ambiguity is created by the fact that legitimate expectation is interrelated with other elements of FET such as arbitrariness, due process and transparency.[19]

There are scholars who support the idea that legitimate expectations arise at the time the investors are planning to invest in a host State. In *Duke Energy v Ecuador* the tribunal provided that legitimate expectation cannot arise at a later point of time other than the investor entry to the host State.[20]According to Schreuer & Kriebaum[21], most international investment involve complex operations and therefore it is not possible to restrict creation of legitimate expectations at initial stage, but rather they should be considered at every stage when a decisive step is taken by the investor.[22] Therefore, the legal framework existing when the investor is making the decision to invest is important in creating legitimate expectations.

An investment is an economic project that requires a colossal amount of money and time. Due to longevity of the project, changes may occur that affect the investment. There are changes that relates to actions of a host State that affects investors. The changes may dependent on political and economic environment of the host State.

Investors are required to obey the laws of the host State. In addition, long term projects require agreement between the investor and host State

---

[18] International Thunderbird Gaming Corporation v. The United Mexican States, Award of 26 January 2006, UNCITRAL Case, para 147.

[19] Schreuer, Christoph, "Fair and Equitable Treatment in Arbitral Practice", Journal of World Investment and Trade, vol 7 (2005) pp.357-386.

[20] Duke Energy v. Ecuador, ICSID Case No. ARB/04/19.

[21] Schreuer, Christoph and kriebaum, Ursula, At What Time Must Legitimate Expectations Exist? In: werner, Jacques; ALI, Arif Hyder (eds.), A Liber Amicorum: Thomas Walde - Law Beyond Conventional Thoughts [online]. CMP Publishing, 2009, p. 265-276.

[22] Ibid.

outlining the gaps and limits of interferences in agreements rights. The claim for violation of legitimate expectation is raised in circumstances where the investor claim that host State has breached expectations assured at the beginning of the investment. The question is to what extent does equitable treatment supports legitimate expectations of the investor and which expectations are considered legitimate.

Based on arbitral practice, there are three key elements that must be fulfilled for an investor to claim breach of legitimate expectations:

1. *Specific representations or commitments made to the investors which were relied on;*
2. *The investor is aware of the general regulatory framework in host State; and*
3. *Investors' expectation be balanced against legitimate regulatory activities of host States.*[23]

What constitute specific assurances?

In *LG&E v Argentina* the tribunal held that for legitimate expectation of an investor to be established, there must be specific assurances. The tribunal considered the regulatory framework that governed gas industry. In order to attract investors Argentina enacted several laws fixing Argentine peso at par with the USA dollar. Calculation of gas tariffs was in dollars and conversion to pesos at the time of billing. The legal framework was later amended during 2000-2002 economic crisis that negatively affected investors. This resulted in several claims against Argentina. The tribunal concluded that the regulatory framework governing gas industry created specific commitments. The tribunal stated that the regulatory framework was not a general legislation since it was designed to regulate foreign investors. Therefore, it was not a general law since it affected all investors in terms of fixing tariffs.[24]

This informs the need to differentiate between legitimate expectations created by specific assurances and those created by general regulatory framework. If there are specific assurances generated by general legal framework, legislative expectations only have marginal scope of

[23] UNCTAD. Fair and equitable treatment, UNCTAD Series on Issues in International Investment Agreements II, United Nations: New York and Geneva, 2012. P. 68.

[24] Ibid.

application.[25] According to Schill, protection arising from general regulatory framework will only apply when newly introduced law is retroactive. In *Parkering v Lithuania*, it was held that assurances can be explicit in form of promise or implicit when the "*State make assurances that the investors took into account in making the investment.*" [26]

Therefore, legitimate expectations can arise only for specific assurances offered by the host State. Further, regulatory framework can be accounted for as specific assurances only if there is a specific connection to the investment. For example, when a host State provide investors with benefits without which the investor would not have invested in the host State.

What constitutes investor general awareness of regulatory framework in host State?

Investors should take into account business risks and regulatory framework in their area of investment. This indicates connection between reasonableness and due diligence on the part of the investors.[27] In *Duke Energy v Ecuador* case[28], the tribunal pointed out that expectations of the investors must be reasonable and legitimate. Therefore, all circumstances must be taken into account when assessing reasonableness including "*political, social economic and cultural conditions of the host State*."[29]

In specific areas of law, investors need to be considerate and foresee possible changes in legislation based on external factors. The investors ought to be familiar with connected area of law. For example, in environmental law, there exist regulations on use of chemicals that harm the environment. There are multilateral agreements that regulate investment in that filed. In addition, investors consider the stability of the legal environment in the field of investment. In *Methanex* case,[30] the investor entered in a regulated environment where restrictions on chemicals were

[25] Schill, S. W. Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law, International Law and Justice Working Papers. New York University Law School, Global Administrative Law Series, 2006 vol. VI. p. 32.

[26] Parkerings-Compagniet AS v. Lithuania (Parkerings v Lithuania), ICSID Case No. ARB/05/8, para 331 217.

[27] LG&E v Argentina, 2006.

[28] Duke Energy v. Ecuador, ICSID Case No. ARB/04/19, para. 340.

[29] Ibid.

[30] Methanex v United States, 2005.

typical. The claimant claim did not succeed against the United States of America (USA). This was informed by the fact that USA did not provide investors with specific assurances that regulation of chemical industry would remain unchanged. The tribunal stated that the ban in California State was non-discriminatory and did not breach legitimate expectations of the investor. It was held that the area of law was constantly being monitored by government authorities to safeguard public interests. Therefore, the changes could have been expected in the legal framework.

Therefore, claims based on breach of legitimate expectation that is connected to the stability of the legal system should not succeed if the regulation was non-discriminatory, reasonable and general.

What constitute due diligence on part of investor in absence of specific assurances from host State?

It is not sufficient for an investor to prove specific assurances. The investor should conduct due diligence in order to estimate the risks involved in the host State. In addition, the investor cannot rely on unlawful and unauthorized assurances. In the case of *Thunderbird v Mexican States*,[31] it was held that the claimant could not rely on the opinion of the government because he knew that gambling was illegal in Mexico. The investor did not provide correct facts to the host State of the nature of his business when he requested for legal opinion form the government. Therefore, the investor claim for breach of legitimate expectation failed since he did not act in good faith when he provided incorrect information.

In addition, the obligations of investors related to the investments are crucial in evaluating the responsibility of the state in case of breach. The investor is expected to fulfil certain conditions in order to be granted protection under bilateral investment treaties. In *Muchlinski* case,[32] it was held that the investor must have good faith and conduct due diligence when making an investment. Investments bear certain level of risk and investments

[31] Thunderbird v Mexico, 2006, Award, para 148 and 164.

[32] Muchlinski, Peter. 'Caveat Investor'? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard, International & Comparative Law Quarterly [online]. 2006, Vol. 55, p. 527-557, at 531 Available at http://eprints.soas.ac.uk/3466/1/CaveatInvester.pdf.

in developing countries require investors to be more careful due to the risks involved.[33]

The investor cannot rely on assurances given by host State. Investors should familiarize themselves with the legal framework governing a particular filed of investment. Investors cannot rely on the general framework that they encounter when they made the decision to invest in a host State. They need to consider political, economic, social and legal changes that occur in a host State. The principle of good faith should be applied by the investor and any actions that negate the principle are not legally protected.[34]

2.0 Broad and Specific approaches to the concept

The broad approach to the concept of legitimate expectations requires that officials of host State to act clearly and without ambiguity in order to ensure that the investor know in advance all regulations and policies to abide to. In the case, *Tecmed S.A. v. The United Mexican States*[35], Técnicas Medioambientales Tecmed, S.A. filed a claim alleging that the Mexican government's failure to re-license its hazardous waste site contravened various rights and protections set out in the bilateral investment treaty (BIT) between Spain and Mexico. The tribunal examined transparency with predictability of the legal environment of a host State. The tribunal reached the conclusion that Mexican officials had acted in unclear and ambiguous manner and violated legitimate expectations of the investor.[36] Therefore, an investor should be informed beforehand of any changes in legal policy of a host State. Further, the public and investors have an obligation to monitor proposed changes of the law and policies that affect their investment.

In *Duke Energy v Ecuador*, it was stated that expectations must arise form conditions advanced by host State and the foreign investor must have relied upon them when making the decision to invest.[37] However, in *Tecmed* case, there was a shift with regards to extension of legitimate expectations to be

[33] Ibid.

[34] A Case Review and Analysis of the Legitimate Expectations Principle as it Applies within the Fair and Equitable Treatment Standard [online]. Social Science Research Network Legal Scholarship Network ANU College of Law Research Paper No. 09-01 p. 45-52.

[35]Técnicas Medioambientales Techmed S.A. v. the United Mexican States, ICSID case No ARB(AF)/00/2 (Award) (May 29, 2003).

[36] Ibid.

[37] Duke Energy v. Ecuador, ICSID Case No. ARB/04/19.

considered. The state did not give any direct assurances nor implied assurances in their legal framework. The legitimate expectation of the investor was established since the investors were relying on return of their investment from the landfill which was expected last more than two years.

In MTD v Chile, the tribunal arrived at a different conclusion and criticized the decision of *Tecmed* because of reliance on investor expectations as a source of host State obligation. *MTD v Chile* Tribunal stated that "*the obligations of the host state towards investors derive from the terms of the applicable investment treaty and not from any set expectations investors may have. A tribunal ought to generate such expectations as a set of rights different from what is contained in the BIT may exceed its powers*".[38] The findings of the tribunal criticized the broad approached applied in *Tecmed* case which incorrectly held that legitimate expectation can be based on general regulatory framework.

The broad approach is based on un-changeability of policies and regulations of the host country. It provides the investor with inherent right of legitimate expectation unless the host country has a reason to alter its policy. This has brought concerns regarding the role of a State on legislative discretion when faced with economic crisis.

The broad approach bestows greater benefits on the foreign investor than the local economic activities and majority of citizens in the host state. Thus, many have criticized this approach since it fail to appreciate that regulations and policies of a host state may change depending on political and economic environment. Therefore, *Tecmed* case is not at all a standard to be used but rather it is a description of a perfect general rule in a perfect world which all states wish to attain.[39]

The narrow approach of legitimate expectation of an investor tries to relate to reality on the ground. The approach is more objective and closer to reality. The investor legitimate expectations are formed considering that the governing situations, existing precedent and practical experiences in a host State. This was expressed in *Parkering v Lithuania*[40] where the tribunal stated that Lithuania was experiencing political transition. Therefore, the investor

[38] MTD v Chile, ICSID Case No. ARB/01/7, Annulment proceedings para 67 213.

[39] UNCTAD, Fair and Equitable Treatment, Series on Issues in International Investment Agreements II, 2012, p63.

[40] Parkerings-Compagniet AS v. Lithuania (Parkerings v Lithuania), ICSID Case No. ARB/05/8, para 331 217.

should have predicted possibility of change in legitimate system. In such a case, an investor cannot expect that the policies and regulation of the host state would remain unchanged. Therefore, an investor who decides to invest in a country facing political transition accepts the instability as a trading risk and is expected to protect his legitimate expectations by having clear treaty conditions that prevent unexpected policy changes.[41]

The expectations of the investors are legitimate in case they are logical at the time of establishment of investment in host state. The evaluation of logicability must be done considering all conditions and not only incidents about investments but the political, economic and historical conditions of the host State.

3.0 The right of Host State to legislate or regulate policy

The broad approach of interpreting the concept of legitimate expectations presupposes that host countries lose their discretion on policy matters and regulatory autonomy. This is because the foreign investor right to predictability of laws and regulations in a host country reign supreme. This has been demonstrated in Argentina cases where the government faced economic crisis.[42] The executive made policy changes to remedy the situation. Following the executive changes in regulations, the country faced numerous arbitral cases. Investors were disgruntled by the decision of the government and sought protection under BIT. They claimed that there was lack of fairness in policy decisions and breach of legitimate expectations. Argentinian cases raised public concerns because they affected a host state ability to regulate its affairs for public interest.

In *Parkering v Lithuania*[43] case, the tribunal evaluated the investor claim of breach of legitimate expectation due to changes in local regulations. The tribunal held that each state has a right to legislate, modify and cancel local regulation. The right of the state to legislate was considered as a general principal. The investor has a right to protect his legitimate expectation that seem logical after considering all conditions. It was stated that the host

[41] Parkerings-Compagniet AS v. Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007.

[42] CMS v. Argentina, Op.cit, para. 274; Enron v. Argentina, ICSID Case No. ARB/01/3, Award, 22 May 2007, paras. 259–260.

[43] Parkerings-Compagniet AS v. Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007, paras. 335–336.

State did not guaranteed or act in a manner to provide logical expectation for the investor concerning absences of changes in new policy and regulations. At that time Lithuania was transitioning from Soviet Union to European Union. Therefore, changes in regulations was possible and any expectation based on stability of regulations was illegitimate. The tribunal held that the legitimate space was unpredictable and therefore, the investor should have predicated the possibility of changes in regulations and policies.

The Continental case against Argentina[44] emphasized that the stability of the regulatory framework in a host State provided for under bilateral treaty does not necessary create legitimate commitment for parties. Arbitral tribunals have acknowledged the right of host State to legislate on general interests even though the changes in regulations may have some negative effect on the investor.[45] Therefore, such actions by host state followed by good will cannot be regarded as violation of legitimate expectation of the investor or violation of fair and equitable standard.

4.0 How to balance the interests of host State and Investor

Arbitral tribunals have emphasized the need to balance investor legitimate expectations against the host state legitimate regulatory goals. The underlying assumption is that fair and equitable treatment standard does not prevent a State from making changes to policies and regulations in public interest despite having negative effect on investment.[46] The principle of legitimate expectation should be applied in a sense that permit a balance of protection of foreign investors interests and the host State autonomy to enact legislation in public interests. In addition, the principle of consistency and stability should outweigh power of host state to act in public interest.

Proportionality of investors and host state interests play a role in controlling the extent to which the exercise of regulatory power is permissible in interfering with foreign investment under fair and equitable treatment. When we consider what arbitral tribunals identify as reasonable, it does not shed light on what constitute legitimate expectations or consistency in the legal

[44] CMS v. Argentina, Op.cit, para. 274; Enron v. Argentina, ICSID Case No. ARB/01/3, Award, 22 May 2007, paras. 259–260.

[45] PSEG Global et al. v. Republic of Turkey, ICSID Case No. ARB/02/5, Award, 19 January 2007.

[46] Tudor, I. The fair and equitable treatment standard in the international law of foreign investment. Oxford: Oxford University Press, 2008.

framework of a host State.[47] Therefore, it is not clear what can be considered reasonable. There are tribunals that are strict in interpretation of what constitute breach of legitimate expectation. They consider consistency and stability as absolute principles which lead to finding of breach of legitimate expectation when host States act in public interest. Such strict interpretation only serves the interest of the investors. A state must be able to adjust in crisis situations and in case where its citizens are at risk.

That is why proportionality should be understood as a specific manifestation of the concept of reasonableness. Reasonableness and proportionality suggest a balance of interest. The concept of reasonableness should be understood as a search for equilibrium in context of disagreement. Proportionality is widely used by tribunals because it provides a set of criteria to judge measures of legality while reasonableness lacks the analytical methodology. Therefore, proportionality test is used to scrutinize reasonableness.

The host state has the right to legislate to protect public interest but the same must be done logically, reasonably and fairly. The goal of treaties is not to protect foreign investors but to help develop the economy of a host country.[48] Local development require that investors are accorded preferable treatment and the same be balanced with legitimate right of host country to protect public interest.

5.0 Conclusion

Legitimate expectation of the investor is one of the elements of fair and equitable treatment that is emphasized in arbitral tribunals. The issue of balancing investor expectations and special needs of the host country to protect the public interest is a growing concern in developing countries. The concept of fair and equitable treatment should not only protect the interest of investors but has to consider the interest of host state and should bring a balance between the interests of the parties.

Investors should take enough time to evaluate the possible risks and adjust their expectations with real conditions in the host country. When investors decide to invest, they have an obligation to examine special prevailing

[47] Ibid.

[48] Joseph C. Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 21 January 2010.

conditions of the host country such as level of democracy, governance practices and development. The reality on the ground is that we cannot expect a state to change its governance practices and regulations because an investor has made an investment. However, the investor can be asked to evaluate the host country with care and make a decision to invest bearing in mind of existing risks.

The article recommends that developing countries should detach themselves from the trappings of the school of thought that lead them to make concession to foreign investors. There is need to rethink the terms and conditions given to investors. The host State should be allowed to have control of development policies without legitimacy of its actions being unnecessarily being challenged by investors.

In addition, developing countries of ought to rethink on cost and benefits the dangers of trading off sovereign right to exercise control over all activities within it territory. An appreciation of the issues posed by legitimate expectation of an investor means that developing countries are better placed to clamour for equalitarian terms when engaging foreign investors.

References

1. Muchlinski, Peter. 'Caveat Investor'? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard. International & Comparative Law Quarterly [online]. 2006, Vol. 55, p. 527-557, at 531. Available at http://eprints.soas.ac.uk/3466/1/CaveatInvester.pdf.
2. Wouters, Jan and Duquet, Sanderijn and Hachez, Nicolas, International Investment Law: The Perpetual Seazrch for Consensus (2012).
3. Reinisch A., Standards of Investment Protection (Oxford: Oxford University Press, 2008).
4. Schreuer, Christoph and Kriebaum, Ursula. At What Time Must Legitimate Expectations Exist? In: Werner, Jacques; Ali, Arif Hyder (eds.), A Liber Amicorum: Thomas Walde - Law Beyond Conventional Thoughts [online]. CMP Publishing, 2009, p. 265-276.
5. Stephen Vasciannie, The Fair and Equitable Treatment Standard in International Investment Law and Practice, 70 BRIT. Y.B. INT'L L. 99 (1999).
6. Schill, S. W. Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law, International Law and Justice Working Papers. New York University Law School, Global Administrative Law Series, 2006 vol. VI. p. 32
7. Tudor, I. The fair and equitable treatment standard in the international law of foreign investment. Oxford: Oxford University Press, 2008.
8. Pandya, A.P. Interpretations and coherence of the fair and equitable treatment standard in investment treaty arbitration. The London School of Economics and Political Science (LSE), 2011.
9. UNCTAD, Fair and Equitable Treatment, Series on Issues in International Investment Agreements II, 2012.
10. UNCTAD. Fair and equitable treatment, UNCTAD Series on Issues in International Investment Agreements II, United Nations: New York and Geneva, 2012.

Cases

11. Waste Management Inc v. United Mexican States. Award, 30 April 2004
12. "Myers", S.D. Myers Inc. v Canada. Partial Award (Final Award on the Merits), 13 November 2000 http://naftaclaims.com/Disputes/Canada/SDMyers/SDMyersFinalAwardMerits.pdf
13. MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile. 25 May 2004 http://www.asil.org/ilib/MTDvChile.pdf
14. Methanex Corporation v. United States of America. Final Award, 3 August 2005 http://ita.law.uvic.ca/documents/MethanexFinalAward.pdf
15. Genin, Alex, Eastern Credit ltdInc asn AS Baltoil v Republic of Estonia. Award, 25 June 2001 http://ita.law.uvic.ca/documents/Genin-Award.pdf
16. CME Czech Republic B.V. v. The Czech Republic. Final Award, 14 March 2003 http://ita.law.uvic.ca/documents/CME-2001PartialAward.pdf

17. CMS Gas Transmission Company vs. the Republic of Argentina. Decision on Jurisdiction, 17 July 2003, 42 ILM 788 (2003).
18. Alex Genin et al v Estonia, ICSID Case No ARB/99/2, Final Award,25 June 2001.
19. L.F.H.Neer and Pauline Neer (USA) v United Mexican States, Reports of international Arbitral Awards (15october 1926) 21.
20. Técnicas Medioambientales Techmed S.A. v. the United Mexican States, ICSID case No ARB(AF)/00/2 (Award) (May 29, 2003).
21. Duke Energy v. Ecuador, ICSID Case No. ARB/04/19.
22. Parkerings-Compagniet AS v. Lithuania (Parkerings v Lithuania), ICSID Case No. ARB/05/8, para 331 217.
23. WalAm Energy Inc. v. Republic of Kenya ICSID Case No. ARB/15/7 Tribunal recently constituted: June 2, 2016 (Geothermal energy development)
24. Joseph C. Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 21 January 2010.
25. PSEG Global et al. v. Republic of Turkey, ICSID Case No. ARB/02/5, Award, 19 January 2007,
26. CMS v. Argentina, Op.cit, para. 274; Enron v. Argentina, ICSID Case No. ARB/01/3, Award, 22 May 2007, paras. 259–260
27. Kinangop Windpark Ltd vs Republic of Kenya, ICC Case 21728/TO.
28. International Thunderbird Gaming Corporation v. The United Mexican States, Award of 26 January 2006, UNCITRAL Case, para 147

ISBN 978-9966-046-15-4