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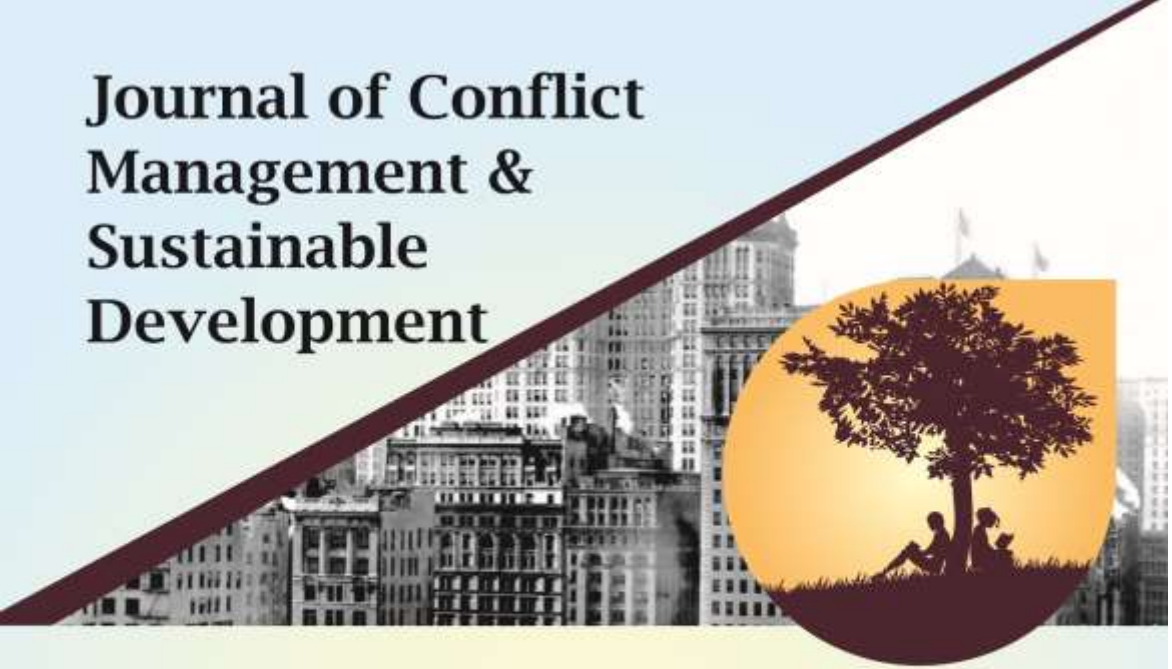

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Editor's Note

Welcome to Volume Three Issue one of the Journal of Conflict Management and Sustainable Development (Journal of CMSD, Vol 3(1)). The themes of Conflict Management and Sustainable Development continue to be relevant.

The Sustainable Development Goals are now the backdrop against which discourse on issues that touch on the human and ecological wellbeing is based. There has been a debate on how to eradicate poverty, achieve cleaner habitats, ensure access to justice/ gender equity and how to utilise international trade as a tool to promote human rights and sustainable development.

This Issue contains articles covering various themes such as: the interrelationship between International Investment Law and Policy in Africa, and the Human Rights, Environmental Damage and Sustainable Development; the Legacies of Colonialism and the place of Third World Approaches to International Law (TWAIL) in the teaching of International Law in Kenya; the merits and demerits of management of community land conflicts through arbitration in Kenya; and the status of South Africa with regard to either monism or dualism in its observance of international law, and whether South African law exhibits an interaction of partly monist and partly dualist (monist-dualist) complementary application of international law and domestic law. The prospects and challenges of environmental litigation in Kenya have also been explored in an article that discusses the low environmental caseload in Kenya's Environment and Land Court and the required reforms to increase the said caseload.

These themes are relevant in the context of many African states and thus useful for a wider scope of readers. The Journal is peer reviewed so as to ensure the highest quality possible. Feedback received from the readers has shaped the Journal positively. We aim at continuous improvement. The Journal reaches a worldwide audience of scholars, policy makers and institutions interested in conflict management and achievement of Sustainable Development.

We appreciate the Editorial Board, the Publisher, the Reviewers and the contributors. Teamwork makes it possible to produce the Journal and keep it running.

Dr Kariuki Muigua, **PhD, FCIArb, Chartered Arbitrator, Accredited Mediator**
Managing Editor, May, 2019

Journal of Conflict Management and Sustainable Development

A Journal Published Twice a Year – Volume 3 Issue 1

International Investment Law and Policy in Africa: Human Rights, Environmental Damage and Sustainable Development

By: ***Kariuki Muigua****

Abstract

Sustainable development agenda seeks to strike a balance among what are considered to be the three dimensions of sustainable development: the economic, social and environmental. Any efforts that concentrate on either of the three while neglecting the other aspects are undesirable. This paper looks at the environmental aspects of sustainable development and the related issues of human rights in the context of international investments law. While the issues as discussed are transnational in nature, and thus the scope of this paper is not limited to Kenya, there are references to the relevant regional and international legal instruments, where applicable.

1.0 Introduction

This paper critically discusses the sustainable development agenda and the related issues of human rights in the context of international investments law with a bias on Kenya. It explores the international investments law and policy in Africa and Kenya in particular, and how the same addresses the related environmental questions and human rights issues that arise.

1.1 International Investment Law and Policy in Africa: International Investments and National Development

The main objective of investment laws is to promote (foreign) investment by regulating access to the domestic market; stipulating investor rights and guarantees; clarifying access to dispute settlement; setting up institutions, including investment promotion agencies and one-stop shops; and providing incentives schemes.[1] Development of international investment law, which

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Paper was first presented at the Africa International Legal Awareness (AILA) Conference Held on 5th November, 2018 at Riara University, Nairobi, Kenya.

* *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/*

pre-dates the development of investment treaties by several decades, is largely attributed to the customary international law theory that an affront to the rights of a foreign owned business in its host state is an affront to the sovereignty and interests of the investor's home state sovereign.[2] Scholars have observed that that in the immediate post-World-War II era, as international investment gained momentum, foreign investors who sought the protection of international investment law encountered an ephemeral structure consisting largely of scattered treaty provisions, a few contested customs, and some questionable general principles of law.'[3] For investors, this international legal structure was seriously deficient in at least four respects: first, it was incomplete, for it failed to take account of contemporary investment practices and to address important issues of investor concern, such as their rights to make monetary transfers from the host country; second, the principles that did exist were often vague and subject to varying interpretations; third, the content of international investment law was contested, particularly between industrialized countries and newly decolonized developing nations that in the 1970s began to demand a new international economic order to take account of their particular needs; and finally, existing international law offered foreign investors no effective enforcement mechanism to pursue their claims against host countries that had injured or seized their investments or refused to respect their contractual obligations.[4]

To change the dynamics of this struggle and protect the interests of their companies and investors, industrialized countries began a process of negotiating international investment treaties that, to the extent possible,

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[1] United Nations Conference on Trade and Development, *World Investment Report 2018*
UNCTAD/WIR/2018 (United Nations, 2018), p. 106. Available at https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf [Accessed on 1/10/2018].

[2] Mann, H., "Reconceptualizing international investment law: its role in sustainable development," *Lewis & Clark Law Rev.* 17 (2013): 521 at p.521.

[3] Salacuse, J.W., "The Treatification of International Investment Law," *Law and Business Review of the Americas* 13, no. 1 (2007): 155 at p. 155.

[4] Ibid, at p. 155.

would be: 1) complete, 2) clear and specific, 3) uncontestable, and 4) enforceable. These treaty efforts took place at both the bilateral and multilateral levels, which, though separate, tended to inform and reinforce each other.[5] Notably, the focus of the initial period of growth of investment treaties was singular: the protection of investor rights in foreign states.[6] The protection of investors remained the sole objective of International Investment Agreements (IIAs) until the inclusion of investment liberalization provisions.[7]

United Nations Conference on Trade and Development (UNCTAD) observes that national investment laws operate within a complex web of domestic laws, regulations and policies that relate to investment (e.g. competition, labour, social, taxation, trade, finance, intellectual property, health, environmental, culture).[8] It is also observed that investment-related issues are typically also enshrined in countries' company laws, and-sometimes- in countries' constitutions. As such, to the extent a country has an investment law, this law must be assessed in the context of the country's larger policy framework.[9]

There has been identified challenges arising from the policymaking interaction between IIAs and the national legal framework for investment as follows: policymakers in charge of national and international investment policies might be operating in silos and create outcomes that are not mutually supportive or, worse, conflicting; incoherence (e.g. between a clearly defined Fair and Equitable Treatment (FET) clause in one or several IIAs and a broad FET clause in an investment law) may have the effect of rendering IIA reform ineffective; and incoherence between investment laws and IIAs may also create Investor-state dispute settlement (ISDS)-related risks when national laws include advance consent to international

[5] Ibid, at p. 156.

[6] Mann, H., "Reconceptualizing international investment law: its role in sustainable development," *Lewis & Clark Law Rev.* 17 (2013): 521 at p.524.

[7] Ibid, at p.524.

[8] United Nations Conference on Trade and Development, *World Investment Report 2018* (United Nations, 2018), p. 106.
Available at https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf [Accessed on 1/10/2018].

[9] Ibid, at p. 106.

arbitration as the means for the settlement of investor-State disputes, which could result in parallel proceedings.[10]

The World Bank has rightly pointed out that different countries have different priorities in their development policies and, therefore, any attempt at comparison of their development levels, would require one to first decide what development really means to them, and what it is supposed to achieve.[11] However, regardless of their priorities, developing economies can draw on a range of external sources of finance, including Foreign Direct Investment (FDI), portfolio equity, long-term and short-term loans (private and public), Official development assistance (ODA), remittances and other official flows.[12] Foreign investments are considered important for a country as they have the potential to build and upgrade industries, connect countries to international markets and also drive essential innovation and competitiveness.[13] In addition, Investment Promotion Agencies (IPA) in developing economies expect most investment to come from agribusiness corporations, followed by information and communication Multinational Enterprises (MNEs). IPAs also expect to attract utilities and construction investors to fill infrastructure gaps. On the other hand, IPAs in developed economies expect most investments to come from information and communication companies and professional services, and from specialised manufacturing industries: pharmaceuticals, automotive and machinery.[14] It is however noteworthy that there are some parallels within MNE expectations: IPAs from developing and transition economies all forecast investments from the food and beverages industry (light industry), matching corporation's plans of investments across the developing world. In addition, another promising industry for developing economies is information and

[10] Ibid, at p. 107.
[11] The World Bank, 'What Is Development? ' pp. 7-10 at p.10. Available at *http://www.worldbank.org/depweb/beyond/beyondco/beg_01.pdf* [Accessed on 1/10/2018].
[12] United Nations Conference on Trade and Development, *World Investment Report 2018*, at p. 12.
[13] United Nations Conference on Trade and Development, *World Investment Report 2018.*
[14] Ibid, at p.18.

communication (that includes both tech and telecom corporations) as the digital economy spreads to frontier markets.[15]

2.0 Investments, Human Rights, Environmental Damage and Sustainable Development: The (Dis) Connection

Sustainable development has been defined as a combination of elements, such as environmental protection, economic development, and most importantly social issues.[16] Notably, the relationship between development and environment gave birth to the sustainable development concept, whose central idea is that global ecosystems and humanity itself can be threatened by neglecting the environment.[17] Economic, social, environmental and cultural aspects must be integrated in a harmonious manner to enhance the intergenerational well-being.[18]

Sustainable development contains both substantive and procedural elements, where substantive elements include the integration of environmental protection and economic development; the right to development; the sustainable utilisation of natural resources; the equitable allocation of resources both within the present generation and between present and future generations, while procedural elements include public participation in decision making; access to information; and environmental impact assessment.[19]

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[15] Ibid, at pp.18-19.

[16] Fitzmaurice, M., 'The Principle of Sustainable Development in International Development Law' *International Sustainable Development Law*, Vol. 1 ISBN: 978-1-84826-314-7 (eBook).

[17] 'Theories of Economic Development,' p. 14. Available at *www.springer.com/cda/content/document/cda_downloaddocument/9789812872470-c2.pdf?SGWID=0-0-45-1483317-p177033406* [Accessed on 02/10/2018].

[18] Ibid; See also generally, Chambers, R., *Sustainable Livelihoods, Environment and Development: Putting Poor Rural People First*, IDS Discussion Paper 240, Brighton: IDS, 1987. Available at *https://opendocs.ids.ac.uk/opendocs/bitstream/handle/123456789/875/rc279.pdf?sequence=1&isAllowed=y* [Accessed on 02/10/2018].

[19] Birnie, P. et al, *International Law and the Environment*, (3rd Ed., Oxford University Press, New York, 2009), p. 116.

Human rights are inextricable from sustainable development, since human beings are at the centre of concerns for sustainable development.[20] Human rights depend upon having a liveable planet. The *Draft Principles on Human Rights and the Environment of 1994,*[21] (1994 Draft Principles) provide for the interdependence between human rights, peace, environment and development, and declares that human rights, an ecologically sound environment, sustainable development and peace are interdependent and indivisible.[22] This indivisibility has been affirmed by various judicial courts such as in the in the case of European union case of *Lopez Ostra v Spain*[23], where the Court stated: *"Naturally, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely…."*

The human rights-based approaches provide a powerful framework of analysis and basis for action to understand and guide development, as they draw attention to the common root causes of social and ecological injustice.[24] Human rights standards and principles then guide development to more sustainable outcomes by recognizing the links between ecological and social marginalization, stressing that all rights are embedded in complex ecological systems, and emphasizing provision for need over wealth accumulation.[25]

The *Universal Declaration of Human Rights of 1948*[26] (UDHR) places an obligation on all states to employ progressive measures to ensure recognition of human rights as guaranteed therein. Notably, the Declaration recognises the need for mobilization of resources by States so as to ensure realization of these rights. It provides that everyone, as a member of

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[20] 1992 Rio Declaration, Principle 1, which reads in full: "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."

[21] Draft Principles On Human Rights And The Environment, E/CN.4/Sub.2/1994/9, Annex I (1994).

[22] Draft Principles on Human Rights and the Environment, Principle 1.

[23] *López Ostra v. Spain*, 303 Eur. Ct. H.R. 41 (1994).

[24] Fisher, A.D., 'A Human Rights Based Approach to the Environment and Climate Change' *A GI-ESCR Practitioner's Guide*, March 2014.

[25] Ibid.

[26] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: *http://www.refworld.org/docid/3ae6b3712c.html* [Accessed 10/08/2016].

society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.[27]

While the *International Covenant on Economic, Social and Cultural Rights (*ICESCR) 1966[28] guarantees the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources, they must do so without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law.[29] This is also captured under the *African Charter for Human and People's Rights* (Banjul Charter)[30].

Agenda 21[31] was adopted in 1992 with the aim of combating the problems of poverty, hunger, ill health and illiteracy, and the continuing deterioration of the ecosystems on which the human race depend for their well-being. Further, it sought to deal with the integration of environment and development concerns and greater attention to them which would lead to the fulfillment of basic needs, improved living standards for all, better protected and managed ecosystems and a safer, more prosperous future.[32] The aim was to achieve a global consensus and political commitment at the highest level on development and environment cooperation. *Agenda 21* basically seeks to enable all people to achieve sustainable livelihoods through integrating factors that allow policies to address issues of development, sustainable resource management and poverty eradication simultaneously.[33]

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[27] *Universal Declaration of Human Rights of 1948,* Art. 22.

[28] *International Covenant on Economic, Social and Cultural Rights*; adopted 16 Dec. 1966, 993 U.N.T.S. 3, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) (entered into force 3 Jan. 1976).

[29] Ibid, Article 1.2.

[30]*African Charter for Human and People's Rights* (Banjul Charter), adopted 27 June 1981, entered into force 21 October 1986), Article 21.

[31](A/CONF.151/26, vol. II), United Nations Conference on Environment & Development, Rio de Janeiro, Brazil, 3 to 14 June 1992, Agenda 21.

[32] Ibid, Preamble.

[33] Ibid, Clause 3.4.

The *IISD Model International Agreement on Investment for Sustainable Development, 2005*[34] was formulated to promote foreign investment that supports sustainable development, in particular in developing and least-developed countries.[35]

Notably, the new generation of International Investment Agreements (IIAs) have sustainable development orientation, where, in contrast to the IIAs signed in 2000 and before, the 2017 IIAs include a larger number of provisions explicitly referring to sustainable development issues (including by preserving the right to regulate for sustainable development-oriented policy objectives).[36] For instance, UNCTAD observes that of the 13 agreements concluded in 2017, 12 have general exceptions – for example, for the protection of human, animal or plant life or health, or the conservation of exhaustible natural resources.[37] In addition, all but one also explicitly recognize that the parties should not relax health, safety or environmental standards to attract investment; and 11 refer to the protection of health and safety, labour rights, the environment or sustainable development in their preambles.[38] A good example is the Morocco-Nigeria BIT of 2016.

The place of sustainable development agenda in investment law was also captured in the *United Nations 2030 Agenda for Sustainable Development*[39] which outlines the Sustainable Development Goals (SDGs) provides that one of the ways of reducing inequality within and among countries is 'to encourage official development assistance and financial flows, including

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[34] Howard Mann, et al., Int'l Inst. for Sustainable Dev., IISD Model International Agreement on Investment for Sustainable Development: Negotiator's Handbook (2d ed. 2006), available at https://www.iisd.org/sites/default/files/publications/investment_model_int_handbook.pdf [Accessed on 1/10/2018].

[35] Model International Agreement on Investment for Sustainable Development, Article 1.

[36] United Nations Conference on Trade and Development, *World Investment Report 2018* (United Nations, 2018), op cit., at p. 96.

[37] Ibid, at p. 96.

[38] Ibid, at p. 96.

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

foreign direct investment, to States where the need is greatest, in particular least developed countries, African countries, small island developing States and landlocked developing countries, in accordance with their national plans and programmes'.[40] In addition, it provides that in order to strengthen the means of implementation and revitalize the global partnership for sustainable development, there is needed to adopt and implement investment promotion regimes for least developed countries.[41] Furthermore, one of the declarations is that '*private business activity, investment and innovation are major drivers of productivity, inclusive economic growth and job creation. The state parties also acknowledged the diversity of the private sector, ranging from micro-enterprises to cooperatives to multinationals. They called on all businesses to apply their creativity and innovation to solving sustainable development challenges. They affirmed to foster a dynamic and well-functioning business sector, while protecting labour rights and environmental and health standards in accordance with relevant international standards and agreements and other on-going initiatives in this regard, such as the Guiding Principles on Business and Human Rights and the labour standards of ILO, the Convention on the Rights of the Child and key multilateral environmental agreements, for parties to those agreements*'.[42]

The SDGs ought to inform the efforts of member states in achieving sustainable development, poverty eradication, and environmental conservation and protection. They offer an integrated approach, which is environmentally conscious, to combating the various problems that affect the human society as well as the environmental resources. It is expected that states efforts will be informed by the SDGs in the economic, social, political and environmental decisions. The Goals also provide an elaborate standard for holding countries accountable in their development activities. This way, environmental health is not likely to be sacrificed at the altar of economic development but will be part of the development agenda. The *2030 Agenda* paints a picture of inextricable interdependence as far as international investment as a tool of development and the realisation of sustainable development agenda are concerned.

[40] Ibid, Goal 10(7) b.
[41] Ibid, Goal 17.5.
[42] Ibid, Para. 67.

In addition to other reform-oriented elements, some of the IIAs concluded in 2017 contain innovative features that have rarely been encountered in earlier IIAs such as: conditioning treaty coverage on investors' contribution to sustainable development. That is, inclusion of a requirement that a covered investment should contribute to the host state's economy or sustainable development (Burundi-Turkey BIT, Mozambique-Turkey BIT, Turkey-Ukraine BIT).[43] Moreover, there is also need for fostering responsible investment which requires including a "best efforts" obligation for investors to respect the human rights of the people involved in investment activities and to promote the building of local capacity and the development of human capital.[44] For instance, the mining operations often exist in remote parts of developing countries, with the combined challenges in public services delivery and development assistance and mining sector players are always called upon to catalyze development in such areas.[45] Furthermore, an increase in the number of multinational corporations has led to a greater presence of private corporations amongst communities around the world, and this, combined with a global decline in public sector development assistance has cast the private sector as an important player in social and economic development.[46] Under the requirement for corporate social responsibility, these corporations play an active role in betterment of the lives of locals in their countries' and specifically areas of operation. They, therefore, appear to be more useful in upgrading the lives of locals as compared to the often inefficient or absent government bodies.

This has been attributed to various factors including the existence of mining operations in environments where government institutions may be absent, weak, lack in capacity or corrupt, leaving gaps in essential public service

[43] United Nations Conference on Trade and Development, *World Investment Report 2018* (United Nations, 2018), p. 98. Available at https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf [Accessed on 1/10/2018].

[44] Ibid, at p. 98.

[45] "World Bank, Mining Foundations, Trust and Funds: A Sourcebook. Washington, DC., 2010, p. 7, available at *https://openknowledge.worldbank.com/handle/10986/16965* [Accessed on 1/10/2018].

[46] The World Bank, 'Examining Foundations, Trusts and Funds (FTFs) in the Mining Sector,' Part 1, p.17. Available at http://siteresources.worldbank.org/EXTOGMC/Resources/Sourcebook_Part1_Main_Findings.pdf[Accessed on 1/10/2018].

provision. Further, the social and environmental footprint of mining operations often has impacts on local communities, requiring compensation and mitigation programmes and the remote locations of many operations accentuates the expectation for employment and economic development within host communities. The enclave nature of the mining industry can limit the "trickle down" of benefits unless specific social investment programmes are undertaken.[47] These are usually based on corporate social responsibility requirements that require these organisations to contribute positively to the lives of the communities.

The corporations involved in the extraction activities are not only supposed to focus on maximising profits, but also impact positively on the lives of the communities amongst whom they operate. Corporate Social Responsibility is, thus, an important tool that can be used by MNCs as a business tool to promote a positive image to business stakeholders, and as a way to improve the quality of life among citizens of the host countries.[48] However, the work of MNCs must go beyond CSR and be sustainable in the long run, as CSR in most cases is largely philanthropic and not anchored in law.[49] In carrying out their functions, the various MNCs should ensure that they operate in a manner that is sustainable. They are to ensure that their activities are socially sustainable, environmentally sustainable and economically sustainable.

These requirements should be backed by a legal and policy framework safeguarding the rights of communities as well as entrenching environmental obligations in investment laws. It has however been noted that these innovative features do not necessarily translate into reduced level of investment protection, as most of the IIAs signed in 2017 maintain substantive investment protection standards.[50]

It has been argued that states have a right, and indeed a duty, to seek to ensure that investments make a positive contribution to their sustainable

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[47] *Ibid*.

[48] Pimpa, N., 'Multinational Corporations: Corporate Social Responsibility and Poverty Alleviation in Thailand,' School of Management, RMIT University.

[49] See generally, Porter, M.E. & Kramer, M.R., 'Strategy and Society: The Link between Competitive Advantage and Corporate Social Responsibility,' *Harvard Business Review,* December, 2006.

[50] Ibid, at p. 98.

development.[51] This, it is argued, requires a shift in focus from looking at the quantity of investment as the only issue, to the quality of that investment as the key issue.[52] From a sustainable development perspective, the link to investment is considered essential.[53] Scholars also argue that from a purely environmental perspective, foreign direct investment (FDI) provides a very valuable way to disseminate new technologies and processes, and thus to more rapidly advance the goal of sustainable development at the different levels of communities, states, and globally.[54]

In addition, from a broader sustainable development perspective however, and taking fully into account social and economic development factors as well as environmental, more subtle approaches are needed.[55] Those in support of this proposition also believe that poverty eradication and economic and social development must be equal factors, and the protection and promotion of human rights is both a necessary goal and a measure for the achievement of sustainable development.[56] This is also affirmed in Principle 5 of the *Rio Declaration on Environment and Development 1992*[57] which provides that all States and all people should 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. Poverty eradication is thus considered to be at the heart of achieving sustainable development in the world, and unless it is dealt with, then attaining sustainable development remains a mirage. Environmental goals cannot be achieved without development since poor people will circumvent environmental restrictions in their desperation for land, food, and

[51] Mann, H., "Reconceptualizing international investment law: its role in sustainable development," *Lewis & Clark Law Rev.* 17 (2013): 521 at p.534.
[52] Ibid, at p.534.
[53] Ibid.
[54] Mann, H., "Reconceptualizing international investment law: its role in sustainable development," op cit., at p. 535.
[55] Ibid., p. 535.
[56] Ibid, at p.534.
[57] United Nations, *Rio Declaration on Environment and Development 1992,* UN Doc. A/CONF.151/26 (vol. I) / 31 ILM 874 (1992).

sustenance.[58] The World Bank defines poverty as "the economic condition in which people lack sufficient income to obtain certain minimal levels of health services, food, housing, clothing and education generally recognized as necessary to ensure an adequate standard of living."[59]

Human rights are defined as universal, inalienable rights inherent to all human beings, which they are entitled to without discrimination.[60] Environmental protection is usually treated as a human rights issue because a human rights perspective directly addresses environmental impacts on the life, health, private life, and property of individual humans, thereby serving to secure higher standards of environmental quality, based on the obligation of states to take measures to control pollution affecting health and private life.[61]

Recognition of the relationship between abuse of human rights of various vulnerable communities and related damage to their environment is found in the concept of environmental justice. Environmental justice theory recognizes how discrimination and marginalization involves expropriating resources from vulnerable groups and exposing these communities to the ecological harms that result from use of those resources. Environmental justice is based on the human right to a healthy and safe environment, a fair share to natural resources, the right not to suffer disproportionately from environmental policies, regulations or laws, and reasonable access to environmental information, alongside fair opportunities to participate in environmental decision-making.[62]

Despite the fact that the period between 1960s-70s saw many African countries attain independence from colonial domination, and the expectations that wealth would trickle down and create jobs for the

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[58] Sachs, J.D. and Reid, W.V., "Investments toward sustainable development," *Science (Washington)*, Vol.312, no. 5776 (2006): 1002.

[59] World Bank, *Handbook on Measuring Poverty,* Chapter 2. Available at *http://siteresources.worldbank.org/INTPA/Resources/429966125977480572 4/Poverty_Inequality_Handbook_Ch02.pdf* [Accessed on 3/10/2018].

[60] *www.ohchr.org/EN/Issues/pages/WhatareHumanRights.aspx* [Accessed 3/10/2018].

[61] Boyle, A., 'Human Rights and the Environment: Where Next?' *The European Journal of International Law,* Vol.23, No. 3, 2012.

[62] Scottish Executive Social Research, *Sustainable Development: A Review of International Literature*, (Scottish Executive Social Research, 2006), p.8. Available at *http://www.gov.scot/resource/doc/123822/0029776.pdf* [Accessed on 3/10/2018].

people,[63] for most African countries, the expectations of a prosperous independent country have remained a mirage. Poverty remains rampant amongst many people across many African nations. Oil and mineral extraction, amongst other resources, in Africa is mostly carried out by multinational companies. These companies enter into agreements with African Governments for the extraction of resources. They have high bargaining power in the negotiations due to their influential position and backing from their governments. On the other hand, African governments have low bargaining power in these contracts or agreements because they are less influential. They are more flexible in negotiations than their foreign counterparts. In exchange, they end up giving what rightfully belongs to the people to foreigners.[64]

Governments need to enforce environmental liability laws in their countries. To curb or avert violation of environmental rights or human rights, corporate entities involved in international investments could be exposed to criminal or tortious liability. A claim for toxic torts, in a civil suit, would be brought against a corporation for personal injury resulting from exposure to chemicals and other compounds brought about by activities of the corporation. Claims in toxic torts could be brought by employees, and other ordinary citizens that might suffer personal injury from toxic outputs from the activities of a corporation. This would be in addition to claims for workers' compensation for occupational injury, where they occur. The liability could also arise from environmental harm affecting communities and their rights. For instance, *Wiwa v. Royal Dutch Petroleum, Wiwa v. Anderson*, and *Wiwa v. Shell Petroleum Development Company* were three lawsuits filed by the Center for Constitutional Rights (CCR) and co-counsel from EarthRight International on behalf of relatives of murdered activists who were fighting for human rights and environmental justice in

[63] Pilger, J., "Apartheid Did Not Die" in "Freedom Next Time" (Edition, 2006); "Mandela's Greatness may be assured, but not his Legacy" *New African*, Jan. 2014.

[64] Africa Development Bank, "Resource companies ripping-off Africa"-AFDB Chief.Available at *http://uk.reuters.com/Art./2013/06/16/uk-africa-economy-idUKBRE95F0EH20130616* [Accessed on 3/10/2018].

Nigeria.[65] Royal Dutch/Shell began using land in the Ogoni area of Nigeria for oil production in 1958. Pollution resulting from the oil production has contaminated the local water supply and agricultural land upon which the region's economy is based. Also, Royal Dutch/Shell for decades, is said to have worked with the Nigerian military regime to suppress any and all demonstrations that were carried out in opposition to the oil company's activities.[66] It has been alleged that Shell's aim for the lowest possible production cost including the practice of gas flaring, without regard for the resulting damage to the surrounding people and land, wreaked havoc on local communities and the environment.[67] In the early 1990s, the Ogoni, led by Ken Saro-Wiwa and the Movement for the Survival of the Ogoni People, began organized, non-violent protests against Shell's practices. Shell grew increasingly concerned with the heightened international prominence of the Ogoni movement and made payments to security forces that they knew to be engaging in human rights violations against the local communities. The military government violently repressed the demonstrations, arrested Ogoni activists, and falsely accused nine Ogoni activists of murder and bribed witnesses to give fake testimony.[68] From the foregoing, it is apparent that the Nigerian people, just like it has been the case in other select African countries, have not benefited much, if at all, from the extractive industry in their country but instead have suffered more tragedy as a result.

Thus, in Africa, it is argued that unless investment law regime shifts its focus, it will begin to reverse its penetration and diminish in legitimacy as its focus on investor rights and freedom of investment proves to be of less and less value to developing countries.[69] Moreover, there is a growing

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[65] Centre for Constitutional Rights, *Wiwa et al v. Royal Dutch Petroleum et al*., available at http://ccrjustice.org/home/what-we-do/our-cases/wiwa-et-al-v-royal-dutch-petroleum-et-al [Accessed on 3/10/2018].

[66] Ibid.

[67] Centre for Constitutional Rights, *Settlement Reached in Human Rights Cases Against Royal Dutch/Shell*, New York, June 8, 2009. Available at http://ccrjustice.org/home/press-center/press-releases/settlement-reached-human-rights-cases-against-royal-dutchshell [Accessed on 29/05/2016].

[68] Ibid.

[69] Mann, H., "Reconceptualizing international investment law: its role in sustainable development," op cit., at p.535.

international consensus that more is needed from investment treaties if they are to have a meaningful future, or any future at all, and this consensus is increasingly revolving around the sustainable development paradigm.[70]

3.0 Sustainable International Investment Law and policies for National Development

It has convincingly been argued that although countries' investment policy regimes typically have both a national and an international dimension, and which dimensions often diverge intentionally, they nevertheless should interact in a way that maximizes synergies, including from a sustainable development perspective.[71] As such it is suggested that shaping such interaction requires a solid understanding of the different objectives, functions and natures of the legal instruments involved. Strengthening cooperation between national and international investment policymakers, improving interaction and ensuring cross-fertilization between the two regimes (including by identifying lessons learned that can be transferred from one policy regime to the other) are crucial tasks for countries striving to create a mutually supporting, sustainable development- oriented investment policy regime.[72] For instance, as far as SDG-oriented evolution is concerned, IIAs are subject to global debate on sustainable development-oriented IIA reform and also exhibit reform approaches to IIAs by many states, based on UNCTAD Reform Package.[73] On the other hand, the national legal framework have some elements, such as environmental laws, at the core of SDG-oriented policy reform while other elements, such as national investment laws, are less exposed to the SDG discourse.[74] It is still a contentious issue as to whether states should be held internationally accountable for achieving sustainability, whether globally or nationally, and also the specific formula to be used in deciding the 'acceptable standard of sustainable development.'[75]

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[70] Ibid, at p.536.
[71] United Nations Conference on Trade and Development, *World Investment Report 2018*, op cit., at p. 106.
[72] Ibid, at p. 106.
[73] United Nations Conference on Trade and Development, *World Investment Report 2018*, op cit., at p. 105.
[74] Ibid, at p. 105.
[75] Birnie, P. et al, *International Law & the Environment,* op cit, pp. 125-126.

The Rio+20 Declaration participating State Parties reaffirmed the need to achieve sustainable development by promoting sustained, inclusive and equitable economic growth, creating greater opportunities for all, reducing inequalities, raising basic standards of living, fostering equitable social development and inclusion, and promoting integrated and sustainable management of natural resources and ecosystems that supports, *inter alia*, economic, social and human development while facilitating ecosystem conservation, regeneration and restoration and resilience in the face of new and emerging challenges.[76] Thus, states retain substantial discretion in interpreting and giving effect to sustainable development.[77] It is however arguable that the national requirements to meet the needs of their people may be an incentive for such countries to uphold the principles of sustainable development and even set standards for the same.

This is well evidenced in the laws and the jurisprudence emanating from Kenyan courts. The Constitution stipulates that sustainable development is one of the national values and principles of governance that must 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.[78] Article 43 of the Constitution of Kenya 2010 provides for economic and social rights of all the Kenyan people and guarantees the right to an adequate standard of living for all and this encompasses right to adequate food, clothing, shelter, clean and safe water, education, health and social security. Any efforts geared towards achieving these rights should thus bear in mind the principles of sustainable development. This would thus include laws and policies on international investments in the country that would have any impact on these rights. For instance, one of the most applicable principles of sustainable development is the Polluter-Pays Principle which is seen not as a principle of equity; rather than to punish polluters, it is designed to introduce appropriate signals in the economic system so as to incorporate environmental costs in the decision-making process and, consequently, to

[76] Art. 1.4, *Rio+20 Declaration*.
[77] Ibid, p. 126.
[78] Constitution of Kenya, Art. 10(2) (d).

arrive at sustainable, environment-friendly development.[79] The aim is to avoid wasting natural resources and to put an end to the cost-free use of the environment as a receptacle for pollution.[80] The precautionary principle is believed to provide guidance for governance and management in responding to uncertainty.[81] It also provides for action to avert risks of serious or irreversible harm to the environment or human health in the absence of scientific certainty about that harm and it is now widely and increasingly accepted in sustainable development and environmental policy at multilateral and national levels.[82] This is just a demonstration of how the various principles of sustainable development can be applied in decision-making processes related to international investments.

The emergence of the precautionary principle marked a shift from post-damage control (civil liability as a curative tool) to the level of a pre-damage control (anticipatory measures) of risks.[83] It originated in environmental risk management to provide regulatory authority to stop specific environmental contaminations without waiting for conclusive evidence of harm to the environment (i.e., while there was still "uncertainty" about the evidence).[84] It has been suggested that the precautionary principle might be described both in terms of the level of uncertainty that triggers a regulatory response and in terms of the tool that will

[79] Ibid, p. 67; See also Nicoleta, D.D., 'The Polluter-Pays Principle- -Expression Of Tort Liability For Environmental Protection,' Analele Universităţii din Oradea, Fascicula Protecţia Mediului Vol. XVIII, 2012, pp. 295-302 at p. 301. Available at *http://protmed.uoradea.ro/facultate/anale/protectia_mediului/2012A/im/11.%20Dascalu%20Diana.pdf* [Accessed on 3/01/2018].

[80] Ibid, p. 67.

[81] Cooney, R., *The Precautionary Principle in Biodiversity Conservation and Natural Resource Management: An issues paper for policy-makers, researchers and practitioners*, (IUCN, Gland, Switzerland and Cambridge, 2004), UK. xi + 51pp at p. 1. Available at *http://www.sehn.org/pdf/PrecautionaryPrincipleissuespaper.pdf* [Accessed on 3/10/2018].

[82] Ibid, p.1.

[83] World Commission on the Ethics of Scientific Knowledge and Technology (COMEST), *The Precautionary Principle*, (United Nations Educational, Scientific and Cultural Organization, Paris, 2005), p.7. Available at *http://www.eubios.info/UNESCO/precprin.pdf* [Accessed on 3/10/2018].

[84] Hathcock, J.N., 'The Precautionary Principle–An Impossible Burden Of Proof for New Products,' *AgBioForum*, Vol. 3, No. 4, 2000, pp. 255-258, p.255.

be chosen in the face of uncertainty (as in the case of technological requirements or prohibitions).[85]

Maximising sustainable development benefits requires maximising synergies between IIAs and the national legal framework for investment.[86] Strengthening cooperation between the authorities in charge of the various dimensions of a country's investment policy framework is crucial for ensuring a coherent approach that reflects the country's overall strategy on investment for development.[87] It is suggested that one option for doing so is the establishment of special agencies or inter-ministerial task forces with a specific mandate to coordinate investment policy-related work (including the negotiation of IIAs) of different ministries and other government units. In addition, stakeholder consultations can help maximise synergies.[88]

In addition, well-managed legal interaction between different investment policy instruments, based on a clear understanding of the different functions and objectives of the two regimes and the way they relate to each other, can help minimize challenges arising from diverging or conflicting clauses.[89] Policymakers are encouraged to strive for a more synergetic approach to the formulation of IIAs and the national legal framework for investment in order to produce an investment regime that is in line with a country's broader national development strategy and with sustainable development imperatives.[90] This is because an investment policy regime does not exist in a vacuum; it interacts with other areas of economic law and policy, as well as with other areas of law and policy that are considered "non-economic", such as culture, environment, health, labour, social or gender-related issues;

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[85] Sunstein, C.R., 'Beyond the Precautionary Principle,' University of Chicago Public Law and Legal Theory Working Paper No. 38, January 2003, p.11. Available at *http://www.law.uchicago.edu/files/files/38.crs_.precautionary.pl-lt.pdf* [Accessed on 3/10/2018].

[86] United Nations Conference on Trade and Development, *World Investment Report 2018*, op cit., p. 108.

[87] Ibid, at p. 109; See also Organisation For Economic Co-Operation And Development, *Policy Framework For Investment*, (OECD, 2006). Available at https://www.oecd.org/daf/inv/investment-policy/36671400.pdf [Accessed on 3/10/2018].

[88] Ibid, at p. 109.

[89] Ibid, at p. 109.

[90] Ibid, at p. 111.

land rights; national security issues, among others.[91] In order to foster sustainable development-oriented policy coherence, it has been suggested that IIA reform must take into account the interaction between IIAs and other bodies of international law. This is because addressing this relationship in IIA reform can help avoid conflicts and provide arbitral tribunals with guidance on how to interpret such interaction.[92]

Globalization has simply been described as increasing and intensified flows between countries of goods, services, capital, ideas, information and people, all of which produce cross border integration of a number of economic, social and cultural activities.[93] There are said to be four main driving forces behind increased interdependence namely: trade and investment liberalization; technological innovation and the reduction of communication costs; entrepreneurship; and global social networks.[94] There are remarkable benefits that come with globalization. For instance, there has been introduction of new technologies, access to new markets and the creation of new industries. Foreign aid remains crucial to developing countries. However, the practical situation in the global market is that there are unfair rules that are disadvantageous to developing countries due to their reduced bargaining powers as against many of the developed world countries.[95]

Advocates of globalisation have contended that it affords the poor countries and their citizenry the chance to develop economically and raise their standards of living.[96] Opponents of globalisation on the other hand, have argued that the creation of an unregulated international free market works for the benefit of multinational corporations in the Western world at the

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[91] United Nations Conference on Trade and Development, *World Investment Report 2018*, op cit., at p. 111.

[92] Ibid, p. 114.

[93] Bertucci, G., & Alberti, A., 'Globalization and the Role of the State: Challenges and Perspectives' p. 1. Available at *http://unpan1.un.org/intradoc/groups/public/documents/un/unpan006225.pdf*[Accessed on 3/10/2018].

[94] Ibid.

[95] World Bank World Economy Report, 'Sustainable Development Challenges' *World Economic and Social Survey* 2013 E/2013/50/Rev. 1ST/ESA/344.

[96] Globalization 101, 'What Is Globalization?' *The Levin Institute* - The State University of New York, Available at *http://www.globalization101.org/what-is-globalization/* [Accessed on 3/10/2018].

expense of local enterprises, local cultures, and common people.[97] They disagree with those who support globalisation in that it is concerned with the welfare of the rich and the developed world while denying the poor countries and their citizenry the chance to develop economically and raise their standards of living. The more developed countries with high bargaining power enjoy the biggest share of the benefits of globalisation. The rich industrialized countries formulate policies to make developing countries liberalize domestic markets for easier access but the same is not reciprocated in the domestic markets of industrialized countries. This makes Africa vulnerable since it can be extensively exploited yet it cannot readily access the national markets of developed countries.[98] As a result, African domestic industries have collapsed while foreign investments continue thriving. It has been argued that international policies on globalisation are deliberately calculated to ensure continued economic domination by the industrialized countries.[99] This only serves to impoverish the people in the developing states especially in Africa. Globalisation has also been associated with a decline in the power of national governments to direct and influence their economies especially with regard to macroeconomic management.[100]

It is thus argued that the need to understand investment law as part of a broader part of international law relating to globalization suggests the need for a better method of integrating human rights, environmental, and other areas of law in a more transparent and conflict-free dispute settlement environment.[101] The World Commission on Environment and Development recommended that in order to achieve sustainable development, changes are required in the attitudes and procedures of both public and private-sector enterprises. Moreover, environmental regulation must move beyond

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[97] Ibid.

[98] For example, under North American Free Trade Agreement, USA has entered into agreement opening its market only to its neighbours, that is, Canada and Mexico. Developing countries are excluded yet NAFTA members can under WTO's GATT agreement access the markets of developing countries.

[99] Stiglitz, J., *Globalization and its Discontents (*Penguin Books, UK, 2002).

[100] Smith, M. K. & Doyle M. 'Globalization' *the encyclopedia of informal education* (2002), Available at *www.infed.org/biblio/globalization.htm*[Accessed on 2/10/2018].

[101] Mann, H., "Reconceptualizing international investment law: its role in sustainable development," op cit., at p.544.

the usual menu of safety regulations, zoning laws, and pollution control enactments; environmental objectives must be built into taxation, prior approval procedures for investment and technology choice, foreign trade incentives, and all components of development policy.[102]

Cross-fertilization between domestic investment rules and IIAs can also ensure that lessons learned in one realm of policymaking benefit the other. Facilitating cross-fertilization not only requires intensified cooperation between policymakers, but also the careful identification of potentially transferable lessons learned.[103]

As far as sustainable development orientation of domestic laws on investments is concerned, it has been observed that only a small number of national investment laws refer- in their preamble or another dedicated clause on the objectives of the law- to sustainable development (or environmental or human health protection). This is however not to say that sustainable development- related concepts are entirely missing from other national laws and policies, as exemplified above in the case of Kenya.[104]

4.0 Conclusion

An effective investment law and policy regime should be geared towards promoting sustainable development. It should also ensure minimal or no environmental damage. In addition, human rights must at all times be upheld. This paper argues that for long lasting and sustainable investment policies that positively impact on the lives of communities, there is a need to ensure that the same are in line with the principles of sustainable development especially those that seek to safeguard human rights as well as sound environmental management and governance.

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[102] World Commission on Environment and Development, *Our Common Future*, United Nations 1987, "Report of the World Commission on Environment and Development," General Assembly Resolution 42/187, 11 December 1987. A/42/427, chapter 2, para. 79.

[103] United Nations Conference on Trade and Development, *World Investment Report 2018*, op cit., at p. 109.

[104] Ibid, at p. 111.

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Decolonizing the Classroom: Towards Dismantling the Legacies of Colonialism & Incorporating TWAIL into the Teaching of International Law in Kenya

By: ***Florence Shako****

Abstract

The colonial encounter largely shaped the African continent and Kenya was no exception. In Kenya, formal western education was introduced by the missionaries as part of the civilising mission and continued to evolve in the post-colonial state with the establishment of universities offering legal programs. Core in the curricula of these law undergraduate and postgraduate programs are international law courses such as public international law, international criminal law, international commercial law, international trade law, inter alia. The objective of offering international law courses is to enable students to appreciate traditional aspects of international law as well as modern aspects such as globalization and their relevance in today's world. However, international law is mainly taught from a European perspective with the bulk of the textbooks utilized in these law programs written by European scholars. The literature used and the pedagogy adopted in the teaching of international law remains rife with exclusions and distortions of indigenous knowledge, voices, critiques and scholars. This article analyzes the potential of decolonizing the approach to the teaching of international law that is prevalent in law schools in Kenya. This article will analyze the mainstream narrative that is taught in the international law curricula and why it is problematic. Through the lens of Third World Approaches to International Law (TWAIL), this article argues for the teaching of international law in a manner which allows students to critically engage with its doctrines. This article will analyze the TWAIL theory of law and the potential for its incorporation into the teaching of international law with the aim of understanding the exclusions of the African perspective. The author will analyze why the use of TWAIL can aid in deconstructing western narratives and incorporate indigenous viewpoints into the classroom with the aim of decolonization. The author concludes by reflecting on third world visions of international law which can be integrated into the law curricula in Kenya and its wider implications for the study of international law going forward.

1.0 Introduction

Classrooms in law schools are one of the sites where the legacies of colonialism are perpetuated. In Kenya, the international law curricula adopted in various law schools is riddled with exclusions and distortions in its narrative and this results in a pedagogy that is less than ideal for students who ought to be engaging in critical thinking. Processes of exclusion in higher education are difficult to unpack as they are underscored by the complex dynamics of class, gender and race.[1] Experiences are complex and relational and are located at the intersection of structure, culture and agency.[2]

However, this article is at its core about the danger of a single story. Chimamanda Ngozi Adichie's words, in a TED talk that she gave ten years ago in 2009, ring true as this research evolves…

> *"So after I had spent some years in the US as an African, I began to understand my roommate's response to me. If I had not grown up in Nigeria, and if all I knew about Africa were from popular images, then I too would think that Africa was a place of beautiful landscapes, beautiful animals and incomprehensible people fighting senseless wars, dying of poverty and AIDS, unable to speak for themselves, and waiting to be saved by a kind, white foreigner …This single story of Africa ultimately comes, I think, from Western literature. Now, here is a quote from the writing of a London merchant called John Locke who sailed to West Africa in 1561 and kept a fascinating account of his voyage. After referring to the black Africans as beasts who have no houses, he writes, 'They are also people without heads, having their mouths and eyes in their breasts.' Now I have laughed every time I have read this and one must admire the imagination of John Locke. But what is important about his writing is that it represents the beginning of a tradition of telling African stories in the West, a tradition of sub-Saharan Africa as a place of negatives, of difference, of darkness, of people who, in the words of the wonderful*

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* Law Faculty at Riara Law School;
http://www.riarauniversity.ac.ke/law/index.php/our_team/florence-shako

[1] Heidi Safia Mirza 'Decolonizing Higher Education: Black Feminism and the Intersectionality of Race and Gender' [Fall 2014] Journal of Feminist Scholarship 7, 6-7.

[2] Ibid.

> *poet, Rudyard Kipling, are 'half devil, half child'. And so, I began to realize that my American roommate must have, throughout her life, seen and heard different versions of this single story …*
>
> *Now, what if my roommate knew about my friend Fumi Onda, a fearless woman who hosts a TV show in Lagos, and is determined to tell the stories that we prefer to forget? What if my roommate knew about the heart procedure that was performed in the Lagos hospital last week? What if my roommate knew about contemporary Nigerian music? Talented people singing in English and Pidgin, and Igbo and Yoruba and Ijo, mixing influences from Jay-Z to Fela to Bob Marley to their grandfathers. What if my roommate knew about the female lawyer who recently went to court in Nigeria to challenge a ridiculous law that required women to get their husband's consent before renewing their passports? What if my roommate knew about Nollywood, full of innovative people making films despite great technical odds? Films so popular that they really are the best example of Nigerians consuming what they produce. What if my roommate knew about my wonderfully ambitious hair braider, who has just started her own business selling hair extensions? Or about the millions of other Nigerians who start businesses and sometimes fail, but continue to nurse ambition?*
>
> *… So that is how to create a single story. Show a people as one thing, as only one thing over and over again, and that is what they become… The single story creates stereotypes, and the problem with stereotypes is not that they are untrue but they are incomplete. They make one story become the only story."*[3]

The story of international law is one such narrative, where only a single story, the European story, exists in the international law curricula in Kenyan law schools. The literature utilized in these classrooms is heavily from a European perspective which results in the silencing of the African voice and the perpetuation of distorted and/or incomplete narratives. The pedagogy used therefore remains rife with exclusions and distortions of indigenous knowledge, voices, critiques and scholars. This article will delve into the concept of decolonizing the classroom in law schools in Kenya; attempting

[3] Chimamanda Adichie, <https://www.ted.com/talks/chimamanda_adichie_the_danger_of_a_single_story> accessed 14 May 2019.

to begin to dismantle the legacies of colonialism still apparent in the international law curricula.

The first part of this paper will analyze the mainstream narrative that is taught in international legal scholarship and why it is problematic. The second part will evaluate the possibility of incorporating the Third World Approaches to International Law (TWAIL) theory of law into the understanding of international law to enable students to have a more inclusive understanding of international law. This does not mean throwing the baby away with the bath water, but instead means exposing students to TWAIL doctrines to enable them to have a more inclusive understanding of international law. The third part of this research will consider why the use of TWAIL can be used to deconstruct western narratives and incorporate indigenous viewpoints into the classroom with the aim of decolonization. The research concludes not by reflecting on what a decolonized classroom looks like and its wider implications for the study of international law. The author suggests that attempting to dismantle the legacies of colonialism in the teaching of international law will necessarily include the incorporation of TWAIL and the deconstruction of western narratives to include African voices, African knowledge and critiques and African scholars. This article hopes to encourage a more critical understanding of international law and perhaps ultimately, tell more than one story.

1.1 The Mainstream Narrative

In the international law curricula in law schools in Kenya, one will find what this article refers to as the mainstream narrative of international law being disseminated. International law is often taught by first reflecting on its historical background which has its roots in the colonial period. A law student undertaking any strand of international law is expected to understand the history, sources and main concepts of international law. One of the core concepts is that of state sovereignty and it is usually discussed early on as part of the foundational aspects of the discipline.

The concept of an international community made up of sovereign States is the basis of the intellectual framework for international law.[4] Antony Anghie

[4] Christoph Schreuer, 'The Waning of the Sovereign State: Towards a New Paradigm for International Law? ' [1993] European Journal of International Law 4, 447.

in his book *Imperialism, Sovereignty and the Making of International Law* explains that in attempting to formulate a new, scientific international law, the jurists of the nineteenth century articulated a formalist model of sovereignty; sovereignty as an absolute set of powers which was bound by no higher authority and which was properly detached from all the imprecise claims of morality and justice.[5] Herein began the exclusion of the Third World within this very framework of 'sovereignty.'

The interaction between European and non-European societies in the colonial encounter was not an interaction between equal sovereign states but between sovereign European states and non-European states denied sovereignty.[6] The conventional way of accounting for this relationship is by recourse to the recognition doctrine, and to the story of the 'expansion of international society' - an ambiguous, euphemistic and somewhat misleading term when it is understood that this refers not to an open process by which the autonomy and integrity of non-European states were accepted, but to the colonial process by which African societies were made to accept European standards as the price of membership.[7]

This means that the sovereign European states were deemed to be civilized while the non-European states which were denied their sovereignty were viewed as uncivilized and hence the narrative of Africa as a Dark Continent emerged. For the uncivilized non-European states to gain sovereignty, they had to adopt European culture, laws and practices. Their own way of life would have to be abandoned or subjugated as it was viewed as barbaric. The process of colonization would therefore be a 'saviour' of the Dark Continent.

Therefore, in the teaching of international law, when the concept of sovereignty is discussed as one of the principles which must be understood at a foundational level, its conceptualization is already problematic. This problematic framework is the backdrop against which the story of colonialism is understood. The subjugation of indigenous institutions and mechanisms was part of the European justification of the colonization of Africa - that it was its moral duty to 'uplift' Africans from their primitive

[5] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004) 101.
[6] Ibid.
[7] Ibid.

state.[8] The *civilizing mission* was to ensure that the so-called Dark Continent was brought into the light. The *civilizing mission* operated by characterizing non-European peoples as the 'other' - the barbaric, the backward, the violent - who must be civilized, redeemed, developed and pacified.[9] Race played a crucially important role in constructing and defining the 'other.'[10] This concept of the *civilizing mission* justified the continuous intervention by the West in the affairs of Third World societies and provided the moral basis for the economic exploitation of the Third World that was an essential part of colonialism.[11] These ideas of the civilized versus the uncivilized, the idea of the 'other' helped to shape the dominant understanding of international legal scholarship. It also helped to justify any violent interventions in the Third World as it was viewed as the price that had to be paid to transform the uncivilized to the civilized.

Therefore, as students are taught about empire, the story unfolds from the point of view of the colonizer. The economic exploitation of the country and the intense violence during the colonial period is minimized and the focus turns on how Kenya developed ergo became *civilized* under colonial rule. This understanding of empire is distorted and excludes the narratives of violence meted out against the people, the loss of land to the settler community, the fight by the Mau Mau to reclaim the right to self-rule and the domino effect to-date of this economic exploitation. The story of colonialism in the dominant narrative excludes the legitimacy of African customs, beliefs and practices which pre-existed empire. This narrative further perpetuates the myth that European culture is superior to African culture and these viewpoints continue to manifest in the post-colonial state. A critical pedagogy employed in the study of international law would not only look at the point of view of the colonizer but also that of the colonized and further understand how there might have been points of inter-dependence in this relationship.

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[8] Vincent Khapoya, *The African Experience: An Introduction* (4th edn, Routledge 2016) 106.

[9] Antony Anghie and B.S. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' [2003] Chinese Journal of International Law, 85.

[10] Ibid.

[11] Ibid.

Another lens through which this mainstream narrative is perpetuated is through the dynamic of difference. For Anghie, the dynamic of difference, particularly of cultural difference between Europeans and non-Europeans, was an important impetus in the generation of some of the defining doctrinal problems of international law.[12] Anghie shows how the legacy of the dynamic of difference was embodied in international legal innovations such as the mandate and trusteeship systems, while all the time seeking to obscure its colonial origins, its connections with inequalities and exploitation inherent in the colonial encounter.[13]

The impact of this is that the dominant international legal scholarship, while legitimate in its own right and agenda obscures its origins in empire and the resultant inequalities which were perpetuated. It unwittingly silences the African voice and indigenous perspectives not only of empire but of today's comprehension of the happenings in the international realm. The legacies of subjugation of the African culture continues and in the classroom, the African experience is ignored or minimized. When students are engaging with international law doctrines, they are seemingly in a 'global' space yet indigenous voices, critiques and scholars are either wholly excluded or continually subjugated.

Albert Memmi in his book *The Colonizer and the Colonized* speaks of the 'mummification of the colonized society' which implies that even when a nation has won its freedom, the relics of colonisation remain and sometimes grow even stronger, resulting in a kind of neo-colonisation by the elite sections of society; those sections which have appropriated the cultures of the coloniser to such an extent that they seek to propagate it as both modern and inevitable.[14] Acknowledging the class compulsions of the process of colonization, Memmi further points to the fact that, the root of colonisation is the economic disparity that is cultivated assiduously between the rulers and the ruled.[15] Therefore, in addition to racial differences, cultural and class differences are an integral part of the understanding of

[12] James T. Gathii, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography' [2011] 3 Trade Law & Development 26, 31
[13] Ibid
[14] Albert Memmi, *The Colonizer and the Colonized* (first published 1974, EarthScan Publications Ltd 2003) 142
[15] Ibid

international law today and the post-colonial state. It is important that as critical thinkers, students are exposed to a more than one narrative of international law and are exposed to a Third World perspective. One of the ways to do this is by exploring the possibility of including the Third World Approaches to International Law (TWAIL) theory of law into the international law curricula of various law programs.

2.0 Third World Approaches to International Law (TWAIL) Theory of Law

As Makau Mutua once stated, TWAIL is not a recent phenomenon.[16] Broadly speaking, TWAIL scholars are united in their opposition to the politics of empire.[17] TWAIL is an alternative narrative of international law that has developed in opposition to the realities of domination and subordination prevalent in the international legal apparatus.[18] Therefore, TWAIL presents an alternative view of international law other than that which has dominantly been elucidated in international legal scholarship.

Eslava and Pahuja note: 'Although there is arguably no single theoretical approach which unites TWAIL scholars, they share both a sensibility and a political orientation. TWAIL is therefore defined by a commonality of concerns which center on attempting to attune the operation of international law to those sites and subjects that have traditionally been positioned as the "others of international law".'[19]

TWAIL is therefore an approach which allows those in the global south to tell their stories from their perspectives and provides an alternative perspective of international legal scholarship. This theory endeavours to reconstruct international law and give audience to those voices that have long been silenced in the dominant narratives. The 'others of international law' have always been those states in the global south which were perceived as non-sovereign and hence uncivilized and barbaric.

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[16] Makau Mutua, 'What is TWAIL' [2000] Proceedings of the American Society of International Law Annual Meeting 94, 31.

[17] B.S. Chimni 'The World of TWAIL: Introduction to the Special Issue'" [2011] Trade, Law and Development, Volume 3(1), 17-18.

[18] Ibid.

[19] Ibid.

While seeking to reconstruct international law, TWAIL's approach to the discipline is based on a philosophy of suspicion because it sees international law in terms of its history of complicity with colonialism, a complicity that continues now in various ways with the phenomenon of neocolonialism, the identifiable and systematic pattern whereby the North seeks to assert and maintain its economic, military and political superiority.[20]

In understanding TWAIL, reference is made to the Third World. In a purely descriptive sense, Third World is frequently used interchangeably with other terms such as 'less-developed', 'developing' or 'under-developed countries' and increasingly, 'the South'; referring to countries of Africa, Asia and Latin America that have traditionally been classified as lagging behind the 'West', 'North', 'First World' or 'developed countries' in terms of economic growth and indicators of economic prosperity.[21] Karin Mickelson notes that the term Third World could also be used to designate a political coalition, much like any other grouping of states in pursuit of common goals but further notes that all these characterizations of the Third World are somewhat problematic.[22] She suggests that the Third World would better be characterized as occupying a historically constituted, alternative and oppositional stance within the international system.[23]

The characterization of the Third World either from a political or economic standpoint still remains problematic to date with some scholars viewing it as outdated. There exists a further debate on whether speaking of the Third World in general terms properly deals with the issues specific to Africa and whether there is a need to rethink TWAIL in such terms. Perhaps there is need to develop an African Approach to International Law and think through what its constituent parts or features would be and its uniqueness as compared to the overall TWAIL theory. It is safe to say that there is not one universally acceptable meaning of the term Third World. In this article, it refers to those countries in the Global South.

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[20]Antony Anghie and B.S. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' [2003] Chinese Journal of International Law, 96.

[21] Karin Mickelson, 'Rhetoric and Rage: Third World Voices in International Legal Discourse' [1998] Wisconsin International Law Journal, 16(2), 356.

[22] Ibid.

[23] Ibid.

TWAIL has also been referred to as an *approach* to international law. There has been a debate on whether TWAIL is a theory or a methodology of analyzing international law and institutions. Obiora Okafor has suggested that TWAIL is a broad approach; *approach* encompassing both the theoretical and methodological dimensions and properties of TWAIL scholarship.[24] He explains that TWAIL is an approach that is intimately connected to the kinds of theoretical propositions that are generated from its application.[25] In this context, TWAIL is analyzed as an approach to the understanding of the dominant narrative of international law and this necessarily includes its theoretical propositions.

There are many different perceptions of TWAIL. It has developed over the years and different scholars have had different areas of focus in their analysis. Bhupinder Singh Chimni asserts that anyone may be part of the TWAIL movement, as there is no need to subscribe to a party program and in his opinion, it is a loose network of scholars whose work is animated with the concern to establish a truly universal international law that goes to promote a just global order.[26] This is true to the extent that any scholar can be a TWAIL-er in so far as they analyze international law from a Third World perspective, although whether this results in a universal international law remains to be seen.

According to Obiora Okafor, some strains of TWAIL are more oppositional than reconstructive, while others are more reconstructive than oppositional.[27] Some TWAIL scholars are avowed socialists (such as Bhupinder Chimni), but many are not; some can be seen as leaning toward post-structuralism (such as Rajagopal and Vasuki Nesiah), but many do not accept the poststructuralist label.[28] He further espouses that some are feminists (such as Celestine Nyamu, Sylvia Tamale, and Nesiah), but many

[24] Obiora Chinedu Okafor, 'Critical Approaches to International Law (TWAIL): Theory, Methodology or Both?' [2008] International Community Law Review 10, 377.
[25] Ibid.
[26] Larissa Ramina, 'Framing the Concept of TWAIL: Third World Approaches to International Law' [2018] Justica do Dirieto, 32 (1), 6.
[27] Obiora Chinedu Okafor, 'Newness, Imperialism and International Legal Reform in Our Time: A TWAIL Perspective' [2005] Osgoode Hall Law Journal, 43(1/2), 176.
[28] Ibid.

are not.[29] Scholars can therefore write in different strands of international law using the TWAIL approach and integrate this approach with other legal theories in their various fields.

TWAIL can also be divided into TWAIL I and TWAIL II. In Chimni's opinion, TWAIL I was the analysis during the first decades after decolonization which noted the contribution of Third World communities to the evolution and development of international law, it recognized that the complete rejection of the rules of international law was not a feasible option, it aptly underlined the significance of sovereignty and non-intervention for colonized people, it recognized the potential of the United Nations to usher in an era of change and believed in a global coalition of Third World states.[30]

He explains that TWAIL II is irreverent in its critique of dominant western scholarship and hopes to transform international law in the era of globalization from being a language of oppression to a language of emancipation.[31] This shifts what he perceives as the agenda of TWAIL in contemporary international law scholarship.

Antony Anghie and Chimni delve into a further explanation of TWAIL II explaining that TWAIL II scholars have developed powerful critiques of the Third World nation-state, of the processes of its formation and its concern is also to identify and give voice to the people within Third World states - women, peasants, workers, minorities - who had been generally excluded from consideration by TWAIL I scholarship.[32] TWAIL II scholars have also examined how the great projects of 'development' and nation-building promoted by international law and institutions and embraced in some form by Third World worked to the disadvantage of Third World peoples.[33] By simultaneously examining the Third World state critically and recognizing the possibility of using international law to promote the interests of Third World peoples, these TWAIL II positions on international human rights law

[29] Ibid.

[30] B.S. Chimni, 'Towards a Radical Third World Approach to Contemporary International Law' [2002] ICCLP Review, 5(2), 16.

[31] Ibid.

[32] Antony Anghie and B.S. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' [2003] Chinese Journal of International Law, 83.

[33] Ibid.

differ from either mainstream or critical Northern views on human rights as well as from the views of Third World states themselves.[34]

TWAIL therefore continues to evolve as more scholars from the Third World engage in critical legal scholarship. What remains constant is the need to voice international law doctrines from a Third World perspective and continuously question the agenda of western narratives that are dominantly perpetuated. Further there is need to understand international institutions and their agenda in light of the understanding of the Third World for a more just and inclusive global order. It is hoped that ultimately there will be a universal global order which takes into account not only the voices of the Global North but the increasing voices of the Global South.

However, TWAIL as an approach to international law has also faced some criticism in its propositions. One of the criticisms of TWAIL scholarship is that the TWAIL movement suffers from the paradox that its argumentative logic ultimately relies on the same underlying assumptions of the system it sought to transcend.[35]

James Gathii also reference another critique of TWAIL and that is the false charge of nihilism. He explains that many scholars in Europe and North America have sometimes not responded very favourably to Third World scholarship and views of international law.[36] Gathii rightly notes that TWAIL scholars have a broad agenda of seeking to transform international law from being a language of oppression to a language of emancipation - a body of rules and practices that reflect and embody the struggles and aspirations of Third World peoples and which, thereby promotes truly global justice.[37]

Despite its critiques, there is merit in considering the incorporation of TWAIL into international legal scholarship with the aim of deconstructing western narratives which have dominated for far too long. The international law curricular adopted in Kenyan law schools needs to be reviewed to

[34] Ibid.

[35] J. D. Haskell, 'TRAIL-ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law' [2014] Canadian Journal of Law and Jurisprudence, 32.

[36] James T. Gathii, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography' [2011] 3 Trade Law & Development 26, 43.

[37] Ibid.

enlighten students on critical legal scholarship and alternative views of international law and ultimately, decolonize the classroom.

3.0 Towards Decolonizing the Classroom

Decolonization does not fit into one neat definition. However, in this context it does not refer to political change but rather a cultural one. It refers to the fact that during empire, the culture of the people of Kenya was annihilated and subjugated in favour of that of the Europeans and how this has had ripple effects to date that must be addressed.

Decolonization includes deconstruction and reconstruction; self-determination and social justice; ethics, language and therefore the internationalization of indigenous experiences, history and critique.[38] Deconstruction and reconstruction concerns discarding what has been wrongly written, and interrogating distortions of people's life experiences, negative labelling, deficit theorizing, culturally deficient models that pathologized the colonized; Self-determination and social justice relates to the struggle by those who have been marginalized by the Western academy and about seeking legitimacy for knowledge that is embedded in their own histories, experiences and ways of viewing reality; Ethics relates to the formulation, legislation and dissemination of ethical issues related to the protection of indigenous knowledge systems and Language concerns the importance of teaching/learning in indigenous languages as part of the anti-imperialist struggle.[39]

The introduction of western education during the period of empire was one of the methods utilized to fulfil the colonizer's agenda in the country. Colonialism's historical association with academia is characterized by a mutually dependent relationship that resulted in the establishment and development of bodies of knowledge to describe, regulate, and order the indigenous 'other' based on European frames of reference.[40] Functioning as part of the state apparatus that provided internal legitimacy and technical

[38] L. le Grange, 'Decolonizing the University Curriculum' South African Journal of Higher Education, ' [2016] 30 (2), 3.
[39] Ibid.
[40] Soenke Biermann, 'Knowledge, Power and Decolonization: Implications for Non-Indigenous Scholars, Researchers and Educators, ' Counterpoints, Volume 379, Indigenous Philosophies and Critical Education, 390.

support to the process of colonization, learned institutions delivered the intellectual goods by providing pseudo-scientific justifications of racial superiority and *civilizing missions*.[41] Eurocentric knowledge was disseminated as being superior and a way of civilizing the Africans whose indigenous knowledge was subjugated as barbaric and primitive.

Africans strongly reject the characterization of their legacy as primitive yet both the process of Western education and the normative equation of modernization with Westernization condition them to endorse the charge of backwardness.[42] Worse still, their denial only succeeds in pushing the charge to the dark corners of the unconscious.[43] Modernity requires embracing western education which was introduced during empire but a lacuna persists in the teaching of international law. This is the fact that the curricular fails to embrace indigenous knowledge. The perception that African customs, African customary law and African views of international law are inferior is one of the legacies of colonialism which still persists to date. There can be no modernity without universality.

Educators are called upon to play a central role in constructing the conditions for a different kind of encounter, an encounter that both opposes ongoing colonization and that seeks to heal the social, cultural, and spiritual ravages of colonial history.[44] This means presenting an alternative narrative of international law that resounds with the Third World and explains current happenings in the world from a Third World viewpoint; a narrative that critically analyzes the role and actions of international institutions to date.

As Ngugi wa Thiong'o stated, the biggest weapon wielded and actually daily unleashed by imperialism is the cultural bomb – the effect of annihilating a people's belief in their names, in their language, in their environment, in their heritage of struggle, in their unity, in their capacity and ultimately in

[41] Ibid.

[42] Messay Kebede, 'African Development and the Primacy of Mental Decolonization' [2011] Philosophy and African Development: Theory and Practice, 98.

[43] Ibid.

[44] Vanessa Andreotti, Sharon Stein, Cash Ahenakew, Dallas Hunt, 'Mapping Interpretations of Decolonization in the Context of Higher Education' [2015] Decolonization: Indigeneity, Education and Society, 4 (1), 36.

themselves.[45] Therefore, while international law should be embraced in the law curricular, the exclusions and/or distortions in its mainstream narrative should not. Students undertaking international law should be exposed to critical legal scholarship with the aim of decolonizing the mind and helping them to embrace their African culture, their African heritage and ultimately, themselves.

This research therefore argues that one of the ways to dismantle the legacies of colonialism with the goal of decolonization of the classroom is to include critical theories of international law and not just the mainstream narrative. Incorporating a TWAIL analysis to the teaching of international law would be a good starting point to deconstruct western narratives. While learning international law, engaging with Third World scholarship and viewpoints should be ingrained in the foundation of critical pedagogical work.

In relation to decolonization of higher education, a robust critical pedagogical and engaged epistemology is the means of understanding and acting upon difference, problems, concerns and longstanding inequities.[46] Critical pedagogy can assist in asking questions that are far from the mainstream narrative but which resonate with the realities of the majority of the Third World.[47]

This will necessitate a review of the international law curricula of law schools in Kenya in order to include indigenous knowledge, voices and scholars. African scholars should endeavour to engage with third world scholarship to be able to disseminate it to the student body. Embracing TWAIL and other critical legal scholarship would be a good way forward. Since there is no blueprint that is TWAIL, it is applicable in different strands of international law. What is at the core of TWAIL scholarship is the goal of transforming international law to include Third World perspectives and contribute to a more universal and inclusive story of international law. For example, when empire is taught as part of the history of international law,

[45] Ngugi wa Thiong'o, *Decolonising the Mind: The Politics of Language in African Literature*, (London: Portsmouth, N. H.: J. Currey; Heinemann 1986) 3.

[46] Ali A. Abdi (ed.), 'Decolonizing Philosophies of Education' [2012] Sense Publishers, 27.

[47] Ibid.

including the story of the colonized persons and their view of empire would be more inclusive.

This also places an obligation on African academics to publish more. Part of the reason why western literature is so dominant is that African scholars are not publishing from the point of view of the Third World. Academics should add their authentic voices to international law in order to develop indigenous knowledge. This research suggests a repository of critical readings to be developed in the Kenyan context that can help academics to share specifically Third World scholarship and exchange ideas. There is already amazing scholarship from renowned TWAIL scholars such as Antony Anghie, James Gathii, Obiora Okafor, Chimni, among many others, which can be a good reference or starting point. It further suggests that international law scholars should have forums to discuss the impact this would have on the content that they teach and to encourage one another to slowly infuse the curricular with African scholars, African cases and African voices.

Indigenous education is self-determined; engages distinctive indigenous methods, structures, and content; and encourages respect for indigenous knowledge and self-reliance and self-respect of indigenous peoples.[48] It addresses the social, cultural, pedagogic, and epistemological needs of indigenous communities and explores indigenous collective heritage and contributions to global education.[49] It enables an understanding of indigenous ancestors' mimetic consciousness as well as examination and critique of colonization.[50] Our pedagogies, like our epistemologies, are in relation to the worlds we know and experience. Students should be conditioned to appreciate indigenous knowledge as much as they appreciate western knowledge and sometimes this is a question of exposure to critical legal scholarship. The continuous subjugation of indigenous knowledge which is a legacy of colonialism must be dismantled.

[48] Judy M. Iseke-Barnes, 'Pedagogies for Decolonizing' Canadian Journal of Native Education, 31 (1), 123.
[49] Ibid.
[50] Ibid.

4.0 Conclusion

The teaching of international law in Kenyan law schools has for a long time been plagued by exclusions and distortions of African voices and perspectives. The time has come to incorporate critical thinking into the curricula of international law with the goal of exposing students to more than one narrative of international law. This is a good starting point towards dismantling the legacies of colonialism and ultimately decolonizing the classroom.

Eurocentric narratives of sovereignty and the dynamic of difference have for far too long helped to perpetuate the views of the colonizer. As Anthony Anghie posited, 'doctrinal and institutional developments in international law cannot be understood as logical elaborations of a stable, philosophically conceived sovereignty doctrine but rather as being generated by problems relating to colonial order.'[51] The colonial encounter has therefore helped to shape international law as understood today and to subjugate the African experience.

International law should also be understood from the perception of the colonized. What did the colonized experience during empire? Was empire about civilizing the African people or was it part of economic and political exploitation? What cultures and practices of the colonized people pre-existed empire and were they legitimate? These and other kinds of interventions would help students to engage critically with international legal scholarship.

International law lecturers in law schools in Kenya should therefore reflect on the need to incorporate more critical legal scholarship. This research suggests the incorporation of TWAIL as an approach which can be used to give a more inclusive understanding of international law, no matter the strand being taught. TWAIL does not have one universal blueprint that must be followed by scholars but at its core is the need to collectively transform international law and have a more universal and just global order.

Through this lens, there is a more inclusive critical engagement of different strands of international law. The Third World is no longer seen as barbaric and uncivilized but as legitimate in its own right and western narratives are

[51] James T. Gathii, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography' [2011] 3 Trade Law & Development 26, 31.

dismantled and unpacked to give a clearer picture of their agenda in each context. The Third World voices are finally heard and the story of the colonized told.

Besides infusing TWAIL into the pedagogy adopted in law schools, scholars in Kenya should endeavour to publish more from the Third World perspective which will increase third world scholarship and third world voices in the international arena. This will help shed light on the Kenyan experience from the point of view of Kenyans. This will also serve as an example to the students to be proud of their culture and not view it as an inferior way of life that must be rejected in favour of 'modernity. ' Perhaps scholars in different universities could maintain repositories of critical legal scholarship where they could share ideas and critical readings.

Decolonizing the mind is what will lead to decolonizing the classroom. Decolonizing the classroom would mean the infusion of TWAIL and other critical legal theories into the international law curricular in Kenyan law schools. It would mean having an alternative story of international law that is more inclusive and just.

There have been interesting conversations relating to an African approach to international law (AAIL). The starting point of TWAIL scholarship is the Third World and it is worth considering a more African approach whose starting point would be Africa. However, this would necessitate an understanding of its features and examples and is an area for future research. The Keba M'baye Conference held in Pretoria in December 2018 considered such questions and it will be interesting to see the scholarship resulting from these conversations going forward.

The mainstream story of international law cannot be the only story taught in law schools in Kenya as this subjugates and silences indigenous knowledge, voices, critiques and scholars. Law students should be exposed to critical legal scholarship and a more universal narrative of international law. The African story and even more specifically, the Kenyan story ought to be taught in the international law curricula because as Chimamanda Adichie so eloquently stated "*The single story creates stereotypes, and the problem with stereotypes is not that they are untrue but they are incomplete. They make one story become the only story."*[52]

[52] Chimamanda Adichie,

<https://www.ted.com/talks/chimamanda_adichie_the_danger_of_a_single_story> accessed 14 May 2019.

Monism or Dualism: The Dilemma in the Application of International Agreements under the South African Constitution

By: ***Wilfred Mutubwa****

1.0 Introduction.

The interaction between international and municipal (national domestic) laws has been classified as taking three forms; monism[1], dualism[2] and a hybrid of both monism and dualism (monist-dualist). The application by states, in their national or municipal courts, of international law or agreements and their general application thereof define whether a state's observance of international law is either monist, dualist or a combination of the two.

This paper interrogates the position under the South African Constitution, particularly Sections 231 and 233 thereof against the principles and elements that define monism and dualism with a view to determining whether the South African Constitution espouses either of the two approaches or a hybrid of both models in its recognition and application of international law. Critical to this discourse is an analytical dissection and dichotomy of the interpretation of Section 231 of the South African Constitution by the diametrically opposed and in some respects sharply contrasting opinions of the majority and minority Judges of the Constitutional Court of South Africa in its decision in *Glenister v President of South Africa and Others.*[3]

In the ultimate, this research is an inquiry into the fundamental question, whether South Africa subscribes to either monism or dualism in its observance of international law, or whether South African law exhibits an interaction of partly monist and partly dualist (monist-dualist)

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[1] Those writers who subscribe to this theory are also referred to as naturalists-see the definition of the theories by Shaw, M.N. 2008. *International Law.* p. 131

[2] Also known as Positivist-dualism. *Ibid.*

[3] (CCT 48/10) [2011] ZACC6; 2011(3) SA 347(CC); 2011 (7) BCLR 651 (CC) (17 March 2011).

complementary application of international law and domestic law. First, the paper will briefly highlight the salient features of the three theories.

1.1 Monism

The Monist approach in the application of international law essentially entails the direct observance of international law as part of the laws of the state without the necessity of domesticating the enabling treaty or convention. Treaties and Conventions therefore apply as a source of law of the party state upon the signing thereof and ratification. Some states exhibit the monist approach either by direct application or by express provision in their Constitutions that bespeak international law as a source and part and parcel of the state's law. A case in example is the Constitution of the Republic of Kenya.[4]

1.2 Dualism

Dualism distinguishes, in its elementary sense, national domestic sources of law (such as the state's constitution and statutes) from international law instruments such as treaties and conventions. Dualist states provide, usually in their constitutions, that international law instrument entered into by the state do not automatically form part of the sources of law of the state party. The same only become applicable after domestication through domestic statutes and legislative processes.

The dualist approach is informed, partly at least, by the conventional universal constitutional principle of separation of powers inherent in the political governance of states to the effect that parliaments enact laws while the executive (which binds states to treaties and conventions in international law) usually implement the law.[5] It is therefore based on this constitutional truism that many dualist constitutions find it necessary to require the domestication of international norms and instruments through

[4] Article 2(5) and 2(6) of the Constitution of Kenya provides:
"(5) The general rules of international law shall form part of the law of Kenya
(b) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution".

[5] The principle of separation of powers is attributed to the 18th century French philosopher Montesquieu who is also referred to as the 'father of the constitution'.

domestic parliamentary legislation. The majority opinion in *Glenister* seems to readily accept this basis in the following terms:

> *"To summarise, in our constitutional system, the making of international agreements falls within the province of the executive, whereas the ratification and the incorporation of the international agreement into our domestic laws fall within the province of parliament. The approval of an international agreement by the resolution of parliament does not amount to its incorporation into our domestic laws. Under our constitution, therefore, the actions of the executive in negotiating and signing an international agreement do not result in a binding agreement. Legislative action is required before an international agreement can bind the Republic".*

The other reason advanced in favour of the dualist approach is the fact that some international treaties and conventions are not self-executing and may rely on municipal laws for enforcement[6]. It is also suggested that the process of domestication aids in mitigating and/or obviating inconsistencies and probable contradictions of international agreements with existing national laws.[7]

The dualist approach is also fortified in Articles 11, 14, 15 and 16 of the *Vienna Convention on the Law of Treaties*[8]. The convention underscores that treaties do not automatically become part of the corpus of a state party's laws unless and until the same have been domesticated pursuant to national legislation providing for the procedure therefore.

1.3 The "Hybrid" approach (Monist-Dualist approach)

The monist-dualist approach exhibits traits or tendencies of both the monist and dualist approach depending on the international law to be interpreted or applied. Monist-dualist's justify their hybrid approach to the practicality and peculiarity that attends the observance of international law

[6] These may include international agreements on human rights whose enforcement often require domestic interventions.

[7] See a deeper discussion of the doctrine of *lex posterior derogate prior* below at part 3.

[8] Concluded in 1966 and which came into force in 1980. Articles 11, 14, 15 and 16 of the convention are reproduced and discussed extensively under part 2.2.1 of this work. The convention is the primary and principal instrument that codifies principles of interpreting international treaties and agreements.

norms, particularly treaties in their multifarious forms. International law instruments, they opine, fall into two categories; those that are self-executing and those that require the aid of domestic mechanisms for enforcement or execution. The former are often said to apply without the necessity of domestication. The latter category, which include more complex or involving international agreements and cover the rest of the agreements including those creating human rights obligations, require domestication.

2.0 The South African Constitutional Context

2.1 Section 231 of the South African Constitution

The application of international agreements in South Africa is principally defined in Section 231 of the Constitution of South Africa. The provision underscores that international agreements do not apply directly nor are they binding upon South Africa unless approved by the National Assembly and the Council of provinces save for agreements of technical, administrative or executive nature, and which agreements do not require either ratification or accession before application but must be tabled in the National Assembly and the Council within a reasonable time.[9]

[9] Section 231 of the Constitution of South Africa reads: -

> "(1) The negotiating and signing of all international agreements is the responsibility of the national executive.
>
> (2) An international agreement shall bind the Republic only after it has been approved by resolution in both the National Assembly and the National Council of provinces, unless it is an agreement referred to in Subsection (3)
>
> (3) An international agreement of technical, administrative or executive nature, or an agreement which does not require the ratification or accession entered into by the national executive binds the Republic without approval by the National Assembly and the National Council of provinces, but must be table in the National Assembly and the Council within a reasonable time
>
> (4) Any international agreement becomes law in the Republic when it is enacted into by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or Act of Parliament.
>
> (5) The Republic is bound by international agreements which were binding on the Republic when the constitution took effect"

Additionally, the subject international agreement must not be inconsistent with the Constitution or an Act of Parliament. Further, even a self-executing provision of an international agreement that has been approved by Parliament applies only with the qualification that it should be consistent with the Constitution and Acts of Parliament[10]. However, international agreements which were binding before the promulgation and effect of the Constitution remain so binding[11].

The foregoing provisions of the South African Constitution have been interrogated and interpreted in at least two decisions of the Constitutional court of South Africa and form the crux of the next part of my discourse. I will briefly now discuss the same.

2.2 Glenister v President of South Africa and Others[12]

2.2.1 The Majority Decision

The majority decision of the South African Constitutional Court in *Glenister* interpreted Section 231 of the Constitution of South Africa to the effect that international agreements, save for those of administrative, technical or executive nature, must be domesticated by ratification/approval of the National Assembly and Council of provinces. The majority decision essentially bespeaks the South African observance of international law as one of dualism.

The decision furthermore emphasises the provisions of Section 231 of the Constitution of South Africa which also requires international agreements to accord with the Constitution and Acts of Parliament. The majority decision seems to underscore the sovereignty of the state and conformity with the principles enunciated in the *Vienna Convention on the Law of Treaties (the Vienna Convention)*.

The Vienna Convention, concluded in 1969 and which came into force in 1980, is perhaps the most elaborate effort by international law in codifying its fundamental principles of interpretation of international treaties, conventions and protocols. It seeks to ensure harmony and uniformity in

[10] *Ibid*, S.231 (4)
[11] *Ibid*, S.231(5)
[12] *Supra*, note 2.

this regard. Articles 11, 12, 14, 15, 16, 26 and 27 (as read with Article 46) of the convention are instructive with regard to this discourse.

Articles 11, 12, 14, 15 and 16 of the Vienna Convention deal with the manner of conclusion and consent by states of international agreements. They define the process of ratification, accession, signature and the date of taking effect of an international agreement. They underline consent of the state by signing and ratifying a treaty as an unequivocal expression of its intention to be bound thereby, failing which would invite sanctions.

The majority decision in *Glenister* penned by former Chief Justice Ngcobo makes reference and places reliance on an earlier decision of *Azanian Peoples Organization (AZAPO) and others v President of the Republic of South Africa and Others.*[13] In *AZAPO*, precedent was set that perhaps put the dualist slant to the South African application of international agreements most succinctly thus:

> *"International agreements do not become part of municipal law of our Country, enforceable at the instance of private individuals in our courts, until and unless they are incorporated into municipal law by legislative enactment".*

The majority opinion of the Constitutional Court in *Glenister* exemplifies an unyielding positivist interpretation of Section 231 of the South African Constitution. This constricted literal and restrictive construction thereof invites the conclusion that the majority of the Supreme Court favours a dualist approach to the application of international agreements by South Africa. This it does in the following terms:-

The positivist- dualist approach taken by the majority in interpreting section 231 of the South Africa Constitution is largely informed by the international principle of general application of separation of powers between the various arms of government, in this regard the executive and legislature. The former cannot enact laws but only gives effect to what the latter has legislated upon.

[13] 1996 ZACC 16' 1996 (4) 671 CC; 1996(8) BCLR1015 (CC) quoted in *Glenister* at page 45.

2.2.2 The Minority Opinion

The dissenting view of the Constitutional Court in *Glenister* makes for the case that state parties to international treaties and agreements are under a duty to fulfil their obligations entered into in international agreements and international law in general. This duty, they underscore, in the context of South Africa is a creature of the Constitution. The minority see this duty as a direct consequences or requirement of section 7 of the Constitution of South Africa which enjoins the state to ensure protection and fulfilment of fundamental rights.[14] As such, they observe that international obligations cannot be divorced or made subservient to domestic laws. They interpret Section 233 of the Constitution of South Africa as requiring domestic legislation to be interpreted consistently with international law.[15] The minority opinion does not therefore reject the dualist approach underlined in the majority view but underscores the place of international law in the South African Constitutional order as complimentary and not subservient to domestic laws.

They find fortitude and another justification in section 232 of the Constitution. Section 232 expressly recognizes customary international law as the law of the Republic except if it is inconsistent with the Constitution or an Act of parliament. They therefore conclude by regarding international and domestic laws as being in "concordance" and not discordance.

The minority opinion is not without intellectual and jurisprudential support, none less than the doyen jurist of international law Sir Hersch Lauterpatch.[16]Sir Lauterpatch is of the persuasion that states cannot invoke their municipal laws so as to avoid or fail to fulfil their obligations under international law, this is what is generally known in international law parlance as the doctrine of *Pacta Sunt Servanda*. Sir Lauterpatch famously states that municipal law and indeed the very concepts of sovereignty and recognition of the states are functions of international law. The two

[14] Section 7(2) reads;
"The State must respect, protect, promote and fulfil the rights in the bill of Rights".
[15] Section 233 reads "international customary law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament"
[16]Lauterpatch, H. (ed.) *The Development of International law by the International Court* .1982.

concepts, he emphasises, can only exist in an international context and legal system.[17] Simply put, national laws or indeed a state cannot exist or function in a vacuum or outside an international legal system. The latter gives validity and existence to the state and therefore by extension to national laws. States only exist in the context of an international legal system. In other words there cannot be a state or for that matter national laws in the absence of international law or an international legal systems.

A strict monist approach can be further broken down to two categories. First, the one which Sir Lauterpatch subscribes to which advocates for supremacy of international law on the basis of human rights, and one which favours monism for "formalistic legal grounds" like Kelsen.[18]

Though not espousing a monist approach, what comes through from a reading of the minority opinion in *Glenister* is the liberal or flexible approach the minority take in the application of international agreements which mirrors some monist elements such as the universality of the application of customary international law, *jus cogens* and *Pacta Sunt Servanda* as enduring irreducible principles of international law. The minority emphasise that a contextual reading of Section 231 of necessity involves a reading of Section 233 of the Constitution of South Africa which they opine implies or requires domestic laws to be read in concordance, consonance or consistently with international laws particularly those which bespeak human rights obligations. This view almost suggests that contrary to the majority decision in *Glenister* and the decision in *AZAPO* which emphasise domestication before justiciability (enforceability in Courts) of the international agreements or instruments in South Africa, the same can have direct application in view of Sections 7, 232 and 233 of the South African Constitution.

Perhaps it is now opportune to discuss what I prefer to call the twin doctrines of *Pacta Sunt Servanda* and *Lex Posterior derogate prior***,** and the import of these two principles to the notions of dualism and monism in the context of the majority and minority opinions of the Constitutional Court in *Glenister*.

[17] *Ibid.*

[18] *Per* Hans Kelsen, quoted in Malcom, *supra* note 1 page 131.

3.0 Monism and Dualism in Light of the Principles of "*Pacta Sunt Servanda*" Versus *"Lex Posterior Derogate Prior*"

Though referred to as twin principles, Pacta Sunt Servanda and Lex Posterior *derogate prior* can only be fraternal twins. Whereas they both impact on the application of international law by national courts and other domestic fora, the two doctrines present diametrically opposed prepositions in terms of observance of international agreements by state parties thereto.

3.1 Pacta Sunt Servanda

This principle essentially denotes that international treaties or agreements are to be applied or observed by state parties in good faith. It is a moral high calling to all who subscribe to international agreements to do all that is required under national legislation or otherwise, to give effect to the agreement. *Pacta Sunt Servanda* as a principle in application of treaties, is underscored by Article 26 of the *Vienna Convention on Law of Treaties.* The article reads:

> *"PACTA SUNT SERVANDA"*
>
> *Every treaty in force is binding upon the parties to it and must be performed by them in good faith".*

It is therefore the monist thinking that international law through the doctrine of *Pacta Sunt Servanda* amplifies in the aforequoted provision of the Vienna Convention that underwrites the direct application of international law and requires state parties to observe international agreements without reduction, qualification or their subjection to rigorous recognition processes. The Vienna Convention aforequoted and this doctrine echo the substance of the view taken by Sir Hersch Lauterpatch afore-stated to the effect that it is a principle of international law that states cannot invoke their municipal laws so as to avoid or fail to fulfil their obligations under international law. Indeed, Article 27 of the same said Vienna Convention is emphatic in this respect thus:

> "*International Law and Observance of Treaties A party may not invoke the provisions of its internal law as justification for its* failure to perform a treaty. This rule is without prejudice to article 46"[19]

The International Court of Justice (ICJ), in the *Applicability of the obligation to arbitrate case*[20] was emphatic that international law overrides national or domestic laws. *In the Lockerbie case*[21] the international court underlined that "*the rights guaranteed under the Vienna Convention are Treaty rights which the United State has undertaken to comply with in relation to the individual concerned, irrespective of the due process right under the United States Constitutional law".*

The ICJ has also underscored that it is not its function to interpret national laws of states or to give effect to the same on the international plane but it will only concern itself with national laws merely as evidence of the fact of a state's breach or observance of international law. The International Court is also of the considered view that it can equally examine statutes and Constitutions of states to ascertain whether their enactment or provisions amount to breach or the undermining of international law purely as evidentiary material on observance of international law.[22]

In essence, the majority decision of the Constitutional Court of South Africa in the *Glenister case* can be critiqued when its opinion is exclusively looked at through the prism of the principle of *Pacta Sunt Servanda* and Article 26 and 27 of the Vienna Convention afore-quoted. One can argue that the South African state, as a member of the international Community, cannot be permitted to invoke its Constitution (which is a domestic or municipal law) so as to avoid or fail to fulfil its international obligations. In

[19] Article 46 deals with competence of a treaty found to be invalid on account of a manifest breach of a fundamental international law which vitiates the consent of the person who entered into such treaty on behalf of a state party.

[20] Quoted in Malcom, *supra* note 1 at page 135. The international Court in *Cameroun V Nigeria* also rejected the argument that the 1995 treaty between the two states was invalid on account of non-ratification. It was found to be enough that it was signed. *ICJ Reports*, 2002 p.303, 403.

[21] Ibid.

[22] See for instance the International Court's decision in *Certain German Interests in Polish Upper Silesia case* PCIJ Series A No. 7 P.19 A.D.P.5 *Benin v Niger* ICJ Reports 2005 pp.90, 125 and 148.

other words, contrary to the majority Constitutional Court's opinion, the South African Constitution cannot be invoked so as to limit its citizens' citing and seeking relief pursuant to international agreements, particularly those which South Africa has signed and ratified.

3.2 Lex Posterior Derogate Prior

On the other hand, *Lex posterior derogate prior* provides that even after ratification and domestication, in a pure dualist approach, the international rule or agreement which thereby becomes part of the national law is a mere legislation or statute that can then be overridden by another national law subsequently enacted to replace the prior law that domesticated the international rule or agreement.

The dualist approach seems to be preferred or founded upon at least four justifications. First, that the state, even under international law, retains the sovereign mandate to determine the laws that govern its territory. Secondly, that international agreements are often entered into by the executive arm of the state while the law making mandate is mostly exercised by legislatures or parliaments, hence the requirement of the international norms being incorporation or translated into national laws through the domestic legislative processes.

Thirdly, there is always the apprehension that international agreements may contradict existing national laws hence the need for alignment of international law with national law so as to achieve consistency. Fourth, is also a latent fear that the complex and multidisciplinary international law may not be readily competently understood by domestic judges hence the need to "translate" international legal norms into the more familiar territory of national laws or statutes for easier application by domestic courts.

From the aforegoing discourse it is increasingly apparent and decipherable that the contestation between the majority and minority opinion of the Constitutional Court of South African in *Glenister* is an ideological confrontation on the hierarchical order of legal norms within the South African legal system. The majority seems to be inclined towards the view that the national laws of South Africa take precedence over international agreements while the minority look at international agreements as part and parcel of domestic law with direct application without the need for

translation, incorporation or domestication into municipal laws. To enrich this discourse, very brief insights from other jurisdictions will suffice.

4.0 Comparative Perspectives

4.1 The United Kingdom

The contestations between dualism and monism as theories of application of international norms is equally live in the United Kingdom. In the UK the positivist- dualist theory has evolved into what is referred to as *"transformation"* while the monist approach is referred to as the doctrine of *"incorporation"*. Under the transformation doctrine, domestic and international law form two separate and distinct sets of law and, that international instruments to which the UK is a party require legislative enactment into domestic laws for them to have force of law domestically.

Malcom[23] draws the frontiers and contours of the doctrine of "transformation" in the following words:

> *"…is based upon the perception of two quite distinct systems of law, operating separately, and maintains that before any rule or principle of international law can have an effect within the jurisdiction it must be expressly and specifically "transformed" into municipal law by the use of appropriate Constitutional machinery such as an Act of Parliament".*

The "incorporation" doctrine is perhaps best put by Lord Atkin in *Chung Chi Chengu v R,* thus:

> *"International law has no validity except in so far as its principles are adopted and accepted by our domestic laws... The Courts acknowledge the existence of a body of rules which nations accept among themselves on any judicial issue they seek to ascertain what the relevant rules is, and having found it they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals".*[24]

Incorporation, which takes a monist slant, recognises international law norms as having been adopted as part and parcel of domestic laws of the state upon ratification or signing the treaty or convention and does not

[23] *Supra* note 1 at 139.

[24] [1939] AC 160: 9AP P.264. See also *Commercial and Estates of Egypt V Board of Trade, 1925* 1KB 127, 295; 2AAD P. 423.

require legislation or enactment through domestic statute of the party state. Incorporation, as an approach, is best captured in the words of Blackstone, who is his commentaries states: -

> *"The Law of nations, whenever any question arises which is properly the object of its jurisdiction, is here adopted in its full extent by the common law, and it is held to be a part of the law of the land".*[25]

The dilemma in the approach in the UK almost mirrors the competing views in *Glenister*. The *transformation* and *incorporation* approaches in the UK reflect the difficulty attendant in the treatment of international agreements even within the entrenched and long standing and developed common law.

The line between the transformation and incorporation theories, in the UK and therefore by extension in other common law seems to get blurred with the development of case law.[26] This lends more difficulty in ascertaining the principles applicable in observance of international law particularly in common law legal system, especially under its most prominent feature of *stares decisis* or precedent. It is therefore only natural that jurisdictions which apply or import common law practices and tendencies will face similar if not a more confounding or confusing dilemma as was confronted in *Glenister*.

4.2 The Kenyan Experience: Article 2 of the Constitution of Kenya, 2010 and *Beatrice Wanjiku and Another v The Attorney General* [27]

The Constitutional Court of Kenya in interpreting Articles 2(5) and 2(6) of the Constitution of Kenya 2010 compares and contrasts the position under the current Constitution and the former Constitution. The current Kenyan Constitution of Kenya, under the aforesaid provisions, international law including its rules, forms part of the law of Kenya and that any treaty or

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[25] Quoted in Malcom *supra* note 1 at P. 140.

[26] See for instance *West Rand Gold Mining Co case (1905) 2KB 391* wherein Lord Alverstone declared that "whatever had received the common-law consent of civilized nations must also have received the consent of Great Britain and as such would be applied by municipal tribunals". Lord Denning and Shaw L J in *Tredex (1977)* ZWLR 356 elucidated that international law is oblivious of the rule of *stares decisis* and therefore where international law changed, the court could implement that change, "without waiting for the House of Lords to do it".

[27] Petition No 190 of 2011, eKLR.

convention ratified by Kenya equally forms part of the law of Kenya[28]. The previous constitution took a dualist approach which required domestication before legal recognition and application of international law, including treaties.[29]

4.3 The United States of America

This fairly recent American case of *Medellin v Texas*[30] throws a spin to the hitherto settled legal preposition by introducing the Monist –dualist (Hybrid) approach into the United States of America (USA). The case underscores that this hybrid approach is informed by some treaties not being self-executing hence requiring domestic legislation to give them effect. This mixed approach is also said to be in acknowledgement and appreciation of the United States of America's lack of a homogeneous legal system with semi-autonomous states applying either a monist or dualist approach. The US position seems to have been similar to the UK, at least in the early 1900 through to the 1990's with the only difference being requirement of the international agreement's compliance with the US Constitution.[31] Article VI of the US Constitution directly recognises treaties as part of the law of the US. Section 2 thereof instructively reads:

> *"All treaties made or which shall be made with the authority of the United States shall be Supreme Law of the land and the Judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding".*

The Supreme Court of the US as early as 1900 in the *Paquete Habana case*[32] emphasised that *"international law is part of our law".* The Supreme Court also asserted that international law would not be applied if it contradicted or was inconsistent with a legislative, executive, or judicial act to the contrary. The US therefore exemplifies a mixed (dual –monist) approach, guided by national interest (mostly security and economic) and supremacy

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[28] *Supra* note 4 above.
[29] Per Odunga J in *Beatrice Wanjiku Supra*, note 28.
[30] US 491(2008).
[31] See US Supreme Court decision in *Boss V Bary 99L* Ed 2d stated: "it is of course correct that the United States has a vital national interest in complying with international law".
[32] 175 Us 677 1900.

of domestic laws, particularly its Constitution.[33] There is therefore a remarked difference between the UK, USA and South Africa.

4.4 Australia

The Australian case of *Minister for Immigration and Ethnic Affairs v Toeh*[34] bespeaks the preposition similar to the majority decision in *Glenister* and *AZAPO*. It demonstrates that that Australian jurisprudence seems to favour a dualist approach on similar basis as espoused in the *Glenister* case.

The principal foundation and rationale for the dualist approach in Australia is perhaps most aptly captured by the Australian High Court in the said case of *Toeh* in the following terms: -

> "*It is well established that the provisions of an international treaty which Australia is a party, do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statue. This principle has its foundation in the preposition that in our constitutional system the making and ratification of treaties fall within the province of the executive in the exercise of its prerogative power whereas the making and alteration of the law fall with the province of parliament, not the executive. So, a treaty which has not been* incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law".[35] (Emphasis added).

The "incorporation" referred to in Australian decision aforequoted seems to reflect the "transformation" theory in the United Kingdom and not the "incorporation" theory. This confusion notwithstanding, the Australian position in general principle seems to mirror the UK and South African approach.

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[33] *Committee of United States Citizens living in Nicaragua-v- Reagan 859 F.2d* 929 (1988) the Court of Appeals stated that "no enactment of congress can be challenged on the ground that it violates customary international law". It is however a general presumption in US law that legislation is meant to accord with international law- See *Schroeder v Bissell* 5F.2d 838 1925 and also *MacLeod v US* 229 Us 416(1913).

[34] [1995] 183 CLR 273.

[35] *Ibid*, at 268 – 7.

5.0 Conclusions

In the ultimate, the odyssey that is the analysis of the competing concepts of monism and dualism as appreciated by the majority and minority opinions of the Constitutional Court in *Glenister* in its interpretation of the import of Sections 231 of the South Africa Constitution leads to two inescapable conclusions.

First, that the South African Constitution primarily prefers and typifies a dualist approach with some limited elements of monism. It also shows some elements of the mixed or hybrid (monist-dualist) approach to the observance and application of international norms or agreements. For the administrative, technical and executive international agreements, the constitution permits a direct monist automatic application without the necessity of domestication through legislation and subject only to the international agreements' presentation to the national assembly and council of provinces within reasonable time, while all other agreements must be translated into domestic laws of South Africa for them to have the force of law.

Secondly, that the primary concern of international law is that its obligations are observed, but the manner and form of observance of its obligations seem to largely be to the election and realm of domestic laws of individual state parties Although international law (including the Vienna Convention under Article 27 and the International Courts (ICJ) advocates for direct application of international treaties) the reality is largely quite the opposite. Whether observance in good faith of international norms is ultimately achieved by either transformation or incorporation (dualism or monism) is not something the Vienna Convention is useful on. The Convention leaves a lot of room for non-observance of international law and invites legal excuses therefor, contrary to its very basic objective. This in itself is an area for further debate and potential or possible reform. For purposes of this discourse, however, both the majority and minority opinions espousing dualism and monism respectively are valid in their interpretation of section 231 of the South African Constitution to the extent that the application of either self-executing administrative, executive and technical international agreements on the one hand do not require domestication through legislation, while those which require domestic assistance in enforcement and which primarily regard national security, political, social economic and

cultural rights and interest, on the other hand require domestication through municipal legislative processes. The distinction between technical and non-technical international agreements as drawn in section 231 of the South African Constitution is easier said in theory than in practice. It is not clear what technical international agreements would import as anything of any serious substance can be said to be technical and therefore fall thereunder. Worse still it is not clear whose role it is to determine what agreements fall within the ambit of technical and which ones do not, particularly in the event of a dispute. This lacuna in the South African Constitution requires attention.

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Arbitration as a Tool for Management of Community Land Conflicts in Kenya

By: ***James Ndung'u Njuguna****

Abstract

Arbitration and other forms of Alternative Dispute Resolution (ADR) mechanisms have been designated as some of the methods of dealing with disputes and conflicts involving community land as expressly provided under section 39 (1) of Community Land Act. However, the Community Land Act fails to appreciate the distinction between disputes settlement and conflicts resolution.

This paper therefore focuses on the management of community land conflicts through arbitration in Kenya. While the Community Land Act 2016 envisages the use of various ADR mechanisms as conflict management mechanisms, the scope of this paper is limited to examining the effectiveness of arbitration as a tool for management of community land conflicts. The main hypothesis is that arbitration is ordinarily conceived is coercive and results in outcomes similar to those found in litigation and this, based on African communities desire for reconciliatory approaches, makes it inappropriate in addressing community land disputes and conflicts.

The paper also seeks to prove the following hypotheses: firstly, arbitration is not an effective tool in the management of natural resources with regard to community land in Kenya; secondly, the apparent conflict between the characteristics and nature of community land conflicts and the nature and process or arbitration, devoid of any harmonization, may defeat the intentions of Article 159 of the Constitution; and thirdly, the viable panacea to settling community land-based conflicts is to adopt a hybrid ADR mechanisms so as to achieve a customised approach.

It also attempts to contribute to the legal debate and suggest the best way forward in making arbitration and to an extension ADR, a much more effective tool for the management of community land conflicts in Kenya.

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1.0 Introduction

Law is a social mechanism, a means to further the ends of society.[1] Thus, it is arguable that the use of law as a tool in dealing with social conflicts in any society should not be done in a rigid manner but should instead respond to the particular circumstances and needs of the society in question. This approach thus informs this study in coming up with the most responsive conflict management mechanism(s) for managing community land conflicts in Kenya.

Land is a natural resource[2] and undoubtedly, the management of land as a natural resource and the resultant conflicts thereof has important ripple effects in a given country.[3] In Kenya, the case is 'worsened' by the contentious history of land laws, the emotive nature of the land question as well as the real or perceived land injustices in the country since the pre-colonial era.[4] This study takes cognizance of the fact that various efforts have been commissioned in a bid to provide expeditious, affordable and just mechanisms that enable smooth and practical processing of land disputes and conflicts. One of the issues under examination in this paper, however, is the adequacy and effectiveness of arbitration as a tool for managing community land-based conflicts.

The Constitution of Kenya 2010 recognizes the principle of promoting alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms as one the principles that should guide the courts and tribunals when exercising judicial authority.[5] While this provision is not specific on the kind of disputes and conflicts to be submitted to alternative forms of dispute resolution, there are other provisions that contemplate such disputes or conflicts as including community land conflicts. For instance, the Constitution also requires that land in Kenya should be held, used and managed in accordance with the

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[1]Gardner, J.A., "The Sociological Jurisprudence of Roscoe Pound (Part I)," *Villanova Law Review* 7, no. 1 (1961): 1 at, p.12.

[2]See Article 260 of the Constitution of Kenya on definition of 'Natural Resources'.

[3] K Muigua, D Wamukoya F kariuki, *Natural Resources and the Environmental Justice in Kenya*. Glenwood Publishers 2015 Nairobi; See also B. Wehrmann, 'Land Conflicts A practical guide to dealing with land disputes' Eschborn, 2008.

[4] L. Adam, 'Land reform and Socio-Economic Change in Kenya' in Wanjala C. Smokin, Essays on Land Law; The Reform Debate in Kenya (Faculty of Law University of Nairobi 2000) p 192.

[5]Article 159 (2) (c), Constitution of Kenya 2010.

principles of, *inter alia*, encouragement of communities to settle land disputes through recognized local community initiatives consistent with the Constitution.[6] Notably, one of the recognized classifications of land under the Constitution is community land.[7]

Community Land Act 2016[8] was enacted to give effect to Article 63 (5) of the Constitution. It provides for recognition, protection and registration of community land rights, management and administration of community land and for the role of county governments in relation to unregistered community land.[9] It also allows a registered community to use Alternative Dispute Resolution mechanisms including arbitration where it is appropriate to do so, for purposes of settling disputes and conflicts involving community land.[10]

The Community Land Act allows the parties to community land disputes to jointly refer the dispute to arbitration.[11] Furthermore, where the parties to an arbitration agreement fail to agree on the appointment of an arbitrator or arbitrators, the provisions of Arbitration Act relating to the appointment of arbitrators are to apply.[12]

One of the issues that may have informed the need for inclusion of ADR mechanisms including arbitration as part of available mechanisms for management of community land disputes and conflicts is the inadequacy and the hurdles that bedevil litigation.[13] While Community land disputes may easily be managed using dispute settlement mechanisms, community land conflicts are *sui generis* in nature requiring a carefully customized approach. In as much as arbitration is a voluntary and an alternative resolution process, it is similar to litigation in some aspects considering that they are both settlement mechanisms. It is adversarial in nature with minimal or no

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[6] See also Article 67 (2) which tasks the National Land Commission—(f) to encourage the application of traditional dispute resolution mechanisms in land conflicts.

[7] Article 63, Constitution of Kenya.

[8] Community Land Act, No. 27 of 2016, Laws of Kenya.

[9] Ibid.

[10] Section 39 (1), Community Land Act, 2016.

[11] Section 41(1), Community land Act, 2016.

[12] Ibid, Section 41(2).

[13] See generally, K. Muigua, *Settling Disputes through Arbitration in Kenya*, (3rd Ed., Glenwood Publishers, Nairobi, 2017); See also K. Muigua, *Alternative Dispute Resolution and Access to Justice in Kenya*, (Glenwood Publishers, Nairobi, 2015).

chances of saving existing relations. It is in light of this that this paper discusses the effectiveness of arbitration in managing community land conflicts as provided for under the Community Land Act 2016.

One of objectives of the Constitution and the Community Land Act 2016 is to promote reconciliation amongst community members especially in land management matters.[14] Arbitration is arguably not one of the most viable mechanisms of promoting reconciliation in the context of community land disputes owing to some of its intrinsic characteristics. Unless this legal debate is broached and recommendations implemented, the objects and intentions under Article 159 and article 63 (5) of the Constitution might stand frustrated and suppressed or at most be rendered elusive.

2.0 Background

Some authors observe that in the traditional African setup, indigenous resource management systems reflected the way communities organized their lives within the constraints of the environment in which they lived.[15] Decision-making institutions focused on utilizing and managing environmental resources based on the knowledge of the community and within the framework of their ethics, norms and beliefs.[16]

They also observe that resource use systems relied upon building reciprocal relations among families and communities, for example, through livestock sharing, and with other groups and communities through trade, marriage and advisers. These relations redistributed risk and strengthened social obligations to be utilized during times of drought, pestilence or war. The indigenous tenure systems thus provided high levels of tenure security. They however acknowledge that over time customary tenure systems in Africa have spontaneously evolved "from more diffuse and collective to

[14] Article 60: (1) (f) elimination of gender discrimination in law, customs and practices related to land and property in land; and (g) encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution.

[15] Juma C. & Ojwang J.B (eds), *In Land We Trust: Environment. Private Property and Constitutional Change,* (African Centre for Technology Studies (ACTS) Press, Nairobi 1996).

[16] Ibid, p. 17.

more specific, exclusionary individual rights" in response to population pressure and commercialization of agriculture.[17]

Undoubtedly, customary land law tenure and colonial administration are critical factors that have shaped the evolution of property laws and the existing property regimes and proprietary transactions in Kenya.[18] Community ownership of land stems from the pre-colonial period.[19] Colonialists then introduced land tenure systems of private land when they settled in Africa. Despite several spirited attempts by the colonial government to erase the concept of African commons, community land ownership persisted, as a parallel and informal system. Due to the lack of a comprehensive legal framework, it was not recognized as a legitimate form of ownership, which in turn encouraged its conversion to private land.[20]

It was with the development of the National Land Policy, 2009[21] and the promulgation of the Constitution of Kenya 2010[22] that community land was given a seat at the table of legitimate land tenure systems. This part of the paper shall consider the pre-colonial, colonial and post-colonial history of community land in Kenya.

2.1The pre-colonial era

Kenya's pre-colonial era was that before 1895. During this period, Kenyan communities held land in common and used the land either for agrarian activities or pastoralism.[23] One of the prominent scholars made the following observations with regard to the ownership of community land before colonial administration: 'These African commons were managed and protected by a social hierarchy organized in the form of an inverted

[17]Ibid, p. 18.

[18] H.W.O. Okoth-Ogendo, Tenants of the Crown: Evolution of Agrarian Law & Institutions in Kenya, (ACTS Press, Nairobi, 1991), 7-19.

[19] Haki Blog, 'Taking Community Land Matters Seriously in Kenya.' Available at https://kituochasheria.wordpress.com/2015/05/19/taking-community-land-matters-seriously-in-kenya/ [last accessed on 4/6 /2017].

[20] Kariuki F., 'Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology' Strathmore Law School (2015).

[21] Session Paper No. of 2012 on National Land Policy, Laws of Kenya.

[22]Article 63, the Constitution of Kenya 2010.

[23] Wamicha W N and Mwanje J I, 'Environmental management in Kenya; Have the national Conservation Plans Worked? ' Organization for Social Science Research in Eastern and Southern Africa, (2000) Addis Ababa, Ethiopia.

pyramid; the tip represented the family, the middle, the clan and lineage and the base, the community. The ownership of the land lies in all members of a community, past, present and future and access to the resources of the Commons is open to persons who qualify on the basis of socially defined membership criteria reinforced internally, by obligations which are assumed on the basis of reciprocity and to each member of the social hierarchy.'[24]Land ownership and use was also governed by the respective customary laws of the various ethnic communities.[25]

The African Commons were considered to be the primary economic and social asset individuals and which communities drew on, from which the fountain form their spiritual life and political ideology sprung and thus could not be subject to transfer or sell to any person outside the community.[26]

2.2 The Colonial Era

The beginning of this period was marked by the British Government's declaration of the East African Protectorate as a protectorate of the Queen of England in 1895.[27] This era saw the implementation of colonial laws and practices which led to mass disinheritance of the Kenyan communities.[28] Colonialism had an impact on African landholding in these ways: land alienation from Africans, imposition of English property law and transformation of customary land law and tenure.[29]

One of these practices was that colonial white settlers, either erroneously or purposely, perceived any tract of land left fallow as no man's land or annexed it.[30] In 1901, the East Africa Lands Order in Council came into

[24]HWO Okoth Ogendo, 'The Tragic African Commons: A Century of Expropriation, Suppression and Subversion' Amplifying Local Voices: Striving for Environmental Justice, Centre for International Environmental Law, et. al.". In: Cent. Afri. J. Pharm.Sci. 5(3): 60-66. Cent. Afri. J. Pharm.Sci. 5(3): 60-66; 2002.

[25] H.W.O. Okoth-Ogendo, *Tenants of the Crown: Evolution of Agrarian Law & Institutions in Kenya*, op. cit.; See also F. Kariuki, S. Ouma & R. Ng'etich, *Property Law,* Strathmore University Press, 2016.

[26] Ibid.

[27] Clayton A. and Savage D.C., 'Government and Labour in Kenya 1895-1963' Routledge, 1974.

[28] Republic of Kenya, *National Land Policy*, (2009, Government Press).

[29] S. Wanjala, 'Land Ownership and Use in Kenya; Past, Present and Future' in Wanjala S (ed), Essays on Land Law: The Reform Debate in Kenya, University of Nairobi, Nairobi, 2000, 27.

[30] [Wamicha W N and Mwanje J I] Ibid.

force. It vested crown lands in the entire Protectorate in the Commissioner and such other trustees as might have been appointed, to be held in trust for her Majesty. The Commissioner also had power to make grants and leases on such terms as he saw fit.[31]

Individual ownership of land was also introduced as tenure of land for white settlers.[32] The Settlers displaced African communities such as the Maasai from the productive lands and settled them in less productive lands.[33]

The full effect of the 1915 Ordinance was well captured in the judgment of Barth CJ in the case of *Isaka Wainaina v Murito*.[34] In this case, the plaintiffs had claimed ownership of a parcel of land on the basis that they had purchased it from the Ndorobo Community before the European settlement.[35] Barth CJ's held as follows;

> *'In my view, the effect of the Crown Lands Ordinance 1915 and the Kenya (Annexation) Order-in-Council, 1920 by which no native private rights were reserved and the Kenya Colony Order-in-Council, 1921… is clearly inter alia to vest land reserved for the use of a tribe in the Crown. If that be so then all native rights in such reserved land, whatever they were… disappeared and natives in occupation of such Crown land become tenants at the will of the Crown…'*[36]

Colonization thus caused great upheaval to local communities, whose means of livelihood, spiritual and cultural structures were disrupted. The Colonial government consistently undermined community land ownership, through enactment of laws that facilitated their acquisition of rich, arable land. Both the Trust Land Act and the Land (Group representatives) Act were meant to transition customary to individual tenure in areas where immediate individualization of land could not be undertaken.[37]

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[31]Ojienda, T., *Principles of Conveyancing in Kenya, A Practical Approach*, op cit.

[32]J. Bruce, 'Kenya Land Policy: Analysis and Recommendations', USAID-Kenya, (April,2008)

[33] [Wamicha W N and Mwanje J I] Ibid.

[34][1923] 9 (2) KLR 102.

[35]; F. Kariuki, S. Ouma & R. Ng'etich, *Property Law*, (2016) Strathmore University Press.

[36] Ibid.

[37]Odote C, 'The Legal and Policy Framework Regulating Community Land in Kenya: An Appraisal'
Friedrich-Ebert-Stiftung, Nairobi, Kenya, 2013.

The Swynnerton reforms mainly proposed the establishment of individual title to land, which proposal led to policy recommendations that worked to the disadvantage of African communities. The Swynnerton Plan conceptualized the issue of access to land as one of tenure and the technology of production and made recommendations to modernize agriculture. One of the results of the Swynnerton Plan was the establishment of African gentry which was groomed to succeed the colonial administration and to dispel the nationalist movements which were forming at the time.[38]

2.3 The Post-Colonial Era

At independence, it was expected that the transfer of power to indigenous communities would dramatically change the policies that were in place, especially with regards to land; this was not the case. The decolonization process of Kenya was instead an adaptive, co-optive and pre-emptive process, installing the African elites in power and allowing them to gain access to the European economy; this resulted in a general re-entrenchment and continuity of colonial land policies, laws and administrative structures.[39]

The independent government thus only made superficial changes to the laws, changing them from 'Ordinances' to 'Acts', while the 'Crown' was substituted with 'President' who now had authority to allocate and alienate land.[40] The problem of landlessness remained unsolved, and there developed a culture of selective land allocation by the political elite to gain political support and mileage which intensified in the 1990s.

The 1999 Njonjo Report[41] and the 2002 Ndung'u Report[42] were key instruments in legal land reforms especially with respect to community land.

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[38]F. Kariuki, 'Securing Land Rights in Community Forests: Assessment of Article 63(2)(d) of the Constitution' University of Nairobi, Thesis 2013.

[39]Kameri-Mbote P, *The Land Question in Kenya: Legal and Ethical Dimensions*, International Environmental Law Research Centre (2009) Strathmore University and Law Africa.

[40][Odote C.] Ibid. See also Friedrich Ebert Stiftung, Nairobi, Kenya.

[41] Republic of Kenya, *Report of the Commission of Inquiry into Existing Land Law and Tenure Systems*, (Njonjo Commission Report, 2002).

[42] Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (Ndung'u Commission Report, 2004).

They both recommended a land policy that would recognize and address historical land injustices, customary land rights and conflict resolution.[43]

The *National Land Policy 2009*, for the first time in Kenya's history, designated customary land as a category of land in Kenya.[44] It recommended a number of measures in order to secure community land, including but not limited to documenting and mapping of existing forms of communal tenure, whether customary or contemporary, rural or urban, in consultation with the affected groups, and incorporate them into broad principles that would facilitate the orderly evolution of community land law. Although the full implementation of this Policy has been slow, Kenya now has a legislative framework governing community land comprised of Article 65 of the Constitution of Kenya[45], Land *Act*[46] and the recently enacted Community Land Act 2016.[47]

3.0 Nature of Community Land Conflicts

Under the Community Land Act, there are possible types of conflicts that can occur as far as community land in Kenya is concerned. Some of these would include, *inter alia;* Conflict between communities over community land interests; Conflict between an individual community member and the community; Conflict between the community and county or national government over community land interests; and Conflicts between county governments for community land that crisscross county boundary.

Some authors have rightly pointed out that land conflicts can result from historical injustices, ill-advised government policies, conflicts of interest, corrupt leadership, or more generally from competition over land and resources.[48] Furthermore, Conflicts can be clearly apparent, involving violence or damage to property, or may be latent or dormant.[49]

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[43] Issues and Recommendations Report of the National Land Policy, Ministry of Lands and Housing (August 2005).

[44]Sessional Paper No. 3 of 2009 on National Land Policy, Government Press

[45] Constitution of Kenya 2010.

[46] Section 37, Land Act No. 6 of 2012, Laws of Kenya.

[47] Community Land Act, No. 27 of 2016.

[48] Boudreaux, K, Vhugen, D. & Walter, N., 'Community Land Conflicts: How Local Land Disputes Affect

Private Sector Investments and Development Projects,' (IGAD, 2017), p.1. Available at http://land.igad.int/index.php/documents-1/countries/kenya/investment-3/628-

These are the various kinds of conflicts that the Constitution and the Community Land Act contemplate may require ADR and other methods of conflict management to address them.

4.0 Management of Community Land Disputes through Arbitration

Before the promulgation of the current Constitution of Kenya, the now repealed *Land Disputes Tribunal Act* (Cap 303A)[50] was enacted to limit the jurisdiction of magistrates' courts in certain cases relating to land; to establish Land Disputes Tribunals and define their jurisdiction and powers and for connected purposes. Subject to the Act, all cases of a civil nature involving a dispute as to— the division of, or the determination of boundaries to land, including land held in common; a claim to occupy or work land; or trespass to land, were to be heard and determined by a Tribunal established under section 4.[51]

When a claim was filed, the Tribunal was to adjudicate upon the claim and reach a decision in accordance with recognized customary law, after hearing the parties to the dispute, any witness or witnesses whom they wished to call and their submissions, if any, and each party was to be afforded an opportunity to question the other party's witness or witnesses.[52] Any appeals would be lodged with the Land Disputes Appeals Committee or the High Court.[53] Notably, while this Act provided for the use of customary law, it did not have any express provisions recognizing the use of ADR mechanisms in managing land disputes, whether community or group held. This however changed with the promulgation of the current Constitution as it formally recognized the use of formal and informal methods of dispute and conflicts management in land and environmental matters.

Chapter ten[54] of the Constitution of Kenya 2010 vests judicial authority in the constitutionally established courts and tribunals.[55] The Constitution

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[49] Ibid, p.1.

[50] Repealed by Environment and Land Court Act, No. 19 of 2011.

[51] Sec. 3(1), *Land Disputes Tribunal Act.*

[52] Sec. 3(7), *Land Disputes Tribunal Act.*

[53] Sec. 8, *Land Disputes Tribunal Act.*

[54] Articles 159-173, Constitution of Kenya 2010.

further empowers the Parliament to establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land.[56] As a result of this provision, Parliament enacted the *Environment and Land Court Act, 2011*[57], to give effect to Article 162(2) (b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes.[58]The Act established the Environment and Land Court (ELC),[59]which has original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.[60]

In exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the Court can hear and determine disputes on environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources, compulsory acquisition of land, land administration and management public, private and community land and contracts, choses in action or other instruments granting any enforceable interests inland and any other dispute relating to environment and land.[61]

In addition to the matters referred above, the Court can entertain appeals over the decisions of subordinate courts or local tribunals in respect of the above listed matters.[62] In exercise of its jurisdiction under this Act, the Court order reliefs may include interim or permanent preservation orders including injunctions, prerogative orders, award of damages, compensation, specific performance, restitution, declaration and/or costs.[63] The effectiveness of the specialized court as a panacea for management of land based conflicts has however been contested. For instance, it has convincingly been argued that the creation of the Environment and Land

[55]Article 159 (1), Constitution of Kenya.
[56]Article 162 (2) (b), Constitution of Kenya.
[57]Environment and Land Court Act, No. 19 of 2011, Laws of Kenya.
[58]Preamble, Environment and Land Court Act, No. 19 of 2011.
[59] Sec. 4(1), Environment and Land Court Act, No. 19 of 2011.
[60] Sec. 13(1), Environment and Land Court Act, No. 19 of 2011.
[61]Ibid, Sec. 13(2).
[62]Ibid, Sec. 13(4).
[63]Ibid, Sec. 13(7).

Courts is likely to result in a more convoluted and inefficient legal framework with an additional Court being formed into an already overcrowded legal system, resulting in the application of the provisions of the Constitution in a manner that was not envisaged.[64] One of the authors strongly advocates for the use of ADR in managing land disputes.[65] However, there is no discussion on the distinction between dispute settlement and conflict resolution, which distinction is important in key in this study.

50 Efficacy of Arbitration in Management of Community Land Disputes

From the outset, an understanding of the nature of these conflicts and the parties involved is critical. It in turns informs the particular challenges and opportunities for arbitration as a form of ADR mechanisms and far as the inaptness of arbitration is concerned, this question remains focal throughout this research. The averments of the Report by the Njonjo Commission on the ownership and control of land have significance to the nature of community land conflicts.[66] The fact that issues around ownership and control of community land rights are more often influenced by the structure of social and cultural relations rather than juridical principles is critical to the analysis of arbitration mechanism as a suitable means of solving disputes. Most importantly, this assertion speaks into the nature of community land conflicts. Further, the truism in the statement that they are not spawned by strict legal principles and conflicts *inter se;* essentially means that the option to litigate on these issues would be a misleading approach. On this basis, it is safe to conclude that indeed ADR mechanisms are more preferable resolution methods compared to litigation when attempting to determine and resolve conflicts relating to community land matters. The former goes into the root of the conflict. Community land conflicts are usually subject to

[64]Maina, M.W., *Land Disputes Resolution in Kenya: A Comparison of the Environment And Land Court And The Land Disputes Tribunal*, LLM Thesis, (University of Nairobi, September 2015), p. 81. Available at http://erepository.uonbi.ac.ke/bitstream/handle/11295/95229/Maina_Land%20Disputes%20Resolution%20In%20Kenya%20%20A%20Comparison%20Of%20The%20Environment%20And%20Land%20Court%20And%20The%20Land%20Disputes%20Tribunal.pdf?sequence=1&isAllowed=y

[65] Ibid.

[66] [Njonjo Report]

resolution by traditional justice systems.[67] These systems or traditional dispute resolution mechanisms (TDRs) are as vast as there are tribes in Kenya; they are specific to each context. All the same, certain characteristics are common. It has been suggested that in using arbitration to settle claims over land, there are some issues that must be addressed. It is important to know what substantive law arbitration will be based upon? It is also vital to find out what value of certainty the awards render and the relative enforcements?[68]

Some scholars have argued that the major problems with the general use of arbitration alone are its adjudicatory nature and its lack of efficiency. Although arbitration is not as formal as adjudication, it does follow the same general style as a courtroom proceeding. The process resembles a courtroom because "the arbitrator accepts evidence, listens to witnesses called by the parties, and hears the arguments of the parties."[69] This may not be the ideal setting for disputes or conflicts with need for or close relationship as it can feel adversarial, even if it is less formal than going to court. Additionally, the added procedural requirements inherent in arbitration can increase the costs of the process. To some, these aspects of the procedure can make it almost indistinguishable from litigation.[70] Moreover, arbitration is criticized because of its lack of efficiency as far as saving time is concerned.[71]

It is not very clear on how the issue of fees should be handled especially in conflicts between one or more communities against another. Disputants are not only looking to resolve the issues of ownership but may also have other underlying issues that they may wish addressed. As already pointed out, arbitration is adversarial in nature and resembles litigation. As such, it may not address any psychological issues that may arise in community land conflicts. Unsatisfied parties may seek to appeal decisions. This may present

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[67] Human Rights and traditional Justice Systems in Kenya, United Nations Human Rights, Office of the High Commissioner (New York and Geneva, 2016).

[68]Nucci, D., 'Study on arbitration, mediation and conciliation of land and property disputes,' *Land and Property Study in Sudan* (2004), p.5. Available at https://www.cmi.no/file/1828-UNHCRNuccilandarbitrarion12Dec2004.pdf

[69]Vorys, Y., "The best of both worlds: the use of med-arb for resolving will disputes," p. 884.

[70] Vorys, Y., "The best of both worlds: the use of med-arb for resolving will disputes," p. 884.

[71] Ibid, p. 884.

a challenge in the case of arbitration since parties may have agreed not to appeal. Arbitration may also suffer from power imbalances which may adversely affect the process and outcome of the process.

6.0 Recommendations: Enhancing the Effectiveness of ADR Mechanisms in Managing Community Land Disputes

The paper sought to prove the following hypotheses: firstly, arbitration is not an effective tool in the management of natural resources with regard to community land in Kenya; secondly, the apparent conflict between the characteristics and nature of community land conflicts and the nature and process or arbitration, devoid of any harmonization, may defeat the intentions of Article 159 of the Constitution; and thirdly, the viable panacea to settling community land-based conflicts is to adopt a hybrid ADR mechanisms so as to achieve a customised approach. Effective settlement of community land conflicts in Kenya is critical in preserving social order in the country. As such, there is need for involvement of all stakeholders including the county and national governments to ensure that such conflicts are amicably resolved. As the custodian rights, the government has a higher obligation in ensuring that this is achieved. This will be with the aim of guaranteeing the proprietary rights of Kenyan communities. Further, the National Land Policy places an obligation on the government to establish a system for community land management and conflict resolution.[72] It can be argued that the enactment of the Community Land Act, 2016 is a major milestone towards achieving this goal. However, from the discussion in the previous sections, it has been established that the Act has several shortcomings especially in the area of conflict resolution. As such, the following can be done to enhance an effective system of handling community land conflicts and safeguarding the proprietary rights of Kenyan communities.

6.1 Investing in Public Awareness among Kenyan Communities

Conflicts are bound to occur whenever there is more than one person claiming a stake or interest in a resource as in the case of community land. In the Kenyan context, the default rule has been to rush to court whenever any kind of dispute arises regardless of whether or not the dispute can give

[72] Sessional Paper No. 3 of 2009 on National Land Policy, S 66 (d)

rise to a course of action. However as discussed, litigation has several shortcomings such as delays, costs and technicalities that may hinder access to justice among most people in Kenya. Further, as a rights-based system, litigation does not settle the root cause of a conflict creating a harbinger for the dispute to remerge in future. It is therefore important that communities be encouraged to pursue Alternative Dispute Resolution whenever disputes arise with regards to the use or management of community land. This would allow them to benefit from the advantages of most of these systems such as flexibility, expediency, low costs and settling the root course of a problem. This will help to preserve social and order and ensure that members can continue to co-exist in the community.

6.2 Streamlining the Conflict Resolution Mechanisms under the Community Land Act

By recognizing Alternative Dispute Resolution mechanisms such as arbitration, mediation and traditional dispute resolution, it is evident that the Constitution envisioned the advantages attributed to these systems. However, as discussed, the practice of Alternative Dispute Resolution in Kenya has not lived to its expectations. The Constitution advocated for a system that would guarantee efficiency, expediency, affordability and access to justice while it can be said that the contrary is true. Some of the shortcomings pointed with the current forms of Alternative Dispute Resolution include delays, costs and court interference especially in arbitration. Where this occurs, then the whole purpose of Alternative Dispute Resolution is defeated. Further, it is arguable that traditional dispute resolution may result in outcomes that are contrary to justice and morality defeating the provisions of Article 159 (3) of the Constitution.

These shortcomings can be cured by streamlining alternative dispute resolution in line with the Constitutional provisions. While pursuing arbitration, parties should be discouraged from making numerous and unnecessary applications to court as this results in inordinate delays. Further, there is need to institutionalize traditional dispute resolution mechanisms in line with the Constitution to ensure their efficacy in settling community land conflicts.

6.3 Use of Med-Arb to Manage Community Land Conflicts

Med-Arb entails subjecting a conflict to mediation then resorting to arbitration if the mediation fails. The system allows parties to benefit from the advantages of mediation and arbitration in the dispute resolution process. Further, the system guarantees finality, efficiency and flexibility which are key features of both arbitration and mediation. The discussion in the previous sections points to several shortcomings with the use of arbitration to settle community land conflicts. One mechanism that can offer a better alternative to arbitration is the use of Med-Arb. This is a form of conflict resolution mechanism that combines the use of both arbitration and mediation.[73] Med-Arb is a hybrid form of Alternative Dispute Resolution that has not been specifically recognized under the current legal regime in Kenya. However, the wording of the provisions of Article 159 (2) (c) of the Constitution of Kenya 2010 can be interpreted to be allowing other forms of Alternative Dispute Resolution not specifically provided for in the Article to be employed. The Article states that, 'alternative forms of dispute resolution such including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted.'[74] The list is not exhaustive and parties to a dispute may employ other forms of Alternative Dispute Resolution such as Med-Arb.

This form of conflict resolution is premised on the shortcomings of mediation and arbitration and seeks to give parties to a dispute an opportunity to benefit from the benefits of both mediation and arbitration.[75] As discussed, arbitration has become too formal and expensive whereas in mediation lack of a binding award limits its efficacy in conflict resolution. On the other hand, the finality of an arbitration award and the flexibility of mediation points to some of the advantages that these forms of Alternative Dispute Resolution possess. As such, use of Med-Arb settles the underlying issues in both arbitration and mediation by providing for finality, efficiency and flexibility.[76]

In Med-Arb, parties to a conflict first resort to mediation for purposes of resolving the conflict. At this stage, the mediator attempts to make the

[73] Pappas, B., 'Med-Arb and the Legalization of Alternative Dispute Resolution,' *Harvard Negotiation Law Review*, Vol 20 (2015) pp 159-200.
[74] Constitution of Kenya 2010, Article 159 (2) (c)
[75] Ibid.
[76] Ibid.

parties reach at an amicable solution. If the mediation fails to produce an agreement, the arbitration stage sets in and the arbitrator imposes a binding award on the parties.[77] Med-Arb recognizes the advantages of mediation over arbitration and this is the reason why mediation is first utilized in the conflict resolution and arbitration sets in only where the mediation has failed.

The finality, efficiency and flexibility of Med-Arb make it a viable mechanism of resolving conflicts related to community land. The Community Land Act recognizes the use of Alternative Dispute Resolution in managing disputes under the Act and specifically advocates for the use of traditional dispute resolution, mediation and arbitration.[78] However, the Act does not appreciate the shortcomings of these methods that may affect their efficacy in managing conflicts. As such, there is a need for a kind of dispute resolution mechanisms that guarantees party autonomy, efficiency and finality to the dispute. In the case of community land, there is also the need to preserve the relationship between the parties so that they can co-exist in the society. Through the use of Med-Arb, these concerns will be effectively addressed.

It has been asserted that Med-Arb has the ability to guarantee long term notions of procedural and distributive justice. [79] This arises from the fact that in Med-Arb, the disputants are given two chances to present their case, that is, at the mediation stage and at the arbitration stage, before such a dispute is determined. As a result, there is a high likelihood that all the underlying issues in the dispute will be resolved and the final decision will be arrived at after parties have been allowed to present on the issues and the arbitrator has full knowledge of all such issues. This contributes to the finality of the process and the notion of justice. This therefore makes Med-Arb a viable mechanism of resolving disputes related to community land under the Community Land Act, 2016.

Med-Arb is a hybrid form of alternative dispute resolution and is yet to be embraced in Kenya. Owing to its potential and advantages, there is a need

[77] William. H. Ross and Donald. E Conlon, 'Hybrid Forms of Third Party Dispute Resolution: Theoretical Implications of Combining Mediation and Arbitration.' The Academy of Management Review, Vol 25. No 2 (2000) pp 416-427

[78] Community Land Act, No 27 of 2016, S 39-4.

[79] William. H. Ross and Donald. E Conlon, 'Hybrid Forms of Third Party Dispute Resolution: Theoretical Implications of Combining Mediation and Arbitration.'

to embrace Med-Arb as a form of ADR in Kenya. The system can be very effective in settling community land conflicts by removing the barriers posed by both mediation and arbitration by providing finality to a conflict whilst preserving the relationship among the disputants.

6.3.1 Demerits of Med-Arb

While Med-Arb has the foregoing advantages, one should be wary of a few disadvantages. Some scholars and practitioners have argued that it is best to have different persons mediate and arbitrate. However, at times the same person acting as mediator "switches hat" to act as the arbitrator.[80] The risk in such a scenario is that the person mediating becomes privy to confidential information during the mediation process and may be biased if he or transforms himself into an arbitrator.[81]

The other risks have been identified as obtaining less-than-optimal assistance from the third party due to different competencies' requirement for mediation and arbitration.[82] This is because, the arbitrator's strength is believed to be in intellectual analysis and evaluation, while the mediator's strength is in balancing the legal evaluation with the creative work necessary to meet the parties' underlying business, personal and emotional interests.[83] There is also the risk of delay should the mediation fail. It will take some time to get the arbitration back on track, especially if a party decides a different neutral is needed to serve as the arbitrator.[84]

The other question that has been raised is whether procedural fairness requirements may tie the mediator-arbitrator's hands in the mediation and impede (or preclude) private caucusing.[85] This may be attributed to the fact that the person mediating becomes privy to confidential information during

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[80] Lieberman, A., 'MED-ARB: Is There Such a Thing?' *Attorney At Law Magazine*, (Greater Phoenix Edition), available at http://www.attorneyatlawmagazine.com/phoenix/med-arb-is-there-such-a-thing/ [Accessed on 01/11/2018] (As quoted Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya,* Glenwood Publishers, Nairobi – 2015, p. 50).

[81] Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya,* Glenwood Publishers, Nairobi – 2015, p. 50.

[82] Ibid.

[83] Ibid.

[84] Ibid.

[85] 'Agreements to engage in 'med-arb' now enforceable in Ontario,' *ADR Bulletin of Bond University DRC*, op cit.

the mediation process especially during such caucusing. The information so obtained is likely to affect their objectivity in arbitration. It may also raise confidentiality breach issues, thus affecting acceptability of the outcome.[86] This regards the question whether the Med-Arbitrator will remain unaffected as an arbitrator after engaging in caucuses and becoming privy to confidential, perhaps intimate, emotional, personal, or other "legally" irrelevant information.[87] However, it has been suggested that in reaching an ultimate arbitration decision, the med-arbiter has to be sensitive as to how to use, or if to use at all, the knowledge that he or she may have gained in confidence during the mediation phase of the process.[88] Despite the concerns for confidentiality, it is asserted that unlike normal arbitration, parties have to know, and to release, the med-arbiter from the normal restraints of an arbitrator's prohibitions of *ex parte* contacts.[89] This is important considering that mediation views such contacts as essential to come up with an award that addresses the parties' interests.[90]

It is argued that it is also important to let the parties know at the outset that particularly sensitive information, which they might identify in their deliberations with the med-arbiter as to matters not to be shared with the opposition, would be used only in mediation and would be ignored in arbitration.[91] That way, parties may gain confidence in the process and chances of the parties readily accepting the outcome are enhanced. Yet, some authors argue that to find an adequate resolution in the arbitration

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[86] Baril, M.B. & Dickey, D, 'MED-ARB: The Best of Both Worlds or Just A Limited ADR Option? (Part Two),' August 2014. Available at http://www.mediate.com/pdf/V2%20MED-ARB%20The%20Best%20of%20Both%20Worlds%20or%20Just%20a%20Limited%20ADR%20Option.pdf (as quoted in Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya,* Glenwood Publishers, Nairobi – 2015, p. 50).

[87] De Vera C, 'Arbitrating Harmony: Of Culture and Rule of Law in the Resolution of International Commercial Disputes in China' *Columbia Journal of Asian Law*, op cit, p. 158 (as quoted in Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya,* Glenwood Publishers, Nairobi – 2015, p. 50).

[88] Kagel J, 'Why Don't We Take Five Min.mutes? Med-Arb After 40 : More Viable than Ever' 241, 2013, p.246. Available at http://naarb.org/proceedings/pdfs/2013-241.PDF (as quoted in Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya,* Glenwood Publishers, Nairobi – 2015, p. 50).

[89] Ibid.

[90] Ibid.

[91] Ibid.

phase of the process, the Med-Arbitrator will need to use his understanding of the relationship between the parties during the mediation phase, or use his prior knowledge of their respective underlying interests.[92] This presents conflicting views on what the med-arbiter should do. However, what is more important for the third party who is retained to conduct both phases of the process is to ensure that information gathered in either phase is used sparingly and only for purposes of balancing the interests of the party. They must scrupulously guard their reputation of impartiality and independence as either the mediator or an arbitrator in the process. The debate out there is whether this is really possible and therefore, med-arb practitioners must always be aware of these misgivings about the process. There are those who still hold that the Mediation/Arbitration process can be an effective alternative dispute resolution method if parties, counsel, and neutrals alike understand the pros and cons of merging the two processes and the nuances inherently involved in the resultant combination.[93]

It has been observed that in Kenya, the process has not yet been the subject of court discussion although it is not expressly endorsed or prohibited, in its hybrid form. However, it is possible to argue that med-arb should be encouraged, in light of the current constitutional dispensation that allows parties to explore as many ADR and TDR mechanisms as possible. Parties should be able to appreciate the challenges that are likely to arise in med-arb before settling for it. To facilitate this, the proposed mediator-arbitrator should be well trained in both mediation and arbitration. They should also be able to advise the parties accordingly on

[92] De Vera C, 'Arbitrating Harmony: Of Culture and Rule of Law in the Resolution of International Commercial Disputes in China' *Columbia Journal of Asian Law*, op cit, pp. 156-157 (as quoted in Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya,* Glenwood Publishers, Nairobi – 2015, p. 50).

[93] Flake, RP, 'The Med / Arb Process : A View from the Neutral's Perspective,' *ADR Currents: The Newsletter of Dispute Resolution Law and Practice*, June, 1998, p. 1; See also Weisman, MC, 'Med/Arb-A Time And Cost Effective Hybrid For Dispute Resolution,' *Michigan Lawyer's Weekly*, October 10, 2011. Available at http://www.wysr-law.com/files/med-arb__a_cost_effective_hybrid_for_dispute_resolution.pdf [(as quoted in Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya,* Glenwood Publishers, Nairobi – 2015, p. 50).

the consequences of taking up med-arb as the conflict management mechanism of choice. [94]

Parties may also need to decide beforehand whether the third parties will be drawn from the communities involved or will be independent persons. They should also agree on how the potential costs of the process will be settled to avoid disagreements later on.

7.0 Conclusion

Community Land Act 2016 contemplates the use of ADR including arbitration, in management of community land conflicts. This research paper has assessed the viability of arbitration in management of these natures of conflict, based on its characteristics, and concluded that it may not achieve the best results for the parties involved.

The Community Land Act, 2016 was enacted to address among other issues, the management and administration of community land conflicts and the arising disputes. The Act provides an elaborate system of conflict resolution that entails mechanisms such as traditional dispute resolution, mediation, arbitration and litigation as a measure of last resort. However, as discussed in detail, the nature of community land conflicts makes some of these mechanisms especially arbitration and litigation inefficient in handling such kinds of conflicts.

As pointed out, community land conflicts are not spawned by strict legal principles or conflicts that make litigation ill-equipped to deal with them. Litigation is a right based system that places emphasis on the law and evidence when deciding disputes. In absence of these, a dispute subjected to litigation will likely be dismissed for disclosing no reasonable cause of action. Further, it has also been established that there are several underlying issues that needs to be adequately addressed in community land conflicts such as the need to preserve social relationships to ensure peaceful co-existence among members of a community.

The Paper has espoused the fact that community land conflicts are most preferably disposed of through Alternative Dispute Resolution than by litigation. This is in line with the principles of land policy enshrined in Article

[94] Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya,* Glenwood Publishers, Nairobi – 2015, p. 50.

60 of the Constitution that advocates for settling of community land conflicts through local initiatives consistent with the constitution.[95]

[95] Constitution of Kenya 2010, Article 60 (1) (g).

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Environmental Litigation in Kenya: A Call for Reforms

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

Abstract

The establishment of the Environment and Land Court (ELC) in Kenya is novel. The ELC has dual jurisdiction to hear and determine land and environmental matters. Since it was established in the year 2012, there is no published data on the number of environmental matters that have been handled by the court as compared to land. However, the research carried out by individuals and institutions indicate that the court has handled fewer environmental cases as compared to land cases. Caseload grants a court an opportunity to settle disputes, develop the related law and jurisprudence. Based on this, this paper discusses the factors that have contributed to the low environmental caseload in the ELC and provides recommendations on how to improve the said caseload in the ELC.

1.0 Introduction

Environmental litigation provides a mechanism for both private and public interest claimants a mechanism to enforce environmental law, determine environmental disputes, obtain compensation for environmental damage and in the end, conserve and protect the environment. As a result of the benefits associated with environment litigation in environmental governance, Kenya has continued through policy, legal and institutional reforms to provide mechanisms that seek to enhance environmental litigation. Yet, despite these fundamental reforms, environmental litigation in Kenya remains low as cases of environmental degradation continue to ravage the country.

While environmental litigation had since the colonial period been adjudicated by the general courts, the 2010 Constitution of Kenya changed this position by establishing a specialized Environment and Land Court (ELC) with dual jurisdiction to hear and determine environment and land matters[1]. In addition, with various provisions in the Constitution that seek to protect and conserve the environment, it was expected that the

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[1] Article 162(2) (b), Constitution of Kenya.

establishment of the ELC would enhance environmental litigation and in the end settle environmental disputes, develop environmental law and jurisprudence.

Environmental litigation cannot be effective if litigants do not approach the ELC to claim redress for environmental violations. This paper, therefore, focuses on environmental caseload and the required reforms to increase the said caseload. The paper is divided in three parts. The first part, discusses environmental litigation prior to the establishment of the ELC by identifying the issues that undermined environmental caseload and the key reforms that were undertaken. The second part, analyses the current state of environmental litigation in the ELC by interrogating environmental caseload and the jurisprudence emanating from the court. The third part, provides important reforms that would increase environmental litigation in Kenya.

This paper builds up on the findings of my Master of Laws (LLM) project '*The Role of the Environment and Land Court in Enforcing Environmental Law: A Critical Analysis of the Environmental Caseload*' submitted at the University of Nairobi in 2018.[2] The project sought to determine environmental caseload in the ELC since it was established and operationalized in 2012, and the impact of the environmental caseload on the functionality of the ELC. The key findings in the report were that: there is low environmental caseload in the ELC as most of the cases filed in the court concern land; and despite the few environmental cases filed in the ELC, the ELC has continued to make far reaching decisions in environmental matters.

2.0 The Road towards Increased Environmental Litigation in Kenya: Environmental Caseload Prior to the Establishment of the Environment and Land Court (ELC)

Concerns pertaining to environmental degradation such as overexploitation of natural resources, pollution, climate change, deforestation, loss of biodiversity and dumping of industrial waste in Kenya has continued to attract a lot of attention.[3] In order to protect the environment, Kenya has

[2] Oscar Amugo Angote, *The Role of the Environment and Land Court in Enforcing Environmental Law: A Critical Analysis of the Environmental Caseload* (Masters of Laws Thesis, University of Nairobi 2018).

[3] Pierre Failler, Patrick Karani and Wondwosen Seide, 'Assesment of the Environment Pollution and Its Impact on Economic Cooperation and Integration

continued to undertake fundamental reforms such as strengthening the institutional, legal and policy framework on environmental governance. In the wake of environmental degradation, the courts have continued to play a great role in environmental protection by hearing disputes filed by parties. The courts have also continued to develop environmental law and jurisprudence through judicial pronouncements.

Environmental disputes in Kenya are not novel. They existed even during the precolonial period where traditional methods of resolving disputes were employed.[4] During the colonial period, and prior to the promulgation of the Constitution which established the ELC, environmental matters were handled by courts of general jurisdiction. Enforcement of environmental law by the general courts was characterized by a number of features that hindered environmental litigation and fewer numbers of environmental cases were brought before the courts.[5]

Firstly, the laws pertaining to the environment were scattered across various sectors, making environmental regulation difficult and leading to forum shopping.[6] Secondly, enforcement of environmental matters was 'strictly a private affair that was of less concern to the main branches of public law'.[7] People resorted to the law of contracts and tort in enforcing environmental law and seeking redress for environmental breaches. Thirdly, the legislative framework then vested the enforcement of environmental matters in public officials who were reluctant to act. In the famous case of *Wangari Maathai v Kenya Times Media Trust,*[8] the Court held that it was only the Attorney General who could sue on behalf of the public and the Plaintiff had no right to bring an action against the Defendant. It was therefore

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Initiatives of the IGAD Region') IGAD, National Environment Pollution Report, Kenya 2016).

[4] Collins Odote and FA Away, Traditional *Mechanisms of Conflict Management* (Legal Education Foundation 2002); Collins Odote and Mo Makoloo, 'African Initiatives for Public Participation in Environmental Management' in C Bruch (ed), *The New "Public": Globalization of Public Participation (*Environmental Law Institute 2002).

[5] ACTS-UNEP, *The Making of a Framework Environment Law in Kenya* (ACTS-UNEP 2001).

[6] Migai Aketch, 'Land, the Environment and the Courts in Kenya' (Background Paper for the Environment and Land Law Reports 2006).

[7] Joel Kimutai Bosek, 'Implementing Environmental Rights in Kenya's New Constitutional Order: Prospects and Potential Challenges' (2014) 14 African Human Rights Law Journal 489, 490.

[8] (1989) 1KLR.

difficult for individuals to pursue environmental claims and seek for environmental justice. The implication of this strict rule of standing meant that the public officials could not file cases where the government violated environmental law. This had a negative impact on the number of environmental cases filed in the courts, thus denying the courts the opportunity to settle environmental disputes and protect the environment.

Fourthly, the courts applied the restrictive approach to standing in cases involving environmental matters.[9] The courts required the litigants to indicate their interest in environmental matters and prove the injury that they had suffered. This hindered environmental litigation even in the presence of environmental degradation and apparent environmental violations. Most of environmental matters are by their very nature public, and the requirement for personal injury meant that it was difficult for a person to prove that he had suffered injury due to environmental degradation. Fifthly, Migai notes that during this period, the law only provided for criminal penalties which were paltry and could not act as sufficient deterrent against environmental degradation.[10] This hindered civil litigation as the court could not order persons degrading the environment to pay damages or compensate those who had suffered injury due to their actions. Finally, the law did not provide for environmental impact assessment of development projects to mitigate their adverse impact on the environment.[11] This had a negative outcome on environmental litigation in Kenya, thus undermining the number of environmental cases that were filed in the general courts.

As a host of the UNEP, Kenya had to reconsider its environmental legal framework to enhance environmental litigation and reflect the developments in environmental governance at the international level. In order to enhance environmental litigation, and to address the challenges above, Kenya enacted the Environmental Management and Co-ordination Act (EMCA)[12] whose date of commencement was 14th January, 2000. The enactment of the EMCA was seen as a milestone in protecting the

[9] *Nairobi Golf Hotels (Kenya) Ltd v Pelican Engineering and Construction Co. Ltd HCCC 706 of 1997.*
[10] Migai (n7) 19.
[11] Ibid.
[12] Environmental Management and Co-ordination Act No. 8 of 1999

environment and spurring environmental litigation.[13] The Act brought with it new impetus in environmental governance. First, the EMCA provided a coordinated legal and institutional framework in environmental governance.
Second, for the first time in history, EMCA provided for the general principles to guide environmental management in the country recognized at international level. These principles include the right to a clean and healthy environment[14] and the application of the principles of sustainable development.[15] This was expected to trigger civil litigation in environmental issues.[16]
Third, the EMCA adopted the liberal approach to the rule of standing in enforcing environmental law.[17] Under Section 3(4), any person can approach the court to enforce environmental law. Such a person is not compelled to show that the Defendant's action or inaction has caused or is likely to cause him any personal loss or injury. However, such an action should not be vexatious, frivolous and/or an abuse of the court process.[18] It was expected that this would result into a floodgate of environmental cases in the Court.
The EMCA further established the National Environment Tribunal (NET) as a specialized environmental tribunal. In 2002, the NET was operationalized as required under Section 125 of the EMCA to hear and determine appeals arising from the decisions of the NEMA, the Director General and Committees established under EMCA. The jurisdiction of NET is specific and limited to instances that arise under Section 129(1) of EMCA.[19] Any

[13] Angela Mwenda and Thomas N Kibutu, 'Implications of the New Constitution on Environmental Management in Kenya' (2012) 8 Law, Environment and Development Journal 76.
[14] EMCA 1999, s 3.
[15] EMCA 1999, s 3(5).
[16] Jackton B Ojwang, 'The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development' (2007) 1(19) Kenya Law Review 19, 22.
[17]EMCA 199, S.3(4)
[18] Ibid.
[19] Section 129 of EMCA allows any person to appeal to the NET where they are aggrieved by the: refusal to grant or transfer of licence or permit; imposition of condition, limitation or restriction on licence; revocation, suspension or variation of licence; amount of money which he is required to pay as a fee; and imposition against environmental restoration order or environmental improvement orders. Upon appeal, NET can: confirm, set aside or vary the order or decision in question; exercise any of the powers which could have been exercised by the Authority in the proceedings in connection with which the appeal is brought; or make such

matter not falling under Section 129(1) of the Act was to be filed in the courts of general jurisdiction. Before the promulgation of the CoK, any person aggrieved by the decision or order of the NET would appeal to the High Court whose decision was final. Currently, such appeals are filed in the ELC.[20]

Due to the limited jurisdiction of the NET, courts of general jurisdiction continued to hear and determine environmental disputes not falling under Section 129 of the EMCA. Even with the enactment of the EMCA, environmental litigation remained minimal. The call for reforms in environmental governance featured promptly during the Constitutional review process and included the need to elevate environmental matters to a constitutional level. The Constitution of Kenya Review Commission (CKRC) argued, and correctly so, that the independence Constitution did not have provisions on environment and natural resources thus compromising environmental governance in the country[21] It was in CKRC's view that a provision in the Constitution on the environment and natural resources should be included in the Constitution to create a constitutional obligation to enhance and protect the environment. It also recommended the need to elevate the right to a clean and healthy environment from a statutory level to a constitutional status.[22]

During this period, the Ndung'u report had recommended for the establishment of the Land Division in the High Court due to the large number of land cases filed in the courts.[23] Whereas the implementation of the Ndung'u Report has remained elusive,[24] the Judiciary established the Environment and Land Division, as a division of the High Court, through

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other order, including orders to enhance the principles of sustainable development and an order for costs as it may deem just.

[20] Section 130 of the Environmental and Co-ordination Act No. 8 of 1999.

[21] CKRC, *Report of the Constitution of Kenya Review Commission* (2003) <http://katibainstitute.org/Archives/images/REPORT%20OF%20THE%20CONSTITUTION.pdf> accessed 26 January 2018.

[22] Ibid.

[23] Government of Kenya, *Report of the Inquiry into the Illegal/Irregular Allocation of Land* (Government Printers 2004); Joseph Kieyah, 'Ndung'u Report on Land Grabbing: Legal and Economic Analysis' (IDS 2010); Ndung'u Commission.

[24] African Centre of Open Governance (AFRICOG), 'Mission Impossible: Implementing the Ndung'u Report' (AFRICOG) https://www.africog.org/reports/mission_impossible_ndungu_report.pdf accessed 27 January 2018.

Gazette Notice No. 301 of 2007. However, the Environment and Land Division was only established in Nairobi and Mombasa.[25] All land and environmental matters outside Nairobi and Mombasa were required to be filed in the appropriate High Court stations in the country in accordance with the provisions of the Civil Procedure Act. The general courts therefore continued to hear and determine environment and land matters in other areas.

It should be noted that the establishment of the Environment and Land Division in the High Court in Nairobi and Mombasa had been informed by the increased number of land cases, not environment, and the need to adjudicate those matters expeditiously. The drafters of the Constitution deemed it necessary to have a specialized court to handle land and environment disputes to create public confidence. It was expected that the specialized ELC would handle land and environmental disputes expeditiously and competently.[26] After the promulgation of the Constitution establishing the ELC under Article 162(2) (b) of the Constitution in August 2010, a task force was established by the Minister for Environment and Natural Resources to draft a legislation on the implementation of the provisions in the Constitution relating to land use, environment and natural resources.[27] It is this taskforce that spearheaded the enactment of the Environment and Land Court Act[28] (the ELC Act), which outlines the jurisdiction and the institutional framework of the ELC.

In addition to establishing the ELC as a specialized court, the promulgation of the 2010 Constitution brought with it a new impetus in environmental governance.[29] The Constitution put in place a new progressive and internationally accepted regime in environmental governance. The Constitution addresses the issues of environment in many articles such as

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[25] Samuel Ongwen Okuro, 'The Land Question in Kenya: The Place of Land Tribunals in the Land Reforms in Kombewa Division' (A Paper Presented at the Codesria Tenth General Assembly Kampala Uganda 8th -12th December 2002).

[26] Augustus Wafula, 'Jurisdiction of Environment and Land Court' https://wafulaaugustus.wordpress.com/2013/02/20/jurisdiction-of-environment-and-land-court-kenya/ accessed 22 January 2018.

[27] Kenya Law, 'Kenya Gazette Notice No. 13880' <http://kenyalaw.org/kl/index.php?id=3709> accessed 24 January 2018.

[28] Environment and Land Court Act No. 19 of 2011.

[29] Robert Machatha Kibugi, 'New Constitutional Environmental Law in Kenya: Changes in 2010' (2011) 2 IUCNAEL eJournal 136-142.

its Preamble,[30] Article 10,[31] Article 42,[32] Article 48,[33] Article 69 [34] and Article 70, [35] amongst others.

The Constitution also did away with the requirement to demonstrate *locus standi* before a party can file a suit alleging violation of the right to a clean and healthy environment.[36] Before the enactment of the Constitution, Kenyan courts had relied on the strict rule of standing to bar litigants from enforcement of environmental rights.[37] Any person can now approach the Court on grounds of public interest without demonstrating that they have incurred loss or any damage.[38] The Constitution therefore elevated substantive environmental rights which had earlier been recognized under EMCA, to a constitutional status.[39] Article 42 of the CoK, protects the right of every person to a clean and healthy environment. The Constitution also envisages a number of rights whose enforcement is geared towards

[30] The preamble of the CoK provides that the people of Kenya, 'Respectful of the environment, which is our heritage and determined to sustain it for the benefit of future generations'.

[31] Article 10 of the CoK recognizes sustainable development as one of the national values and principles of governance binding all state organs, state officers, public officers and all persons when applying or interpreting the CoK, any law and when making and implementing public policy decisions.

[32] Article 42 provides that every person has the right to a clean and healthy environment.

[33] Article 48 of the CoK requires the State to ensure access to justice for all persons and where a fee is required, it should be reasonable and not impede access to justice.

[34] Article 69 provides the obligations of the State in respect of the environment

[35] Article 70 provides for the enforcement of the right to a clean and healthy environment; the orders that the court can grant and the fact that one need not have suffered any injury to file a petition alleging a breach of the right to a clean and healthy environment.

[36]Collins Odote, 'Public Interest Litigation and Climate Change: An Example from Kenya' in Oliver C Ruppel, Christian Roschmann and Katharina Ruppel-Schlichting (eds), *Climate Change: International Law and Global Governance* (Vol I Legal Responses and Global Responsibility, Nomos 2013) 805-830; Kenyan for Peace Truth and Justice (KPTJ), *A Guide to Public Interest Litigation in Kenya* (KPTJ, 2012).

[37] See *Wangari Maathai v Kenya Times Media Trust Limited (1989) 1 KLR; Nairobi Golf Hotels (Kenya) Ltd v Pelican Engineering and Construction Co Ltd HCCC 706 of 1997.*

[38] Article 70(3) stipulates that, 'an applicant does not have to demonstrate that any person has incurred loss or suffered injury'.

[39] Bosek (n 8).

environmental protection.[40] For example, Article 43 of the Constitution provides for the right to reasonable standards of sanitation; and to clean and safe water in adequate quantities which are related to environmental protection.[41]

The Constitution also requires that formalities relating to commencement of suits in respect of human rights violation should be kept to the minimum and if necessary, informal documentation be entertained by the court.[42] The court filing fees is not supposed to be charged for commencing such proceedings.[43] Further, the application of international environmental laws and principles, as recognized under Article 2(5) and (6) of the Constitution, has a direct effect on the Kenyan domestic legal order. International treaties and Conventions relating to environmental law and management can now be invoked by litigants and applied in court.[44] The ELC is therefore required to develop international environmental law jurisprudence through interpretation of the Conventions and international environmental laws and principles. Ideally, the implication would be to open a floodgate of environmental cases being filed in court in a country where environmental degradation and climate change is apparent.

While Kenya is the first country to establish an environment court (EC) in Africa, by entrenching it in its Constitution in the year 2010, at the global level, specialized courts continue to mushroom. Australia is one of the earliest regions in the world to establish specialized ECs. The main ECs in Australia are: the New South Wales (NSW court);[45] Environment Court of

[40] Kenya Water for Health Organization (KWHO), Human Rights Based Approach to Reforms in the Kenya Water Sector (Kenya Water for Health Organization 2009).

[41] The rights to access to justice; fair administrative action; rights of minorities and marginalized groups in environmental governance; access to information; right to life are also related to environmental protection.

[42] Article 22 (3)(a) of the CoK.

[43] Article 22 (3)(c) of the CoK.

[44] For instance, the Rio Declaration on Environment and Development (Rio Declaration) sets out a number of principles which have further been codified under Section 18 of the Environment and Land Court Act (ELC Act) and Section 5 of EMCA.

[45] Paul L Stein, 'The Role of the New South Wales Land and Environment Court in the Emergence of Public Interest Law' (1996) 13, Environmental Planning Law Journal 179.

New Zealand (New Zealand Court);[46] and the Queensland Planning and Environment Court (Queensland Court).[47] In the US, the Vermont Environmental Court (Vermont Court) was established in 1990 while the Hawaii Environmental Court was established in 2014.[48] China,[49] Philippine,[50] Sweden,[51] and India have also established specialized ECs.[52]

3.0 Environmental Litigation and Caseload in the Environment and Land Court (ELC): An Overview

Despite the lack of public information from the ELC, the National Council for Law Reporting (NCLR) and the Judiciary distinguishing between purely land and environmental matters filed in the ELC, studies on the functioning of the ELC indicate that the ELC has not handled numerous environmental cases as it was expected because 'most of the cases concern land'.[53] Otieno,

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[46] George Pring and Catherine Pring, *A Practitioners Guide to the Land and Environment Court on NSW* (3rd edn, NSW Young Lawyers Environmental Law Committee 2009) 21.

[47] Bret C Birdsong, 'Adjudicating Sustainability: New Zealand Environmental Court' (2002) 29, Ecology Law Quarterly 1.

[48] Merideth Wright, 'The Vermont Environmental Court' (2010) 3(1), Journal of Court Innovation 201; Hawaii State Judiciary, 'Hawaii State Judiciary Launches New Environmental Court' <http://www.courts.state.hi.us/news_and_reports/press_releases/2015/06/environmental_court_launches> accessed 31 October 2017.

[49] Alex L Wang, 'Environmental Courts and Public Interest Litigation in China' (2010) 43 (6), Journal of Chines Law and Government 4; Jin Zining, 'Environmental Impact Assessment Law in China's Courts: A Study of 107 Judicial Decisions' (2015) 55, Environmental Impact Assessment Review 35; Zang Minchun and Zang Bao, 'Specialized Environmental Courts in China: Status Quo, Challenges and Responses' (2012) 30(4), Journal of Energy and Natural Resource Law 361.

[50] Rodrigo V Cosico, *Philippine in Environmental Laws: An Overview and Assessment* (Central Book Supply Incorporation 2012); Hilario G Davide and Sara Vinson, 'Green Courts Initiative in Philippine' (2010) 3(1), Journal of Court Innovation 121.

[51] Ulf Bjällås, 'Experiences of Sweden's Environmental Courts' (2010) 3 (1), Journal of Court Innovation 177.

[52] Ria Guidone, 'Environmental Courts and Tribunals: An Introduction to National Experiences, Lessons Learned and Good Practice Examples Special Courts' (Forever Shabah, Legal Innovation Working Paper No1 2016).

[53] Justice Samson Okong'o, 'Environmental Adjudication in Kenya: A Reflection on the Jurisdiction of the Environment and Land Court' (A presentation made at the Symposium on Environmental Adjudication in the 21st Century held in Auckland New Zealand on 11th April 2017)

in her study, indicates that very few cases at the ELC are purely of environmental nature.[54] The 2013 Land Development and Governance Institute's (LDGI) report indicates that while 69% of the respondents filed their cases in the ELC, most of the cases related to land matters.[55] Odote has argued that in Kenya, land forms the basis of the livelihood of people and in this regard, most of the cases before the ELC will likely relate to land.[56] Angote also found that most of the judgments and rulings emanating from the ELC concern land.[57]

The majority of the public continue to perceive the ELC as solely a land court because land forms the basis of the people's livelihood._Okong'o has argued that,[58] environmental matters found their way in the ELC because of their proximity to land use and tenure.[59] So, it is not surprising that most of the matters filed before it concerns land.[60]

The reforms leading to the enactment of the EMCA and the Constitution was meant to trigger environmental litigation and grant the ELC the opportunity to interrogate and resolve environmental disputes. That is why the Judiciary appointed judges who had more than ten years' experience and expertise in land and environmental law. However, more than a half decade later, environmental litigation in the ELC is still scanty. Yet, when the ELC was established as a specialized and distinct court from the High Court to hear and determine land and environmental matters under the new Constitution, it was expected that the ELC would play a great role in enhancing land and environmental governance through litigation.[61] In so

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<http://environmental-adjudication.org/assets/Uploads/General/Okongo-PPT2.pdf> accessed 8 October 2017.

[54] Norah A Otieno, Appraising Specialized Environmental Courts in the Attainment of Environmental Justice: Kenyan Experience (Master's Degree, Centre for Advanced Studies in Environmental Law and Policy University of Nairobi 2014).

[55] LDGI (n 65).

[56] Collins Odote, 'Kenya: The New Environment and Land Court' (2013) 4, IUCN Academy of Environmental Law E Journal 171.

[57] Angote (n 3) p. 41-42.

[58] Okongo'o (n 54).

[59] Ibid p. 9.

[60] Otieno (n 55).

[61]Donald Kaniaru, 'Launching a New Environmental Court: Challenges and Opportunities' (2012) 29 (2), Pace Environmental Law Review 626, 628.

doing, environmental litigation was to provide the ELC with sufficient cases and an opportunity to enhance environmental justice.[62]

a) An Overview of the Developing Environmental Law and Jurisprudence in the ELC

So far, the Environment and Land Court (ELC), through judicial pronouncements, has continued to develop environmental jurisprudence on key environmental issues such as: the rule of standing; public participation in environmental matters; the jurisdiction of the ELC; and the application of international environmental law and principles. If given more opportunities through environmental litigation, the ELC will play a greater role in protecting the environment through judicial pronouncements.

The issue of *locus standi* is now settled in environmental matters. Litigants do not need to prove any personal injury. Violation or a threat of violation of the right to a clean and healthy environment alone is sufficient for any person to move the ELC for enforcement of the right. In the case of *Safaricom Staff Pension Scheme Registered Trustees v Erdemann Property Limited & 5 others*,[63] and *Joseph K. Nderitu & 23 others v Attorney General & 2 others,*[64] the ELC affirmed that the Petitioners did not need to show personal interest or injury for them to have *locus standi.*

The ELC has further held that where other statutory disputes resolution mechanisms exist, litigants must exhaust them before invoking the jurisdiction of the ELC. The role of the ELC *vis a vis* other statutory dispute resolution mechanisms was affirmed by the court in the cases of *Koome Mwambia and another v Deshun Properties Company Limited and 4 others,*[65] *West Kenya Sugar Company Limited v Busia Sugar Industries Ltd and 2 Others,*[66] and *Republic v Senior Resident Magistrate's Court Ndhiwa & another; Ex parte Sajalendu Maiti [2016] eKLR.*[67]

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[62] Caiphas B Soyapi, 'Environmental Protection in Kenya's Environment and Land Court' (2019) 31(1) Journal of Environmental Law 151.

[63] *Petition No. 4 of 2017, In the Environment and Land Court at Machakos [2017] eKLR.*

[64] *Constitution Petition No. 29 of 2012, In the High Court at Nakuru [2014] eKLR.*

[65] *ELC Petition No. 1433 of 2013, Environment and Land Court at Nairobi.*

[66] *Bungoma Petition No. 6 of 2016, In the Environment and Land Court of Kenya at Bungoma.*

[67] *ELC Miscellaneous Application No.3 of 2016, In the Environment and Land Court at Kisumu.*

The ELC has also had the opportunity to apply international environmental law and the general principles of environmental law. Public participation in environmental decision making is now mandatory as was held in the case of *Republic v Lake Victoria South Water Services Board and 2 others,*[68] where the ELC was called upon to determine whether the Migori Water Supply and Sanitation project undertaken by Lake Victoria South Water Services Board was illegal and in breach of the Constitution, the EMCA and the other statutes dealing with the regulation and management of water resources in Kenya. The ELC affirmed that public participation by those likely to be affected by the development projects that have a social and environmental impact is mandatory.

The ELC has also had occasions to interrogate in detail the principle of sustainable development which requires the balancing of economic development *vis a vis* environmental sustainability. In some cases, the court has gone ahead to develop environmental law by filling up the gaps in the existing statutes. In the case of *Moffat Kamau & 9 others v Aelous Kenya Limited & 9 others [2016] eKLR,*[69] the court was presented with a scenario where there was no specific provision regarding whether a new EIA Study Report is required before an EIA variation license could be issued. The ELC, while, invoking Regulation 28 of the EIA Regulations[70], held that where there is substantial change that goes to the gist of the project, it should be deemed as a new project which requires a new EIA license, meaning that a fresh EIA must be carried out. This gave the ELC an opportunity to develop the law in that regard

In the case of *Addax (K) Limited v National Environmental Management Authority and the Mastermind Tobacco Limited,*[71] the ELC, while interpreting environmental law, affirmed that appeals in environmental disputes should be filed within the prescribed time. In this case, the appeal to NET requesting that the EIA license be set aside had been filed eight months after the license had been issued. The court held that Section 129(2) of the

[68]*Misc. Civil. Appl. No. 47 of 2012, In the ELC at Kisii.*
[69]*Constitutional Petition No.13 of 2015, In the Environment and Land Court of Kenya at Nakuru [2016] EKLR (Wind Farm Project Case).*
[70] The Environmental (Impact Assessment and Audit) Regulations, 2003
[71]*Civil Appeals No 81 of 2013 and 1 of 2014, In the Environment and Land Court in Nairobi.*

EMCA and Rule 4(2) of the NET Rules[72] are clear that an appeal to NET must be made not later than 60 days after a decision is made or served, which the Respondent had not adhered to.

Further, the ELC has shown that it will endeavour to protect the right to a clean and healthy environment. For instance, in the case of *Ken Kasinga vs David Kiplagat & 5 Others*,[73] the court held that where there is non-compliance with the procedure for protecting the environment, then 'an assumption ought to be drawn that the project is one that violates the right to a clean and healthy environment, or at the very least, is one that has potential to harm the environment.'[74]

These key decisions by the ELC is a clear indication that if more cases are brought before the ELC, it shall be in a position to develop not only environmental law and jurisprudence but also protect the environment.

b) The reasons for the low environmental caseload in the Environment and Land Court

Pring and Pring note that before establishing a specialized environmental court, a country must be able to calculate the current environment caseload or predict the future environmental caseload.[75] The justification is to sustain its functionality and operationalization. The caseload grants judges with the opportunity to not only resolve environmental disputes, but also develop the law and jurisprudence. While the establishment of the ELC was largely influenced by the backlog in land cases, future environmental caseload was predicted on the reforms brought about by the enactment of EMCA and the Constitution.

It is not easy to tell the environmental caseload in the ELC at a glance for a number of reasons. Firstly, since the ELC was established, there is no public statistical data distinguishing between purely environmental and land matters before the court, either from the judiciary or the National Council for Law Reporting (NCLR). Although the National Environment and Management Authority (NEMA) has partnered with the NCLR and the

[72] The National Environmental Tribunal Procedure Rules, 2003.
[73] *Petition No. 50 of 2013, In the Environment and Land Court at Nakuru ELC (unreported) para 73.*
[74] *Wind Farm Project Case,* n 30.
[75] George Pring and Cathreen Pring, *Environmental Courts and Tribunals: Guide for Policy Makers* (UNEP 2016)68.

National Environmental Tribunal (NET) to avail to the public all the judgments on environmental law in soft, the NCLR is yet to provide the information as required.[76] In the State of the Judiciary and the Administration of Justice Reports that the Kenyan judiciary has continued to publish, it provides the ELC caseload without distinguishing between environment and land matters. All matters emanating from the ELC are categorized as ELC matters making it difficult to determine the extent of environmental litigation in the ELC.

Secondly, the filing system of cases in the ELC does not distinguish between environmental and land matters. All matters at the ELC are categorized as either Judicial Review, Appeals, ELC civil cases, ELC Petitions or Miscellaneous Applications. The lack of categorization of environment cases is a setback in determining the environmental caseload in the court. This is so because such cases cannot be prioritized in terms of hearing and disposal, thus compromising the efficiency that is required in dealing with environmental cases. There is therefore a need for policy direction requiring that environment and land matters be distinguished during filing.[77]

On the question of categorization of land and environment cases, Kenya can draw lessons from other countries which have specialized ECs. For example, in determining the environment and land cases, the North South Wales, Land and Environment Court (NSW LEC) of Australia classifies the matters that come before it, making it easy to distinguish the matters that are purely environmental and land.[78] The NSW LEC registry further compiles information on the caseload that the court has handled on each type of class. At a click of a button, a person litigating an environmental issue can easily determine the class of their dispute by visiting the court's website, making a call or sending an email to the court.

The low environmental caseload in the ELC can be attributed to a number of factors:

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[76] NEMA, 'Environmental Cases' <https://www.nema.go.ke/index.php?option=com_content&view=article&id=36&Itemid=178> accessed 24 November 2017.

[77] LDGI, *An Assessment of the Performance of the Environmental & Land Court* (16th Scorecard Report 2014).

[78]NSW LEC, 'Type of Cases' <http://www.lec.justice.nsw.gov.au/Pages/types_of_disputes/types_of_disputes.aspx> accessed 30 June 2018.

i Public awareness and recognition of the ELC as an appropriate legal forum in solving environmental disputes

The ELC is a new court. Therefore, there is need to educate the public as to its existence and dual jurisdiction. The lack of recognition of the ELC as the appropriate forum for filing environmental disputes is one of the reasons why the public continues to file environmental matters in the general courts, and especially the High court. In addition to the lack of public awareness as to the existence of the ELC, the ELC is not the only appropriate and legal forum to hear and determine environmental matters. In addition to the Alternative Dispute Resolution mechanisms envisaged under Article 159(2) of the Constitution,[79] the National Environmental Management Authority (NEMA), the NET, the Magistrates court, the Ministry of Environment and the County Governments also resolve environmental disputes that may not find their way to court.

Indeed, where the law is clear that disputes must be resolved by these alternative institutions, any aggrieved party must first exhaust these dispute mechanisms before invoking the ELC jurisdiction. There is therefore need for all institutions involved in environmental disputes resolution to provide statistical information to the public of the environmental cases they have handled. There is also need to create public awareness of all the institutions involved in environmental disputes resolution and their respective mandates to avoid forum shopping.

ii Public awareness on what constitutes environmental matters and environmental law

The ELC can only function well if litigants approach it and seek redress for environmental violations. The court cannot institute litigation on its own. Public awareness on what constitutes environmental matters has a great impact on environmental litigation as it puts the public in a position to recognize environmental violations and seek redress. Critics of specialized ECs have argued that it is difficult to distinguish between environment and non-environment matters.[80] This difficult in distinguishing the two phenomena may in the end affect, not only the number of environmental

[79] Article 159 (2) (c) of the CoK provides that in exercising judicial authority, the courts and tribunals shall be guided by, inter alia, alternative forms of dispute resolution including traditional dispute resolution mechanism.

[80] *Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir. 1973).*

cases filed, but also the statistics of purely environmental cases that have been filed and determined by the ELC. Critics of specialized ECs further provide that whilst environmental law is now firmly embodied in statutes, it lacks clear boundaries as to what constitutes purely environmental matters.[81]

It is therefore important that that the public understand, know and are in a position to recognize environmental violations. If litigants are able to distinguish between what constitutes an environmental matter from a land matter, they will be in a better position to understand which matter they will be pursuing at any particular point.

iii Public awareness on the avenues created by the Constitution and EMCA

The Constitution and EMCA provide various mechanisms to enhance environmental litigation. They include public interest litigation; the right to a clean and healthy environment; locus *standi* in environmental matters; the remedies to be granted by the court; the application of international environmental principles; the use of ADR in environmental litigation; the obligations of the State towards environmental conservation; and the establishment of the ELC as a specialized forum to hear and determine environmental disputes. The constitutional provisions on environmental protection are not limited to the above-mentioned provisions because the Constitution is to be read as a whole document. Yet, lack of public awareness about these provisions is likely to hinder environmental litigation.

iv The jurisdiction of the ELC

Preston notes that in order to increase public confidence and trust in specialized ECs as the appropriate forum to resolve environmental disputes, the EC needs to exhibit centralized and comprehensive jurisdiction to avoid forum shopping.[82] In order to increase the case volume of environmental

[81]Scott C Whitney, 'The Case for Creating a Special Environmental Court System: A Further Comment' (1973) 14, William and Mary Law Review 473.

[82] Brian J Preston, 'Characteristics of Successful Environmental Courts and Tribunals' (2014) 26 Journal of Environmental Law 365, 377; Brian J Preston, 'Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study' (2012) 29(2) Pace Environmental Law Review 396.

matters, Pring and Pring have indicated that the jurisdiction of a specialized court should be centralized and with a wide geographical scope. In Kenya, the ELC's jurisdiction is anchored in the Constitution and the ELC Act. The question on the jurisdiction of the ELC was raised in case of *Malindi Law Society v Attorney General & 4 others*[83]and *Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 Others*[84] where the High Court and the Court of Appeal was called upon to determine whether magistrates can hear and determine environment and land cases. These cases were informed by the Statute Law (Miscellaneous Amendments) Act 2015, amending the ELC Act, requiring the Chief Justice 'by notice in the Gazette, to appoint certain magistrates to preside over cases involving environment and land matters of any area of the country.'[85] The High Court held that the magistrates' court had no jurisdiction.

On appeal, in the case of *Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 Others Nairobi Civil Appeal No. 287 of 2016,* the Court of Appeal held that the Magistrates court can hear and determine environmental matters as a court of first instance limited by its pecuniary jurisdiction. It was the decision of the Court of Appeal that the ELC does not have exclusive jurisdiction to hear such matters. Whereas this decision was mainly informed by the high caseload of land matters, it affects the adjudication of environmental matters. In most cases, environmental matters cannot be valued in monetary terms. Indeed, other than the issue of pursuing damages, environmental degradation is not capable of being valued. In the absence of guidelines on how environmental matters should be valued, this is likely to pose a challenge when it comes to filing of environmental matters in the magistrate's courts.

On the other hand, if the magistrates' courts can hear and determine environmental matters, this can increase environmental litigation because magistrates' courts are easily accessible to people than the ELCs which are located in 26 counties only. However, this undermines the creation of a specialized ELC which require that judges must have experience in land and environment matters, thus hindering the much anticipated development of jurisprudence.

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[83]*Malindi High Court Constitutional Petition No. 3 of 2016, [2016] eKLR.*
[84]Nairobi Civil Appeal No. 287 of 2016.
[85] ELC Act, s 26(3).

v. Public attitude and apathy towards environmental matters and environmental litigation

Due to the public nature of environmental matters, Kenyans are more unlikely to file environmental cases because, in their view, they are not directly affected by environmental degradation. Environmental matters by their very nature affect the wider public and essentially constitute public interest litigation. For instance, due to the political nature of environmental matters that involved the Mau Forest eviction, individuals are likely to shun away from pursuing such cases or, waiting upon another person to institute such matters.

vi. Accessibility of the ELC and the cost of litigation

The establishment of the ELC stations across the country has been slow. Indeed, out of the 47 Counties in the country, only 26 Counties have an ELC court. In some areas, one ELC judge handles environmental matters in more than one County. Due to the uneven distribution of the ELCs in the country, physical inaccessibility of the ELC by the public is likely to discourage individuals from pursuing environmental matters. Further, litigation in Kenya is generally costly. Court filing fees pose a great impediment in the filing of cases in the ELC. Whereas environmental litigants can invoke public interest litigation, they still have to pay for filing fees. In the NET, as a result of most environmental matters being in the public interest, there is no requirement for paying the filing fees. That should be emulated in the ELC.

4.0 A Call for Reforms

For the ELC to continue functioning effectively, it will be dependent on it being presented with sufficient cases, effective litigation of the said cases and the court's ability to appreciate and determine the matters effectively. The essence of enhancing environmental litigation is to ensure that the ELC is granted an opportunity to resolve disputes, develop jurisprudence and the law.

Despite the few environmental caseloads before it, the ELC has continued to develop the law and jurisprudence by making far reaching judicial pronouncements. These decisions have revolved around the protection of the right to a clean and healthy environment, the non-application of the strict rule of standing, the need for public participation in environmental

decision making, amongst other environmental principles. To enhance environmental litigation, whose effect will improve environmental governance in the country, there is need for key reforms to be undertaken both by the judiciary and the national government through its organs.

a. Enhanced public awareness on the environmental matters and the role of the ELC in settling environmental disputes.

The Judiciary and the national government should enhance and create public awareness of what environmental matters are and the jurisdiction of the ELC and the other institutions dealing with environmental governance. The ELC needs to make use and strengthen the Court Users Committees (CUC) and open court days to inform the public on its role in environmental litigation. This will be key in ensuring that the public does not continue perceiving the ELC as a land court alone.

Public awareness of environmental matters and the role of the ELC in environmental governance can also be undertaken by other stakeholders. The civil society must continue playing its role in advocacy and public interest litigation in environmental matters. Faith based organizations should also enhance advocacy and public awareness on environmental issues at the grassroots levels.

The media in Kenya plays a great role in bringing to the attention of the public environmental matters. For instance, through investigatory journalism, the media in Kenya brought to the limelight the "'Lead Case" in Mombasa. The media should continue to increase coverage on the role of the ELC in conservation and protection of the environment.

The institutions of education need to integrate environmental governance into the learning process. This will change the attitude of the younger generation on environmental conservation and litigation. The Ministry of Education, in conjunction with the other environmental stakeholders should strive towards developing a curriculum from the lowest level of the education system that seeks to integrate environmental matters.

The County Governments should be proactive in environmental issues, including putting in place sound environmental governance structures and be active players in helping to realize the mandate of the ELC in Environmental matters. Further, the national government agencies involved in environmental governance like NEMA should be at the forefront in the protection of the environment and use its resources, both human and

financial, in filing cases in the ELC. NEMA, as an enforcement agency, needs to strengthen its enforcement tools and create awareness to the public of the mandate of the ELC.

b. Categorize environment and land matters in the ELC

The hearing of environmental matters in priority to other matters by the ELC can only be achieved if the ELC registries distinguish land cases from environmental cases. All the ELC registries should have two registers and registries, one for land matters and the other for environmental matters. The two registers and registries will enable the ELC identify with precision the matters concerning the environment and allocate them dates on a priority basis. Such a system will not only see an improvement in the number of environmental cases, but will also assist the court in rating itself on its role in promoting environmental governance. Just like the High Court which has several divisions like the family, commercial and criminal divisions, it is imperative that the ELC creates land and environment divisions to enhance environmental governance in the country.

c. The ELC to expedite resolving environmental matters

The ELC should seek and endeavor to finalize environmental cases within a reasonable time. The ELC should avoid granting many adjournments in environmental matters. There is need to provide timelines within which environmental matters should be determined depending on the nature of the case. The ELC should also adopt ADR mechanisms and traditional dispute resolution mechanisms, where applicable, as a method of resolving environmental disputes faster. The use of ADR mechanisms such as arbitration, reconciliation, mediation and traditional dispute resolution mechanisms are well entrenched not only in the Constitution, but also in the statutory framework such as section 20 of the ELC Act.

d. ***Increase the number of ELC judges and ELC Stations***.

This is a policy decision which is dependent on whether the judiciary has the funds to increase the number of the ELC Judges or not. It is therefore upon the government, in collaboration with the judiciary, to channel more resources to enhance capacity building of the ELC. There is also a need to carry out a survey in each ELC station to determine the capacity required before channeling resources to those stations.

e. *Enhanced collaboration and coordination between ELC and the various organs that are involved in the environmental governance.*

The civil society and environmental public interest litigators can influence environmental protection by bringing to the attention of the ELC environmental issues. The ELC must seek to improve its working relationship with other government agencies, religious organizations, the civil society and environmental public interest litigators, including lawyers, involved in environmental governance by having joint workshops and exchanging information on the emerging issues in environmental law.

f. Training of the Judges and Magistrates

Judges and magistrates need to be trained on environmental law, not only at the national level but also at the international level. This can be done through informal, formal and refresher courses. To enhance cohesiveness, uniformity and synergy in environmental governance, there is need to involve the legal practitioners and legal scholars, both from within the country and without, in trainings on environmental litigation and adoption of best practices. This calls for deliberate training programs and partnerships between the Judiciary, the Bar and the legal scholars and provide an incentive system to encourage Public Interest Litigation.

g. Waive court filing fees

Very few litigants are able to afford environmental lawyers and the court filing fees. Where an environmental concern exists, there is need to grant to public spirited individuals incentives of filing the cases by scrapping of the court filing fees.

h. Simplification of the ELC procedures

Unlike the current Civil Procedure Rules, which the ELC uses, there ought to be a simplification of the ELC procedures to make it easier for the public to file environmental matters. The ELC should have separate, distinct and simplified procedures governing the filing and hearing of environmental disputes. New environmental procedural rules should be enacted and applied by the court in a manner that is responsive to the unique aspects of environmental litigation.

i. The ELC must be seen as a separate court from the High Court

The current administrative arrangement tends to suggest that the ELC is an appendage of the High Court, while in actual sense, the ELC is a distinct, specialized superior court established by the Constitution. The ELC should therefore be treated as such to enable the public to recognize it as an independent specialized court. Currently, all the 26 ELC stations are in the same locality, both physically and administratively, with the High Court, with the High Court Judges being the presiding judges of those stations (for the High Court, the ELC and the ELRC). Indeed, although the High Court has one overall Principal Judge, with Presiding Judges in all the stations, the ELC has one Presiding Judge based in Nairobi. Considering that none of the ELC Judges is heading any of the stations, an assumption arises that the ELC is subservient to the High Court, thus compromising the courts' visibility in terms of its distinct nature as a specialized court.

This perception by the litigants has informed some of them to file environmental matters in the High Court on the assumption that it is the superior court in a particular station. It is therefore recommended that each ELC should have a separate courtroom, a registry or registries, a Deputy Registrar and members of staff. The ELC should have an overall Principal Judge, Presiding Judges in all the stations where the court is located and Deputy Registrars to enhance efficiency and visibility, thus encouraging more litigants to file environmental disputes in the court.

j. Enhance and support public interest litigation in environmental matters

The court should encourage public interest litigation in environmental matters by not punishing unsuccessful litigants in public interest litigation with costs.

k. Clarify the jurisdiction of the magistrates' court in environmental litigation

Considering the likely confusion that the issue of granting magistrates the jurisdiction to handle environmental matters, and in view of the fact that a violation of the right to a clean and healthy environment may not be capable of being measured or valued, for the purpose of developing the law and jurisprudence in environmental governance, the magistrates ought not to have been given the jurisdiction to hear environmental disputes. All disputes

relating to the environment should be heard by a specialized court, which in this case is the ELC and the relevant specialized Tribunals. The hearing of environmental matters by the magistrates' court, which is not specialized, defeats the spirit of the Constitution which contemplated the hearing of environmental disputes by the ELC and other specialized bodies like the NET. The public's confidence in filing environmental disputes will improve significantly if the jurisdiction of ELC is comprehensive and centralized.

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