Environmental Governance in Kenya

Implementing the Constitutional Framework

Editors:
Patricia Kameri-Mbote
Robert Kibugi
Nkatha Kabira

ENVIRONMENTAL GOVERNANCE IN KENYA

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Dedication

This Book is dedicated to the immense contributions of the following persons:

First

To all those people who fight for a better environment

Second

To Prof. Charles Odidi Okidi

(Sunset: 19 April 2021)

Prof, your commitment to protecting the environment, and to the law and policy tools to achieve this is legendary, always a cut above the rest. Your intellectual footprint remains indelibly etched into treaties, treatises, national laws and policies, and the minds and work of the students you mentored and inspired throughout your life.

Ever the builder, you built up many individuals into better environmental protectors and advocates, in various disciplines. As a leader, you inspired colleagues to aim higher as you expected nothing short of excellence.

This publication is inspired by the 2008 book which focused on Environmental governance under the framework environmental law.

We are assured that even from heaven, you will carry on as a teacher, mentor, and guardian to many. We know you will continue to inspire more cutting-edge thoughts and outputs to enhance environmental protection.

Rest in Eternal Peace, Prof. Charles Odidi Okidi

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Foreword

I am very pleased to write a foreword for this book, which is the first scholarly output focused on appraising the implementation of the Constitution of Kenya's provisions on environmental governance. This book comes at a critical juncture, in 2020, which is ten years since promulgation of the Constitution in August 2010. There is thus a decade worth of experience in constitutional implementation to uphold environmental governance and sustainable development. Another important milestone to highlight is that this book has been published during the year when the University of Nairobi marks fifty (50) years since establishment.

The upholding of good environmental governance has been a challenge for humanity since the advent of the industrial age. The extraction of natural resources to produce social and economic goods has resulted in generation of waste, pollution and decline in environmental quality. Parameters have been drawn overt time in search of means to constrain or limit social and economic activities to only those limits that the environment can tolerate. The concept of sustainable development emerged as humanity sought a methodology through which to ensure that social and economic activities respected environmental limits. The need to ensure equity amongst present generations, while preserving a healthy environment for future generations has been difficult to universally implement. Prior to promulgation of the current Constitution, the High Court deciding in the case *Peter K. Waweru v Republic* in 2006 determined that a clean and healthy environment was integral to enjoying the right to life. This Constitution now guarantees every person in Kenya a clean and healthy environment. Implementation of this right is defined to include obligations for Kenya to put in place and maintain a minimum ten (10) percent national tree cover; implement systems of environmental assessment and audit; eliminate harmful environmental practices; enhance public participation; and promote sustainable utilization of natural resources, including sharing of benefits. The Constitution also guarantees critical procedural rights, including public consultation during decision making, access to information, and access to justice.

Access to justice, including entitlement for any person to go to court to seek orders to protect the environment deserves special mention. As many readers would know, in 1989, in *Wangari Maathai v Kenya Times Media Trust Ltd.,* the High Court had dismissed an application to protect *Uhuru* Park in Nairobi from grabbing. The judge gave orders that the applicant, the Late Nobel Laureate Prof. Wangari Maathai, did not have legal standing to file suit in the public interest. Today, as evident from the various court orders and judgements, many people in Kenya have utilized the provisions in articles 22 and 70 of the Constitution to seek judicial protection of the entitlement to a clean and healthy environment. In previous period, I had the honour of serving as the inaugural Director of the Wangari Maathai Institute for Peace and Environmental Studies (WMI). In recognition of the special role that law serves in framing and upholding good environmental governance, the teaching of environmental law and policy was made compulsory for the Masters and Doctoral students at the Institute.

This book will thus be an important resource for students at WMI, the School of Law, the Centre for Advanced Studies in Environmental Law and Policy (CASELAP), and many others within the University of Nairobi, Kenya, the region and beyond.

The context for this publication is therefore very sound, and its utility will last for a long time to come. In 2008, an earlier publication titled *"Environmental Governance in Kenya: Implementing the Framework Law"* was published comprising of contributions by various scholars, edited by scholars led by the eminent environmental law scholar Prof. Charles Okidi. He was at the time the founding Director of CASELAP. This book, titled *"Environmental Governance in Kenya: Implementing the Constitutional Framework"* is an advancement of the 2008 volume, which had focused on implementation of the Environmental Management and Coordination Act (EMCA). This volume is edited by scholars led by Prof. Patricia Kameri-Mbote, who previously served as Dean of the School of Law. This publication, with twenty six (26) substantive chapters is authored by scholars drawn from the University of Nairobi, other Kenyan and regional universities, public and non-governmental institutions. It represents a successful collaboration in generation of knowledge that is critical to university research in the twenty first (21st) century.

As Vice-Chancellor, I am pleased to note that in addition to collaboration amongst authors, this book is also the outcome of a strategic partnership. The financial resources for its publication have been provided through a partnership by the International Development Law Organization (IDLO). I thank the leadership of IDLO for this important engagement and support.

I commend the editors and the authors for this scholarly output and point out that our thirst for endogenously generated knowledge and ideas for good environmental governance remains unquenched. This is a volume that I unreservedly recommend to university and other tertiary-level students, researchers and even policy makers.

Prof. S. G. Kiama
VICE CHANCELLOR
UNIVERSITY OF NAIROBI

Foreword

It is my pleasure to write the foreword to this book, which is the first treatise that assesses the implementation of constitutional provisions on the enhancement of environmental governance.

The Constitution of Kenya, promulgated in August 2010, is now a decade old. The Constitution has very specific provisions concerning environmental protection and sustainable development. The importance of protecting the environment for present and future generations is captured in the preamble to the constitution. The Bill of Rights guarantees the right to a clean and healthy environment for all persons, including present and future generations.

Article 69 of the Constitution stipulates various obligations that Kenya should implement in order to respect, protect and fulfill this human right to a clean and healthy environment. It is important to note that various socio-economic rights, including the rights to safe and clean water and freedom from hunger, depend on the existence of a clean and healthy environment. The Constitution also guarantees various procedural rights, including access to information, access to justice, fair administrative action, and public participation in decision-making process. Our Constitution is, without doubt, a transformative basic law which has put environmental protection and sustainable development at the core of its provisions.

In the period since 2010, Kenya has made significant strides through policy and legislative action to implement the Constitution. A new environment policy was approved in 2014, and a land use policy in 2017. The Fifth Schedule to the Constitution requires the enactment of various laws relating to the environment. To this end, Parliament has enacted amendments to the Environmental Management and Coordination Act (EMCA) and passed new laws governing forestry, water, wildlife, physical and land use planning to implement the Constitution. A law implementing the constitutional requirement for parliamentary approval of transactions relating to certain natural resources has also been enacted.

Similarly, laws governing the environmentally sensitive mining and petroleum sectors and aligned to constitutional provisions, have been enacted. The Environment and Land Court, a specialized court with the status of High Court, was established through legislation in 2011 to implement Article 162 of the Constitution. This court continues to actively adjudicate land and environment disputes in Kenya and to chart new jurisprudential pathways. The National Environment Tribunal, established under EMCA, has also continued to provide a vibrant pathway through which interested persons have had grievances from decisions of the National Environment Management Authority (NEMA) reviewed.

In implementing the Constitution, the courts have led the way in laying down principles to guide the interpretation of the Constitution. For instance, in *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others (2015) eKLR*, the Court framed the key elements of public participation. These important principles will go a long way in guiding the actions of public officers undertaking functions that required public consultations. The Office of the Attorney General and Department of Justice actively defended Kenya's interest in an arbitration action in *Cortec Mining Kenya & others v. Republic of Kenya (ICSID Case No. ARB/15/29)*.

The final decision of the arbitral panel recognized the supremacy of our constitutional and legal provisions in finding that since the applicant had not received (the mandatory) Environmental Impact Assessment licence for NEMA, it did not hold a valid mining licence. This is based on Section 58 of EMCA (our framework environmental law), which stipulates that for all activates requiring an EIA licence from NEMA.

It is therefore clear that this book could not have been written and published at a better time. The book is aptly titled *"Environmental Governance in Kenya: Implementing the Constitutional Framework"*. Comprising twenty six (26) chapters, the authors explore how Kenya has performed in implementing the constitutional mandate, including under international law. The authors provide an accurate picture of the current situation, and informed by sound theoretical foundations, also make recommendations for further actions to enhance environmental governance and sustainable development in Kenya.

I commend the editorial team from the University of Nairobi's School of Law for this scholarly output. It has, as I have pointed out herein above, been published at a critical time as we mark ten years since the promulgation of the Constitution. The book gives us a context for meaningful reflection on how we are doing. The authors have made important suggestions on the improvements that can be undertaken to promote sustainable development, and the rule of law. I recommend this book as a reference text to lawyers, law students and other experts across disciplines.

P. Kihara Kariuki

ATTORNEY GENERAL OF THE REPUBLIC OF KENYA

(2018-2022)

Foreword

I am immensely honoured to write a Foreword for this book titled *Environmental Governance in Kenya: Implementing the Constitutional Framewor*k comprising twenty-six (26) chapters, which reflects a significant and collaborative effort amongst scholars in Kenya and beyond. The extensive scholarly content in the book is mainly a reflection on the implementation of environmental law provisions of our transformative Constitution. Promulgated on 27 August 2010, our Constitution contains provisions that prioritize protection of the environment, sustainable development, and the fulfilment of the socio-economic needs of our people. Protecting the environment is imperative for meaningful equity amongst the present generation and between the present and future generations.

Importantly, Kenya's Vision 2030 prioritizes attainment of social and economic advancement in order to generate human development. There is however a realization that many economic actions promoted for this purpose are inherently drivers of environmental degradation. Food security and manufacturing are helpful illustrations: Food security relies on agriculture, which in turn requires the exploitation and utilization of land and water resources. Manufacturing requires various raw materials which are mostly obtained through extractive activities. If implemented without necessary safeguards, these economic outputs may deliver short-term social benefits such as incomes, while resulting in environmental harm negating any gains made in the medium to the long-term. Fortunately, Kenya's Constitution was drafted with these considerations in mind and has inbuilt safeguards to prevent these risks by requiring economic and social planning to mainstream environmental protection. This also includes ensuring safe handling of various categories of solid waste, and effluents through environmental regulation.

As Principal Secretary in the Ministry of Environment and Forestry, these matters are an important part of my regular agenda in terms of policy making and oversight. We recognize that the human right to a clean and healthy environment does not exist in a vacuum. This right requires maintenance of an environment capable of providing wholesome ecosystem services to support human life, and livelihoods. We recognize that while a balance is sought between protecting the environment, and implementing the socio-economic agenda, the former should take priority. Kenya has had regulatory tools such as Environmental Impact Assessments (EIA) and Environmental Audits (EA) for this purpose for close two decades. These are important and have been of great value in ensuring environments sustainability but they need to be constantly reviewed and updated to safeguard our environment.

Through the diverse selection of chapters in this book, authors from varying backgrounds and experiences provide a valuable assessment of how we have performed since 2010. They examine, in-depth, the law and practice in implementing the environmental governance requirements of the Constitution, and whether the intended transformative outcome has been achieved, or is close to realization. I commend the authors for their dedication and insightful research; and thank the editors for putting together this project and team of authors. It is not lost on me, and the Ministry of Environment and Forestry that this important publication has been completed at a time when the University of Nairobi is celebrating fifty (50) years since

it was established. The publication, and the knowledge it has generated are a great output to show-case the competences and capacity that the University of Nairobi has built and fostered overt time.

The publication provides rich content that is valuable for our officers in the public service, at both the national and county levels of government, to reflect over how they undertake their respective mandates. I recommend the text to other persons who pursue knowledge and reflection, including judicial officers, lawyers, students and various professionals whose work touches on, or is impacted by concerns over environmental integrity.

Dr. Chris Kiptoo, PRINCIPAL SECRETARY

MINISTRY OF ENVIRONMENT AND FORESTRY

GOVERNMENT OF KENYA

(2020-2022)

Preface

The culture of prolific scholarship in environmental law has clearly taken root in Kenya. This book is the latest evidence and it is built on some outstanding works on environment and natural resources which constitute boots and bootstraps that sustain a country. Similarly the constitution and its implementation is at the core of national governance.

It is therefore a matter of extreme delight to find that this book attracted a total of thirty six authors who have prepared twenty seven chapters. One will also note that the majority of the authors are fairly young by most standards. The obvious conclusion is that environmental law which safeguards inter- and intra-generational equity is in the hands of majority of young people. At least the intellectual assessment and the formulation of regulations should be heavily vested in the younger generation of scholars.

The large number of authors has also enabled the book to cover a reasonably broad range of natural resources sectors and constitutional instruments to cover. What may be a challenge is the constitutional formulations to promote sustainability. Kenyans may be in the best position to offer an example for Articles 71 and 72 in Constitution of Kenya 2010. A significant part of authority to control exploitation of natural resources is left to further enactment by Parliament. And this may in turn undermines the possible effectiveness of the provisions. These provisions actually have their origins in articles 268 and 269 of the Constitution of the Republic of Ghana, 1992. It may be of interest to seek the experience of Ghana with implementation of the provisions. The spirit is very good but it may be worthwhile to do a better drafting exercise for Kenya to expect better chances of implementation of Articles 71 and 72 referred to above.

All said and done, the approach of Kenyan Scholars tackling a topic as a collective is truly laudable. In 2008, for instance, 14 scholars came together and published a book titled, ***Environmental Governance in Kenya: Implementing the Framework Law.***[1] This book was a scholarly examination of the development of environmental law at the levels of framework law and entrenchment in the constitution.

That is scholarly examination of development of environmental law at the levels of framework law and entrenchment in the constitution. Both may be said to depend on the work done in Kenya at an earlier stage by ascertaining how the framework environmental law was made in the first place.[2]

The book under review adds to the reputation of Nairobi as a global epicenter of scholarship and practice in environmental law. It is that reputation that led the global community of scholars to approve the proposal to hold the Second Colloquium of IUCN Academy of Environmental Law in Nairobi in October 2004. Not only was the Colloquium highly successful, enjoying the support of different sectors of the public but there was obviously enthusiastic participation from Kenya and Africa at large. Out of the thirty three papers presented and accepted for publication five were from Kenya. Besides, a Kenyan scholar, Professor Kameri-Mbote was one of the four members of the prestigious editorial board that prepared the proceedings for publication.[3]

1 Edited by C.O. Okidi, P. Kameri-Mbote and Migai Akech (Nairobi, East African Educational Publishers 2008) 554pages

2 Kameri-Mbote P. and C.O. Okidi (Ed) *The Making of Framework Environmental Law in Kenya* (Nairobi: United Nations Environment Programme and African Centre for Technology Studies (2001) 213 pages.

3 See Nathalie Chalifour, Patricia Kameri-Mbote, Lin Heng, Lye and John R. Nolon (Editors) *Land Use Law for Sustainable Development*. (Cambridge University Press, 2007) 632 pages.

Out of organization of the Colloquium also came the creation of the Association of Environmental Law Lecturers in African Universities (ASSELLAU) organized at University of Nairobi, under the leadership of Professor Kameri-Mbote. That ASSELLAU has sustained life for nearly two decades is clear evidence that there is established life in Nairobi as a vital apex of environmental law research and scholarship. The latest major activity of ASSELLAU was a conference in Yaounde Cameroon in January 2018 the outcome of which was a book with 32 papers, published.[4]

This is just further evidence that the publication under review has actually come out in an atmosphere which is intensely fertile for scholarship and practice in environmental law. Moreover, an examination of the contents will show that there is significant continuity of participants with the significant presence of Kenyan contributors. In other words the book is produced in the context of Kenyan scholars working with the rest of the global scholarly community. In point of fact, the commitment of African scholars to environmental law has been likened to military discipline.[5]

It is not lost on this commentator that in the book under review and each of the other books or articles referred to, there is one key player, Professor Patricia Kameri-Mbote. She can now be considered a central inspiration and organizer among legal scholars in Kenya. She has featured prominently since ***The Making of Framework Environmental Law in Kenya***[6] and is evidently a prolific author and lead editor. Fortunately she is still fairly young and manifestly youthful. She is unlikely to cease her role in leadership of the "Army of environmental law scholars." The latest report is that, as chairperson of ASSELLAU, she is working with Environmental Law Scholars from Middle East and North Africa to launch an organization replicating ASSELLAU. It will not be surprising if the new organization encourages projects on environmental law governance implementing the constitutional framework.

Prof. Charles Odidi-Okidi (in Memoriam)
PROFESSOR OF ENVIRONMENTAL LAW

INSTITUTE OF DEVELOPMENT STUDIES & CENTRE FOR ADVANCED STUDIES
IN ENVIRONMENTAL LAW & POLICY
UNIVERSITY OF NAIROBI

4 Kameri-Mbote, Patricia, Alexander Peterson, Oliver C. Ruppel, Bibobra Bello Orubebe and Emmanuel D. Kam Yogo (Eds) *Law/ Environment/ Africa.* Publication of the 5th Symposium/ 4th Scientific Conference 2018 of the Association of Environmental Law Lecturers from African Universities in Cooperation with Climate Policy and Energy Security Programme for Sub-Saharan Africa of the Konrad-Adenauer Stiftung and UN Environment. Nomos Press 2019, 724 pages.

5 Patricia Kameri-Mbote, "Building An Army of Environmental Law Scolars: Profess Charles Odidi Okidi's Legacy" in Patricia Kameri-Mbote and Collins Odote (Editors) *Blazing the Trail: Professor Charles Okidi's Enduring Legacy in the Development of Environmental Law* (University of Nairobi School of Law 2019) 613 pages. 6 See note 2 *supra*, p.107.

Acknowledgments

The work on this publication, from inception to completion, has been made possible by the diligent efforts of various individuals and institutions. The editors recognize the contributions made by the authors who contributed the twenty-seven (26) chapters which make up the book. To this end, we specifically and individually express our sincere gratitude to the following authors for their respective contributions: Andrew Muma, Anne Nyatichi Omambia, Boru Gollo Jattani, Clarice Wambua, Collins Odote, David Ong'are, Duncan Ojwang', Emmanuel Kasimbazi, Elvin Nyukuri, Fatema Rajabali, Francis Mwaura, Gavin Rodgers, Irene Kamunge, John Mugane, Kariuki Muigua, Lars Otto Naess, Mercy Wanjau, Mwenda Makathimo, Munyao Sila, Muriuki Muriungi, Nkatha Kabira, Patricia Kameri-Mbote, Peter Mburu, Purity Wangigi, Robert Kibugi, Robert Owino, Selelah Okoth, Thuita Thenya, and Tom Kabau. Without the individual contributions of each of these authors, this scholarly output would not have been possible.

The idea of this book arose during a discussion, in 2018, on potential collaboration pathways between the International Development Law Organization (IDLO) and the University of Nairobi, School of Law. The editors deeply appreciate the role played by Felix Kyalo, who as Programme Manager for IDLO at the time, seized on the opportunity and supported the initiation of the Environmental Law Book project, as it was referred to. We deeply appreciate the contributions and support provided by other IDLO technical staff during the life of the project, including Benard Moseti. Ms. Anne Nderi as programme manager for continued support to the project to its successful conclusion. The editors are thankful to the IDLO Country Manager, Ms. Teresa Mugadza, for the support provided.

We remain thankful to the University of Nairobi, and the Vice Chancellor Prof Stephen Kiama for his support, including authoring a foreword for this book and his unreserved endorsement. We thank the former Attorney General of Kenya (2018-2022), Justice (Rtd) Paul Kihara Kariuki, who has kindly authored a fitting foreword to this book and given his endorsement to various categories of users. The authors appreciate the kind words and endorsement of this scholarly output by the former Principal Secretary at the Ministry of Environment and Forestry (2020-2022), Dr Chris Kiptoo. We are honoured that our eminent environmental scholar in Kenya and Africa, the Late Prof Charles Odidi Okidi, took his time to review the book and provide the Preface. We thank these eminent persons for taking time to review the book and provide befitting forewords, preface and endorsements.

We deeply thank Kwamchetsi Makokha for taking time to undertake technical and language editing for the entire publication. A dedicated team of Research Assistants took time to diligently review and format each chapter of the book, ensuring footnotes and other references were aligned with the referencing style. This team worked with a tight deadline and delivered stellar results, and we thank them. The team comprised of the following young lawyers: Boru Jattani Gollo, Dan Allan Kipkoech, Joyce Kanze Nzovu, Karen Jepchumba Koech, Kelvin Bronze Ndambuki, Sandra Kemunto Akama, Shalom Neema Wasike and Wendy Magoma Nyakweba.

Thanks also to the Norwegian Programme for Capacity Development in Higher Education and Research for Development for generously funding the publication of the book.

Patricia Kameri-Mbote, Robert Kibugi & Nkatha Kabira

EDITORS

Author Biographies

EDITORS

Patricia Kameri-Mbote

Patricia Kameri-Mbote is a Professor of Law and former Dean, School of Law, University of Nairobi. She is a Founding Research Director of the International Environmental Law Research Centre (IELRC) www.ielrc.org and a member of the Governing Board of the International Council on Environmental Law (ICEL); Chair of the Association of Environmental Law Lecturers in African Universities (ASSELLAU); Advocate of the High Court of Kenya; and was conferred the rank of Senior Counsel in 2012. She has contributed to environment, land, agriculture, science, technology and gender law and policymaking. She has taught law in many universities around the world for over 30 years and published widely. Her recent related works include *Blazing the Trail: Professor Charles Odidi Okidi's Enduring Legacy in the Development of Environmental Law,* School of Law University of Nairobi (2019); *Law, Environment Africa*, Nomos Publishers (2019); and *Unlocking Africa's Future: Biotechnology & Law Fountain Publishers, Kampala* (2019).

Robert Kibugi

Robert Kibugi is a Senior Lecturer, at the School of Law, University of Nairobi; and teaches at the University of Nairobi's Centre for Advanced Studies in Environmental Law (CASELAP) and Wangari Maathai Institute (WMI). He holds a Doctor of Laws (LL.D) Degree from the Faculty of Law, University of Ottawa; and is an advocate of the High Court of Kenya. Kibugi teaches, and publishes on land use, climate change, natural resources, environmental liability, tort law among others. He has extensive experience in development of law and policy frameworks include Kenya's Climate Change Act and policy, drafting of national water policy, regulations and enhancements to the 2016 Water Act. He has also worked on county laws and policies for water (Mombasa), sustainable forestry and tree growing (Elgeyo Marakwet) and Climate change policy (Laikipia) including design and drafting of Kenya's climate change legal and policy framework, the water policy, the legal framework and the regulations. Dr Kibugi is the African representative to the Board of the IUCN Academy of Environmental Law. A member of the IUCN World Commission on Environmental Law (WCEL), Kibugi is a member of the WCEL specialist group on "Getting to Zero" emissions in agriculture. His recent work includes a publication on climate change transition in Kenya titled *Towards a Low Carbon Climate Resilient Development: Discussion Paper on Shaping a Just Transition for Kenya.*

Nkatha Kabira

Nkatha Kabira is a poet, author and Senior Lecturer at the School of Law, University of Nairobi. She is an Iso Lomso ("eye of tomorrow") Fellow at the Institute for Advanced Studies in Stellenbosch (STIAS), South Africa, a Fellow at the Institute of Advanced Studies, Berlin (Wiko), a Fellow of the Africa Science Leadership Programme, University of Pretoria and a fellow at the Institute of Advanced Studies, Program on Social Sciences at Princeton University. She is a fellow at the Ife Institute for Advanced Studies, Nigeria, a fellow at the Intercontinental Academia (ICA) and a member of the Global Young Academy. Nkatha was also recently appointed as a Distinguished

Africanist Scholar at the Institute of African Development at Cornell University. She completed her doctoral degree at Harvard Law School (HLS) in May 2015 and has professional and research experience in law, democracy and governance. She lectures widely and has taught both in Nairobi and at Harvard and has received awards in recognition of excellence in teaching. She completed the Master of Laws Program at HLS in 2008 and holds a Bachelor of Laws degree from the University of Nairobi and a postgraduate diploma in legal practice from the Kenya School of Law. She is an Advocate of the High Court of Kenya.

AUTHORS

Andrew Muma

Muma holds a Bachelor of Laws LLB and a Master of Laws LLM (Intellectual Property) from the University of Nairobi and is currently enrolled in the Doctor of Philosophy in Law Programme at the University of Nairobi and writing a thesis on *A Constitutional pathway to realising Sustainable Development and Sustainable Forest Management in Kenya; A Case Study of Ngare Ndare and Arabuko Sokoke Forest Ecosystems.* Muma has engaged in Teaching, Writing and Research for 10 years. Currently he is a Lecturer, Department of Commercial Law at the University of Nairobi. Muma has 15 years' experience in active practice of Law as an Advocate of the High Court of Kenya currently Senior Partner at Muma & Kanjama Advocates. He is a Member of the Law Society of Kenya, Chartered Institute of Arbitrators. Vice Chair of the Business Premises Rent Tribunal and a Member Inter Ministerial Committee on Climate Change (NCCC).

Anne Nyatichi Omambia

Nyatichi's interest in environmental management is attributed to her upbringing in a farming community in Kenya. This saw her join the Geography Club in High School and later undertake a Bachelor of Environmental Studies (Science) degree at Kenyatta University where she was also a member and Vice Chair of the Environmental Club. The urban exposure in Kenya's capital awakened in her the intricate nexus between development and environment spurring her to undertake a master's degree in Environment and Development at University Of Cambridge, UK and later a Doctorate degree in Environmental Engineering from China University of Geosciences. Nyatichi joined the National Environment Management Authority in 2004 where she currently serves as the Chief Compliance Officer and Climate Change Coordinator. She has a wealth of experience in environmental management, climate change and policy formulation and has published on the same. Besides being a mother, her hobbies include reading, travelling and sports.

Boru Gollo Jattani

Boru Gollo Jattani is an Advocate of the High Court of Kenya and a member of the Law Society of Kenya. He is also an Associate at the law firm of TripleOKLaw Advocates, LLP. He holds a Bachelor of Laws Degree from Riara University and a Diploma in Law from the Kenya School of Law. Boru also holds a Diploma Certificate in Corporate Social Responsibility in Legal, Economic and Moral Contex from the Pázmány Péter Catholic University in Budapest, Hungary.

Clarice Wambua

Clarice Wambua is an Environmental Lawyer with significant expertise in climate change. She manages the legal aspects of carbon and climate finance projects and advises on climate change governance and issues at the intersection of climate change and human rights. She has consulted for the Government of Kenya, the African Development Bank, the United Nations Development Programme, the Office of the United Nations High Commissioner for Human Rights, amongst others. She holds a Master of Laws (LLM) (With Distinction) in Climate Change Law and Policy from the University of Strathclyde, a Master of Science (MSc) (With Distinction), in Africa and International Development from the University of Edinburgh, and a Bachelor of Laws (LLB) (Honours), from the University of Nairobi. She is currently a PHD Student at the University of Nairobi, Centre for Environmental Law and Policy (CASELAP), where she holds a Tutorial Fellowship. Clarice is also a Lord Hope, John Fitzsimons, Strathclyde International and Commonwealth Scholar.

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Collins Odote is an advocate of the High Court of Kenya, with a PhD in law from the University of Nairobi specializing in land and environmental law. He is a currently a senior lecturer and the Director of the Centre for Advanced Studies in Environmental Law and Policy (CASELAP), University of Nairobi.

His research interests span the areas of governance, elections, land law, environment, natural resource management and extractives, areas on which he has written extensively. Some of his recent publications include, "Human Rights-based Approach to Environmental Protection: Kenyan, South African and Nigerian Constitutional Architecture and Experience" in Michael Addaney and Ademola Oluborode Jegede (eds), *Human Rights and the Environment under African Union Law (*Palgrave macmillan, 2020) and "The Role of the Environment and Land Court in Governing Natural Resources in Kenya" in Patricia Kameri Mbote, et al(eds) Law, Environment, Africa, (Nomos, 2019); He also co-edited *Blazing the Trail: Professor Charles Okidi's Enduring Legacy in the Development of Environmental Law*, (University of Nairobi, 2019), a publication produced in honour of the father of environmental law, Professor Okidi.

David Ong'are

David Ong'are started his career as a service man in the National Youth Service (Kenya) before enrolling and completing his Bachelor's degree,with Honours and proceeding to work as a teacher, examiner, and head of school in several public and private schools in Kenya for about 8 years. He later enrolled for his master's degree and subsequently was employed as a deputy director in charge of outreach programmes at the National Environment Management Authority (NEMA) in Kenya. He was later promoted to Director in charge of compliance in 2015; a position he holds to date in addition to partially working as an independent consultant. David is based in Nairobi, Kenya, where he lives with his wife and two children. His hobbies include community service, sports, traveling and scientific publication.

Duncan Ojwang

Dr Duncan Ojwang is a senior law lecturer Africa Nazarene University. He gained experience working with the United Nations Special Rapporteur for Indigenous peoples as a legal adviser, a job that introduces me to the indigenous world thinking. Dr Ojwang is am glad to be part of this journey towards creating an ecoliterate law and ecoliterate lawyers. He holds the view that if law is to remain valuable to the society then it must protect what is important in the society like sustainability and local principles and ethics on environment. Duncan argues that in the pursuit of standardization and universality no single ethics can protect our universe. This is because the local communities whose distinct identity is embedded with their environment have values and beliefs that make them empathise, intimate and embedded with their environment. As Huxley put it; "We are the great abbreviators. None of us has the wit to know the whole truth, the time to tell it if we believed we did, or an audience so gullible as to accept it"

Emmanuel Kasimbazi

Emmanuel Kasimbazi is a Professor Law at School of Law, Makerere University, Uganda. He is the Managing Partner of Kasimbazi and Company Advocate and has worked as a Consultant on different projects in Uganda and other African countries. He is the current President of the East African Association for Impact Assessment (EAAIA) and the Vice President of Association for Environmental Law Lecturers in African Universities (ASSELLAU). He is an active in the IUCN as a member of the Academy on Environmental Law and a member of the IUCN Commission on Environmental law. He has advised governments, international and Regional Organizations and Non-Governmental Organizations on various aspects of policy and law. He is a fellow of the Uganda National Academy of Sciences, the African Academy of Sciences and the World Academy of Sciences. His research interests are in water law, climate change, wildlife, wetlands, oil and gas among others.

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Elvin Nyukuri is a lecturer and social scientist at the Centre for Advanced Studies in Environmental Law and Policy (CASELAP), University of Nairobi. A doctoral degree holder, her research interests are Environmental governance, devolved governance, Climate resilience, climate financing, food security and Gender studies. She currently serves as a programme committee member of the Leading Integrated Research Agenda for Africa, 2030.

Fatema Rajabali

Ms. Fatema Rajabali specializes in climate adaptation research and the critical exploration of knowledge management and communication processes on climate change and development issues at IDS. She has developed strong experience in managing projects and implementing and evaluating strategies for research uptake, and the process by which evidence is translated into policy and practice. She also engages with tools and processes to capture learning from projects for institutional reflection and learning.

Francis Mwaura

Francis Mwaura is an Associate Professor in the Department of Geography & Environmental Studies at University of Nairobi where he also serves as thematic head in the Biogeography and NRM sections. He also coordinates the graduate program in Biodiversity & Natural Resources Management (MBNRM). His scientific and professional interests are centred around tropical biodiversity and ecosystems especially the linkages of this with society and development. Prof. Mwaura is an Editorial Board Member of the East African Journal of Science Technology and Innovation (EAC journal. He was a lead biodiversity author in the 2012 UNEP Global Environment Outlook (GEO-5) and is a member of a number of professional bodies including the Environment Institute of Kenya (EIK), Africa Nature People for Nature (P4N), Heritage Conservation and Human Rights (HCHR) Network (University of Nairobi), and Eastern Africa Population, Health and Environment (PHE) Network. He has supervised fifty graduate students both at master's and PhD levels and published widely in peer-reviewed journals. Prof. Mwaura is actively engaged in environment and NRM consultancy work both in Kenya and the Eastern Africa region.

Garvin Rodgers

Garvin Rodgers is currently a Research Assistant to the Technical Team of the Ministry of Trade of Kenya in the ongoing Kenya-USA Free Trade Agreement negotiations. He holds a Bachelor of Laws (LL.B) Degree with Second Class Honours (Upper Division) from the University of Nairobi. He has just concluded his Advocates Training Program at the Kenya School of Law, and he is awaiting admission to the bar as an Advocate of the High Court of Kenya. His research interests include International Trade Law, African Studies, Labour Law Rights, Environmental Law and Interplay between Law and Language.

Irene Kamunge

Irene Kamunge is an advocate of the High Court of Kenya serving as the Director of Legal Services at the National Environment Management Authority- Kenya. She holds a Master of Laws (LL.M) and Bachelor of Laws (LL.B) degrees from the University of Nairobi. Ms. Kamunge has extensive experience in managing and coordinating environmental and natural resources governance programmes, drafting and negotiating multi-lateral environmental agreements and policy formulation. Her recent assignment was to successfully lead a Team of experts in the forestry sector to undertake mapping, verification and valuation of mature and over mature public forest plantations.

John Mugane

John Muratha Mugane is the Director of the African Language Program and Professor of the Practice of African Languages and Cultures in the Department of African and African American Studies at Harvard University. Mugane is a linguist and a pedagogical innovator whose research interests include the linguistics of the social, Bantu linguistics, how Africans learn languages, African languages in the disciplines and the professions, language learning and acquisition, and language as the instrument of thought. Mugane is the author of *Africa's Sources of Knowledge Digital Library (ASK-DL)* http://contests.zeraki.co.ke:8090/ask-dl/which archives documents

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Kariuki Muigua holds a Ph.D. in law from the University of Nairobi. He teaches law at the University of Nairobi School of Law and currently serving as the Chair of the Private Law department. He also teaches at the Centre for Advanced Studies in Environmental Law and Policy and the Wangari Maathai Institute for Peace and Environmental Studies in the same University. He is the (CIArb) Regional Trustee for Africa. Dr Muigua is recognised nationally and globally and rated by Chambers and Partners as one of the best dispute resolvers in the country and is an Advocate of the High Court of Kenya of over 30 years standing. He has authored the following environmental books: (1) Securing Our Destiny through Effective Management of the Environment, 2020; (2) Nurturing Our Environment for Sustainable Development, 2016; and (3) he has co-authored: *Natural Resources and Environmental Justice in Kenya, 2015*.

Lars Otto Naess

Lars Otto Naess is a social scientist, and a doctoral degree holder, with more than 15 years of experience with climate change, development and agriculture at IDS. His current research interests include social and institutional dimensions of adaptation to climate change, policy processes on climate change and agriculture at national and sub-national levels, the role of local knowledge for adaptation to climate change, and adaptation planning in the context of international development. Much of his recent work has focused on Africa, in particular Tanzania, Kenya, Malawi and Ethiopia.

Mercy Wanjau

Ms. Mercy Wanjau is the Acting Director General of the Communications Authority of Kenya (CA) having been appointed on 22 August 2019. Prior to her appointment, she was the Director, Legal Services, at the Authority. Ms. Wanjau is a commercial lawyer, regulatory and governance expert who has been involved in design and harmonization of ICT policy and regulation at the local, regional and international level for over 15 years. She is a passionate and focused regulatory professional deeply interested in harnessing the transformative power of responsive public policy, regulatory reform and innovative technologies towards achieving development with impact. A Certified Secretary and Professional Mediator, she has previously consulted with KPMG South Africa, PriceWaterhouseCoopers Kenya and also had a stint in commercial legal practice. She has also served on international secondment at the International Telecommunications Union (ITU), the UN specialized agency for ICTs. Ms. Wanjau serves on the Board of the SOS Children's Villages and is a Council Member of the Institute of Certified Secretaries (ICS) Kenya. She is a graduate of the University of Nairobi (LLB Hons), University of Cape Town (LLM) and Strathmore Business School. In addition, she is an Eisenhower Fellow and a published author with the ITU and the United Nations Conference on Trade and Development (UNCTAD). Mrs. Wanjau was appointed in April 2020 to chair the COVID-19 ICT Advisory committee that coordinated ICT industry response to the COVID-19 pandemic in Kenya. In 2020, Ms. Wanjau was feted with the Moran of the Order of the Burning Spear (M.B.S.) by His Excellency, President Uhuru Kenyatta in recognition of her distinguished and outstanding services rendered to the nation.

Mwenda Makathimo

Mwenda Makathimo is the Executive Director of Land Development and Governance Institute. He is a Registered and Licensed Valuer and holds a Bachelor of Arts degree in Land Economics, a Master of Arts in Valuation and Property Management and a Doctorate in Environmental Policy from the University of Nairobi. He has also undertaken an executive training on Extractive Industries and Sustainable Development at the Columbia University. Dr Makathimo is passionate about development programmes aimed at sustainable land and natural resource management. He has wide experience in practice and research on issues relating to land and environment policy development, land management and administration, governance, assets and property valuation, real estate management, boundary delimitation and mapping. Dr Makathimo is a past Chairman of the Institution of Surveyors of Kenya and was a Commissioner of the Interim Independent Boundaries Review Commission. He has served as a member of the Nairobi City Valuation Court, an External Examiner at the University of Nairobi, School of the Built Environment, Department of Real Estate and Senior Lecturer Mount Kenya University, School of the Built Environment.

Munyao Sila

Hon. Justice Justice Munyao Sila is one of the pioneer judges of the Environment and Land Court of Kenya, having been appointed to this position in 2012. Prior to his appointment as Judge, he practiced law as an advocate from the year 1998 and also taught Land Law and Criminal Procedure Law at the Moi University School of law. Justice Munyao holds a Bachelor of Laws (LLB) Degree from the University of Nairobi and a Master of Laws (LLM) Degree from the University College London. He also holds a diploma in International Environmental Law from the UN Institute for Training and Research (UNITAR)Justice Munyao has written and presented various conference papers both locally and internationally and is also the author of the book Modern Law of Criminal Procedure in Kenya. He is married with 3 children.

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Muriuki Muriungi is Partner at KMK Africa Law Advocates in Nairobi, Kenya and Lecturer at the School of Law, University of Nairobi. He read for a Master of Science in Law and Finance at St. Peter's College, University of Oxford, UK where he was a Standard Bank Africa Chairman Scholar. An Advocate of the High Court of Kenya, Muriuki is also a doctoral candidate in law researching into the role of central banks in mobilising climate finance at the University of Nairobi. Muriuki is also a member of the International Network for Sustainable Financial Policy Insights, Research, and Exchange (INSPIRE) currently inquiring into the role of central banks in sustainable finance. His areas of research interests reside in the area of sustainable finance, environmental law, property theory, and financial regulation.

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Peter Mburu is a Kenyan lawyer, who holds a Bachelor of Laws (LL.B) Degree from the University of Nairobi. He holds a Master of Laws (LL.M) degree in law from the University of Nairobi and a Ph.D in law from the University if Groningen in the Netherlands. His research interests include land law, land registration law and land as a human right. He has worked at the Ministry of

Lands in Kenya as a Registrar of Titles where he has held several positions and continues so to do to date. He has been involved in the various efforts to re-design and in the development of and re-engineering core applications at the Lands Registry. He is also an adjunct lecture at the School of Law, University of Nairobi.

Peter Munyi

Peter Munyi is a Lecturer of Law at the University of Nairobi School of Law. A 2011 Netherlands Organization for Scientific Research (NWO) Fellow, Peter holds a PhD from Wageningen University & Research, the Netherlands, a Master's degree in European Intellectual Property Law from Stockholm University, Sweden and a Bachelor's degree in law from Moi University, Kenya. His legal practice focusses on all aspects of intellectual property and related issues while in academia, his research revolves around issues concerning intellectual property rights, public health, genetic resources, and international trade. He is a member of the Licensing Executives Society, the Law Society of Kenya and the Institute of Certified Secretaries, Kenya. He was advisor to the African Group in the process leading to the adoption of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, and also in the negotiations towards the adoption of the WHO Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property.

Purity Wangigi

Purity Wangigi is a Teaching Fellow for the Strathmore Law School. She teaches Property Law, Legal Research and Writing and Legal Business Ethics. She is a pioneer graduate from Strathmore Masters law program where she studied Oil and Gas Law. Her environmental law interests and dissertation "Towards an Efficient Oil Spill Management in Kenya: Strengthening Liability and Compensation Requirements" led her to engage in academia, civil society and government technical support teams to ensure sustainability in land use choices. She is currently working on her Phd research as she teaches at the Strathmore Law School.

Robert Owino

Robert Owino is a Kenyan environmental lawyer and scholar. He holds a Dr. jur degree in international environmental law from Universität Bayreuth, Germany; an LLM degree from University of Dar es Salaam and an LLB degree from Moi University. He is a Senior Law Lecturer and Chair of Private Law Department at Jomo Kenyatta University of Agriculture and Technology (JKUAT) School of Law. Additionally, he is an adjunct lecturer at the Kenya School of Law. Dr. Owino is a practicing advocate of the High Court of Kenya and a member of the Law Society of Kenya Land, Environment, Natural Resources and Conveyancing Committee. He is presently a visiting fellow of the Bayreuth Africa Multiple Cluster of Excellence. His research interests are in the areas of climate change; renewable energy and; natural resource related issues.

Selelah Okoth

Selelah holds a Master of Science in Urban Environmental Planning and Management and B.Sc. in Environmental Studies from Maseno University. She is currently pursuing a PhD in Environmental Policy at the University of Nairobi. Her passion for environmental management can be traced back to her childhood when she used to undertake a lot of conservation activities including tree growing. To this date, Selelah has always had a strong desire in environmental conservation and management which has largely defined her career path. Her drive has been that since she contributes to environmental pollution, she owes the environment a duty to clean it and make it habitable for other generations. Selelah is currently in charge of Air Quality, Ozone Depleting Substances and Petroleum Units at the National Environment Management Authority. She has more than 8 years experience in the field of ozone layer protection and petroleum sector.

Thuita Thenya

Thuita Thenya is a Senior Lecturer at Wangari Maathai Institute of Peace and Environmental Studies, University of Nairobi, Kenya in the area of Biogeography and Natural Resources Management and governance. Previously, he worked as senior lecturer in the Department of Geography and Environmental Studies. He holds a PhD in Biogeography from the University of Nairobi and the University of Bonn (Sandwich). He also holds a BSc. And MSc. both from the University of Nairobi. He has over 20 years' experience in participatory forest management including forestry resources utilization, governance, community capacity building, preparation of participatory forest management plans (PFMP), research and policy engagement. He has been extensively involved participatory natural resources management and governance. Dr. Thenya is trained in conflict mediation and has a wealthy of experience in natural resources conflict management based on field practice and as trainer. He is a board member of Green Belt Movement (GBM), a coordinator of SDG 16 cluster lead under International Association of Universities (IAU) and a member UNESCO Man and Biosphere (MAB) national committee.

Tom Kabau

Tom Kabau is a Senior Lecturer at the School of Law, Jomo Kenyatta University of Agriculture and Technology, an Advocate of the High Court of Kenya, and has previously provided research and consultancy services to various organisations. He also serves as an African Area Advisor for the Oxford Bibliographies in International Law. Kabau holds a Doctor of Philosophy (PhD) degree in Public International Law from the University of Hong Kong, and Master of Laws (LLM) and Bachelor of Laws (LLB) degrees from the University of Nairobi. He has also been a Research Fellow at Utrecht University, and was a 2015 Transnational Law Summer Institute Fellow at King's College London. He has various publications in the form of book chapters and articles in peer-reviewed journals. His research interests are in Public International Law, Law and Development, Environmental Law and Intellectual Property Law.

Abbreviations

AATF	African Agricultural Technological Foundation
ABS	Access and Benefit Sharing
ABSA	Amalgamated Banks of South Africa
AFEW-K	African Fund for Endangered Wildlife-Kenya
ACHPR	African Court on Human and Peoples' Rights
ACRAG	Africa Centre for Rights and Governance
ACEC	African Clean Energy Corridor
ADR	Alternative Dispute Resolution
AMP	African Mountain Partnership
ASAL	Arid and Semi-Arid Land
AU	African Union
BCH	Biosafety Clearing House
BWRC	Basin Water Resources Committees
BXW	Banana Xanthomonas Wilt
CAACs	Catchment Area Advisory Committees
CBA	Cost-Benefit Analysis
CBD	Convention on Biological Diversity
CBSD	Cassava Brown Streak Disease
CD	Compact Disk
CDA	Coast Development Authority
CDKN	Climate and Development Knowledge
CE	Circular Economy
CEC	County Executive Committee
CEPA	Communication Education and Public Awareness
CEMIRIDE	Rights Development
CETRAD	Centre for Training and Integrated Research in ASAL Development
CFAs	Community Forest Associations
CFTs	Confined Field Trials
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CIDP	County Integrated Development Plan
CLA	Community Land Act
CMS	Convention on the Conservation of Migratory Species of Wild Animals
CO_2	Carbon Dioxide
COA	Court of Appeal
COMESA	Common Market for Eastern and Southern Africa

COP	Conference of the Parties
CS	Cabinet Secretary
CSUD	Center for Sustainable Urban Development
CSOs	Civil Society Organizations
DEPA	Danish Environmental Protection Agency
DTU	Denmark Technical University
DVD	Digital Versatile Disks
DVS	Department of Veterinary Services
EACJ	East African Court of Justice
EA	Environmental Audit
EAP	Environmental Assessment Plan
EBM	Ecosystem Based Management
ECJ	European Court of Justice
EEE	Electronic and Electrical Equipment
EEZ	Exclusive Economic Zone
EIA	Environment Impact Assessment
EIS	Environmental Impact Statement
EISA	Environmental and Social Impact Study Report
ELC	Environment and Land Court
ELCA	Environment and Land Court Act
ELRC	Employment and Labour Relations Court
EMCA	Environment Management and Coordination Act
EMP	Environmental Management Plan
EPR	Extended Product Responsibility
EPRA	Energy and Petroleum Regulatory Authority
EPT	Energy and Petroleum Tribunal
EPZ	Export Processing Zone
ERC	Energy Regulatory Commission
ESIA	Environmental and Social Impact Assessment
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
GAD	Gender and Development
GDP	Gross Domestic Product
GESIP	Green Economy Strategy and Implementation Plan
GEF	Global Environmental Facility
GHG	Greenhouse gases
GIS	Geographical Information Management System
GMO	Genetically Modified Organisms

GOK	Government of Kenya
GOU	Government of Uganda
GRASCOM	GMO Risk Assessment Sub-Committees
GRDI	Gender Related Development Index
HEP	Hydro Electric Project
HPP	Hydro Power Project
HWC	Human-wildlife conflict
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Convention on Economic, Social and Cultural Rights
ICIPE	International Centre for Insect Physiology and Ecology
ICJ	International Court of Justice
ILRI	International Livestock Research Institute
ICT	Information Communication Technology
ICZM	Integrated Coastal Zone Management
IDA	International Development Association
IGAD	Intergovernmental Authority on Development
IMPACT	Indigenous Movement for Peace Advancement and Conflict
IOC	International Oil Company
IRECs	International Renewable Energy Conferences
IRENA	International Renewable Energy Agency
ISAAA	International Service for the Acquisition of Agri-biotech Applications
ISK	Institution of Surveyors of Kenya
IUCN	International Union for Conservation of Nature
IWRM	Integrated Water Resources Management
IYM	International Year of Mountains
JPOI	Johannesburg Programme of Implementation
KALRO	Kenya Agriculture and Livestock Research Organization
KAM	Kenya Association of Manufacturers
KARA	Kenya Alliance of Resident Associations
KARI	Kenya Agricultural Research Institute
KEBS	Kenya Bureau of Standards
KEFRI	Kenya Forestry Research Institute
KENGEN	Kenya Electricity Generating Company Limited
KEPHIS	Kenya Plant Health Inspectorate Service
KES/Ksh	Kenyan shilling
KFS	Kenya Forest Service
KIPI	Kenya Industrial Property Institute
KIPPRA	Kenya Institute for Public Policy Research and Analysis

KIRDI	Kenya Industrial Research and Development Institute
Km	Kilometres
KMA V	Kenya Maritime Authority
KMFRI	Kenya Marine and Fisheries Research Institute
KNCPC	Kenya National Cleaner Production Center
KPA	Kenya Ports Authority
KPLC	Kenya Power and Lighting Company
KURA	Kenya Urban Roads Authority
KWS	Kenya Wildlife Service
KWTA	Kenya Water Towers Agency
LAICONAR	Laikipia County Natural Resource Network
LAPSSET	Lamu Port-South Sudan-Ethiopia-Transport
LBDA	Lake Basin Development Authority
LCA	Life Cycle Assessment
LCD	Liquid Crystal Display
LDC	Less Developed Countries
LSK	Law Society of Kenya
MDGs	Millennium Development Goals
MEAs	Multinational Environmental Agreements
MEF	Ministry of Environment and Forestry
MiniSASS	Mini Stream Assessment Scoring System
MMUST	Masinde Muliro University of Science and Technology
MOIED	Ministry of Industrialisation and Enterprise Development
MRB	Mineral Rights Board
MTP	Medium Term Plan
MW	Megawatt
NBA	National Biosafety Authority
NBSAP	National Biodiversity Strategy and Action Plan
NCCG	Nairobi City County Government
NCWSC	Nairobi City Water and Sewerage Company
NDCs	Nationally Determined Contributions
NEMA	National Environment Management Authority
NEP	National Environmental Policy
NET	National Environment Tribunal
NGBK	National Genebank of Kenya
NGO	Non-governmental Organization
NLC	National Land Commission
NLP	National Land Policy

NMK	National Museums of Kenya
NPP	Nuclear Power Plant
NPTC	National Performance Trials Committee
NPTs	National Performance Trials
NSP	National Spatial Plan
OAU	Organization of African Unity
PCPB	Pest Control Products Board
PETCO	Kenya PET Recycling Company
PLUPA	Physical and Land Use Planning Act
PPA	Power Purchase Agreement
PPP	People, Planet, Profit
PSC	Production Sharing Contract
PTD	Public Trust Doctrine
RABESA	Regional Approach to Biotechnology and Biosafety Policy in Eastern and Southern Africa
REDD+	Reducing emissions from deforestation and forest degradation
REREC	Rural Electrification and Renewable Energy Corporation
RTA	Registration of Titles Act
RUBICON	Ruaraka Business Community
SCP	Sustainable Consumption and Production
SD	Sustainable Development
SDGs	Sustainable Development Goals
SE4ALL	The Sustainable Energy for All
SEA	Strategic Environmental Assessment
SESA	Strategic Environmental and Social Assessment.
SGR	Standard Gauge Railway
SMP	Sustainable Management Plan
SOBIFAK	Society for Biotech Farmers of Kenya
SPS	Sanitary and Phytosanitary Standards
Sq	Square
STBs	Set Top Boxes
TBT	Technical Barriers on Trade
TRIPS	Trade-Related Aspects of Intellectual Property Rights
STAP	Science and Technology Advisory Panel.
STBs	Set Top Boxes
TARDA	Tana and Athi River Development Authority
TDRMs	Traditional Dispute Resolution Mechanisms
TFT	Thin Film Technology

TMRA	Treaty Making and Ratification Act
UK	United Kingdom
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCHE	United Nations Conference on the Human Environment
UNDP	United Nations Development Programme
UNEP	United Nations Environmental Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Council
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
US	United States
USAID	United States Agency for International Development
USD	US Dollars
VAT	Value Added Tax
WASREB	Water Services Regulatory Board
WCMA	Wildlife Conservation and Management Act
WEEE	Waste Electronic and Electrical Equipment (e-waste)
WEF	Water-energy-food
WEHAB	Water, Energy, Health, Agriculture, and Biodiversity
WHC	World Heritage Convention
WHO	World Health Organization
WID	Women in Development
WRA	Water Resources Authority
WRMA	Water Resource Management Authority
WRUAs	Water Resource User Associations
WSCSD-K	World Student Community for Sustainable Development- Kenya
WSTF	Water Services Trust Fund

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14. Constitution of Kenya, 2010
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18. Energy (Energy Management) Regulations, 2012
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41. Land Control Act, 1989
42. Land (Group Representatives) Act, 1970
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20. National Climate Change Response Strategy, 2010
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Introduction

Patricia Kameri-Mbote, Robert Kibugi & Nkatha Kabira

"You cannot protect the environment unless you empower people, you inform them, and you help them understand that these resources are their own and they must protect them."

These powerful words by The Late Professor Wangari Maathai, the first African woman to receive a Nobel Peace Prize for her work on protecting the environment, resonate immensely with the realities we find ourselves confronting today at global, regional, national and local levels.

Global environmental phenomena, including climate change, biodiversity loss, desertification and land degradation, natural disasters and pandemics, continue to present unprecedented challenges to humanity and sustainable development goals. As a consequence, the world is experiencing global warming; extreme weather events coupled with low resilience to disasters; energy insecurity; emergence of pandemics such as Ebola, H1N1, SARs and Covid-19; food insecurity; unemployment and diminishing incomes. These factors present unprecedented challenges to the rule of law.

Kenyan environmental law has evolved dynamically over the past decade, influenced by, among others, the promulgation of a new Constitution on August 27, 2010. This has resulted in extensive changes in the governance framework of Kenya, which have in turn resulted in the modification of the foundational structures of environmental governance. The constitutional change consolidated gains achieved through enactment and implementation of the 1999 Environmental Management and Coordination Act (EMCA).

No scholarly publication has so far consolidated the analyses on implementation of the 2010 constitutional framework in environmental governance. An earlier volume, published in 2008, focused on environmental governance in Kenya in the context of implementing the EMCA.[1] This publication is, therefore, timely because the constitutional provisions are a remarkable enhancement of the EMCA and the repealed Constitution. These include: devolution of functions; values and principles of national governance; human rights, including right to a clean environment, gender equality and public participation; devolution of environmental mandates; State obligations on environment, including a minimum of 10 per cent tree cover; systems of environmental impact assessment and audit, elimination of harmful environmental practices; and culture, among others.

> Prof Wangaari Maathai, at one point, famously declared that:
> … today we are faced with a challenge that calls for a shift in our thinking, so that humanity stops threatening its life-support system. We are called to assist the Earth to heal her wounds and, in the process, heal our own with indeed to embrace the whole of creation in all its diversity, beauty and wonder. Recognizing that sustainable development, democracy and peace are indivisible is an idea whose time has come.[2]

1 Charles O Okidi, Patricia Kameri-Mbote, and Migai Aketch, (eds.,) *Environmental Governance in Kenya: Implementing the Framework Law* (2008) East African Education Publishers.

2 Wangari Maathai, 'Nobel Lecture' December 10, 2004, https://www.nobelprize.org/prizes/peace/2004/maathai/26050-wangari-maathai-nobel-lecture-2004/ accessed on 12 March 2021.

Indeed, the promulgation of the Constitution in 2010, and its implementation through diverse modifications to the regulatory (legal, policy and institutional) structure for environmental governance requires a fundamental shift in our thinking to ensure that humanity stops threatening its life support system. The meaning and outcomes of sustainable development should be refined to ensure that in balancing between social, economic, environmental and political considerations, the protection of the environment is deemed sacrosanct. The rule of law, and the existence of effective State institutions is imperative to this goal. This is because there is a need to resolve ever-present questions and challenges of constitutionalism, rule of law, and effective institutions.

The separation of powers between the three branches of government (*trias politica)* and the assertion of judicial independence remain crucial to successful environmental governance, and attainment of the sustainable development ideal elucidated in Articles 10 and 69 of the Constitution. This is important in the face of developments in the environmental realm globally; and further, for Kenya to live up to its commitments to implement the Sustainable Development Goals, in order to augment fulfillment of the constitutional promises on environment, human rights and sustainable development.

Implementation of the Constitution has been under way for a decade, making this an opportune time for a scholarly inquiry into how it has impacted environmental governance. The book aims to assess how the law, policies and institutions have adapted to the changes, and analytically reviews the performance of diverse actors and institutions in an attempt to make an original contribution to knowledge.

The book is divided into six thematic parts: Foundational elements of environmental governance; Land and environmental governance; Compliance and enforcement; Sectoral environmental governance; Crosscutting elements of environmental governance; and Regional perspectives of environmental governance. The part on foundational elements of environmental governance discusses the variety of tenets on which environment governance is premised. The Land and Environmental Governance one discusses a whole range of practices, rules, and institutions that are in play in environmental management. The third part on Compliance and Enforcement examines and analyses conformity with the rules on environmental governance and the measures put in place to induce conformity. The fourth part of the book, on sectoral environmental governance, analyses how various sectors in Kenya approach environmental governance. Part five on crosscutting elements of environmental governance documents the tenets of environmental governance that spread to areas that were traditionally not considered part of environmental governance. The final part of the book on regional perspectives of environmental governance widens the scope of the book by analyzing, describing and evaluating environmental governance at a regional level.

Dr Duncan Ojwang in the first chapter, titled ***'Environmental Ethics, Culture, Traditional Knowledge and Norms for the Realization of Sustainable Development'***, critiques the 2010 Constitution's response to land issues and questions the optimism that stakeholders place on the new constitutional order. The chapter investigates different ethics and cultural values that impact sustainable development. It concludes that environmental ethics are too liberal to

protect future generations, and that by failing to address the individual land ownership problem in Kenya, the 2010 Constitution may not adequately ensure environmental governance.

In the second chapter, ***'The Language Question in Environmental Knowledge and Governance'***, John Mugane explores the interplay between environmental use and its governance through language. Mugane argues that language is both a critical source of environmental knowledge and a terminus of knowledge in which the WH-questions (who, what, how, when, where and why) postulated and addressed are constantly being reworked and improved, and therefore, there is need for language visibility in environmental laws.

Munyao Sila's chapter, '***The Environment and Land Court: Jurisdiction and Jurisprudence'***, analyses the jurisdiction and jurisprudence of the Environment and Land Court. The author, who is a serving judge of the Environment and Land Court, concludes that the court has been at the forefront of ensuring that the right to a clean and healthy environment is given effect. His discussion of the different ways in which questions brought before the court manifest is very informative.

Irene Kamunge and Kariuki Muigua document the main amendments to the Environmental Management and Coordination Act (EMCA) since the promulgation of the 2010 Constitution in the chapter, ***'An Analysis of the Implementation of EMCA: Assessing the Experience and State of Play in Implementation of the Framework Environmental Law in Kenya'***, addresses the extent to which the amendments have been implemented. The authors critique the efficacy and success of the amendments in enhancing harmony and explore whether or not they have just entrenched the chaos in environmental governance in Kenya. Further, the chapter interrogates whether there is need to retain the Framework Environmental Law in its current form after the promulgation of the Constitution, which not only contains a number of provisions stipulated in the EMCA but also establishes bodies such as the Environment and Land Court and National Land Commission with whose powers and mandates potentially overlap with institutions created under the framework law.

The chapter, ***'Fulfilling Socio-Economic Rights and Governance'*** by Nkatha Kabira and Garvin Rodgers, reviews the extent to which the right to environment (socio-economic rights) has been mainstreamed into other related legislation such as elections law, diversity law, public participation, public finance and citizenship law. The chapter concludes that although Kenya's legal framework encapsulates an expansive Bill of Rights that includes the right to environmental protection geared towards transforming democracy and governance processes in Kenya, nevertheless implementation remains a challenge because of the perceived distinctions between different types of rights, which ought to be viewed in a symbiotic manner.

Collins Odote's chapter, '***Appraising Kenya's Theory and Process of Environmental Law and Policy Making'*** outlines the sources of environmental law and analyses the linkage between environmental law and policy making in Kenya. It determines the role of devolved government in environmental law and policy-making, and maps the environmental law implementation challenges. In ***'The Evolving Application of International Environmental Governance Mechanisms in Kenya'***, Tom Kabau evaluates the evolving application of public international

environmental law and governance mechanisms in Kenya in the quest to fulfil the right to a clean and healthy environment, as provided by Article 42 of the Constitution.

Patricia Kameri-Mbote's '***Land Tenure and Sustainable Environmental Management within the Context of the Constitution of Kenya 2010'*** argues that the 2010 Constitution provides a firm grounding for aligning land tenure with sustainable environmental and natural resources' management, and that this has been carried into the laws enacted to implement the Constitution. Unlike the repealed constitution, the 2010 Constitution includes a whole chapter on land and the environment; has both rights to property and a healthy environment in the Bill of Rights; has sustainable development as a national principle of governance; and explicitly provides for the regulation of land rights, which opens space for imbuing sustainability in land use.

Peter Mburu discusses the concepts of physical planning, land use and development control in Kenya in the chapter, '***Assessing whether Kenya's Physical and Land Use Planning Legal Framework Enhances the Sustainable Land Use envisaged by the Constitution'***. The author highlights the policy, legal and institutional frameworks governing the same and goes further to assess the current legal situation and concludes by suggesting possible propositions that can be adopted to achieve sustainable use of land and land resources.

'The Law and Practice on Environmental Assessment in Kenya Under the Constitution of Kenya, 2010' chapter by Patricia Kameri-Mbote, Nkatha Kabira & Boru Gollo Jattani, evaluates the challenges in the implementation of environmental assessment with a focus on the scope the Constitution of Kenya, 2010, which has transformed the law and practice on environmental assessment in Kenya.

Peter Munyi reflects on the status quo of access and benefit-sharing before the 2010 Constitution in the chapter, ***'Access and Benefit Sharing of Genetic Resources'*** and examines the constitutional provisions on access and benefit-sharing, while outlining the statutory responses to the constitutional provisions and the challenges these responses have brought about for the access and benefit-sharing regulatory order. In the chapter, ***'Governing Modern Biotechnology in Kenya: Law, Policy and Politics'***, Patricia Kameri-Mbote examines the governance of modern biotechnology (mainly GMO technology) within the context of the 2010 Constitution and concludes that the Biosafety Act and the 2010 Constitution have many points of interface, which if integrated will improve the regulatory framework.

The chapter, ***'Electronic Waste Management in Kenya: The Implications of Environmental Governance'*** by Mercy Wanjau explores the interaction of e-waste governance frameworks in Kenya with complementary frameworks on environmental governance, and concludes that Kenya does not have a formal system to measure its e-waste. Robert Omondi Owino, in the chapter, ***'Renewable Energy in Kenya: Legal and Regulatory Approaches'*** evaluates the key features of the renewable energy regulatory framework and assesses the nature and reach of the regulatory approaches adopted by Kenya to shore up its proportion of renewable energy in the overall energy mix. Further, the chapter examines the policy underpinnings of renewable energy regulation and discusses specific renewable energy drivers and dampeners that are discernible in the regulatory bulwark.

Francis Mwaura evaluates Kenya's effort towards sustainable governance of biological heritage in both terrestrial and aquatic ecosystems around the country in ***'The Governance of Biological Heritage in Kenya'***. He determines the gaps and weaknesses in the policies regulating sustainable governance of biological heritage. Mwenda Makathimo, writing on the ***'The Role of Public and Stakeholder Participation in Enhancing Sustainable Water Resources Management in Kenya',*** maps the progress Kenya has made in enhancing policy, legal and administrative mechanisms for stakeholder and public participation in water resources' management. The author concludes that despite the commendable progress Kenya has made, there is a need to address the emerging gaps with respect to the financial and operational effectiveness of the institutions established at the Basin and local levels. Robert Kibugi, writing the chapter, '***Appraisal of Kenya's Law and Practice for Implementing the Constitutional Human Right to Water in Context of Available Water Resources'***, argues that there is a fundamental duty on the State to observe, respect, protect, promote and fulfil the human right to safe and clean water in adequate quantities. The chapter observes that, when analysing the right to water, there should be an examination of the available water resources to ascertain the optimal manner of ensuring availability and accessibility of the needed water.

Patricia Kameri-Mbote, in the chapter ***'Innovations in Wildlife Conservation & Management in Kenya under the 2010 Constitutional Dispensation'*** evaluates wildlife conservation in Kenya in the post-2010 Constitutional dispensation and argues that the Constitution has provided a good anchorage for sustainable wildlife management. Andrew Muma, and Thuita Thenya, in ***'Governance of Forest Resources'*** document the ideals in the Constitution, 2010, relating to forest conservation and management, determine the challenges face in the process of realizing the ideals and provide recommendations on how to overcome the challenges.

In ***'Environmental Governance of The Extractives Sector in Kenya: A Review of the Legal Framework Relating to Water and Air Pollution in The Extractive Industry'***, Muriuki Muriungi and Purity Wangigi map and appraise the environmental legal regime in the extractives sector in Kenya. The two conclude that extractive activities cause air and water pollution and water shortage. The authors conclude that the absence of comprehensive and uniform standards relating to waste/effluent discharge into the environment accounts for the increased water and air pollution and the concomitant negative effects on the environment.

Kariuki Muigua's chapter, '***Conflict Management Mechanisms for Environmental Governance'*** critically examines and analyzes conflict management mechanisms in environmental matters for effective environmental governance. The chapter discusses the nature of environmental and natural resource-related conflicts; provides an overview of the various conflict management mechanisms and their applicability or suitability in the management of environmental conflicts, and offers a critique of Kenya's framework on the management of environmental and natural resource-related conflicts.

Clarice Wambua's chapter, ***'Climate Change Governance through the Kenyan Constitution: Bastion of Hope or Boulevard of Broken Dreams?'***, assesses the climate change governance structure under both the old and new constitutional dispensations, and highlights the myriad changes brought about by the 2010 Constitution. The chapter concludes that the constitutional

values and principles are not wholly embraced and the mainstreaming approach to governing climate change is hampered by challenges, 10 years after the promulgation of the new Constitution.

Robert Kibugi appraises biodiversity in Kenya within the context of social and economic activities, in '***Assessing the Utility of Human Rights, Environmental Assessments and Devolved Functions as Constitutional Tools to Enhance the Mainstreaming of Biodiversity in Kenya'***, and discusses the approach to biodiversity mainstreaming under the Convention on Biological Diversity (CBD), and evaluates human rights, environmental assessments and devolved government functions as critical constitutional tools for enhancing biodiversity mainstreaming in Kenya.

Anne Nyatichi Omambia, Selelah Atieno Okoth and David Walunya Ong'are in ***'Environmental Pollution and Waste Management in Kenya'*** provide a situation analysis of pollution management in Kenya, and postulate that actions such as industrial symbiosis using Ruaraka Industrial Park as a case study are indispensable in ensuring a clean and healthy environment for all and leading the country towards a green economy pathway.

Fatema Rajabali, Elvin Nyukuri and Lass Otto Naess examine the framing and implementation of gender in sub-national level policy processes in Laikipia and Machakos counties in Kenya, focusing particularly on the water, energy and food security sectors in the chapter ***'Gender and Climate-Resilient Planning: Lessons from Kenya'***. The chapter finds that while there are instruments of support and monitoring nominally in place, there is a lack of mechanisms to gauge progress, as well as lack of spaces for adjusting policy processes on the basis of lessons learnt. The chapter concludes that the way gender is considered in county-level planning and implementation processes in Kenya risks undermining the effectiveness of adapting to climate change as well as the possibility of achieving gender equity goals.

Emmanuel Kasimbazi analyses the constitutional and human rights approaches and biodiversity management in the environmental law of Uganda in ***'Environmental Law in Uganda: Constitutional Approaches, Human Rights and Biodiversity Management'***. The chapter looks at the environmental problems in Uganda, causes and implications, reviews the constitutional environmental principles, analyses the linkage between human rights to environmental law and assesses how biodiversity management is incorporated in environmental law.

> "*There comes a time when humanity is called to shift to a new level of consciousness... that time is now.*"
>
> ***Wangari Maathai***

PART I

FOUNDATIONAL ELEMENTS OF ENVIRONMENTAL GOVERNANCE IN KENYA

CHAPTER 1

Environmental Ethics, Culture, Traditional Knowledge and Norms for the Realization of Sustainable Development

Duncan Ojwang

A. Background and overview

This book attempts to update environmental law in line with the 2010 Constitution, which is the most important source of law in Kenya. What stands out and is fascinating about the 2010 Constitution, which is departure from the old Constitution, is that its enactment involved Kenyans, and is to that extent a homegrown Constitution. I am, however, of the view that though the Constitution brought some concerns and the place of Kenyans' interest to the table, it did not go far enough, when you examine how it has handled land. In that respect, I am less optimistic than other authors in this book. The connection between land and environment is another reason for my minimised hope in the power of the 2010 Constitution to bring changes to environmental governance in Kenya, which is the subject of this book. I doubt that if the Constitution had envisioned self-determination for the people of Kenya it would have been impotent to deal with land injustice, just as it is expected to deal sufficiently with environmental governance. For one, some repugnant common law doctrines on extreme individual property ownership were still woven into the 2010 Constitution. This is the source of my questioning the optimism that my colleagues writing other chapters of this book have for the constitutional provisions on the environment.

This chapter is an investigation of different ethics and cultural values that impact on sustainable development. It seeks to identify environmental ethics on one hand and conceptions of Sustainable Development on the other by discussing the range from which they are liberal and might not protect future generations and indigenous peoples, and therefore might not recognize the place of future generations. This discussion on the place of different ethics application to protect future generations is crucial because numerous international agreements define sustainable development is generally as development that meets the needs of the present generation without compromising those of future generations.[1] Some courts have further articulated intergenerational equity to offer a legal standing to those generations that do exist at present, and harm that could affect future people, a concept that is the opposite of capitalism.[2]

The premise of one ethics for the whole universe, with the centralism of western ethics as the starting point in environmental ethics is counterpoised in this chapter with an examination of African communitarianism norms.[3] However, as much as the chapter acknowledges nonwestern environmental ethics, it is not at the same time dismissing the international environmental governance gains that have been realized from those ethics.[4]

1 JA Leggett, 'Rio + 20: The United Nations Conference on Sustainable Development', (June 2012).

2 *Minors Oposa v Secretary of the Department of Environment and Natural Resource*, Supreme Court of the Philippines, No. 101083 (30 July 1993).

3 Stockholm Declaration on the Human Environment, in Report of the United Nations Conference on the Human Environment, UN Dec./CONF.48/14, at 2 and Corr.1 (1972). Principle No. 23.

4 E Galeano, 'Open veins of Latin America: Five Centuries of the Pillage of A Continent.' (1973) New York: Monthly Review Press.

Conceptually, as pointed out in the rest of the chapter, environmental ethics permeate every question on environment, the value of environment, the role and the desire of future generations that we might not know today, the role of community, state, etc. This informed my approach in teaching environmental law, which is to dedicate first classes to the discussion on environmental ethics. Setting out to first discuss environmental ethics in environmental law class is based on the fact that ultimately every law is anchored on an ideological foundation.[5] What is more, environmental crisis is really a crisis on environmental ethics. Because every choice arises from ethics, it is the philosophical foundation of all actions, laws and policies.

Different worldviews, epistemologies and value systems in various civilizations challenge claim of western theories' to be universal and the standard.[6] Concepts are important because they do not exist in an ideological void but within a culture, yet culture's role is downplayed in the pursuit of universalization and standardization.[7] Vine Deloria, a champion of decolonization, provides a basis to investigate different paradigms. In his essay entitled 'Trickster and Messiah', he wrote that two issues should be priority to current post colonization legal research:

> The burning question that should occupy our time should concern where the complex of ideas that constitute Western civilization originated, how they originated, and whether they have any realistic correspondence to what we can observe and experience in nature.[8]

As suggested by Deloria, it is important to have a clear understanding of the western ideas that dominate law and to evaluate their deception and the extent to which they veer off from what we see in nature. The starting point is clarity of concepts.[9] We must learn to step back at times and look at the big picture of what we call laws and retrace their ontological and epistemological foundations.[10] This is the reason the decolonization works of Okoth-Ogendo[11] are inextricably linked with those of Robert Williams on western conquest.[12] Their discussion on how things come to be owned demonstrates how western views are instrumental in shaping modern laws on property that led to expropriation and occupation of land not owned privately through the *terra nullius* doctrine.[13] Ogendo, for example, just summarized why the African concept of property is embedded within the sustainable goal which considers future generations, because land

5 R Oduor, 'Western Liberalism, African Communalism and the Quest for An Adequate Ideological Foundation for the Recognition and Protection of the Rights of Persons with Disabilities in Kenya', (2016) *East Africa Law Journal, Special Issue on Disability Rights.*

6 C Taylor, 'The Politics of Recognition' in Taylor, Charles et al. (1994) pp.25-73.

7 Frantz Fanon, *The Wretched of the Earth*. New York: Penguin Books. (1963)

8 R Williams, 'Columbus Legacy: Law As An Instrument of Racial Discrimination against Indigenous Peoples' Rights of Self-Determination', (1991) 51 *Arizona Journal of International & Comparative Law* 8 (available online).

9 AF Chalmers, *What Is This Thing Called Science?* (2013) New York: Open University Press. AK Meroka and D Ojwang, 'A Critical Analysis of Legal Research in Kenya: The Nexus between Research Funding, Academic Freedom and Social Responsibility' (2018) *Asian Journal of Legal Education* Vol 5, Issue 2, pp. 109 – 121 https://doi.org/10.1177/2322005818768682

10 GC Spivak, *A Critique of Postcolonial Reason: Toward A History of the Vanishing Present.* (1999) Cambridge: Harvard University Press

11 HWO Okoth-Ogendo, 'The Tragic African Commons: A Century of Expropriation, Suppression and Subversion' (2002) An Occasional Paper series No 24. Program for Land and Agrarian Studies, School of Government University of Western Cape. ISBN: 1-086808-542-2.

12 RA William, *Savage Anxieties: The Invention of Western Civilization* (1st ed.). New York: Palgrave Macmillan. ISBN 978-0-230-33876-0.

13 HWO Okoth-Ogendo, *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya.* (1991) ACTS Legal Studies Series No. 2. Nairobi: African Centre for Technology Studies (ACTS).

protects the interest of the past, present and future generations unlike the western conception which centres on the individual and not the future.[14]

Thankfully, they evaluate the doctrines and expose their inconsistency and racism as they were used to maximize exploitation of resources to the detriment of the colonized people, environment and the low regard for the needs of future generations, who are the basis for sustainable development.[15] They clarify crucial doctrines and give us hope of contesting various doctrines and civilizations, a crucial discourse in the post-colonization era. Majorly, colonizing groups chose means to achieve their goals that harmed colonized groups for all generations dismissed their concept of preserving resources for future generations, and caused social conflict.[16] Ogendo and Roberts locate the western doctrine down the poisonous mine like the canary birds which were used by miners to detect poison, to demonstrate how the doctrines were determined to get rid of the tribal way of life with especially the connection of land between them and the future generations.

It is on that basis that Kenya's High Court conceptually used the Common Law to deny the indigenous customary land claim of the Ogiek people and seek to pigeon hole their claim within the Common Law basis of personal property.[17] The Ogiek cannot survive as a distinct group out of the Mau ecosystem because of their relations to the land, not merely a matter of possession but their own survival however, according to court, but this was ignored in the Endorois case and the Kemai case.[18] For example, the court reasons that "going into a bush to collect wild berries" was not a way of life but rather an act that did not require possession of land.[19] This is proved by the argument of the judges that one does not need to own Mount Kenya to climb it and enjoy it or own Kakamega historical sites to visit them.[20] You can visit during the day, pay entrance fees and then move back home.

B. Linking sovereignty and environmental ethics with culture, traditional knowledge, and norms

Recent reforms leading to some reconceptualization of environmental protection and development indicate new changes influenced by non-western values. Arguably, the underlying doctrines on sustainable development are not fully characterized within liberal values but are influenced by Africa communitarianism, which asked to forego current benefits for the sake of preventing harms. For example, decades before the sustainable environmental principles on intergenerational equity and partnership were captioned into sustainable development goals, Okoth-Ogendo had given the African conception of protecting resources for future generations and having common good beyond western individualism and the tragedy of the commons.[21]

14 Ibid.

15 Patricia Kameri-Mbote, 'Governance: Institutions and the Human Condition', (2009) Strathmore University and Law Africa pp. 219-246. Williams R. 'Columbus Legacy: Law As An Instrument of Racial Discrimination against Indigenous Peoples' Rights of Self-determination', (1991) 51 A*rizona Journal of International & Comparative Law* 8 (available online).

16 A Oberschall, 'Theories of Social Conflict' (1978) Department of Sociology and Anthropology, Vanderbilt University, Nashville Tennessee 37235; Mommsen W, European Expansion and Law: The Encounter of European and Indigenous Law in 19th and 20th Century Africa and Asia (BERG 1992).

17 *Kemai and 9 Others v AG and 3 Others* Civil case No 238 of 1999 in eKLR (E& I) (Ogiek case).

18 Ibid.

19 Ibid.

20 Ibid.

21 HWO Okoth-Ogendo, 'The Tragic African Commons: A Century of Expropriation, Suppression and Subversion', (2000) *University of Nairobi & Fellow of the Kenya National Academy of Sciences*.

Interests and governance for usage of resources and development in Africa is communal. The management protects the interests of the past, present and future generations unlike the western conception, which centres on the individual and not the future.[22]

The world order is recognizing that protection of the environment and development will only be successful if it involves local communities and when it is anchored on local values.[23] Wangari Maathai carried Africa's voice on environment, using vivid experiences and realities from the continent to advocate for the environment. Much of her work sufficiently succeeded in vernacularizing environmental protection, which is dominated by concepts and individuals from developed countries, and by doing that, she made environmental protection suitable for the whole universe.[24] Her concern was that majority of the people in Africa feel alienated and lack the empathy of ownership of institutional frameworks due to marginalization of their own values, with the result that local communities became indifferent to the environment. This conception is accommodated in the current model of sustainable development and protection of the environment even after her death nearly a decade ago.[25] This is notwithstanding the provisions of the 2010 Constitution of Kenya, the most important law on all aspects of life, which provides legitimation of African culture and more importantly, the right to self-determination of the people.[26]

It is my contention that all this work is focused around the issue of self-determination both as a doctrine and as a reason to challenge the alienation of colonized people through westernization doctrines. This chapter seeks to connect the dots from conception of property to environment and development through the doctrine of self-determination. Self-determination is therefore the miner's canary bird that we will send down the poisonous mine of colonization and western domination to check whether the mines of environment and development have lost some of the toxic colonial poison that makes them impotent in promoting development or dealing with environmental protection in Kenya.[27] We hope to finally make it clear that much of "the complex of ideas that constitute Western civilization" lose their appeal when seen in full light of self-determination that protects against racism and cultural discrimination by recognizing cultural integrity.

Western doctrines are clearly the centerpiece of much environmental disaster,[28] exploitation of the environment without sympathy and easily succumb to unbalanced development that sustainable development seeks to mitigate.[29] They cause a great whiplash disregarding the rights of communities and extinguishing their communal / tribal way of life. This ensures that

22 Ibid.

23 JB Ojwang, 'The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development' (2007) 1 *Kenya Law Review Journal* 19

24 WG Mbure, 'Heroic Transverser: A Rhetorical Analysis of Representations of Wangari Maathai in Kenyan Press' (2018) *The Rhetorical Legacy of Wangari Maathai: Planting the Future* pp. 63-82.

25 N Florence, *Wangari Maathai: Visionary, environmental leader, political activist.* Lantern Books, 2014.

26 Constitution of Kenya, (2010) Preamble.

27 BZ Tamanaha, 'The Primacy of Society and the Failure of Law and Development' (October 2, 2009), *Cornell International Law Journal,* Forthcoming; Washington U. School of Law Working Paper No. 10-03-02, available at SSRN: http://ssrn.com/abstract=1406999,

28 R Nixon, *Slow Violence and the Environmentalism of the Poor.* (2011) Cambridge: Harvard University Press.

MA Pérez-Rincón, Colombian International Trade from A Physical Perspective: Towards An Ecological. (2006) Prebisch thesis. *Ecological Economics* 59: 519-529;

29 *The Southern Bypass Construction Co.* v *NEMA (2013) (eKLR).*

they cannot take part in decisions that affect their community's development, land resources or environment.[30] These universalized doctrines might not be the most sensible approach, because as Deloris suggests, they are not built on 'realistic correspondence to what we can observe and experience in nature'.

This points out that the liberal ideologies embedded in the global system that currently dominates laws on environment and development is slowly giving way to communitarian values. Interestingly, rather than admitting the inadequacy of western concepts on the environment today, they are seeking to expand their conception of environment by seeking to extend legal standing, citizenship and human rights to trees and the environment in an attempt to resolve its inadequacy which has been created by anthropocentrism.[31] Therefore, this chapter briefly highlights concepts of environment and sustainable development relevant to Africa's citizens and the extent to which they respect their right to self-determination.[32] In contrast, the African concept of Ubuntu is not only about the human but extends to the environment since humanity is part of nature.[33]

Self-determination refers to the ideal that human beings, individually and collectively, should have the right to control their destiny and choose their own system of government.[1] Further, in defining self-determination it is noteworthy that one aspect of its violation is cultural discrimination used as a justification by whoever wants to discriminate.[34] In fact, cultural discrimination precedes all other forms of discrimination, making it an important test for respect for the self-determination of a people.[35] It can be inferred that it is through the right to self-determination that other rights are secured and exercised. Most dramatically, the right to culture can be likened to a miner's canary,[36] which indicates whether the poisonous gas of discrimination, marginalization and domination still exists.

Debatably, there is a distinct connection between sustainable development, environmental ethics and culture on self-determination. Environmental values have been interpreted in a way that recognizes people's right to self-determination. Discussing the extent to which the 2010 Constitution provides opportunities for people to be involved in environmental ethics requires an evaluation of whether or not the Constitution takes into consideration the role of culture and the place of community. Wolfgang Danspeckgruber opines that the reason humans have anchored their contestations on the right to self-determination is that:

> No other concept is as powerful, visceral, emotional, unruly, and as steep in creating aspirations and hopes as self-determination.[37]

30 J Rice, 'The Transnational Organization of Production and Uneven Environmental Degradation and Change in the World Economy', (2009) *International Journal of Comparative Sociology* 50(3-4): 215–236.

31 JT Roberts and CB Parks. 'Fueling Injustice: Globalization, Ecologically Unequal Exchange and Climate Change', (2007) Globalizations 4(2): 193-210

32 DS Christopher, 'Trees Have Standing? Towards Legal Rights for Natural Objects', *Southern California Law Review* 45 (1972): 450-501,

33 DT Chibvongodze, 'Ubuntu is Not Only about the Human! An Analysis of the Role of African Philosophy and Ethics in Environment Management',"(2016) *Journal of Human Ecology*, 53:2, 157-166, DOI: 10.1080/09709274.2016.11906968 <https://doi.org/10.1080/09709274.2016.11906968>

34 A Memmi, *The Colonizer and the Colonized* (1965)

35 Frantz Fanon, *The Wretched of the Earth* (1963)

36 B Catherine, 'Risking Life and Wing: Victorian and Edwardian Conceptions of Coal-Mine Canaries' (2014 *Victorian Review* 40, no. 2): 143-59. Accessed November 17, 2020. http://www.jstor.org/stable/24877720.

37 D Ojwang, 'Converging Child Identity & Culture with Right to Self Determination', (2015) Lambert Academic Publishing 1-50.

Possibly, self-determination is the best tool to check if there is any meaningful reconceptualization of environmental law and governance in respect of the right to culture because of sovereignty of the people. Umozurike[38] contends that self-determination principles posit that the reason for reviewing cultural recognition of the environment is because it still remains a real solution for people who are victims of European colonization like Kenyans.[39] Cultural recognition assists these people to resolve challenges like discrimination of the local culture that arises out of colonization as promoted by the central state laws and norms. In essence, self-determination is the most important tool to challenge exclusively state-centered law.[40]

Even after independence, a significant proportion of the post-colonial state structure and institutions in Kenya did not change. The 2010 Constitution was meant to roll back the lingering colonial legacy and provide Kenyans benefits of the right to self-determination. Unlike previous constitutions, the 2010 Constitution is conscious and deliberate in protecting Kenyan's right to self-determination. For instance, it provides for public participation in decision-making and protection of marginalized groups. Since the Constitution is anchored on the self-determination principle, it is important to evaluate how it has conceptualized environmental governance in Kenya.

In principle, self-determination is better at highlighting the limitation of the colonial systems that work towards standardization and universalization at the expense of local communities. More than any other principle, I contend that it is better in reviewing pluralistic systems by giving voice to the majority of Africa's communities and culture, which is discriminated against. Since local communities are crucial stakeholders on environment, it works best to set aside the lingering effect of colonization and domination. Unfortunately, these values did not change after independence and that is why the 2010 Constitution offered some hope to avoid cultural dislocation.[41] It is observable that the ethical foundation of environmentalism is constructed through dominant European ethics and values.[42] African tribal ethics and values, including those on environment are treated as irrational, un-enterprising, superstitious, and too subjective and emotional as compared to scientific means.[43]

Section III summarizes the main ethical approaches to environment in two main thematic areas while Section IV discusses and analyses African concepts and ethics on the environment to highlight how culture constructs environment. Section V discusses Sustainable Development (SD) and indigenous or community knowledge systems and the space provided for communal participation in Environmental Impact Assessments to infuse this knowledge.

38 UO Umozurike, 'International Law and Self-Determination in Namibia', (1970) *The Journal of Modern African Studies* 8, no. 4 pp. 585-603. Accessed November 17, 2020. http://www.jstor.org/stable/159091.

39 Ibid.

40 SJ Anaya, 'Indigenous Peoples in Pnternational Law' (2004) 3-72.

41 C Ake, *Democracy and Development in Africa.* (1996) The Brookings Institution, Washington, D.C.

42 Wilson, E. O. Consilience: the unity of knowledge. (1998) New York: Alfred A. Knopf Inc

43 J Ogbonnaya, 'Theology, Culture and Sustainable Development in Africa' (2012) <https://epublications.marquette.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1397&context=theo_fac>

C. Environmental ethics

According to Odera Oruka,[44] beliefs, values, norms and duties that produce the normative field of ideology are what is good to mankind. These beliefs, values, norms and duties form the ethos, which are principles that guide any belief system.[45] It is through this ethos that we find rights, status, obligations and duties of a society. It is also within this that we find the social and cultural structure. Social structure provides the means that each society uses and regulates their values and beliefs in the society. Cultural structure on its part provides the standards, values and expectations of that society. In the cultural structure, we find what is relevant to our discussion in terms of discussion of the different ethics, laws, morals and knowledge on the environment.

Contemporary environmental discourse often uses western ethics as a starting point. Environmental law and governance have developed within the western theoretical view that was used during colonization and post-colonization European culture. Generally, the discussion on ethics is in relation to their suitability to develop communitarian thinking, which underscores the need for sustainable development or liberal view that is sometimes extreme on individual autonomy and welfare at the expense of others at present and in future.

Markedly, different ethics on environment spring from various historical and cultural constructions of environment and human relations to it.[46] Ethics are discussed here in relation to their position in the environment and the extent to which they value or devalue the environment. In other words, which ethics are better placed to promote respect for environment, reduce greed and enhance human's relation to environment for public good?[47] Which ones recognize that environmental "goods" have value in and of themselves apart from humans; and that environmental goods are related to a certain land and therefore not movable.[48]

The different western ethics on environment are anchored on a non-anthropocentric value of environment, which means that environment is protected not because of itself but to the extent that humans appreciate or consider its value.[49] Because of that, environment or nature is evaluated in terms of its economical worth in order to make decisions on policy implications of destroying it based on a cost-benefit analysis. Economic valuation is therefore based on the value humans ascribe to nature and it is easy to miss non-monetary values.[50] Rationality is seen as a reason for superiority of humans and atomic individual place and interest on environment. In a typical way, they bear the hallmark of the western view where even in subjects like law, it is about hierarchy, categorical, dichotomous reasoning, lack of sacredness, and over-emphasis on logics and reasoning.[51]

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44 H Odera Oruka, (ed). *Sage Philosophy: Indigenous Thinkers and Modern Debate on African Philosophy,* (1990) Vol. 4. Brill.

45 ABC Ocholla, 'Traditional Ideology and Ethics among Southern Luo' (1976) Manuscript.

46 D MacKenzie, 'Is Economics Performative? Option Theory and the Construction of Derivatives Markets' (2006) *Journal of the History of Economic Thought* 28(1):

47 S McMullen and D Molling, 'Environmental Ethics, Economics, and Property Law' (2013) Working Draft – Prepared for the 2014 ASSA Meetings in Philadelphia, 2013 file:///C:/Users/dojwang/Desktop/evidence/EnvironmentalEthicsEconomicsAndPro_preview%20(3). pdf

48 Ibid.

49 U Klein, 'Belief with Views on Nature with Western Environmental Ethics and Maori World Views' (2000) *NZJ Envtl. L.* 4: 81.

50 David R Keller, (ed.) *Environmental Ethics: The Big Questions*. John Wiley & Sons, (2010).

51 D Ojwang, and A Meroka and F Situma, 'Is Technology Used to Subordinate Socially Conservative Constitutions in Africa? The Case of Kenya's Proposed Legislation on Assisted Reproductive Technology', (2016) *Africa Nazarene University Law Journal* 4, No. 1 pp. 1-26.

In a broad sense there are two dominant branches of western ethics on environment, that is consequentialist and deontological. Deontological ethics focuses on 'doing what's right' as a moral duty or principle without considering much of the consequences of an action. The most common example of deontological ethics is the 'The tragedy of the commons', as an example of lack of care for the commons because no one has a duty. So that man is to avoid those actions that are impermissible as a sense of duty and one of those duties could be to protect and not destroy the environment. Because every creature have its natural autonomy, then each is entitled to exist by their own right without preference to one life over the other, for example human over environment.

Noticeable weaknesses of deontological ethics are in its liberal nature: what is the compelling need to restrain and curtail others' choice. Just because others want to sacrifice luxurious living for the sake of future generations should not interfere with the individual autonomy of those who might not see that as a priority. Moreover, the assumption is that if my action does not directly harm others, then why should there be limitation on one's choice and freedom? For example, whether I want to drive a fuel guzzler or not, why should the issue of greenhouse gas emission and the future generations who do not exist, limit my choice.?

Furthermore, deontology is not well balanced, giving priority to private property ownership as opposed to common good, like forests.[52] It appears that environment is not a priority but simply meant to please humans. It does not balance other non-human interests, and is incompatible with other important goals. It is the reason we can talk of animal-human conflict. Even when endangered animals' habitats are encroached, it is labeled to give humans unfair priority over environment. It is centered on individuals not community or peoples, which makes it a crucial ingredient for capitalism. They find the need to preserve resources for future generations speculative because we actually cannot tell what the future generation will want or what they will need sufficiently, and therefore cannot be a priority. [53]

Given that environment is only a matter of duty, there is no place to determine the morality of a choice by itself. Common in Christianity is the view that man was given a duty to protect the environment and have dominion over environment.[54] Humans might have a duty to live simpler lifestyles and adhere to sustainable consumption patterns. According to Kant, man has this duty because of the social contract, which makes the categorical imperative.[55] Therefore, make sure your action can be universal and never treat man as a means to an end but an end by itself. It has nothing to do with environment, duty rises because of your relationship to and respect for other people, not environment. Another challenge is that respect is not extended to future generations since they are not part of the social contract.

Consequentialist ethics focus on the effects of human actions and policies that are relevant to promoting intrinsic value like minimizing or not causing pain to environment as a value. There are various types of consequentialist theories, like consequentialist utilitarianism, bio centric

52 HWO Okoth-Ogendo, 'The Tragic African Commons: A Century of Expropriation, Suppression and Subversion', (2000) *University of Nairobi & Fellow of the Kenya National Academy of Sciences*.

53 H Matthew, 'Harming Future People', (1990) *Philosophy & Public Affairs*, 19: 47–70;

54 Ibid. 41

55 Immanuel Kant,. *The Philosophy of Kant: Immanuel Kant's Moral and Political Writings.* (1949).

consequentialism, and ecocentric (or holistic) consequentialism. Because of the dominance of utilitarianism, there is a discussion on how this set of ethics works.

Under utilitarianism, the cost-benefit analysis means that the main consideration is economics.[56] Utilitarianism is used to measure interest in the environment to protect economic value, with maximum benefit and the least pain. Here, the common good is for everybody and therefore sacrificing indigenous people for the interest of the common good. The inadequacy with consequentialist ethics is that they are not anchored on any rule and things are neither wrong nor right by themselves, only by measuring proportionality. There exists the assumption that there is a common understanding of what an increase in pleasure constitutes; for others it might be living in a luxurious way at the expense of nature. The biggest criticism is that it puts humans at the centre and therefore nature is not balanced. It is poor ethics on non-humans and therefore not ideal for protecting the environment.[57],[58]

Utilitarian ethics advocate for increasing happiness to maximum people with a goal to decrease pain and increase pleasure. It is poor in protecting small interests like a local community of Ogiek. Utilitarian analysis is common in property ownership as discussed by the court in the Ogiek case. This is important, given that property is the river through which every other important issue flows and whoever owns it owns the sky and the centre of the earth, which means they control the environment.[59] The environment is inextricably linked to land ownership. If your ownership rights are extinguished and you are living on tenancy rights, then those dominating the land as owners will also impose their conceptions on environment.[60] The conflict is between the property rights' five bundles of rights and the rights of other individuals who have no property rights but have an interest in the ecosystem and environment, without restrictions on the bundle that can be construed as taking or impairing the property interest.[61] The dominant land doctrines will, as a matter of course, also dominate environmental conceptions and governance.[62] As a result the economic approach dominates public policy, which means that property owners protect the environment and their rights based on a cost benefit analysis.[63]

Another example of consequentialist ethics is that the anthropocentric is heavily reliant on ranking human beings higher than environment and animals because human beings are intelligent and can appreciate pain.[64] According to Aristotle, everything in nature exists for

56 RA Posner, 'Utilitarianism, Economics, and Legal Theory', (1979) *The Journal of Legal Studies* 8, no. 1 pp103-140.

57 J Alder, and D Wilkson, *Environmental Law and Ethics*. Macmillan International Higher Education, (6 Jan 2016) <https://books.google.co.ke/books?isbn=1349142719> Pg. 38.

58 Ibid. Pg. 41

59 AK Jorgenson, K Austin and C Dick, Ecologically Unequal Exchange and the Resource Consumption/environmental degradation paradox: a panel study of less-developed countries, 1970-2000. (2009) International Journal of Comparative Sociology 50(3-4): 263-284.

60 S McMullen and D Molling. 'Environmental Ethics, Economics, and Property Law'. Working Draft – Prepared for the 2014 ASSA Meetings in Philadelphia, 2013 file:///C:/Users/dojwang/Desktop/evidence/EnvironmentalEthicsEconomicsAndPro_preview%20(3).pdf

61 WN Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) *The Yale Law Journal*, 23(1), 16–59. Doi: 10.2307/785533

62 G Hardin, 'The Tragedy of the Commons', (1968) Science, 162(3859), 1200 –1248. Doi: 10.1126/science.162.3859.1243

63 JM Meyer, 'The Concept of Private Property and the Limits of the Environmental Imagination', (2009) *Political Theory*, 37(1), 90–157. Doi: 10.1177/0090591708326644

64 D Julia, *Consequentialism*. Routledge, 2011.

human pleasure and not for its own good.[65] Human beings exclusively can have direct moral values towards other things in the environment based on how they serve human goals and purposes. The ability of some animals to feel pain because they are intelligent can be a reason to protect them better than other animals.[66]

The ethics that emphasize human intelligence is the opposite of Africa's Ubuntu and communism that look at relation and ability to relate as the uniqueness of a person not just having mind soul and body. A good example is the emphasis on protecting dolphins because they are intelligent and are able to internalize mistreatment, which led to an outcry against their use for entertainment in aquaria, which is a very artificial life that leads some to opt to commit suicide by deciding to stop breathing.[67] The Christian belief in the relationship between humans and the environment is similar to anthropocentrism as argued by Aquinas.[68] He opines that man is the centre of creation and the environment is for man's benefit without any intrinsic value in itself.

Virtue ethics focus on attitude not behaviour.[69] One's personality should develop in a balanced way so that one is not too kind or too mean.[70] However, there are no clear guidelines on this development. Proportionality comes into play as one should balance and even respect the environment. It is the aim of social impact to test the proportionality of a project, taking into account impacts on the environment. Virtue ethics on environment seek to evaluate the proportionality of any action in relation to impacts on the environment. Environmental Impact Assessment is a way of measuring the proportionality of a project. One can argue that the tools used for measuring are not constructed in a vacuum, but with underlying values. It is likely that what assumes importance as science is not deemed expedient and does not work well to accommodate pluralistic values.

Africans, even those living in urban areas, have a strong connection to land, which enables them to appreciate land and environment as important.[71] African ethics offer a better interconnection between humans and the environment. This can be justified by the African's view of life as perpetuity that connects them with the past, the present and the future.[72] They reverence the geographical and ancestral land because it connects them.[73] This view can advance the common good and communal ownership of the environment while making each individual accountable; and all can become agencies that are personally involved with the environment and a real stakeholder.[74]

65 Aristotle, *Physics*, Books I–II, translated with introduction and notes by William Charlton, Oxford: Clarendon Press (Clarendon Aristotle Series), 1970 (2nd. ed. 1992).

66 A Julia, 'Aristotle on inefficient causes," (1982) Philosophical Quarterly, 32: 311–26.

67 RJ Hankinson, 'Natural, Unnatural, and Preternatural Motions: Contrariety and Argument for the Elements in *De caelo* 1.2–4', (2009) in Alan C Bowen and Christian Wildberg (eds.), *New Perspectives on Aristotle's* De caelo, Leiden-Boston: Brill, pp. 83–118.

68 T Aquinas, *Basic Writings of St. Thomas Aquinas.* (1997) (Volume 1) Hackett Publishing; 1997 Sep 15.

69 RL Sandler, 'Environmental Virtue Ethics' (2013*) International Encyclopedia of Ethics*.

70 Ibid.

71 ES Atieno-Odhiambo, 'Burying SM: The Politics of Knowledge and the Sociology of Power in Africa'. *Social History of Africa series,* (1992) Portsmouth, NH: Heinemann / London: James Currey.

72 K Bentsi-Enchill, 'Ghana Land Law, An Exposition, Analysis and Critique'. (1964) In *Ghana Land Law: An Exposition, Analysis and Critique.*

73 LO Ugwuanyi, 'Advancing Environmental Ethics through the African Worldview'. (2011) *Mediterranean Journal of Social Sciences*, *2*(4), 107-107.

74 W Kelbessa, 'Can African Environmental Ethics Contribute to Environmental Policy in Africa?' (2014) *Environmental Ethics*, *36*(1), 31-61.

The power of perpetuity and respect for land is a value that makes Africans connect and respect the actual environment as their common connector and a guarantee to perpetuity. It gives them duty to protect that environment and allows them connect to that environment intimately, not merely as something to exploit but part of their identity and driving force of their life.[75] As an exemplar of reality, a lot of Kenyans prefer to be buried in their ancestral land because of this connection to it and the related environment. Most Kenyans have done everything possible, with the help of extended family and clans, to transport their dead to their ancestral land as an indication of the importance of land and its link to kinship in Africa. This connection is closely tied to being human as one owes their existence and personhood to their kinship provided by that ancestral place, making one a true product of that place.[76] This is borne out by Thabo Mbeki's argument that he ascribes equal citizenship to the land, the river and the animals' resident where he comes from.[77] This view of environment means that the geographical location is not just an environment binding to you, but also binding to your humanity as well as to your survival.

Within the African context, the environment, like the land, is priceless. Humans are intertwined with environment and the environment ranges from being sacred to being a living thing that can for example empathize with people.[78] For instance, Africans believe that when some calamity or death that is disruptive is imminent, the weather is gloomy as a natural sign from the environment.[79] According to Mbiti, an African's life is intertwined with the environment, through religious influence, in sowing seeds or harvesting new crops, or celebrating life seasons.[80] This African thinking allows the environment to be seen as a living thing. Regarding these beliefs, there is a common story of when storms and the lake punished a village in Simbi, Karachuonyo, when they refused to assist an old woman while it was raining as they celebrated in a beer party. [81]

The environment is therefore regarded as being able to reward and cooperate on its own will; it is valuable but can also be a destructive or negative moral agent,[82] which makes communities like the Agikuyu perceive tragedy in a Mugumo tree falling.[83] Also, the tradition of making libation, where one pours drink to the ground for the ancestors to drink before partaking of it, demonstrates how much the environment connects the individual with the ancestors who are believed to ultimately own the land. In essence, the environment becomes like the umbilical cord between the living and the dead.[84]

75 D Ojwang, 'Converging Ubuntu Principles with Corporate Social Responsibility to Extend Corporate Benefits to Communities' (2015) *E. Afr. LJ*, 49.

76 Ibid.

77 Thabo Mbeki, 'I Am an African' Speech at the Adoption of the Republic of South Africa Constitution Bill. (1996).

78 DT Chibvongodze, 'Ubuntu Is Not Only about the Human! An Analysis of the Role of African Philosophy and Ethics in Environment Management' (2016) *Journal of Human Ecology*, 53:2, 157-166, DOI: 10.1080/09709274.2016.11906968 To link to this article: https://doi.org/10.1080/09709274.2016.11906968mbeki

79 T Metz and JBR Gaie, 'The African Ethic of Ubuntu/Botho: Implications for Research on Morality', (2010) Journal *of Moral Education*, 39:3, 273-290, DOI: 10.1080/03057240.2010.497609

80 Ibid.

81 ABC Ocholla, 'Traditional Ideology and Ethics among Southern Luo'(1976) Manuscript.

82 LO Ugwuanyi, 'Advancing Environmental Ethics through the African Worldview'. (2011) *Mediterranean Journal of Social Sciences, 2*(4), 107-107.

83 Fall of Mugumo tree causes panic in Nyeri as elders plan to visit village, Daily *Nation* newspaper story by James Ngunjiri on (2015) https://www.nation.co.ke/counties/nyeri/Fall-of-Mugumo-tree-causes-panic-in-Nyeri/1954190-2898978-7fdsp4/index.html

84 Ibid.

Symbols also form part of the connection between a community and the environment.[85] A case in point is the Maasai community, which names each clan after an animal, and for that clan that animal remains sacred and a member of their kinship.[86] If one comes from the clan of the snake, then the snake is a dear symbol of their ancestors and they are not allowed to kill the snake. Even if found in the wild, the snake is fed with milk and then gently removed.[87] Children are also named after animals or seasons, which demonstrates their intimacy with nature and seasons.[88] African proverbs are also associated with the environment and natural world. The Ndebele proverb "*ihloka liyakhohlwa kodwa isihlahla asikhohlwa*" (An axe forgets but the tree doesn't forget), is a good example.[89]

This was seen in the case of *CEMIRIDE v. Kenya*[90] where the Endorois argued that the land in Lake Bogoria connected them in a special way with their ancestors and religion; that they could not exist as a group without accessing that land. The Africa Human Rights Commission agreed with them that because they are a land based religion; they can only worship in a specific place, and without it their survival as a people was impaired.[91]

Unlike other ethics, African ethics protect the environmental community interest, which might be different at times from an individual interest. Therefore, an action can be judged as bad if it does not promote a shared identity among people. An act like selling ancestral land or destroying the environment can be seen as wrong because it impairs a shared identity and destroys the bond of kinship with the African idea of community. John Mbiti, in his classic survey of African worldviews, takes the phrase to be a 'cardinal point in the African view of man'.[92]

According to Africa ethics then, it is possible for a greedy person who is engaged in wanton destruction of environment to lack in humanity and be a lesser person.[93] These African ethics focus on an individual and his/her attitude, concerned about the right attitude and not just the outcome. An element of proportionality to achieve balance in respect to the environment arises. These ethics urge people never to see the environment as an agent by itself but rather encourage the larger question as to what each individual does for their community, including the environment.[94]

85 DT Chibvongodze, 'Ubuntu Is Not Only about the Human! An Analysis of the Role of African Philosophy and Ethics in Environment Management' (2016) *Journal of Human Ecology*, 53:2, 157-166, DOI: 10.1080/09709274.2016.11906968 To link to this article: https://doi.org/10.1080/09709274.2016.11906968

86 J Galaty, 'Animal Spirits and Mimetic Affinities: The Semiotics of Intimacy in African Human/Animal Identities', (2014) *Critique of Anthropology*, 34(1): 30-47

87 Ibid.

88 F Ochieng'-Odhiambo, 'Communalism in African Cultures and the Naming System among the Luo of Kenya', (2020). *Philosophia Africana: Analysis of Philosophy and Issues in Africa and the Black Diaspora*, 19(2), 154-175.

89 DT Chibvongodze, 'Ubuntu Is Not Only About the Human! An Analysis of the Role of African Philosophy and Ethics in Environment Management', (2016) *Journal of Human Ecology,* 53(2), 157-166.

90 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, 276/2003 (May 2009) African Commission on Human and Peoples' Rights.

91 Ibid.

92 John Mbiti, *African Religions and Philosophy* (1969) London: Heinemann (pp. 108–109).

93 T Metz & JBR Gaie, 'The African Ethic of Ubuntu/Botho: Implications for Research on Morality', (2010) *Journal of Moral Education,* 39:3, 273-290, DOI: 10.1080/03057240.2010.497609

94 K Gyekye, 'African Ethics', (2011) *Stanford Encyclopedia of Philosophy*.

Courts appear to apply utilitarianism and deontological ethics that alienate the cultural rights of the Ogiek and their right to self-determination.[95] In their view, even though the Ogiek have lived on the land from time immemorial, the land belongs to the Kenya government and the Ogiek cannot be allowed to dwell on it as it provides a means of livelihood preserved and protected for all Kenyans.[96] Here, the court demonstrated ignorance on the special attachment of indigenous people to a particular land. It is ironical that the court assumes that the government is the trustee in the Ogiek case, yet at the same time they base their rejection of the Ogiek claim to land rights on the lack of title, which is in the hands of the government.[97]

D. Environment through Africa culture's interdependence, personhood, identity and humanness

The concept of environment is culturally constructed and, as a result, there are various conceptions of environment based on different worldviews. One culture cannot have mastery over the meaning of the environment and development but rather different approaches are needed to understand peoples' relationship with the environment.[98] One cannot neglect cultural values on environment and assume that universal jurisprudence arises in a vacuum without cultural elements.[99] What is important is not merely looking at enacted law but its conceptualization of how people consider and relate to environment.[100]

Culture, through the historical and social context, informs the rights of communities, protects communities from harm, obligates communities, and benefits the community as a whole. Since beliefs arise from the culture of people, environmental values are derived from the culture and administered through cultural practices.[101] Article 11 of Kenya's Constitution recognizes culture as a foundation of society.[102] In the regional human rights' system, culture was recognized and governments have a duty to protect it.[103]

According to the African idea of a community, people and the environment are interdependent.[104] Depending on how one is able to live harmoniously, a person can fail or succeed at being a person.[105] To be a person, therefore, a person must be able to live with the goal of improving their capacity to be more human.[106] Consequently, a person who wantonly destroys the environment is less a person and needs to apply more personhood. In the African context, a full person is one who lives harmoniously with the community, which will include the environment. Any purely self-regarding activity, such as rationally controlling one's appetite and avoiding selfishness, is important, whether it is appetite for an extreme lifestyle not conducive for the environment.

95 *Kemai and 9 Others v AG and 3 Others* Civil case No 238 of 1999 in eKLR (E& I) (Ogiek case)

96 A Sen, 'Utilitarianism and Welfarism', (1979) *The Journal of Philosophy*, 76(9), pp.463-489.

97 *Kemai and 9 Others v AG and 3 Others* Civil case No 238 of 1999 in eKLR (E& I) (Ogiek case);

98 J Jones, 'Foucault – the lost interview'. (2014) < http://www.openculture.com/2014/03/lost-interview-with-michel-foucault.html#comment-1338587> (17 November 2020).

99 S Harding, *Science and Social Inequality: Feminist and Postcolonial Issue'* (2006) Chicago: University of Illinois Press.

100 BG Kluthe & D Chen, 'Eucalyptus sp. at the Intersection of Environment and Culture in Kenya', (2017) *Ethnobiology Letters*, *8*(1), 15-22.

101 Ibid.

102 Constitution of Kenya, (2010) Article 11.

103 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, 276/2003 (May 2009) African Commission on Human and Peoples' Rights.

104 NN Mabovula, 'The Erosion of African Communal Values: A Reappraisal of the African Ubuntu Philosophy', (2011) *Inkanyiso: Journal of Humanities and Social Sciences,* 3(1), 38-47.

105 Ibid.

106 M Molefe, 'Personhood and Rights in An African Tradition', (2018) *Politikon*, *45*(2), 217-231.

If one harms others by being exploitative, deceptive or unfaithful, or even if one is merely indifferent to others and fails to share oneself with them, then one is said to lack humanness.[107]

Within this context, culture can be defined as a product of the environment as much as it influences it.[108] Culture is the means through which an individual can differentiate between the artificial and the natural and what we do to the environment and what environment does for us.[109] The rationale for this view is that since the environment is culturally constructed then the ethical propriety of African communitarianism can be reviewed as the proper equilibrium for environmental governance.[110] Even though there is some urbanization, infusion of African culture with modernity, Islam and Christianity, which makes it dynamic, the tripartite culture strand does not rob African culture of its distinctiveness or its vibrancy today.[111] There is a cultural appropriateness of African values in making other moral considerations on what is environment since it balances between individual and community oversights. This is unlike modern values that give priority to individual autonomy.

African environmental ethics can expose environmental injustice committed by different groups in Africa, and assist local communities to secure justice and protect their environment. It can also create awareness within countries and globally about the actions of transnational corporations, irresponsible countries, and local industries, which damage the environment.[112] It gives farmers and pastoralists an opportunity to look at their own local environmental concerns and issues within the context of a greater global perspective. It is only by involving peasant farmers, pastoralists, and indigenous people at the grassroots level that we can understand the larger picture.[113]

The dominating western values of the environment are not sufficient to shape environmental values and ethics as they place emphasis on the pure individual rights model. It is accepted that African culture and values on environment can help to humanize the environment, and make sustainable development holistic. This aspect is lacking in other ethics, which have not only undermined the environment but also led to loss of human value as they sometimes turn self from being to having. Also, weakness in the common good threatens the environment through unsustainable consumption and production patterns.[114]

Cultural discrimination was meant to elevate extreme versions of individualism and compulsion to dispossess non-Europeans, alienating communities by turning the environment and land to commodities.[115] As with land, much conception of environment and development

107 IA Menkiti, 'On the Normative Conception of a Person' (2004) w: *Kwasi Wiredu. A Companion to African Philosophy*.
108 African Charter on Human and Peoples' Rights, (1981) Article 17.
109 T Eagleton, *The Idea of Culture* (2002) Malden. MA. Blackwell.
110 MO Eze, 'What is African Communitarianism? Against Consensus as a Regulative Ideal', (2008) *South African Journal of Philosophy,* 27(4), 386-399.
111 AA Mazrui, *The Africans: A Triple Heritage*, Little, Brown and Co., Boston and Toronto, (1986) 67-68
112 PA Ojomo, 'Environmental Ethics: an African Understanding," (2011) *African Journal of Environmental Science and Technology,* 5(8), 572-578.
113 W Kelbesa, 'Can African Environmental Ethics Contribute to Environmental Policy in Africa?' (2014) Volume 36, Issue 1, Spring Pages 31-61
114 RK Blamey, 'Principles of Ecotourism', (2001) In DB Weaver (ed.), *The Encyclopaedia of Ecotourism* (pp.5-21). New York: CABI International.
115 KB Nunn, 'Law as a Eurocentric Enterprise', (1997) *Law and Inequality*, Spring pp. 323-370.

revolves around cultural contestation, the role of individuals, consumerism, commodification, ownership and dispossession. This contributes to killing communities' tribal living.[116] This is the linkage between this chapter and the work of Okoth-Ogendo and Williams. While weighing the eurocentrism of environment and development against the Sustainable Development Goals on the one hand, and Kenya's 2010 constitution's impact on environmental conception on the other, it is clear that the latter sought to change the colonization concepts by giving people sovereignty and placing them at the centre of their affairs.

Truth can only be found through dialogue and discourse, not when some knowledge is privileged over others.[117] Truth can only be found through dialogue and discourse between different concepts. One concept cannot provide truth even in an area where consensus exists, like in human rights.[118] Questionably, the western concepts on land are very disruptive and crucial to an understanding of the environment, human rights with especially the right to self-determination, environment, development, international law process of colonization, and most areas of law.

The dominant European ethics and values seem to neglect African cultural value through the agrarian revolution, the industrial revolution and capitalism. In other words, the western values and ethics have led to exploitation of environment, and reject the common goods proposition and what is important to the community life. So that today theories of development like modernization theory ascribe that all nations develop using a similar pattern and the main ingredient is for the developing countries to shed off tribal values and follow as a path to civilization. Africa's civilization may not be similar because other nations developed at the expense of other countries' land and environment, which saw Africa being divided in accordance to the kind of resources it offered Europe.

Undeniably, our common future can be achieved through equity and participation of people. Radically moving from the assimilationist approach to development requires recognizing cultural diversity and cultural rights and an indicator of development and liberty. For those who teach humanitarianism, Sustainable Development Goals were a big endorsement of the work that rose on the periphery as criticism of human rights, which was impotent on the issue of poverty even with so much talk of equality.

Africa humanitarianism encompasses a number of environmental principles that are meant to guarantee environment governance in a sustainable manner.[119] African humanitarianism is largely modeled along protection of communal rights and not on the values of economic globalization fueled by industrialization and consumerism.[120] For example, intergenerational equity and equity principles protect the current society and future generation's interest and can only be morally obligated and derived from western values.

116 Ibid.

117 James T Gathii, 'Africa and the Disciplines of International Economic Law: Taking Stock and Moving Forward', (2016) Available at SSRN 3002108.

118 WM Makau 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties', (1995) *Virginia Journal of International Law*, Vol. 35, p. 339, 1995. Available at SSRN: https://ssrn.com/abstract=1526730

119 United Nations Framework Convention on Climate Change, (1994) Article 3.

120 Rio Declaration on Environment and Development, (1992) Principle 3.

In order to ascertain the nature of community participation on environment, we must start from the fact that local community has a legitimate role in environment, decision-making and protection.[121] Unfortunately, the principle of community participation in Kenya appears weak because the legal and institutional framework only incorporates local communities and indigenous knowledge systems at the implementation of projects that have an environmental component, but not at an early stage of project design where they can influence its design and provide sufficient protection and engagement of the community. This is counter to the principle given by the right to self-determination, which requires that before a project commences, a community have free, prior informed consents. Self-determination right demands that community members are involved at earlier stages of project formulation to avoid diverting scarce resources from more pressing priorities.

Liberalism is a characteristic of western ethics where individual rights preempt any other consideration, to the detriment of other moral considerations that create duty to contribute to the collective good, live in solidarity with other humans and environment, and not just work for self-interest but for the common good. The 2010 Constitution has potential for making this shift, to a different concept, because it anchors peoples' rights to self-determination. Ideally, self-determination should provide benefits to the local community and indigenous peoples, culture and knowledge that was often ignored and dismissed in matters of environment and development. There is consensus that culture is an enabler of Sustainable Development Goals.

This observation indicates that individualism was not the sole doctrinal basis of development and that Africa communitarianism, which focuses on societal welfare is used to counter the negative effects of extreme greed and consumerism on the environment and development. Concepts like World Environment Day can be adopted by neighborhoods and universities, among others, because apart from cleaning the environment, it is anchored on a call for African community living: it takes a village to protect our environment.[122]

E. Sustainable goals, community knowledge and traditional knowledge systems and norms

The appropriate role of indigenous/traditional knowledge in environmental protection is to use the African experience as a way that the community relates with environment. It is crucial to apply and utilize the indigenous knowledge system, which is very broad. Some aspects of Indigenous Knowledge Systems are knowledge on climate change impacts, rural and urban development, natural resource management, indigenous foods, traditional medicines and indigenous religions. [123]

Most indigenous knowledge has been marginalized and even lost in the process of colonization. This may have contributed to poverty, famine, and disease; inefficient and unequal distribution of resources, economic opportunity and erosion of sustainable environment. The promotion of traditional relationships with nature can mitigate the indifference to the environment. Kenya's

121 Rio Declaration on Environment and Development, (1992) Principle 10.

122 Wangari Maathai, 'Challenge for Africa', (2011) *Sustainability Science*, *6*(1), 1-2.

123 FL Elifuraha, 'Indigenous Peoples' Perspective on Gaps in the Intellectual Property Protection of Traditional Knowledge', (2018).

constitution establishes a legal framework for the protection of indigenous and community knowledge,[124] even though it falls short of recognizing indigenous people and prefers to protect them within the rubric of marginalized and minority communities.[125]

The SDs were developed with the aim of preventing and managing catastrophic human disasters in the global arena. However, some states and communities have contributed to, and are affected by these catastrophes more than others.[126] Sometimes, states and communities bear the bigger burden caused by these disasters yet the disasters are contributed by others who suffer little or no consequence. Our common future can be achieved especially through equity and participation of people.[127]

Further, the evolution of SDs to solve global disasters can be explained through the analysis of philosophical thinking in development that originates from a humanistic perspective, not far from Africa's Ubuntu. As described by Kit Sinclair, Ubuntu means 'And I begin to see you',[128] and also demonstrates the role of Ubuntu. Ubuntu signals leadership by calling for collective participation especially in goal 17 on partnership in order to achieve the SDG goals. There is a general consensus on what ails the world and a joint resolve to tackle those ailments.[129]

Today, the earth is facing urgent challenges and the present and future life of human kind and nature is under threat. The threats have led to an attitude change to save the planet for the current and future generations. The world developed consciousness and commitment to resolve to end poverty, hunger, ignorance inequality, lack of water among others. Given past failures of development initiatives, SDs were concerned with developing an effective framework for development. A total paradigm shift later led to the SDGs goal embracing partnership under goal 17 as the only way to succeed and have an impact. This goal has been highlighted because it is a creative way of overcoming past failures as discussed here.

An approach that fully embraces inclusive and wider participation of all stakeholders, including the affected community, must be adopted for these goals to be sustainable and to have an impact.[130] Such an approach also provides an opportunity for recognition, which should bring the participation of local community. Either way, local communities can engage and raise their voice over what action must be taken or to contribute to suggestions from policy makers and other stakeholders. After all, it is the local communities that are in touch with the local environment and will therefore be the first to detect a change.

124 Constitution of Kenya, (2010) Articles 11, 40 and 69(1) (c), (d)

125 Abraham K Sing'Oei, *Kenya at 50: Unrealized Rights of Minorities and Indigenous Peoples*, (2012) London: Minority Rights Group International 1-32, available at <http://responsibilitytoprotect.org/Kenya%20report%20Jan12%202011.pdf> accessed on 17 November 2020.

126 A Jorgenson, W Longhofer, & D Grant, 'Disproportionality in Power Plants' Carbon Emissions: A Cross-national Study', (2016) *Scientific reports*, 6, 28661.

127 GH Brundtland, 'Global Change and Our Common Future' (1989) *Environment: Science and Policy for Sustainable Development*, 31(5), 16-43.

128 Kit Sinclair, 'Ubuntu and Millennium Development Goals'. (2013).

129 A Thakhathi, & TG Netshitangani, 'Ubuntu-as-Unity: Indigenous African Proverbs as A "Re-educating" Tool for Embodied Social Cohesion and Sustainable Development.' (2020) *African Identities*, 18(4), 407-420.

130 AS Pullin, & GB Stewart, 'Guidelines for Systematic Review In Conservation And Environmental Management.' (2006) *Conservation Biology*, *20*(6), 1647-1656.

Despite this reality, the philanthropy index is now showing shrinking funding across the globe, yet this is the time when the world should be partnering. Nobody should be left behind, and if these goals are to be sustainable, then communities must be on the frontline. It cannot be that some goals belong to the government and policy makers. In order to make sure nobody is left behind in achieving SDGs, community knowledge, traditional knowledge and norms must be incorporated in the effort to achieve them.

In creating a bridge between the environment and culture, it has been argued that the environment is a product of a cultural worldview.[131] Governments are urged to move towards implementing SDs within their states using the prevailing culture.[132] Culture is perceived not just a means for achieving sustainable goals but an end by itself, which must be preserved. According to the 2030 Agenda for Sustainable Development Resolution on Culture and Sustainable Development,[133]culture ought to be protected within cultural rights.[134] This aspect of culture recognizes culture as creative knowledge and expressions.[135] It also recognises cultural knowledge as an indispensable tool for sustainable development.[136]

There is a growing appreciation of the distinctive Indigenous knowledge System. Traditional knowledge is also viewed as an enabler and foundation for sustainable living on this planet. Within Article 17 of the African Charter particularly, the African Commission noted that culture is dualistic in nature, individual and collective, national or ethnic, composed of religious and linguistic minorities. The Commission opined that culture manifests itself in diverse ways, including a particular way of life associated with the use of resources, especially by indigenous people. Indigenous knowledge systems and traditional knowledge are tools for comprehensively understanding the environment and use culture against exploitation to minimize potential misunderstandings of SDs. It is capable of making it a moral duty to live life in a sustainable way and to protect the common interest.

Law schools should establish environmental legal clinics, which can be important in involving young lawyers developing environmental public interest litigation. Education institutions and the youth play a key role in environmental conservation as part of the community humming bird. The humming bird was used by Wangari Maathai to illustrate that nobody is insignificant. Universities and youth are crucial partners and allies of local communities in their advocacy and achievement of SDs.[137] Engaging local communities enables them to pass their knowledge and skills to the next generation by assuring that youth embrace their values. After all, Education is also one of the SDGs but it is meant as education that does not lead to brain drain but equips students to resolve real society issues and to help local communities during their studies and in future in effective free legal aid and services on environment. Education has a transformative power and such education, according to SDGs is that which enables one to engage with local communities. Especially since most young people are in the universities, youths have agency and are in a great position to bring change to local communities.

131 I Altman & MM Chemers, 'Culture and Environment', (1984) CUP Archive.
132 Power of Culture, UN Millennium Declaration UN Doc A/55/L2 (2000).
133 The 2030 Agenda for Sustainable Development Resolution on Culture and Sustainable Development, (2015).
134 Ibid.
135 Ibid.
136 Ibid.
137 F Rauch, 'The Potential of Education for Sustainable Development for Reform in Schools', (2002) *Environmental Education Research*, 8(1), 43-51.

Sustainable development is about balance. Indigenous knowledge closely related to survival and subsistence, accumulated and adopted to survive for a long time in a context, is crucial to sustainable development.[138] This assertion was further recognized in the 1992 United Nations Conference on Environment and Development held in Rio de Janeiro. According to the Brundtland Report, sustainable development was defined as 'development that meets the needs of the present without compromising the ability of the future generations to meet their own needs.'[139]

The Brundtland Commission (also known as the World Commission on Environment and Development (WCED)) was headed by Norwegian Prime Minister Gro Harlem Brundtland and the Report with WCED Our Common Future[140] is credited with successfully thrusting the concept of 'sustainable development' into the mainstream of world debate. The WCED was convened in 1987 to argue for, among other things, the resultant effect of exploitative resource use in industrialized countries.[141] The report of the WCED: *Our Common Future: Report of the World Commission on Environment and Development,* UN Doc GA/42/427 (1987) (hereafter WCED *Our Common Future*) states that development that is not situated within community culture is 'simply development without a soul'.[142] To put community at the centre is to make sure that nobody is left behind by development. The most important partner in SDGs is the community because they are the ones who will remain with the projects or development when all others are gone. Sustainability of any work belongs and is pegged on the involvement of the community. If development is not going to be within the community, then what we are going to see is simply development that will lead to brain drain and rural urban migration as opposed to brain circulation.[143]

Also, they added that indigenous knowledge can refer to knowledge that identifies with a specific ethnic group. For example, 'indigenous knowledge is the local knowledge that is unique to a given culture or society.[144] It is the basis for local-level decision-making in agriculture, healthcare, food preparation (gastronomy), education, natural resource management and a host of other activities in rural communities'.[145]

In essence, indigenous knowledge is that knowledge used to run/manage all the sectors and sub-sectors of the traditional or local or rural economies/society. Less specific to indigenous knowledge is locally bound and indigenous to a specific area; culture and context-specific; non-formal knowledge; orally transmitted and generally not documented; dynamic and adaptive; holistic in nature and; closely related to survival and subsistence of many people worldwide.

138 D Barasa, 'Indigenous Knowledge Systems and Sustainable Development in Africa: Case Study on Kenya' (2005) A paper presented at the international conference Vrije Universiteit Brussel.
139 World Commission on Environment and Development, (1987) 43.
140 Ibid.
141 Ibid.
142 *Our Creative Diversity Report* (1995) WCCD Our Creative Diversity 48
143 Rio Declaration also states that 'human beings are at the centre of concerns for sustainable development'.
144 Nuffic and UNESCO/MOST, *Best Practices Using Indigenous Knowledge*. (2001) The Hague: Nuffic, and Paris: UNESCO/ MOST.
145 K Schmidt-Soltau, 'Indigenous Peoples Planning Framework for the Western Kenya Community Driven Development and Flood Mitigation Project (WKCDD/FM) and the Natural Resources Management Project (NRM)', Final Report. (2006) Nairobi: Republic of Kenya, p. 143.

F. Professor Wangari Maathai on environmental conservation

One of the most remarkable proponents of SDs in relation to culture is the late Professor Wangari Maathai. Her futuristic theory on environmental protection focuses on not to leave anyone behind. Her theory was eventually actualized within the 2015 UN General Assembly where 193 countries adopted SDGs. Outstandingly, Maathai's work on environment puts in place a strong background for African values of "it takes a village" and room for their ethics in environment to influence SDGs. People must take an active role and duty to save the environment. Her work on environment occurred in an era when local communities and disenfranchised groups were invisible and unrecognized in environment protection.

She advocated for the involvement of the local communities and people. She encouraged localities and the people to make their leaders change without fear of intimidation and to stand for what they believed in.[146]To implement this theory, Prof Maathai pioneered and worked among local communities to save the environment because they have agency.[147] She encouraged local communities to articulate their problems to the government and be at the forefront of conserving the environment instead of being hopeless in the face of poverty. According to Prof Maathai, local communities were the true agents to fight for the environment in comparison to the state, environment management agencies, multinational organizations and non-governmental bodies.

Her theory and ideals were captured in the 2010 Constitution, which has legitimized African culture and values while recognising citizens as sovereign. Ideals of the people exemplified by local communities empowered through culture as an empowering agency is captured in the 2010 constitutional and legal framework. Article 69 (2) of the Constitution states that every person has the duty to cooperate with state organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. Under Article 70, persons who allege violation to a clean and healthy environment can approach the court for enforcement of these rights and seek redress. This provision has altered the previously existing position as illustrated by *Wangari Maathai v Kenya Times Media Trust*, civil case no. 5403 of 1999. Kenya Times Media Trust wished to construct an office block in Uhuru Park, which they said was going to be about 60 storeys. Wangari Maathai – then leader of the Green Belt Movement sought an injunction to stop the construction of the office block on the basis that Uhuru Park was a public recreation facility. The Attorney General raised a preliminary objection to the application on the basis that Wangari Maathai had no *locus standi*.

Article 70 (1) provides for access to justice, giving every person the right to apply to court for redress whenever they feel that the right to a clean and healthy environment 'has been, is being or is likely to be denied, violated, infringed or threatened'. The constitutional provision raises the question whether the hummingbird in the Africa story has been given space to protect their environment. Storytelling in African society is used to achieve ethical and normative education.[148]

146 Wangari Maathai, ' Challenge for Africa'. (2011) *Sustainability Science*, *6*(1), 1-2.

147 Prof Wangari Maathai's keynote address during the 2nd World Congress of Agroforestry (2009) < https://www.greenbeltmovement.org/wangari-maathai/key-speeches-and-articles/2nd-world-congress-of-agroforestry-keynote-address> 17 November 2020.

148 DT Chibvongodze, Ubuntu Is Not Only about the Human! An Analysis of the Role of African Philosophy and Ethics in Environment Management', (2016) Journal *of Human Ecology*, 53:2, 157-166, DOI: 10.1080/09709274.2016.11906968 To link

Ethical elements are received through symbols to communicate ethics subject matter. African stories of the humming bird portray the looming implosion of nature and the environment and the urgent need of intervention through a story. The humming bird decides to work alone to try save the mighty forest, knowing the importance of the forest and therefore drawing water with its beak from a river to put out a forest fire with a job seemingly impossible. This use of stories is a common means of communication to pass knowledge and values. In using it, Maathai's belief in Africans' knowledge on the environment and their culture is clearly communicated.

Indisputably, Prof Maathai connected the dots on what was missing in most of environmental work, namely empathy and using and relying on local community knowledge, interest and work. She talked of the values and ethics of Africa and the power to believe they can change their world, as the hope for Africa's future was not dependency but partnership. [149] Her work and efforts encouraged rural women to plant trees and therefore her model of environment was engaging all, especially local communities. Finally SDs have come to the local level, where Prof Maathai wanted environmental protection to be focused by bringing in all stakeholders.

Primarily, the most appropriate means of incorporating and engaging local community knowledge in projects that have an impact on the environment is by including them in decision-making processes through strategic environmental assessments, which are usually conducted at the plan level and not the project implementation level.

Unfortunately, in most cases the involvement of the community and indigenous knowledge systems are only carried out in the project implementation stage and not the planning stage, which is an oversight even under international law environmental law.[150] Often, by the time an environment impact assessment is carried out, there is an assumption that the management body authorized it and that it has fulfilled the policies of the government and mitigation measures have been put in place.[151] The local communities have no voice at the information gathering stage of the project and are sometimes given audience at the tail end of the project, sometimes when the project has begun.[152] They do not have information in good time yet the Constitution's Article 35 provides for the right to access information.[153] The requirement for the Environmental Impact Assessment (EIA) is provided for and required under Part 6 of the Environmental Management and Coordination Act[154]. EIA experts are consultants appearing on a register, which is maintained by the NEMA, but they are mainly scientists who do not have community knowledge yet they are the ones who evaluate projects.

Three critical stages of EIA have evolved. The first is the information gathering stage where the responsibility has been placed on the developer. Many people have argued that placing the responsibility for information gathering on the developer means that the developer is likely to influence the kind of information that is gathered. Participation therefore implies that people

to this article: https://doi.org/10.1080/09709274.2016.11906968

149 Wangari Maathai, A hummingbird says, 'I'm going to do something about the fire.' <https://www.upworthy.com/in-this-charming-short-story-a-hummingbird-explains-why-we-have-to-at-least-try. > (17 November 2020).

150 Convention on Biological Diversity, (1992) Article 14 and Article 13.

151 Rio Declaration on Environment and Development (1992) principle 17.

152 Environmental Management and Coordination Act, (1999).

153 E Abuya, 'Realizing the Right of Access to Information: What Should Stakeholders be on the Lookout For?' in Fatima Diallo and Richard Callan, (eds), *Access to Information as a Catalyst for Social Change in African Countries* (BRILL: Leiden, 2013) 215-244 (available online).

154 Environmental Management and Coordination Act, (1999) Part 6.

need to be involved at every stage, not merely as beneficiaries but as agents who are able to pursue and realize goals that they value and have reason to value.[155]

The African Commission on Human and Peoples' Rights (African Commission) in the *Centre for Minority Rights Development and Others v Kenya* (*Endorois case*)[156] developed the concept of meaningful participation of the local communities.[157] The complainants alleged that consultations that took place were not in good faith or with the objective of achieving agreement or consent.[158] The commission held that consultations that the state undertook the community were inadequate and could not be considered effective participation. The commission further held that the community members were only informed of the impending project as a *fait accompli*, and not given an opportunity to shape policies or their role in the Game Reserve.[159]The commission emphasized that the state was obligated to conduct the consultation process in such a manner as would allow the representatives to be fully informed of the agreement, and participate.

The rationale for these measures and for the recognition and integration of community views in environment management is to investigate whether the community has had sufficient avenues to shape environmental governance. The 2010 Constitution was meant to empower the "people" by recognizing their right to self-determination in all matters. It should enable those tribal ways of living, which were illegitimated by colonial and post-colonial laws, to be embraced once more. These include the culture of communal interest rather than an obsession with individualism.

The Constitution worked to enable a postmodern plural legal approach as a discourse for state centric approach to accommodate and be influenced by different laws and cultures in Kenya. This is the reason the nature of this emancipation is evaluated to gauge how it empowers local communities and groups to be involved in environmental governance. Environmental law tends to mostly focus on liberal individual rights as opposed to other norms like African communal values and local communities' interest. This is not to dismiss the place of the individual in environmental protection but it is a recognition that local customs and practices also cater for the environment and are crucial for sustainable development.

G. Conclusion

It is my contention that as pointed out in sustainable development goal 17, which seeks partnership to achieve the implementation of the SDGs, is the most important goal. At the centre of partnership is the working together of individuals and institutions, with the local community being the most important partner since communities sustain any development. Generally African values seek to work with nature and not against nature as discussed above. African culture contributes effectively to development and environmental protection. The 2010 Constitution sought to frame a new story for Kenya with the people as the sovereign. Some of the

155 S Deneulin, and Lila Shahani, *An Introduction to the Human Development and Capability Approach,* 2012 Sterling: London. See also; L Chenwi, 'Meaningful Engagement' in the Realisation of Socio-economic Rights: the South African Experience' (2011) 26 *SAPL* 128, 129.

156 *Centre for Minority Rights Development and Others v Kenya* (*Endorois case*) (2009). AHRLR 75 (ACHPR 2009) 289.

157 Ibid.

158 Endorois case para 274.

159 Endorois case para 281.

important constitutional aspects are that it gives standing for those affected by environmental pollution in court. This can be creatively used to protect community interest.[160] However it is not wise to expect much on environmental governance embracing community interest and group rights while the same Constitution is not able to break the spell of obsessive individual land ownership in order to resolve some historical land injustices in Kenya.

Self-determination right based on good faith consultation and effective participation of communities and indigenous people should be strengthened in the spirit the Kenyan constitution. Neighborhoods, society and communities must be at the forefront if we are to make significant impacts on environmental protection. Indeed, culture is an enabler and determinant of development. In this context, 'culture' began to feature as a very prominent dimension of human development. Africa must lead its own environmental path and participate in sustainable development. African communal living can be the basis for conceptualizing environmental protection and common good through its communal living. The environmental legal and institutional framework ought to harness the energy of indigenous knowledge and address African values and culture as a means for sustainable development. They should guide and inform State policies as well as international strategies for the betterment of environmental security and the eradication of poverty.

160 *Friends of Lake Turkana Trust v Attorney General*, ELC Suit No. 825 of 2012 (May 19, 2014) Environment and Land Court (Nairobi).

CHAPTER 2

The Language Question in Environmental Knowledge and Governance

John M. Mugane

Knowing a place ...is both a prerequisite for proper maintenance of it and for developing ways of talking about it. In its turn, being able to talk about a place, in a language which has developed ways of talking about it, observing it, in a detailed way, is a prerequisite for maintaining it and for transferring the knowledge about the place and its maintenance to further generations. And maintenance, in its turn, is a prerequisite for having a place to talk about it in the first place. Both locally and globally. [1]

A. Introduction

The quote above describing the inalienable relationship between environment use, knowledge, governance and the development of language is the premise from which the thinking in this chapter proceeds. This chapter looks at the interplay between environmental use and its governance through language. The definition of linguistics as the study of how languages are constituted, acquired, used, and represented fits well with how the environment and governance are also looked at, talked about, and studied. Language is an instrument of thought,[2] of knowing, and of action. It is a part of human biological endowment that involves the association of meaning with sound or sign for a particular reason or course. It follows then that the view that the function of language is communication as often claimed is "virtual dogma" from too narrow a view of what language is.[3] The author agrees with this understanding and is critical of the view that the language question in the disciplines and professions is simply one of communication and the translation of communication. I take Chomsky's[4] point that "communication is not a yes-or-no but rather a more-or-less affair" which fails "[i]f similarities are not sufficient" to be an apt reading of why translation of environmental knowledge (indeed any knowledge) depending on stable definitions of what words mean, is fraught with error, primarily that of misconception. To talk about language in linguistic terms means to pay attention to its physical manifestation and context thereof in terms of the rules of sound, word, phrase, sentence, and discourse, pragmatic formation with all of which lead to thought encapsulation, formation and conveyance.[5]

What the environment constitutes of is known through experience, through use of it and most importantly through human engagements in it. Experience grows the expressive resources of a language. The etymologies of language betray this fact, as shall be pointed out in this chapter. Language is connected to the production, accumulation and utilization of environmental

1 Skutnabb-Kangas, Tove. Linguistic genocide in education - or worldwide diversity and human rights? (2000:94). Mahwah, NJ: L. Erlbaum Associates.

2 This is a departure from the Aristotelian dictum (still current, as Noam Chomsky 2018:4 observes) that states the converse – language is the association of sound with meaning.

3 Noam Chomsky, *What Kind of Creatures are We?* (2018). New York: Columbia University Press,14-15.

4 Ibid. 15-16.

5 Ibid.

knowledge. As the quote from Kangas above says in earnest, language underlies 'knowing a place' and talking about it – describing the environment, interpreting it, and analyzing and dealing with challenges arising from it. How come language is not mentioned in such important documents as The Environmental Management and Co-ordination Act, 1999 and The National Environmental Policy (NEP) of Kenya of 2013 and in the environmental law provisions in Articles 42, 69, and 70 of Kenya's 2010 Constitution?[6] It is perhaps too obvious to be mentioned but it is a good place to state it as there is seldom a better place to encounter the concepts and thinking behind environmental knowledge than in the language spoken by those surrounding it. The omission of language is puzzling given the input in vernacular language that characterized the grassroots engagements and deliberations that took place through much of Kenya, leading to the publication of the NEP and the 2010 Constitution documents in English.

The centrality of language in how environmental knowledge is constituted, how environmental governance emerges, and how it is operationalized, needs to be articulated not merely alluded to. Governance is a social function guiding or steering society towards socially desirable outcomes and away from undesirable ones.[7] Language consideration is a critical piece of governance but it is often missing, or obliquely referred to in ceremonial texts or sections of important documents. The importance of language is implied, not stated, in constitutions, often put in preambles to the substantive discussions of culture and environment, after which it is seldom mentioned. I argue for the study of language in environmental governance not merely as a translation issue but as integral to policy making and as a venue for observing, describing and analyzing processes of practice in rulemaking to regulate human behaviour. In this way, the horizontal languages expressing meaning in human social-cultural engagements are not obscured or lost in the languages of the press or of record keeping, which are vertical and elite.

To illustrate this, Mount Kenya is for instance, the vertical name of Africa's second tallest mountain, but in the horizontal it is *Kĩrĩnyaga, Gĩkũyũ, Kĩrĩmara, Kĩrenyaa, Kĩnyaa* – words which, according to the Mount Kenya people, mean a place of wonder, brightness, and God's resting place.[8] Naming of the environment in the horizontal is local, crosscutting and arising out of social-cultural engagement in context. In the vertical, *Kirinyagaa*, *Kirimara, Kirenyaa*, and *Kiinyaa* became Kenia /ˈkɛnjə/[9] (Kenya), the name of the country which was a result of writing based on European pronunciation of *Kirinyagaa*, *Kirenyaa*, and *Kiinyaa*. Thus, European excitement at seeing a snow-capped mountain on the Equator resulted in the name of a landform (a mountain) and of a country, distancing itself from the underlying etymology as a landform yes, but one that gave the Gikuyu, Embu and Meru their orientation of perspective, of life, and of culture vividly symbolized by the act of building houses with doors facing the mountains, also burying their dead facing mountains, and with the mountain as an important premise of their religious experience.[10]

I take the foregoing contrast in the name of a mountain to be an instant that shows how oral and grassroots indigenous knowledge is subordinated or altogether lost as it is translated into vertical policy statements without attention to vernacular language as a reservoir and transmitter of

6 Yash P Ghai& Jill Cottrell, *Kenya's Constitution: An Instrument for Change*, (2011). Nairobi, Kenya: Katiba Institute.
7 *Environmental Governance* by Oran Young <https://www.youtube.com/watch?v=I0VVlk47OvI> (17 November 20200
8 Jomo Kenyatta, *Facing Mount Kenya.* (1965) New York, Random House Vintage Books.
9 BJ Ratcliffe, 'The Spelling of Kenya'. (January 1943). *Journal of the Royal African Society*. 42(166): 42–44.
10 Kenya Wildlife Service. *Mount Kenya Official Guidebook*, (2006) Kenya Wildlife Service.

meaning. A translation whose aim is to find equivalences of words between languages assumes too narrow a view of what language is and what people do with it. Translating end products and not the processes leaves out the engagements that take place in organic human sociality.

Seeking to understand the environment from language and language from the environment, this paper looks into environmental knowledge production as a process that originates and crystallizes in the vernacular. In the vertical, language is relegated to the functional role of translating syntactic meaning, thus losing the socio-semiotic – meaning making as a social practice. Linguistic considerations are thus kept on the periphery of environmental law and governance even in circumstances where efforts are directed at meanings.[11] The recognition that local knowledge, local institutional efforts, and local actors are critical in resource management is well noted, especially since Ostrom's *Governing the Commons* became a classic in the field.[12]

In what follows, I tell three stories all of them speaking to environmental problems, governance, and law all of which are set to "regulate the impact of human activities on the environment" so that humans can live within the carrying capacity of the earth.

The first story is on how a language grew at the nexus of water, land and a great diversity of peoples, cultures and traditions. It is a broad sweep of Swahili history as a repository of environmental knowledge that is more than a millennium old and one that is behind the coming into existence of Nairobi, the setting where the next two stories take place. The second story is about trash in the discourse of environmental governance in Nairobi, and the third is a reading of environmental governance challenges in a criminal case I have titled 'Peeing -to kill and die for', to show how language is often the 'elephant in the room' when the vernacular in the horizontal is converted to the vertical through translation.

B. Growing Swahili at the nexus of water, land and people

The historical lands of the Swahili are on East Africa's Indian Ocean littoral, a 2,500-kilometre chain of coastal towns from Mogadishu, Somalia, to Sofala, Mozambique, as well as offshore islands such as Zanzibar, Pemba, Lamu, Comoros and Seychelles to name only a few. Environmental knowledge is perhaps best observed when we consider the status of Swahili cities as states. The cities were numerous and many of them ancient, beginning from Mogadishu (in present-day Somalia) to Sofala (present-day Mozambique). Among the most prominent cities at the zenith of Swahili prosperity (1000 – 1500 AD) included Mogadishu, Lamu, Siu, Pate, Mombasa, Malindi, Zanzibar, Kilwa and Sofala. Each of the cities had its heyday of prosperity; challenges that threatened survival; rich and poor; and free and slave populations. Each city had its reputation and diplomacy that complemented it. Mombasa was warlike – hence its name Mvita or 'place of war' while Malindi, Mombasa's neighbour to the north, was inclined to pursue peaceful approaches. Ibn Batutta, the 14th Century Muslim traveller who wrote that Kilwa is "one of the most beautiful and well-constructed towns in the world", gives details of how these cities compared to other cities of the world.[13] Lamu and Mombasa were, for centuries, centres

11 J Baigent, 'Twelve years of Partners in the Horn of Africa'. (2015) *The Advocate*, 73(5), 679-590.

12 E Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Political economy of institutions and decisions). (1990) Cambridge; New York: Cambridge University Press.

13 J Mugane, *The Story of Swahili*, (2015) Ohio University Press. Athens, Ohio p.90.

of the Swahili intellectual production that boasts one of the Africa's great literary traditions.[14] Zanzibar was the biggest trading centre and home to the most powerful sultans, had plumbing, and was the first to establish diplomatic ties with the United States.[15]

The Swahili rich and privileged were mainly the few people who claimed aristocratic lineage and lived according to Islamic law in coral houses at the centre of the city. They were surrounded by the 'vastly larger number of mud-and-wattle houses' that were the abode of farmers, fishermen, masons, carpenters, leather workers, and boat builders.[16] The cities had local linkages and were strategically placed to look outward toward the water and inward to the food and labour supply lines with reflecting a segmented ecology much like the one that is found in modern cities such as Nairobi, which is discussed further along in this chapter.

Swahili culture and language emerged at the nexus of water, land, and people; and for over a millennium, the Swahili served as middlemen between the world of the Indian Ocean and Africa's hinterland. Concerning the developments that took place in the formation of Swahili, Mazrui stated that geography is the mother of history.[17] The word *Swahili* is itself rooted in geography. It is from Arabic *sahil,* meaning 'coast', 'edge', or 'border' — a place — and *sawahil,* meaning 'Swahili country'. Bothered by the phenomenon of how people who are African ended up being named by Arabs in Arabic words and word forms, the distinguished Swahili scholar, Mohamed Sheikh Nabhany, offered the following endogenous view, which very much resembles the etymology of Mount Kenya given in the introduction above. Insisting that his people, the Swahili, named themselves, Sheikh Nabhany told the story that when the Arabs came and found the natives, they asked them, *Nyinyi ni watu wa kutoka wapi?* (Where are you people from?)' The natives responded, *'Sisi ni watu wa siwa hili* (We are the people of this island)'.[18] With *siwa* meaning 'island', the expression '*watu wa siwa hili'* is equivalent to the people of this land, which is how any people will describe their environment in much of the world. Though himself descended from the famed Nabhany clan,[19] he provided an alternative etymology of the word Swahili that was Afrocentric. Etymologies of words betray the source of names humans give to things as the environment withland, sea, island, and water. Naming nature is one of the sources of the etymology of environmental knowledge. The exocentric Arabic etymological view just names the people, the endocentric one enquires of the people where they are from – an enduring question on naming Africa and Africans.[20]

The word 'Swahili' is an adjective not a noun. For it to be a noun or designate something, it has to carry a prefix – *Mswahili* (Swahili person), *Waswahili* (Swahili people), *Kiswahili* (Swahili

14 See *Al Inkishafi* (*The Soul's Awakening*) by Sayyid Abdallah bin Ali bin Nasir; the works of Muhamadi Kijumwa such as the Fumo Liyongo epic and the collection of works by Shaaban Robert.

15 On March 18, 1837, Richard Palmer Waters arrived in Zanzibar as the first US Consul (Gray 1962, 213).

16 N Derek and T Spear, *The Swahili: Reconstructing the History and Language of an African Society*, *(*1985) *800−1500.* Philadelphia: University of Pennsylvania Press. pp. 22

17 AA Mazrui, *The Africans: A Triple Heritage. (*1986) Boston: Little, Brown.

18 *Tamko Mswahili au Kiswahili lina maana mawili, kwa mapokezi: Ni kwamba Waarabu walipokuja wakawakuta wenyeji wa pwani au mwambao, waliwaita 'watu wa mwambao' kwa Kiarabu sahil na kubadilika mpaka kuwa Swahili Maana ya pili ni kwamba walipokuja Waarabu wakawakuta wenyeji, wakauliza nyinyi ni watu wa kutoka wapi? Wenyeji wakajibu, sisi ni watu 'wa siwa hili' Katika lugha tuna masiwa na siwa, tuna visiwa na kisiwa Hapa ni kwa msomi mwenyewe kuyalinganisha maneno au matamko haya mawili ni lipi lililolekea:* AAP 42 (1995). 104-112

19 The *Akhbar Pate* gives a chronological description of 32 reigns of Nabhani kings of Pate, who arrived in Pate in 1203–4 CE (Tolmacheva 1993, 527–48).

20 EU Clasberry, *Culture of Names in Africa: A search for cultural identity*. (2012). New York: Xlibris.

language or style), *Uswahili* (Swahiliness), and *Uswahilini* (Swahili country).[21] Thus, notions such as Swahili life are denoted as *maisha ya Waswahili*, Swahili cities as *miji ya Waswahili/ Uswahilini*, Swahili culture as *utamaduni wa Mswahili,* and so forth. In reference to the language, *Swahili* is not a pronounced word but a root to which prefixes *m-, wa-, ki-, u-, u-...-ni* are added to make nouns. The point here is that the prefixes anchor people (M/WA) to their environment (U-...-NI), which is populated by the conceptual/abstract marked with U- and Ki- while other prefixes mark the concrete/tangible, the know-how, the style of doing things, including meaning-making and sense-making. By name and structure, Swahili emerged from the environment. Kiswahili is a language that grew at the convergence of ecologies – water and land with two possible orientations either inward, or seaward combining to make a third – the hybrids and mixture of inland ecologies and outland ecologies of wind and sea bringing inland Africa and the world of the Indian ocean into contact. Swahili is built on a nexus of 'people facing surmounting challenges, achieving, creating, innovating, and adapting to a variety of situations'[22] that speaks volumes to environmental knowledge and environmental governance.

Swahili's environmental background goes back to the Great Bantu migration in which Bantu peoples historically migrated from southeast Nigeria to central, eastern, and southern Africa 5,000 years ago.[23] The point of mentioning the migration is to note how language builds and stores environmental knowledge. Swahili bears the historical roots of that journey with respect to its language, and here I briefly point to the heritage. According to Nurse and Spear,[24] Modern Swahili still uses words from Ur-Bantu (the original, or proto, language) for "hunting with bows and arrows and traps, collecting honey and wax, fishing with hooks and lines, weaving nets and baskets, paddling canoes, raising goats, molding pottery, collecting water, cultivating root crops and palms, and grinding and pounding these vegetable foods ... and words of aquatic technologies, including 'boat', 'paddle', 'float', 'to fish with a line', 'net', and 'hook'.[25] The heritage of Swahili from the Bantu encounter with the Cushitic populations (the descendants of present-day Somalis, Oromo and others) includes Southern Cushitic words for the animals — 'sheep', 'donkeys', 'chickens', and 'cattle'; the Cushitic ways of grain cultivation and maintaining new types of livestock, including goat herding and millet farming from Cushitic speakers, incorporating Cushitic vocabularies as they did so. The Southern Cushitic word */*-tama/* (grain, specifically sorghum, or millet) was imported into Proto-Swahili around 100 to 500 CE, from which Swahili has descended). The word is still found in many Swahili dialects of today. The word *ng'ondi* (sheep) in the Kiamu (Lamu) dialect of Swahili is taken from the Cushitic root */gwand/,* and *maziwa* (milk) in Kiunguja (modern Standard Swahili) is derived from the South Cushitic root /?*iliba*/. This is true of other dialects of Swahili – Chimwini, Kitikuu, Kisiu, Kipemba and Kingazija.[26]

The Swahili coast has, therefore, been a rapidly globalizing area in the past millennium, thanks to water from rivers, lakes and the sea. The Swahili riverine system provided channels of human communication and migration between the coast and the interior, making accessible fertile hinterlands for agriculture whose produce nourished the Swahili city states that dotted the coast. From the north going southward, the rivers include Juba River in Somalia, the Tana

21 J Mugane,(2015). pp:288
22 J Mugane (2015) 40.
23 J Vansina (1995).
24 N Derek and T Spear (1985) 37-39.
25 J Mugane (2015) p45.
26 J Mugane (2015) 42.

River and the Athi River (also known as Sabaki and Galana along its course) in Kenya, the Rufiji River in Tanzania, and the Ruvuma, which forms part of the border between Tanzania and Mozambique.[27] Thanks to the rivers from the hinterland and the monsoons from the Indian Ocean, all sorts of people (hinterland Africans, traders from Asia, the Arab world) found their way to the Swahili coast.[28]

As rivers deposited silt and were used as guides to and from the ocean, and the monsoons blew ships in and out by the season, the lakes in the region defined the outer reaches of Swahili influence.[29] Thus rivers, lakes and oceans constituted the ecosystem in which the Swahili were nested. The Great Lakes, particularly Lake Tanganyika, Lake Malawi, Lake Victoria, Lake Edward, and Lake Albert, were part of the Swahili economy and an important piece of the Indian Ocean emporium whose high point was the slave trade era and the time of colonial rule. These lakes formed the outer rim or demarcation of Swahili spread and influence that made eastern and central Africa to become an enclave with a name Africa's Swahili-speaking region.[30] The lakes landmarked the areas where slave caravans operated under powerful African chiefs who conducted their trade in slaves, elephant tusks, hides and skins in Kiswahili.[31] Tippu Tip ran the slave trade, controlling the area between the Congo and Lake Tanganyika; Chief Kivoi operated from Kibwezi (present-day Kenya), King Mirambo of the Nyamwezi held the area between Tabora and Lake Tanganyika and the caravan routes to Karagwe and Buganda; and Chief Mlozi of Malawi controlled the trade in the Lake Nyasa region.[32]

One could read the entire story of Swahili as a narrative of how the environment became known, was utilized, and governed. For the Swahili environmental knowledge led to expansion of the sphere of influence to the hinterland that they coupled with access and mastery of the seas. When the colonialists arrived, they found a landscape where a great multiplicity of languages and cultures co-existed and in full use of Kiswahili as a lingua franca. In the colonial era, environmental knowledge was accessed through Kiswahili, which was the lingua franca in the governance of human, and the exploitation of, natural resources.[33] The colonial era ushered in the issue of language as an environmental resource as well as a site of environmental knowledge. As mentioned earlier, Mombasa, the initial capital of colonial Kenya, was a city well practised in resisting foreign incursions for centuries and the fact that the Swahili were Muslims did not help the colonial takeover plan, part of which was establishing British values.

The city of Mombasa was Kenya's first capital and was followed by Nairobi, the city where the rest of this chapter is focused. According to Bethwell Ogot,[34] 'the founding of Nairobi in effect meant the rejection of Swahili culture and its replacement by a European culture'. It is in this takeover of control that the issue of language became critical. Moving to Nairobi from Mombasa was in effect an attempt to de-islamize Kiswahili for use in colonial administration. If there is a place where the broad sweep of Swahili history converged to stay, it is Nairobi, where

27 RL Pouwels, *Horn and Crescent: Cultural Change and Traditional Islam on the East African Coast, 800-1900* (2002) Vol. 53 Cambridge University Press.
28 J Mugane, (2015) 83-84
29 RL Pouwels, (2002).
30 J Mugane, (2015) p219
31 JE Harris, (Ed.). *Global Dimensions of the African Diaspora*. (1993).
32 J Mugane, (2015) p104
33 J Mugane, (2015) p107
34 BA Ogot and JA Kieran, (eds.) *Zamani: A Survey of East African History.* (1968) Nairobi: East African Publishing House.

environmental management and governance are of critical importance. It is to Nairobi that we now turn.

C. Nairobi, the marshland upon which a city stands

The story of Nairobi is one about the marshland on which one of Africa's greatest cities is built. 'Nairobi' comes from the Maasai phrase, *Enkare Nyirobi*, which translates to "the place of cool waters". All languages of Kenya and international ones can be heard in Nairobi but Kiswahili and English are the most commonly used. In the city, Kiswahili and English are spoken in a great variety of ways and accents. Fondly referred to as the 'Green City in the Sun',[35] Nairobi has rapidly grown in both infrastructure and population so much as to constitute a major environmental challenge. The city is home to an estimated 5 million people who generate 3,000 to 3,200 tonnes of solid waste daily. Only 25 per cent of that waste reaches the dumpsite and the rest (about 2,250 tonnes), is disposed off illegally at undesignated locations such as roadsides, rivers and any open spaces as well as some dumping sites declared full more than a decade ago that are still being piled on.[36] The Nairobi City County Government, the authority charged with cleaning the city, is always hard pressed to meet its obligations. This situation has forced people to take steps to address the challenge. Worsening living conditions in already congested spaces gets people to think about possible solutions –- and act in a way closely approximating the people, planet, profit (PPP) framework.[37]

In this story a woman and a man in Nairobi's Eastlands neighbourhood of Buruburu speak in Kiswahili (with English translation provided by the author). This 2017 story sensationally titled, 'The Golden Garbage of Kenya's Capital', concerns the difficulties associated with garbage collection in Buruburu, a residential neighbourhood of Nairobi's Eastlands.[38] The story about environmental governance is one about the human efforts and engagements that take place in the local vernacular that is always developing ways of talking about the place and its challenges.

At the beginning of the story, a woman recalls with nostalgia a time when her neighborhood was less congested and the environment and its drainage system was clear, clean and treated with chemicals by capable caretakers for the wellbeing of the residents.[39]

Woman*:* Long ago, it (this area) was very clean. People were not very many like these days, they were few but the city council workers were adequate. They did the work well, the drainage ditches were very clean and they sprayed them with chemicals at least twice a week.

Mwanamke: Zamani kulikuwa kusafi sana: Watu walikuwa sio wengi sana kama siku hizi walikuwa wachache, lakini wafanyikaza wa kanjo wakati huo walikuwa wengi vizuri, walikuwa wanafanya kazi vizuri huku mitaro kulikuwa kusafi sana ata dawa walikuwa wanapiga karibu mara mbili kwa wiki. Walikuwa wanapulizia kila mtaro dawa.

35 B Wood, *Green City in the Sun.* (1988) Random House.

36 From 'It will take more than good intentions to clear Nairobi's garbage mountains',Article published in December 20, 2017 by *The Conversation* https://theconversation.com/it-will-take-more-than-good-intentions-to-clear-nairobis-garbage-mountains-88421.

37 P Fisk, *People, Planet, Profit: How to Embrace Sustainability for Innovation and Business Growth.* (2010) London; Philadelphia: Kogan Page.

38 The Golden Garbage of Kenya's Capital < https://www.youtube.com/watch?v=BnlUmOA5bck&ab_channel=AfricaUncensored> (18 November 2020)

39 Ibid.

In the not-too-distant past, the lady recalls that there was order that maintained the city's cleanliness in livable condition. It is not in the too distant past as the woman that recalls it is middle aged. The actual words are given in a Kiswahili version typical of the city easily understood in Nairobi and marked with some pidginization and Swahili-English mixing in the naming of objects and actions. There was order in the past. Then a man continues the thought comparing the past to the present.

Man*:* Those lorries of the city council were the ones that usually came then the Matiplo had certain bins, drums that were labeled NCC, Nairobi City Council. Every Friday, that big drum is the one you place there near the tiplo. The big lorry of the Council would come and throw garbage into the lorry and you then would take your drum and return it inside the house – you see.

> *Mwanaume: Hizo malori za kanjo ndo zilikuwa zinakujanga, alafu izi matiplo zilikuwanga na mabin flani, madrum hivi halafu zilikuwa zimeandikwa NCC, Nairobi City Council, sasa kila Friday sasa hicho kidrum ndiyo mnachukua mnaenda mnakieka hapo nje ya tiplo. Haya kilori kya kanjo nakyo kinacome kinazirusha ha—matako kwa lori halafu sasa nyinyi kidrum kyenu mnarudisha nda, unaona.*

Garbage collection was no stranger to Nairobi and the operation was well equipped and orderly. The woman then says:

Woman: But these days, people are many and there are no workers. Now the population has increased. Those elders are completing their service and maybe they are not replaced. They have reduced and now the ditches are full of garbage and rubbish/dirt is all over the place.

> *Mwanamke: Lakini siku hizi watu ni wengi na hakuna wafanyakazi wamepungua saa ile population imekuwa nyingi. Wale wazee wanaenda wakifuta, wakifuta, wakifuta yaani wakimaliza miaka yao labda na hawa-replace na mtu mwingine, wamepungua hakuna watu sasa. Mitaro imejaa takataka; Kila kitu imekuwa me, ni uchafu imejaa kira mahari.*

The woman's comments centre on the changing demographics and the abandonment of city cleaning. She says that there has been a rise in population growth in the city with no replacement of retiring workers or new hires. Then the man says that:

Man: Instead of these council people coming to employ people like us who collect the garbage, they go and employ people whose work is to get into the office.

> *Mwanaume: Badara ya hii watu wa kanjo kuja kuandika watu kama sisi ware tunaokotanga hii matakataka, wanaenda kuandika ati watu wa kuigia kwa ofisi.*

A man then makes a suggestion and is upset by the absurdity of hiring people who just sit in offices, and continue to cite something that injected energy to the youth to clean up.

Man*:* You see how that all came about and changed. Those council people no longer come to take anything and then it came to be that those youth are the ones now that bring bags, plastic bags. Those plastic bags are the ones residents of the plot are putting their garbage in. The Deputy President, William Ruto, came and bought the youth here wheelbarrows, spades, hoes and that has given the youth the morale to clear the ditches that were no longer visible, to tell the truth.

Mwanaume: Unaona sasa vile iyo mambo ili-come ika-change sasa hizo makanjo zikaregeza hazikujangi kuchukua nini, sasa si- ndio hio ikakuwa ni mavijana ndio wanashugulika kuleta mabegi, hizi mabegi hizi makaratasi hizi. Sasa hizo makaratasi sasa ndio watu kwa ploti wanaweka matakataka zao, nini. Deputy Pesident William Ruto alikujanga aka-buy-ia mavijana hapa manini, ma wheelbarrow, maspade, hizi masururu, na ndio unaona vijana ndio sasa wamekuwa na morale za kuendelea kuchimbia izi – izi mtaro zilikuwa hazionekani, kuongea ukweli.

The lack of tools to act is part of the solution. Kenya's Deputy President William Ruto, whom people refer to as "The Hustler", immediately equipped the youth to hassle. He bought them wheelbarrows to transfer trash, hoes to dig up trash and spades, hoes to dig out trash from ditches and restore the drainage into a functioning mode.[40] The energetic youth, suggests the narrator, were equal to the task. They were mindful of the extent to which cleaning up would have to address a sequence of interconnected Buruburu sections (Phase I to Phase V) of the neighbourhood.

Man: This is Phase II, this is the dumpsite of Phase II. This is where the boys of Phase II can throw the garbage. Those that you have seen, and there is garbage for Phase III, Phase IV and Phase V. You see Phase IV cannot bring the garbage here to Phase II. So they establish their own base and when you go there, you can see they will search their own site on which to throw the garbage – you see now? You find that there, just outside the plot is where they have made a dumpsite.

Mwanaume: Hapa ni Phase II, hapa saa hii ni dumpsite ya Phase II, hapa ndio maboy wa Phase II wako karibu na hapa ndio karibu wanawezaru. Sasa izo zenye umeona na huko kuna Phase III, kuna takataka za Phase III, kuna Phase IV, kuna Phase V, unaona, sasa Phase V haiuzileta maha kama hapa Phase II, si hio utatafuta kabez kyao ukienda huko umeziona, hawa watatafuta kabez kyao warushe – umeona sasa. Unakuta ploti hapo nje mtu – hapo nje ndo pametengenezwa ki dumpsite.

It is apparent from the above that there are local initiatives working to collect garbage in specific places and then identify their own 'kabez' (little base) where to throw it. This designation of dumpsites is choosing to take trash to one place instead of everywhere is an important step towards garbage collection, disposal, and ultimately managing the environment. The narrator then relates what compels people to act.

Man*:* Now the bags are thrown out of the estate, thrown out into the streets. They were being thrown from inside and when you pass, you pass through the garbage there, stepping on the trash. So you can see honestly that you cannot wait for the kanjo (NCC) to come and do that work and it is you yourselves who are suffering. So it compelled the boys to be the ones who took that measure, you see.

40 The term 'hustler' is William Ruto's brandname and one he uses to distinguish his success as stemming from hard work and 'smarts' to get ahead. The term 'Hustler Nation' is part of current public discourse that is rooted in the entrepreneurial history of Kenya's post independence leaders. The Hustler Nation refers to anyone who seizes opportunities, works hard and is entrepreneurial (smart about it). Ruto's personal narrative of rags-to-riches is the iconic exemplar of the 'hustler' to be emulated. The use of the word "Dynasty" is a thinly veiled, if not public, reference to a specific group of Kenyans whose current name recognition, wealth status and connections/access to resources is tied to political and economic power inherited from previous regimes. See for instance the Hustler-Dynasty narrative 'Hustler nation vs dynasties' at https://www.youtube.com/watch?v=MIuSWnpnTmk

Mwanaume: Wacha saa hii zinarushwa nje ya estate zinarushwa nje huku kwa mabarabara, zilikuwa zinarushwa hasa kwa estate ndani, mkipita mnapita tu na mauchafu hapo, juu ya mauchafu, saa unaona sasa enyewe hamwezi ngoja kanjo na huko ndio ati itakuja kufanya ile kazi na nyi wenyewe mnaumia hapo saa ikabidi maboy ndio wanachukua tu hio hatua sasa, unaona?

The need to act is brought about by desperation – nowhere to even step and walk through, and the trash was simply moving into the living spaces – going back home to the generators of it. Need stimulates concept; concept leads to action. The action was to create a transactional relationship with the estate dwellers. This pay to benefit approach is relayed as follows:

Man*:* There is something that they ask of every house. There is an amount that every house gives so that the boys can do that work, you see. When it rains, they used to even take the trash to the dumpsite in Dandora but now when it rains, you cannot get in. You see we get affected because to say the truth it is difficult for the youth to take the garbage on a rickshaw to the site; it is difficult. There is no way you will confront a 10-wheeler lorry that has taken trash from far away and taken it into the dumpsite and are lined up and you with your miniscule rickshaw loaded with bags then it will force you to bring one '*mkokoteni'* while in reality you need to ferry something like 20 *mkokoteni*. One *mkokoteni* will make you spend the night there (at the dumpsite) and instead of that, is why the 'mavijana' come and dump them (the bags) here on a road like this one.

Mwanaume: Na hao ikakuwa kuna kitu wanaitishanga kwa kila nyumba eh, kila nyumba kuna ile doh hutoa ndio ma-boy nao wafanye iyo kazi, unaona. Nao sasa inakuwanga enyewe ikianza kunyesha, enyewe walikuwanga ata wanapeleka uko bomba, uko dumpsite sasa yenyewe, nao sasa ikakuwa sasa huku ikinyesha hauwezi ingia. Unaona sasa? Tuna-affect-iwa juu sasa kama mavijana, kuongea kweli kupeleka izo takataka na mkokoteni huko ndani ni ***noma****. Hakuna vile utabishana ni kilori kya miguu kumi hapo kimetoa takataka na huko mbali na kimepeleka huko ndani na zimepanga line, na wewe uko na ka-mkoteteni kako kamejaa mabegi, unaona, halafu sasa itabidi mkokoteni moja na unafaa kubeba mikokoteni kama ishirini. Mkokoteni moja inaweza ikakulalisha huko ndani sasa badala ya ivyo sasa ndio unaona mavijana wana-come wanazi-dump hapa hivi kwa barabara kama hii.*

They created a company whose work was to collect fees from every house to pay for the *Mavijana with* 'groups of youth' workers. The youth converted the affected parts of Buruburu into entrepreneurial space to coordinate efforts to manage the spread of trash by setting up companies to collect garbage for pay with a previously non-existent dynamic.

Then when the rains came the workers hassled to take the trash to the actual dumpsite in Dandora using *mkokoteni* a wooden rickshaw carriage drawn by humans in the city to transport heavy things. Dandora is eight to 10 kilometres from Buruburu, a rather strenuous undertaking. The narrator notes that the *mikokoteni* are no match for the garbage collection trucks that queue at the dumpsite. They look like toys in comparison and the speaker says they would need 20 *mikokoteni* carriages to make a place for themselves among the trucks. Furthermore, spending the night [at the dumpsite] is possible for truck drivers but not for the *mikokoteni* hauliers. The speaker then says this is why they create their own dumps in the estates. The woman confesses that she does the same.

Woman: Even I also dump there. I have no alternative. I just pour it there. That other side (pointing) is blocked (by trash), and this one, too, is blocked. This one here, when the rain came, the water stagnated and flooded because it was blocked and the small drainage was filled up with trash.

> *Mwanamke: Ata mimi pia namwaga hapo, sina alternative. Namwaga hapo tu. Pande ile imefungana, hata hii imefungana pia. Hii wakati mvua ilinyesha juzi, maji ilikuja mpaka huku juu maanake imefungana hata ukiona ka mtaro vile kame kalikuwa kamefungana.*

But all is not lost as people find opportunities to eke a living out of a recycling activity that involves collecting plastic paper bags, cleaning them and selling them to people as the man narrates:

Man: These garbage dumps also save(help) some people because of plastic. Those papers you know are things that people take and reuse them, you see. Therefore, you find there are people who are happy when they see them being thrown away.

> *Mwanamume: Izi matakataka kuna watu pia zina waokoanga enyewe huku ndani juu ma-plan-yo, makaratasi izo unajua ni vitu pia zinaenda kuna watu huzichukua wanaenda wanazirecycle unaona. Kwa hivyo sasa unakuta kuna watu pia wanafurahia wakiona zikiru- zikurushwa.*

In addition to direct re-use just described, there is recycling that fetches some income for the person good enough to help him with upkeep:

Man: I take the cardboard boxes and fill a *mkokoteni* and that is the one I take there (recycling). You go and weigh it and when you take it, you get your money there and then when you take them. One kilo, we buy for 5 shillings and when you take say 300 kilos, you see, you will make your money for your needs.

> *Man: Ma-carton ndio nachukuanga nikijaza mkokoteni sasa hiyo ndio napeleka huko, unaenda unapima unajua sasa huruzi wayo ukipeleka macarton unakuta hakuna kuwekewa pesa, unapewa pesa yako saa hio hio umepeleka. Kama kilo moja tunanunuanga na silingi tano na huko sasa ukipeleka kama kilo mia tatu unaona uko na pesa yako yakukusaidia.*

Some of the time the *mavijana* do get some business contract arrangement for removing trash but working with people is difficult as the narrator relates:

Man: When they employ us, now that's where you know you are doing well. The work inside is a hassle with the people. You can approach a person and he/she tells you, 'I do not throw trash' or 'I do not eat at home' then you start a struggling with him that way, but his/her neighbour is paying but maybe he does not bring out trash. He comes out with a paper (bag) in the morning, you would think it is very good personal belongings, and when you get outside, when he arrives somewhere he looks around and seeing there is no person, he drops it. When you check the contents it is trash, thus avoiding to pay the little money and is charged outside the plot, you see. Therefore if the *kanjo* (NCC) hires people it will reduce, behaviours like those.

> *Mwanamume: Na wakituandika unajua hapo sasa doh yako sasa unaipata mzuri; hii ya huko ndani huanga ni kusumbuana na raia ju unaweza approach mtu anakuambia 'mi situpangi takataka' ama 'mi sikulangi kwa nyumba' sasa mnaanza kusumbuana hivyo na*

jirani yake analipa na labda yeye hatoi iyo takataka. Anatokanga na karatasi asubuhi si wewe unaweza fikiria ni kamzigo kazuri sana amebeba, nao ukitokea na hapo nje akishafika mahali akicheckicheki aone hakuna mtu, anaangusha na ukicheki zile vitu ziko ndani ni uchafu na saa hiyo ana-avoid kulipa ile pesa kidogo anaitishwa huko kwa ploti, unaona eh- kwa hivo sasa kanjo ikiandika watu inaweza pia punguza ngori ka hizo.

In this Buruburu exposition, we see that there are rules and social regulations that have been established to determine how to deal with those who refuse to participate. The story ends with the speaker making a plea to the NCC to hire *mavijana* (young people) who have already demonstrated their willingness to work and to provide fast and capable clean-up service.

They have to add the *mavijana*. They are many here and can do the work. The work was here and it was a big job to remove the trash that was inside the estate and if they were able? Even that trash that is here, they would work fast to remove all the trash that you see there now. *Kanjo* should make that move – employ the *mavijana*

Mpaka waongeza tu mavijana ni wengi huku na wanataka kazi, nahii kazi wanaiweza. Kazi ilikuwa huku ndio ata ilikuwa kubwa sana kutoa hizo zenye zilikuwa huko estate ndani, na kama waliweza? Ata izo ziko huku ata hizo si ni haraka haraka izo na hizi ziko huku zote kutolewa ni haraka. Sasa unaona sasa hapo kanjo bana ichukue hiyo hatua.

Thus ends the snapshot story recorded in 2017 concerning how residents of Buruburu, a residential neighbourhood in Nairobi's Eastlands galvanized themselves and sought out solutions to the trash problem. Environmental governance emerged from need and dilemma from inside the home, where garbage is generated, to outside the home and into the yard, outside the yard into the street, and into an entire estate with almost nothing except their muscle and wit.

Not to be missed in the trash challenge in Buruburu is the language spoken. It is a specific kind of Kiswahili spoken by a particular generation. To now restate Skutnabb-Kangas' 2000:94 quote that headlines this chapter with regard to the Buruburu phenomenon: 'Knowing Buruburu Phase 1 to Phase 5 ... is both a prerequisite for proper maintenance of the neighbourhood and for developing ways of talking about it.' The story has shown that the Mavijana of Buruburu have a language, a particular Kiswahili which has developed ways of talking about Buruburu, "observing it, in a detailed way" as we have seen listening to the narrative. Knowledge and maintenance of Buruburu "in its turn, is a prerequisite for having a place to talk about it in the first place." Need is indeed the stimulus to concept, concept to action. There was a particular need in Buruburu, people talked to each other about it (i.e. the communication function of language) and honed the concept (language as an instrument of thought) and proceeded to act, as we have seen. The Mavijana became innovators and entrepreneurs.

I now turn to the third point of this chapter with a third story in which culture and language are part of the environment of a case that appears in court.

D. Peeing - to Kill for and die for

In this section, I do what Brooks and Gewirtz[41] argued for in *Law's Stories* that law be viewed as 'stories, explanations, performances and linguistic exchanges – as narratives and rhetoric', only I privilege 'linguistic exchanges – as narratives and rhetoric' as the instrument to look through, gaze at, observe and even stare at 'stories, explanations, performances' of horizontal and vertical governance of the environment.[42]

A public nuisance, public urination is a common thing in Kenya, and while it is publicly discouraged and may indeed cause commotion, it is surprising that it can cause some to kill or to die for it, but that is what happened on November 28, 2011 – something that speaks to how environmental governance is not simply a matter of translating the evidence but also undertaking linguistic and cultural studies for interpretation of the same. Could one make a case using environmental law to argue that access to the toilet was a factor if not the trigger that led to the escalation in which someone paid with his life and his family was cast into a different set of circumstances. I argue that the linguistic exchanges that occurred and how they were interpreted must have had something to do with what led to the highly explosive altercation. Here we see an instance in which the dual language featured as an instrument of thought in whatever was served to the court as a language of communication. It may be conjectural that momentary insanity has to be proven by the court but it does leave the question open as to how conscribed spaces in cities produce altercations in this case access to the toilet and whether the environment impacts or is affected by mental health.

It all started with the need to pee. On the the22nd day of February, 2018, , Timothy Kiboga Chochi, a tenant at a building in Pipeline Estate in Nairobi was tried and convicted for the murder of Jesse Mbugua Karanja, the caretaker, and fellow resident at the estate.[43]

According to the court record, the accused TIMOTHY KIBOGA CHOCHI was a tenant at a building in Pipeline Estate Nairobi wherein the deceased was employed and working as a caretaker. On the fateful day, the deceased JESSE MBUGUA KARANJA was at the said building wherein he was living on ground floor while the accused was living on the fourth floor. Both the accused and the deceased lived there with their families. On the 28th day of November 2011, the accused was having a drink at a nearby pub when he decided to go back to the flat known as 'EMMAUS' plot so as to answer the call of nature only to find the toilet locked. Since the bathroom was open and not able to control the urge, the accused decided to relieve himself at the bathroom. This act did not please the wife of the deceased, who reported to him the action of the accused, and as any loving husband and being the caretaker of the flat, he confronted the accused and a quarrel ensued therefrom leading to the death of the deceased, [and] the subsequent arrest and charge of the accused. The accused was therefore charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, He pleaded not guilty to the said charges and on 19th March 2013.

41 P Brooks & P Gewirtz, *Law's Stories: Narrative and Rhetoric in the Law*, (1996) New Haven, Conn.: Yale University Press.
42 Ibid.
43 *High Court of Kenya Criminal Case* Republic v Timothy Kiboga Chochi [2018] eKLR this would citation in a legal journal

This is a case that shows how the court attends to one narrative out of many. The narrative of the court is to establish the facts, as the court would countenance them, with the goal of arriving at a sentence. It was a straightforward case – all the prosecution witnesses were credible – they did not contradict each other, the eyewitness testimonies were unanimous. The record of the court shows the facts of interest for its purposes. A quarrel that turned into a fight between Jesse Mbugua Karanja, the caretaker of the estate, and Timothy Kiboga Chochi, a resident of the estate, because the latter urinated in the wrong place – the bathing place and not the toilet. It was of interest to the court that no trespass law had been broken. It was Jesse's responsibility to maintain the upkeep of the estate so he was doing the right thing to demand an explanation from Timothy, the resident. Irritated, Timothy answered 'that since he pays rent he had a right to urinate anywhere in the building', which of course was a lie and a thinly veiled disrespect of the caretaker. How things are said counts and the statement could be said in any number of ways depending on the intended meaning. What we read in the court document only shows the situation escalated into more word exchanges and a fist-fight. Putting aside what rental rights mean with regards to the use of facilities and the alternatives at one's disposal should the facilities be inaccessible, it is clear that cities and dwellings within them are sites at which micro issues of environmental governance are encountered in the vernacular is spoken is, but the language in which the courtroom operates is different.

Adams Kwaba Osongo, a security guard, heard the commotion and responded and went and separated them at about 8:00 pm, and each went to his apartment. About 15 minutes later, Timothy accompanied by his wife and child, returned with a knife and stabbed Jesse. Adams again heard noise and responded, only to find Jesse stabbed and Timothy trying to escape from the scene, throwing down the knife as he ran, but was arrested by some guards. Jesse was taken to Kenyatta National Hospital and Timothy was arrested. The testimonies of the eyewitnesses, the medical examiner and the police were consistent. The storyline of how Jesse died having been established, it placed the onus on the court to determine whether or not there were extenuating circumstances. It was established that Timothy was not intoxicated beyond the level of sobriety and command of his surroundings given that he had walked a distance of 200 meters from the bar to the Emmaus building to access the toilet. Provocation was pleaded as a defence for the accused to the Court of Appeal in *VMK v Republic* [2015] eKLR, stating that Timothy stabbed Jesse only once.[44] The very rapid progression of acts from peeing to a fatal stab wound was of key interest to the court as eyewitness accounts in the court record reveal. This is the point at which it is worthwhile to contrast perspectives with the language from law perspective and a law from language perspective. Looking at language from law, the court operates on the basis of communication that the individuals concerned understand and can speak Kiswahili or English, otherwise adequate translation must be provided.

The court needed to establish the cause of death, whether it was caused by an unlawful act of omission or commission on the part of the accused, and whether the said unlawful act was premeditated (that is caused by malice aforethought). The the statutory defence of "provocation" pleaded by the defendant was dismissed. The court found that malicious intent was proven as:

> The evidence tendered before the court is that the accused, having urinated in the common bathroom was confronted by the deceased and a quarrel ensued, which [de]

44 *VMK v Republic* [2015] eKLR See: http://kenyalaw.org/caselaw/cases/view/149665/

> generated into a fight and the accused and the deceased were separated only for the accused to go for a knife at his house. He came back to the house of the deceased where he stabbed him and according to PW1, the accused later on threw down the said knife and attempted to run away from the scene.

Looking beyond the court, one will countenance the lingual-cultural considerations surrounding the story. What does it take to provoke? How come that on a case in which the exchange of words in the confrontation are neither mentioned nor the meanings of provocation entertained? This is because the court seeks a translation that aims at communication. Could one poke holes by introducing the language question into what appears to be an airtight case?

A search through the KenyaLaw.org database reveals that language is most often cited as a ground for appeal in an appellate court when the accused alleges that they could not follow the proceedings. For the case in reference here, it is not whether the accused understood the proceedings but rather what transpired and the linguistic exchanges in the storm of events that took place.

The issue here is to note additional facts that are not in the court record. The names of the accused, the deceased and the witnesses, suggest that there are several languages and cultural backgrounds at play, which is typical of Nairobi. Since a court proceeding is called a hearing, the point here is to reflect on what being heard entails, the judge hears and the litigants are heard. The cultural backgrounds of provocation may not be uniform. What language did the accused, Kiboga Chochi (Chochi is Gusii pronunciation of 'George'), and deceased Mbugua Karanja (typical Gikuyu name) speak? The possibilities lay in five likely languages that were in play during that altercation that culminated in a fatality with Kiswahili, Gikuyu, Ekegusii, English and Sheng. The net effect is that multiple translations simultaneous, parallel, and contingent are operative in the altercation at issue. The hearing in the courtroom proceeds in Kiswahili and English and the record is kept in English. Yet there are ethnic, gender, and cultural sub-narratives that are at the core of the case. There is a polysemy of vocalities that need to be looked into in terms of meaning and communication. The adage that people may not remember what is said but they never forget how it made them feel[45] is appropriate here. What provocations were in the words used? It is recorded that Jesse said that Timothy stabbed him. What words did he use, what language? Is provocation gendered? How did Milka Wambui Kamau (the wife of the deceased), the woman who tried to stop Timothy from urinating in the shower, sound to Timothy and to her husband Jesse? Does it provoke them both? What does it mean when a wife reports to her husband that she has been ignored and disrespected? Is the husband required to be a hero and to stand up for his wife? Does the wife expect/demand it? How exactly was this statement rendered: 'I pay rent, therefore, I have a right to urinate anywhere in the building'?. The statement is absurd there are no such rights. It is disrespectful, demeaning to the wife of the custodian and the custodian himself. Was it accompanied with curses and derogatory language and name-calling? Is it a translation of what was said into English or was indeed English the language used? Environmental legal narratives emerge out of a coalescence of ethnic, gender and cultural sub-narratives, which are at a much higher and macro level.[46] There is, therefore, a surface meaning

45 The saying that people 'may forget what you said, but they will never forget how you made them feel' is often attributed to Maya Angelou but it appears earlier in a quote book by Richard L. Evans (1971: 244) ascribed to Carl W. Buehner, who was a high-level official in The Church of Jesus Christ of Latter-Day Saints. See: https://quoteinvestigator.com/tag/carl-w-buehner/

46 This point is suggested by a reviewer of this chapter and raises the issue of language as a loaded weapon going back to the Dwight

and a deep meaning in what transpired in the case in reference here. How was it received by the deceased's wife, and how did Jesse, her husband, take it? Was he demeaned as the "cleaner of toilets?" It is often taken as grossly offensive for one man to be rude to another man's wife. And when the wife reported the incident to her husband, Jesse, the latter was compelled to act. Was Jesse's masculinity and that of Timothy, the accused, in question due to those bystanders at the scene? In what languages and dialects was the verbiage? By hearing what was said, the court has what was said, how it was said, how it made those concerned feel, as part of the accused and the aggrieved's day in court. What was said, how it was said tied to the actions that followed, is a critical part of environmental legal narratives. Culture is a lens to meaning and language is an instrument of thought and therefore of law.

The other side of the preceding discussion has to do with environmental governance and the enforcement of property rights rules: why was Milka adamant in stopping the man from urinating in the shower, failure to which she called her husband? Why did she not call the watchman? The Emmaus plot, a building in Pipeline Estate in the Nairobi County of Kenya, represents modernity and its conscriptions. In some parts of Nairobi, what constitutes a personal and private space is fluid, such that the parameters of trespassing are hard to establish. Peeing is one of the most unremarked non-public acts done outside, often in broad daylight. Living in congested spaces brings with it a reformulation of what privacy means. The court record says that the accused fetched a knife and came back accompanied by his child and his wife. He stabbed the deceased in plain view of his child. It is this point that I find most puzzling about Timothy Kiboga Chochi. How does one read this act? What was it meant to accomplish? Or did his wife and child merely follow him and witnessed something they shouldn't have?

The point here is that language is often taken to be a translation problem. The court record does not mention what languages were spoken or even enquire after words used in the altercation. The only mention of language on the court's part would have been just to enquire whether the accused understood what was said in court. Missing in the court record of the hearing and the sentencing is what meanings were relayed, deduced, and constructed in the sequence of events that led to a fatality.

The court did establish (a) the fact and the cause of death of the deceased, and (b) that the said death was caused by an unlawful act of omission or commission on the part of the accused person. On the issue of provocation, it is difficult to establish without the actual linguistic exchanges traded (c) that the said unlawful act of omission or commission was caused by malice aforethought. It is difficult to establish that what was said to cause provocation could dissipate in a matter of minutes without hearing the language used and considering the atmosphere it elicits. Also, with regard to the other two yardsticks one subjective, the other objective: On the 'subjective' condition that the accused was actually provoked so as to lose his self control it is not clear without the linguistic exchanges in play being considered on their cultural merits. Similarly, for the 'objective' condition that a reasonable man would have been so provoked – it requires there to be a definition of what 'a reasonable man' entails.

Bolinger (1980) book of the same name. To be effective as a weapon, language delivers precise blows through cultural meaning and understandings.

E. Conclusion

The stories considered in this paper are about environmental socio-cultural linguistics connecting environmental knowledge, the emergence of environmental governance captured in Swahili, the culture and language with a millennia-long headstart, in dealings with garbage and the toilet. What is the problem in environmental law and governance for which linguistics is vital? Is language consideration vital to finding a solution to environmental problems? Since language is an instrument of thought and thinking is the process of using one's mind to consider or reason about something to have rational judgment, express ideas, beliefs, to be intelligent and intelligible, not focusing on the language of the local is to fail to focus on thought. I have argued above that the thinking and the understanding of the environment, the needs that stimulate concepts and the concepts that result in action, the assessment and the thinking and actions that follow involve much more than translation, with the impetus to communicate outcomes. Policy statements are outcomes with the published culminations of documents for formal vertical use and are monolingual (often in English and less often in Kiswahili). Outcomes are often translations bent on finding equivalences of words matching the thoughts that underlie the horizontal experience that is usually non-formal processual and multilingual.

This chapter has argued that language matters in environmental discourse, not merely in authored formal documents but in the processes of practice. Language is both a critical source of environmental knowledge and a terminus of knowledge in which the WH-questions (who, what, how, when, where and why) postulated and addressed are constantly being reworked and improved.[47] Told that environmental law is the law of environmental problems whose mandate is to "regulate the impact of human activities on the environment" so that humans can live within the carrying capacity of the earth,[48] one should be able infer the importance of language. That is not enough, however, since it seldom happens and even when it does, language is reduced to a communication issue and therefore a translation problem whose general product is to divorce outcomes from the processes that produce them.

To return to the quote that headlines this paper, 'if "knowing a place" is both a prerequisite for proper maintenance of it and for developing ways of talking about it', then knowing a place includes language proficiency in the vernacular tongue of a cultural landscape, which constitutes the eyes to see with, the mind with which to observe, the lens with which to apprehend and also evaluate concepts with which the environment is represented and interpreted. The example of Mount Kenya's vertical meaning (just naming a landscape) versus horizontal meaning (language of a place), language grows as it develops ways of talking about its environment, how the people have observed it, in a detailed way, is related to the way of maintaining it and relaying environmental knowledge of content and its maintenance for generations.[49] Mount Kenya as the name of a landscape of touristic interest and a country with a plethora of cultural meanings while *Kirinyagaa*, *Kirenyaa*, and *Kiinyaa* is the living and breathing horizontal meaning imbued with cultural meanings constructed through social engagement. The word 'Kenya', other than its mispronunciation, just names a landscape that represents thought in geographical global terms,

47 J Lave & E Wenger, *Situated Learning: Legitimate Peripheral Participation*. (2018) Cambridge: Cambridge University Press

48 *E Fisher, Environmental* Law: A Very Short Introduction. (2017) Oxford, United Kingdom: Oxford University Press.

49 Skutnabb-Kangas, Tove. *Linguistic genocide in education - or worldwide diversity and human rights?* (2000:94). Mahwah, NJ: L. Erlbaum Associates.

while the local *Kirinyagaa*, *Kirenyaa*, and *Kiinyaa* represent thought with latitude in the local. This chapter notes that what is required is to give visibility to language not by merely editing the 2013 National Environmental Policy (NEP) of Kenya and the Environmental Law in Kenya's Constitution of 2010 so as to include language but to do adequate observation, description and explanation[50] of the language factor in environmental governance going beyond translation to thought and concept mapping exploration.

50 Noam Chomsky, Observational, descriptive, and explanatory adequacies (1964).

CHAPTER 3

Constitutional Foundations of Environmental Law in Kenya

Collins Odote

A. Introduction

The gravity of the environmental crisis at once brings the question into the domain of political arrangements, and of the constitutional order, which exists to validate and regulate those arrangements.[1] However, despite this accepted reality in any country, Kenya's Constitution before 2010 did not include a constitutional basis for environmental management. Instead, environmental rights and duties were anchored on a framework law, the Environmental Management and Coordination Act.[2] This position has, however, changed.

When Kenya voted to adopt a new Constitution on August 4, 2010, it gave constitutional recognition to environmental management.[3] The Constitution has detailed provisions capturing various substantive and procedural matters necessary for sustainable management of the environment, including, the right to a clean and healthy environment, the principle of sustainable development and provisions on access to environmental justice. A constitutional status to the human right to a clean and healthy environment had been indirectly drawn when, in 2006, the High Court found in *Peter K Waweru v Republic*[4] case, that the human right to life is expressly co-dependent on a clean and healthy environment. The recognition of the right to a clean and healthy environment as being encapsulated in the right to life was restated by the High Court in the case of *Charles Lekuyen Nabori & 9 Others v Attorney General & 3 Others*[5] brought by a community in Baringo against the introduction of *Prosopis juliflora* into their locality. Two out of the three judges on the constitutional Bench adopted the reasoning in the *Waweru* case, with judge Rawal explicitly quoting it and holding that the 'right to life does include a clean and healthy environment which guarantees the full enjoyment of natural resources of the nation and earth.'[6] On her part, Judge Ang'awa quipped that she would '[i]nterpret the "right to life" using a broad meaning in this case that includes the right to be free from any kind of detrimental harm to human health, wealth and or socio-economic well-being.'[7]

The critical issue that arises from the foregoing cases, decided before the adoption of the 2010 Constitution, was the failure to implement the decisions and the impact this has on the rule of law, especially within the context of the discussions on environmental rule of law. When courts make progressive and far-sighted decisions as they did in both the *Waweru* and *Lekuyen* cases, the failure by the executive to implement those decisions entrenches a culture of disobedience

1 JB Ojwang, 'The Constitutional Basis for Environmental Management', in C Juma and JB Ojwang, *In Land We Trust: Environment, Private Property and Constitutional Change* (Acts Press, Nairobi, 1996) pages 39-60 at 49

2 Act Number 6 of 1999

3 C., Odote "Kenya: Constitutional Provisions on the Environment" 2012(1) *IUCN Academy of Environmental Law E-Journal,* 136145 at 136

4 (2006)eKLR

5 (2008)eKLR

6 Ibid, Per Rawal, J.

7 Ibid, Per Ang'awa, J.

of court orders and compromises the rule of law. In the *Lekuyen* case, the community had to go back to court in 2014, close to seven years after the judgment issued in their favour, seeking to have the Attorney General and the Cabinet Secretary for Environment and Natural Resources cited for contempt for not implementing the judgment of the court that required the government to appoint a technical committee to quantify the loss that the community had suffered; and to recommend appropriate compensation. Although the court did not cite them for contempt, it required that they appear before it to show cause.[8] The failure to implement the judgment continues to date, however.

Against the foregoing background, this chapter explores the importance of including provisions on the environment in the Constitution of Kenya. It makes the argument that as the overarching legal instrument in a country, constitutionalisation of environmental management signals the prioritization of environmental issues in a country's political and legal order. However, the inclusion of environmental provisions in the Constitution and in statutes alone does not necessarily translate to improved environmental management. As Carl Bruch et al, have noted, 'Constitutional provisions offer broad and powerful tools for protecting the environment, but to date, those tools have gone largely underutilized in Africa.'[9]

The central argument in the chapter is that the Constitution adopted in August 2010 provides a sound basis for environmental governance in Kenya. However, the levels of change in the state of the environment will be determined by fidelity to the constitutional provisions on the environment and the laws enacted to act as the superstructure to aid the governance process. The chapter, therefore, moves beyond a discussion of the rationale of the constitutional foundations for environmental law to assessing the implementation of these constitutional provisions.

In doing so, it explores several interrelated issues. First, is the substantive content and importance of the provisions of the Constitution dealing with environmental management. This is undertaken from a historical basis by tracing how the proposals were canvassed during the constitution making process, based on a presentation made to the Constitution of Kenya Review Commission by the 'father of environmental law in Africa',[10] Professor Charles Okidi.[11] A comparison is made between what was proposed and what found its way into the current Constitution.

Second, the chapter discusses various options and tools available in Kenya for implementing the constitutional provisions. Third, the chapter discusses the role of courts in enforcing the right to a clean and healthy environment and the implication this has for the rule of law and promotion of sustainable development. Using the decisions in the *Waweru, Mohammed Ali Baadi v Attorney General*[12] and the *LAPPSET* cases, the chapter argues that Kenya is making slow and steady progress in implementing the constitutional provisions on environmental governance. However, translating court decisions into tangible outcomes through full implementation remains a thorny

8 *Charles Lekuyen Nabori & 9 Others v Attorney General & 3 Others [2016] eKLR*

9 Environmental law Institute and United Nations Environment Programme, *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa* (2nd Edition, Washington, 2007) page vii.

10 For a discussion of Professor Okidi as the father of environmental law, see generally, PK Mbote and C Odote, *Blazing the Trail: Professor Charles Okidi's Enduring Legacy in the Development of Environmental Law* (School of Law, University of Nairobi, 2019).

11 CO Okidi, *Environment, Natural Resources and Sustainable Development in Kenya's Constitution Making* (Institute for Law and Environmental Governance and Kenya Land Alliance, 2003).

12 *Mohamed Ali Baadi and Others v Attorney General & 11 Others [2018] eKLR*

issue affecting full realization of the constitutional dividends of environmental governance. In addition, the High Court continues to treat the Environmental and Land Court as an inferior sibling in the process of enforcing the right to a clean and healthy environment in Kenya, despite constitutional provisions that its status is equal to that of the High Court. In concluding, the chapter re-affirms that faithful implementation of the constitutional provisions on environment is critical for environmental conservation and meeting the country's international commitments under the Sustainable Development Goals (SDGs)[13] agenda.

The chapter is structured into six sections. Following this introduction, the second section discusses the importance of making environmental management a constitutional issue. This is followed by a highlight of the law and practice of environmental management before the adoption of the 2010 Constitution to demonstrate the practical challenges the lack of constitutional protection resulted in and developments to fill the gap. This provides a backdrop for the assessment of the environmental provisions in the 2010 Constitution, which is undertaken in the fourth section. Thereafter, the fifth section discusses the efficacy of tools that have been used to implement the provisions of the Constitution on environment, while the sixth section offers conclusions.

B. Rationale for constitutionalizing environmental management

Society faces myriad environmental challenges, including pollution, biodiversity loss and climate change[14] with some local; others global.[15] Dealing with these challenges requires the application of several tools, of which the law is an important option. At the national level, determining what legal options to deploy depends on a State's assessment of the nature of the environmental threats it faces, its priorities, and the desired outcomes. Some nations place environmental protection at the highest level, securing it within a national constitution, while others relegate it to the statutory level.[16]

The constitution of any country is the principal governance tool. Environmental issues did not, however, feature in constitutions until only recently. Instead, the traditional focus in constitutions was the exercise of and constraints over political power. The limitations of political power regulation in this traditional sense became evident over time because of the linkages between political governance and environmental management, especially for African countries. This led to the recognition that promoting environmental management through constitutions

13 UN, *Transforming Our World: The 2030 Agenda for Sustainable Development,* A/RES/70/1https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E. (Accessed on 5/5/2020.)

14 UN Environment, *Global Environment Outlook, GEO-6: Healthy Planet, Healthy People* (Cambridge University Press, 2019). Available at https://wedocs.unep.org/bitstream/handle/20.500.11822/27539/GEO6_2019.pdf?sequence=1&isAllowed=y (accessed on 5/5/2020).

15 For a discussion of global environmental challenges, see generally: Pal Wapner, 'On the Global Dimension of Environmental Challenges' 13(2) *Politics and the Life Sciences* 173-181(Aug, 1994); Mark Stafford Smith 'Responding to Global Environmental Change' in Gabriele Bammer (ed) *Combining Analytic Approaches with Street Wisdom,* (ANU Press, 2015) 29-42; Ann R Kipzig, *et al* 'Social Norms and Global Environmental Challenges: The Complex Interaction of Behaviours, Values and Policy' 63(3) *Bioscience* (March, 2013) 164-175; and Oliver C Ruppel, 'Intersections of Law and Cooperative Global Climate Governance: Challenges in the Anthropecene' in Oliver C Ruppel, Christian Roschmann and Katharina Ruppel-Shlichting (eds) *Climate Change: International Law and Global Governance Vol II: Policy, Diplomacy and Governance in a Changing Environment* (Nomos,2013) 35-99

16 Kyle Bruns, 'Constitutions & the Environment: Comparative Approaches to Environmental Protection and the Struggle to Translate Rights into Enforcement' *Vermont Journal of Environmental Law (2017).* Available at http://vjel.vermontlaw.edu/constitutionsenvironment-comparative-approaches-environmental-protection-struggle-translate-rights-enforcement/.

was both necessary as an end and as a means to improving political governance. Writing in 1999[17], Okoth-Ogendo and Godber Tumushabe argued that the recognition of the importance of the environment and natural resources in national socio-economic and political structures[18] was resulting in 'environmental considerations being integrated into national constitutions'.[19] They further pointed out that, as a consequence, 'developing countries, many of them in Africa, have begun to explore and examine constitutional underpinnings of environmental change and management.'[20] This was a departure from the hitherto obtaining approach, which was marked by non-recognition or at best implicit or incidental treatment of environment and natural resource management issues.

By including environmental provisions in the Constitution, a country signals that environmental issues are high on its political agenda and will receive priority treatment. A constitution is a social charter that citizens make among themselves so as to guide the relationships among themselves and with their leaders, and hence demonstrates how the society is to be governed and providing broad guidance for addressing fundamental aspects of that society. It is thus a social contract between citizens and their governors, deriving from the social contract theory[21] developed by early philosophers, namely Thomas Hobbes, John Locke and Jean-Jacques Rousseau, who stated that the basis of government and political obligation is the agreement by citizens who form the society, a contract so to speak. The Constitution thus represents the primary obligations of the State and the public institutions and constitutes the basic organizational norm of the public domain.[22]

There is a second important reason for including environmental management prerequisites in the constitution. A constitution details the rights of citizens. By guaranteeing the rights of citizens, it limits the discretionary power of government.[23] The focus of most constitutions was originally on rights that were traditionally categorized as civil and political rights, as opposed to social, economic and cultural rights,[24] where the right to a clean and healthy environment falls.

Its inclusion in the Constitution has been slow in coming. By focusing on it as part of the Bill of Rights, a country demonstrates that it views the environment and its sound management as critical to the realization of the fundamental rights of human beings. The inclusion of the right within the Bill of Rights is not a guarantee for sustainable management of the environment, though. Despite this, doing so gives greater impetus to conservation efforts in the country by elevating environmental conservation not just to constitutional status but placing it within the framework of fundamental rights. As Christina Simeone has argued:

> It is important to understand that environmental rights are not a cure-all for the gamut of environmental problems. They should be looked at as an approach to solving environmental problems by strengthening existing regulations, spurring the creation of new regulations, signaling national commitment to environmental ideals, and enhancing the probability of success of positive environmental outcomes. This can be understood by realizing that successful outcomes in human or nonhuman environmental concerns depend on the political, legal, and economic resources available to humans championing the case. Environmental rights will serve as a considerable tool for humans to use.[17]

17 C. Simeone, 'The Necessity and Possibilities of Constitutional Environmental Rights' (2006), *Masters of Environmental Studies*, Capstone Project 7, University of Pennsylvania. Available at https://repository.upenn.edu/cgi/viewcontent.cgi?article=1006&context=mes_capstones.

Various scholars have written on the rationale for constitutionalizing environmental rights and environmental management more broadly.[18] The importance of their work is evidenced by the increase in the number of countries that have included environmental issues in their constitutions. From the situation in 1972 during the Stockholm UN Conference on the Human Environment,[19] when no country had environmental rights in its constitution with only a handful of constitutions, including Italy, Madagascar, Kuwait, Malta, Guatemala, Switzerland, United Arab Emirates and Panama imposing modest environmental responsibilities,[20] the progress has been steady, with 147 out of 193 countries having explicit reference to environmental rights in their constitution by 2012.[29] The consequence is that 'most of the world's people live under constitutions that protect the environment'.[21] The countries are also spread across all the regions of the world, leading one scholar to conclude that 'More and more constitutions around the world from Bangladesh to Bolivia, and from the Philippines to the countries of the EU are explicitly protecting environmental rights and the values of a clean and healthy environment.'[31] The main reasons that emerge from the literature for constitutionalizing environmental management include stronger laws,[22] increased enforcement,[23] enhanced role for citizens,[24] improved environmental performance[35] to defensively protect against actions that violate citizens' constitutional rights,[25] and affirmatively to compel the government to ensure certain constitutional rights.[37]

In essence, therefore, there are many justifications for including the right to a clean and healthy environment in constitutions. The overriding consideration, however, remains the place of the constitution in the country's legal order. As the fundamental law of the land in any country, inclusion of a provision in it is a demonstration of the political and legal priority that the issue receives in the country. As Boyd aptly states:

> A constitution is the supreme or the highest law of any nation, meaning all other laws must be consistent with it. It establishes the rules that guide and constrain government powers, defines the relationships between institutions, and protects individual rights.[26]

18 D.R. Boyd, *The Right to A Healthy Environment: Revitalising Canada's Constitution* (UBC Press, 2012) page 12. Available at https://www.ubcpress.ca/asset/9095/1/9780774824125.pdf.; C. Simeone, "The Necessity and Possibilities of Constitutional Environmental Rights"(2006), *Masters of Environmental Studies*, Capstone Project 7, University of Pennsylvania. Available at https://repository.upenn.edu/cgi/viewcontent.cgi?article=1006&context=mes_capstones; Environmental law Institute and United Nations Environment Programme, *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa* (2nd Edition, Washington, 2007); JB Ojwang, 'The Constitutional Basis for Environmental Management', in C Juma and JB Ojwang *In Land We Trust: Environment, Private Property and Constitutional Change* (Acts Press, Nairobi, 1996) pages 39-60.

19 See https://sustainabledevelopment.un.org/milestones/humanenvironment. (Accessed on 5/5/2020). For a report of the conference, see A/CONF.48/14/Rev.1. available at https://www.un.org/ga/search/view_doc.asp?symbol=A/CONF.48/14/REV.1&Lang=E. (accessed on 5/5/2020)

20 D.R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment (*University of British Columbia Press, 2012) 47. 29 Ibid.

21 E Daly, 'Constitutional Protection for Environmental Rights: The Benefits of Environmental Process' 17(2) *International Journal of Peace Studies,* Winter 2012, 71-80 at 71. 31 Ibid.

22 D.R. Boyd, *The Right to a Healthy Environment: Revitalising Canada's Constitution*(UBC Press, 2012) page 12. Available at https://www.ubcpress.ca/asset/9095/1/9780774824125.pdf.

23 Ibid.

24 Ibid. 35 Ibid.

25 Environmental law Institute and United Nations Environment Programme, *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa* (2nd Edition, Washington, 2007), 1. 37 Ibid.

26 D.R. Boyd, *The Right to A Healthy Environment: Revitalising Canada's Constitution* (UBC Press, 2012) page 3. Available at https://www.ubcpress.ca/asset/9095/1/9780774824125.pdf.

C. Environmental rights and protection in Kenya before the 2010 Constitution

Policy and legal foundations

Kenya's legal and policy framework for the protection of the environment before 1999 was scattered and uncoordinated. Most of the statutes were sectoral and dealt with fisheries, water, forestry or wildlife or functional like public health, shipping or chief's authority.[27] In addition, the laws largely took a command and control approach, focusing solely on making environmental degradation illegal and thus criminal. This approach, over time, became unsuitable for modern environmental management. While successive national development plans had provisions on the environment,[40] the lack of a comprehensive national environment policy till 2014 limited coordinated government policy direction on environmental management in Kenya.

Because of the disparate legal and policy foundations, the Common Law provided a very useful base for environmental management. Common Law is a source of law in Kenya by virtue of the Judicature Act,[28] which makes the Common Law in force in England as at August 12, 1897, (also called the reception clause) applicable in Kenya. The Common Law of England originated from ancient English customs and was developed by the judges on the principle of judicial precedent. [42] The Common Law filled some of the legislative gaps in environmental management in Kenya. There are four major juridical formulations of the Common Law on environmental problems: nuisance, trespass, negligence and strict liability,[29] also called the rule in *Rylands v Fletcher.*[30] Nuisance refers to situations where one seeks remedies for interference with the quiet enjoyment and use of their land. Nuisance is the cause of action that those harmed by environmental degradation have asserted as a basis of recovery for the longest time and with the greatest frequency.[31] The interference requirement limits the availability of the course of action to occupiers of land.[32] While this was a limit for private nuisance, public nuisance was limited by the requirement of *locus standi* (the right to be bring an action to court), with courts requiring that one proves sufficient interest, over and above everybody else's,[33] which would still boil down to ownership of the land.

While nuisance was the area of Common Law most directly connected to environmental management,[34] trespass, negligence and strict liability, too, had some application, albeit with limitations. Trespass, for example, was limited by the fact that its focus was on landowners as opposed to environmental interests in land,[35] while *Rylands v Fletcher* was limited to someone bringing something to the land, which is not always the case in environmental degradation.

27 C.O. Okidi and PK Mbote, *The Making of A Framework Environmental Law in Kenya*(ACTS and UNEP, 2001) p 32. 40 Ibid, page 17-23.

28 Chapter 8, Laws of Kenya. 42 Okidi, note 39 at page 25.

29 Okidi, note 39 at page 26.

30 CO Okidi, et al, (eds), *Environmental Governance in Kenya: Implementing the Framework Law* (East African Educational Publishers, Nairobi, 2008).

31 Okidi, note 39 at page 27.

32 Patricia Kameri Mbote and Collins Odote, 'Kenya' in R. Lord, *et al, Climate Change Liability: Transnational Law and Practice* (Cambridge University Press, 2012) 296-319 at 313.

33 *Wangari Maathai v Kenya Times Media Trust, HCCC 5403 of 1989.*

34 Supra to Kameri-Mbote and Odote, note 46.

35 A. Mumma, 'The Continuing Relevance of Common Law in Sustainable Development' in in CO Okidi,*et al, (eds), Environmental Governance in Kenya: Implementing the Framework Law* (East African Educational Publishers, Nairobi, 2008) 90-109 at 94 50 Supra, note 39 at page 30.

Negligence, on the other hand, would be limited by the requirement to demonstrate the existence of a duty of care on the part of the person being accused of causing the violation.

Constitution before 2010

The importance of including environmental provisions in the Constitution has already been demonstrated in this chapter. As Okidi and Mbote noted when writing about the Kenyan Constitution before 2010:

> [M]ost national constitutions, including Kenya's, make provisions on what are often referred to as fundamental rights and freedoms of the individual. The direct implication is that those are the rights that an individual may not be denied either through legislation or through government-agency action.[50]

Unfortunately, Kenya's Constitution did not have provisions on the environment,[36] signaling that it was not a priority political issue. A book on the framework environmental law,[37] published in 2008, did not consequently include a chapter discussing constitutional foundations of environmental law.

The lack of direct provisions on the environment, negatively impacted on the management of the environment and the jurisprudence emerging from the courts, which largely dismissed environmental cases based on technicalities on the spurious basis that public spirited individuals who sought to protect the environment by filing cases before court, lacked *locus standi* to do so.[38]

The only constitutional provisions that were tangentially relevant to environment management were those relating to property,[39] arbitrary search,[40] and life.[41] Property rights under the old Constitution were not comprehensively dealt with. Section 75 protected property rights from arbitrary deprivation. The provision recognized that the State could deprive one of the rights to property using the power of compulsory acquisition. Property, in such circumstances, could be acquired if, 'the taking possession of or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote the public benefit."[42] This provision could be used to ensure that property rights can be limited or extinguished in the interests of environmental conservation. However, public purposes and interests in the context of that Constitution, which would justify exercising the power of eminent domain, were largely viewed within the lens of social and economic development. This conclusion was supported by Bhalla, who opined that:

36 C.O. Okidi, 'Concept, Structure and Function of Environmental Law', in CO Okidi, *et al, (eds), Environmental Governance in Kenya: Implementing the Framework Law*(East African Educational Publishers, Nairobi, 2008) 3-60 at 18; and Patricia KameriMbote and Collins Odote, 'Kenya' in R Lord, et al, *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press, 2012) 296-319 at 309.

37 In C.O. Okidi, *et al, (eds), Environmental Governance in Kenya: Implementing the Framework Law* (East African Educational Publishers, Nairobi, 2008

38 MO Makoloo, BO Ochieng and C Odote Oloo, *Public Interest Litigation in Kenya, Prospects and Challenges, (*ILEG, Nairobi, 2007).

39 Constitution of Kenya (2008), (repealed) Section 75. Available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/Constitution%20of%20Kenya%20(Repealed).pdf.

40 Ibid, Section 76

41 Ibid, section 73.

42 Supra, note 54, Section 75(1)(a).

Although the Constitution does provide for the acquisition of private property, under the concept of eminent domain, this opening is narrow, and the legal system remains essentially restrictive, in relation to broad-based environmental goals. One way forward is to define public interest to include environmental conservation.[43]

The second incidental provision was that dealing with protection against arbitrary search and entry. This provision sought to protect people's property and bodies. The protection of property derived from the right to property and the need for securing the enjoyment of that right. By arbitrarily searching one's property or premises, the State would be interfering with their proprietary rights. However, just like in Section 75 of the repealed Constitution, there existed an exception under which the search could be carried out. This was in instances where it was 'reasonably required in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development and utilization of mineral resources, or the development or utilization of any other property in such a manner as to promote the public benefit.'[59] The provision would be applicable in environmental instances, for example, where one keeps containers suspected to contain hazardous wastes in his compound or house.[44] The provision was also useful as it provided for the limitation of the right to the extent reasonably necessary to ensure the promotion of the rights and freedoms of others.[45] Unfortunately, there was no express provision for the right to a clean and healthy environment. All that one had was the Right to Life, which courts in other jurisdictions, like the Supreme Court of Pakistan, had interpreted to include the right to a clean and healthy environment.[46]

While both provisions discussed before are of environmental significance, they are restrictive in scope and, as residual constitutional provisions, do not offer sufficient environmental protection.[47]

D. The Environmental Management and Coordination Act

Before 1999, Kenya did not have a single comprehensive environmental legislation.[48] By the time Kenya enacted the 1999 law, there had been a move towards adopting framework environmental laws across the world, with Libya, Algeria, Senegal and Tanzania being the first countries to do so in Africa.[49] Kenya's framework law, the Environmental Management and Coordination Act[66] (EMCA) was enacted after a lengthy process.[50] The main highlights of that process were the work of the Kenya Law Reform Commission, which resulted in the development of a National

43 RS Bhalla, 'Property Rights, Public Interest and the Environment' in C Juma and JB Ojwang, *In Land We Trust: Environment, Private Property and Constitutional Change* (Initiative Publishers and Zed Books, Nairobi and London, 1996) 61-81 at 79. 59 Supra, note 54, Section 76(2)(a).

44 Supra, note 39 at page 31.

45 Supra, note 54, Section 76(2) (b).

46 *Sheila Zia and Others v Wapda* PLD 994 SC 693.

47 Supra, note 52 at page 13.

48 AN Angwenyi, 'An Overview of the Environmental Management and Coordination Act" In C.O. Okidi, et al, (eds), *Environmental Governance in Kenya: Implementing the Framework Law* (East African Educational Publishers, Nairobi, 2008) 142-182 at 142.

49 For a discussion of the evolution of framework environmental laws see CO Okidi, 'Background to Kenya's Framework Environmental Law', in CO Okidi, et al, (eds), *Environmental Governance in Kenya: Implementing the Framework Law* (East African Educational Publishers, Nairobi, 2008) 126-141 at page 128 66 Act Number 8 of 1999.

50 For a discussion of the history of the process leading to the enactment, see generally, CO Okidi, 'Background to Kenya's Framework Environmental Law', in CO Okidi, et al, (eds), *Environmental Governance in Kenya: Implementing the Framework Law* (East African Educational Publishers, Nairobi, 2008) 126-141. 68 Ibid, page 130.

Environment Bill in 1993.[68] The Bill, however, only focused on issues of air quality.[51] This draft was forwarded to and formed part of the background material for a Committee of Experts appointed by the Attorney General to develop a Framework Environmental Law.[52] Additionally, the Attorney General formed a taskforce to reform penal laws and procedures, one of whose committees was focusing on environmental offences.[53] This committee on environmental offences expanded its work to include preparing a draft framework environmental law.[54] Lastly, was the process of preparing a National Environmental Action Plan between 1993 and 1994, which also recommended the necessity for a framework environmental law.[73] These processes resulted in the development of the Bill that was eventually discussed by stakeholders, debated in Parliament, and passed into law in 1999.

The EMCA was enacted to 'provide an appropriate legal and institutional framework for the management of the environment.'[55] It is based on the recognition that improved coordination of diverse sectoral initiatives can deliver better management of the environment.[75] The EMCA had several innovations. First, is its framework approach. It sought to be the overarching law in matters environment, an issue that was underscored by the inclusion of Section 148 of the Act, which provided that:

> Any written law by the national and county governments relating to the management of the environment in force immediately before the commencement of this Act shall have effect, subject to such modifications as may be necessary to give effect to this Act, and where the provisions of such law are in conflict with any provisions of this Act, the provisions of this Act shall prevail.[56]

The drafters of the EMCA made an attempt to preserve its pride of place as the preeminent legislation on the environment.[57] The foregoing provision was changed in 2015 to align it with the 2010 Constitution by including reference to county laws too.

The second innovation relates to the institutional architecture under EMCA. At the centre of the coordination mechanism of the EMCA, is the National Environment Management Authority (NEMA). Established under EMCA,[78] NEMA is required to "exercise general supervision and coordination over all matters relating to the environment and to be the principal instrument of the government in the implementation of all policies relating to the environment.'[58] NEMA was established when there existed several government agencies with a legal mandate over various aspects of environmental management. The law did not intend that NEMA would replace these bodies. Instead, it was to coordinate and harmonize their functions, hence the reference to these bodies as lead agencies, meaning they were to take lead in their sectoral spaces.

Third, the law changed the philosophy on environmental management. Hitherto, the existing legislations were generally punitive in nature, dealing largely with detrimental effects to the

51 Ibid.
52 Ibid.
53 Ibid.
54 Ibid. 73 Ibid.
55 The Environmental Management and Coordination Act, Act Number 8 of 1999. 75 Supra, note 64 at page 143.
56 Supra, note 74 at Section 148.
57 M Akech, 'Governing Water and Sanitation in Kenya', in CO Okidi, et al, (eds), *Environmental Governance in Kenya: Implementing the Framework Law* (East African Educational Publishers, Nairobi, 2008) 305-334 at 320 78 Supra, note 74, section 7.
58 Supra, note 74, Section 9(1).

environment by fixing criminal penalties and liability.[59] The EMCA, on its part, focuses more on management of the environment and not just punishment. To this end, it uses both carrots and sticks, through its reliance on the traditional criminal law, and use of fiscal incentives, provisions on environmental easements and environmental conservation orders to elicit positive actions.

Fourth, the law includes the right to a clean environment, and guiding principles to guide courts in making decisions relating to violation of this right.[60] This right was a precursor to the provision in Article 42 in the 2010 Constitution. It helped to signal the country's changed philosophy on protection of environmental rights, despite the concern about whether a statute could create a human right that is not recognized in the Constitution.

Lastly, there are numerous instruments that the law creates for managing the environment. These focus on environmental impact assessment, audit and monitoring.

The National Environment Policy

When Kenya adopted a framework environmental law, it did not adopt an accompanying overarching policy. From independence, environmental matters had been included as a chapter in successive five-year national development plans. However, following the conclusion of the United Nations Conference on Environment and Development[61] held in Rio de Janeiro, which called for national action on environmental management, Kenya commenced the process of developing a National Environmental Action Plan.[62] This process ended in 1994 and recommended the development of a national policy. The policy process culminated in the development of Sessional Paper No. 6 of 1999 on Environment and Development.[84] However, it is doubtful whether the policy was eventually adopted. While the current National Environment Policy seems to suggest so, the fact that in 2006 a process to develop a National Environment Policy was initiated without any reference to the 1999 draft raises doubts. What is not in doubt, however, is that the policy was never implemented.

In 2014, following an extensive consultation process, the National Environment Policy was adopted. The policy seeks to provide an integrated approach to planning and sustainable management of Kenya's environment and natural resources.[63] The policy underscores the principle role that constitutional provisions play in ensuring sustainable management of the environment, rationalizing its adoption to the need for alignment to the constitutional imperatives.[64] In addition, it called for review and harmonization of the EMCA and sectoral laws and policies so as to align their provisions with those of the Constitution. [65]

Select case law

Before the 2010 Constitution, cases on environment had mixed approaches. While after the adoption of the EMCA, the courts started focusing much more on protecting the environment,

59 Supra, note 74, at page 143.
60 Supra, note 74, Section 3.
61 https://sustainabledevelopment.un.org/milestones/unced. (Accessed on 7/5/2020)
62 Republic of Kenya, *National Environment Policy(2013 or 2014????)* Page 1. 84 Ibid.
63 Ibid, page 8.
64 Supra, note 84.
65 Ibid, page 45.

there were instances where their approach was still restrictive and against environmental protection.[66] However, the overall trend was in favour of granting citizens' rights to ventilate environmental issues.[67] One of the earliest cases that demonstrated the court's contribution and appreciation of the changed landscape in favour of environmental management related to the discovery of Titanium in the current Kwale County.

In the case of *Rodgers Muema Nzioka and Others v Tiomin Kenya Limited,*[68] residents of Kwale, where Titanium had been discovered, sued Tiomin who were a subsidiary of a Canadian company. Tiomin had been granted a licence by the Kenyan government to prospect for and eventually mine titanium in the area. The residents' court case revolved around low compensation for their land, and the risk of environmental and health impacts of the proposed activities. The court granted an injunction against the prospecting and mining activities on the basis that the action complained about infringed Section 3(1) of the EMCA, which guaranteed the right to a clean and healthy environment.

The second decision remains the hallmark of environmental jurisprudence from the courts before the 2010 Constitution. The case of *Peter K. Waweru v Republic*,[91] arose from a criminal charge against Peter Waweru and others for offences under the Public Health Act,[69] arising from their action of discharging raw sewage into a public water source and into the environment.

The action resulted from the construction of septic tanks by Waweru and others who were plot owners in Kiserian in Kajiado.

The applicants filed a constitutional reference challenging the constitutionality of the charges against them based on discrimination since out of over 100 owners, only 23 had been charged in court. The court eventually agreed with them and issued orders quashing the charges. However, the case is more celebrated for the findings made on environmental issues, which the court dealt with without any supporting submissions from the parties. The court took the view that promoting sustainable development was an important function of the Judiciary and as such, they were under an obligation to deal with environmental aspects of the case.

In the court's view, the actions complained about were affecting the right to a clean and healthy environment and went against the principles encapsulated in Section 3 of the EMCA. The court was not limited by the lack of a provision dealing with environment as a right in the Constitution at that time. In the court's judgment, the right to life was enough basis for it to make findings on the impact of the polluting activities on the right to life. The judges argued that:

> Under Section 71 of the Constitution, all persons are entitled to the right to life - In our view the right of life is not just a matter of keeping body and soul together because in this modern age that right could be threatened by many things including the environment. The right to a clean environment is primary to all creatures, including man; it is inherent from the act of creation, the recent restatement in the Statutes and the Constitutions of the world notwithstanding.[70]

66 Supra, note 53, page 34.
67 Ibid, page 36.
68 HCCC Mombasa, Number 97 of 2001. Available at http://kenyalaw.org/caselaw/cases/view/1357/. 91 (2006)eKLR.
69 Chapter 242, Laws of Kenya.
70 Supra, note 91.

E. 2010 Constitution and the right to a clean and healthy environment

The constitutional signal

Kenya's 2010 Constitution is transformative in many respects. As the first Chief Justice of Kenya appointed under the 2010 Constitution aptly remarked in describing that transformative aspect:

> In their wisdom the Kenyan people decreed that past to reflect a status quo that was unacceptable and unsustainable through: reconstitution or reconfiguration of a Kenyan State from its former vertical, imperial, authoritative, non-accountable content under the former Constitution to a State that is accountable, horizontal, decentralized, democratized, and responsive to the vision of the Constitution; a vision of nationhood premised on national unity and political integration, while respecting diversity; provisions on the democratization and decentralization of the Executive; devolution; the strengthening of institutions; the creation of institutions that provide democratic checks and balances; decreeing values in the public service; giving ultimate authority to the people of Kenya that they delegate to institutions that must serve them and not enslave them; prioritizing integrity in public leadership; a modern Bill of Rights that provides for economic, social and cultural rights to reinforce the political and civil rights giving the whole gamut of human rights the power to radically mitigate the status quo and signal the creation of a human rights State and society in Kenya; mitigating the status quo in land that has been the country's Achilles heel in its economic and democratic development, among others, reflect the will and deep commitment of Kenyans for fundamental and radical changes through the implementation of the Constitution. The Kenyan people chose the route of transformation and not the one of revolution.71

As is evident from this quotation, the transformation affected all aspects of the governance framework of the country, including environmental governance. The Constitution did not just include the right to a clean and healthy environment in the Bill of Rights;72 it has elaborate provisions on environmental governance,73 resulting in the Constitution being aptly described as a 'green Constitution'.74 The Preamble to the Constitution sets the tone for this green focus when it stipulates that in adopting and enacting the 2010 Constitution, the people of Kenya, were 'respectful of the environment, which is our heritage, and determined to sustain it for the benefit of future generations.'75

This section addresses several critical aspects of the Constitution, including the provisions on sustainable development, the right to a clean and healthy environment, *locus standi,* devolution, land use regulation and natural resource contracts.

71 Willy Mutunga, 'The 2010 Constitution and its Interpretations: Reflections from the Supreme Court', Distinguished Lecture, University of Fort Hare, October 16, 2014, published in Vol 1(2015) *SPECJU* 6. Available at http://www.saflii.org/za/journals/SPECJU/2015/6.html.

72 Article 42, Laws of Kenya.

73 See, Collins Odote, 'Kenya's Constitutional Provisions on the Environment' 1 *IUCN Academy of Environmental Law*, 136-145.

74 DW Kaniaru, 'Environmental Courts and Tribunals: The Case of Kenya' 29 *Pace Environmental Law Review* 566-581, at 581.

75 Constitution of Kenya, 2010, Preamble.

Sustainable development

The quest for development is often pitted against the environment. This is particularly so in developing countries, such as Kenya, where development is predicated on the use of the environment and natural resources. The need to reconcile these two seemingly contradictory pursuits led to the evolution of the concept of sustainable development. Originally conceptualized by the Brundtland Commission as development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs,[76] the concept has evolved over the years[77] to a situation where it is central to global discourse.[78]

Despite its universal acceptance, the legal content of sustainable development continued to be contested until the adoption of the Sustainable Development Goals in 2015.[79] The SDGs seek to ensure that poverty is eradicated in the world by 2030 and that environmental degradation is halted.[80] In addition, it targets prosperity in harmony with nature, fostering peace and partnership.[81]

Achieving sustainable development is a constitutional commitment, which has been included as part of the national values and principles of governance.[82] The Constitution requires that every person in Kenya be they a private individual, a State officer, a public officer or a State organ applying or interpreting the Constitution; enacting, applying or interpreting law; or making or implementing public policy decisions be guided by the principle of sustainable development.

By thus entrenching sustainable development, the Constitution has elevated environmental considerations into all developmental decisions that take place in the country. It is important that both environmental and developmental pursuits be integrated. Failure to do so will lead to a violation of the constitutional principle of sustainable development. Several laws passed after the 2010 Constitution, including those dealing with water,[83] forests[84] and wildlife[85] include the principle of sustainable development as part of their guiding principles, demonstrating the importance of the constitutional guarantee.

The right to a clean and healthy environment

The evolution of the right to a clean and healthy environment within the human rights lexicon provided an important response to the mounting environmental challenges of the 20th Century.[109] While there was initial debate about whether the right to a clean and healthy environment is

76 WCED, *Our Common Future*, *The Report of the World Commission on Environment and Development* (New York, Oxford University Press, 1987, 44

77 For a discussion of its evolution, see BJ Preston, 'The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific', 9(2&3) *Asia pacific Journal of Environmental Law* 109-212(2005).

78 Collins Odote, 'The Role of the Environment and Land Court in Governing Natural Resources in Kenya' in PK Mbote, *et al, Law Environment Africa: Publication of the 5th Symposium and 4th Scientific Conference 2018 of the Association of Environmental Law Lecturers from African Universities in Cooperation with the Climate Policy and Energy Security Programme of the Sub-Saharan Africa of the Konrad-Adenauer Stiftung and UN Environment,* (Nomos, 2019) 335-55 at 336.

79 United Nations General Assembly, *Transforming our World: The 2030 Agenda for Sustainable,* A/RES/70/1, available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (accessed 5/8/2019).

80 Ibid.

81 Ibid.

82 Constitution of Kenya, 2010. Article 10(2)(d).

83 Water Act, Act No. 43 of 2016.

84 Forest Conservation and Management Act, Act No. 34 of 2016.

85 Wildlife Conservation and Management Act, Act No. 47 of 2013. 109 Supra, note 28 at page 1.

a human right,[86] it is now clear that the right is part of the human rights lexicon.[87] From its first mention in the Stockholm Declaration in 1972,[88] to the Rio Declaration,[89] to its explicit stipulation in the first human rights instrument in Article 24 of the African Charter on Human and Peoples' Rights,[90] the right to a clean and healthy environment is now part of international human framework.[115]

The impetus for international recognition of the Human Rights to A Clean and Healthy Environment commenced with the appointment of a special Rapporteur on Human Rights and the Environment by the Human Rights Council in 2012.[91] In 2018, the first special rapporteur John Knox in collaboration with his successor David Boyd presented in a report to the Council urged for international recognition of the human rights to a clean and healthy environment[92] and also presented a set of global principles on the issue as part of that report.[93] The intention of elaborating the principles was to "spur international consciousness and action with a view to eventual recognition and adoption of a global instrument explicitly providing for the human right to a clean and healthy environment."[94] This call was carried forward by the Second Rapporteur, David Boyd, emphasizing the linkages between human rights and the environment and the urgency of global action to recognize the right to a clean and healthy environment.[95]

The first formal global recognition of the right occurred in November 2021, when the UN Human Rights Council, following a resolution proposed by Costa Rica, the Maldives, Morocco, Slovenia, and Switzerland. [96] The council adopted the Resolution, recognizing " the right to a clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights." Further the resolution noted that "the right to a clean, healthy and sustainable environment is related to other rights and existing international law"[97] and affirmed that " the promotion of the human right to a clean, healthy and sustainable environment requires the full implementation of the multilateral environmental agreements under the principles of international environmental law."[98] The Council then called upon the UN General Assembly to consider the matter.

86 See LE Rodrigues-Rivera, 'Is the Human Right to Environment Recognized Under International Law? Well it Depends on the Source' 12 *Colorado Journal of International Law and Policy* (2001) 1-45.

87 S Kravchenko, 'Environmental Rights in International Law: Explicitly Recognized or Creatively Interpreted' 7(2) *Florida A & M University Law Review* 163-180.

88 Stockholm Declaration on the Human Environment, in *Report of the United Nations Conference on the Human Environment*, UN Doc. A/CONF.48/14, at 2 and Corr.1 (1972). Available at http://webarchive.loc.gov/all/20150314024203/http%3A//www.unep. org/Documents.Multilingual/Default.asp?documentid%3D97%26articleid%3D1503(Accessed on 7/5/2020)

89 Rio Declaration on Environment and Development, A/CONF.151/26 (Vol. I). Available at https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf (Accessed on 7/5/2020).

90 Available at https://www.achpr.org/legalinstruments/detail?id=49 (Accessed on 7/5/2020). 115 Supra note 111, p 165-8,

91 Human Rights Council, Report of the Human Rights Council on its Nineteenth Session, A/HRC/19/2, https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/19/2.

92 UNGA, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, UN/ A/73/188, https://undocs.org/Home/Mobile?FinalSymbol=A%2F73%2F188&Language=E&DeviceType=Desktop&LangRequested=False

93 A/HRC/37/59

94 C. Odote, "Human-Rights Approach to Environmental Protection: Kenyan. South African and Nigerian Constitutional Architecture and Experience," In M Addaney and A.O Jegede(Eds), *Human Rights and Environment Under African Union Law, Palgrave Macmillan Publishers, 2020* 381- 414 at 387

95 Ibid

96 Resolution 48/13: The human right to a clean, healthy and sustainable environment, adopted by the Human Rights Council on 8 October, 2021. https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/289/50/PDF/G2128950.pdf?OpenElement.

97 Ibid.

98 Ibid.

Pursuant to above call, the UN General Assembly on 28th July 2022 passed a resolution along the same lines as the Human Rights Council, thus recognising at the international level, the right to a clean, healthy and sustainable environment.[99] The international recognition while historic, called for national action to ensure the realization of the right. The UN High Commissioner for Human Rights, Michelle Bachele in a statement celebrating the UNGA decision, pointed out " Today is a historic moment, but simply affirming our right to a healthy environment is not enough. The General Assembly resolution is very clear: States must implement their international commitments and scale up their efforts to realize it. We will all suffer much worse effects from environmental crises, if we do not work together to collectively avert them now."[100]

The above international recognition gives impetus to national action including constitutional provisions on the right to a clean and healthy environment. It also underscores the farsightedness of the Kenyan Constitution adopted in 2010 Constitution, which included this right under the Bill of Rights. The Constitution provides that:

> 'Every person has the right to a clean and healthy environment, which includes the right—
>
> a. to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and
>
> b. to have obligations relating to the environment fulfilled under Article 70.[101]

These provisions confirm the twin focus of the right to a clean environment, both the positive right, which is for present and future generations, and the negative element, which is an obligation to ensure the right is respected and promoted.

As part of the right to a clean and healthy environment, the State has several obligations that it is required to fulfil. These include duties to:

i. Ensure sustainable exploitation, utilization and management of environment and natural resources;

ii. Ensure equitable sharing of benefits arising from the utilization of environment and natural resources;

iii. Achieve and maintain a tree cover of 10 per cent of land area in Kenya;

iv. Protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;

v. Encourage public participation in the management, protection and conservation of the environment;

vi. Protect genetic resources and biological diversity;

99 UNGA Resolution, *The Human Right to a Clean, Healthy and Sustainable Environment,* A/Res/76/300. Available at https://digitallibrary.un.org/record/3983329?ln=en.

100 https://www.un.org/africarenewal/magazine/july-2022/un-general-assembly-declares-access-clean-and-healthy-environment-universal-human.

101 Constitution of Kenya, Article 42.

vii. Establish systems of environmental impact assessment, environmental audit and monitoring of the environment;

viii. Eliminate processes and activities that are likely to endanger the environment; and

ix. Utilize the environment and natural resources for the benefit of the people of Kenya.[102]

Realizing the right to a clean and healthy environment is not a responsibility of the State alone. All people in Kenya share in delivering an environment of good health and quality. This is the rationale for including obligations on the part of people as part of Article 42. In a similar vein, the Constitution requires everybody to 'cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.'[103][118] The upshot of the foregoing is that in addition to being entitled to live in and enjoy the benefit of a clean environment, citizens are also required to work with and support State agencies to ensure that the environment is clean and that the obligations relating to sustainable management of the environment and natural resources are achieved.

Locus standi

Environmental matters are largely public in nature. While every individual has the right to a clean and healthy environment, the environment is a shared resource. Consequently, protecting the environment has traditionally relied on the work of public-spirited individuals, who employ public interest litigation. Such litigation focuses on matters of broad public interest, and on social justice causes.[104] It is a conception of litigation that is closely intertwined with the notion of *locus standi*.[105] *Locus standi* is about the right that someone must have to bring a matter to court. Kenya's Court of Appeal defined the term to mean 'a right to appear in Court and, conversely, as is stated in Jowitt's Dictionary of English Law, to say that a person has no *locus standi* means that he has no right to appear or be heard in such and such a proceeding.'[106]

Traditionally *locus standi in* environmental cases was limited to those who had suffered more harm than other members of society.[122] This position was articulated in the English case of *Gouriet v Union of Post Office Workers,*[107] and cited with approval in the Kenyan case by Nobel laureate Prof Wangari Maathai against Nairobi City Council.[108] The court argued that only the Attorney General had the right to sue on behalf of the public. While the Environmental Management and Coordination Act included provisions granting citizens the right to sue in case of complaints about violations of environmental rights, a constitutional provision was still considered necessary.[109]

102 Constitution of Kenya, Article 69(1).
103 Ibid, Article 69(2).
104 GP Tumwine-Mukubwa, 'Public Interest Litigation and Public interest Law: The Role of the Judiciary' in PM Walubiri (ed), *Uganda: Constitutionalism at Crossroads,* (Uganda Law watch, Kampala, 1998) p.99; J. Oloka-Onyango, 'Human Rights and Public Interest Litigation in East Africa: A Birds Eye View' 47 *George Washington International Law Review* 763-823 at 763; MO Makoloo, BO Ochieng and C Oloo Odote, Supra, note 53 at page 15.
105 Supra, note 53 at page 15.
106 *Alfred Njau & 5 others v City Council of Nairobi 1983(eKLR)* 122 Supra, note 53, at page 26.
107 (1978) AC 435.
108 *Wangari Maathai and 2 Others v City Council of Nairobi and 2 Others, HCC No 72 of 1994.*
109 Supra, note 53 at page 40.

The Constitution expands *locus standi* in cases of violations of rights under the Bill of Rights to persons whose rights have been violated, a person acting on behalf of another person who cannot act in their own name, one acting on behalf of a group or class of persons, and a person acting in the public interest.[110] The last provision caters for those who seek to enforce rights on behalf of the public and would cater for public interest environmental litigation. However, because of the intractable nature of *locus standi* in environmental cases, the Constitution contains a standalone provision relaxing standing in environmental cases.[111] The Constitution provides that anyone bringing an action seeking to enforce Article 42 on a clean and healthy environment 'does not have to demonstrate that any person has incurred loss or suffered injury'.[112]

Devolution

The adoption of devolution as part of the 2010 Constitution transformed the way the country was governed in several fundamental respects. With devolution, the exercise of power and authority with a view to ensuring that delivery of essential services to the citizens, moved from being centralized to action at both the national and county levels.[113] Out of the recognition that the environment is interconnected, the Constitution makes the management of the environment and natural resources a shared function of national and county governments. In that shared space, the national government has the overall responsibility for 'protection of the environment and natural resources with a view to establishing a durable and sustainable system of development, including, in particular fishing, hunting and gathering; protection of animals and wildlife; water protection, securing sufficient residual water, hydraulic engineering and the safety of dams, and energy policy.'[114] County governments, on the other hand, are responsible for 'implementation of specific national government policies on natural resources and environmental conservation, including soil and water conservation; and forestry.'[115] Other environment-related functions include water and sanitation services;[116] and solid waste management.[117]

Sustainable management of the environment is a cooperative process that requires the involvement of all actors.[118] Consequently, collaboration between the two levels of government is necessary for the realization of the constitutional imperative of sustainability. National and county governments must ensure that the laws and policies that they put in place for the natural resource sector are in line with the Constitution and the spirit of devolution. Once those laws are enacted, they should be implemented timeously and faithfully, including through allocation of sufficient budgetary resources for environmental conservation.

In an assessment of the national and county laws and policies in the environment and natural resource sector undertaken with special focus on water, mining and forestry, it was found that there was lack of compliance with the letter and spirit of the Constitution and respect for

110 Constitution of Kenya, 2010, Article 22.
111 Ibid, Article 70.
112 Ibid.
113 Collins Odote, 'Audit of National and County Policy and Law for Natural Resource Management Sector (Water, Mining and Forestry)' Unpublished report prepared for Council of Governors and Kenya Law Reform Commission (2018) (on file with author).
114 Constitution of Kenya, Fourth Schedule, Part 1 (22).
115 Constitution of Kenya, Fourth Schedule, Part 2 (10).
116 Ibid, Part2 (11).
117 Ibid, Part 2(2).
118 Principle 10, Rio Declaration on Environment and Development, 1992.

devolution.[119] Of the three sectors, the Forest Act is the most compliant, while the Water Act is the one that departs most substantially from constitutional dictates.[120] In addition, the laws creating various regional development authorities, which are established along river basins, should be repealed for being unconstitutional.[121]

Land use regulation

While land is a fundamental part of Kenya's socio-economic development and politics, it is only after the adoption of the 2010 Constitution that land received comprehensive constitutional treatment. However, before 2010 the land question was focused on tenure and its resolution as the sole property rights questions. While questions of land tenure are important, from an environmental perspective, land use concerns are more germane to sustainability discourse. As Paul Farmer, Executive Director of the American Planning Association, wrote in the foreword to a book on land use, in using land 'we also abuse land and, in so doing, create problems for other individuals, society and future generations.'[122] As a consequence, as some scholars have argued, '(g)overnments, communities, and indeed all stakeholders are being forced to recognize the importance of not only rationalizing the use to which land is put, but more importantly ensuring that land and resources are stewarded ecologically for future generations.'[123]

Unfortunately, Kenya's undue focus on tenure at the expense of land use resulted in environmental degradation. As Smokin Wanjala aptly stated, '(b)ecause of the overemphasis placed by the law (including the Constitution) on land tenure, the government policy has paid lip service to the broader environmental question, which comes into play as a result of land use activities.'[124]

The 2010 Constitution places a premium on the nexus between land and the environment. First, the issues are dealt with in the same Chapter 5 of the Constitution. Second, the Constitution details the principles to govern the management of land, including conservation.[125] This involves sound conservation and conservation of ecologically sensitive areas.[126] In addition, the Constitution captures the State's regulatory powers over land use, otherwise referred to as development control or police power.[127] This power can be used to enhance environmental conservation. This will ensure that as property rights holders and others use land, they consider and adhere to ecological imperatives.

Natural resource contracts

How contracts over natural resources are dealt with can result in either sustainability or conflicts. There are many instances where resource-based contracts are negotiated in secrecy

119 Supra, note 131.
120 Council of Governors and Kenya Law Reform Commission, *Report on Audit of National and County Policy and Legislation* (COG and KLRC, 2018) page 356.
121 Ibid.
122 JR Nolon, *Land Use in A Nutshell, (*Thomson, 2006) page v.
123 This argument is made by Nathalie Chalifour, Patricia Kameri-Mbote, Lin Heng Lye, John Nolon and Charles Odidi Okidi in the introductory chapter to the book they edited on land use, N.J Chalifour, *et al, Land Use Law for Sustainable Development*, (Cambridge University Press, 2007) page 1.
124 S Wanjala, 'Recurrent Themes in Kenya's Land Reform Discourse Since Independence' in SC Wanjala (ed), *Essays on Land Law: The Reform Debate* (School of Law, University of Nairobi, 2000).
125 Constitution of Kenya, 2010, Article 60(1).
126 Ibid, Article 60(1)(d).
127 Constitution of Kenya, 2010, Article 66.

and without considering the interests of local communities. This led to the famous Ogoni conflicts with Shell Company in Nigeria and resulted in the death of Ken Saro-Wiwa.[128]

Prof Okidi recommended that to mitigate these challenges, and based on case studies from several countries in Africa, it was imperative that such contracts be subjected to debate, scrutiny and ratification by the legislature in addition to approval by the executive.[129] Before such ratification by the legislature, he suggested that a report should be presented to Parliament detailing eight key issues, including industrial development plan, socio-economic plan, revenue management plan, resettlement plan, environmental impact assessment, environmental management plan, and capacity development plan.[146] He then suggested that 'the conditions should be entrenched in national constitutions to give them an overarching and general application over all natural resources.'[130] He had made similar submissions to the constitution review process in early 2002. At the time, he had stated as follows:

> We propose an agreement that the change in paradigm be considered to its conclusion, complemented by a Constitutional regime, which compels change of conduct. It is submitted that the natural resources and environment be vested in the people of Kenya. Secondly, we submit that the trustee be Parliament as the institution comprised of the elected representatives of the people of Kenya, rather than government.[131]Further he suggested that Parliament be provided with specific conditions to consider and that ratification only follow the fulfillment of the stipulated conditions.[132] In the end, while the provisions were not captured in the Constitution, the requirement for parliamentary ratification for certain classes of transactions was included in the Constitution.[133] The details of the classes of transactions subject to parliamentary ratification and the procedure for such ratification are then dealt with in the Natural Resources (Classes of Transactions Subject to Ratification) Act.[134]

E. Relationship between High Court and ELC

Judiciaries world over balance the interests of society with economic development, environmental sustainability, and the competing interests of persons and entities.[135] By so doing, they provide help in implementing sustainable development.[136] Kenya's judiciary has had a mixed history with issues of environment: before the 2010 Constitution, its approach was largely antienvironment. However, starting with the adoption of the EMCA in 1999, efforts were made to change the focus of the judiciary to one that was more supportive of sustainable development. Concerted

128 See Joya Uraizee, 'Combating Ecological Terror: Ken Saro-Wiwa's "Genocide in Nigeria"' in 44(2) *The Journal of the Midwest Modern Language Association, (Fall 2011), pp. 75-91.* See also Roy Dolon, Toyin Falola and Laura Seay, 'The Complex Life and Death of Ken Saro-Wiwa' *Washington Post*, (July, 29, 2016). Available at https://www.washingtonpost.com/news/monkeycage/wp/2016/07/29/the-complex-life-death-of-ken-saro-wiwa/. (accessed on 7/5/2020)/

129 CO Okidi, 'How Constitutional Entrenchment Could Mitigate Conflicts and Poverty in Resource-rich African Countries', 37(2&3) *Environmental Policy and Law*, 158-169(2007) at 163. 146 Ibid, at 164.

130 Ibid, at 167.

131 Supra, note 11 p. 25.

132 Ibid.

133 Constitution of Kenya, 2010, Article 71.

134 Act Number 41 of 2016.

135 P Kameri-Mbote & C Odote 'Courts as Champions of Sustainable Development: Lessons from East Africa' (2009-2010) 10(1) Fall, *Sustainable Development Law and Policy* 31-38 at 83-84.

136 Supra, note 101 at page 337.

efforts commenced by the work of UNEP in fulfilment of the declaration at the Global Judges Symposium in 2002 gained momentum through a series of Judicial colloquia organized on environmental law by the Institute of Law and Environmental Governance in partnership with the National Environmental Management Authority and the University of Nairobi.[137] These efforts led to the Chief Justice establishing a division of the High Court to deal with land and environment maters.[138]

When the 2010 Constitution was adopted, Kenya followed in the footsteps of several other countries and created a specialized court to deal with environmental matters.[139] The court is established 'with the status of the High Court to hear and determine disputes relating to the environment and use and occupation of, and title to, land.'[140] The creation of the court as a specialized forum for resolving environmental disputes was to enhance the delivery of justice by ensuring efficiency, focus on technical issues and improving the quality of jurisprudence. While there are already some signals of its utility, there is need to improve both the quantity and quality of jurisprudence emanating from the court.[141]

A fundamental issue that continues to linger relates to that of jurisdictional demarcation between the High Court and the Environment and Land Court as regards environmental matters. It was not until the Supreme Court decision in *Republic v Karisa Chengo and Others*[142] that the issue of jurisdiction in environmental matters was settled in favour of the Environment and Land Court. The supreme court pointed out that the jurisdiction of the two courts was different, with the ELC being a 'special cadre of courts with *sui generis* jurisdiction'[160] and that jurisdiction as the court stated is limited to the matters provided for in their enabling statute, which for the ELC is the Environment and Land Court Act. Consequently, the High Court is restricted from hearing and determining environment and land matters, since the Constitution clearly provides that the 'High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of courts contemplated in Article 162(2).'[143]

The lingering question that remains relates to mixed cases, that is, those that raise both environmental and other issues. Which between the High Court and the Environment and Land Court should deal with such cases? The issue came up before a five-judge bench of the High Court in the case of *Mohamed Ali Baadi and Others v Attorney General and Others,*[144] a case that revolved around a challenge by members of a local community in Lamu regarding the Lamu Port South Sudan Ethiopia Transport Corridor (LAPSSET) project.

The court was asked to address the question of jurisdiction of the High Court Bench to handle the dispute, considering the provisions of Article 162 and 165(5)(b) of the Constitution. The court held that the decision of the Supreme Court in the *Karisa Chengo*[145] case did not deal with

137 Ibid, page 341.
138 Ibid.
139 For an assessment of the Environment and Land Court, see, Odote, supra, note 87; C Odote, 'The New Environment and Land Court' 4 *IUCN Academy of Environmental Law Journal* (2013) 171-177.
140 Constitution of Kenya, 2010, Article 162(2)(b).
141 Supra, note 101 at page 353.
142 Supreme Court Petition No. 5 of 2015. 160 Ibid.
143 Constitution of Kenya, Article 165(5)(b).
144 HC at Nairobi, Petition Number 20 of 2012.
145 Supra, note 161.

the jurisdictional issue in 'controversies in hybrid cases'.[146] The court cited the jurisprudence from the courts in Kenya that the critical determination in cases that involve environment and other matters is the predominant purpose case. This test was discussed in the case of *Suzanne Butler and 4 Others v Redhill Investments & Another:*

> When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.
>
> The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse. Ordinarily, the pleadings give the Court enough glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue.[147]

Based on the above judgment, the High Court in the *Baadi Ali* case held that it had jurisdiction since the case raised a hybrid of pertinent constitutional issues.[166] This decision by the High Court is disturbing since it continues past attempts to treat the Environment and Land Court as inferior to the High Court, which is an incorrect interpretation of the Constitution. In any case, the main right that is in dispute in that case is the right to a clean and healthy environment. It seems escapist for the court to argue that:

> [V]iolation of rights to a clean and healthy environment can easily lead to the violation of other rights in the Bill of Rights such as the right to life. Yet, the determination of violations or threats of violation of any rights in the Bill of Rights undoubtedly falls within the province of this Court.[148]

At the very least, this is a case where a mixed Bench would suffice so that the Judge with jurisdiction deals with environmental matters, while the other rights are dealt with by the High Court. But if one were to apply the predominant purpose test, then the above quotation by the High Court itself would demonstrate that the predominant purpose of the case is to resolve the question of the right to a clean and healthy environment in addition to the related procedural rights of access to information, public participation and access to justice.

146 Ibid.
147 *Suzanne Butler and 4 Others v Redhill Investments & Another,* 2017 eKLR. 166 Supra, note 164.
148 Ibid

F. Tools for implementing constitutional provisions on the environment

While the inclusion of environmental provisions is recognition of the citizens' right to an environment that nurtures life and provides for human activities,[149] it takes more than constitutional recognition to guarantee the enjoyment of environmental rights. What is necessary is the translation of those constitutional provisions into tangible results for the citizens. Implementation will require that the procedural environmental rights of access to information, public participation and access to justice are given meaning.

Access to information

Access to environmental information will enable citizens to be aware of decisions and programmes taking place in the country, and which affect the environment and their environmental rights. Without information, citizens will be ignorant and unable to be informed and to engage meaningfully in such processes and programmes. Access to information is a constitutional right,[150] thus making it an important aspect of democratic governance in Kenya.[151]

Enabling the public to have access to environmental information is a key tool to empowering them to contribute to the sustainable management of the environment and realization of environmental rights. It is also an international commitment, which the Rio Declaration on Environment and Development has included as part of procedural rights for ensuring sound governance of the environment.

One of the earliest decided cases after the adoption of the 2010 Constitution, which demonstrates the place of access to information in the constitutional implementation architecture on the environment, involved a Kenya civil society group seeking to obtain from the government information relating to a power purchase agreement with the Ethiopian Government from Gibe III dam project.[152] The court found in favour of the group, *Friends of Lake Turkana,* affirming that access to information was a constitutional right and thus they were entitled to the environmental information held by the Government of Kenya.

Amendments to the Environment Management and Coordination Act[153] in 2015[154] included a provision on access to environmental information[155] as a specific right, and complementary to the provisions of the Access to Information Act.[156]

Public participation

The second prerequisite for implementing the constitutional provisions on the environment and promoting environmental governance is public participation. The Constitution has woven public participation into the entire governance architecture of the country, demonstrating the

149 A Mwenda and TN Kibutu, 'Implications of the New Constitution on Environmental Management in Kenya' 8(1), *Law, Environment and Development Journal*¸ 76-88(2012) at 87.
150 Article 35, Constitution of Kenya, 2010.
151 Collins Odote, *Access to Information Law in Kenya: Rationale and Policy Framework* (International Commission of Jurists with ICJ-Kenya), 2015) p.10
152 *Friends of Lake Turkana Trust v Attorney General & 2 Others [2014] eKLR*
153 Act Number 8 of 1999.
154 Act Number 5 of 2015.
155 Supra, note 174 at Section 3A.
156 Act Number 31 of 2016.

recognition that democracy requires consent of the people being governed something that is best delivered not just through episodic elections but also regular and frequent consultations with citizens and incorporation of their views in decision-making. Public participation is included in Article 10 as a fundamental principle of governance and also dealt with in specific reference to environmental management. In the latter case, the Constitution requires the state to encourage public participation in the management, protection and conservation of the environment.[157]

These constitutional dictates are reinforced by the provisions of the Environment Management and Coordination Act[158] and the Environment and Land Court Act,[159] both of which require the Environment and Land Court to be guided by the requirements for public participation in development of policies, plans and processes for the management of the environment.[160]

Through mechanisms provided, for example, public consultation processes during the conduct of and decisions on whether to grant an environmental impact assessment licence for a proposed project, citizens will have their views heard and decisions makers can then consider these views. Such an approach ensures that the resulting decision is informed and has greater chances of being successful due to public support. Environmental assessments, audits and monitoring are, therefore, essential components of public participation tools that are necessary for the management of the environment.

The Constitution expressly requires the State to establish frameworks and measures for environmental assessments,[161] a recognition of their critical role in sustainable management of the environment. They serve not just as tools of public participation but also for balancing development and environmental prerequisites to ensure that not suffers thus giving meaning to the constitutional directive that the State must adhere to sustainable development in its governance processes.[162]

Access to justice

Access to justice is about fora that exist for those dissatisfied with any decision relating to the environment to seek redress. It is expected that the management of the environment will generate disputes. These disputes, unless addressed, have the potential of detracting from the quest for realization of sustainable development. Consequently, the mechanisms for dispute resolution become an important aspect of the promotion of sustainable development.[163] To ensure that these disputes are addressed in the Kenya context, the 2010 Constitution made access to justice a constitutional imperative, guaranteeing people access to courts in cases of environmental complaints[183] and guaranteeing that courts would serve substantive justice,

157 Article 69(1)(d), Constitution of Kenya, 2010.
158 Act Number 8 of 1999.
159 Act Number 19 of 2011.
160 Ibid, Section 18(1)(a)(i); and Supra, note 179, Section 3(5)(a).
161 Article 69(1)(f), Constitution of Kenya, 2010.
162 Article, 10(2)(d), Constitution of Kenya, 2010.
163 For a discussion of the role of courts and realization of sustainable development, see Collins Odote, 'The Role of the Environment and Land Court in Governing Natural Resources in Kenya', in Patricia Kameri-Mbote, *et al*, (Eds) *Law, Environment, Development* (Nomos, 2019) 335-356; Patricia Kameri-Mbote and Colins Odote, 'Courts as Champions of Sustainable Development: Lessons from East Africa' 10(1) *Sustainable Development Law and Policy* (2009-2010) 31-38 and 83-84; and BJ Preston, 'The Role of the Judiciary in Promoting Sustainable Development: Experience of Asia and Pacific' 9(2&3) *Asia Pacific Journal of Environmental Law* (2005) 109-212. 183 Article 70, Constitution of Kenya, 2010.

unhindered by procedural shackles.[164] Various justice mechanisms have been provided for in the Constitution, with the recognition that both formal and alterative justice systems must be pursued in environmental disputes. At the centre of the innovations under the 2010 Constitution, though, is the Environment and Land Court,[165] established as a specialized court having the status of a High Court with primary over environment cases so as to enhance access to environmental justice.

The performance of the Environment and Land Court,[166] the relaxation of the rules of *locus standi,* and the extent to which citizens take to public interest litigation become critical indicators for accessing the implementation of the constitutional provisions on the environment.[167]

Budgetary allocations

Effective implementation of the Constitution requires resources. One of the criticisms of the 2010 Constitution was the huge cost that implementing it would require due to, among other issues, the many layers of governance and leadership positions that it created. This has, however, not been borne out by evidence. A socio-economic audit of the implementation of the Constitution undertaken for the Budget and Appropriations Committee of the National Assembly between 2014 and 2016 concluded that while there was an increase in public expenditure, the same was not as a result of the implementation of the Constitution, but other factors including wastage.[168] Additional burdens brought about by the Constitution cannot, therefore, be a legitimate reason for not allocating sufficient resources to ensure that the environmental provisions are implemented.

Budget-making is both technical and political. The constitutional responsibility for approving budgets vests in Parliament. How much money is allocated to the environment sector to support management actions at both national and county level impacts on the extent to which sustainability goals will be pursued and realized. It is, therefore, necessary that yearly budgets prioritize environmental projects and actions to support the commitments made under the Constitution to 'sustain the environment for present and future generations'.[169]

G. Conclusion

Fifteen years after the publication of *Environmental Governance in Kenya: Implementing the Framework Law,*[170] the process of governing the environment in Kenya and dealing with the country's intractable environmental challenges is now fully anchored on a sound constitutional framework. Kenya's new constitutional dispensation is pointing to brighter prospects in the management of the environment.[171]

164 Article 159(2)(d), Constitution of Kenya, 2010.
165 Article 162(2) (a), Constitution of Kenya, 2010.
166 See Collins Odote, 'The Role of the Environment and Land Court in Governing Natural Resources in Kenya', in Patricia KameriMbote, et al, (eds) *Law, Environment, Development* (Nomos, 2019)335-356.
167 For a review of the state of public interest litigation in East Africa, see J Oloka-Onyango, 'Human Rights and Public Interest Litigation in East Africa: A Bird's Eye View' 47 *George Washington International Law Review* 763-823.
168 Republic of Kenya, *Report of the Working Group on the Socio-Economic Audit of the Constitution of Kenya, 2010(*Office of the Auditor General, September 2016).
169 Constitution of Kenya, 2010, Preamble.
170 CO Okidi, P Kameri-Mbote and M Akech, *Environmental Governance in Kenya: Implementing the Framework Law* (East African Educational Publishers, 2008).
171 Supra, note 3 at page 145.

While the existence of progressive provisions in the Constitution is a pointer to the positive path that Kenya seeks to chart, it is not constitutional provisions that are important but the inculcation of environmental constitutionalism.[172] This requires deliberate action to translate each of the environmental provisions in the Constitution into reality. It is only when those letters written in the Constitution deliver for the environment and for the people who live in Kenya that we will truly say that Kenya is making progress in environmental governance.

The Constitution provides broad outlines for promoting sound management of the environment. Its delivery will be supported by the quality of legislation that is enacted to implement its provisions. Unless the legislation enacted is faithful to the letter and spirit of the Constitution, and implemented effectively, delivering on the environmental promise of the 2010 Constitution will remain a mirage.

Sections of some laws, like those that sought to amend laws governing the security sector in order to respond to terrorist attacks in Kenya in 2014 have been struck down by the courts for going against the Constitution.[173] Similarly, concerns have been raised about the alignment of some laws in the environment sector to the prerequisites of the Constitution. For example, the Water Act, 2016, has been assessed and found to have failed to achieve its purpose[174] of 'regulation, management and development of water resources and water and sewerage services in line with the Constitution'.[195] Consequently, there in need to pay greater attention to the quality of laws and policies being rolled out to implement the Constitution so that they support, and not distract from, the promises of the 2010 Constitution

While Kenya has made important strides in its quest to deliver sustainable management of the environment through adoption of a truly green Constitution, living the constitutional dream must continue to be a daily exercise for both public and private actors in the republic. The Constitution has set the foundation for sustainability. Translating this into effective management, however, depends to a large extent on the superstructure erected over this foundation, which is about laws and policies and their implementation which is where the challenge still lies in moving forward.

172 For a discussion on constitutionalism in Kenya, see generally HWO Okoth-Ogendo, 'Constitutions without Constitutionalism: Reflections on An African Political Paradox', in D Greenberg, et al. *Constitutionalism and Democracy: Transitions in the Contemporary World*. (Oxford University Press, Oxford, 1993)

173 *Coalition for Reforms (CORD) & 2 Others v Republic of Kenya & 10 Others (2015) eKLR*

174 E Gachenga, 'Kenya's Water Act (2016): Real Devolution or Simply the "Same Script, Different Cast"' in PK Mbote, et al, Law *Environment Africa: Publication of the 5th Symposium and 4th Scientific Conference 2018 of the Association of Environmental Law Lecturers from African Universities in Cooperation with the Climate Policy and Energy Security Programme of the SubSaharan Africa of the Konrad-Adenauer Stiftung and UN Environment*, (Nomos, 2019) 429-452 at 429. 195 Section 3, Water Act (2016).

CHAPTER 4

The Environment and Land Court: Jurisdiction and Jurisprudence

Munyao Sila

A. Establishment and Jurisdiction of the Environment and Land Court

Establishment of the Environment and Land Court

The Constitution of Kenya established the Environment and Land Court (ELC) to hear disputes related to environment and land.[1] The ELC is one of the two courts with the status of the High Court that the 2010 Constitution created, the other being the Employment and Labour Relations Court (ELRC).[2] Before 2010, the court system comprised of The Magistrates' Courts and Tribunals as subordinate courts, the High Court being next in hierarchy, and the Court of Appeal being the apex court.[3]

This changed after the promulgation of a new Constitution in August 2010, which radically altered the structure of the court system. The Magistrates' courts together with the Kadhi Courts and Tribunals, comprise the subordinate courts.[4] The High Court was retained, but alongside the High Court, was created the ELC and ELRC, both having equal status with the High Court. The Court of Appeal was maintained, but not as the apex court, the apex court now being the Supreme Court.[5]

The elaborate jurisdiction of each court is outside the scope of this work, suffice to state that the High Court, the ELC and ELRC, being superior courts, have both original and appellate jurisdiction, the appellate jurisdiction being to hear appeals from decisions of the subordinate courts.[6] The Court of Appeal's jurisdiction is to hear appeals from decisions of the High Court and the Courts of equal status (ELC and ELRC).[7] The Supreme Court's main mandate is to hear appeals from decisions of the Court of Appeal but it also has limited original jurisdiction, which is to hear petitions arising out of presidential elections, and advisory jurisdiction over matters related to the County Governments.[8] An appeal to the Supreme Court is of right on matters relating to the interpretation of the Constitution , and with leave on other appeals, but such appeal must raise issues of public importance or serious questions of law.[9]

It is important to point out at the outset that although the ELC is a court with the same status as the High Court, it is not the High Court. Judges of the ELC are also not judges of the High Court. This was made clear by the Supreme Court in the case of *Republic vs Karisa Chengo & 2 Others*.[10]

1 Article 162(2)(b) of the Constitution of Kenya, 2010 promulgated on 26 August 2010.
2 *Ibid*, Article 162(2) (a).
3 Chapter IV of the Constitution of Kenya, 1963 (repealed).
4 Article 169(1) of the Constitution of Kenya, 2010.
5 *Ibid*, Articles 163 and 164.
6 High Court (Organization and Administration) Act, Act No. 27 of 2015, S 5; Environment and Land Court Act, S 13, Act No.19 of 2011; Employment and Labour Relations Act, Act No. 20 of 2011, s 12.
7 Constitution of Kenya 2010, Article 164.
8 *Ibid*, Article 163.
9 *Ibid*, Article 163(4).
10 Republic v Karisa Chengo & 2 Others [2017] eKLR

The case arose from the move by the Chief Justice to clear accumulated case backlog over criminal matters in the High Court. To marshal numbers, the Chief Justice directed all judges of the High Court, the ELC, and the ELRC to hear various criminal appeals from Magistrates' courts across the country. In this particular case, a two judge bench was constituted, with one judge being from the High Court and the other from the ELC. A question was raised on whether the High Court was properly constituted to hear the criminal appeal given that one of the judges was a judge of the ELC. The court dismissed the objection and proceeded to hear the matter, the appeal against conviction and sentence being dismissed. The appellant appealed to the Court of Appeal.[11] The Court of Appeal was of the view that the High Court was not properly constituted as one of the judges who sat in the appeal was a judge of the ELC. It held that the High Court could only be properly constituted if its personnel were all judges of that Court. In the same vein, an ELC court is only properly constituted by duly gazetted and appointed ELC judges. In other words, a judge of the ELC cannot sit in the High Court and a judge of the High Court cannot sit in the ELC. The same case applies to the ELRC. The Supreme Court upheld the decision of the Court of Appeal.[12] Before this decision, the Chief Justice had placed four judges of the High Court to sit in the ELC. This decision was dropped following the *Karisa Chengo* case. It is now difficult to envisage a situation where there is a mixed bench - a bench in which a judge of the ELC and a judge of the High Court or ELRC, sit together. Prior to the *Karisa Chengo* case, it was not uncommon for the Chief Justice to set up a mixed bench to hear cases. One such case is that of *Martin Nyaga Wambora vs Speaker County Assembly of Embu & 5 Others,*[13] where a judge of the ELC sat alongside two other High Court judges in a three judge bench case filed in the High Court. Another is that of *Ledidi Ole Tauta vs AG,*[14] where a judge of the ELC sat in a bench of three, the other two being judges of the High Court.

The aim of the Constitution was to split into three, what previously was the sole jurisdiction of the High Court. Under Article 165 (5) of the Constitution , the High Court is barred from hearing cases that fall within the jurisdiction of the ELC and ELRC. It therefore follows that provided a matter is within the jurisdiction of the ELC or ELRC, the High Court cannot assume jurisdiction over it. This is indeed clear from the letter of the Constitution , though its application in practice has been controversial. There have been various decisions where it has been held that the High Court has "concurrent jurisdiction" with the ELC on some matters, especially those related to fundamental rights and freedoms. The situation arose in the case of *Patrick Musimba vs National Land Commission & 4 Others,*[15] where a petition was filed before the ELC, at Machakos, being a matter related to the construction of the Standard Gauge Railway. The petitioner complained *inter alia* about the manner in which land was being compulsorily acquired, contending that it was against the Land Act, 2012,[16] and also that the construction was a threat to the environment as the procedures laid down in the Environmental Management and Coordination Act, 1999, (EMCA)[17] had not been properly followed. The ELC sitting at Machakos was persuaded that

11 *Karisa Chengo & 2 Others v Republic*, Court of Appeal at Malindi, Criminal Appeals Nos.44, 45 and 76 of 2014, (2015)eKLR.
12 Supra, (n 10).
13 Martin Nyaga Wambora v Speaker County Assembly of Embu & 5 Others [2014] eKLR, High Court of Kenya at Kerugoya bench of Ong'udi J, Githua J, and Olao J, the latter being of the ELC.
14 Constitution Constitution Ledidi Ole Tauta & Others v Attorney General & 2 others [2015] eKLR, High Court of Kenya at Nairobi, Constitution al & Judicial Review Division, bench of Nyamweya J, Ougo J, and Mutungi J, the latter being of the ELC.
15 Patrick Musimba v National Land Commission & 4 others [2015] eKLR.
16 Land Act, Act No. 6 of 2012.
17 Environmental Management and Coordination Act, No. 8 of 1999.

the matter was weighty and fit to be heard by a bench of more than one judge and referred the matter to the Chief Justice[18] who appointed 5 judges of the High Court to hear the case. The case was thus removed from the ELC and referred to the High Court's Constitutional and Human Rights Division at Nairobi. The 1st respondent, the National Land Commission (NLC) and the 3rd respondent, the National Environment Management Authority (NEMA)[19] raised a preliminary objection that the case was before the wrong court, and that it should be heard at the ELC and not the High Court. Despite the objection being supported by all the respondents, the High Court dismissed it, the bench holding the opinion that "both the High Court and the ELC have a concurrent and or coordinate jurisdiction and can determine Constitution al matters when raised and do touch on the environment and land."[20]

The reasoning that both the High Court and ELC have "concurrent and or coordinate jurisdiction", is debatable, given that the Constitution applies an exclusionist method on what the ELC and High Court can handle. The Constitution at Article 165(5) provides that if a matter falls within the jurisdiction of the ELC or ELRC, the High Court has no jurisdiction to hear the said matter. It is therefore questionable as to whether there exists a middle ground for the application of the principle of "concurrent and or coordinate jurisdiction" especially given the holding by the Supreme Court in the case of *Karisa Chengo*[21] case, where it stated of the High Court, the ELC and ELRC, that, "*The three are different and autonomous Courts and exercise different and distinct jurisdictions".*[22] Given that the three superior courts of equal status exercise different and distinct jurisdiction, one may find difficulty in seeing the place for "concurrent and coordinate" jurisdiction.

This is not to say that there are no cases which bring forth cross-cutting (or "mixed grill") issues some of which clearly fall within the mandate of the ELC but some which fall out of its domain. Where such issues cannot be severed, so that the different issues are heard by different courts, then the course of justice would demand that all issues be tried in one case before one court. It is however probably best to first determine what the main issue in the case is, and whether it is more inclined towards the jurisdiction of the ELC or not. One such test is proposed by Ngugi J, in the case of *Suzanne Achieng Butler & 4 Others vs Redhill Heights Investments Limited & Another*[23], where the judge held that the court needs to find out what the predominant transaction in the matter was. If the transaction falls more within the ELC, then it is best heard before this court, but if less within the ELC, then the case can be heard before the High Court.[24]

18 Constitution of Kenya 2010, Article 165(3) and (4), which provides for the empanelling of an uneven number of Judges, not being less than three, where the court certifies that a matter raises a substantial question of law. Constitution

19 Established by EMCA, (n 18) Section 7.

20 See also the cases of *Ledidi Ole Tauta & Others vs Attorney General & Others (2015)eKLR*, and *Mohammed Ali Baadi & Others vs Attorney General & Others (2018)eKLR.*

21 *Supra* (n 10).

22 Ibid, paragraph 52.

23 Suzanne Achieng Butler & 4 Others v Redhill Heights Investments Limited & Another [2016] eKLR, High Court of Kenya at Kiambu, Commercial & Tax Division.

24 See *Lydia Nyambura Mbugua vs Diamond Trust & Another*, Nakuru ELC Case No. 296 of 2013 (2018)eKLR ruling of 20 September 2018 on jurisdiction, where the court proposed a predominant issue test.

Jurisdiction of the ELC

From the foregoing, it is critically important to find out what exactly is the subject matter jurisdiction of the ELC. The starting point is of course the Constitution which provides as follows at Article 162 :-

(1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

(4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article

What the framers of the Constitution envisaged at Article 162 (2) (b) is a court handling disputes that generally touch on environment and land. The Constitution was explicit at sub-article (3) that Parliament was to create the court and provide for its jurisdiction. To conform to the dictate of the Constitution, Parliament passed the Environment and Land Court Act (ELC Act)[25] establishing the ELC and setting out its jurisdiction at Section 13. Section 13 (2), which spells out the actual jurisdiction of the court, provides that the court shall have power to hear and determine the following disputes :-

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and,

(e) any other dispute relating to environment and land.

There is therefore specific subject matter spelt out in subsection 2 (a) to (d), whereas subsection 2 (e) is expansive enough to capture all other disputes not covered within subsection 2 (a) to (d). The inclusion of subsection 2 (e) implies that the ELC has no limitation so long as the dispute relates to environment and land.

Apart from the ELC Act, there are also other statutes, relating to environment and land, which identify the ELC as the court with jurisdiction over the subject matter that they cover. They include the Land Act,[26] the Land Registration Act,[27] EMCA[28] and the Forest Management and Conservation Act.[29]

25 Environment and Land Court Act, Act No. 19 of 2011.
26 Land Act (n 16), at S 150.
27 Land Registration Act, s 101.
28 EMCA, (n 18), s 130.
29 Forest Management & Conservation Act, s 70.

The application of Section 13 of the Environment and Land Court Act has however not been without contention. One subject matter that appears covered by both Constitution and statute to provide for jurisdiction within the ELC are cases relating to charges and the exercise of the statutory power of sale by the chargee. However, in the case of *Cooperative Bank of Kenya Limited vs Patrick Kangethe & 5 Others* [30] the Court of Appeal appears to have taken a very restrictive interpretation of Article 162 of the Constitution and Section 13 of the Environment and Land Court Act. The plaintiff filed suit before the High Court, to stop the defendant bank from exercising its statutory right of sale. The jurisdiction of the High Court was questioned, the argument being that the issue fell within the realm of the ELC. The objection was dismissed but brought up again on appeal. The Court of Appeal in analysing the issue, held that the ELC did not have jurisdiction over charges. The decision is questionable as charges are created under the Land Act and the Land Act provides that jurisdiction lies with the ELC, for disputes, actions and proceedings arising out of the said Act.[31] A charge is a disposition that affects title to land, since it is an encumbrance over the title, and a sale by chargee will lead to change in proprietorship which directly affects title. Given that the ELC has jurisdiction over title to land, it is difficult to see how a dispute over a charge cannot fall within the jurisdiction of the ELC. Part of the reasoning of the Court of Appeal in the *Kangethe case* was that a charge is not 'use of land' and therefore outside the jurisdiction of the ELC. A charge may not constitute 'use' of land, if you are looking at actual physical use of land, but it certainly is a disposition that touches on title to land for which the ELC will have jurisdiction.

It was mentioned earlier in this Chapter that the Constitution , at article 165 (5), applies the mutually exclusive method, namely, that what falls within the jurisdiction of the ELC, cannot fall within the jurisdiction of the High Court. Despite this exposition, it is not uncommon to find instances where the High Court has heard matters, which *prima facie* fall within the jurisdiction of the ELC. A case in point is that of *R vs National Environment Tribunal ex parte China Road & Bridge Construction,*[32] which was a suit seeking prerogative orders of *certiorari* and inhibition on a decision of the National Environment Tribunal (NET). The motion was heard and allowed within the High Court yet from EMCA, decisions of NET are only appealable to the ELC,[33] meaning that any contest on a NET decision, even where the path of Judicial Review is chosen, arguably ought to fall for review by the ELC.

So far, the exercise of the jurisdiction of the ELC has been restricted to civil cases. There may however be a strong case to expand the jurisdiction of the ELC to criminal matters relating to land and the environment. For starters, the Constitution does not provide that the jurisdiction of the ELC is only on civil matters, unlike in other specialized environmental courts, such as the Green Tribunal of India,[34]and thus there is no Constitution al restriction in granting criminal jurisdiction to the ELC. Criminal cases over environment and land are heard by Magistrates' courts, and appeals are filed to the High Court. There is a point in arguing that such appeals are best heard before

30 *Cooperative Bank of Kenya Limited vs Patrick Njuguna Kang'ethe & 5 Others , Court of Appeal at Mombasa, Civil Appeal No. 83 of 2016 (2018)eKLR*.

31 Land Act, s 150, see also section 128.

32 *R vs National Environment Tribunal ex parte China Road & Bridge Construction*, *Nairobi High Court Misc. Application No. 82 of 2016, (2016)eKLR.*

33 EMCA s 130.

34 Section 14 of the National Green Tribunal Act of India provides that the Tribunal is to have *"jurisdiction over all civil cases where a substantial question relating to environment… is involved"*.

the ELC, because the ELC is the specialized court on matters related to land and environment, particularly given that the judges are well versed with the law relating to this sector.

We have seen that what falls within the jurisdiction of the ELC or the ELRC, is excluded from the jurisdiction of the High Court following Article 165 (5) of the Constitution. This however does not apply to subordinate courts. Subordinate courts can thus hear cases related to the environment and land so long as the matter falls within their pecuniary jurisdiction. This was affirmed in the case of *Law Society of Kenya, Nairobi Branch vs Malindi Law Society & 6 Others.*[35] The issue in this case arose out of amendments to the law, which introduced jurisdiction over matters related to land and environment to the Magistrates' courts. An argument was raised that the Constitution gave the specialized superior courts, that is the ELC and ELRC, exclusive jurisdiction and such jurisdiction could not be expanded to the Magistrates' courts. The High Court upheld this argument[36] but the Court of Appeal held the opposite opinion.[37] That being the case, Magistrates' courts have jurisdiction to hear and determine cases related to the environment and land, subject only to the pecuniary limits of the Magistrate handling the case.[38]

Apart from Magistrates' Courts, there are also tribunals dealing with specific subject matter related to the environment and land. One such tribunal is the National Environmental Tribunal (NET)[39], whose jurisdiction is elaborated in Section 129 of EMCA which is more or less to hear appeals from decisions of NEMA. Another important forum is the County Physical and Land Use Planning Liaison Committee created by Section 76 of the Physical and Land Use Planning Act.[40] These committee, which each County Government is supposed to have, is empowered to do the following :-

(a) hear and determine complaints and claims made in respect to applications submitted to the planning authority in the county;

(b) hear appeals against decisions made by the planning authority with respect to physical and land use development plans in the county;

(c) advise the County Executive Committee Member on broad physical and land use planning policies, strategies and standards; and

(d) hear appeals with respect to enforcement notices.[41]

There has been debate as to whether the ELC has jurisdiction, in the first instance, to hear matters that may be heard by NET or by the Liaison Committees or such other tribunals. The initial jurisprudence of the ELC was that the ELC could hear such cases given the sweeping jurisdiction outlined in Section 13 of the ELC Act. This is exemplified in the case of *Ken Kasinga vs Daniel Kiplagat Kirui & 5 Others*[42] *(2014) eKLR*, where the judge stated as follows on this point:

35 *Law Society of Kenya, Nairobi Branch vs Malindi Law Society & Others, Civil Appeal (2017)eKLR.*
36 *Malindi Law Society vs Attorney General & 4 Others, High Court at Malindi,* Constitution (2016) eKLR.
37 *Supra* (n 35)
38 Magistrates Court Act, s 9. and Environment and Land Court Act, s 26.
39 Established by EMCA, s 125.
40 Physical and Land Use Planning Act, No. 13 of 2019. It is the successor to the Physical Planning Act, (1996) Chapter 286, Laws of Kenya. The Physical Planning Act 1996 also provided for Liaison Committees.
41 *Ibid*, s 78.
42 Ken Kasinga v Daniel Kiplagat Kirui & 5 Others [2015] eKLR, ELC at Nakuru.

It will be seen (from Section 13 of the Environment and Land Court Act) that the ELC has an extremely expansive jurisdiction. Indeed, in my view, as long as a dispute can be categorized as being a dispute over environment, or over land, the ELC has unlimited jurisdiction.This jurisdiction is both original and appellate. One cannot therefore be faulted if he originates his suit in the ELC and not in NET, for the ELC has original jurisdiction. I am unable to accept the argument of the respondents, that the ELC has no jurisdiction in a matter concerning the issuance or the rejection of an EIA licence. True, a person aggrieved by the decision has avenue to appeal to NET within 60 days, but that does not mean that he is prevented from contesting that decision in an appropriate pleading filed in the ELC as a court of first instance. If the ELC feels that the matter can be determined by NET, it can refer the matter to NET for determination, and wait to sit on appeal over the decision of NET. But such deferral to NET would not be a statement that the ELC has no jurisdiction over the matter.[43]

The above case involved a mixture of environmental and physical planning issues thus a multifaceted dispute. The court reasoned that since not all issues could be dealt with at the NET, it would be prudent to hear the whole dispute before the ELC.

A similar decision was reached in the case of *Taib Investments Limited vs Fahim Salim Said & 5 Others*.[44] In the matter, a preliminary objection was raised that it was NET with jurisdiction and not the ELC. Justice Angote, dismissing the objection, held that the issues in the case were mixed, as they raised both developmental and environmental matters and thus not exclusive to NET. The Court however agreed with the assertion that where there is a tribunal or body established by law to deal specifically with an issue, such matter needs to be commenced before that body, stating as follows :

However, where a suit raises specific issues which are supposed to be dealt with by a specific Tribunal or body established by law, then the matter must be commenced in the Tribunal or body so established before an appeal can be lodged in this court or the High Court, as the case may be. That is not the case in this matter. The issues raised in the Plaint fall outside the mandate of the National Environment Tribunal.[45]

In another case, *Hosea Kiplagat vs NEMA & 2 Others*,[46] the matter revolved around the issue of an EIA licence for purposes of constructing a hospital which was argued to be within a residential area. A preliminary objection was raised that the ELC had no jurisdiction where the case involved cancellation of a licence granted by NEMA and that the dispute should have been filed in NET. The Court, dismissing the preliminary objection, held that issues relating to a clean and healthy environment are matters that can be brought before the ELC and this power cannot be taken away from the Court.

The above approach by the Courts is however now in serious doubt especially given the decision of the Court of Appeal and Supreme Court in the *Kibos* cases. A Constitutional petition[47] was filed by various persons before the ELC at Kisumu seeking various declarations, including a

43 *Ibid*, paragraph 36.
44 *Taib Investments Limited vs Fahim Salim Said & 5 Others* (2016)eKLR.
45 *Ibid,* paragraph 54.
46 Hosea Kiplagat & 6 Others v National Environment Management Authority Nema & 2 Others [2015] eKLR.
47 Gerick Kenya Limited v National Environment Management Authority [2015] eKLR.

declaration that the petitioners' right to a clean and healthy environment had been violated by the respondents and an order for cancellation of EIA licences issued by NEMA (sued as 4th respondent) to the 1st to 3rd respondents (sister companies engaged in the business of milling sugar cane and other auxiliary businesses, respectively being Kibos Sugar and Allied Industries, Kibos Power Limited and Kibos Distillers Limited). The case was based on the grounds inter alia that the EIA licences were issued illegally, and that the 1st – 3rd respondents were discharging effluent to the nearby rivers pursuant to their operations thus leading to pollution. One of the issues that the court dealt with in its judgment was the preliminary objection that the court had no jurisdiction and that jurisdiction lay with the NET or the National Environmental Complaints Committee (NECC) created under EMCA.[48] The court (Kibunja J) held that the case was properly before the ELC. On appeal to the Court of Appeal, the Court of Appeal was of opinion that the Court had no jurisdiction. The appellate court inter alia stated as follows :-

A court cannot arrogate itself an original jurisdiction simply because claims and prayers in a petition are multifaceted. The concept of multifaceted claim is not a legally recognized mode for conferment of jurisdiction to any court or statutory body.

The Court of Appeal found that the key dispute was whether the three 1st – 3rd respondents were polluting the environment and whether the EIA Licences were lawfully procured. The court held the opinion that the competent organ with original jurisdiction to hear and determine the matter was the NET or the NECC and thought that the ELC Judge had erred in usurping jurisdiction.

There was an attempt at further appeal to the Supreme Court which was however rejected at a preliminary stage.[49] In its ruling, the Supreme Court stated that the ELC ought not to have usurped jurisdiction based on the abstention doctrine, that is, that the court ought to abstain from taking a case if it can be heard by an inferior body. The Supreme Court held as follows :-

> [50] The trial Court, as did the appellate Court, correctly determined that the Petition was multifaceted, and presented issues in an omnibus manner. The point of divergence between the two Superior Courts was where the trial Court then went further to determine that these multifaceted issues could be determined by the Court "in the interests of justice." It would seem that the ELC had failed to appreciate that there were properly constituted institutions that were mandated to hear and determine the issues, but instead chose to arrogate to itself the jurisdiction to hear and determine all the issues raised in the Petition. The Petitioners stated that the Superior Court correctly relied on the doctrine of judicial abstention, and exercised it discretion to hear and determine the Petition.
>
> [51] Judicial abstention, as with judicial restraint, is a doctrine not founded in Constitution al or statutory provisions, but one that has been established through common law practice. It provides that a Court, though it may be vested with the requisite and sweeping jurisdiction to hear and determine certain issues as may be presented before it for adjudication, should nonetheless exercise restraint or

48 EMCA, s 31

49 *Benson Ambuti Adega & Others vs Kibos Distillers Limited & 5 Others,* Supreme Court (2020)eKLR.

> refrain itself from making such determination, if there would be other appropriate legislatively mandated institutions and mechanism.

By similar reasoning, the Court of Appeal upset the decision of the ELC in the *Ken Kasinga* case,[50] holding that the ELC had no jurisdiction, and that it ought to have deferred the matter to NET on the issue of the grant of an EIA licence and to the Liaison Committees on the issue of development permission. Through a Constitutional petition filed before the ELC at Nakuru, the petitioner complained about the development of a telecommunications mast in his neighbourhood. There had been issued an EIA licence by NEMA permitting the development which was followed by the grant of a development licence by the County Government of Nakuru. The ELC overruled objections to jurisdiction and held for the petitioner. On appeal the Court of Appeal was of opinion that the petitioner ought to have exhausted all other processes availed by other statutory dispute resolution organs before moving to the ELC by way of Constitutional petition.[51]

It therefore appears that, in so far as cases relating to grant of EIA licences are concerned, the position of the Court of Appeal and Supreme Court is that such suits need to be heard by NET and not by the ELC in the first instance. Similarly, for disputes related to development permission, these ought to be heard in the first instance by the Liaison Committees established under the Physical and Land Use Planning Act. Where the suit raises multifaceted issues, the view of the Supreme Court and Court of Appeal is that the claimant needs to sever his issues and present them, separately, to the judicial bodies with power to hear the distinct issues. Thus, if a case involves a dispute over grant of an EIA licence intertwined with one over grant of a development licence, the claimant would need to file a separate suit before NET to oppose the EIA licence, and another to the County Physical Planning Liaison Committee to impugn the development licence.

This approach was applied by Olola J in the case of *Okiya Omtatah Okoiti vs Kenya Power & Lighting & 10 Others, (2018) eKLR*[52] where question arose as was whether the ELC should handle the case or defer it to relevant tribunals. The main issue in the case concerned the development of the Lamu Coal Fired Power Plant. In the suit, the plaintiffs challenged the grant by NEMA of the EIA licence and also sought to quash the Electricity Generation Licence and the Power Purchase Agreement. A preliminary objection was raised that the court had no jurisdiction and that jurisdiction lay with NET or the Energy Tribunal pursuant to section 25 of Energy Act.[53] It emerged, in the course of arguments, that there was a case pending before NET filed by the 1st Interested Party (an NGO known as Save Lamu) and an injunction issued pending hearing of the case at NET. The 1st Interested Party had also lodged a complaint to the Energy Regulatory Commission but the same had been dismissed and no appeal filed before the Energy Tribunal. The Court upheld the preliminary objections and struck out the petition. In arriving at its decision, the court relied on the old High Court decision of *R vs NEMA ex-parte Sound Equipment*,[54] which held that where a special procedure is provided for in statute, that

50 *Supra*, note 42.
51 *Eaton Towers Kenya Limited vs Kasinga & 5 Others* (2022) eKLR.
52 *Okiya Omtatah Okoiti vs Kenya Power & Lighting & 10 Others,* (2018)eKLR.
53 Energy Act, No. 1 of 2019.
54 *Republic v National Environment Management Authority Exparte Sound Equipment Ltd, Misc Civil Application No. 7 of 2009 (unreported).*

procedure ought to be pursued instead of filing a suit in the ordinary courts.[55] The matter therefore needed to be filed before NET and/or the Energy Tribunal.

The ELC at Kajiado in the case of *Charity Mpano Ntiyione vs China Communications Construction Company Limited & NEMA*[56] also came to a more or less similar conclusion. The court was deciding an application for contempt alongside a preliminary objection on jurisdiction that the matter ought to have been filed at the NET. The subject matter before court was a complaint that the respondents were quarrying and blasting rocks on neighbouring land and the applicant contended that this threatened her right to a clean and healthy environment. The court looked at the prayers sought and was of view that two of the prayers, that is, the cancellation of the EIA licence and a prayer for a fresh EIA to be conducted, fell to the NET, but the court had jurisdiction to handle the other prayers (which generally involved damages claimed in the suit such as damages for relocation, future medical expenses; and damages for violating the right to a clean and healthy environment).

Also worthy of mention is the case of *Samson Chembe Vuko vs Nelson Kilumo & Others*[57] where in issue was a physical development plan, and the Court held that the matter should be handled by the Liaison Committee established under the Physical Planning Act.[58]

The above jurisprudence suggests that where the matter is squarely one that falls within the jurisdiction of a specialized tribunal, the court ought to defer the matter to the tribunal.

Sometimes the issues before court are not brought by way of a traditional suit filed through plaint, or by way of petition, but through judicial review. By its very nature, judicial review is an avenue where the court looks more into the procedure rather than the substance of the decision.[59] It could happen that there is a specialized institution or Tribunal which is empowered to hear the substance of the suit and the question may arise whether the ELC should proceed to entertain the judicial review matter, only looking at procedure, or dismiss the suit, or refer the parties to the specialized body or tribunal so that the substance of the case may be looked at. This arose in *R vs Nyeri County Government ex parte Central Coffee Mills.*[60] In the case, development permission was granted and then nullified. A judicial review motion was filed to quash the decision nullifying the permission and the applicant also filed an appeal before the Liaison Committee. The court held that Judicial Review is inclined towards procedure and it was thus better for the applicant to pursue the appeal at the Liaison Committee which would go to the merits of the decision.

A more complex scenario unfolded in the case of *Cortec Mining v Cabinet Secretary for Mining & Others,*[61] where a judicial review motion, which concerned the cancellation of a Mining licence by the Cabinet Secretary for Mining, was filed. It was argued in the case that the ex-parte applicant, ought

55 See also *Samson Chembe Vuko vs Nelson Kilumo & 4 Others (2014)eKLR*.
56 Charity Mpano Ntiyione v China Communications Construction Company Limited & NEMA [2017] eKLR
57 *Supra* (n 55).
58 Physical Planning Act, No. 6 of 1996 (repealed) Part III.
59 See for example the decision in *Master Power Systems Limited vs Public Procurement Administrative Review Board, Court of Appeal at Nairobi, Civil Appeal (2015) eKLR*.
60 *R vs Nyeri County Government ex parte Central Coffee Mills, ELC Nyeri, Judicial Review Application No. 8 of 2014 (2015) eKLR* (ruling of Waithaka J, of 16 September 2016).
61 *Cortec Mining v Cabinet Secretary for Mining & Others* (2015)eKLR.

to have appealed the decision of the Cabinet Secretary to the High Court under Section 93 (3) of the Mining Act,[62] where an avenue is provided for one to file an appeal if aggrieved by the decision of the Cabinet Minister, including a decision to revoke a prospecting or mining licence. The Court was of the view that the applicant chose the wrong forum to ventilate its grievance, and held that it ought to have filed an appeal to the High Court as provided by the statute, rather than file a Judicial Review motion. The court observed that judicial review was limited to the process and not the substance of the decision. The court held that the orders of judicial review could not therefore issue and dismissed the suit.

There is no doubt that there are still a lot of issues that will arise regarding the jurisdiction of the ELC in handling various subject matter. This is not surprising as the ELC is still a fairly young court. With the passage of time, these jurisdictional questions are expected to settle and litigants will be well guided on what to file within the ELC and what not to refer to the ELC but to defer to other courts or Tribunals.

Jurisprudence on the Jurisdiction of the National Environment Tribunal

An important appendage to the ELC, with regard to determination of environmental disputes, and which deserves special mention, is the National Environment Tribunal (NET or 'the tribunal'), which we looked at briefly in the preceding part. Its jurisdiction is provided for in Section 129 (1) and (2) of EMCA which provides as follows :-

129. Appeals to the Tribunal

(1) Any person who is aggrieved by—

(a) the grant of a licence or permit or a refusal to grant a licence or permit, or the transfer of a licence or permit, under this Act or its regulations;

(b) the imposition of any condition, limitation or restriction on the persons licence under this Act or its regulations;

(c) the revocation, suspension or variation of the person's licence under this Act or its regulations;

(d) the amount of money required to paid as a fee under this Act or its regulations;

(e) the imposition against the person of an environmental restoration order or environmental improvement order by the Authority under this Act or its Regulations, may within sixty days after the occurrence of the event against which the person is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.

(2) Unless otherwise expressly provided in this Act, where this Act empowers the Director-General, the Authority or Committees of the Authority or its agents to make decisions, such decisions may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose.

62 Mining Act, Chapter 306, Laws of Kenya (now repealed).

As noted above, one has avenue to appeal a decision over grant of a licence under EMCA or decisions of NEMA and its officers and officers, to the NET. Litigation touching on Section 129 have mostly centred on who is entitled to file an appeal to NET and the time within which to do so.

It will be observed that Section 129 (1) requires that appeals be filed within 60 days "after the occurrence of the event against which the person is dissatisfied." Section 129 (2) does not provide for a time period to file an appeal only stipulating that decisions of the "Director-General, the Authority or Committees of the Authority or its agents" may be subject to an appeal before the tribunal in accordance with the established procedures. The procedure of the tribunal is regulated by the National Environment Tribunal Procedure Rules, 2003.[63] Under Rule 7, "the Tribunal may for good reason shown, on application, extend the time appointed by these Rules (not being a time limited by the Act) for doing any act or taking any proceedings, and may do so upon such terms and conditions, if any, as appear to it just and expedient." It will thus be noted that pursuant to the rules, NET has power to extend time, so long as it is not time limited by the Act.

Question has arisen as to whether there is a difference between the categories of appeal between subsection (1) and subsection (2) of Section 129. In the case of *Simba Corporation Limited vs Director General , NEMA & Others*[64] the court held that an appeal under Section 129 (1) relates to an appeal by a person who was a party to the decision whereas Section 129 (2) provides a framework for an appeal by a person who was not a party to the process leading to the decision. In the former case, the appeal must be filed within 60 days of the decision, and this, being a time frame provided in the Act itself, may not benefit from the provision on extension of time provided in Rule 7 of the NET Procedure Rules. With regard to an appeal presented under Section 129 (2), the court held that this needs to be filed within 60 days after the date in which the decision was given or served on the appellant. If good reason is shown, for not having filed the appeal within 60 days, the appellant can benefit from an extension of time beyond the stipulated 60 days. In the instant case, NEMA gave a licence to a developer to build an office block next to the high end Kempinski Hotel owned by the appellant. NET dismissed the appeal on the basis that it was out of time. The ELC held that it was not clear when the appellant was informed of the decision, and this being a Section 129(2) appeal, could benefit from an extension of time if thought to have been out of time. The appeal was allowed and the matter remitted to NET to hear it on merits.

The reasoning that a Section 129 (2) appeal is available to one who was not party to process leading to the decision was taken by Gitumbi J in the case of *Amos Njoroge Kamweru vs Kajiado County Government & 2 Others.*[65] In this case, the petitioners filed suit in the ELC challenging the grant of an EIA licence. A preliminary objection was raised that the petitioners ought to have appealed to NET. The position of the petitioners was that they did not participate in the process leading to the grant of the licence and thus could not appeal to NET. The court was not moved by this argument of the petitioners. The court held that the petitioners could appeal to NET pursuant to Section 129 (2).

63 National Environment Tribunal Rules, 2003, Legal Notice No.177 of 2003.
64 *Simba Corporation Limited vs Director General , NEMA & Others* (2017) eKLR,
65 *Amos Njoroge Kamweru vs Kajiado County Government & 2 Others* (2015)eKLR.

However, in the case of *Pakwood Investments Limited & Another vs National Environment Management Authority & 7 Others*[66] the holding of the court appears to suggest that the distinction between Section 129 (1) and (2) is not related to whether a party participated before the grant of the licence in question. In that case, the appellant filed suit before NET challenging the grant of an EIA licence. The licence was dated 20 November 2018 whereas the appeal at the tribunal was filed on 23 January 2019. A preliminary objection was raised that the appeal was filed out of the 60 days period outlined in Section 129 (1). The tribunal allowed the preliminary objection holding that the appeal before it was filed out of time and that there is no stoppage of time "from 21 December to 6 January" (probably meant 13 January) of the following year (as applies in the Civil Procedure Act).[67] This ruling provoked an appeal to the ELC. Among the arguments raised was that the appellant filed appeal pursuant to Section 129 (2) and not Section 129 (1) of EMCA and was not bound by the 60 day period in subsection (1), and further, that it only became aware of the grant of the licence in mid-January despite the licence being dated 20 November 2018 and the appeal was not therefore out of time. The court was not persuaded by these submissions. The court's assessment of the facts was that the appellant participated in the objections before the licence was issued and therefore had to file an appeal by 18 January 2019. The court further held that "the Tribunal was not bound to interrogate whether the Appellants were privy to the process leading up to the issuance of the licence. It only had to consider that the appeal had been brought challenging a licence and whether it had been brought within the stipulated timelines." The court continued as follows :-

> 42. The substance of the Appellants' appeal was the decision of National Environment Management Authority to grant licence No NEMA/EIA/PSL/6998 to the 2nd Respondent. This falls within the ambit of Section 129(1)(a) of Environmental Management and Coordination Act which allows Appeals against the grant of licences to be made within sixty days of the decision being made. The Appellants' appeal did not fall within Section 129(2) of Environmental Management and Coordination Act as subsection (2) covers appeals against acts or omission of the Director General or the committee of the authority or its agents on matters outside the issuance of a licence.

It will be noted from the above that the court's interpretation of Section 129 (1) and 129 (2) was different from the view propounded in the *Simba Corporation Limited* case. In the *Pakwood Investments Limited* case, the opinion of the court was that subsection (2) covers appeals outside the issuance of a licence. The court did not see distinction between persons who participated in the process before issuance of a licence and those who did not.

The interpretation of Section 129 came up before the Court of Appeal in the case of *National Environment Tribunal vs Overlook Management Limited & 5 Others*.[68] The first and second respondents wished to develop some luxury villas in Malindi and the first respondent applied for an EIA licence from NEMA (3rd respondent). The application was opposed by various stakeholders but was ultimately granted. The 4th and 5th respondents (Malindi Green Town Movement and Malindi South Residents Association) appealed the grant of the EIA licence to

66 *Pakwood Investments Limited & Another vs National Environment Management Authority & 7 Others*, (2021)eKLR.

67 Under Order 50 Rule 4 of the Civil Procedure Rules, 2010, made under the Civil Procedure Act, Chapter 21 Laws of Kenya, the time between 21 December and 13 January of the following year is not computed in the running of time.

68 *National Environment Tribunal vs Overlook Management Limited & 5 Others* (2019)eKLR.

NET. This triggered the institution of judicial review proceedings before the High Court to quash the proceedings before the tribunal. It was inter alia contended that only a person capable of being granted a licence under the Act, or against whom an environmental restoration or improvement order could be imposed, could bring an appeal to NET under the Act. It was further urged that the fourth and fifth respondents did not have locus standi. The High Court allowed the judicial review motion finding that the jurisdiction of NET to hear appeals could only be invoked by parties who were, or are parties, affected by the grant or denial of licences as stipulated under section 129 (1) (a)-(e). This provoked an appeal to the Court of Appeal. The Court of Appeal held that the High Court had failed to consider sub section (2) which clothed the 4th and 5th respondents with locus standi since they were appealing against a decision made by the 3rd respondent. The court elaborated as follows :-

> In our view and to reconcile the conflicting decisions, where a party considers itself aggrieved by the events stipulated in section 129 (1) (a)-(e) of the Act, such a party may as of right appeal to the appellant. Where an aggrieved party does not qualify under the provision but is aggrieved by a decision made by the 3rd respondent, its Director-General or its committees, then such a party may lodge an appeal pursuant to sub-section 2 of that provision. We take the view that such a party does not have to demonstrate that he has a right or interest in the property, environment or land alleged to have been or likely to be harmed. This is in line with the expanded locus standi in the Act and gives effect to its legislative purpose.

It will be discerned from the above that any party aggrieved by a decision on the grant of a licence, or of NEMA, or its offices, may approach NET either through Section 129 (1) or 129 (2).

Appeals from decisions of NET lay to the ELC pursuant to Section 130 of EMCA. A related question is who is entitled to appeal a decision of NET. Is the right to appeal only vested upon those who had litigated before NET or can any person, not a party to the case at NET, file an appeal ? So far, there is no decided case by the ELC touching on this point. However, in the fairly old case of *Kiserian Isinya Pipeline Residents Association & 6 Others vs Jamii Bora Charitable Trust & Another*[69], an appeal to the High Court against a decision of NET was dismissed on the ground that the interested party was not an actual litigant before the tribunal. This decision notwithstanding, modern jurisprudence appears to support the position that persons affected by the decision can proceed to file an appeal, as observed in the case of *Law Society of Kenya, Nairobi Branch vs Malindi Law Society*.[70] The appellant in this matter was not a party before the suit at the High Court but was allowed to file an appeal. Given the approach taken by the Court of Appeal, as seen in this case, it may be difficult to argue that a party aggrieved by the decision of NET, despite not being a party thereto, has no locus to file an appeal against the decision to the ELC.

Another important subject, worthy of discussion, are decisions of NET on whether or not to grant an extension of time for appeal. We have already seen that Rule 7 of the NET Procedure Rules allows a party, in certain instances, to apply for extension of time to lodge an appeal. Such a decision would fall upon the discretion of the tribunal, of which courts are generally slow at

69 *Kiserian Isinya Pipeline Residents Association & 6 Others vs Jamii Bora Charitable Trust & Another* (2007) eKLR.
70 *Law Society of Kenya, Nairobi Branch vs Malindi Law Society* (2017)eKLR.

interfering, unless such decision is clearly wrong.[71] In the case of *Micah Mutoko & 4 Others vs Director General, NEMA & 2 Others,*[72] an appeal was lodged against the decision of NET in failing to allow an application for extension of time to appeal the grant of an EIA licence. The EIA licence was issued by NEMA, on 3 November 2016, permitting the 2nd respondent to construct a two level temple building for religious purposes in land situated within Loresho area in Nairobi. Subsequently, on 6 April 2017, the appellants filed an application before NET, seeking an order extending the time within which to lodge an appeal. The application was dismissed, prompting the appeal to the ELC. The Court declined to disturb the exercise of the Tribunal's jurisdiction. The Court found that the NET had dismissed the appeal as it was not persuaded by the grounds upon which it was based. It found that the allegations of lack of information on the issuance of the licence, and lack of public participation to make the appellants aware of the project, were not supported by the evidence. The Court was thus of the view that the Tribunal had properly exercised its discretion in refusing to extend time to appeal.

There is no question about the jurisdiction of NET over NEMA appeals, but difficulties can arise where a multifaceted issue arises within the NEMA decision. In the case of *R vs NET ex-parte Homescope Properties Limited & 13 Others,*[73] the applicant was issued with an EIA licence and other approvals to construct 47 town houses. The project commenced but some residents filed an appeal on grounds that account was not taken of Nairobi Zoning Regulations and Guidelines. It was also claimed that false statements were made in the EIA study and that there was no public participation. A preliminary objection was raised that NET did not have jurisdiction on issues related to planning, change of user and approval of building plans. This preliminary objection was dismissed, the court reasoning that the issue of change of user or approval of building plans was not what was presented on appeal, and in any event could not be divorced from the matters which NET ought to consider when determining whether the EIA licence was validly issued.

It is foreseeable that there will be litigation before the ELC on decisions of NET on the issues outlined above and it will be interesting to see how the ELC will settle the same, especially the interpretation of Section 129 of EMCA and Rule 7 of the NET Procedure Rules.

B. Jurisprudential issues within the ELC

Locus Standi

Old jurisprudence as illustrated in the case of *Wangari Mathai vs Kenya Times Media Trust*,[74] was to the effect that one needs to demonstrate personal loss in order to have *locus standi* to sue in a matter. The disdain with which the Court treated the suit is well exemplified in the choice of words that Judge Dugdale used in stressing the point that the plaintiff, then a re-known and respected environmentalist and later a Nobel Peace Prize Winner, had no *locus standi* to sue the defendant, who wished to put up a building complex within Uhuru Park, one of the few green zones left of Nairobi City. The Court stated as follows:

71 For an exposition see Mbogo vs Shah (1968) EA 93.

72 *Micah Mutoko & 4 Others vs Director General, NEMA & 2 Others* (2018)eKLR (Ruling of Eboso J of 29 March 2018).

73 *R vs NET ex-parte Homescope Properties Limited & 13 Others* (2016)eKLR

74 *Wangari Mathai vs Kenya Times Media Trust* (1989)eKLR.

In particular it is not alleged that the Defendant Company is in breach of any rights, public or private in relation to the plaintiff nor has the Company caused damage to her nor does she anticipate any damage or injury. It is well established that only the Attorney General can sue on behalf of the public but in any event the plaintiff does not wish to bring an action on behalf of anyone else. In the plaint there is no allegation that the plaintiff has a right of action against the Defendant Company.

Mr Ombaka had said it may strengthen her (plaintiff's) standing before the court because of the subject matter of the suit had he adopted what he said had been a suggestion that the plaint may have been brought on moral or social grounds. This may be so. The plaintiff has strong views that it would be preferable if the building of the complex never took place in the interest of many people who had not been directly consulted. Of course, many buildings are being put up in Nairobi without many people being consulted. Professor Maathai apparently thinks this, is a special case. Her personal views are immaterial. The court finds that the Plaintiff has no right of action against the Defendant Company and hence she has no locus standi.

Having held as much, the Court proceeded to dismiss the suit on two grounds, firstly that the plaint disclosed no cause of action, and secondly, that the plaintiff had no *locus standi* to sue in the matter.

This jurisprudence is now antiquated in light of the explicit provisions in written law that provide for *locus standi* with no requirement for demonstration of personal injury or loss to sue over matters related to the environment. Sections 3 and 4 of EMCA[75] are clear on this point.

By dint of Section 4, when a person wishes to enforce the right to a clean and healthy environment under Section 3, such person does not need to show that the defendant's act or omission has caused him/her any personal loss or injury. The only requirement is that the action should not be frivolous or vexatious, or an abuse of the court process.

These provisions were interpreted in the pre-2010 Constitutional regime in the case of *Samson Lereya & 800 Others vs Attorney General & 2 Others.*[76] The plaintiffs filed this suit complaining over the *prosopis juliflora* (mathenge) plant, an invasive species that was introduced in Baringo District in the year 1983 to tackle desertification. The plaintiffs averred that the plant had now taken over the entire landscape of Mugutani and Marigat Divisions and that it had deleterious effects to the environment. A preliminary objection was raised on several grounds, one of which was that the plaintiffs had no specific interest and therefore lacked *locus standi* to present the suit. The court dismissed this objection citing Sections (3)(a) and (4) of EMCA and held that the law after the enactment of EMCA with regard to *locus standi* has changed.[77]

The provisions of Section 3 and 4 of EMCA now have been given formidable strength by the 2010 Constitution. Article 42 of the Constitution provides for the right to a clean and healthy environment whereas its enforcement provision is Article 70 of the Constitution. Article 70(3) is explicit, that "For the purposes of this Article, an applicant does not have to demonstrate that any person has

75 *Supra* (n 17).

76 *Samson Lereya & 800 Others vs Attorney General & 2 Others* (2006) eKLR.

77 The suit against the Government was however dismissed on the other ground of preliminary objection relating to notice under Section 13A of the Government Proceedings Act, Chapter 40, Laws of Kenya. A second case was filed being *Charles Lukeyen Nabori & Others vs AG & 3 Others, High Court at Nairobi*, (2007)eKLR and judgment was given in favour of the petitioners. See also the case of *Mwaniki & 2 Others vs Gicheha & 3 Others* (2006) eKLR.)

incurred loss or suffered injury." Personal loss, either of the applicant or any other person, is not therefore a prerequisite to one enforcing the right to a clean and healthy environment, and the old doctrines of common law , with regard to *locus standi*, no longer apply in Kenya.

Despite the clear provisions in EMCA and the Constitution, it is not uncommon to find litigants raising objections that the persons who have commenced suits have no *locus standi*. However, the ELC has been quick to affirm these statutory and Constitution al provisions. A case in point is that of *Joseph Leboo & 2 Others vs Director Kenya Forest Service & Others.*[78] The plaintiffs in this case filed a suit on behalf of the Lembus Council of Elders and aimed to stop the harvesting of trees in eight Blocks of Lembus Forest within Baringo District. It was their contention that the harvesting of trees was illegal and contrary to the Forest Act, 2005 and the rules made thereunder, which guide the harvesting of trees in a Government forest. Together with the plaint, they filed an application for an interlocutory injunction. At the hearing of the application, the respondents and interested parties (who comprised some harvesters of trees) contended that the plaintiffs lacked *locus standi*. It was held that the suit raised fundamental questions on the management of forests, which was noted to be a public good. The court held further that any person was free to raise an issue that touches on the management and conservation of the environment and that it was not necessary for such person to demonstrate that he, as an individual, stands to suffer personal injury or loss. The court was emphatic that in an environmental matter, *locus standi* as known and applied under common law, is not applicable in Kenya under Articles 42 and 70 of the Constitution.[79]

The expansion of the leeway to persons to file cases, despite not having a direct interest in the subject matter, has led to public spirited persons and organizations filing suits aimed at environmental protection. We have now seen persons, having no residence and no direct connection to a project under challenge, file cases challenging various projects. An example is the case of *Okiya Omtata vs Kenya Power & Lighting Company Limited & 4 Others,*[80] where the petitioner, a public spirited individual, filed a case to stop the development of a coal fired electricity generating plant in Lamu.[81] We also have Non-Governmental Organizations (NGOs) inclined towards environmental protection coming to court and filing suits aimed at protecting a clean and healthy environment as happened in the case of *African Centre for Rights and Governance (ACRAG) & 3 Others vs Naivasha Municipal Council.*[82] In the matter, *ACRAG*, an NGO, sued the local authority for locating a dumpsite within a residential area. The organization did not own any property within the dumpsite under challenge, and was certainly not directly affected by the judgment, but teamed up with a few residents to present the litigation. The case of *Joseph Leboo vs Director Kenya Forest Service & Others,*[83] was also filed by a Council of Elders who hitherto would probably otherwise not have dared approach the court. Similarly the case of *R vs Lake Victoria South Water Services Board & Another ex parte Lower River Oyani Water Users Association,* [84] was filed by a water user association.

78 *Joseph Leboo & 2 Others vs Director Kenya Forest Service & Others* (2013) eKLR.

79 See also *John Kabukuru Kibicho & Others (Suing on behalf of Milimani Residents Association) vs County Government of Nakuru, ELC at Nakuru* (2016)eKLR.

80 *Supra* (n 52).

81 The case was however dismissed on other reasons and not the issue of locus standi.

82 *African Centre for Rights and Governance (ACRAG) & 3 Others vs Naivasha Municipal Council* (2017) eKLR.

83 *Supra* (n 78).

84 *R vs Lake Victoria South Water Services Board & Another ex parte Lower River Oyani Water Users Association* (2013)eKLR.

Despite the relaxation of the rule on *locus standi*, the number of environmental cases filed in the ELC is still low. With the establishment of a court dedicated to hearing cases over land and environment, coupled with the fact that the ELC is spread throughout the country, one would have expected that there would be a proliferation of environmental cases. This is however not the case. NGOs and individuals probably need to appreciate the fact that the ELC exists specifically to hear environment and land disputes and push for more public interest litigation. It is probable that there is a fear of being penalized with costs in the event that the litigation is not successful. This fear is understandable given the old jurisprudence demonstrated by the case of *Rodgers Muema Nzioka vs Attorney General & 8 Others.*[85] In this case, the petitioner had filed suit to challenge the grant of a mining licence and the compulsory acquisition of certain land earmarked for mining. The petition was dismissed and the petitioner condemned to pay the costs of the suit despite the fact that the case raised issues related to environmental management in a mining area and compensation for those affected. It was in essence public interest litigation filed in good faith and it was probably harsh for the court to penalize the petitioner with costs.

Modern jurisprudence is that in public interest litigation, so long as the suit is not vexatious, the unsuccessful claimant ought not to be burdened by costs.[86] Generally, there should be no fear over being burdened by costs as the jurisprudence demonstrates that the ELC is slow to make orders on costs on matters that are aimed at environmental protection. To give an illustration, in the case of *Okiya Omtata Okoiti vs KPLC*[87] despite the petition being dismissed, there were no orders as to costs.

NEMA decisions

We have already seen that under EMCA, NEMA is the institution given the mandate to exercise general supervision and co-ordination over all matters relating to the environment.[88] NEMA makes recommendations to the relevant authorities with respect to land use planning, and examines land use patterns to determine their impact on the quality and quantity of natural resources[89] NEMA is also the institution empowered to give EIA licences[90] and under the law, no project or development is to be undertaken without at least an EIA Study Report presented to NEMA.[91] It therefore goes without saying that NEMA is an extremely significant institution when it comes to matters relating to land use planning and management, and specifically, development projects. It is NEMA, which makes decisions on whether or not to grant an EIA licence for a project, whether to vary the terms of a licence, whether to extend the licence, and such other related decisions. The decisions of NEMA can be subjected to challenge in the courts or NET as we have earlier seen.

85 *Rodgers Muema Nzioka vs Attorney General & 8 Others* (2006) eKLR.

86 See the cases of *Patrick Musimba vs National Land Commission & 4 Others* (supra note 15) *; Kenya Human Rights Commission vs Communications Authority of Kenya & 4 Others* (2018)eKLR and *Mulungusi Muthembwa Mutunga vs Managing Director, Kenya Wildlife Services & 2 Others* (2017)eKLR a petition seeking to challenge an award for harvesting of biological material, but which case was withdrawn.

87 *Supra* (n 52).

88 EMCA, s 9.

89 Ibid, s 9(2) (c) and (d).

90 Ibid, s 63.

91 Ibid, s 59 (1).

A majority of the litigation relating to NEMA has been over 3 broad issues:

i. Failure by a proponent to undertake and obtain an EIA licence before embarking on a project.

ii. Failure by the proponent to follow the relevant guidelines stipulated in the EIA licence.

iii. That NEMA ought not have granted an EIA licence to a particular project because the project, though approved, poses a threat to a clean and healthy environment, which is not adequately mitigated.

We will look at these points in the following discussion.

1. Failure to obtain an EIA licence

The relevant law is contained in Section 58 of EMCA. Section 58(1) provides that a proponent must at the very least present to NEMA an EIA study report before embarking on a project. The ELC in its jurisprudence has emphasized the mandatory nature of the above provision and has not hesitated to stop projects for which no EIA has been undertaken. One of the instructive cases is that of *R vs Lake Victoria South Water Services Board & Another ex parte Lower Oyani Water Users Association.*[92] This was a judicial review motion seeking to stop the implementation of the Migori Water Supply and Sanitation Project which entailed extraction and treatment of water from River Oyani for purposes of supplying water to the residents of Migori. The applicants argued that there was no EIA conducted before the implementation of the project, and further that there was no public consultation prior to commencement of the project, contrary to the provisions of EMCA. They also presented the case that the 1st respondent was continuing with the project despite not having obtained a water licence from the Water Resource Management Authority (WRMA), as it was then known, and as was required by Section 25 of the now repealed Water Act, 2002.[93] The case was supported by NEMA, which was named as 1st interested party. NEMA did affirm that no EIA licence had been issued prior to the commencement of the project, and although the 1st respondent had submitted an Environmental and Social Impact Study Report (EISA), the same was still being assessed. The response of the 1st respondent was that they were in the process of obtaining the EIA licence after which they would apply to WRMA for the water licence. The Court found that the project was continuing without an EIA licence contrary to the requirements of EMCA and thus the right to a clean and healthy environment was under threat. The court proceeded to grant an order of prohibition to stop the project, until there was compliance with both EMCA and the Water Act, and the requisite EIA and Water Licences issued, as required by the two statutes.

A more or less similar situation was presented in the case of *Kibwezi Water Resources Users Association & 4 others v Attorney General & 5 others.*[94] TANATHI Water Services Board, the 6th respondent, initiated a project dubbed the Mtito Andei Water Project Phase 1 in Umani Springs within Kibwezi forest, which was aimed at providing water to residents of Kibwezi. Among the complaints raised by the petitioners was that the project was being undertaken without an EIA being conducted and an EIA licence issued. NEMA affirmed that they had not issued any EIA

92 Supra (n 84). (Judgment of Okong'o J, delivered on 11 February 2013).

93 Water Act, 2002, Chapter 372, Laws of Kenya (now repealed by the Water Act, Act No. 43 of 2016).

94 *Kibwezi Water Resources Users Association & 4 others v Attorney General & 5 others* (2019) eKLR

licence and none was exhibited by the 6th respondent. The court (Mbogo J) had no hesitation in holding that the project was illegal and issued an order of prohibition stopping any further water abstraction from Umani Springs.

In *West Kenya Sugar Company Limited vs Busia Sugar Industries & 2 Others,*[95] the petitioner complained that the 1st respondent had developed a sugar factory without having the requisite EIA licence. It emerged in the case that an entity known as Africa Polysack Sugar Factory Limited, had applied for, and was granted an EIA licence to construct a sugar factory on the land parcel LR No. Bukhayo/Ebusibwabo/972. A sugar factory was however constructed on two different land parcels LR Nos. Bukhayo/Ebusibwabo/1274 and Bukhayo/Ebusibwabo/1379. In addition, it was another entity known as Busia Sugar Industries that undertook the construction and not Africa Polysack Sugar Factory Limited, who held the EIA licence. It was argued by Busia Sugar Industries, that Africa Polysack had transferred the EIA licence to it. The court was not convinced. Firstly, the court (Mukunya J) held that there was no EIA licence granted for construction of a sugar factory within the land parcels No. 1274 and 1379, and no such factory could be constructed without there being an EIA as required by Section 58 of EMCA. Further, it was Busia Sugar Industries who constructed the factory, yet it held no EIA licence. The judge doubted the transfer of the EIA licence to Busia Sugar Industries. The petition was therefore allowed and the court stopped any further activities in the factories until all licences were applied for and granted as required by law.

In the case of *ACRAG vs Naivasha Municipal Council*[96], the petitioners claimed in their petition that the respondent was operating a dumpsite without an EIA licence as required by Section 87 of EMCA. This provision of the law requires that any person who wishes to operate a dumpsite must first apply to NEMA for a licence to do so and such licence must be issued before a dumpsite can be operated. The facts confirmed that the respondent, the local authority with jurisdiction over the area, and who owned the land where garbage was being dumped, had not applied for a licence for the dumpsite in question. The court ordered the respondent to acquire the requisite licence or the dumpsite would be closed. This is an important case relating to the manner in which local authorities mange wastes and operate dumpsites. The court indeed directed that service of the judgment be served *inter alia* upon the Council of Governors, so that they could ensure that counties managed waste within the parameters of the law.[97]

A more recent decision emphasising the point that an EIA licence is mandatory before commencement of a project is that of *Communist Party of Kenya v Nairobi Metropolitan Services & 3 others; National Environment Management Authority & another (Interested Parties)*.[98] In contention was an undertaking by the Nairobi Metropolitan Service aimed at rehabilitating Uhuru and Central Parks, which are recreational areas and among the few green spaces left in Nairobi. The court found inter alia that the commencement of the project before an EIA licence had been issued was contrary to the law.[99]

95 *West Kenya Sugar Company Limited vs Busia Sugar Industries & 2 Others* (2017) eKLR.

96 *Supra* (n 82).

97 See also the case of *Isaac Chebon & 4 Others vs County Government of Baringo Eldoret ELC Case No. 57 of 2017, (2017)eKLR*, where a complaint was raised that the defendant is constructing a cattle dip without an EIA licence, and an injunction was issued.

98 *Communist Party of Kenya v Nairobi Metropolitan Services & 3 others; National Environment Management Authority & another (Interested Parties)* (2021) eKLR.

99 The EIA licence was however not cancelled as the court found that it was proper though issued late after the project had commenced.

The above jurisprudence affirms the ELC's position that the court will not hesitate to stop a project when an EIA licence has not yet been issued.

2. Failure to follow procedure before issuance of EIA licence

Apart from a total failure to acquire an EIA licence as required by law, there are cases that have challenged EIA licences that have been issued by NEMA, on the basis that such EIA licences were granted without following the laid down procedure. Under Section 58 (7) of EMCA, EIAs are to be conducted in accordance with the environmental impact assessment regulations, guidelines and procedures issued under the Act. The Environmental (Impact Assessment and Audit) Regulations, 2003 guide the conduct of EIAs.

A key component of these regulations, and invariably the element that invites most litigation, is the requirement for public participation during the environmental impact study. This is explicitly required under Regulation 17.

Many litigants argue that they were not consulted when the EIA study was conducted, or that their views were ignored. The Court has had to determine these questions and there is jurisprudence on this important aspect of any EIA study. A relevant question to ask is, what constitutes adequate public participation?

Public participation is not the equivalent of giving every individual a personal hearing. Public participation involves the giving of a reasonable opportunity and a forum to the public at large to make them aware of the issues at stake, enable them present their views about the same, and take into consideration these views, before making the decision at hand. It does not always mean that these views will carry the day, but there must be demonstration that before arriving at the decision, these views were indeed taken into account. As stated by Justice Odunga in the case of *Republic vs County Government of Kiambu ex parte Robert Gakuru & Another Nairobi High Court,*[100], (which involved public participation before the enactment of laws, but whose dictum can aptly be adopted to cover public participation generally):

> …it must be appreciated that the yardstick for public participation is that a reasonable opportunity has been given to the members of the public and all interested parties to know about the issue and to have an adequate say. It cannot be expected of the legislature that a personal hearing will be given to every individual who claims to be affected by the laws or regulations that are being made. What is necessary is that the nature of concerns of different sectors of the parties should be communicated to the law maker and taken in formulating the final regulations. Accordingly, the law is that the forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.[101]

100 *Republic vs County Government of Kiambu ex parte Robert Gakuru & Another Nairobi High Court* (2016) eKLR.
101 *Ibid*, para 50.

This view was echoed in *Luo Council of Elders & 8 Others vs County Government of Bomet & 24 Others (The Itare Dam Case)*[102] where the court stated:

It is our view, public participation cannot mean that every person must be heard and/or involved during the process of public hearings and/or that the views received during such public hearings must be accepted. It is sufficient that the views have been made and to the extent possible factored in the final report that will be implemented. If the position was that whenever there is an organized group or interested persons, who have voiced objection to a development project, the project should be stopped, there would be impediment to development as there will be no one project that will have one hundred percent approval rating. The courts, in the face of at times unwarranted objections have to consider and evaluate the objections having regard to the wider interest of the public. In the present matter, it is our view that the wider public interest in the project outweighs the interest of those opposed to the project.

In *Mui Coal Basin Local Community & 15 Others vs Permanent Secretary Ministry of Energy & 17 Others*[103] the court held that public participation in the area of environmental governance will at a minimum entail the following six elements:[104]

a. It is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.

b. Public participation calls for innovation and malleability depending on the nature of the subject matter, culture and logistical constraints. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness.

c. Whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information.

d. Public participation does not dictate that everyone must give their views on an issue of environmental governance. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, especially in environmental governance matters must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining

102 *Luo Council of Elders & 8 Others vs County Government of Bomet & 24 Others (The Itare Dam Case)* (2018) eKLR (Judgment of 19 October 2018).

103 *Mui Coal Basin Local Community & 15 Others vs Permanent Secretary Ministry of Energy & 17 Others*Constitution Constitution (2017)eKLR

104 *Ibid*, para 97.

inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.

e. The right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.

f. The right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.

In this matter, the Government had gone through an exploratory phase of determining whether there were sufficient coal deposits in the Mui area for purposes of concessioning for commercial mining. It invited tenders for mining purposes and proceeded to award the same after a competitive bidding. Before work could start, some residents of the area filed a suit claiming that the EIA process had not been undertaken. On the facts, the Court found that all that had happened was an award of a concession and no work had yet to start. It is before the works could start that an EIA would have been needed and the suit was thus dismissed.

When it comes to EIA study reports, it must be demonstrated that the public were indeed given a reasonable opportunity to familiarize themselves with the project, give their views about it, and that these views were taken into account before a decision on whether or not to grant an EIA licence was made. In order to assess whether there has been adequate public participation, each case must be considered on its own facts and circumstances, since, as was stated in the above case of *Mui Coal Basin*, *"it is not possible to come up with an arithmetic formula or litmus test for categorically determining when a Court can conclude there was adequate public participation."*[105]

In the case of *Safaricom Staff Pension Scheme Registered Trustees vs Erdemann Property Limited & 5 Others*,[106] the court was not persuaded that there had been adequate public participation. In this case, the petitioner owned certain land on which it had developed a housing estate (Crystal Rivers). The respondent, a property developer, engaged in the development of about 2,000 apartments (Great Wall Apartments), not too far from the petitioner's development. The issue at hand concerned the development of a sewer line by the 1st respondent. The petitioner complained that the sewer line was being built across a road which led to the petitioner's development, and was also going to be above the ground thus block the petitioner's access to its property and also cause major drainage challenges. She complained that the stakeholders making use of this road were not consulted, that due process was not followed, and that there was no public participation before approval was given. The court held that although the 1st respondent held an

105 *Spura* (n.103), para 99.
106 *Safaricom Staff Pension Scheme Registered Trustees vs Erdemann Property Limited & 5 Others* (2017)eKLR.

EIA licence, the EIA project report did not address the issue of access for the petitioner and the interested party. It also did not address the impact of raising the sewer line one metre above the ground. The court also took issue with the alleged public participation. It noted that the report showed that only five people were interviewed, but there was no evidence that these five people owned land or houses along the road in question. The court held that as owners along road, the petitioner and interested party had a legitimate expectation that they would be consulted in case of any changes to their access road. The Court held that it was imperative before the final EIA report could be completed, that the petitioner and interested party be consulted, or at least, the project be advertised in the local newspapers for any objections, which did not happen. The court thus concluded that there was no adequate public participation before the project was licenced, declared the licences illegal and quashed them.

A similar conclusion was made in *J.S Muiru & Others on behalf of Tigoni Residents Association vs Tigoni Treasures Limited*[107] where the applicants complained about a project being carried out by the respondent comprising of a multiple dwelling housing development of 27 maisonettes on a 6 acre property. They claimed that the project was against the recognized user of the land, contrary to the Physical Planning Act, and that before the EIA licence was granted, they were not consulted and no public hearings were conducted. They averred that they had presented to NEMA their objections to the project but rather than hearing them, NEMA proceeded to issue the EIA licence. The Court held that since there was a Residents Association, it would be reasonably expected that the Association would be actively involved before the project was approved. The court found that there was only a brief consultation at the instigation of the plaintiff, and there was no indication that NEMA considered their concerns before it issuing the EIA licence. The court held that the EIA licence was not issued in compliance with EMCA and the EIA Regulations with regard to public participation. The court set aside the EIA licence and ordered a fresh EIA study to be conducted.

It is clear from the two cases above that when it comes to public participation, people most affected by the project must be in the first line of consultation. It is not enough to consult any member of the public. If the persons most affected have not been consulted, then this will run afoul the principle of public participation. In essence, there must be some quality to public participation. This qualitative aspect of public participation was emphasized in the case of *John Kabukuru Kibicho & Others (suing on behalf of Milimani Resident (Nakuru) Welfare Association) vs County Government of Nakuru & 3 Others.*[108] The petition was prompted by the decision of Nakuru County Government and NEMA to issue planning permission and an EIA licence respectively to the 2nd respondent, to commence the development of a multiple storey development (flats) in an area that is predominantly comprised of single dwelling units. In their defence, the developer and NEMA averred that they had done a proper EIA study and that the EIA licence was properly issued. The court observed that in so far as public participation was concerned, there were only 3 questionnaires annexed to the EIA study report. There was no indication of who these persons were, their years of settlement in the area, and it was not known who they were in connection

107 *J.S Muiru & Others on behalf of Tigoni Residents Association vs Tigoni Treasures Limited* eKLR, (Ruling of Mutungi J, of 14 November 2014).

108 *John Kabukuru Kibicho & Others (suing on behalf of Milimani Resident (Nakuru) Welfare Association) vs County Government of Nakuru & 3 Others* (2016) eKLR.

to the project. There was also no hint that the neighbours who lived next to, or around the project, were ever engaged. The court was emphatic that this is not the way that an EIA study is to be conducted, as it is necessary for the persons around the project to be consulted and their views taken into account before the licences are issued.

In *Patrick Musimba vs National Land Commission & 4 Others,*[109] the court was of the view that the burden of adequate public participation had been discharged. The petitioner contended that the construction of the Standard Gauge Railway from Mombasa to Nairobi, passing through the Tsavo National Park, was being conducted in violation of various Constitutional provisions, *inter alia*, the right to a clean and healthy environment under Article 42 of the Constitution. The petitioner argued that he and other affected persons did not participate before an EIA licence was issued. The response by NEMA was that the public at large, as well as the individual persons who were likely to be affected by the project, were fully and wholly involved in the process of assessing the environmental and social impact of the project. The court dismissed the petition and held that there was adequate public participation and also found that the Kenya Wildlife Service, the Ministry of Planning, the Kenya Forest Service and the National Museums were all involved. There was also evidence of publication of the project in two newspapers and in the Kenya Gazette. Comments were received and taken into account.

A similar holding was arrived at in the *Itare Dam Case.*[110] The petitioners in the matter argued that the construction of a dam, situated in the Mau Forest complex, was going to affect the communities living far downstream whose source of water can be traced to the Mau. It was argued that the project was a threat to various rivers, all of which end up in Lake Victoria, and that the project was only aimed at benefiting the people of Nakuru, at the expense of the people in nine other counties named as interested parties. The petitioners argued that they were not adequately consulted yet they would be affected by the project. The court held that there was adequate consultation and public participation. The court also found that the EIA study was subjected to stakeholder review and one significant lead agency, WRMA made its comments. The County Government of Nakuru also made comments approving the project. There was also publication in the newspapers and the Kenya Gazette, and pronouncements through radio, through which the public were invited to make comments. It was observed that there were also public hearings held. Given all these, the court was not persuaded that the public consultations were not adequate as argued by the petitioners and dismissed the petition.[111]

Despite the above holdings, various questions still linger with regard to public participation. One fundamental consideration is what weight the views of the public carry in so far as the project is concerned. It should of course not be the case that public participation is done just for the sake of it but the views of the public need to be taken into account. This is an issue that remains to be determined by the courts alongside the related questions of whether a project may be stopped solely based on the views of the public, or whether such project will still continue, despite the views of the public. This aspect of public participation is expected to grip the courts in future and it will be interesting to see how the ELC will grapple with the same.

109 *Supra* (n 15).
110 *Supra*, (n 102).
111 See also *Patrick Simiyu Khaemba & Another vs Ketraco & Others,* (2014)eKLR, (ruling of Obaga J of 28 May 2014)

3. Transfer and Variation of EIA Licences

It may happen that after receiving the EIA licence, the proponent transfers his interest in the project, or the project is taken over by another person or entity. Such successor will hope to rely on the existing EIA licence to continue the project and be saved from the trouble and expense of conducting a fresh EIA for a project that has already been given a clean bill of health. In such an instance the incoming entity will seek to have the existing EIA licence transferred to it. It may also happen that once an EIA licence is granted, some new issues arise, and the project has to be adjusted to a certain extent. It may also emerge that the conditions set for award of the licence may not be met for one reason or another. Since there will be an adjustment to the project, which was not captured in the initial EIA study, the proponent may wish to apply for a variation of the licence without undergoing a new EIA.

The EIA Regulations, 2013 outline situations when the EIA licence may be transferred or varied. In so far as transfer of an EIA licence is concerned, Regulation 26 applies. The transfer must be for the same project for which the EIA licence was given, meaning that the beneficiary of the transferred licence cannot go and undertake another project which is not covered in the EIA licence, and neither is he/she allowed to vary the project. For example, the project cannot be undertaken on a different parcel of land from what is specified in the EIA licence as happened in the case of *West Kenya Sugar Limited vs Busia Sugar Industries & Others.*[112] A factory project was transferred to another entity but the factory was not built on the land for which the EIA study was conducted. The court also found that no application for transfer of the licence was ever made. The court held that the 1st respondent's activities were illegal and ordered a stop of all activities in the factory.

Regulation 25 of the EIA Regulations 2003 addressed variations in EIA licences. There is no need for a new EIA study if the project, as varied, would still comply with the requirements of the original licence. The law does not however provide for the actual situations or circumstances under which NEMA may vary an existing EIA licence rather than insist on a new EIA study and fresh licence. The danger of course, is that the proponent of a project can attempt to hide behind an existing EIA, and claim that all that he is doing is a variation, so as to escape the requirement for a new EIA, yet in all respects, the project is a completely different project. In the case of *Diasta Investments Limited vs Nilesh Devan Kara Shah & 4 Others,*[113] there was an increase of a development project from the approved 8 floors in the original EIA to 10 floors through a variation of the licence thus at least a 20% increase in the size of the project. Similarly in *Deepak Harakch & another v Anmol Limited & 4*[114] the original approved development project was for 24 apartments but these were increased to 48, through a variation, a 100% increase in the size of the project. These cases however passed the test of variation and a new EIA licence was not required.

The situation in *Moffat Kamau & 9 Others vs Aeolus Kenya Limited & 9 Others (the Kinangop Wind Park Project case)*[115] was however treated differently. In this case, a company called Ecogen, sought to have a wind power park in Kinangop area initially for the production of up to 30MW of power from turbines to be located in a single parcel of land. It applied for and was issued with

112 *Supra* (n 95).
113 *Diasta Investments Limited vs Nilesh Devan Kara Shah & 4 Others* (2013) eKLR.
114 *Deepak Harakch & another v Anmol Limited & 4 Others* (2018) eKLR.
115 *Moffat Kamau & 9 Others vs Aeolus Kenya Limited & 9 Others (the Kinangop Wind Park Project case)* (2016) eKLR.

an EIA licence. This licence was later transferred to Aeolus Limited. Aeolus upscaled the project to 61MW and the said project coverage was expanded from 2 sq km to 16 sq km. To continue with this project, Aeolus did not apply for a new EIA licence, nor did it conduct a new EIA. Instead, it applied for, and was granted, a variation of the original EIA licence without the necessity of conducting a fresh EIA. The petitioners successfully challenged this. The court held that where there was a substantial change in the character of the project, a variation of the original licence, without the need for a fresh EIA was wrongful. The court held that where circumstances exist that would entitle NEMA to cancel the original licence, then NEMA must at least seek a fresh EIA before issuing a variation. In this instance, the court felt that the character of the project had changed so fundamentally that it was wrong for NEMA to only issue a variation of the original EIA licence, without a new EIA being conducted. The court also pointed out situations when it would be wrong for NEMA to only vary a licence without requiring a fresh EIA, including, change in the site of the project, a change in law, a change in technology to be used, or change in the environmental effects.[116]

Going forward, it would help if the regulations were clear on what would suffice for a variation, which would not need a new EIA, and what would require a distinct EIA. As was noted, there is a risk of persons taking advantage of their existing EIA licences, to do a different project under the guise of a variation, which may lead to risks to the environment which were not foreseen, and for which mitigation measures were not pronounced in the initial EIA study.

C. Jurisprudence on Planning and Environmental Management

Planning and development control

Planning and control of developments is a key component of environmental management. Without planning there would be no controls over the built environment and no regulations over what to build, where to build, and what standards to use in building. There would also be no special requirements for conservation areas, designated parks and recreational spaces. In as much as the Constitution protects the property rights of landowners , such owners cannot do whatever they want on their land. Article 66 of the Constitution explicitly provides that property rights are subject to planning regulations. It is important to have such limitation for the general good of the public and for the proper and sustainable use of environmental goods and services.

Several statutes have provisions on planning and land use. For example under Section 23 of the Agriculture and Food Authority Act,[117] the Cabinet Secretary for Agriculture is empowered to make land preservation guidelines. This includes the power to prohibit, regulate, or control the undertaking of agricultural activities over land, such as clearing and destruction of vegetation, construction of gullies or other such drainages, and afforestation of land.

Under Section 37 of the Forest Conservation and Management Act,[118] there is a direct requirement for every County Government to cause housing estate developers to make provision for the establishment of Green Zones at the rate of at least 5% of the total land area of any housing estate intended to be developed. There is also a requirement for every County Government to establish

116 *Ibid* para 85.

117 Agriculture and Food Authority Act, No. 13 of 2013.

118 Forest Conservation and Management Act, No. 34 of 2016.

and maintain a recreational park in every market centre within its area of jurisdiction.[119] But by far the most important statute is the Physical and Land Use Planning Act.[120] This statute provides for the enactment of development plans from the regional to the local level.

There has been litigation on the manner in which the Government, whether national or local, previously through the Municipal or County Councils, and now under the County Governments, has approved various development plans. The case of *Wangari Mathai vs Kenya Times Media Trust,*[121] earlier discussed, sought to stop the construction of an office complex in Uhuru Park. The case was aimed at protecting one of the few remaining green zones within the City of Nairobi, and it is unfortunate that it was dismissed offhand without being heard on its merits. One can however argue that the litigation, though struck out in court, was successful, as the pressure that it brought to preserve Uhuru Park bore fruit, and the complex was eventually never built. This case was filed by the activism of an individual. However, much of the litigation over matters related to planning is lodged by neighbours or Residents Associations. In the case of *Hardy Residents Association vs Andrew Nganga*,[122] the resident association of Hardy Estate, in Langata, sued the defendant for constructing a student hostel within a residential area without having obtained the necessary change of user licence and without public participation. They complained about the activities of the students residing thereon, and how they had caused the Plaintiff's members discomfort, inconvenience and disturbance. They raised the issue of non-compliance with provisions of the Physical Planning Act and EMCA in relation to change of user. The court was persuaded to grant an injunction, as the plaintiffs made out a prima facie case that the premises was being used as a hostel, without the requisite change of user approvals.

In the case of *John Kabukuru Kibicho & Others (suing on behalf of the Milimani Residents Welfare Association) vs County Government of Nakuru & Others,*[123] the residents of Milimani in Nakuru, through their association, filed suit to oppose the construction of a multiple storeyed residential block (flats) in an area that was predominantly comprised of bungalows. The evidence showed that the developer had applied for a change of user, which was opposed by the plaintiff, but despite this opposition, the County Government of Nakuru (sued as the 1st respondent), gave the go-ahead for the development without giving the petitioners a hearing. At issue was the interpretation of Section 41(3) and 52 of the Physical Planning Act[124], in relation to change of user. The court held the view that change of use of land is applied for because the intended use of the land is not in conformity with the conditions attached to the holding of the title, and thus, it is among the applications that need to be served on owners or occupiers of adjacent land. A further notice also needed to be placed in the Kenya Gazette, in two local dailies, and notice be served upon the Chief as required by Section 41 of the said Act. In the instant case, there was only one advertisement in one English daily newspaper, and the court was of the view that the provisions of the Act had not been complied with. The court cancelled the change of user licence.[125]

119 *Ibid* s 37(3).
120 Physical and Land Use Planning Act, No.13 of 2019.
121 *Supra* (n 74).
122 Republic v Nairobi City Country Ex-Parte Andrew Ng'ang'a & another [2014] eKLR
123 *Supra* (n 108).
124 Physical Planning Act of 1996.
125 See also *Koome Mwambia & Others suing on behalf of Kunde Road Residents Association vs Deshun Properties Company Limited & 4 Others* (2014)eKLR.

Telecommunication Masts and Base Receiver Stations

Telecommunication is an important aspect of modern life and many of us cannot envisage a life without use of the existing telecommunication technology. We all make calls on our mobile phones, use the same phones, computers and laptops, every day to access the internet and also spend a lot of time on social media. To do all this, we use radio waves, which are transmitted through cell sites hosted in telecommunication masts or towers. The masts are either anchored on the ground, or on buildings, and are placed high enough for minimal obstruction. There are quite a number of masts and these have invited attention about their impact on the environment and to the general health of human beings.

There is not much litigation on these though in the now fairly old case of *Sam Odera & 4 Others vs NEMA & Another,*[126] residents of a block of flats objected to telecommunication masts being placed on top of their roof. The court allowed the suit and stopped the placing of the masts as it was not persuaded that the proponent had studied its impacts on the residents well.

The issue also arose in the case of *Ken Kasinga vs Daniel Kiplagat Kirui*[127] where the petitioner complained about the fact that his neighbour, the 1st respondent, had caused the erection of a telecommunication mast in his land without consulting the petitioner. The petitioner also argued that the telecommunication licence and the physical planning licence for extension of user were irregularly issued. On the evidence, the court held that the telecommunication, NEMA and planning licences were not properly issued. The court also found that there were no rules with regard to the citing of telecommunication masts and directed NEMA and the Communications Authority of Kenya, to develop guidelines on these. An appeal was however filed to the Court of Appeal over this decision and the same was quashed on the basis that the ELC had no jurisdiction to hear the case.

Waste Disposal and dumpsites

Waste disposal is a global challenge facing numerous countries and Kenya has not been spared either. Most towns in Kenya are choking under the weight of garbage and most Counties have not been able to put in place effective waste management programs within their areas of jurisdiction. It goes without saying that poor waste disposal is a threat to the Constitutional right to a clean and healthy environment and to safeguard this, vigilant residents have opted to come to court to enforce this right.

One of the significant cases is *ACRAG & 3 Others vs Naivasha Municipal Council*[128] where the Naivasha Municipal Council converted one of their parcels of land into a dumpsite, which was challenged as threatening the right to a clean and healthy environment. The court found that the dumpsite was not only unlicenced, but was not being properly managed, and was indeed a threat to the environment. The court proceeded to order a closure of the dumpsite if the respondent did not properly have the site inspected by NEMA and a licence to operate the dumpsite given.

126 *Sam Odera & 4 Others vs NEMA & Another* (2006) eKLR,
127 *Supra* (n 42).
128 *Supra* (n 82).

A similar scenario unfolded in the case of *Martin Osano Rabera & Another vs Municipal Council of Nakuru & 2 Others.*[129] The petitioners, residents of Kiamunyi area in Nakuru, complained about the use by the 1st respondent, of certain land where the 1st respondent operated a dumpsite, popularly known as "Gioto Dumpsite". In their petition, the petitioners wanted orders to have the dumpsite moved from this area and relocated. They also wanted an environmental restoration order to be issued to rehabilitate the dumpsite. The court, like in the case of *ACRAG vs Naivasha Municipal Council,* while holding that there was a violation of the right to a clean and healthy environment, was alive to the reality that an immediate closure of the dumpsite would not be tenable. It granted the 1st respondent time to regularize its operation of the dumpsite.

In the case of *Justus Irungu Githae & 12 Others vs Attorney General & 4 Others*[130] an injunction was issued against the County Government of Kirinyaga, stopping them from dumping waste on land that was neighbouring that of the petitioners. The petitioners argued that the County Government's action of dumping waste in their neighbourhood threatened their right to a clean and healthy environment. The County Government conceded in their reply that they had not conducted any EIA before starting to dump waste and the court was of the view that any further dumping should be stopped pending hearing of the petition.

The court was however not persuaded to grant an injunction in the case of *Rose Juma Nyanjom vs County Government of Kisumu & 3 Others,*[131] where the petitioners sought to stop the relocation in Kisumu County of Kachok dumpsite, to an abandoned quarry. They argued that the abandoned quarry holds underground water, which would be at risk of being polluted by toxins, and make the same dangerous for consumption by humans and animals. While dealing with an application for conservatory orders to stop the relocation of the dumpsite, the court was not persuaded that the case was one of relocation of the dumpsite, but rather that part of the waste will be deposited in the new site with the old site still continuing in operation. The court therefore declined to issue the injunction.

In the case of *Isaiah Luyara Odando & another v National Management Environmental Authority & 2 others; County Government of Nairobi & 5 others (Interested Parties)*[132] , the court was moved to order the closure of Dandora dumpsite in Nairobi. In the suit, the petitioners complained about pollution of Nairobi and Athi river, and poor management of the Dandora dumpsite. Inter alia the court was moved to find that both NEMA and the County Government of Nairobi had not properly managed the Dandora dumpsite and ordered its decommissioning and relocation within 6 months of the judgment.

These waste disposal cases are expected to occupy some space in the ELC, as it is doubtful if a majority of the County Governments have moved to licence waste collection sites as required by EMCA. But even without litigation, it behoves the County Governments to have proper waste management systems of dealing with waste and if this does not happen, waste disposal is going to be a big problem in the near future.

129 *Martin Osano Rabera & Another vs Municipal Council of Nakuru & 2 Others* (2017) eKLR.
130 *Justus Irungu Githae & 12 Others vs Attorney General & 4 Others* (2016) eKLR.
131 *Rose Juma Nyanjom vs County Government of Kisumu & 3 Others* (2018) eKLR.
132 *Isaiah Luyara Odando & another v National Management Environmental Authority & 2 others; County Government of Nairobi & 5 others (Interested Parties)* (2021) eKLR.

Pollution and compensation to victims of pollution

Pollution of the environment is a global problem. Issues have arisen within Kenya about pollution and compensation of the victims of such acts. A landmark decision was made in the case of *KM & 9 Others vs Attorney General & 7 Others (the Owino Ohuru case)*.[133]This was a petition filed by persons representing the residents of Owino Ohuru Village, a densely populated area in Mombasa. The 7th respondent leased adjacent land and set up a lead battery recycling factory. The petitioners contended that the factory emitted toxic waste, which seeped into their village, exposing them to lead poisoning that resulted various illnesses and death. The petitioners sought a declaration that their right to a clean and healthy environment was violated and sought compensation for the harm suffered. The court found that there was indeed evidence of lead pollution in the soil and water from the factory and faulted the Government and its institutions for failing to take corrective action in good time. The court made an award of Kshs. 1.3 billion as general damages to the petitioners. It made an additional order for the respondents to clean up the environment and in default pay Kshs. 700,000,000/- to the petitioners to enable them facilitate the clean-up exercise.

There was also a demand for pollution cleanup and compensation resulting from the pollution of River Nairobi and River Athi that was made within the case of *Isaya Luyara* case[134]. The court found that the respondents had failed to eliminate the processes and activities that cause air and water pollution in Korogocho and Mukuru kwa Reuben slums attributable to the Dandora dumpsite and the pollution of the Nairobi River water upstream. The court ordered the respondents to identify the materials and processes that are dangerous to the environment and human health in relation to the people living in Nairobi and more specifically in Korogocho, Mukuru, and the areas surrounding the Dandora dumpsite. They were also directed to prescribe measures for the management of the materials and processes identified. In addition, an order was made directing the respondents to develop a plan and strategy for the cleaning up of the Nairobi and Athi River. The Respondents were directed to undertake an urgent clean-up of the Nairobi River from the source up to the estuary at Sabaki River in Malindi until the whole river is clean and free of pollution. The Respondents were directed to file reports in court every four months showing the water quality of samples of water taken from a minimum of twelve different points of the Nairobi and Athi River, including samples of water taken from all the counties which River Athi passes through. With regard to compensation, the court made an award of Kshs. 10,000/= to each petitioner.

It is significant that individuals have not become assertive in pointing out issues of pollution and demanding redress. It is expected that litigation on this area will increase if State agencies do not institute clean up exercises to reduce the levels of pollution to the environment. Of interest is how the court will compute compensation to victims of pollution and how the polluter pays principle will be applied and enforced.

133 *KM & 9 Others vs Attorney General & 7 Others (the Owino Ohuru case)* (2020) eKLR.
134 *Supra* (n 132).

D. Jurisprudence on Forests Management Conservation and Indigenous Rights

Forests are a critical natural resource. Trees and related vegetation, whether on land or in the sea, sustain life and ecosystems in more ways than we can ever imagine. The ecological value of forests can never really be measured in monetary terms and States must put all efforts at sustaining forests. Yet, forests worldwide have never faced as severe a threat as they do today, and this has not spared Kenya. The factors at play within our jurisdiction relate to poor management of forests, pressure for land by the ever expanding population, outright theft or grabbing of forest land and the rights of indigenous forest populations.

Pressure for Land

The pressure to settle the growing population has never been greater. To achieve this, the Government has a history of creating settlement schemes within areas that were hitherto gazetted forests. These are attractive settlement areas, for they have trees, which are a ready market for instant cash, and they are also good areas for farming, given that they are fertile and well supplied with rain. The Government, especially during administration of president Daniel Moi settled various persons in forests, particularly the Mau Forest Complex, and issued titles to them. However, during the presidency of Mwai Kibaki, a lot of these titles were cancelled and the persons settled therein evicted from the forests on the basis that the titles were illegally acquired. It transpired that in several cases, titles were issued to the settlers before the forest was degazetted, and what the Government did was to give monetary compensation to such persons to vacate the forests.

In the case of *Clement Kipchirchir & 38 Others vs Principal Secretary, Ministry of Lands Housing and Urban Development & 3 Others,*[135] the petitioners filed suit claiming that they have titles to parts of the Mau Forest. In the petition, they also complained of violent eviction and wished to be given security to be able to settle in their parcels of land; in the alternative they sought full compensation at market rates. The evidence tendered revealed that the titles of the petitioners were those that were issued before the forest was degazetted. The said titles were issued in the year 1997, yet the forest was degazetted in the year 2001. The petitioners complained that despite having titles, they were forcefully and inhumanely evicted in the year 2011, and they further complained that the offer of Kshs. 400,000/= made to them as compensation was a pittance. In their petition, the petitioners referred to various human rights treaties and the Article 40 Constitutional right to own property. The Court held that the forest needed to be properly degazetted before titles to private individuals could be issued.[136] Reference was made to Article 40 (6) of the Constitution, which provides that titles that have been unlawfully acquired cannot be protected. On whether there was a 'forceful eviction', the court dealt with the challenges of this term in its judgment[137] and also considered international law regarding evictions,[138] the general position being that all evictions need to be done humanely. The court found that the claims that the petitioners were forcefully evicted, their houses razed, and that

135 *Clement Kipchirchir & 38 Others vs Principal Secretary, Ministry of Lands Housing and Urban Development & 3 Others*(2015) eKLR.

136 *Ibid,* para 42.

137 *Ibid*, para 56.

138 *Ibid,* para 60.

they were beaten were not proved, and consequently the court was not persuaded that the eviction of the petitioners was not done humanely as claimed. Neither did the court see any problem with the level of compensation offered, as the petitioners never disclosed where they came from or whether they had alternative land. There was also no valuation of surrounding settlements so as to reach the conclusion that the level of compensation was a pittance. The petition was dismissed.

A more or less similar scenario played out in the case of *Kokwo Multipurpose Cooperative Society vs The Principal Secretary, Ministry of Lands & Housing and Urban Development & 3 Others*.[139] In this case, the petitioner, a cooperative society, claimed to own certain land after allocation by the Government, upon which it settled its members. It however emerged in evidence that at the time of allocation, these parcels of land constituted part of a gazetted forest, specifically, Mt. Elgon Forest. The allocation of the land to the petitioners was therefore declared unlawful as the process of allocating a forest had not been followed. The court held that the only remedy would be that of refund of what they had paid to the Government. There were other allegations in the case, of torture and inhuman treatment, but the court held that there was no medical evidence tabled to prove this.

The court in the case of *Timothy Ingosi & 87 Others vs Kenya Forest Service & 2 Others*[140] also came to a similar finding. The plaintiffs in this matter claimed to have been allocated land through a Presidential Decree but complained that they had not been issued with titles and complained that they were facing harassment and eviction by the Kenya Forest Service (KFS). KFS responded that this land is part of Kipkurere Forest. The evidence given showed that there was an allocation of land to the plaintiffs but the process of degazettement of the forest was never followed. The Court dismissed the case of the plaintiffs but directed the Government to consider the plight of the plaintiffs with a view of completing the due process of allocation. The declaration that the land is forest land was suspended for 2 years as the plaintiffs awaited the directed Government action.

There appears, therefore, to be consensus from the judges of the court, that they will not protect, land that was previously forest land which was not degazetted following the procedure laid down in the Forest Act. Such titles are not to be given the sanctity of the law as they are titles that are irregularly issued. The court has made it clear that forest land must first be lawfully degazetted as provided by law, before it can be converted into private land holdings and titles issued. The question whether such persons deserve compensation is however thorny and awaits determination if an appropriate case is presented.

Poor Forest Management

The Kenya Forest Service (KFS) created under the Forest Act has the mandate to manages forests. It is, however, common knowledge that there has been illegal harvesting of forests, and questions have arisen as to the manner in which KFS has managed forests. In the year 2018, a Task Force on Forest Resources Management and Logging Activities in Kenya was formed by the Cabinet Secretary for Environment. The report of the Task Force revealed that there

139 *Kokwo Multipurpose Cooperative Society vs The Principal Secretary, Ministry of Lands & Housing and Urban Development & 3 Others* (2015)eKLR, (judgment of 1 October 2015).

140 *Timothy Ingosi & 87 Others vs Kenya Forest Service & 2 Others* (2016)eKLR (judgment of 8 January 2016).

was significant mismanagement of forests by KFS.[141] A few cases have also been presented, complaining about KFS' management of forests. In *Joseph Leboo & 2 Others vs Director Kenya Forest Service & Another,*[142] the plaintiffs complained about KFS' issuance of licences for the felling of trees in Lembus Forest. They complained that KFS had illegally allocated pre-qualified and unqualified saw millers to harvest timber and fuel materials from the Lembus forest, without involving the community, contrary to the law governing the harvesting of timber and firewood from forests. They also complained that the saw millers were harvesting trees unspecified trees that they were never allocated. The Court found that indeed there was no management plan for the forest despite this being an explicit requirement in the Forest Act, 2005.[143] The rules required a 5 year management plan for every forest[144] and also barred KFS from issuing any authorization without a site-specific plan in place.[145] All these were found to be lacking and the court issued an injunction stopping any further harvesting of trees.

A more disturbing case that revealed the imprudence of KFS was that of *Raycon Limited vs Superply Limited & 2 Other,*[146] where the plaintiff claimed to have been granted harvesting rights over exotic timber in the Mau Forest by KFS. It claimed that the 1st and 2nd defendant had encroached on its allocated portion and were harvesting trees illegally and thus sought an injunction against the 1st and 2nd defendants to stop them from any further harvesting of trees pending hearing of the suit. It emerged in the course of hearing that the plaintiff did not in fact have any licence to harvest trees, yet he had been allowed to harvest trees by KFS. The court also wondered how the 1st and 2nd defendants were allowed to harvest timber despite clear provisions in the Forest Act, 2016, barring one from harvesting trees in a forest without a licence.[147] The court was not persuaded that either the plaintiff or the 1st and 2nd defendants had any licence to harvest trees and issued summons to the Director KFS, to explain why these companies were being allowed to harvest trees in the Mau forest.

The above two cases, are rather disturbing, and reveal the dismal performance of KFS. Hopefully, the Forest Task Force report, which gave proposals on how to manage the forests better, will be implemented, so that KFS may improve in discharging their mandate to properly manage this important natural resource.

Claims by indigenous persons to rights in forest land

There are indigenous populations which have lived in forests since time immemorial. These populations have continuously derived their daily subsistence from forests but they do not have any recognizable title to any land in the forest. Such populations have attempted to assert their rights to live in the forests and continue with their age old practices which are basically hunter/gatherer in nature. They have however faced threats of eviction by the Government, as

141 Taskforce Reporton Forest Resources ManagementandLogging Activities'(Ministry of Environment and Forestry 2018), available at http://www.environment.go.ke/wp-content/uploads/2018/05/Task-Force-Report.pdf visited on 20 August 2018.

142 *Supra* (n 78).

143 The Forest Protection and Sustainable Management Rules in the Forest Act, 2005.

144 *Ibid*, Rule 5 (1).

145 *Ibid,* Rule 5(6).

146 *Raycon Limited vs Superply Limited & 2 Other* (2017)eKLR.

147 The Forest Conservation and Management Act, 2016, Section 64(1) (a), which makes it mandatory for one to have a licence before harvesting any trees in a forest and Section 64 (2) which provides that it is an offence for anyone to undertake those activities without a licence.

the general conservation approach that the Government employs is to have nobody resident in forests. The Government policy is based on the reasoning that populations who are resident in forests threaten the Government's conservation efforts. These communities' lifestyles are also changing moving away from their hunter/gatherer practices and embracing modernity, which may lead to clearing forests for cultivation. This has thus brought a conflict between these indigenous populations and the Government, which has seen litigation both locally and internationally. The difficulty is in finding a balance between the rights of the indigenous persons and at the same time safeguard the forests which are ecologically sensitive areas.

There has been litigation from three indigenous communities being the Maasai, the Ogiek and the Sengwer.

The case of *Ledidi Ole Tauta & Others vs Attorney General & 2 Others*[148] was filed by persons of Maasai origin. They claimed that they were entitled to Ngong Hills which hosts the Ngong Forest through ancestry. KFS, the 2nd respondent, in its reply, averred that Ngong Hills was a Government forest having been so gazetted in the year 1985 and argued that this was public land that was not available for distribution to the petitioners or any community. It contended that it was entitled to issue vacation notices to illegal settlers within the forest. The court held that the claim of the petitioners was contrary to the spirit of the Constitution, especially Article 69, which obligates the state to protect the environment. It held further that the Forest Act, 2005, does not make provision for individualized ownership of forest land which is categorized as public land. On the question of historical injustices, the court was of the view that this was best handled by the National Land Commission (NLC) and cited the mandate of the NLC under Article 67 (2) (e) of the Constitution. The Court held that it was premature for the petitioners to come to court without first following the process of degazettement of the forest or going through the NLC on historical injustices and proceeded to dismiss the petition.

There have been at least two cases by the Sengwer community, the first being the case of *James Kaptipin & 43 Others vs The Director of Forests & 2 Others*[149], and the second being the case *David Kiptum Yator & 2 Others (suing as leaders of the Sengwer community) vs The Attorney General & 4 Others* consolidated with the case of *Elias Kibiwot Kimaiyo & others (acting on their own behalf and as representatives of the Sengwer Community of Embobut Forest, Cherangany Hill) vs Kenya Forest Service and Others.*[150] which is pending as at the time of compiling this text. In the first case, the petitioners were arrested for farming in Kapolet Forest without the permission of the Director of Forests and were arraigned in court to face criminal charges. They then filed a Constitutional petition seeking to have the criminal cases declared unConstitutional arguing that the charges infringed on various of their Constitutional rights. They also sought a declaration that Kapolet Forest was land for the settlement of the Sengwer community. They urged that in the year 1997, the Government agreed to settle the Sengwer on 3000 acres to be hived off Kapolet Forest. They contended that only 489 of their members have been settled on 1846.57 acres and they asserted that they needed to be allocated the balance of the land to make 3000 acres. In response, the Government stated that Kapolet Forest is a gazetted Government Forest, which can only be given out in accordance with the law. It was further submitted that

148 *Supra* (n 14).

149 *James Kaptipin & 43 Others vs The Director of Forests & 2 Others* (2014) eKLR.

150 Eldoret ELC, Petition No. 15 of 2013 and Eldoret ELC, Petition No. 3 of 2018.

the forest is a water catchment area which is the source of a number of rivers, which if allowed to be invaded, will cause an ecological disaster. The court held that the criminal charges were presented because the petitioners were found cultivating in a forest without permission, which by itself is a criminal offence, and that the prosecution was not brought on grounds that the petitioners come from the Sengwer Community. The court held that the petitioners were being charged as individuals who are alleged to have violated provisions of the Forest Act, and they would be accorded a fair trial and presumed innocent until proved guilty. Their prosecution was thus held not to be a community affair. On the issue of whether or not the charges facing the petitioners were tenable, the court held that this was a matter to be decided by the trial court and found no evidence of discrimination. The court also found that the plea of the petitioners that they deserved to be granted land for settlement, meant that they had abandoned their hunter/gatherer lifestyle, and that being the case, they could not be allowed to settle in the forest as this would lead to its degradation. The court stated as follows :

> The petitioners are not asking for part of the forest to conserve it as they go on with their traditional way of hunting and gathering. They instead want it for settlement full with titles in individual names. About 100 years ago, it was possible for the Sengwer to live as hunter-gatherer community. The circumstances have now changed. Population has grown and a number of people are fighting for scarce natural resources. The people have adopted modern farming which is not conducive to sustainable development and conservation of forests. Forests are being cleared for firewood and timber. People are putting up permanent structures in the forests. It is therefore not tenable that we can go back to the old days of hunter-gatherer lifestyles. There are legal ways in which the community can be allowed back into the forest to harvest honey without affecting the environment. The Director of Forest is empowered by the Act to allow people into forests to undertake certain regulated activities. The Sengwer community should embrace this in efforts to conserve the environment for the present and future generations.[151]

Ultimately, the court was not persuaded that the Sengwer should be settled in Kapolet forest, reasoning that this is an important water catchment area, although it left it open for the Government to consider their settlement. The petition was dismissed.

The second Sengwer case, that of *David Kiptum Yator and Others*[152], was a complaint by the Sengwer that they were being illegally evicted from Embobut forest. They asserted that Embobut forest is their ancestral home and claimed that they were being forcefully evicted and that their houses were burnt and their crops destroyed. They sought orders to restrain the Government and its agencies from interfering with their quiet possession of the forest and stop any further evictions. The reply by the respondents was that Embobut forest was gazetted in the year 1954 and is one of the three forests within Cherangany Hills, thus protected under the Constitution and held in trust for the people of Kenya. They averred that the forest had been illegally invaded and that pursuant to a task force recommendation, the squatters had been compensated to enable them move out of the forest and settle in other areas. The court held that since Embobut was a gazetted forest, it was public land and not community land belonging to the Sengwer. The

151 *Ibid*, para 24.
152 *Supra* (n 15).

court was of opinion that if the Sengwer have historical grievances they can pursue the same before the National Land Commission. The two consolidated petitions were dismissed.

The case of the Ogiek has been presented before the national courts and before the African Court on Human and Peoples Rights. There are at least two decided domestic cases, relating to the Ogiek of the Mau forest being the case of *Kemai & 9 Others vs Attorney General and 3 Others*,[153] and that of *Joseph Letuya & Others vs Attorney General & 5 Others.*[154] A third case, *Peter Kitelo Chengoiywo and Others (suing as representatives of the Ogiek/Ndorobo community of Chepkitale, Mt. Elgon) vs Attorney General and Others*[155] relates to the Ogiek of Chepkitale forest in Mount Elgon.

In *Kemai vs AG*[156], the applicants, members of the Ogiek community, filed suit on behalf of 5,000 members of the Ogiek community. They sought a declaration that their eviction, by the Government, from Tinet Forest (part of the Mau Forest complex), contravened their right to life, right to the protection of the law and the right not to be discriminated against. They sought further orders for compensation by the Government. This was based on their claim that they had been living in Tinet Forest since time immemorial, where they derived their livelihood by gathering food, hunting and farming. They argued that they would be left landless if evicted from the forest. They asserted that their culture aimed at preserving nature so as to sustain their livelihood and they had never been a threat to the environment. They averred that their eviction was coming after the Government had finally accepted to have their community settled in Tinet Forest and a number of other places like Marioshoni, Teret, and Ndoinet within the Mau Forest. They stated that this acceptance was in the year 1991, and that between 1991 and 1998, the community settled in the area in question with the full cooperation of the Government who issued letters of allotment to specific pieces of land to individual members of the community, and that the community had thus embarked on massive developmental activities, such as building schools, trading centres, carrying out modern crop farming and animal husbandry, and had built permanent and semi-permanent houses. They complained that in May 1999, the Government issued a 14 days ultimatum to vacate or face forceful eviction which threatened their livelihood as they knew no other home.

The Government responded by saying that the applicants and the 5,000 persons they represented were not genuine Ogiek, as the genuine members of the Ogiek community had been settled by the Government in Sururu, Likia and Teret areas of the Mau. The State averred that between 1991 and 1998, the Government while intending to degazette part of Tinet Forest, issued some cards to landless persons, which was a promise to settle them once land became available, and the applicants were not among those issued with these cards. It was later realized that the part of Tinet Forest, which was intended to be degazetted, was a water catchment area, and the Government shelved the settlement plan, at least for the time being. When the Government came to learn that the applicants had unlawfully entered Tinet Forest, they gave them a notice to vacate. They contended that they had settled the Ogiek elsewhere but some people entered Tinet Forest with an intention to dwell there without a licence. They denied that evicting them would deny

153 *Kemai & 9 Others vs Attorney General and 3 Others* (2006) KLR (E&L) 326 (judgment of Oguk and Kuloba JJ of 23 March 2000).

154 *Joseph Letuya & Others vs Attorney General & 5 Others* (2014)eKLR.

155 *Peter Kitelo Chengoiywo and Others (suing as representatives of the Ogiek/Ndorobo community of Chepkitale, Mt. Elgon) vs Attorney General and Others.*ELC at Bungoma, Petition No. 1 of 2018 (unreported).

156 *Supra* (n 154).

them their livelihood as it was pointed out that they also keep livestock; they also discounted the assertion that there were any developments in the forest as claimed by the applicants.

In its analysis, the Court went through the historical records, and found that in the 1930s, the persons living in the Forest were called *Dorobos* (a *Maasai* term meaning poor folk who had no cattle and thus derived livelihood from eating game meat and collecting honey) and amongst the Dorobo was a group called the Ogiek (or *Okiek*). The court also found that today, hunting has become a secondary economic pursuit, and the social value of honey, has never constituted more than a fifth of their diet, and that these people now herded cattle or cultivated. Their homes had also changed from temporary units that could be abandoned, to permanent or semi-permanent structures. The court was not convinced that they were engaging in cultural and economic activities, which depended on ensuring the continuous presence of forests. The court had this to say :

So, whilst in his undiluted traditional culture the Ogiek knew their environment best and exploited it in the most conservational manner, they have embraced modernity which does not necessarily conserve their environment. As we have just said, they cannot build a school or a church house, or develop a market centre, without cutting down a tree or clear a shrub and natural flowers on which bees depend, and on which bee-hives can be lodged, from which honey can be collected, and from which fruits and berries can be gathered. The bush in which wild game can be hunted is inconsistent with the farming (even though the applicants call it peasant farming) they tell us they are now engaged in. Their own relatively permanent homesteads cannot also be home of wild game which the applicants want us to believe to be one of their mainstay. As the applicants did pit- latrines or construct other sewage systems for schools, market places, residences, etc, as of necessity they must have, they obviously provide sources of actual or potential terrestrial pollutants.[157]

The court found that the area was declared a forest during the colonial days, and that the Ogiek were moved to an area called Chepalungu, but with tendency to seep back to Tinet and adjoining forest areas, where lack of supervision caused a build-up of settlement. However, by 1956, the court found that only a mere 7 persons appear to have been in Tinet, but as forest guards. According to the Court, the Ogiek had thus been given alternative land during the colonial days, and such alternative land constituted compensation. The court held that the applicants could not claim that Tinet Forest was their land, and therefore their means of livelihood. The court held that the forest was a natural resource, to be enjoyed by everyone, and there was no reason why the Ogiek should be the only favoured community to own and exploit it, a privilege not extended to other Kenyans. They could still eke out a living and livelihood but by observing permit and licencing laws like everyone else does or may do. The court dismissed the suit with costs.

The court arrived at a different holding in the case of *Joseph Letuya & Others vs Attorney General & 5 Others.*[158] This suit had been filed on 25 June 1997 before the High Court by the petitioners representing the Ogiek community living in East Mau Forest. The petitioners sought various orders, but basically they wished to have a declaration that their forcible eviction from the Mau Forest contravened their right to life; that the settlement of other people in the Mau Forest

157 *Ibid*, page 333.
158 *Supra* (n 155).

was an act of discrimination against them; that the settlement of other persons from other districts in the Mau Forest was null and void; an order to stop the respondents from allocating other people, other than themselves, land in the Mau Forest; an order to remove the persons so allocated land within the forest; and an order that their use of land not be interfered with. They claimed in the suit that they have been living in the East Mau Forest as their ancestral land and that about 10% of them derive their livelihood from food gathering and hunting whilst the rest practice peasant farming. They averred that their ancestors lived in the Mau Forest, but during the colonial period, their ancestral land was declared a forest. They stated that when land was set aside for other African communities as Trust Land between 1919 and 1939, none was set aside for them, with the consequence that no titles have ever been issued to their members. They contended that in the year 1991, the Government promised to settle them in part of the forest, but what happened is that from the year 1993, this land started being given to other people. The response of the Government was that the Eastern Mau Forest is a Government Gazetted Forest, and not a reservation of the Ogiek community as ancestral land, and that the members of the Ogiek who have been in occupation have been doing so illegally as squatters contrary to the Forest Act. It was argued that the petitioners should be treated, for purposes of settlement, as any other landless Kenyan without discrimination on account of clan, tribe, religion, place or origin or any other local connection and that some of the applicants had already been allocated land within the settlement scheme.

The court held that the Applicants' livelihood is directly dependent on forest resources and the health of forest ecosystems, and that they relied on the Mau Forest to sustain their way of life, as well as their cultural and ethnic identity. Their right to life was thus dependent on their continued access to the Mau Forest and needed to be protected. The Court was not however persuaded that their long occupation of the forest provided them with any proprietary rights as the process of acquisition of land, and specifically forest land, was clear. The Court felt that the applicants' claim for property rights was therefore not ripe for determination, and was of the view that this should be pursued through the National Land Commission (which, under the Constitution, is mandated to investigate historical injustices and recommend appropriate redress). The court further held that the Ogiek are both a minority and an indigenous group, and thus merit to be treated as a special group, over and above the rights applicable to other persons. The court ultimately made the following three substantive orders:

1. This Court hereby declares that that the right to life protected by section 71 of the previous Constitution and Article of 26 the 2010 Constitution, right to dignity under Article 28 of the 2010 Constitution and the economic and social rights under Article 43 of the Constitution of the affected members of the Ogiek Community in Marioshioni Location, Elburgon Division and Nessuit Location, Njoro Division, Nakuru in the Mau Forest Complex including the Applicants has been contravened, and is being contravened by their forcible eviction from the said locations without resettlement and that the said members of the Ogiek community have been deprived of their means of livelihood.

2. This Court hereby declares that the eviction of the Applicants and other members of the Ogiek Community from Marioshioni Location, Elburgon Division and Nessuit Location, Njoro Division, Nakuru in the Mau Forest Complex is a contravention of their right not to be discriminated against under section 82 of the previous Constitution, and Article 27 and 56 of the 2010 Constitution as it has resulted in the Applicants being unfairly prevented from living in accordance with their culture as farmers, hunters and gatherers in the forests.

3. The National Land Commission is hereby directed to within one (1) year of the date of this judgment identify and open a register of members the Ogiek Community in consultation with the Ogiek Council of Elders, and identify land for the settlement of the said Ogiek members and the Applicants who were to be settled in the excised area in Marioshioni Location, Elburgon Division and Nessuit Location, Njoro Division, Nakuru and have not yet been given land in line with the recommendations in the Report of the Government Task Force on the Conservation of the Mau Forest Complex published in March 2009.

This judgment was a complete turnaround from the decision in the case of *Kemai & Others vs AG.* It would appear from the above judgment, that the Ogiek, got orders in their favour, as the court held, as noted in order 2 above, that their eviction from sections of the Mau Forest was a contravention of their rights, despite the court in the *Kemai* case not being convinced. It will also be seen from order 3 above, that the NLC was directed to register the Ogiek and identify land for their settlement.

Despite the favourable orders above, another suit seeking to benefit the Ogiek was filed before the African Court on Human and Peoples' Rights by the African Commission on Human and Peoples' Rights.[159] The complaint lodged was that the Government of Kenya, in October 2009, issued a 30 day eviction notice to the Ogiek and other settlers of the Mau Forest. The notice was issued on the basis that the Mau Forest is a reserved water catchment area but the applicant contended that the Government had failed to take into account the importance of the Mau Forest to the survival of the Ogiek. In the suit, the applicant sought orders to halt the evictions of the Ogiek from the Mau, issue the Ogiek with legal title and revise its laws to accommodate communal ownership of land; and pay compensation to the Ogiek for their loss of property, development and natural resources, and loss of right to practice their religion and culture. On 15 March 2013, orders for provisional measures were granted stopping the Government from transactions on the Mau Forest and various other orders. The State filed various objections, one of which was an objection to admissibility based on the argument that the applicant first needed to exhaust local remedies[160]. The State argued that its national courts are competent to deal with any violations alleged by the Ogiek and that the local remedies are adequate, effective and available. The international court dismissed this objection mainly on the reasoning that the cases in the domestic courts took too long based on delays by the State. Ultimately, the case was heard and in its judgment of 6 May 2017, the court held that the Ogiek were an indigenous population; that the Government was expelling the Ogiek from their ancestral lands without their will thus violating their rights to land; that the Government has denied the Ogiek status of a distinct tribe

159 Application No. 006/2012, African Commission on Human and Peoples' Rights vs Republic of Kenya.
160 Based on Article 56 of the Charter and Art 6(2) of the Protocol and Rule 40 (5) of the Rules.

like others; that there was violation of their right to life and integrity; that there was violation of their right to conscience and religion and culture; a violation of their right to freely dispose of property; that there was a violation of their right to development. The Government was informed to take corrective measures to correct the violations and report within 6 months of the judgment.

It is rather interesting that the ACHPR chose to assume jurisdiction in this matter despite the objections of the State on the availability of local remedies. The argument that the local remedies took too long to be effective is doubtful as the Ogiek had already been heard in the *Kemai* case and there was already a decision in the *Joseph Letuya* case. The risk of an international court arrogating itself jurisdiction, where local courts are dealing with, or have dealt with a matter, may lead to conflicting decisions, placing the Government in a quagmire. An international court should be extremely cautious before entering an arena that can be covered by a domestic court. Indeed, it is arguable that the Ogiek got what they sought in the case of *Joseph Letuya*, and it was completely unnecessary for the ACHPR to have delved into the matter, just to duplicate, what had already been decided by a domestic court.

Be that as it may, the Government has now through a notice dated 25 October 2018, established a team to implement the decision of the ACHPR, titled *"Task Force on the Implementation of the Decision of the African Court on Human and Peoples' Rights Issued Against the Government of Kenya in Respect of the Rights of The Ogiek Community of Mau and Enhancing the Participation of Indigenous Communities in the Sustainable Management of Forests."* It will be interesting to see what recommendations the Task Force will present.

The case of the Ogiek of Mt. Elgon, *Peter Kitelo Chengoiywo and Others (suing as representatives of the Ogiek/Ndorobo community of Chepkitale, Mt. Elgon) vs Attorney General and Others*, was dismissed.[161] In this case, the petitioners claimed that Chepkitale forest was the ancestral land of the Mt. Elgon Ogiek and its gazettment as a forest was unconstitutional. They wished to have the forest declared the community land of the Ogiek. The court was not persuaded. The court did not doubt that the Ogiek may have initially have occupied the forest as a hunter gatherer community. The court however heldt "The gazettement of Mt Elgon Forest as a public forest effectively extinguished the Ogiek's claim to the forest.

E. Conclusion

This chapter has discussed at length the jurisdiction of the ELC and its jurisprudence. It is apparent that matters of jurisdiction will probably be with us for a little while given that the ELC is a fairly new court and jurisprudence on the issue of jurisdiction is yet to settle. What the courts need to actuate is the dictate of the Constitution, that there be the High Court and two other courts (ELC and ELRC) with the status that is equal to the High Court, but with the three courts having different mandates. The reason for this is the need to effectively allocate resources within the judiciary, including manpower, more efficiently and the desire to ensure that the hearing and conclusion of cases is expedited. Matters touching on the environment and land are sensitive and emotive, thus requiring quick resolution. Certainly, one of the reasons for the formation of the ELC was to attempt to ensure that these cases were not bogged down by the many other cases within the traditional docket of the High Court. What the courts need to settle, insofar as

161 *Supra* (n 156), judgment of 19 October 2022 (unreported).

the jurisdiction of the ELC is concerned, is the precise definition of what a matter related to land and environment may be. Once this question is settled, the issue of jurisdiction will be a thing of the past and parties will concentrate on finalizing their dispute without spending so much time arguing whether or not the court has jurisdiction. Apart from the question of jurisdiction within the country, another apposite point is the emerging jurisprudence from international courts especially the African Court of Human and Peoples Rights.

This chapter has discussed the decision of the Ogiek that was made by the ACHPR and it is apparent that matters of human rights that have been referred, and could be referred to that court, and the jurisprudence emerging therefrom may very well impact on the cases before the ELC. The jury is of course still out on whether or not the international courts have jurisdiction on matters that are alive in the ELC or those to which parties could have referred to the ELC. Apart from the Ogiek case, which was determined by the ACPHR, there is a pending dispute before the East African Court of Justice by a group of persons who seek to protect titles within the former Maasai Mau Forest. The same dispute is also before the ELC and it will be interesting to see how it will be finalized especially on the question whether the EACJ would have jurisdiction.

Insofar as the jurisprudence of the ELC is concerned, it will be seen that the ELC has been at the forefront of ensuring that the right to a clean and healthy environment is given effect. The emerging jurisprudence demonstrates that the ELC is alive to the principle of sustainable development, and the court attempts to balance the right to a clean and healthy environment with the need to develop. There will certainly be challenges on how to maintain equilibrium on these two important points. Of late, there has been a spate of demolitions of structures some of which are said to have been in ecologically sensitive areas. These will most likely end up in the courts and it will be interesting to see the jurisprudence that will emerge from these disputes.

All in all, it cannot be argued that there has been a failure on the ELC to assume its mantle and so far if a scorecard is to be filled, it will be difficult not to rate the ELC as having been excellent so far.

CHAPTER 5

Assessing the Experience and State of Play in Implementing the Framework Environmental Law in Kenya: An Analysis of the Implementation of EMCA

Irene Kamunge & Kariuki Muigua

A. Introduction

Upon the promulgation of the Constitution of Kenya 2010, the Environment Management and Coordination Act was reviewed and amended to align it with the Constitution, by enacting the Environmental Management and Co-ordination (Amendment) Act, 2015.[1] Subsequently, other provisions of the EMCA were amended through the Prevention of Torture Act[2] and the Statute Law (Miscellaneous Amendments) Act.[3] Some of the key amendments in the EMCA were the abolition of organs and statutory committees such as the National Environment Council (NEC), Standards Enforcement Review Committee (SERC) and National Environment Action Plan Committee. The functions of NEC were assigned to the Cabinet Secretary for Environment, who was also empowered to consult with the National Environment Management Authority (NEMA) in setting environmental quality standards with a mandate that was previously undertaken by SERC. In regard to environmental planning, NEMA is required to formulate the National Environmental Action Plan and submit it to the Cabinet Secretary for approval.

Access to environmental justice was also enhanced. For instance, the quorum for the National Environment Tribunal is three (3) members with or without the chairperson.[4] Previously, the chairperson had to be present in any sitting for the Tribunal to constitute quorum, thus greatly hampering the delivery of justice. Stiffer penalties were also introduced in the EMCA by providing for minimum and maximum penalties. This is a positive move towards enhancing efficiency in the implementation of the EMCA and access to justice in environmental matters.

The Second Schedule of the EMCA, which deals with projects that are required to undergo environmental impact assessment, was also amended.[5] Unfortunately, the scope of projects listed in the Second Schedule was narrowed, and this could negatively impact the country's sustainable development agenda.

This chapter will document the main amendments in the EMCA since the promulgation of the Constitution. It will also address the extent to which the amendments have been implemented and critique whether they have succeeded in enhancing harmony or just entrenched chaos in environmental governance in Kenya. The chapter will also interrogate whether or not there is need to retain the Framework Environmental Law in its current form after the promulgation of the Constitution, which not only contains a number of provisions stipulated in the EMCA but also establishes bodies such as the Environment and Land Court and National Land Commission, whose powers and mandates potentially overlap with institutions created under the EMCA.

1 Environmental Management and Co-ordination (Amendment) Act No. 5 of 2015.
2 Prevention of Torture Act, No 12 of 2017.
3 Statute Law (Miscellaneous Amendments) Act, No. 4 of 2018.
4 Environmental Management and Co-ordination (Amendment) Act, 2015, S. 66.
5 Environmental Management and Co-ordination (Amendment) Act, 2015, S. 80.

B. The framework environmental law

The Environmental Management and Coordination Act (EMCA)[6] is the framework law for conservation and management of the environment in Kenya.[7] Before enactment of the EMCA, there were some 78 sectoral laws dealing with various components of the environment, which characterised the deteriorating state of Kenya's environment as well as increasing social and economic inequalities. The law was thus meant to harmonise the management of the country's environment.[8] Specifically, the EMCA was enacted to provide for the establishment of an appropriate legal and institutional framework for the management of the environment. Improved legal and administrative coordination of the diverse sectoral initiatives was seen as necessary to improve the national capacity for the management of the environment.[9]

The law upholds the constitutional right to a clean and healthy environment enshrined in Article 42 of the Constitution of Kenya, and imposes obligations upon the State and every person to protect and conserve the environment.[10] The EMCA further replicates the provisions of the Constitution and sets out mechanisms for the enforcement of environmental rights in case of threat, violation or infringement.[11]

The EMCA thus sets out the general principles, including principles of sustainable development, which should guide the interpretation and implementation of the law. These include the principle of public participation in the development of policies, plans and processes for managing the environment, the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources, the principles of intergenerational and intragenerational equity, the polluter-pays principle and the pre-cautionary principle.[12]

NEMA's coordinating and oversight mandate

The EMCA establishes institutions for making policies on environment, setting environmental quality standards, and enforcing environmental rights and duties. The National Environment Management Authority (NEMA), for instance, is established[13] with the principal objective of exercising general supervision and coordination over all matters relating to the environment, and to be the principal instrument of the Government of Kenya in the implementation of all policies relating to the environment.[14] Consequently, lead agencies (government ministries; departments; parastatals and state corporations; and local authorities) mandated by law to control or manage the environment or natural resources are required to cooperate with NEMA in the preservation and protection of the environment.[15] These institutions and organs are thus subservient to NEMA. This can be deduced from the EMCA, which empowers NEMA to, after giving reasonable notice of its intention so to do, direct any lead agency to perform, within such time and in such manner as it shall specify, any of the duties imposed upon the lead agency by

6 Environmental Management and Coordination Act, No. 8 of 1999, [Revised Edition 2018 [1999]].
7 *Ibid,* Preamble.
8 National Environment Management Authority (NEMA): The Establishment <https://www.nema.go.ke/index.php?option=com_content&view=article&id=1&Itemid=136> ,20 November 2020.
9 Environmental Management and Coordination (Amendment) Act, 2015, Preamble.
10 *Ibid*. S. 3 (2 A).
11 *Ibid.* 2 3 (3).
12 *Ibid.* S 3.
13 *Ibid.* S. 7.
14 *Ibid.* S.9.
15 *Republic v National Environment Management Authority & another Ex-Parte Philip Kisia & City Council Of Nairobi* [2013] eKLR, J.R Case No. 251 of 2011, Environmental Management and Coordination (Amendment) Act, 2015, S. 9(2)(a).

or under this Act or any other written law in the field of environment, and if the lead agency fails to comply with such directions, the Authority may itself perform or cause to be performed the duties in question, and the expense incurred in so doing shall be a civil debt recoverable by the Authority from the lead agency.[16]

The interpretation and application of Section 12 of the EMCA has been canvassed in various cases. For instance, in *Republic v National Environment Management Authority & Another Ex-Parte Philip Kisia & City Council of Nairobi [2013] eKLR,*[17] the court commented as follows:

> I have considered the arguments on this issue and I agree with the applicants that lead agencies (government ministries; departments; parastatals and state corporations; and local authorities) which are per law mandated to control or manage the environment or natural resources should cooperate with NEMA in the preservation and protection of the environment. NEMA is, however, given the mandate to "exercise general supervision and coordination over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the environment"- see Section 9 of EMCA….
>
> … The EMCA is, therefore, clear that the buck stops with NEMA as regards environmental matters. NEMA assists and guides lead agencies in the preservation and protection of the environment but when a lead agency fails to comply with the directives given by NEMA, then NEMA has no option but to engage the powers granted to it by EMCA. The 2nd Applicant's attempt to elevate itself to the same status with NEMA is, therefore, untenable. The attempt by the applicants to escape liability by upgrading their roles in the preservation of the environment fails….
>
> … A reading of the above provision clearly shows that NEMA is granted the option of directing a lead agency to perform a duty imposed on the lead agency by the EMCA. Where the lead agency fails to comply, NEMA can carry out the duty at the expense of the lead agency. As can be seen, all these powers are optional and they do not, therefore, compel NEMA to exercise the powers under Section 12 before exploring other options provided by the EMCA. I, therefore, do not find any merit in the argument by the applicants that NEMA ought to have taken over its responsibilities as a lead agency instead of prosecuting the 1st Applicant. This particular argument is, therefore, rejected.

The discretionary nature of the exercise of NEMA's oversight powers and the power to delegate under Section 12 of the EMCA was also affirmed in the case of *Martin Osano Rabera & Another v Municipal Council of Nakuru & 2 others [2018] eKLR*, where the court stated as follows:

> The petitioners have argued that NEMA is properly joined to this case as a respondent and that it abdicated its responsibility. The 1st and 3rd respondents, on the other hand, argue that NEMA ought to have invoked its powers under **section 12** of the EMCA to carry out the restoration measures itself. Whereas NEMA has specific functions,

16 Environmental Management and Coordination (Amendment) Act, 2015, S. 12.

17 *Republic v National Environment Management Authority & another Ex-Parte Philip Kisia & City Council Of Nairob*i [2013] eKLR, J.R Case 251 of 2011.

> some of which I have outlined above, and whereas the functions under **section 9 (2)** are couched in mandatory terms, *NEMA's powers to perform restorative measures or cause restorative measures to be performed under **section 12** of EMCA are not mandatory*. NEMA cannot, therefore, be faulted for not taking it upon itself to carry out the restorative measures that are necessary at Gioto dumpsite.[18]

Thus, while the lead agencies are required to cooperate with NEMA in environmental matters, the actual duty to carry out environmental duties seems to rest with those agencies with NEMA only coming in to oversee implementation. Where agencies fail to carry out their duties, the court's opinion in *Republic v National Environment Management Authority & Another Ex-Parte Philip Kisia & City Council of Nairobi* seems to rule out the possibility of such an agency relying on NEMA to carry out such functions on their behalf. It seems that the most readily available option for NEMA is to enforce such compliance, under its direction as provided in Section 12 of the EMCA. The provision that 'if the lead agency fails to comply with such directions, the Authority may itself perform or cause to be performed the duties in question, and the expense incurred by it in so doing shall be a civil debt recoverable by the Authority from the lead agency' can potentially make some of these lead agencies lax in their duties relying on NEMA to take up their duties. Courts have, however, sought to prevent such an eventuality, even though, in reality, some agencies may continue exploiting that possibility and absconding their environmental duties.

It must be pointed out, therefore, that while NEMA is the lead government agency in the implementation of the EMCA, other stakeholders and persons also have an active role in environmental management and governance.

EMCA governance of environmental sub-sectors

It is worth pointing out, however, that apart from setting out the general guidelines and principles, the EMCA, being the overarching framework law, also contains particular provisions governing the various environmental subsectors[19] but the subsidiary legislation and sectoral regulations provide for the interpretation and additional content covering the protection and conservation of forests, rivers, lakes, wetlands, traditional interests, hill tops and hill sides, mountain areas and forests, among others.[20] Accordingly, in consultation with the lead agencies, NEMA is empowered to develop regulations, prescribe measures and standards and, issue guidelines for the management and conservation of natural resources and the environment.[21] Therefore, all environmental sectors have a duty to abide by the provisions of the EMCA, in addition to the specific sectoral laws. This has been affirmed by Kenyan courts, as was pointed out in the case of *Willice Omondi Were & Another v Director of Public Prosecutions & 3 others [2018] eKLR*[22] in the following words:

> Under Section 69, NEMA is required, in consultation with lead agencies, to monitor: all environmental phenomena with a view to making an assessment of any possible changes in the environment and their possible impacts; or the operation of any project or activity with a view to determining its immediate and long term effects on

18 *Martin Osano Rabera & another v Municipal Council of Nakuru & 2 others* [2018] eKLR, Petition 53 of 2012.
19 Environmental Management and Coordination (Amendment) Act, 2015, S.42-57
20 *Ibid,* S.42-57, S.147.
21 *Ibid,* S. 9.
22 *Willice Omondi Were & another v Director of Public Prosecutions & 3 others* [2018] eKLR, Constitutional Petition 5 of 2018.

> the environment. Further, Section 69 (1A) makes it mandatory for every lead agency to establish an environmental unit to implement the provisions of the EMC Act. It is this environmental unit that is the link between NEMA and any such lead agencies, including the Water Resources Authority, for implementation of the provisions of the relevant legislation (emphasis added).

Thus, in analysing the effectiveness of implementing the EMCA, one must also look at how effectively environmental rules and regulations put in place to implement provisions on the EMCA have been put to use. As already pointed out, under the general supervision of NEMA, the lead agencies (government ministries; departments; parastatals and state corporations; and local authorities), which are by law mandated to control or manage the environment or natural resources, are obliged to establish environmental units that should cooperate with NEMA in the preservation and protection of the environment in the various sectors. The environmental obligations of these agencies (which basically form the state machinery in fulfilling its environmental obligations), could be deemed to be generally those spelt out under Article 69(1) of the Constitution of Kenya. These include the obligation to: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of accruing benefits; work to achieve and maintain a tree cover of at least 10 per cent of the land area of Kenya; protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity; establish systems of environmental impact assessment, environmental audit, and monitoring of the environment; eliminate processes and activities that are likely to endanger the environment; and utilise the environment and natural resources for the benefit of the people of Kenya.

The obligations spelt out in Article 69 clearly fall under various environmental sectors and generally sum up state obligations, which cover most if not all environmental sectors in Kenya. They also need enabling provisions spelt out under statutes or regulations to facilitate full implementation. This is where the various lead agencies from the different sectors come in. It is also worth pointing out that the EMCA has the enabling provisions that allow these agencies and or the Cabinet secretaries in charge of the relevant sectors to make the necessary subsidiary legislation for discharging these environmental duties. The EMCA also sets the specific environmental standards as well as various measures and tools for determining those standards.

Dispute resolution mechanisms under the EMCA

The EMCA also establishes judicial and quasi-judicial dispute resolution bodies and mechanisms, among them, the National Environmental Complaints Committee (NECC) and National Environment Tribunal (NET) to handle disputes arising from the implementation or enforcement of the framework law.

The National Environmental Complaints Committee is established under EMCA[23] as a quasi-judicial body regulating its own procedure.[24] It is charged with the duty to investigate (i) any allegations or complaints against any person or against the Authority in relation to the condition

23 Environmental Management and Coordination (Amendment) Act, 2015, s. 31 as read together with S.20.
24 *Ibid* S. 31(6).

of the environment in Kenya; (ii) on its own motion, any suspected case of environmental degradation, and to make a report of its findings together with its recommendation thereon to the Council; to prepare and submit to the Council periodic reports of its activities which report shall form part of the annual report on the state of the environment under Section 9 (3); and to perform such other functions and exercise such powers as may be assigned to it by the Council.[25]

The National Environment Tribunal (NET) is established under Section 125 and Part XII of the Environmental Management and Coordination Act to receive, hear and determine appeals arising from decisions of the National Environment Management Authority (NEMA) on issuance, denial or revocation of Environmental Impact Assessment (EIA) licences, among other decisions. Specifically, NET has jurisdiction to entertain appeals as outlined in the EMCA, under Section 129(1), which provides that any person who is aggrieved by (a) the grant of a licence or permit or a refusal to grant a licence or permit, or the transfer of a licence or permit, under this Act or its regulations; (b) the imposition of any condition, limitation or restriction on the persons licence under this Act or its regulations; (c) the revocation, suspension or variation of the person's licence under this Act or its regulations; (d) the amount of money required to paid as a fee under this Act or its regulations; (e) the imposition against the person of an environmental restoration order or environmental improvement order by the Authority under this Act or its Regulations, to, within 60 days after the occurrence of the event against which the person is dissatisfied, can appeal to the Tribunal in such manner as may be prescribed by the Tribunal.

The Cabinet Secretary determines the remuneration and other allowances for members of the Tribunal on the recommendation of the Salaries and Remuneration Commission. These and any other expenses incurred by the Tribunal in the execution of its functions should be paid out of monies voted by Parliament for that purpose. This ensures that the Tribunal operates independently and impartially. The Tribunal can also employ staff necessary to perform its functions.

Section 132 (1) of the EMCA provides that when any matter to be determined by NEMA under the law appears to it to involve a point of law or to be of unusual importance or complexity, it may, after giving notice to the concerned parties, refer it to the Tribunal for direction.

Section 131 of the EMCA gives the chairperson of the Tribunal power to appoint any persons with special skills or knowledge on environmental issues, which are the subject matter of any proceedings or inquiry before the Tribunal, to act as assessors in an advisory capacity in any case where it appears to the Tribunal that such special skills or knowledge are required for proper determination of the matter.

Section 70 of the Forest Conservation and Management Act, 2016, empowers the Tribunal to hear appeals on any dispute that may remain unresolved in respect of forest conservation, management, utilization or conservation from the lowest possible structure under the devolved system of government as set out in the County Governments Act, 2012.

Section 25 (6) of the Wildlife Conservation and Management Act 2013 allows any person who is dissatisfied with the award of compensation by either the County Wildlife Conservation and Compensation Committee or the Kenya Wildlife Service to, within 30 days after being notified

25 *Ibid,* S. 32.

of the decision and award, file a first appeal to the National Environment Tribunal, and a second appeal subsequently to the Environment and Land Court. The law, under Section 26, also empowers the Tribunal to hear appeals arising from the decisions made under this Act.

Any person aggrieved by a decision or order of the Tribunal may, within 30 days of such decision or order, appeal against it to the Environment and Land Court.[26]

Any person aggrieved in any matter falling within the scope of EMCA is, thus, expected to exhaust the dispute settlement mechanisms conducted by these bodies before lodging any appeal in the Environment and Land Court. This is in accordance with the law as affirmed in the case of *Mui Coal Basin Local Community & 15 Others v Permanent Secretary, Ministry of Energy & 17 others [2015] eKLR,*[27] where the court stated as follows: "Our law is now settled that where a statutory regime (like the Public Procurement Act) sets a regime for dispute resolution, an aggrieved party must exhaust it first before approaching Court."[28] This issue was also canvassed in the case of *Sanlam Kenya PLC & Another v National Environment Management Authority & 2 Others [2018] eKLR,*[29] where the court stated as follows:

> It suffices to observe that the issuance of an Improvement Notice [is] a decision appealable to the National Environment Tribunal (NET) within the framework of Section 129 (1) of EMCA.
>
> Secondly, it is to be noted that Section 9 (2) of the Fair Administrative Action Act bars this court against exercising judicial review jurisdiction unless available statutory appeal and review mechanisms have been exhausted. It provides thus:
>
> The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
>
> Reference to the 'High Court' in Section 9(2) of the Act is to be construed to conform with the constitutional architecture of the Judiciary insofar as it relates to the constitutional jurisdiction of the three superior courts of equal status. Secondly, it is to be noted that the Fair Administrative Action Act has fundamentally changed the character, scope and procedure of judicial review proceedings in Kenya. First, judicial review remedy is available only after available review and appeal mechanisms have been exhausted. Second, the courts do not have undefined discretion to *suo motto* grant exemption from the requirement to exhaust review and appeal mechanisms; the applicant must move the court and satisfy the **interest of justice** criteria set out in Section 9(4) of the Act before exemption is granted.
>
> The present motion seeks a review of the Improvement Notice (Order) suspending further construction. The redress avenue provided in the law is an appeal to the National Environment Tribunal within the framework of Section 129(1) of EMCA.

26 Environmental Management and Coordination (Amendment) Act, No. 5 of 2015, S. 130.

27 *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR, Constitutional Petition No. 305 of 2012, No. 34 of 2013 and No. 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated).

28 *Ibid*, Para. 18.

29 *Sanlam Kenya Plc & Another v National Environment Management Authority & 2 Others* [2018] eKLR, J.R No. 92 of 2016.

> The applicants opted to ignore that appeal mechanism and instead came to this court. They did so without seeking exemption under Section 9 (4) of the Fair Administrative Action Act. In my view, insofar as the judicial review motion seeks to quash the Improvement Notice (Order) dated 8/4/2016, it is untenable because the applicants have not complied with the mandatory provisions of Section 9 (2) and (4) of the Fair Administrative Action Act.
>
> There is sound rationale behind the requirement for exhaustion of appeal and review mechanisms. Firstly, there is need to ensure orderly functioning of agencies engaged in administrative and *quasi-judicial* processes. Secondly, there is need to avoid turning judicial review proceedings into mechanisms for unnecessarily disrupting administrative and *quasi-judicial* processes. Where the court is appropriately moved and the interest of justice criteria is satisfied, the court may properly grant an exemption under Section 9(4) of the Act. No exemption was sought in the present proceedings.
>
> My finding on the first issue, therefore, is that the present judicial review proceedings were initiated prematurely and in violation of the provisions of Section 129 of EMCA and Section 9(2) and (4) of the Fair Administrative Action Act insofar as they relate to the quashing of the Improvement Notice (Order) issued by the 1st Respondent.

The Tribunal has been sitting regularly, handling diverse references appealed from NEMA. Some of the most important appeals relate to the issuance, revocation or denial of licences. For instance, one of the most recent high profile matters was the appeal against NEMA licences on the implementation of Phase 2A of the Standard Gauge Railway, challenging the Environmental and Social Impact Assessment (ESIA) report as being incomplete and incompetent.[30] Although the appeal was dismissed, it was a matter of national importance that saw weighty environmental issues being canvassed. The Tribunal has, however, cancelled the licences in some instances, as was the case in *Elizabeth Katisya and Another v National Environment Management Authority and Another*.[31]

As at October 2018, the Tribunal had decided on over 75 environmental cases relating to different aspects of the environment, where some appeals were finally determined, settled or fixed for mention to record consent; finalised and pending ruling or judgment; pending submissions being filed and highlighted; and some slated for continuation of hearing (four of these were consolidated, 14 were new appeals filed in 2018, and 16 from previous years). Based on these precedents, there is a need to strengthen these review and appeal mechanisms under the EMCA to ensure that they are efficient and effective in discharging their mandate to ensure access to justice. Adequate funding and access to all the relevant government support is one of the most effective ways of ensuring that the EMCA is fully and efficiently implemented to achieve the constitutional goals on environmental governance in Kenya. This is necessary to avoid a situation where an aggrieved person is barred by the law from bypassing the dispute settlement bodies under EMCA but fails to get justice because of efficiency gaps in these agencies.

30 *Okiya Omtata v National Environment Management Authority (NEMA) and 8 others*, Tribunal Appeal No. NET 200 of 2017.
31 Eliz*abeth Katisya and Another v National Environment Management Authority and Another,* Tribunal Appeal No. 100 of 2012.

Mechanisms for restoration and rehabilitation of the environment

The EMCA has made good attempts at promoting rehabilitation and restoration of the environment. Notably, the Environment and Land Court has power to compel persons responsible for environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage.[32] NEMA is also empowered to issue and serve an environmental restoration order on any person in respect of any matter relating to the management of the environment.[33] Such an order may require the person on whom it is served to restore the environment as near as it may be to the state in which it was before the taking of the action which is the subject of the order; prevent the person on whom it is served from taking any action which would or is reasonably likely to cause harm to the environment; award compensation to be paid by the person on whom it is served to other persons whose environment or livelihood has been harmed by the action which is the subject of the order; levy a charge on the person on whom it is served which in the opinion of the Authority represents a reasonable estimate of the costs of any action taken by an authorised person or organisation to restore the environment to the state in which it was before the taking of the action which is the subject of the order.[34]

Acknowledging that it may not always be possible to apportion blame for environmental degradation on a particular person as envisaged under Section 3, the EMCA sets up the National Environment Restoration Fund, whose object is to act as supplementary insurance for the mitigation of environmental degradation where the perpetrator is not identifiable or where exceptional circumstances require the Authority to intervene to control or mitigate environmental degradation.[35]

The provisions on restoration and rehabilitation of the environment coupled with other sectoral laws such as the Mining Act, 2016, and the Climate Change Act, 2016, which contain similar provisions, are relevant in safeguarding the environment. They set minimum standards and also close loopholes on restoration and rehabilitation where a particular sectoral law may not have any enforceable provisions. Under the Climate Change Act, 2016, the Environment and Land Court, while carrying out its mandate of mitigating the effects of climate change, may order a public officer to take measures to prevent or discontinue an act or omission that is harmful to the environment.[36] NEMA, as the public body tasked with safeguarding the environment, may thus be mandated by the Environment and Land Court under to take necessary measures to protect the environment – such as cancelling an EIA license or undertaking environmental audits.

C. Substantive modifications in the Environmental Management and Coordination (Amendment) Act, 2015

The Cabinet Secretary in charge of Environment and Mineral Resources appointed a task force in November 2010 to review and harmonize the EMCA with the Constitution. The task force was initially appointed for one year.[37] Additional members were appointed to the task force in April 2011. Subsequently, the task force was reconstituted and its term renewed for a further period

32 Environmental Management and Coordination (Amendment) Act, No. 5 of 2015, S. 3(3)(e).
33 *Ibid,* S. 108(1).
34 Environmental Management and Coordination (Amendment) Act, No. 5 of 2015, S. 108(2).
35 *Ibid,* S. 25.
36 Climate Change Act, No. 11 of 2016, S. 23 (2) (b).
37 Gazette Notice No. 13880.

of one year.[38] The task force held consultative meetings and workshops with stakeholders and formulated a Bill to amend the EMCA, which was submitted to the Ministry of Environment and Mineral Resources. The ministry engaged the Attorney General, the Cabinet and the Commission for the Implementation of the Constitution[39] on the Bill before submitting it to the National Assembly for debate and adoption**.** The President assented to the Environmental Management and Coordination (Amendment) Bill, 2015, on May 27, 2015, and the law came into effect on June 17, 2015.

The amendments to the law (herein referred to as the Amendment Act) are analysed in the section that follows.

Modifications in the interpretation of terms of use

Substantial modifications were introduced to technical terms of use in Section 2 of the Environment Management and Coordination Act, which deals with interpretation. The amendment law repealed the definition of coastal zone and introduced a new definition: a 'coastal zone' means the geomorphologic area where the land interacts with the sea, comprising terrestrial and marine areas made up of biotic and abiotic components systems coexisting and interacting with each other and with socio-economic activities. This definition provides clarity on the precise area to which the law applies. Previously, the area comprising a coastal zone was at the discretion of the minister. A coastal zone comprised of an area declared by the minister to be a protected coastal zone through notice in the Gazette.[40] The amendment in the interpretation of the term 'coastal zone' is important in that it not only took away discretionary ministerial powers to designate coastal zones but also introduced certainty on what constitutes such coastal zones. This made it easier for all relevant stakeholders to identify and conserve coastal zones without waiting for prompting from the minister. It also eliminated chances of degradation and the corrupt conversion of areas that were potentially coastal zones into private land.

The amended law also adopted the definition of Exclusive Economic Zone (EEZ) assigned by the United Nations Convention on the Law of the Sea, defining it as the area beyond and adjacent to the territorial sea, subject to the specific legal regime under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of the Convention.[41] The exclusive economic zone does not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.[42] Prior to the amendment, an exclusive economic zone was defined in accordance with Section 4 of the Maritime Zones Act.[43] As far as environmental and natural resources management and

38 Gazette Notice No 5828.

39 The Commission for the Implementation of the Constitution was established under the Commission for the Implementation of the Constitution Act, No. 9 of 2010, Laws of Kenya and pursuant to section 5 of the Sixth Schedule to the Constitution. The Commission's functions were to — monitor, facilitate, and oversee the development of legislation and administrative procedures required to implement the Constitution; co-ordinate with the Attorney-General and the Kenya Law Reform Commission in preparing for tabling in Parliament, the legislation required to implement the Constitution; work with each constitutional Commission to ensure that the letter and the spirit of the Constitution is respected; report at least once every three months to the Parliamentary Select Committee on—(i) the progress in the implementation of the Constitution; and (ii) any impediments to the implementation of the constitution; exercise such other functions as are provided for by the constitution or any other written law (Section 4).

The Commission stood dissolved five years after it was established or at the full implementation of the Constitution as determined by Parliament, whichever was sooner, but the National Assembly had the option, by resolution, to extend its life.

40 Environmental Management and Coordination (Amendment) Act, No. 5 of 2015, Repealed s. 55(1).

41 United Nations Convention on the Law of the Sea, UN Treaty series vol. 1833, 10 December 1982, Article 55

42 *Ibid*, Article 57.

43 Maritime Zones Act, Cap 37. s. 4

conservation is concerned, the Convention outlines the rights of States in respect of the EEZ as including: sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; jurisdiction as provided for in the relevant provisions of this Convention with regard to the protection and preservation of the marine environment.[44]

Implication of amendments on wetlands governance

The amended law replaced the definition of wetlands and expounded the type and characteristics of wetlands to which EMCA applies.[45] 'Wetlands' are defined in the amended law to include areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six metres. This definition accords with Article 1 of the Convention on Wetlands of International Importance especially Waterfowl Habitat (Ramsar Convention).[46] Previously, wetlands were defined as areas permanently or seasonally flooded by water where plants and animals have become adapted. Notably, the amended definition was not alien to the Kenyan laws as reflected in the Environmental Management and Coordination (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulation, 2009,[47] which had already adopted this definition. The Draft Environmental Management and Coordination (Conservation and Management of Wetlands) Amendment Regulations, 2017, also retains this definition. The object of the 2017 Regulations may be a good pointer as to why there was need to amend the framework law to reflect the broader definition, in line with global best practices in wetlands management and conservation. The regulations apply to the protection, conservation and management of inland, coastal and marine, lake basin and river basin wetlands, whether occurring on private, public or community land, both natural and man-made.[48]

In the expanded definition, the presence of animals or plants is not a prerequisite to the protection or conservation of a wetland. It seeks to conserve a broad spectrum of ecosystems without necessarily looking at the presence or absence of animals and/or plants to warrant taking conservation measures. The wide range of benefits accruing from wetlands is captured under the Draft National Wetlands Conservation and Management Policy, 2013.[49]

The new definition envisages wetlands occurring on private, public or community land, both natural and man-made. This provision is significant since the Constitution not only obligates the State to conserve the environment but also places a duty on all persons to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.[50] Adopting the definition under the

44 United Nations Convention on the Law of the Sea, UN Treaty series vol. 1833, 10 December 1982, Article 56.
45 Environmental Management and Co-ordination (Amendment) Act, 2015, S. 2(1) (h).
46 United Nations, Convention on Wetlands of International Importance especially as Waterfowl Habitat, Ramsar (Iran), signed 2 February 1971. UN Treaty Series No. 14583. As amended by the Paris Protocol, 3 December 1982, and Regina Amendments, 28 May 1987.
47 Legal Notice, No. 19 of 2009.
48 Environmental Management and Coordination (Conservation and Management of Wetlands) Amendment Regulations, Regulation 3, of 2017.
49 Republic of Kenya, Draft National Wetlands Conservation And Management Policy 2013.
50 Constitution of Kenya, 2010, Article 69(2),

Convention thus, while not necessarily extending the rights of the State under EEZ in itself, is important for NEMA and other lead agencies to gain some clarity on the extent to which they can apply the law within the Kenyan EEZ in line with the Convention.

Most of the amendments to the interpretation of different terms are not only meant to enhance clarity but also capture the spirit of the Constitution and the sustainable development agenda. They also sought to reflect the spirit of devolution in Kenya.

Enhancing the right of access to information

The right to access information was entrenched in framework law through the amendment. Section 3A(1) of EMCA states that every person has the right to access information that relates to the implementation of the Act that is in possession of NEMA, lead agencies or any other person.[51] This is in line with the international legal framework on environmental rights, as evidenced by Principle 10 of the *Rio Declaration on Environment and Development of 1992*, on public participation, which includes access to environmental information. It may therefore be construed that the information that relates to the implementation of EMCA as envisaged under section 3A above that is either necessary for the enjoyment of environmental rights under the Environmental Management and Coordination Act or the Constitution, or information resulting from the application or implementation of particular provisions under the law, such as impact assessment and audit reports on certain environmental matters.

A person desiring information should apply to NEMA or the relevant lead agency and may be granted access on payment of a prescribed fee.[52] This provision implements the constitutional right of access to information enshrined in Article 35, as well as the the Access to Information Act, 2016,[53] which guarantees every citizen the right of access to information held by — the State; and another person and where that information is required for the exercise or protection of any right or fundamental freedom, including environmental information.

The need for a person to expressly make an application for access to information was also affirmed by Mumbi Ngugi, J. in *Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 Others [2013]* eKLR where she held that:

> … what is required is for the person seeking information to make a request for such information. A violation of the right to information cannot be alleged before a request for information has been made.

However, while there is a condition for parties to expressly apply for such information, the High Court, in *Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company,* held that even though:

> [T]he right to information implies entitlements to the citizen to information, it also imposes a duty on the State with regard to provision of information. Thus the State has a duty not only to proactively publish information in the public interest – this, I believe, is the import of Article 35(3) of the Constitution of Kenya which imposes an obligation on the State to 'publish and publicize any important information affecting

51 Environmental Management and Coordination (Amendment) Act, No. 5 of 2015, S.3A.
52 *Ibid,* S. 3A (1) (2).
53 Access to Information Act, No. 31 of 2016.

> the nation', but also to provide open access to such specific information as people may require from the State.[54]

Furthermore, in *Friends of Lake Turkana Trust v Attorney General & 2 others [2014] eKLR,*[55] the court observed that:

> [S]pecifically, in relation to the right to and access to environmental information, Article 69 (1) (d) of the Constitution places an obligation on the State to encourage public participation in the management, protection and conservation of the environment. This court in exercising its jurisdiction under the Environment and Land Court Act section 18 is also obliged to take into account the principle of sustainable development including the principle of public participation in the development of policies, plans and processes for the management of the environment and land…. Such public participation can only be possible where the public has access to relevant information, and is facilitated in terms of reception of views. It is the view of this Court that access to environmental information is therefore a prerequisite to effective public participation in decision-making and to monitoring governmental and private sector activities on the environment.[56]

This amendment was thus crucial and timely to address an issue the courts had been grappling with affording citizens means of accessing environmental information.

It is worth pointing out, however, that while the *Nairobi Law Monthly Company Limited* case had restricted the right to information to natural persons, the Access to Information Act, 2016,[57] was enacted to: give effect to the right of access to information by citizens as provided under Article 35 of the Constitution; provide a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on request in line with the constitutional principles; provide a framework to facilitate access to information held by private bodies in compliance with any right protected by the Constitution and any other law; promote routine and systematic information disclosure by public entities and private bodies on constitutional principles relating to accountability, transparency and public participation and access to information; provide for the protection of persons who disclose information of public interest in good faith; and provide a framework to facilitate public education on the right to access information under this Act.[58]

The meaning of 'citizen' in the context of the law was thus broadened to encompass both natural persons and legal entities. Specifically, the term 'citizen' under the law means any individual who has Kenyan citizenship, and any private entity that is controlled by one or more Kenyan citizens.[59]

The Access to Information Act, 2016, is thus a positive step towards expanding the enjoyment of the right to information and a tool to ensure that, as evidenced in the two cases above, public entities publish information that may be relevant for enjoyment of certain rights without

54 *Nairobi Law Monthly Company Limited* V *Kenya Electricity Generating Company & 2 Others* [2013] eKLR.
55 *Friends of Lake Turkana Trust* V *Attorney General & 2 others* [2014] eKLR ELC Suit 825 of 2012.
56 *Friends of Lake Turkana Trust v Attorney General & 2 others* [2014] eKLR.
57 Access to Information Act, No. 31 of 2016.
58 *Ibid,* S. 3.
59 *Ibid,* S. 2.

necessarily waiting for any person to request it.[60] This is especially relevant in the context of lead agencies contemplated under the EMCA.

In light of the decision in *Friends of Lake Turkana Trust* case, participation of the citizenry in decision-making processes in environmental matters is mostly implemented through environmental impact assessment exercises. Some of the constitutional State obligations include: encouraging public participation in the management, protection and conservation of the environment; and establishing systems of environmental impact assessment, environmental audit and monitoring of the environment.[61]

Abolition of the National Environment Council

Section 5 of the EMCA was repealed, thereby abolishing the National Environment Council (NEC), which was responsible for policy formulation and direction, setting national goals and objectives, determining policies and priorities for the protection of the environment, and promoting cooperation among public, private and civil society organizations engaged in environmental protection and programmes. NEC's functions were reassigned to the Cabinet Secretary in charge of matters relating to the environment and natural resources. The Cabinet Secretary is required to provide evidence of public participation in the formulation of the policy and environmental action plan.[62] While NEC was required to meet at least four times in every financial year, it hardly met due to budgetary constraints. Hence, NEC failed to deliver on its mandate and did not meet its statutory obligations hence the decision to scrap it.

Streamlining NEMA's governance through changes to its board

A Board of Management is responsible for NEMA's governance. Its composition was redefined through amendment of the law to enhance corporate governance.. The position of the Board Secretary was repealed, and the Director General, who is the authority's Chief Executive Officer is now secretary to the Board.[63] Previously, the Director General was a residential appointee. Even though the EMCA stipulated the qualifications and experience required for a Director General, the law did not outline the process the President would follow in appointing candidates. The Director General's appointment by the President implied that environmental protection was ranked high in the country. The amendment creates a new procedure through which the Cabinet Secretary responsible for environment appoints the Director General from among three nominees competitively selected by the Board of Management.

Before, three directors, who were officers of NEMA, also sat on the Board, thus presenting very awkward situations especially when the Board was required to deal with disciplinary issues touching on some of its members. The question arose whether the said directors could be disciplined in accordance with NEMA's processes and procedures or the EMCA. How would fellow directors purport to discipline one of their own? Consequently, this provision was repealed through the amended law.[64] New additions to the board now include the Principal Secretary in charge of finance or his representative,[65] and the Attorney General or his representative.[66]

60 Access to Information Act, 2016, S. 5.
61 Constitution of Kenya, Article 69 (1).
62 Environmental Management and Coordination (Amendment) Act, No. 5 of 2015, S. 5 (ca).
63 *Ibid,* S. 10(1) (c).
64 Environmental Management and Coordination (Amendment) Act, No. 5 of 2015, S. 10(b).
65 *Ibid,* S. 10(b).
66 *Ibid,* S. 10(d).

In instances where the position of the Director General fell vacant, the law did not state who would be in charge of NEMA pending the appointment of a new Director General. The amended law provides that where the office of the Director General falls vacant, the Board may appoint a person to act in that capacity, pending the appointment of a Director General, provided that such appointment does not exceed six months.[67]

Changes to NEMA's mandate

The National Environment Management Authority (NEMA) is established under the EMCA and charged with the general supervision and co-ordination of all matters relating to the environment, and to be the principal instrument of Government in implementing all policies relating to the environment.[68]

NEMA is required to audit and determine the net worth or value of natural resources in Kenya, as well as their utilization and conservation.[69] In addition, NEMA is required to encourage voluntary environmental conservation practices and natural resource conservancies, easements, leases, payments for ecosystem services, and other such instruments and, in this regard, develop guidelines.[70] Further Article 69(1) (b) of the Constitution requires the Authority to work with other lead agencies to issue guidelines and prescribe measures to achieve and maintain a tree cover of at least 10 per cent of the land area.

Prior to the enactment of the EMCA, the Authority was required to prepare and issue an annual report on the state on the environment in Kenya. This provision was amended to require NEMA to submit to the Cabinet Secretary a state of environment report every two years.[71] The process of preparing state of environment reports is expensive, laborious and time consuming. One year appears to be too short a time to detect major environmental changes, which require reporting. Hence, it is more appropriate to prepare the state of environment reports biannually. It is worth noting that NEMA has not implemented any of the additional mandates due to budgetary constraints.

Section 12 of the EMCA empowers NEMA to direct any lead agency to perform any of the duties imposed on it within a stipulated time, and if the lead agency fails to comply with these directions, NEMA may itself perform or caused the duties in question to be performed. This was succinctly captured in *Republic v National Environment Management Authority & another Ex-Parte Philip Kisia & City Council of Nairobi (2013) eKLR,*[72] where the court decided that NEMA has the option of directing a lead agency to perform a duty imposed on the lead agency by the law and where the latter does not comply, NEMA can perform that duty. The expense incurred in performing the duties imposed on a lead agency amount to a civil debt recoverable from the said agency.

Courts have however observed that EMCA is clear that the buck stops with NEMA as regards environmental matters, and, whereas NEMA assists and guides lead agencies in the preservation and protection of the environment, when a lead agency fails to comply with the directives given

67 *Ibid,* S. 10(e).
68 *Ibid,* S.9.
69 Environmental Management and Coordination (Amendment) Act, No. 5 of 2015, S. 9(2) (bb).
70 *Ibid,* s 9(2) (q).
71 *Ibid,* S. 9(2) (p).
72 *Republic v National Environment Management Authority & another Ex-Parte Philip Kisia & City Council of Nairobi* [2013] eKLR, J.R Case 251 of 2011.

by NEMA then NEMA has no option but to engage the powers granted to it by EMCA.[73] Thus, NEMA has a mandate both under the EMCA Act and the Constitution to protect and safeguard the environment for the benefit of all Kenyans.[74] In addition, its obligations pursuant to that mandate resonates with the provisions of articles 3, 10, 42, 69, 70 and 71 of the Constitution in so far as they touch and relate to the conservation of the environment and utilization of the natural resources.[75]

While NEMA has invoked this section of the law several times in directing lead agencies to perform their duties, it has not been able to follow through where the lead agencies have not obeyed its directives. Hence, there has been no civil action for recovery of costs. NEMA lacks the resources to undertake the duties neglected by the lead agencies. Consequently, Section 12 was strengthened to provide for criminal sanctions in order to encourage enforcement. It is now an offence for any person to fail to comply with NEMA's directive.[76]

Decentralizing NEMA

In order to ensure that services offered by NEMA are available at the national and county level, Section 8 of the framework law was amended to provide that the Authority shall ensure its services are accessible in all parts of the Republic. Currently, the Authority has established offices in the 47 counties. There are also five regional offices established in Mombasa, Kisumu, Nairobi and Eldoret for administration of the county offices, thus enhancing access to services offered by NEMA, such as issuance of environmental licenses, in all parts of the country.

National Environment Trust Fund

Section 24 of the EMCA was reviewed and amended to provide for autonomy of the National Environment Trust Fund. The Fund is a body corporate, having perpetual succession and a common seal. A Board of Trustees administers the Fund in accordance with a Trust Deed, which constitutes the rules and regulations that govern its operations and functions. The Board of Trustees is appointed by the Cabinet Secretary by a notice in the Gazette on such terms and conditions as may be prescribed by the Salaries and Remuneration Commission. Previously, the Fund was domiciled in NEMA and administered by a Board of Trustees appointed by the minister on such terms and conditions he deemed fit. The object and purpose of the Fund is to facilitate research intended to further the requirements of environmental management, capacity building, environmental awards, environmental publications, scholarships and grants.

Delinking the Fund from NEMA and its transformation into an independent state corporation holds great potential in promoting and supporting environmental research. This dedicated approach will not only guarantee financing for such research but also ensure that dedicated staff closely follows up on the new developments in the area of environment. This will in turn boost the efforts geared towards efficient implementation of the EMCA and realisation of sustainable development agenda in Kenya.

73 *Republic v National Environment Management Authority & another Ex-Parte Philip Kisia & City Council Of Nairobi* [2013] eKLR, JR Case No. 251 of 2011.

74 *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others* [2015] eKLR, Environment and Land Case 195 of 2014.

75 *Ibid*.

76 Environmental Management and Coordination (Amendment) Act, No. 5 of 2015, S. 11.

Deposit bonds

Deposit bonds are paid as appropriate security for good environmental practice. The Cabinet Secretary in charge of Finance, on the recommendation of the Cabinet Secretary in charge of environment and natural resources, can prescribe that persons engaged in activities or operating industrial plants and other undertakings which can have significant adverse effects on the environment when operated in a manner that is not in conformity with good environmental practice should pay such a deposit bond, according to Section 28 of the EMCA. An operator who observes good environmental practices to the satisfaction of NEMA is entitled to refund of the deposit bond from NEMA, without interest, within six months. Before the law was amended, NEC would designate the activities, industrial plants and undertakings that required an operator to pay deposit bonds. At the time, NEMA was required to refund the deposit bond within 24 months. Shortening the period for reimbursing the deposit bond encourages investment in Kenya. NEMA had developed draft Deposit Bonds Regulations in 2014 to give effect section 28 of the law.

The regulations sought to ensure good environmental practices; achievement of adequate remediation without adversely affecting economic viability; compliance with remediation obligations; availability of funds for remediation; and sustainable development.[77]

County environment committees

Provincial and District Environment Committees were abolished by repealing Section 29,[78] in an effort to harmonize the framework law with the devolved form of government established in the Constitution. The new law created County Environment Committees (CECs), which are constituted by the Governor through a Gazette Notice, and are chaired by members of the executive committee in charge of environmental matters. Other members of the committee include a representative each from the ministries responsible for the matters specified in the First Schedule of the EMCA at the county level; two representatives of farmers or pastoralists within the county appointed by the Governor; two representatives of the business community operating within the county appointed by the Governor; and two representatives of the public benefit organizations engaged in environmental management programmes within the county. A NEMA officer, whose area of jurisdiction falls wholly or partially within the county, is the secretary to the CEC.[79]

The Governor should ensure that there are equal opportunities for persons with disabilities and other marginalized groups in making appointments; and that not more than two-thirds of the members are of the same gender. Members of the CECs, except the chairperson and the secretary, are required to hold office for a three-years term, and are eligible for re-appointment for one further term. There is an assumption that the term of office for representatives of the ministries at the county level covers the length of posting and runs concurrently with appointment as member of the CEC. However, this is not the case and there is a possibility that a ministry representative continues to perform the functions of the ministry at county level after term his term as a member of the county environment committee has expired.

77 Environment Management and Coordination Draft (Deposit Bonds) Regulations, 2014, Regulation 4.
78 Environmental Management and Coordination (Amendment) Act, No. 5 of 2015, S. 18.
79 *Ibid.* S, 18(2).

CECs are responsible for proper management of the environment within the county. They are also responsible for development of county strategic environmental action plans every five years. The committees may also perform such additional functions as may be prescribed by the EMCA or from time to time assigned by the Governor by notice in the Gazette.[80] So far, 14 CECs have been established but none has undertaken its mandate.

The County Environment Committee mainly manages the environment within the county.[81] The EMCA defines 'environmental management' to include the protection, conservation and sustainable use of the various elements or components of the environment.[82] This definition has been adopted in other environmental laws and regulations in the country and even reflected in court decisions. For instance, in the case of *Francis Ngigi Macharia & 67 others v National Environment Management Authority [2018] eKLR,*[83] the court was dealing with a County Government ban on harvesting and transporting sand in Machakos County. The court pointed out that 'the said management includes monitoring and controlling the way natural resources are exploited to ensure that the exploitation of such resources is done sustainably and in accordance with the law'.[84] The court found that it is the mandate of the Respondent (County Government), pursuant to Article 69 of the Constitution and Section 30 of the Environmental Management and Co-ordination Act (EMCA), to ensure that the natural resources of this country, including sand, are conserved and are sustainably exploited.[85] If the approach by the court in the *Machakos County* case is anything to go by, the term 'proper management of the environment' under section 30 of the Environmental Management and Co-ordination (Amendment) Act, 2015, encompasses a wide range of management activities geared towards achieving the state obligations towards the environment under Article 69 of the Constitution. The possible wide meaning of management within this context may also be inferred from the Environmental (Impact Assessment and Audit) Regulations, 2003,[86] which define 'environmental management' to include the protection, conservation and sustainable use of the various elements or components of the environment.[87]

The Draft Environmental Management and Coordination (Conservation and Management of Wetlands) Amendment Regulations, 2017, also affirm the broad scope of this committee's mandate as they designate it as being responsible for coordinating, monitoring and advising on all aspects of wetland resource management within the county.[88]

Where there are express provisions on the obligations of the committees, the counties seem to have discretion, at least for now, in determining the activities that fall within the scope of 'proper management of the environment' as long as they are geared towards 'protection, conservation and sustainable use of the various elements or components of the environment'. At the time

80 *Ibid.* S. 19
81 Environmental Management and Coordination (Amendment) Act, No. 5 of 2015, S. 30(a).
82 *Ibid.* S.2.
83 *Francis Ngigi Macharia & 67 others v National Environment Management Authority* [2018] eKLR, Environment & Land Petition 36 of 2012.
84 *Ibid*, para. 14.
85 *Ibid*, para. 17.
86 Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice No. 101 of 2003.
87 *Ibid*, Regulation 2.
88 Draft *Environmental Management and Coordination (Conservation and Management of Wetlands) Amendment Regulations, 2017,* Regulation 17.

of writing this chapter, 36 counties had gazetted county environment committees. Forty-four (44) counties had developed county environmental action plans. None had developed county strategic environmental assessments, and the county environment action plans had not been adopted by the County Assemblies as envisaged in section 40 of EMCA. Some counties had developed county environment action plans in the absence of County Environment Committees, which are mandated to prepare county environment plans.

National Environmental Complaints Committee

The National Environmental Complaints Committee (NECC) was established following a review of Section 31 of the EMCA. NECC is a committee of NEMA, composed of a chairperson appointed by the Cabinet Secretary and who is a person qualified for appointment as a judge of the Environment and Land Court of Kenya, a representative of the Attorney-General, a representative of the Law Society of Kenya, one person who has demonstrated competence in environmental matters nominated by the Council of County Governors with and who is the secretary to the department, a representative of the business community appointed by the Cabinet Secretary, and two members appointed by the Cabinet Secretary for their active role in environmental management.

Before the law changed, Section 31 established the Public Complaints Committee (PCC), which was an environmental ombudsman. The membership of PCC was similar to that of the National Environmental Department, except the representative of the Council of County Governors. A representative of non-governmental organisations appointed by the National Council of Non-Governmental Organization was the secretary. The non-governmental organisations are, therefore, not represented in the department yet they are a key stakeholder in the conservation and management of the environment in Kenya.

Section 32 of the EMCA sets out the functions of the NECC, which is mandated to investigate any allegations or complaints against any person or against the Authority in relation to the condition of the environment in Kenya. NECC is also mandated, on its own motion, to investigate any suspected case of environmental degradation, and to make a report of its findings together with its recommendations to the council. NECC is responsible for preparing and submitting to the NEC, periodic reports of its activities, which form part of the annual report on the state of the environment. NECC is empowered to undertake public interest litigation on behalf of citizens in environmental matters. Section 32 of the EMCA makes reference to the abolished NEC through amendment of the law and needs to be reviewed. NECC is a committee of NEMA and, consequently, does not have requisite independence to undertake its mandate effectively. How will it, for instance, undertake public interest litigation against NEMA? The defunct PCC faced similar challenges and did not therefore effectively discharge its mandate as envisioned in the law. The most problematic issue is that NECC is required to submit its reports to NEC, which is now no longer in place. This renders NECC quite ineffective.

Streamlining national environmental action planning

The amended law abolished the National Environment Action Plan Committee. The committee was responsible for preparing a national environment action plan for consideration and

adoption by the National Assembly after every five years. NEMA was required to formulate the National Environment Action Plan through a public participation process within two years of the commencement of the Act.[89] Thereafter, NEMA is required, to formulate the National Environmental Action Plan every six years,[90] and submit it to the Cabinet Secretary for approval. Subsequently, the Cabinet Secretary is required to submit the plan to the National Land Commission and the Ministry of Lands,[91] and publish it in the Gazette. NEMA should review the National Environment Action Plan every three years.[92] The plan is binding on all persons, government departments, agencies, state corporations and other organs of Government upon adoption by the National Assembly. At the time of writing this chapter, NEMA had not finalized drafting the Plan as required by the amended law.

The EMCA contains provisions on the objectives of environmental action plans, which were not stipulated prior to its amendment. The purpose of environmental action plans is to co-ordinate and harmonise the environmental policies, plans, programmes and decisions of the national and county governments in order to minimize the duplication of procedures and functions; promote consistency in the exercise of functions that may affect the environment; secure the protection of the environment across the country; and prevent unreasonable actions by any person, state organ, or public entity in respect of the environment that are prejudicial to the economic or health interests of other counties or the country.[93]

Enhancing the implementation of the law at county level

Every County Environment Committee was required to prepare a county environment action plan for consideration and adoption by the County Assembly within one year of the commencement of the Act, and every five years thereafter, through a public participation process. In preparing a county environment plan, the County Environment Committee should take into consideration every other county environment action plan already adopted with a view to achieving consistency among such plans. Upon adoption by the County Assembly, the County Environment Action Plan is submitted[94] to the Cabinet Secretary for incorporation into the National Environment Action Plan. Every county environment action plan should contain provisions dealing with matters contained in the National Environment Action Plan in relation to the specific county.[95]

NEMA is empowered to consider every county environment action plan and recommend its incorporation into the National Environment Action Plan or specify changes to be incorporated into it. The Cabinet Secretary is empowered to issue guidelines and prescribe measures for the preparation of environmental action plans on the recommendation of NEMA.[96] So far, no county environment action plans that have been developed. NEMA has formulated a draft tool kit to guide counties in developing environment action plans.

89 Environmental Management and Coordination (Amendment) Act, No. 5 of 2015, S. 37.
90 *Ibid*, S. 37.
91 *Ibid,* S. 37.
92 *Ibid,* S. 37.
93 Environmental Management and Coordination (Amendment) Act, No. 5 of 2015,S. 41 A.
94 *Ibid,* S. 40.
95 *Ibid,* S. 41.
96 Environmental Management and Coordination (Amendment) Act, No. 5 of 2015, S. 41(5).

Considering the potentially broad interpretation that can be given to 'environmental management', these action plans are necessary to offer guidelines on how to undertake such management. It is also worth noting that some of the issues arising in some counties may have national implications and hence the need to ensure that NEMA still has the mandate to ensure that these plans collectively contribute to the implementation of the EMCA and discharge of state obligations in respect of the environment as captured under Article 69 of the Constitution.

Monitoring compliance with environmental action plans

NEMA has the responsibility for monitoring compliance with national and county Environmental Action Plans.[97] It may take any steps or make any inquiries it considers necessary to determine if the plans are being complied with. If NEMA, as a result of any action taken or inquiry, is of the opinion that a plan is not substantially being complied with, it shall serve a written notice on the organ concerned, calling on it to take such specified steps the Authority may consider necessary to remedy noncompliance. Within 30 days of receipt of such notice, the organ shall respond in writing setting out any objections, if any; the action that will be taken to ensure compliance with the respective plan; or other information that the organ considers relevant to the notice.

After considering representations from the organ, and any other relevant information, NEMA shall within 30 days of receiving the response issue a final notice to confirm, amend or cancel the notice; and to specify any action and a time period within which such action shall be taken to remedy non-compliance. The Authority is required to keep a record of all environmental action plans and ensure that they are available for public inspection. Prior to the amendment of the law, there were no provisions for enforcing environmental plans.

Averting potential conflict through protection and conservation of the environment

Part V of the EMCA deals with conservation and management of various segments of the environment. Amendments to the EMCA enhanced the scope of protection measures for the environment. The Cabinet Secretary may, by notice in the *Gazette*, issue general and specific orders, regulations or standards for the management of river basins and lake basins.[98] Previously, the Cabinet Secretary was limited to issuing orders, regulations and standards for protecting lakes and rivers without taking into account the entire area of land drained by a river and its tributaries, and lake. There are, however, no seas in the country and hence Section 42 is inapplicable to the extent to which it applies to seas.

An interesting provision in the EMCA concerns interests in or over land. The Cabinet Secretary in charge of environment and natural resources may make regulations for any interest in or over land in the interests of defence, public safety, public order, public morality, public health, or land use planning.[99] This function is purely a land management and administrative matter that would be better placed within the Ministry in charge of matters relating to land and the National Land Commission.

The amended law empowered NEMA, in consultation with the relevant lead agencies and stakeholders, to issue guidelines and prescribe measures for co-management of critical habitats

97 *Ibid*, S. 41 B, s 27 AA.
98 Environmental Management and Coordination (Amendment) Act, No. 5 of 2015, S. 42(3).
99 *Ibid,* S. 42(A).

within or around a lake basin, wetland, forest or coastal zone; and such measures shall take into account the interests of the local resident communities.[100]

In order to avert any potential conflict in management of any of the sectors of the environment, there is a need to promote cooperation between the various lead agencies and relevant stakeholders. The EMCA provisions should be construed in the broadest terms possible and should be compared to the implementation details from the various sectoral laws.

Protection and conservation of hilly and mountainous areas

CECs have a duty to protect and conserve hilly and mountainous areas. Before the EMCA was reviewed, District Environment Committees were responsible for protecting these areas. Every CEC should identify the hilly and mountainous areas under its jurisdiction that may be at risk of environmental degradation[101] and notify NEMA.[102] Every CEC should specify which of the areas identified are to be targeted for afforestation or reforestation[103] and take measures, through encouraging voluntary self-help activities in their respective local community, to plant trees or other vegetation in any area specified within the limits of its jurisdiction.[104] Where the areas specified are subject to leasehold or any other interest in land, including customary tenure, the holder of that interest should implement measures that should be implemented by the CEC with including measures to plant trees and other vegetation in those areas.[105] CECs are responsible for ensuring that the guidelines issued and measures prescribed by NEMA for the sustainable use of hilltops, hill slides and mountainous areas are implemented. [106]

In regard to protection of forests, EMCA makes reference to the Forest Act, 2005, which was repealed through the enactment of the Forest Act, 2016.[107] The provision requiring NEMA to enter into contractual arrangement with private owners of any land for purposes of registering such land as forest land after consultation with the Chief Conservator of Forests is, therefore, unenforceable and should be revised. Where a forested area is deemed to be protected, in accordance with section 54(1) of the EMCA, the Cabinet Secretary may cause to be ascertained any individual, community or government interests in the land and forests, and provide incentives to promote community conservation.[108] A person who contravenes any conservation measure prescribed by the Authority, or fails to comply with a lawful conservation directive issued by the Authority or its environment committee in the counties, commits an offence.[109]

It is noteworthy that under the EMCA, the NEMA is mandated to issue guidelines and prescribe measures for the sustainable use of hill-tops, hill slides and mountainous areas in consultation with the relevant lead agencies.[110] This means, therefore, that the CECs are obligated to work closely with NEMA and other relevant lead agencies to ensure smooth implementation of any guidelines and other related measures.

100 *Ibid,* S. 43(2) s 29 AA.
101 Environmental Management and Coordination (Amendment) Act, No. 5 of 2015, S. 45(1).
102 *Ibid,* S. 45(3).
103 *Ibid,* S. 46(1).
104 *Ibid,* S. 46(2).
105 *Ibid,* S. 46(3).
106 *Ibid,* S. 47(3).
107 *Ibid,* S. 48(1).
108 *Ibid,* S. 48(3).
109 *Ibid,* S. 48(4).
110 *Ibid,* S. 47.

Measures for sustainable management of the environment

NEMA's function of issuing guidelines and prescribing measures for sustainable management of the environment was moved to the Cabinet Secretary through amendment of the framework law. The Cabinet Secretary is responsible to prescribe on the advice of NEMA with measures necessary to ensure the conservation of biological diversity in Kenya.[111] Additionally, the Cabinet Secretary is responsible for issuing guidelines and prescribing measures for the sustainable management and utilisation of genetic resources of Kenya for the benefit of the its people.[112] The requirement for consulting lead agencies before formulation of guidelines and measures was scrapped by the amended law. This situation could create acrimony between NEMA and other lead agencies if they were not consulted on matters that they administer on a day to day basis and, in most cases, have the required expertise to provide advice.

Protection of coastal zones

The responsibility for conducting a survey of the coastal zone and preparing an integrated national coastal zone management plan based on the report of such a survey was reassigned to the Cabinet Secretary through the amended law.[113] The Cabinet Secretary is required, from time to time, but not for a period exceeding every four years, to review the national coastal zone management plan.[114] Previously, NEMA was responsible for conducting the survey and preparing the plan every two years.

Amendments to the framework law also enhanced the penalty for polluting the coastal zone.[115] Where any polluting or hazardous substances are discharged, released, or in any other way escape into the coastal zone, any person responsible for management of the polluting or hazardous substances is liable for any resultant damage; for the cost of any measures reasonably taken after the release or escape for the purpose of preventing, reversing or minimising any damage caused by such discharge, release or escape; and for any damage caused by any measures so taken.[116] In addition, any person responsible for the management of the polluting or hazardous substances is liable for the cost of any measures reasonably taken for the purpose of preventing, minimising or controlling any damage as well as any damage caused by any measures so taken.[117] In other words, such a person is liable for costs and damage incurred for preventing, minimising or controlling pollution before, during and after the act causing pollution has occurred.

The Cabinet Secretary, in consultation with the Authority, is responsible for issuing guidelines and instituting programmes concerning: the elimination of substances that deplete the stratospheric ozone layer; controlling activities and practices likely to lead to the degradation of the ozone layer and the stratosphere; reduction and minimisation of risks to human health created by the degradation of the ozone layer and the stratosphere; and formulation of strategies, preparation and evaluation of programmes for phasing out ozone depleting substances.[118] The Cabinet Secretary is also required, in consultation with relevant lead agencies, to issue guidelines and prescribe measures on climate change.[119]

111 Environmental Management and Coordination (Amendment) Act, No. 5 of 2015,S. 51.
112 *Ibid,* S. 55(3).
113 *Ibid,* S. 55(2).
114 *Ibid,* S. 55(3).
115 *Ibid,* S. 38 AA.
116 Environmental Management and Coordination (Amendment) Act, No. 5 of 2015, S. 55 (8).
117 *Ibid,* S. 55(9).
118 *Ibid,* S. 56 S. 39 (a) AA.
119 *Ibid,* S. 56(A) S. 39 (b).

Strategic and environmental impact assessment and environmental audits

Environmental Impact Assessment

The title of Part VI of the Environmental Management and Coordination Act was changed from 'Environmental Impact Assessment' to 'Integrated Environmental Impact Assessment'.[120] 'Environmental impact assessment' means a systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impacts on the environment. 'Integrated Environment Impact Assessment', on the other hand, refers to a systematic study conducted to determine whether or not a project will have any adverse impacts on the environment. It is, however, noteworthy that the change in the title is intended to capture the broadened scope of the assessment, with reports expected to capture not only the project effect on the environment but also on the socio-economic lives of the people in the target locality.[121] Further, provisions of the Climate Change Act require NEMA to integrate climate risk and vulnerability appraisals into all forms of assessment including Environmental Impact Assessment.[122] This is an important addition to the development agenda as it reflects the spirit of sustainable development.

Carrying out environmental impact assessments as part of environmental conservation measures is now provided for under Article 69(1) of the Constitution as State obligations towards the environment. Where reports on such assessments are required to be submitted, they comply with the law, as Article 69(2) of the Constitution also requires every person to cooperate with the State in the conservation of the environment.

The Cabinet Secretary is mandated to consult with NEMA in promulgating regulations and formulating guidelines for the practice of Integrated Environmental Impact Assessments and Environmental Audits in order to regulate the practice of integrated environmental assessments.[123] The Cabinet Secretary is also mandated to make regulations for the accreditation of experts on environmental impact assessments.[124] Penalties have been prescribed for providing false or misleading information in the environmental impact assessment reports. A person who knowingly submits a report that contains false or misleading information commits an offence and is liable, on conviction, to imprisonment for a term of not more than three years, or to a fine not exceeding Ksh5 million, or to both and in addition to revocation of licence.[125]

The EMCA was amended and now requires NEMA to publish notice of a proposed project not only in the Gazette and at least two newspapers circulating in the area or proposed area of the project, but also to announce it over the radio.[126] This measure sought to enhance public access to information contained in the environmental impact assessment reports because previously, notices were published for two successive weeks in the Gazette and in a newspaper circulating in the area or proposed area of the project. Consequently, only a few members of the public

120 *Ibid,* S 42 AA.
121 The draft Environmental (Strategic Assessment, Integrated Impact Assessment and Audit) Regulations, 2017 intended to repeal the Environmental (Impact Assessment and Audit) Regulations, 2003.
122 Climate Change Act No. 11 of 2016, S. 20.
123 Environmental Management and Coordination (Amendment) Act, No. 5 of 2015, S. 58 (6A).
124 *Ibid,* S. 58 (6B).
125 *Ibid,* S. 58(10).
126 Environmental Management and Coordination (Amendment) Act, No. 5 of 2015, S. 59(1)

could access the environmental impact assessment reports. NEMA is also obliged to ensure that its website contains a summary of the environmental impact assessment reports.[127]

NEMA may cancel or revoke an environmental impact assessment licence, or suspend such licence for such time but not more than 24 months, where the licensee contravenes the provisions of the licence.[128] Where the Authority cancels, revokes or suspends a licence in accordance, the reasons for such action shall be given to the licensee in writing.[129] Formerly, the power to cancel, revoke or suspended environmental impact assessment licences vested in NEMA on the advice of the Standards and Enforcement Review Committee. It was challenging to cancel, revoke or suspend an environmental impact assessment licence since convening a meeting for the Standards and Enforcement Review Committee was often difficult.

Before amendment, the EMCA was not clear on the status of an environmental impact assessment licence that had been issued before NEMA had directed a project proponent to submit a fresh environmental impact assessment report. Where NEMA has directed that a fresh environmental impact assessment be carried out, or that new information is necessary from the project proponent, any environmental impact assessment licence that has been issued may be cancelled, revoked or suspended.

The Second Schedule of the EMCA, which deals with projects that require an environmental impact assessment, was reviewed. The requirement to undertake environmental impact assessment study for an activity out of character with its surrounding was repealed. In addition, it was clarified through the amendment to the law that only the construction of new housing developments exceeding 30 housing units would require an environmental impact assessment. Nevertheless, the requirement for an environmental impact assessment should be guided by the risk a project poses to the environment and not the size of the project. Small projects may, in certain instances, pose higher environmental risks in comparison to big projects.

The owner of a premise or the operator of a project is required to take all reasonable measures to mitigate any undesirable effects not contemplated in the environmental impact assessment study report, and to prepare and submit an environmental audit report on those measures to NEMA annually or as NEMA may, in writing, require.[130] Every lead agency is required to establish an environmental unit to implement the provisions of the EMCA. This includes providing technical advice on environmental impact assessment reports, which NEMA refers to the lead agencies. So far, no lead agency has established an environmental unit.

Strategic Environmental Assessment

A new section was introduced in the EMCA, which requires all policies, plans and programmes for implementation to be subjected to strategic environmental assessment. Strategic environmental assessment means a formal and systematic process to analyse and address the environmental effects of policies, plans, programmes and other strategic initiatives.[131] The plans, programmes and policies that are subject to strategic environmental assessment are those that are prepared

127 *Ibid,* S. 59(3).
128 *Ibid,* S. 67 (1).
129 *Ibid,* S. 67 (1A).
130 Environmental Management and Coordination (Amendment) Act, No. 5 of 2015, S. 68(4).
131 *Ibid,* S. 2.

or adopted by an authority or Parliament at national, county and regional levels. NEMA may also determine the policies, plans and programmes that should be subjected to strategic environmental assessment since they are likely to have significant effects on the environment.[132] The cost of undertaking the strategic environmental assessment is to be borne by the entities preparing the plans, programmes and policies.[133] The assessments are submitted to NEMA for approval.[134] NEMA is required, in consultation with lead agencies and relevant stakeholders, to prescribe rules and guidelines in respect of strategic environmental assessments.[135]

Environmental audits

Environmental audit is 'the systematic, documented, periodic and objective evaluation of how well environmental organisation, management and equipment are performing in conserving or preserving the environment'.[136] The framework for environmental audits provided for under Article 69 (1) (f) of the Constitution of Kenya, 2010, which requires the state to establish *inter alia* systems for environmental audit.

Under this system, NEMA is mandated to enter any land or premises for purposes of determining the extent to which activities being undertaken conform to the statements made in the Environmental Impact Assessment study report.[137] The aim of environmental audits is to evaluate ongoing projects in order to ascertain whether or not such projects adhere to the standards prescribed in the EIA licence.

The Cabinet Secretary is required to formulate guidelines for the performance of environmental audits in consultation with NEMA.[138]

Environmental compliance inspectors

Section 117 of the EMCA provides for the appointment and powers of environmental inspectors. Before the law was amended, only the Director General could issue an improvement notice. Currently, any person nominated by the Director General can issue such a notice.[139] This enables NEMA officers at the county level to act swiftly to prevent activities that may be deleterious to the environment without referring the matter to the Director General, who may not be available to act in good time and avert irreversible damage to the environment. An environmental inspector may also install any equipment on any land, premise, vessel or motor vehicle for purposes of monitoring compliance with the provisions of the EMCA or the regulations made thereunder once the owner or occupier of the land has been given 14 days written notice. Before the framework law was reviewed, the owner or occupier of the land would be given three months' notice – considered very long and providing an opportunity for an owner or occupier of land to interfere with information being sought for purposes of monitoring compliance. NEMA may request from the Inspector-General of Police such number of officers as it may require to effect

132 *Ibid,* S. 57 (A) (2).
133 *Ibid,* S. 57 (A) (3).
134 *Ibid,* S. 57(A) (3).
135 *Ibid,* S. 57(A)(4).
136 Environmental Management and Coordination (Amendment) Act, No. 5 of 2015S. 2.
137 *Ibid,* S 68 (2).
138 *Ibid,* S. 43 (c) AA.
139 *Ibid,* S. 117 3(g).

arrest.[140] The Inspector General has currently seconded 10 police officers to NEMA – a number that is insufficient to effectively deal with environmental crimes, which are committed on a regular basis in the country. Perhaps, there is need to establish an environmental police unit under the command of the Director General instead of relying on the Inspector General.

Enhancing environmental justice for all: Prosecution of environmental crimes

Amendments to the EMCA aligned Section 118 with the provisions of Article 157 of the Constitution. An environmental inspector may, under the direction and control of the Director of Public Prosecutions, institute and undertake criminal proceedings against any person before a court of competent jurisdiction (other than a court martial) in respect of any offence alleged to have been committed by under the EMCA. An environmental inspector may at any stage, with the approval of the Director of Public Prosecutions, discontinue a case before judgment is delivered, or any proceedings instituted or undertaken.

Multilateral environmental agreements: Adopting international best practices?

The powers of NEMA to assist lead agencies in negotiating international treaties, conventions or agreements on environment were curtailed through the repeal of section 124 (2) (b) of the framework law. However, it is arguable that NEMA would still assist in negotiations by dint of section 9(o) of the EMCA, which requires the Authority to render advice and technical support, where possible, to entities engaged in natural resources management and environmental protection.

Within six months of the commencement date of the amended law, the Cabinet Secretary, under Article 71 of the Constitution, is empowered to consult with NEMA and lead agencies to develop legislation requiring certain transactions involving environmental resources to be submitted to Parliament for ratification.[141] The law should specify the acreage, quantity, quality, value, location and dimensions of natural resources whose agreements require parliamentary approval. Any transaction requiring ratification by Parliament should include the grant of a right or concession by or on behalf of any person, including a local community, a county government or the national government to another person for the exploitation of wildlife resources and habitats; resources of gazetted forests, water resources, resources on community land and biodiversity resources; and in the case of a foreign national or company, land owned by such person of more than three hectares. The Cabinet Secretary may, by notice in the Gazette, specify additional environmental resources whose transactions require ratification by Parliament. Any agreements concluded before the promulgation of the Constitution and the coming into force of this the amended law may be reviewed within a period of two years. The Natural Resources (Classes of Transactions subject to Ratification) Act, 2016, was enacted to give effect to Article 71 of the Constitution.

There is need for NEMA to continuously ensure that the State not only enacts environmental laws that are in line with international best practices in the area of environmental governance but also fully implements and enforces them in the spirit of sustainable development by balancing between development needs and environmental conservation.

140 Environmental Management and Co-ordination (Amendment) Act, No. 5 of 2015, S. 117(5).
141 Environmental Management and Co-ordination (Amendment) Act, No. 5 of 2015, S. 124 A.

National Environment Tribunal

Provisions on the National Environment Tribunal in the framework law were amended through the Environment Management and Coordination (Amendment) Act, Prevention of Torture Act, 2017, and The Statute Law (Miscellaneous Amendments) Act, 2018. The Tribunal is composed of among others, three persons with demonstrated competence in environmental matters, including but not limited to land, energy, mining, water, forestry, wildlife and maritime affairs.[142] The members of the Tribunal shall, in their first meeting, elect from among themselves a chairperson and a vice chairperson of the Tribunal. The chairperson and vice-chairperson shall be of opposite gender. In the absence of the chairperson, the vice-chairperson shall serve as the acting chairperson for the duration of the absence of the chairperson, and the acting chairperson shall perform such functions and exercise such powers as if that person were the chairperson. In the absence of both the chairperson and the vice-chairperson, the members of the Tribunal present may nominate from among themselves a person to act as the chairperson. Such a person shall have the training and qualifications in the field of law and, while acting as the chairperson, shall perform such functions and exercise such powers as if that person were the chairperson. The chairperson may designate the vice-chairperson and two other members to constitute a separate sitting of the Tribunal. The quorum for hearing or determining any cause or matter before the Tribunal shall be three members. Previously, the quorum consisted of the chairman and two members of the Tribunal. The chairman was nominated by the Judicial Service Commission and was qualified for appointment as a judge of the High Court. The law did not provide for the position of a vice-chairperson. The upshot of these amendments is to ensure that the Tribunal is operational even in the absence of the chairperson.

In order to enhance the right to a fair hearing at the Tribunal, the EMCA was amended by inserting a new subsection providing that any person who is a party to proceedings before the Tribunal may appear in person or be represented by an advocate.

The jurisdiction of the Tribunal was enhanced, so that it does not only hear and determine matters relating to the refusal to grant or transfer a licence under the EMCA or regulations made thereunder, but also the issuance, refusal to issue or transfer of licences or permits. Where the EMCA empowers NEMA's agents to make decisions, such decisions may be appealed to the Tribunal,[143] which may make such other order, including orders to enhance the principles of sustainable development.[144]

Section 129 of the EMCA was revised by deleting subsection (4), which provided for an automatic maintenance of the status quo once an appeal was lodged at the Tribunal. At present, there has to be an application to the Tribunal to maintain the status quo, and if the Tribunal is satisfied with the application, it may issue orders maintaining the status quo of any matter or activity which is the subject of the appeal until the appeal is determined. The Tribunal may also, upon application by any party, review any orders maintaining the status quo made which had been previously granted. Further, any status quo automatically maintained by virtue of the filing of an appeal prior to the amendment of Section 129(4) lapsed upon commencement of this section unless the Tribunal, upon application by a party to the appeal, issues fresh orders maintaining

142 *Ibid,* s. 125(d).
143 Environmental Management and Coordination (Amendment) Act, No. 5 of 2015, s 129(2).
144 *Ibid,* S. 129(3).

the status quo. Upon application by any party, the Tribunal may also review any of its orders, which it had confirmed, set aside, or varied on a decision in question.

Environmental offences

Part XIII of the framework law sets out environmental offences and stipulates the minimum and maximum penalties for them. Any person who contravenes any provision of the EMCA or regulations made thereunder for which no other penalty is specifically provided is liable, upon conviction, to imprisonment for a term of not less than one year but not more than four years, or to a fine of not less than Ksh2 million but not more than Ksh4 million shillings, or to both such fine and imprisonment or to both. While it is desirable to prescribe lowest minimum penalty in order to deter criminal behaviour, this may not be the case in regard to the highest maximum penalties. Damage to the environment may be severe and irreversible, leading to a situation where the maximum penalty imposed is not proportionate to the offence. A court should have the discretion to impose such penalty where the offence is considered a serious danger to the environment.

The framework law further imposes liability on corporations for environmental offences. While recognizing that corporations are artificial persons incapable of performing certain acts on their own, the act imposes this liability on every director or officer of the body corporate who had knowledge of the commission of the offence and who did not exercise due diligence, efficiency and economy to ensure compliance with the law.[145] This extends to partnership where liability for environmental offences is imposed on every partner or officer of the partnership who had knowledge of the commission of the offence and did not exercise due diligence, efficiency and economy to ensure compliance with the law.[146]

A county may enact legislation in respect of all such matters as are necessary or desirable that are required or permitted under the Constitution and the EMCA.[147] Any written law enacted by the national and county governments relating to the management of the environment in force immediately before the commencement of this amended shall have effect, subject to such modifications as may be necessary to give effect to this Act, and where the provisions of such law are in conflict with any provisions of this Act, the provisions of this Act shall prevail.[148] This provision restates the status of the EMCA as the framework law in environmental matters.

D. Enhancing the implementation and effectiveness of the framework law on environmental governance

Since the drafting and enactment of the Environmental Management and Coordination Act in 1999, there have been a lot of changes on the global scene and the international environmental law regime. Environmental management and governance has increasingly been shaped by the sustainable development agenda and the need for a more integrated approach to environmental governance. There have also been changes in the governance regimes, with a need for a more open, transparent, accountable and participatory approach adopted in the area of environmental

145 Environmental Management and Coordination (Amendment) Act, No. 5 of 2015, S 145 (1).
146 *Ibid,* S 145 (2).
147 *Ibid,* S. 147 A.
148 Environmental Management and Coordination (Amendment) Act, No. 5 of 2015, S. 148.

governance. All these have necessitated the review and amendment of various domestic laws, including the EMCA.

The EMCA is still a good law and reflects the environmental governance standards set out in Articles 42, 69 and 70 of the Constitution of Kenya. However, there is need for continuous review and enhancement of the law to provide a mechanism for coordination between the national and county governments, and among county governments on devolved environmental functions.

There is need to appreciate the fact that addressing environmental ills in the country for sustainable development cannot be left to the designated government organs alone. This realisation can minimise the potential conflict between institutions mandated under the law to implement its provisions.

Additionally, the role of the courts in environmental protection and conservation cannot also be ignored in addressing environmental offences. For instance, in *Kenya Association of Manufacturers & 2 Others v Cabinet Secretary with Ministry of Environment and Natural Resources & 3 others* [2017] eKLR,[149] the court rightly pointed out that, besides 'the general guiding principles upon which Kenyan courts make findings on interlocutory applications for conservatory orders within the framework of Article 23 of the Constitution, a court seized of an environmental dispute, whether at the interlocutory stage or at the substantive hearing, is to bear in mind that, through their judgments and rulings, courts play a crucial role in promoting environmental governance, upholding the rule of law, and ensuring a fair balance between competing environmental, social, developmental and commercial interests'.[150] The court went on to state that 'in determining environmental disputes at any stage, Kenyan courts are guided by and promote the framework on the environment as spelt out in Articles 42, 69 and 70 of the Constitution and the legislative framework in the EMCA. Articles 42, 69 and 70 of the Constitution, and the broad environmental principles set out in Section 3 of the EMCA, are important tools in the interpretation of the law and adjudication of environmental disputes. Invariably, the environmental governance legal framework and any other relevant legislative instruments [substantive or subsidiary] ought to be construed in a manner that promotes the letter and spirit of the constitutional underpinnings and general principles in Section 3 of the EMCA'.

The position adopted by the court in the foregoing case is a clear demonstration of the need for concerted efforts from all quotas for the successful implementation of the EMCA.

149 Petition No. 32 of 2017.

150 *Kenya Association of Manufacturers & 2 Others v Cabinet Secretary with Ministry of Environment and Natural Resources & 3 Others* [2017] eKLR. Paras. 20 & 22,

CHAPTER 6

Fulfilling Socio-Economic Rights and Governance

Nkatha Kabira & Garvin Rodgers

Introduction

Ten years ago, Kenyans celebrated the proverbial break of dawn when they ushered in a new Constitution that was successfully endorsed in a referendum on August 4, 2010, which had received 67 per cent approval of the voters. It was then promulgated on August 27, 2010. This was a joyous day for most Kenyans as it marked a new beginning with the promise to develop a new political and legal culture that would protect the rights of all citizens. The final constitution document had been written by the Committee of Experts and released to the public, who were given 30 days to study it and suggest any amendments. Parliament approved the proposed constitution on April 1, 2010, and it was officially published on May 6, 2010.

The adoption of the Constitution of Kenya, 2010, was aimed at fundamentally transforming the governance framework through far-reaching institutional, administrative, legal and policy reforms. The Constitution remained true to its promise to Kenyans during the review process to protect the environment and natural resources. It entrenches environmental rights under the Bill of Rights and makes specific provisions in Articles 69 to 72. It also envisages specific legislation under the framework set out under the Constitution. Fundamental, Article 42 sets out the right to a clean and healthy environment, which includes the obligation to sustain environmental protection for future generations and to fulfil obligations relating to the environment.

The Constitution sets up broad mechanisms for protecting the Bill of Rights: Enforceability of the Bill of Rights in the courts; obligation to develop specific legislation under various aspects of the Bill of Rights, including: diversity; non-discrimination; freedom of the media; administrative justice; consumer protection; labour relations; family; criminal justice rights and rights of persons under custody; and establishment of oversight independent commissions under Article 59 of the Constitution. The Constitution also provides for mainstreaming of the Bill of Rights in all other legislation, including laws on elections; diversity; public service; public finance; land and environment; and citizenship. The Constitution also obligated the Chief Justice to enact rules for the enforcement of the Bill of Rights.

This chapter examines the types of mechanisms Kenya's legal framework has set up for the protection of socio-economic rights, with a specific focus on the right to environment. The chapter reviews the extent to which the right to the environment (socio-economic rights) has been mainstreamed into other related legislation, such as elections law, diversity laws, public participation, public finance and citizenship laws. It argues that although Kenya's legal framework encapsulates an expansive Bill of Rights that includes the right to environmental protection geared towards transforming democracy and governance processes in Kenya, nevertheless implementation remains a challenge because of the perceived distinctions between different types of rights, which ought to be viewed in a symbiotic manner.

The chapter proceeds in five parts: The first part discusses the meaning and the content of socio-economic rights, which specifically focus on the right to environment. The second part connects the right to environment to what have been traditionally understood as first, second, third and fourth generation rights. The third part describes the history of socio-economic rights in Kenya within the context of constitutional review and reform. The fourth part describes the socio-economic rights included in the Constitution and interrogates what socio-economic rights mean within the context of the Constitution of Kenya, 2010. The fifth part describes progress in the realization of the right. It describes measures instituted by the government between 2010 and 2018, and also reviews cases brought before the Kenyan courts including the Land and Environment Court and their impact in the Kenyan context. The fifth part describes challenges for the realization of environmental rights. The sixth part concludes with some reflections and recommendations.

A. Theoretical and conceptual framework

Theoretical framework

Rights in context

Throughout history, different scholars have defined rights in varied ways. The Stanford encyclopaedia of philosophy defines rights as 'entitlements (not) to perform certain actions, or (not) to be in certain states; or entitlements that others (not) perform certain actions or (not) be in certain states'.[1] Collins Online Dictionary defines rights as 'those things that one is morally or legally entitled to do or have'.[2] Laski defines rights as 'those conditions of social life without which no man can seek, in general, to be himself at his best'.[3] Thomas Hill Green defines rights as 'powers necessary for the fulfilment of man's vocation as a moral being'.[4] Beni Prasad defines rights as 'nothing more nor less than those social conditions which are necessary or favourable to the development of personality'.[5] Bentham and Austin defined rights in terms of duties: 'Every right,' says Austin, '... rests on a relative duty ... lying on a party or parties other than the party or parties in whom the right rests'. For Bentham, a duty and right can only exist if written in law. 'Without the notion of punishment... no notion could we have of either right or duty.'[6] Paul Vinogradoff refers to rights as 'a claim upheld by the law'.[7]

1 Leif Wenar, 'Rights' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Fall 2015, Metaphysics Research Lab, Stanford University 2015) <https://plato.stanford.edu/archives/fall2015/entries/rights/> accessed 6 July 2018.

2 'Rights Definition and Meaning | Collins English Dictionary' <https://www.collinsdictionary.com/dictionary/english/rights> accessed 6 July 2018.

3 Edmund SK Fung, 'The Human Rights Issue in China, 1929-1931' [1998] 32 *Modern Asian Studies* 431; WY Elliott, 'Contemporary Political Thought in England'. By Lewis Rockow. (New York: The Macmillan Co.1925. Pp. 336.) – 'The Indestructible Union' by William McDougall. (Boston: Little, Brown, and Co.1925. Pp. Xiii, 249.) [1926] 20 *American Political Science Review* 195.

4 John Herman Randall Jr, *Philosophy after Darwin: Chapters for the Career of Philosophy, Volume III, and Other Essays* (Columbia University Press 1977); Gerald F Gaus and Fred D'Agostino, *The Routledge Companion to Social and Political Philosophy* (Routledge 2013).

5 Stanley Benn, 'Rights' <http://www.ditext.com/benn/rights.html> accessed 6 July 2018.

6 Paul Edwards, *The Encyclopedia of Philosophy* (New York: Macmillan 1967).

7 Thomas D Williams, *Who is My Neighbor?: Personalism and the Foundations of Human Rights* (CUA Press 2005); CP Wellman, *An Approach to Rights: Studies in the Philosophy of Law and Morals* (Springer Science & Business Media 2013).

Understanding socio-economic rights

Adams, Watson and Mutiso, basing their research on a case study of the Marakwet region, give the right to water a gender perspective. They discuss themes, such as bullying, stealing and sharing of water resources.[8] Agbakwa argues that human rights are the key to the realization of human rights and that political and civil rights are inextricably linked to the socio-economic rights that one cannot be violated or realized without doing the same to the other.[9] Alston, presenting at the annual Economic and Social Council (ECOSOC) 104th annual meeting illustrates the impact that the Economic, Social, Cultural Rights (ECSR) Committee general comments have had on the member states. He asserts that the general comments have been influential and that some rights, such as the right to water, despite not being explicitly acknowledged in the ESCR Covenant, were considered human rights by the member states.[10] Arambulo examines the supervisory mechanisms employed by the International Covenant on Economic, Social and Cultural Rights (ICESCR) and suggests that the adoption of an optional protocol and a complaint's procedure will improve the implementation of the Covenant.[11] Arwa, on the other hand, outlines how the new constitution has revitalized socio-economic rights litigation in Kenya by constitutionalizing them and making Kenya a monist state. The author also discusses the challenges that face socio-economic rights litigation in Kenyan courts. He concludes that translation of socio-economic rights from abstract ideas on paper to concrete rights that can be enforced in courts remains a dream.[12] Attalo, examining the decision of the Court of Appeal in the *Mitu-Bell* case, argues that by overturning the High Court decision, the appellate judges once again made the courts toothless when it comes to realization of socio-economic rights.[13] Khakula opines that despite socio-economic rights being justiciable in Kenya, they have not been utilized as tools of social transformation.[14] Wekesa evaluates the international and local framework on the right to water. He determines that the right has two components: clean and safe water for it to be enjoyed.[15] Verani, on the other hand, argues that the realization of the right to health is multi-staged: agenda setting, policy formulation, policy implementation, and evaluation.[16]

Orago, in his article, 'Interpretation and Enforcement of the Socio-Economic Rights Entrenched in the New Kenyan Constitution', argues that for Kenya to achieve or realize the aspirations of the many Kenyans that is depicted in the Bill of Rights, the judiciary must adopt a minimum

8 William Adams, Elizabeth Watson and Samuel Mutiso, 'Water, Rules, and Gender: Water Rights in an Indigenous Irrigation System, Marakwet, Kenya'[1997] 28 *Development and Change* 707.

9 Shedrack C Agbakwa, 'Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights' [2002] 5 *Yale Human Rights & Development Law Journal* 177.

10 Philip Alston, 'The General Comments of the UN Committee on Economic, Social and Cultural Rights', *Proceedings of the ASIL Annual Meeting* (Cambridge University Press 2010).

11 Kitty Arambulo, 'Drafting an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Can an Ideal Become Reality Essay' [1996] 2 U.C. *Davis Journal of International Law & Policy* 111.

12 Jotham Okome Arwa, 'Litigating Socio-Economic Rights in Domestic Courts: The Kenyan Experience' [2013] 17 *Law, Democracy and Development* 419.

13 Alvin Attalo, 'Turning Back the Clock on Socio-Economic Rights: Kenya's Court of Appeal Decision in the Mitu-Bell Case' [2016] (*OHRH*, 13 September 2016) <http://ohrh.law.ox.ac.uk/turning-back-the-clock-on-socio-economic-rights-kenyas-court-of-appeal-decision-in-the-mitu-bell-case/> accessed 6 July 2018.

14 Andrew Barney Khakula, 'Theory and Practice of Social and Economic Rights in Kenya' [2015] 59.

15 Seth Muchuma Wekesa, 'Right to Clean and Safe Water under the Kenyan Constitution, 2010' [2013]<https://repository.up.ac.za/handle/2263/31836> accessed 6 July 2018.

16 Andre R Verani and Others, 'Law and Pediatric HIV Testing: Realizing the Right to Health in Kenya' [2014] 13 *Journal of the International Association of Providers of AIDS Care* (JIAPAC) 379.

core interpretation approach for the realization socio-economic rights.[17] Orago, in another article, 'The Impact of the Global Financial Crisis on the Realization of Socio-Economic Rights in Sub-Saharan Africa: An Analysis Based on the Millennium Development Goals Framework and Processes', examines the effect of the financial crisis on the realization of socio-economic rights. He finds that even though the crisis reduced the amount of resources available for the realization of socio-economic rights, individual African countries would have made more progress had they had political goodwill to implement socio-economic rights.[18] In 'Limitation of Socio-Economic Rights in the 2010 Kenyan Constitution: A Proposal for the Adoption of a Proportionality Approach in the Judicial Adjudication of Socio-Economic Rights Disputes', Orago outlines that just as any other classes of rights, socio-economic rights are not absolute and may be limited based on two principles: the proportionality approach that is based on international jurisprudence, and the reasonableness approach that is based on internal limitations.[19] In 'Poverty, Inequality and Socio-Economic Rights: A Theoretical Framework for the Realisation of Socio-Economic Rights in the 2010 Kenyan Constitution', Orago explains that enforcement of socio-economic rights through provision of a minimum core can be the way to empower the marginalized in the society.[20] Using Burundi and Rwanda as case studies, Orago opines that the processes of resolving conflicts in Africa have majorly focused on the political aspects of the conflicts, disregarding the economic cause of such conflicts. The author holds that socio-economic development and resource (re) distribution can be utilized to prevent and curb conflicts.[21]

Referring to the *Grootboom* case, Bilchitz asserts that the courts' failure to set a minimum core obligation on the government in relation to the right to housing has an undesirable effect on the enforcement of the right in courts.[22] Contesse and Parmo analyze cases from Chile and determine how strategic litigation may have a positive implication on the realization of social economic rights. Further, they assert that the impact of litigated cases depends on the sensibility of a country's political system.[23] Desai puts forward the argument that the assertion that it's only the elected government that is responsible for resource allocation is a sham, the delegitimated nature of poor government warrants the intervention of the judiciary in the distribution process.[24] Relying on comparative jurisprudence from South Africa, Desierto proposes a triangulated theory to aid the Philippine Supreme Court in determining the justiciability of

17 Nicholas Orago, 'Interpretation and Enforcement of the Socio-Economic Rights Entrenched in the New Kenyan Constitution' [2012] African Center for International Legal and Policy Research (CILPRA) and International Association of Constitutional Law (IACL).

18 Nicholas Orago, 'The Impact of the Global Financial Crisis on the Realisation of Socio-Economic Rights in Sub-Saharan Africa: An Analysis Based on the Millennium Development Goals Framework and Processes' [2017].

19 Nicholas Wasonga Orago, 'Limitation of Socio-Economic Rights in the 2010 Kenyan Constitution: A Proposal for the Adoption of a Proportionality Approach in the Judicial Adjudication of Socio-Economic Rights Disputes' [2013] 16 PER: *Potchefstroomse Elektroniese Regsblad* 01.

20 Nicholas Wasonga Orago, 'Poverty, Inequality and Socio-Economic Rights: A Theoretical Framework for the Realisation of Socio-Economic Rights in the 2010 Kenyan Constitution' [2013].

21 Nicholas Wasonga Orago, 'Socio-Economic Development and Resource Redistribution as Tools for Conflict Prevention and Post-conflict Peace Building in Fragile Societies: A Comparative Analysis of Burundi and Rwanda' [2017].

22 David Bilchitz, 'Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance Note' [2002] 119 *South African Law Journal* 484.

23 Jorge Contesse and Domingo Lovera Parmo, 'Access to Medical Treatment for People Living with HIV/Aids: Success without Victory in Chile' [2008] 5 *Sur. Revista Internacional de Direitos Humanos* 150.

24 Deval Desai, 'Courting Legitimacy: Democratic Agency and the Justiciability of Economic and Social Rights' [2009] 4 *Interdisc. J. Hum. Rts*. L. 25.

socio-economic rights under the Philippines constitution.[25] Haysom asserts that there are no antidemocratic rights but democracy requires political/civil and socio-economic rights to exist.[26] Christof Heyns, 'Introduction to Socio-Economic Rights in the South African Constitution' 15. Jung explains that even though socio-economic rights have been constitutionalized, not all of them are widespread.[27] Further, different constitutions rank or give different status to these rights, and the legal tradition of a country determines whether or not its constitution contains socio-economic rights.[28]

Kende discusses the leading cases on socio-economic rights in South Africa in an attempt to disprove the criticism against the South African courts that they are not doing enough to enforce socio-economic rights. The author determines that the criticisms are inconsistent with the ruling party's (ANC) aspirations.[29] Langford opines that despite South African courts creating robust jurisprudence on the justiciability of socio-economic rights, in reality, this is not depicted in the transformation process.[30] Mbazira attributes poverty in Africa to the failure of African countries to enforce socio-economic rights. He argues that unless the African Union becomes capable of imposing sanctions, the trend of countries on the continent failing to put socio-economic rights in practice will continue.[31] McLean argues that even though the realization of socio-economic rights has a cost implication, this should not be a hindrance to their justiciability.[32] Nolan, in his article, explains that children have been ignored as bearers of the socio-economic rights in the world.[33] He explains that any notion that child poverty can be remedied only by law emerges from an illusion that only enforcement of socio-economic rights can eradicate poverty. He argues that enforcement of socio-economic rights can just be one of the tools used to alleviate poverty but not the main one.[34] O'Connell argues that the process of recasting socio-economic rights into "market-friendly" rights has the effect of reducing entrenched socio-economic rights to formal, procedural guarantees rather than substantive material entitlement.[35] Pieterse explains that the judiciary has a role in ensuring that socio-economic rights are realized through evaluation, interpretation and giving them meaning.[36] In 'Legislative and Executive Translation of the Right to Have Access to Healthcare Services', Pieterse asserts that the failure by the executive to translate

25 Diane A Desierto, 'Justiciability of Socio-Economic Rights: Comparative Powers, Roles, and Practices in the Philippines and South Africa' [2009] 11 *APLPJ* 114.

26 Nicholas Haysom, 'Constitutionalism, Majoritarian Democracy, and Socio-Economic Rights' [2017] *South African Journal on Human Rights:* Vol 8, No 4' <https://www.tandfonline.com/doi/abs/10.1080/02587203.1992.11827874?journalCode=rjhr20> accessed 6 July 2018.

27 Christof Heyns, 'Introduction to Socio-Economic Rights in the South African Constitution' [2016] 15.

28 Ibid.

29 Mark S Kende, 'The South African Constitutional Court's Construction of Socio-Economic Rights: A Response to Critics' [2003] 19 *Connecticut Journal of International Law* 617.

30 Malcolm Langford and Others, *Socio-Economic Rights in South Africa: Symbols or Substance?* (Cambridge University Press 2013).

31 Christopher Mbazira, 'The Enforcement of Socio-Economic Rights in the African Human Rights System : Drawing Inspiration from the International Covenant on Economic, Social and Cultural Rights and South Africa's Evolving Jurisprudence' (LLM Mini Dissertation, University of Pretoria) [2003] <https://repository.up.ac.za/handle/2263/1062> accessed 7 July 2018.

32 K McLean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (PULP 2009)

33 Aoife Nolan, 'Children's Socio-Economic Rights, Democracy and the Courts' [2011] (Social Science Research Network) SSRN Scholarly Paper ID 2217668 <https://papers.ssrn.com/abstract=2217668> accessed 6 July 2018.

34 Ibid.

35 Paul O'Connell, 'The Death of Socio-Economic Rights' [2011] *The Modern Law Review* - Wiley Online Library' <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1468-2230.2011.00859.x> accessed 6 July 2018.

36 Marius Pieterse, "Coming to Terms with Judicial Enforcement of Socio-Economic Rights" [2004] 20 South African Journal on Human Rights 383.

policies and laws on the right to health have negatively affected the realization of the right to health.[37]

Wiles argues that the enforcement of socio-economic rights has a counterbalance effect on other rights, such as political and civil rights, and acknowledges that the complexity of the adjudication process has had an adverse impact on the realization of social and economic rights.[38]

Sepúlveda argues that despite the global wealth increasing, the gap between the rich and the poor has risen steadfastly. The author opines that the International Covenant on Economic, Social and Cultural Rights may be used to cure this increasing gap between the rich and the poor.[39] Uebenberg, while focusing on the role of the courts in the process of interpreting socio-economic rights, argues that for these rights to amount to more than just promises, they must be used as tools for the provision of essential social services that are needed in human life.[40]

Tension between socio-economic rights and civil and political rights

Socio-economic rights are the so-called second generation of human rights, as established in the International Covenant on Economic, Social and Cultural Rights of 1976.[41] They include 'the right to work, the right to just and favourable conditions of work, the right to form and to join trade unions, the right to social security, the right to an adequate standard of living, the right to physical and mental health, and the right to education'.[42] Socio-economic rights include both economic and social concerns. Socio-economic rights majorly give rise to positive obligation only when individuals are unable to provide for their own needs.[43] According to David Bilchitz, 'they were sometimes called "positive rights", since they promoted a positive view of liberty as "opportunities for flourishing or well-being", as contrasted against a negative view of liberty simply as non-interference.' Sibonile Khoza defines socio-economic rights as 'those rights that give people access to certain basic needs necessary for human beings to lead a dignified life'.[44] He adds that these are rights used to protect the vulnerable in the society.[45] On the other hand, political rights are the rights that 'confer an opportunity upon people to contribute to the determination of laws and participate in government'.[46] They are "the rights exercised in the formation and administration of a government".[47]

37 Marius Pieterse, 'Legislative and Executive Translation of the Right to Have Access to Healthcare Services' [2010] 14 *Law, Democracy & Development*.

38 Ellen Wiles, 'Aspirational Principles or Enforceable Rights - The Future for Socio-Economic Rights in National Law Articles and Essays Analyzing Justiciability of Economic, Social, and Cultural Rights: Legal Approaches and the Contributions of Case Law' [2006] 22 *American University International Law Review* 35.

39 M Magdalena Sepúlveda and María Magdalena Sepúlveda Carmona, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, vol 18 (Intersentia nv 2003).

40 Sandra Uebenberg, 'South Africa's Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool In Challenging Poverty' [2002] *Economic Rights* 33.

41 Karin Kjellin, 'Socio-Economic Rights What Relevance in an Era of Globalization?' (Masters Thesis, Stockholm University) (2007).

42 Ibid.

43 David Bilchitz, 'Socio-Economic Rights, Economic Crisis, and Legal Doctrine' [2014] 12 *International Journal of Constitutional Law* 710 <https://academic.oup.com/icon/article/12/3/710/763749> accessed 6 July 2018.

44 Sibonile Khoza, *Socio-Economic Rights in South Africa: A Resource Book* (Community Law Centre, University of the Western Cape 2007) <http://repository.uwc.ac.za/xmlui/handle/10566/254> accessed 6 July 2018.

45 Ibid.

46 'Civil and Political Rights' <http://www.lincoln.edu/criminaljustice/hr/Civilandpolitical.htm> accessed 6 July 2018.

47 'Political Rights Law and Legal Definition | USLegal, Inc.' <https://definitions.uslegal.com/p/political-rights/> accessed 6 July 2018.

Conceptual framework: Sustainable development

Origin of sustainable development

The roots of the concept of sustainable development can be traced to ancient times. Ancient writers such as Plato, Strabo and Columella recognized and discussed the environmental degradation that had resulted from human activities such as mining and logging.[48] Recent events such as increase in population and industrialization have led to more focus being placed on the concept of sustainable development. Development, which is the evolutionary means through which human beings achieve certain goals,[49] which gained currency in the 1960s and 1970s, started pointing in new directions. After two world wars and the oil crisis in 1973, the world became aware of the adverse effects of technologies and the possibility of resources being depleted. The recession between 1974 and 1976 created awareness among nations on the limit of economic growth. It is at this point the nations realized that it was becoming difficult to extend the effects of technology beyond the "confines of the industrialized nations".[50] A report by the Club of Rome, titled 'The limits to growth' confirmed that the uncontrolled exploitation of resources would lead to a catastrophic end of the world. Fearing the apocalypse conclusion, nations and the international community rushed to change world development patterns to a self-sufficient style that is in 'harmony with nature and other human beings'.[51]

At this point, many scholars and environment conscious organizations had begun challenging the concepts of growth and development because of their adverse effects. Further, economic development and growth failed to solve the inequalities in the world as had been hoped. Sustainable development, a new concept brought in as a meeting point of two conflicting concepts of conservation and development, was therefore seen as the way forward.[52]

The term sustainable development as currently used is traced back to Barbara Ward, the founder of the International Institute for Environment and Development, who termed sustainability as the utilization of resources in a manner that can be maintained over a long period.[53] Thereafter, the United Nations Conference on the Human Environment held in Stockholm adopted several principles of sustainable development. It not only asserted that development should not only focus on economic and social issues but also environmental ones. Sustainable development, therefore, resulted from the realization that poverty could not be tackled through economic growth alone.[54] The concept was later popularized by the Brundtland Report in 1987.[55]

48 Pliny and H Rackham, *Natural History* (Heinemann ; Harvard University Press 1938); Lucius Junius Moderatus Columella and Others, *Lucius Junius Moderatus Columella on Agriculture and Trees; with a Recension of the Text and an English Translation by Harrison Boyd Ash. Vol. 2, 3. Edited and Translated by ES Forster and Edward H. Heffner.* (Harvard University Press 1941); Horace Leonard Jones, *The Geography Of Strabo Vol. Ii* (1949) <http://archive.org/details/in.ernet.dli.2015.283240> accessed 18 November 2018.

49 Jacobus A Du Pisani Professor of History, 'Sustainable Development – Historical Roots of the Concept' [2006] 3 *Environmental Sciences* 83.

50 Ibid.

51 Harry Blutstein, 'A Forgotten Pioneer of Sustainability' [2003] 11 *Journal of Cleaner Production* 339; Adam Rome, 'Give Earth a Chance: The Environmental Movement and the Sixties' [2003] 90 *The Journal of American History* 525.

52 (Supra, note 18).

53 Barbara Ward and René Dubos, *Only One Earth. The Care and Maintenance of a Small Planet.* (Harmondsworth: Penguin Books Ltd 1972).

54 L Paxton, 'Enviro Facts 3: Sustainable Development' [1993] Howick, South Africa: Environmental Education Association of Southern Africa.

55 Alexandre André Feil and Dusan Schreiber, 'Sustentabilidade e Desenvolvimento Sustentável: Desvendando as Sobreposições e Alcances de Seus Significado' [2017] 15 *Cadernos* EBAPE.BR 667.

Defining sustainable development

Sustainable development as a concept refers to a system that works over a long period. Other writers conceptualize the idea as the creation of a future better than the present.[56] According to Gomis, sustainable development refers to habitual actions that avoid destroying the environment and promote a promising future.[57] According to Baxter, the ideology of sustainable development denotes the process through which strategies on how to reduce inequalities are internalized and not saving nature.[58] The different views on sustainable development all aim at progressive development of human wellbeing through economic growth. The concept seeks to balance different needs that are often in competition against environment awareness with the social and economic limitations that characterize the current society. Sustainable development, therefore, entails more than just conservation of the environment. It encompasses creation of a healthy, strong and just society.[59] Societalists argue that human beings do not hold a special place in the universe and, therefore, should operate in a fair and just manner, while the realists believe that with a little bit of effort, human beings can find solutions to the problems brought about by development.

Governance and governmentality

Sustainable development and the realization of socio-economic rights are connected to the two concepts of governance and governmentality. While governance refers to state actors, the instruments and the modes of procedures used to run a country, governmentality, on the other hand, is the logic and rationale by which a 'polity is governed'. Governance defines and determines who is responsible for the realization of socio-economic rights and who shapes the policies on socio-economic rights. The concept of governmentality, coined by the philosopher Michel Foucault, encompasses the ideas, institutions and the practices that are used in the governance of a polity. In his book, *Security, Territory, Population*, Foucault defines governmentality as "allowing for a complex form of power which has the population as its target, political economy as its major form of knowledge, and apparatuses of security as its essential technical instrument".[60] Governmentality is, therefore, premised on the notion of a governance aimed at finding solutions to the societal problem and not governance aimed at only making policies on societal problems.[61] As such, the concept of governmentality introduces the notion of political imagination and subjectivity in the area of governance. The two concepts, governance and governmentality, converge at steering, regulating, governing and conducting activities, which in the context of this chapter, are aimed at the realization of the socio-economic rights. In a broader sense, governance refers to the mechanisms employed to bring order to a group of actors in an attempt to achieve a specific goal.[62] In the narrow sense, governance refers to the different forms of purposeful actions directed towards a collective concern. Governance is, therefore, important to the realization of the socio-economic rights as it concerns itself with

56 Alexandre André Feil and Dusan Schreiber, 'Sustainability and Sustainable Development: Unraveling Overlays and Scope of their Meanings' [2017] 15 *Cadernos* EBAPE. BR 667.

57 Alexis J Bañon Gomis and Others, 'Rethinking the Concept of Sustainability' [2011] 116 *Business and Society Review* 171.

58 Nick Barter and Sally Russell, 'Sustainable Development: 1987 to 2012-Don't Be Naive, It's Not about the Environmen'[2012].

59 'What Is Sustainable Development: Sustainable Development Commission' <http://www.sd-commission.org.uk/pages/what-is-sustainable-development.html> accessed 19 December 2018.

60 Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977-78* (Springer 2007) 107–108.

61 Henrik Enroth, 'Governance: The Art of Governing after Governmentality' [2014] 17 *European Journal of Social Theory* 60.

62 Karin Amos, 'Governance and Governmentality: Relation and Relevance of Two Prominent Social Scientific Concepts for Comparative Education' [2010] 36 *Educação e Pesquisa* 23.

the steering and structuring of the instruments that are used to interpret and enforce the socio-economic rights.

History of socio-economic rights in Kenya

Before the promulgation of the 2010 Constitution, socio-economic rights in Kenya were majorly provided for by international legal instruments the country had ratified. Kenya ratified the International Convention on Economic, Social and Cultural Rights; the Convention on the Rights of the Child; the Convention on the Elimination of All Forms of Discrimination against Women; and the African Charter on Human and Peoples' Rights with all of which provide for socio-economic rights. The independence constitution had no provision for socio-economic rights, and they were only constitutionalized in the 2010 Constitution.[63] The Constituency Development Fund Act of 2004 was the only legislation prior to 2010 that promoted the realization of the socio-economic rights through the allocation of funds to healthcare and education services. The Vision 2030 policy recognized the importance of realizing socio-economic rights if Kenya was to be transformed into a middle-income economy. The document identified a clean and healthy environment, access to healthcare, education and housing as the tools to be used to transform the country.[64]

Socio-economic rights in the Constitution of Kenya

The promulgation of the 2010 Constitution brought with it a new dawn in the recognition and enforcement of socio-economic rights. Socio-economic rights were not only recognized but also constitutionalized. Article 42 of the Constitution provides for the right to a clean and healthy environment, while Article 43 guarantees to every Kenyan the right to healthcare, accessible housing, food, clean and safe water, social services and education. The Constitution requires the national government to put in place social security services to ensure that those who are unable to support themselves enjoy socio-economic rights.[65] Article 53 of the Constitution stipulates the right of every child to a name, nationality, free and compulsory education, and basic nutrition, as well as shelter and healthcare.[66] The Constitution recognizes the rights of the vulnerable members of society. It recognizes the rights of persons with disabilities to access educational institutions and facilities.[67] Further, the Constitution demands that the state takes measures to ensure that the youth have access to education facilities and employment opportunities.[68] The Constitution also provides a mechanism for enforcing environmental rights. It removed the requirement to demonstrate *locus standi* for one to initiate a proceeding to enforce environmental rights.

63 Mugambi Laibuta, 'Socio-Economic Rights in Kenya's New Constitution: Conference Paper' [2010] 11 *ESR Review: Economic and Social Rights in South Africa* 20.

64 'Kenya Vision 2030 | Kenya Vision 2030' <http://vision2030.go.ke/> accessed 28 October 2018.

65 Art 43, The Constitution of Kenya 2010 Laws of Kenya.

66 Art 53, The constitution of Kenya 2010, Laws of Kenya.

67 Art 54, The Constitution of Kenya 2010, Laws of Kenya.

68 Art 55, The Constitution of Kenya 2010, Laws of Kenya.

Governance mechanisms for fulfilling socio-economic rights

Enactment of legislation and creation of oversight bodies

Several laws have been enacted to ensure the fulfilment of socio-economic rights. These include the Environmental Management and Co-ordination Act, 1999. The EMCA recognizes the right to a clean and healthy environment as an essential right and establishes the National Environment Management Authority to monitor and ensure that the environment is clean and healthy.[69] Second, the Water Act, 2016, seeks to provide a workable plan of realizing Article 43 of the Constitution on the right to clean and safe water. Section 63 of the Water Act reiterates the provisions of Article 43 of the Constitution on the right to clean and safe water. Third, the Health Act, 2017, drafted to meet the requirements of the Constitution, stipulates the right to the highest attainable healthcare for the general public and reproductive healthcare for women.[70] Section 7 of the Health Act incorporates the right to emergency medical treatment.[71]

Other laws include the Children Act, 2001, which is formulated to reflect the provisions of the Convention on the Rights of the Child, and entitles children to free basic education and healthcare. The Children Act bestows on the government and parents the responsibility of ensuring that the right to education and healthcare is realized.[72] Furthermore, the Persons with Disabilities Act, 2003, acknowledges the vulnerability of persons with disability and seeks to prohibit discrimination in employment and education areas based on a person's real or perceived disability. It establishes the National Council for Persons with Disabilities, which is tasked with implementing a national health programme that seeks to prevent disabilities, and provision of other medical services necessary for the well being of persons with disabilities.[73]

State duties

Article 19(1) of the Constitution provides that it is a fundamental duty of the State and every State organ 'to observe, respect, protect, promote and fulfil the rights and fundamental freedoms' in the Bill of Rights. This essentially means the State must pass laws, establish bodies, and create public awareness in order to ensure the fulfilment of socio-economic rights. It further provides that the State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43. Moreover, the Constitution provides that all State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities. Furthermore, the Constitution stipulates that the State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.

Commissions and other independent offices

The Constitution of Kenya and related laws establish various commissions and independent offices geared towards the fulfilment of socio-economic rights. It establishes: the Kenya National

69 The Environmental Management and Coordination Act, 1999.
70 Section 6, The Health Act, 2017.
71 The Health Act, 2017.
72 Section 7&9, The Children Act, 2001
73 Section 20, Persons with Disabilities Act, 2003

Human Rights Commission, the Gender and Equality Commission, the National Cohesion and Integration Commission, the Commission on the Administration of Justice, the National Land Commission, and the Ethics and Anti-Corruption Commission, among others. Each of these commissions was in fact constitutionalized in order to ensure the fulfilment of governance in the country.

B. Progress towards realization of socio-economic rights in Kenya

This section relies on selected case reviews to document progress towards the realization of socio-economic rights in Kenya.

Ibrahim Sangor Osman v Minister of State for Provincial Administration & Internal Security & 3 Others [2011] eKLR

The petitioner and 1,122 others were evicted from Bularika, Bulamedina, Sagarui, Naima, Bulanagali and Gesto by the officers of the 1st and 2nd Respondents. Those evicted included children, women and the elderly. They were evicted from unalienated public land, which the petitioners had occupied since 1940. The police used teargas and violence to evict the petitioners without a written notice. Aggrieved, the petitioners moved to court. The main issue for determination before the court was whether the eviction by the respondent violated the petitioners' rights.

The petitioners argued that under Article 43 of the Constitution, they are entitled to housing and to reasonable standards of sanitation, healthcare, clean and safe water in adequate quantities, and education. Under Article 47, the petitioners were entitled to be given written reasons for their eviction. What this means is that, prior to the evictions the petitioners had to be consulted and provided with notice of eviction. The petitioners further claimed that their forcible, violent and brutal eviction through demolition of their homes without according their children alternative shelter and/or accommodation and leaving the children to live in the open exposed them to the elements and vagaries of nature, which is a violation of the fundamental rights of children to basic nutrition, shelter and healthcare and protection from abuse, neglect and all forms of violence and inhuman treatment and the right to basic education guaranteed by Article 53 (1) (b), (c), (d) and (2) as read together with Article 21 (3) of the Constitution, and Article 28 of the ACHPR, as read with Article 2 (6) of the Constitution of Kenya, 2010.

The court explained that, not withstanding the type of tenure, all persons should possess a degree of security of tenure, which guarantees legal protection against forced eviction, harassment or other threats. State Parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection in genuine consultation with affected persons and groups.

Relying on Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which provides against "[t]he permanent or temporary removal against their will of the individuals, families and/or communities from the home and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection", the court explained that for eviction to be justified, it must be carried out in the most exceptional circumstances after all feasible alternatives to eviction are explored in consultation with the

affected community and after due process protections are afforded to the individual, group or community. The court held that the forced eviction was a violation of the fundamental right of the petitioners to accessible and adequate housing as enshrined in Article 43(1) (b) of the Constitution. Most importantly, the eviction rendered the petitioners vulnerable to other human rights violations. They were rendered unable to provide for themselves. The eviction grossly undermined their right to be treated with dignity and respect. The petitioners were thrown into a crisis situation that threatened their very existence.

John Kabui Mwai & 3 Others v Kenya National Examination Council & 2 Others [2011] eKLR

The case arose from the guidelines issued by the Ministry of Education to all Provincial Directors of Education, all District Education Officers and Principals of Secondary Schools for the Form One selection in the year 2011. The guidelines stated that, "To determine the number of candidates to be placed in national schools from public or private institutions of a particular district, the following formula will be used:

Public: Public schools' district candidature x District quota

District candidature

Private: Private schools' district candidature x District quota"

Feeling that the new policies were discriminatory, the petitioners moved to court. The court was, therefore, asked to determine whether the policy was discriminatory to the applicants, their schools or the children in those schools in relation to accessing Form One places in national schools.

The major contention by the applicants was that the Constitution, under Article 53, provides that every child has a right to free and compulsory education; every person has the right to equal protection and equal benefit of the law; and under Article 27, that the state should not directly discriminate against any person based on any ground. They argued that the new policy discriminated against the children from private schools.

The respondent noted that private schools are a response to the government's acknowledgement of the financial challenges that it faces in providing education to all, as a result of which it called for a partnership between itself and the private sector in the provision of education. The respondents argued that the applicants had not demonstrated that the children in private schools were a group capable of being discriminated against under the provisions of Article 27 (4), and that their attempt to place the children under "social origin" could not be legally tenable.

The court asserted that in order to determine whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation, which has created a distinction that violates the right to equality, but also to the larger social, political and legal context. The court explained that discrimination that is forbidden by the Constitution is unfair or prejudicial treatment of a person or group persons based on certain characteristics. Relying on the case of *James Nyasora Ngarangi and Others v Attorney General*, *HC. Petition No. 298 of 2008 at Nairobi,* the court stated that the element of what is unfair and prejudicial treatment has to be determined objectively based on the facts of individual cases. The court recognised that not every distinction resulting in differential

treatment can properly be said to violate equality rights as envisaged under the Constitution. Further, the court noted that unequal people cannot be treated equally. Borrowing from the European Court in the case of *Okpisz v Germany, No. 59140/00,* the court ruled that human rights does not prohibit a member state from treating groups differently in order to correct 'factual inequalities' between them. The court found that the policy was not discriminatory.

Kenya Society for the Mentally Handicapped v Attorney General & 7 others [2012] eKLR

The case arose from what the petitioner considered to be discrimination on the part of the government for failing to provide support and services to persons with mental and intellectual disability. The case requested the court to take a look at the entire spectrum of persons with disability rights, from right to education to right of participation.

The petitioner argued that the respondents had failed to formulate policies that may lead to the realisation of the rights of persons with mental and intellectual disability as required by the Constitution in Articles 47, 27(6), 27(7), 54, 21(3), 12(1), 47, 43, 27(6), 27(7), 73 and 75. The respondent asserted that the petitioner failed to pinpoint the rights violated and, therefore, it could not be held accountable. The court, basing its arguments on the case of *Anarita Karimi Njeru v Attorney General [1979] KLR 154,* outlined that a petitioner must identify the right infringed and the manner in which the infringement took place. The court was of the opinion that the petitioner had failed to provide any material to show that the rights of the persons with disability had been violated and, therefore, the petition failed.

Mathew Okwanda v Minister of Health and Medical Services & 3 others [2013] eKLR

The petitioner, Mathew Okwanda, was an elderly person (retired) who had been diagnosed with life-threatening diseases with diabetes and benign hypertrophy. He claimed that the cost of his medication was prohibitive and that he needed urgent medical attention. He petitioned the court, therefore, arguing that his health was at risk of deteriorating.

The court was tasked with determining whether the State had fulfilled its obligations under Article 43 as read in conjunction with Article 21 of the Constitution on the realization of socio-economic rights.

Relying on Article 43 of the Constitution on the right to the highest attainable health standards, Article 57 on the rights and assistance to the older members of the society, and Article 11 of the International Covenant on Economic, Social and Cultural Rights, the petitioner sought free medical service at the country's prime hospitals. He further argued that he is entitled to a monthly stipend from the government to enable him take care of himself.

The respondent asserted that the petitioner lacked clarity in outlining the violation. The respondent further argued that the petitioner failed to show how the respondent failed to act and that the economic rights under Article 43 of the Constitution are to be progressively realized based on availability of resources.

The court agreed with the petitioner that the state needs to take the necessary steps to ensure the realisation of the economic rights enumerated in the Constitution, however basing its arguments on the *John Kabui Mwai* case and *Kenya Society for the Mentally Handicapped v Attorney General*, the court held that the petitioner must prove the violated rights. On the issue of whether the government was providing health services, the court noted that government hospitals provide healthcare to the petitioner at a cost and "whether the form of healthcare provided in these circumstances meets the minimum core obligation or the highest standard is not one that was subject of evidence and argument before the court". The petitioner failed to prove a violation of a right, therefore the petition failed.

Minister of Health and Others v Treatment Action Campaign and Others (2002) AHRLR 189 (SACC 2002)

The appeal case arose from the High Court judgment due to the perceived shortcomings in its response to an aspect of the HIV/Aids challenge. The court found that the government had not reasonably addressed the need to reduce the risk of HIV-positive mothers transmitting the disease to their babies at birth. More specifically, the finding was that the government had acted unreasonably in (a) refusing to make an antiretroviral drug called Nevirapine 3 available in the public health sector where the attending doctor considered it medically indicated and, (b) not setting out a timeframe for a national programme to prevent mother-to-child transmission of HIV. The High Court judgement was based on the fact that the government had failed to make Nevirapine 3 accessible to patients with HIV/Aids. The government had only made the medicine available to specific pilot sites. The major problem that led to the case is what is to happen to those mothers and their babies who cannot afford private healthcare and do not have access to the research and training sites. The case began as an application in the High Court of Pretoria before moving to the Court of Appeal. The court was asked to determine whether the respondents were entitled to refuse to make Nevirapine 3 (a registered drug) available to pregnant women who have HIV and who give birth in the public health sector, in order to prevent or reduce the risk of transmission of HIV to their infants, where in the judgment of the attending medical practitioner this is medically indicated; whether the respondents are obliged, as a matter of law, to implement and set out clear timeframes for a national programme to prevent mother-to-child transmission of HIV, including voluntary counselling and testing, antiretroviral therapy, and the option of using formula milk for feeding; and whether the government is constitutionally obliged and had to be ordered forthwith to plan and implement an effective, comprehensive and progressive programme for the prevention of mother-to-child transmission of HIV throughout the country.

The applicants noted that the HIV/Aids epidemic was a major health problem in the country and had reached catastrophic proportions, with one of the most common methods of transmission being through mother-to-child around the time of birth. The applicants asserted that the government had only made Nevirapine 3 available at a limited number of pilot sites. The result was that doctors in the public sector, who do not work at one of those pilot sites, were unable to prescribe this drug for their patients, even though it had been offered to the government for free. In addition to refusing to make Nevirapine 3 generally available in the public health sector, the government had failed over an extended period to implement a comprehensive

programme for the prevention of mother-to-child transmission of HIV. The result of this refusal and this failure was the mother-to-child transmission of HIV in situations where this was both predictable and avoidable. Such action was in breach of the Bill of Rights and contrary to the values and principles prescribed for public administration in the Constitution.

The respondent explained that the courts should not interfere in the policy-making duty of the government. Further, the respondent explained that the capacity, efficacy, resistance and safety concerns attaching to the administration of the drug were still not known.

The court first addressed the issue of the enforcement of economic and social rights and minimum core obligations. It reaffirmed, citing *Grootboom (Government of the Republic of South Africa and Others v Grootboom and Others, 2001 (1) SA 46 (CC))* and *Soobramoney (Soobramoney v Minister of Health, KwaZulu-Natal, 1998 (1) SA 765 (CC),* that states are under a constitutional duty to comply with the positive obligations imposed on them by section 27 of the Constitution, subject to the qualifications expressed therein. It rejected an argument that had been put forth by the applicants, that section 27(1) of the Constitution gives rise to a self-standing and independent positive right, part of a minimum core of rights, enforceable irrespective of the qualifications mentioned in section 27(2). It is impossible to give everyone access to "core" services immediately, however, States are obliged to act reasonably to provide access to socio-economic rights on a progressive basis. Additionally, although progressively realizable, the courts in certain circumstances are obliged to enforce such rights, and they are "clearly" justiciable. Though such decisions may have budgetary implications, there are not in themselves aimed at rearranging budgets, thus respecting constitutional balance.

Turning to the applicants' contentions that the measures adopted by the government to provide access to healthcare services to HIV positive pregnant women were deficient in two main areas (restrictions on Nevirapine 3 and failure to implement a comprehensive programme for the prevention of MTCT), the court highlighted that there is a "negative obligation" placed upon the State and all other entities and persons to desist from preventing or impairing the section 27(1) right of access to healthcare services, including reproductive health.

The court held that the restrictive Nevirapine 3 policy failed to distinguish between the evaluation of programmes for reducing MTCT and the need to provide access to healthcare services required by those without access to the pilot sites. The fact that the pilot sites would provide crucial data on the comprehensive package for MTCT did not mean that until the best programme had been formulated and the necessary funds and infrastructure provided for the implementation of that programme, the drug would be withheld from those who did not have access to the sites, nor could it reasonably be withheld pending the completion of the medical research.

The court highlighted that the case concerned particularly those who could not afford to pay for medical services: the poor outside the catchment areas of the pilot sites are those who will suffer pursuant to the restrictions, as opposed to those who can afford to pay for medical services, namely via the private sector. It held that where counselling and testing facilities exist, the administration of the drug is well within the available resources of the State and it is "a simple, cheap and potentially lifesaving medical intervention."

The government had argued that section 28(1)(c) imposes an obligation on the parents of the newborn child, and not the state, to provide the child with the required basic healthcare services. The court held that while the primary obligation rests on those parents who can afford to pay for such services, this did not mean that the State incurred no obligation. The provision of a single dose of Nevirapine 3, as far as children are concerned, was essential. Their needs were "most urgent" and "most in peril" as a result of the rigid policy adopted and their inability to access the drug profoundly affected their ability to enjoy all rights to which they were entitled. This case concerned children born in public hospitals and clinics to mothers who were for the most part indigent and unable to gain access to private medical treatment beyond their means. They and their children were mainly dependent upon the state to make healthcare services available to them.

The court found that a potentially lifesaving drug was on offer and where testing and counselling facilities were available, it could have been administered within the available resources of the state without any known harm to mother or child. The court thus found that the "rigid and inflexible" policy of the government concerning Nevirapine 3 was a breach of the state's obligations under the Constitution. Implicit in this finding, it added, was a finding that a policy of waiting for a protracted period before taking a decision on the use of Nevirapine 3 beyond the pilot sites was also not reasonable within the meaning of the Constitution.

The court was obliged to assess whether the measures taken in respect of the prevention of MTCT were reasonable and it did so while acknowledging that throughout the country, health services were overextended; that HIV/Aids was but one of many illnesses requiring attention but highlighted HIV/Aids as "the greatest threat to public health" in South Africa. The rights in question were socio-economic rights, the government obliged to take reasonable legislative and other measures within its available resources to achieve the progressive realization of each of them. While noting that, in light of the country's history, this was an extraordinarily difficult task, it was nonetheless an obligation imposed on the state by the Constitution.

Addressing the issue of separation of powers, the court reiterated that there were no bright lines that separated the roles of the legislature, the executive and the courts from one another. All arms of government should be sensitive to and respect the separation of powers, though this did not mean that the courts could or should not make orders that have an impact on policy. It held that:

> Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. Insofar as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.

A dispute concerning socio-economic rights is, the court held, likely to require a court to evaluate state policy and to give judgment on whether or not it is consistent with the Constitution. The court undertook an examination of foreign jurisprudence (United States, India, Germany, Canada, and the UK) on the issue of injunctive relief against the state and concluded that none of those jurisdictions made any suggestion that the granting of injunctive relief breaches the separation of powers.

Examining the circumstances relating to the order to be made, the court noted that there had been developments that clearly demonstrated that, provided the requisite political will was present, the supply of Nevirapine 3 at public health institutions could be rapidly expanded to reach many more of the 10 per cent of the population intended to be catered for in terms of the pilot sites. The court noted that the policy as re-formulated, had to meet the constitutional requirement of providing reasonable measures within available resources for the progressive realization of rights of affected women and new-borns and that it be communicated to health caregivers in all public facilities and to the beneficiaries of the programme.

The court held that;

a) the Constitution requires the government to devise and implement within its available resources a comprehensive and coordinated programme to realize progressively the rights of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV.

b) The programme to be realized progressively within available resources must include reasonable measures for counselling and testing pregnant women for HIV, counselling HIV-positive pregnant women on the options open to them to reduce the risk of mother-to-child transmission of HIV, and making appropriate treatment available to them for such purposes.

c) The policy for reducing the risk of mother-to-child transmission of HIV as formulated and implemented by government fell short of compliance with the requirements in subparagraphs (a) and (b) in that: i) doctors at public hospitals and clinics other than the research and training sites were not enabled to prescribe Nevirapine 3 to reduce the risk of mother-to-child transmission of HIV even where it was medically indicated and adequate facilities existed for the testing and counselling of the pregnant women concerned; ii) the policy failed to make provision for counsellors at hospitals and clinics other than at research and training sites to be trained in counselling for the use of Nevirapine 3 as a means of reducing the risk of mother-to-child transmission of HIV.

Mitu-Bell Welfare Society v Attorney General & 2 others [2013] eKLR

The petitioner is a registered society in Kenya whose members come from Mitumba Village situated near Wilson Airport. The children of the members of Mitumba Village went to Mitumba Primary School also located near Wilson Airport. The respondents demolished the houses belonging to the members of Mitumba Village leading to the instant petition. The court was tasked with determining what rights, if any, the petitioners had over the subject property. If the answer was in the negative, was their eviction and the demolition of their houses a violation of their rights under the Constitution? If the rights of the petitioners were violated, what reliefs could the court grant them?

The petitioners argued that the seven-day notice requiring them to vacate the land they had lived on for 19 years violated their fundamental rights. The petitioner argued that the eventual demolition of their houses by the respondents violated their rights to life, human

dignity, security of person, freedom of movement and residence, social economic rights, right to property, equality and non-discrimination, and fair administrative action as guaranteed under Articles 26, 27, 28, 29, 39, 40, 43 and 47 of the Constitution. Relying on *Ibrahim Sangor Osman v Minister of State for Provincial Administration and Internal Security & 3 Others, Embu HCCC No. 2 of 2011,* where the court held that a 21-day notice was insufficient or unreasonable, the petitioner asserted that the seven-day notice was unreasonable. The petitioner asked the court to be guided by the case of *Susan Waithera Kariuki & 4 Others v Town Clerk, Nairobi City Council & 2 Others, Petition No. 66 of 2006* to find that apart from the City Council of Nairobi having a duty to plan the town, it also had an obligation to respect the constitutional rights of people. The petitioner explained that the land belonged to them by virtue of the doctrine of adverse possession as they had lived on the land for well over 19 years. They further explained that there was no consultation before the eviction, and that the police who evicted them subjected them to brutality and physical violence. The petitioners also alleged violation of the rights of children guaranteed under the Constitution and international law. They claimed that the forcible, violent and brutal eviction through demolition of their homes without according their children alternative shelter or accommodation and leaving them exposed to the vagaries of nature was a violation of the children's rights to basic nutrition, shelter, healthcare, and education, among others, guaranteed by Article 21(3) and 53 of the Constitution.

The first and third respondents argued that the petitioners failed to produce evidence to show that the land belonged to them and, therefore, could not claim violation of their rights based on the eviction. The respondents argued that the basis of the petitioners' claim was social economic rights, which rights are progressive in nature and are limited as provided under Article 25 of the Constitution; that the enjoyment of these rights and freedoms by any individual, including the petitioners, should not prejudice the rights and freedoms of others. Finally, they asserted that there was nothing before the court to prove violation of the petitioners' rights.

The 2nd Respondent asserted that the land in question belonged to it and, therefore, did not violate any law by removing those who had encroached on it. Second, the respond outlined that the demolition was carried out by the state and its agencies. To support its case, the respondent relied on the Indian case *Olga Tellis v Bombay Municipal Corporation (1985) Supp SCR 51*, where it was held that the respondent was justified in directing the removal of the petitioners who had encroached on pavements and footpaths, and *Irene Grootboom and Others v The Government of the Republic of South Africa and Others (2001) (1) SA 46,* in which the court held that Section 26 and 28 of the Constitution of South Africa did not entitle the petitioners to claim shelter or housing immediately upon demand.

The court, addressing the matters before it, asserted that any forcible eviction and or demolition without a relocation option was illegal, oppressive and violated the rights of the persons being evicted, and that all human rights are universal, indivisible and interdependent and interrelated. On the issue of entitlement to the land, the court held that the doctrine of adverse possession did not operate on government-owned lands. The court was of the view that there was nothing before it to show that the petitioners were entitled to the land and, therefore, had no legitimate claim to it. Relying on the General Comment No. 7, "The right to adequate housing" (Art.11.1): forced evictions: (20/05/97) CESCR General comment 7. (General Comments), the court stated

that before evictions are carried out, an opportunity for genuine consultation with those affected should be made available. The court asserted that evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all reasonable measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available. The court took judicial notice of the fact there was no procedure or regulations on how evictions are to be carried. The court further outlined that when a "state agency such as the 2nd Respondent demolishes the homes of poor citizens such as the petitioners who live in informal settlements such as Mitumba Village, when it does so after a seven-day notice, without giving them alternative accommodation, it violates not only the rights of the petitioners but the Constitution itself and the obligations that it imposes on the State, both at Article 21 and 43, but also in the national values and principles of governance set out in Article 10, which include '(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized'. The court asserted that performance of a statutory duty could not excuse violation of citizens' constitutional rights. The failure of the respondents to take any action to protect the vulnerable in the society during the eviction period, especially the children and the women, was a clear indication of violation of the petitioner's rights. The court held that forcible eviction and or demolition without a relocation option was illegal, oppressive and violated the rights of the petitioners.

PAO & 2 Others v Attorney General [2012] eKLR

The petitioners in this case were Kenyans living with HIV/Aids, afraid that the enactment of the Anti-Counterfeit Act, 2008, would negatively affect their ability to access affordable healthcare and essential drugs and medicines, including generic drugs and medicines, thereby infringing their fundamental right to life, human dignity and health as provided for by Articles 26(1), 28 and 43 of the Constitution, they brought the petition to the court. The questions placed before the court were whether, by enacting Section 2 in its present form, and by providing the enforcement provisions in Section 32 and 34 of the Anti-Counterfeit Act, the State was in violation of its duty to ensure conditions were in place under which its citizens could lead a healthy life, and whether these provisions would deny the petitioners access to essential medicines and thereby violate their rights under Articles 26(1), 28 and 43(1), as well as Section 53 with regard to the rights of children.

The petitioners asserted that they are persons living with HIV/Aids and had been beneficiaries of the generic drugs that were affordable and, in some instances, free. The petitioners averred that the Anti-Counterfeit Act posed a danger to the rights of persons living with HIV/Aids in Kenya. That enforcement and application of the law, particularly Sections 2, 32 and 34 would endanger their wellbeing as they would be arbitrarily denied access to affordable and essential drugs and medication necessary for the fulfilment of the necessary quality of life, human dignity and health guaranteed under Articles 26(1), 28 and 43 of the Constitution. They further argued that the failure of the government to exempt generic drugs was a limitation to their rights to life, which is closely tied to their right to health. Relying on *Peter Waweru v R Nairobi Misc. Civil Application No. 118 of 2004*, the petitioners stated that right to life encompassed the right to a healthy environment.

According to the Special Rapporteur, while the objective of the law is to prohibit trade in counterfeit goods, it is likely, as currently written, to endanger the constitutional right to health guaranteed under Article 43 and in turn the right to life under Article 26 of the Constitution.

"The Special Rapporteur submits that the definition of 'counterfeiting' within the Act effectively conflates generic medicines with medicines which are produced in violation of private intellectual property rights, and this conflation of legitimately produced generic medicines with those that possibly violate intellectual property rights is likely to have a serious adverse impact on the availability, affordability and accessibility of low-cost, high-quality medicines."

The respondent asserted that the government had taken care of persons living with HIV/ Aids through the HIV and Aids Prevention and Control Act, 2006. The respondent argued that the government promotes the right to life and health by barring counterfeit drugs from entering the market. Such drugs, if allowed into the market, may cause death. According to the respondents, the intention of the Anti-Counterfeit Act was to protect the public from the harm of using counterfeit goods and that extra care needs to be taken to ensure that the medicine in the market meets the required standard. The respondent explained that, contrary to the petitioner's claims, the Act did not violate provisions of the Constitution.

Addressing the matter, the court relied on the following rule: right to health, life and human dignity are inextricably bound. The court took judicial notice of the fact that HIV/Aids is a pandemic that has led to the death of many Kenyans. To define the right to health, the court relied on the General Comment No. 14 on the Right to Health by the committee on Economic, Social and Cultural Rights that stated that "Health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity." The court, relying on Minister of Health and Others v Treatment Action Campaign and Others, stated that the right to access medicine has also been recognised as an essential component of the right to health and, therefore, the state's obligation with regard to the right to health thus encompasses not only the positive duty to ensure that its citizens have access to healthcare services and medication, but must also encompass the negative duty not to do anything that would in any way affect access to such healthcare services and essential medicines. The court admitted that the danger of using the terms 'generic' and 'counterfeit' interchangeably was that there were instances in which generic medication had been seized while in transit on the basis that it was counterfeit. Such seizures would eventually deny poor people access to the much-needed drugs. The court adopted the argument made by the amicus that the term 'generic' as used in the new law encompassed medicines.

The court held that the right to health and life could not be protected by vague provisions of the new law. The court found that Sections 2, 32 and 34 of the Anti-Counterfeit Act threatened to violate the right to life of the petitioners as protected by Article 26 (1), the right to human dignity guaranteed under Article 28, and the right to the highest attainable standard of health.

Satrose Ayuma & 11 Others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 Others

The events leading to this case were that in 2005, a retirement scheme for the staff of the Kenya Railways Corporation (KRC) was established known as the Kenya Railways Retirement Benefits Scheme, and subsequently a Trust set up through a Trust Deed dated May 3, 2006. In the Trust Deed, the scheme's purpose was mainly the provision of pension and other benefits for employees of KRC. The petitioners were informed that their rent account at the Kenya Commercial Bank had been closed. Shortly thereafter, provision of social amenities such as water and sanitation was stopped and the amenities were disconnected. The 1st Respondent thereafter gave the residents notice to vacate the estate. After the expiry of the notice, demolitions in the suit premises began and the 1st Respondent also disconnected water supply, demolished toilets and bathrooms, and removed the main fence to the property all in an attempt to deliberately force the petitioners out of the suit premises, hence the petition. The court was tasked with determining whether the 1st Respondent owed the petitioners any guarantee of fundamental human rights and freedoms, and whether the petitioners' constitutional rights and freedoms had been violated.

It was the petitioners' submission that the respondents had the responsibility of proving that the socio-economic rights under Article 43 of the Constitution were limited, and referred the court to the South African case of *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders CCT 03 of 2004* as an authority. The petitioners asserted that the respondents were private entities but were still bound to respect human rights. The petitioners argued that the right to housing includes legal security of tenure, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location and cultural adequacy. The petitioners contended that prior to the eviction, consultation should be carried out and appropriate measures taken to ensure that those affected are well taken care of. It was the petitioners' case that their right to housing was violated in the context of evictions by failing to give due notice, and failing to engage with the petitioners and the community. The petitioners claimed that their right to clean and safe water in adequate quantities was violated by disconnecting their water supply so as to frustrate them into vacating the suit premises. They further alleged that their children's right to education was violated since the notice to vacate was issued in the middle of a school year and subsequently affected accessibility to education and increased school dropouts in violation of the right to education as provided under Article 43 of the Constitution. The 11th Petitioner submitted that the obligation to respect human dignity binds both State and non-state actors because the latter have aggregated huge resources and dominated several sectors of economic and social life and the lives of several millions of people depend as much on their behaviour as on the policies and acts of the State.

The 1st Respondent claimed that it had never entered into any tenancy agreement with the petitioners and, further, that the provision of social amenities to the petitioners was not under its control. The respondent further argued that it gave sufficient notice to the petitioners. The 2nd Respondent explained that it had no role in the relationship between the landlord and tenants and, therefore, should not be drawn into the suit. The Attorney General, on his part, argued that the issues canvassed by the petitioners did not raise any constitutional issues.

The court relied on the legal security of tenure rule to determine the case. It stated that notwithstanding the type of tenure, all persons should possess a degree of security, which guarantees legal protection against forced eviction, harassment and other threats.

Based on the case of *International Airport Authority (R.D Shetty v The International Airport Authority of Indian & Others (1979) 1 S.C.R. 1042*, the court was of the opinion that a public body is "any authority, board, commission, committee or other body, whether paid or unpaid, which is invested with or is performing, whether permanently or temporarily, functions of a public nature". Referring to Article 21 of the Constitution, the court found that "[i]t is a fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights." Relying on General Comment 4 of CESCR and the case *Dawood v Minister for Home Affairs*, the court held that the right to adequate housing and housing security is a fundamental precondition to exercising and enjoying other civil, political, social, economic and cultural rights. To find that the right to housing of the petitioners was violated, the court relied on the case of *Port Elizabeth Municipality v Various Occupiers (2005) (1) SA 217 (CC)*, in which it was held that

> The longer the unlawful occupiers have been on the lands, the more established they are on their sites and in the neighbourhood, the more well settled their homes and the more integrated they are in terms of employment, schooling and enjoyment of social amenities. And as such the greater their claim to the protection of the courts.

On the right to water, the court was of the view that the petitioners failed to prove that there was a violation of the right to water as the provision of water is only regulated by the Water Act, which the petitioner failed to refer to.

The court held that the petitioners proved the violation of their right to housing and the respondents ought to be held accountable. The court urged the government to establish or put in place a policy on evictions.

Susan Waithera Kariuki & 4 Others v Town Clerk Nairobi City Council & 3 Others [2013] eKLR

The petitioners, who are residents of informal settlements in Kitusulu and Westlands, were served with a notice to vacate the premises within 72 hours. Feeling offended and terming the notices that were not addressed to any one in particular a violation to their rights to fair administrative action, they brought this action to court. The issues for determination in the case were: whether or not the land occupied by Maasai Village is a public road and whether or not there had been a violation of the petitioners' rights.

The petitioners claimed that they were residents of informal settlements in Nairobi and that their rights were threatened by the respondents, who sought to evict them from these settlements. The petitioners contended that the City Council had permitted the construction of toilet facilities by a non-governmental organization known as Maji na Ufanisi for the use of the residents of Kaptagat Village, but that the council was now intent on demolishing the said facility. The petitioners asserted that the respondents have a duty to respect, promote fulfil and protect their right to dignity; that their right to life would be undermined if they were evicted as they would be unable to fend for themselves; that the City Council had a duty to pass laws and

regulations which are fair on how evictions should be carried out so as not to inconvenience citizens, and that the notices issued by the City Council are void ab initio for not being addressed to anyone. They contended, however, that even if the notices were technically valid, they were void for violating the fundamental rights of the petitioners. They alleged that the notices, which were allegedly served by officers of the Nairobi City Council, accompanied by police officers from the Administration Police Service, were the commencement of the violation of their rights to life, adequate housing, freedom of movement, and right to live in Kenya, the right not to be discriminated against, and the right to be treated fairly, efficiently, reasonably and to receive a written explanation for administrative action.

The first respondent denied the claim that it authorised the construction of a modern toilet in the area. The respondent averred that it served the petitioners with the notice to vacate the premises because their structures had been developed on a road reserve. The 1st Respondent asserted that even if there had been permission to occupy public land or a road reserve, if the said land is required for road expansion or other use for the public good, the occupiers ought to vacate on notice. The second and third respondents asked the court to take judicial notice of the fact that evictions always turn violent and sometimes lead to the death of people. They further argued that the petitioners had encroached on public land and, therefore, had no right over it. The fourth respondent asserted that in the circumstances of the case, the petitioners' alleged rights to occupy a section of a public access road could not be said to override those of other citizens who are blocked from lawful use of the access road.

To determine whether there was a violation of the petitioners' rights, the court relied on the cases of *Anarita Karimi Njeru (1976-80) 1 KLR 1272* and *Trusted Society of Human Rights Alliance v Attorney General & Others High Court Petition No. 229 of 2012*. The court stated that '[i]n demonstrating the manner in which there has been a violation of their rights or of the Constitution, the petitioners should present before the court evidence or a factual basis on which the court can make a determination whether or not there has been a violation.' The court was of the view that this link was missing. The court, further explained that there was no clear identification of the persons or the villagers whose rights were alleged to have been violated

The court dismissed the petition but asked the respondents to issue the petitioners adequate notice of 90 days, and to carry out the eviction according to the international standards contained in the UN Basic Principles and Guidelines on Development-based Eviction and Displacement (2007).

Moi Education Centre Co. Ltd v William Musembi & 16 Others [2017] eKLR

The case arose from the High Court judgment rendered by Justice Ngugi Mumbi that declared demolition of the 1st to 14th respondents' houses without providing them or the children alternative accommodation a violation of the 'fundamental right to inherent human dignity, the security of the person, and to accessible and adequate housing; a violation of the fundamental rights of children guaranteed by Article 53 of the Constitution; and a violation of the rights of elderly persons guaranteed by Article 57 of the Constitution'. The facts of the case were that sometimes in 1968, the respondents entered land parcel number LR No.209/11207 but in 1980, the appellant invaded the property and sought to construct a private school on it. In the

process, about 200 families were resettled in Fuata Nyayo Village. The respondents co-existed with the appellant in the above setting until 2013 when they were evicted by the appellant without notice under the supervision of the police. It is this eviction that led the respondents to approach the court. Aggrieved by the court's finding in favour of the respondents, the appellant challenged the decision in the Court of Appeal.

The argument put forward by the appellant was that the High Court erred in finding that it was liable for providing the respondents with alternative accommodation despite it being a private entity. According to the appellant, it was the rightful owner of the parcel of land and the respondents were trespassers, who failed to vacate the land upon being given sufficient notice.

Addressing the appeal, the court adopted the High Court argument that Article 43 of the Constitution entails "a negative obligation not to deprive citizens of … shelter" and that "the Bill of Rights applies both vertically with as against the State, and horizontally with against private persons, and that in appropriate cases, a claim for violation of a constitutional right can be brought against a private individual." Further, the Court of Appeal agreed with the High Court on the responsibility of the government to provide housing to citizens of Kenya but disagreed with the learned judge's argument that the positive responsibility also applied to private entities. The court argued that while the appellant violated the rights of the respondents, it was wrong for the trial judge to pass the responsibility of the State to a private entity. The court concluded that 'the demolition of their houses and their forced eviction without a court order is a violation of their right to inherent human dignity and security of the person', but the appellant had no obligation to provide alternative accommodation as a private entity. Further, any compensation that is to be awarded to the respondents must be based on the evidence presented before the court.

C. Concluding reflections

Each of these cases illustrates that there is a sharp distinction in the manner in which Kenyan courts and judges conceptualize human rights. On the one hand, socio-economic rights are understood to be; those rights that give people access to certain basic needs necessary for human beings to lead a dignified life' while political and civil rights 'confer an opportunity upon people to contribute to the determination of laws and participate in government.[74]' This chapter demonstrated that although Kenya's legal framework encapsulates an expansive Bill of Rights that includes the right to environmental protection geared towards transforming democracy and governance processes in Kenya, implementation remains a challenge because of the perceived distinctions between different types of rights, which ought to be viewed in a symbiotic manner. The chapter also argued that despite the Constitution of Kenya 2010 providing for socio-economic rights and speaking of them as the most progressive rights, the right to environment is not considered one of the socio-economic rights yet it is considered to be so transformative. The quest to implement socio-economic rights continues to pose a challenge because of these distinctions between the different types of rights.

74 Sibonile Khoza, *Socio-Economic Rights in South Africa: A Resource Book* (Community Law Centre, University of the Western Cape 2007) < http://repository.uwc.ac.za/xmlui/handle/10566/254> accessed 6 July 2018

CHAPTER 7

Appraising Kenya's Theory and Process of Environmental Law and Policy Making

Collins Odote

A. Context

When Kenya adopted the 2010 Constitution, environmental management received special mention starting from the preamble to including sustainable development, a core organizing principle for environmental governance, as part of the principles that would shape the process of implementing the Constitution and all attendant laws and policies in the country. In addition, the second part of Chapter Five of the Constitution focuses on environment and natural resource management, detailing key constitutional principles and responsibilities of both the State and citizens in the country's quest to ensure that its environment is of high quality and its management arrangement is optimal both for present and future generations. As part of that process, the Constitution stipulates that the country is to enact legislation on the environment and natural resource management.[1] This requirement is for all laws on environment and natural resource sectors such as water, wildlife and forests to be aligned to the provisions of the Constitution. It is also a recognition that law plays a central role in sustainable management of the environment and utilization of natural resources, a point underscored in Articles 10, 42 and 69 of the Constitution.

The constitutional call for legislation on environment and natural resource management was not a statement about the lack of laws but for development of a legal framework that aligns to the constitutional dictates. Environmental management has always been part of the country's legal and policy concern. The difference has been in the level of priority accorded to environmental issues. Initially, the Common Law formed the basis for environmental management.[2] The problem was that modern environmental management was managerial in its approach,[3] while Common Law was not. The Common Law approaches to environmental management were largely reactive, based on proprietary rights in land, and their remedies focused largely on fixing of liability for injuries after the fact.[4] Due to inadequacies in Common Law foundations and remedies, statutes on various aspects of the environment were enacted. During the constitution making process, Kenyans expressed concern about the lack of adequate protection for the environment and the need for legal focus, including through a constitutional provision.[5]

Kenya's initial legislation on environmental management was largely sectoral and proceeding from a logic of command and control. In addition to their diverse nature, these laws inhered institutional rivalry in their implementation, had legislative gaps, and did not deliver on effective

1 Constitution of Kenya (2010), Art 72.

2 A Mumma, 'The Continuing Role of the Common Law in Sustainable Development' in C. O Okidi, *et al,* Environmental *Governance in Kenya: Implementing the Framework Law (*Nairobi, East African Educational Publishers, 2008) 90-109.

3 Charles O. Odidi and P. Kameri-Mbote, *The Making of A Framework Environmental Law,* (United Nations Environment Programme and African Centre for Technology Studies, Nairobi, 2001), 29.

4 Ibid.

5 Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission,* 10 February 2005. < http://kenyalaw.org/kl/fileadmin/CommissionReports/The-Final-Report-of-the-Constitution-of-Kenya-Review-Commission-2005.pdf> (accessed on 15 November 2020).

management of the environment.[6] This formed the basis for the enactment of the Environmental Management and Coordination Act[7] in 1999, following the wave of environmental laws as framework laws across the world.

In addition to the law, Kenya too had policies that included aspects of the environment. The first of such policies was the 1965 Sessional Paper No. 10 on African Socialism and its Application to Planning in Kenya.[8] However, the country had no comprehensive national policy on the environment. Instead, reliance was placed on sectoral policies and periodic national development plans.[9] Each of these dealt with environmental problems and called for their effective address. To the extent that the plans were addressing larger national development priorities, environment only received a mention.

Efforts to develop a national environment policy were initially made in 1999, contemporaneously with the development of the Environment Management and Coordination Act. However, this policy was never adopted for implementation. In October 2007, the country adopted a long-term development plan, named Vision 2030.[10] Its aim was to turn Kenya into a 'globally competitive and prosperous country with a high quality of life by 2030.'[11] To achieve this, the country sought to pursue several priorities under three pillars: economic, social and political. Environmental issues were captured under the social pillar. The idea was to ensure social development was undertaken within a clean and secure development. The country set for itself several priorities to be delivered by 2030 in order to achieve these objectives. These included promoting environmental conservation; improving pollution and waste management through incentive measures; public-private partnerships in working for improved efficiency in water and sanitation delivery; and enhancing disaster preparedness in all disaster-prone areas; and improving the capacity for adaptation to global climatic change.[12]

In addition, Vision 2030 recognized the need for work in the area of environmental governance. One of the identified priorities under this focus area was the development and adoption of 'a policy framework to harmonize environment-related laws and institutions, and promote the capacity for collective enforcement of environmental standards'.[13] This formed the basis for the development of the National Environment Policy, whose goal is to deliver a better quality of life for present and future generations through sustainable management and use of the environment and natural resources. The policy sets out to pursue six interrelated objectives to realize this goal, including: integrated approach to planning and sustainable management of Kenya's environment and natural resources; strengthening the legal and institutional framework; ensuring sustainable management of the environment and natural resources; promoting and supporting research and capacity development as well as use of innovative environmental management tools; enhancing cooperation, collaboration, synergy, partnerships

6 Anne Angwenyi, 'An Overview of the Environmental Management and Coordination Act' in CO Okidi., et al (eds) *Environmental Governance in Kenya: Implementing the Framework Law* (East African Educational Publishers, 2008) 142-182.

7 Environmental Management and Coordination Act No. 8 of 1999.

8 Republic of Kenya, African Socialism and Its Application to Planning in Kenya, Sessional Number 10 of 1965. <https://www.knls.ac.ke/images/AFRICAN-SOCIALISM-AND-ITS-APPLICATION-TO-PLANNING-IN-KENYA.pdf> (accessed on 15 November 2020)

9 Ibid (n 3), 33.

10 Republic of Kenya, *Kenya Vision 2030, A Globally Competitive and Prosperous Kenya (*2007)

11 Ibid.

12 Ibid (n 10) VII.

13 Ibid, 129.

and participation; and promoting domestication, coordination and maximization of benefits from Strategic Multilateral Environmental Agreements.

Ideally, law is supposed to follow policy. However, in the Kenyan context, the Environmental Policy came after the enactment of the framework law. How this affects progress in the management of the environment is the focus of this chapter. In addition, the chapter explores the implications of Kenya's environment law and policy framework on sustainable development and identifies the factors that either support or hinder the delivery of optimum results. The chapter is thus structured as follows: Following this introduction, the second section discusses the role of law and policy in environmental management and delivery of sustainability. The third section then discusses the sources of environmental law in Kenya and their relationships to distil which source of law has been most effective in influencing environmental management. This is discussed around two headings, formal and informal sources of law. In the fourth section, the utility and application of the concept of framework environmental law to the delivery of Kenya's sustainable development targets is discussed. In 2013, Kenya formally rolled out devolution. How the devolved system of governance affects the development and implementation of environmental law and policy is the focus of the fifth section. The sixth section explicates the process of environmental lawmaking and policy in Kenya and how the two have related in practice to determine whether the relationship is optimal or sub-optimal. Section Seven discusses the factors that constrain implementation of environmental law and policy in Kenya, while Section Eight concludes the chapter.

B. Role of law and policy in environmental management

Kenya faces numerous environmental challenges. The National Environment Management Policy identifies the key contributors to environmental degradation as being unsustainable land use practices, poor soil and water management practices, deforestation, overgrazing and pollution.[14] Several tools exist to solve environmental challenges.[15] Some problems require finances, while others require technical solutions. In the quiver of solutions, one of the arrows is the law. Law is a tool for social control.[16] By this, law states goals to be pursued in society, sets out the path for pursuing those goals, and measures to ensure that any disputes that arise are resolved. While law is supposed to control society, resolve disputes and facilitate societal change, it does not always deliver on its outcomes. Several factors also facilitate societal development. In addition, law has its limits and is not always the most effective tool. Appreciating the role and limits of law is critical to setting and assessing the extent of realizing targets in society.[17]

14 Republic of Kenya, *National Environment Policy, 2013(*Nairobi), 1.

15 G Nhamo and E Inyang, *Framework and Tools for Environmental Management in Africa,* (CODESRIA, 2011).

16 C N Okolie, 'Law as A Tool for Social Control: Towards Philosophy of Law for Contemporary Africa' [2019] *Nnamdi Azikiwe Journal of Philosophy*, 11 at 2, 127-140.

17 DM Trubek, 'Toward a Social Theory of Law: An Essay on the Study of Law and Development' [1972] *The Yale Law Journal*, 82 at 1, 1-50; J. Barrett and G. Gaus 'Laws, Norms, and Public Justification: The Limits of Law as an Instrument of Reform' available at <https://d1wqtxts1xzle7.cloudfront.net/59832739/Laws__Norms__and_Public_Justification_penultimate_draft20190622-4925-1qcpljw.pdf?1561227042=&response-content-disposition=inline%3B+filename%3DLaws_Norms_and_Public_Justification_The.pdf&Expires=1605462448&Signature=dZRCZoeP0xCmmZsODH0V5G7rG5qas-OPcsKaa~8ug2w2Sb7kl6mNzRklUHJRg5C4b5qW73PQ7B3AaDN4eLFV31e~hlJHAj36a~~vaVLh7sxRbJXwFhfhVSnFy7PEjd48V35a3CECQU0-VT32X7BrVtuZ9aJ04Bz0ibsieOibUzvxsAoKkRG7DtMa3-cp-ZzwxJ4t46p6rPXsPl4xfXdtPyL2ELRSbB~TNxr~SmK2b1mdsYNfLx8azoZDRhSG89rpA1ZlREFLU4KlF5vB~jTiHe3t~Bc9LwvFllNzIS270oxsIchOYPADbdhZcn8-ta8KYjoS0lO9cmAwnSB8pNJIHA__&Key-Pair-Id=APKAJLOHF5GGSLRBV4ZA> (accessed 14 November 2020)

In the environmental context, the targets are that of sustainability. Realizing sustainable development remains the principal preoccupation of environmental law and policies at the international and national level. Starting with the work of the Brundtland Commission and its report, *Our Common Future,*[18] which defined sustainable development as 'development that meets the needs of the present generation without comprising the ability of future generations to meet their own needs",[19] the principle remains an overarching one in environmental governance. The term, as conceptualized by the Brundtland report, comprises two elements, being that of needs, especially the needs of the world's poor to whom priority should be given, and the idea of limitations on the ability of the environment to meet present and future needs due to the state of technology and social organization.[20] Phillip Sands has elaborated these into four elements, which are: the need to preserve natural resources for the benefit of future generations; exploiting natural resources in a manner that is sustainable, prudent, rational, wise or appropriate; the equitable use of natural resources; and the need to ensure that environmental considerations are integrated into economic and other development plans and that development needs are taken into account in applying environmental objectives.[21]

Despite recognition of the importance of the concept at the international level and inclusion in national constitutions and laws, its legal content remained elusive. Questions about the appropriate balance between environmental conservation and the pursuit of development, and how law could help set and protect the threshold for sustainable development continued to be debated among developing and developed countries in international environmental conferences since the acceptance of the concept at the United Nations Conference on the Environment and Development in 1992.[22]

Impetus for legal clarity and accelerated implementation of sustainable development arose from the United Nation Conference on Sustainable Development, held in Rio de Janeiro in 2002.[23] At the launch of the report, the international community renewed its commitment to achieving sustainable development.[24] They also set the basis for development of the sustainable development goals, by stating as follows:

> We recognize that the development of goals could also be useful for pursuing focused and coherent action on sustainable development. We further recognize the importance and utility of a set of sustainable development goals, based on Agenda 21 and the Johannesburg Plan of Implementation, which fully respect all the Rio Principles, taking into account different national circumstances, capacities and priorities, are consistent with international law, build upon commitments already made and contribute to the full implementation of the outcomes of all major summits in the economic, social and environmental fields, including the present outcome document. The goals should address and incorporate in a balanced way all three dimensions of sustainable development and their interlinkages.[25]

18 World Commission on Environment and Development, Report of the World Commission on Environment and Development, Our Common Future (1987).

19 Ibid

20 Ibid, 43.

21 P Sands, et al, *Principles of International Environmental Law* (Cambridge University Press, United Kingdom) 2018, 219.

22 See https://sustainabledevelopment.un.org/milestones/unced. (Accessed 10 February 2020).

23 See https://sustainabledevelopment.un.org/rio20.html. (Accessed 22 February 2020).

24 United Nations, *The Future We want: Outcome Document of the United Nations Conference on Sustainable Development* (2012), 1 <https://sustainabledevelopment.un.org/content/documents/733FutureWeWant.pdf> (accessed on 13/2/2020).

25 Ibid, 63.

Based on the above commitment, work on the sustainable development goals commenced, and the UN General Assembly adopted them in 2015.[26] A set of 17 goals and 169 targets, the Sustainable Development Goals (SDGs) seek to end poverty and thus achieve sustainable development by 2030. The goals include: no poverty; zero hunger; good health and well-being; quality education; gender equality; clean water and sanitation; affordable and clean energy; decent work and economic growth; industry, innovation and infrastructure; reduced inequality; sustainable cities and communities; responsible consumption and production; climate action, life below water; life on land; peace and justice and strong institutions; and partnerships to achieve these goals.

The articulation of sustainable development goals provides clarity on the content of sustainable development around 17 broad areas and further elucidates targets to be achieved in the process. Law comes in to help ensure that the process of realizing these targets is undertaken in an orderly manner and should disputes arise in the process, a clear framework for resolving them exists. It does this by prescribing the threshold for the sustainability of the environment and natural resources.[27]

Environmental law can be argued to perform three distinct but interrelated functions. First, 'law provides institutional mechanisms for the allocation of natural resources, norms regulating the use and development of those resources, and sanctions attendant upon violation.'[28] Second, law helps to 'set standards and provide sanctions'[29] and 'institute anticipatory mechanisms for assessment of the impact of development projects and programmes on the environment.'[30] Not only does environmental law establish rules and regulations, it also provides for other forms of intervention such as management tools, incentives and disincentives.[31] Law, consequently, serves as 'the tool by which our common future is realized'.[32]

Policies, on the other hand, set government priorities in the environment sector. They help determine what priorities a government is to pursue. For example, in the quest for sustainable wildlife management, a government can decide to either adopt the option of consumptive utilization of wildlife resources or non-consumptive utilization. The choice will be based on an assessment of the operating context and the goals that a particular government desires to achieve. Once adopted, laws are then formulated to implement the policy directives. This is because law is an instrument for translating policy formulation into practice.[33] The interplay between law and policy in the environmental sector will ensure that rational policy objectives are set and implemented, and that development processes proceed in an ecologically sustainable manner. This way, an optimum balance between environmental imperatives and development priorities are achieved and thus ensuring the realization of sustainable development.

26 UN, Transforming Our World: The 2030 Agenda for Sustainable Development, A/RES/70/1https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E. (Accessed on 13/2/2020.)

27 C Odote, 'Environmental Jurisprudence and Sustainable Development in Kenya: A Theoretical Foundation' in P Kameri-Mbote and C Odote, *Blazing the Trail: Professor Charles Okidi's Enduring Legacy in the Development of Environmental Law*, (School of Law, University of Nairobi) (2019) 176-193 at 184.

28 BD Ogolla, 'Role of Environmental Law in Development' [1987], *Journal of the Indian Law Institute*, 189 at 187-200.

29 Ibid.

30 Ibid, 190.

31 K Ruppel-Schlichting, 'Introducing Environmental Law' in OC Ruppel and EDK Yogo, *Environmental Law and Policy in Cameroon: Towards Making Africa the Tree of Life, (*Nomos Publishers) (2018), 82.

32 CO Okidi, 'The Role of Environmental Law in Sustainable Development in Africa' unpublished paper presented to Commonwealth Law Conference in Auckland, New Zealand, April 1990(On file with author).

33 Ibid (n 28), 189.

There is no fixed process for policy development, or a central depository for all policies. Some policies receive parliamentary approval and thus have sessional policy numbers while others after, public consultation, start getting implemented. Conventional good practice requires that policy-making should comply with the prerequisites of Article 10 of the Constitution on public participation. It is also important that such policy be placed before Parliament for debate as part of the adoption process.

C. Sources of environmental law

Formal sourwces

Kenya's environmental law is based on international principles and rules. It derives from international environmental law, which developed as a distinct branch of international law following the United Nations Conference on the Human Environment held in Stockholm in 1972.[34] For all international law, their sources are captured in Article 38(1) of the Statute establishing the International Court of Justice.[35] International environmental laws are thus the same as all those international laws.[36]

From the ICJ Statute, the main source of international law is treaties. These are international agreements between states, or between states and international organizations. Treaties remain the main source of international environmental law. There is a wide array of conventions governing specific aspects of the environment, including the law of the sea, biodiversity, wetlands, air pollution, climate change and chemical pollution, among others. Indeed, the bigger problem in this source of law is not paucity but treaty congestion. The result is a multiplicity of rules and institutions, leading to lack of coherence, which can hinder efficiency and effectiveness.[37] A second highlight of environmental treaty making is the tendency to adopt a framework approach to environmental treaties. Under this arrangement, the original treaty does not necessarily contain clear, detailed, or specific rules.[38] Instead, they only lay down a framework or general principles or requirements for states,[39] leaving the detailed and specific measures to be negotiated and laid down in subsequent protocols or annexes. One of the best examples of this approach is a treaty adopted at the 1992 United Nations Conference on Environment and Development. The first of these relates to climate change, where the United Nations Framework Convention on Climate Change[40] was adopted and provided broad contours for addressing climate change threats. At that time, the scientific information was not fully settled and as such, States were not fully agreed on the measures to take. Subsequently, the Kyoto Protocol[41] was adopted with specific time-bound targets for States. This has subsequently been replaced by the Paris Agreement on Climate Change, adopted in 2015.[42]

34 See, https://sustainabledevelopment.un.org/milestones/humanenvironment. (Accessed 16 February 2020).

35 See https://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf. (Accessed on 16 February 2020).

36 P Birnie, A Boyle A and C Redgwell, *International Law & the Environment,* 3rd Edition (Oxford University, Press) (2009)15.

37 EB Weiss, 'International Environmental Law: Contemporary Issues and the Emergence of a New World Order' [995] *Georgetown Law Journal,* 81 at 1, 675-693; Maria Ivanova and Jennifer Roy, 'The Architecture of Global Environmental Governance: Pros and Cons of Multiplicity' in Center for UN Reform Education's reader on Global Environmental Governance. Available at < https://centerforunreform.org/wp-content/uploads/2007/01/Ivanova-and-Roy-GEG.pdf >.

38 Ibid (n 36), 17.

39 Ibid.

40 31 ILM 849. Available at <https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf> (accessed on 20 February 2020).

41 37 ILM 22. Available at https://unfccc.int/resource/docs/convkp/kpeng.pdf (Accessed on 22/2/2020)

42 Decision 1/CP.21, FCCC/CP/2015/10 Add.1

The second source of international environmental law is custom. Customs are a useful source of environmental law and are evidence of accepted practice among States. Unlike treaties, customs do not need ratification and are binding on all states rather than just those who are parties to a treaty. The only trouble is the challenge of proving whether something has crystalized into custom or not. One of the best examples of custom, which has also influenced the development of environmental law at the national and international level, is Principle 21 of the Stockholm Declaration,[43] which provides that:

> States have, in accordance with the Charter of the United Nations and Principles of International Law, the sovereign right to exploit their own resources, pursuant to their own environmental policies, and the responsibility to ensure that activities within their own jurisdiction or control do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction.[44]

The above two sources constitute what may be called hard or traditional sources of environmental law. However, due to the difficulties of these in international law-making, there has been preference to use soft law, which refers to a variety of non-binding instruments used in international relations.[45] In international environmental law, these include Principles and Declarations. For example, Agenda 21, the Stockholm Declaration, and the Rio Declaration fall into the category of soft law. They have, however, been more influential in the development of international environmental law than the more formally binding Conventions. This is due to their flexible nature, which allows states to commit to them without fear of strict sanctions. It helps to build consensus on standards and principles, which can then be incorporated into subsequent treaties and national laws on the environment.

These sources are useful for environmental lawmaking in Kenya. The Constitution recognizes international law as a source of law, providing that conventions and treaties that have been ratified form part of Kenyan law,[46] and further, that general principles of international law also form part of Kenyan law.[47] With the adoption of the 2010 Constitution, Kenya departed from the dualist doctrine, which required international law to be incorporated into municipal laws for them to apply and be adopted. Under the monist approach, international law is considered part of Kenyan law as long as it has been ratified by Kenya. The High Court affirmed this position, with Justice Majanja holding that by the provisions of the 2010 Constitution, "the application of international law in Kenya is clarified to the extent that it is not left in doubt that international law is applicable in Kenya".[48] This point has been reaffirmed by the Court of Appeal and the Supreme Court, holding that by dint of Article 2(6) of the Constitution, any law that has been ratified by Kenya is part of Kenyan law and as such the debate of whether or not Kenya is a monist or dualist state may not be too helpful. What is critical is that such a treaty has been ratified following the process envisaged under the Constitution.[49]

43 UN CONFERENCE ON -THE HUMAN ENVIRONMENT, UN Doc. A/CONF.48/4, at 2-65, and Corrs (1972). Available at http://webarchive.loc.gov/all/20150314024203/http%3A//www.unep.org/Documents.Multilingual/Default.asp?documentid%3D97%26articleid%3D1503.

44 Ibid.

45 Birnie and Boyle (n 36), 35.

46 Constitution of Kenya (2010), Art 2(6).

47 Ibid, Art 2(5).

48 *Beatrice Wanjiku and Another v Attorney General and Another*, (2012) eKLR.

49 *Karen Njeri Kandie v Alassane Ba & Another,* [2017] eKLR.

An example is the process followed by Kenya in ratifying the Paris Agreement. The Treaty Making and Ratification Act[50] provides the procedure for ratification, starting with the executive initiating the process through the relevant state department preparing the proposal to be presented to Cabinet, in consultation with the Attorney General, before submission to the Speaker of the National Assembly for consideration and approval. This is the process that the Paris Agreement went through.[51] The country ratified the Treaty on December 28, 2016 and submitted its instruments of ratification.[52]

From a law-making perspective, the 2010 Constitution further elevated the status of environment to the constitutional level.[53] With its elaborate provisions, including recognition of the right to a clean and healthy environment within the Bill of Rights, the Constitution ensures that environmental lawmaking is prioritized and that laws are judged against the yardstick of their contribution to sustainable development. Thus, as opposed to the pre-2010 legal landscape was characterized by debates between different laws on which was superior in the environmental field, and where fragmentation in environmental regulation could result in sub-optimal management of the environment, the standard henceforth is compliance with the Constitution. Any environmental law that does not adhere to the principles and prerequisites set forth by the very elaborate and progressive provisions on the environment in the Constitution will be void and consequently invalid.[54]

Informal sources

Just as is the case with international law, soft law comprises an informal source of law at the national level, where customary law plays an important role in environmental governance. The Judicature Act recognizes customary law as a source of law in Kenya.[55] Environmental consciousness did not start with colonial rule and the adoption of formal rules. Instead,

'(a)n environmental perspective has always existed in the traditions of virtually all the communities that constitute what is now the Republic of Kenya. These perspectives reflect in the traditions, aesthetics, theology, natural history, and anthropology of these communities, and remain a fundamental influence in their social-economic relationships.'[56]

The nature of these rules varies from community to community, but they include mores and beliefs that aid the conservation of the environment. Traditionally, every community had such rules, whose essence was to ensure that human beings lived in harmony with nature and that their uses of the environment did not lead to exploitation. Traditional communities focused on

50 Treaty Making and Ratification Act, Number 45 of 2012.

51 See Ministry of Environment and Forestry, Kenya Ratifies Paris Agreement, http://www.environment.go.ke/?p=3001. (Accessed 21 November 2020); Abby Muricho Onencan and Bartel Van de Walle, 'From Paris Agreement to Action: Enhancing Climate Change Familiarity and Situation Awareness' [2018], *Sustainability,* 10 at 6. Available at <https://www.mdpi.com/2071-1050/10/6/1929> (accessed 21 November 2020)

52 See <https://unfccc.int/node/61092> (Accessed on 21 November 2020); C.N.979.2016.TREATIES-XXVII.7.d.

53 C Odote, 'Kenya: Constitutional Provisions on the Environment' *IUCN Academy of Environmental Law, e-Journal* [2012], 136 at 1, 136-145; C Odote, 'Human Rights-based Approach to Environmental Protection: Kenyan, South African and Nigerian Constitutional Architecture and Experience' in M Addaney and AO Jegede, *Human Rights and the Environment under African Union Law*, Palgrave Macmillan (2020), 381-414.

54 Constitution of Kenya (2010), Art 2(4).

55 Judicature Act, Chapter 8 Laws of Kenya, s 3.

56 B Ochieng, 'Institutional Arrangements for Environmental Management in Kenya' in CO Okidi *et al (eds) Environmental Governance in Kenya: Implementing the Framework Law* (East African Educational Publishers, 2008) 183-207 at 185-186.

ecology and conservation[57] in their relations with nature and natural resources. Many of the rules were developed to ensure that resources were used in a sustainable manner, and with regard to the interests of all members of the society but also those members yet unborn.[58] In essence, therefore, the principles of sustainable management, which is key to environmental law and policy, were fully ingrained in customary rules of communities.

While modernity attempted to disregard customary rules and subordinate them to Common Law, the reality is that they continued to thrive only going underground but never disappeared. Professor Okoth-Ogendo, writing about customary law, opined that 'indigenous law, long regarded as a dangerous weed, simply went underground from whence it continued to grow despite the overlap of statutory law that was destined to replace it'.[59] It follows, that in seeking to understand and make environmental law, reliance should also be given to the customary laws in Kenya. This is not an easy task, though, since customary law, by its very nature remains largely unwritten. It is, therefore, not easy to discern its content or commonality. But just like custom at the international level, this difficulty does not mean avoidance.

The Constitution recognizes customary law as an essential component of the sources of law of Kenya,[60] and also recognizes the importance of customs for sustainable development. For example, the Constitution stipulates that the state shall protect indigenous knowledge, biodiversity and genetic resources of communities.[61] The only limitation to the application of customary law is if it is not consistent with the Constitution. This is a recognition that traditional knowledge is an important facet of the rules for sustainable management of the environment. Identifying and protecting these traditional rules and incorporating them into legislative enactments is important for bridging the divide between customary law and modern law, and also for ensuring efficacy in the role of law as a tool for sustainable development.

D. The framework environmental law concept and its application in Kenya

The adoption of the Environmental Management and Coordination Act followed an approach that had been popularized across the world, commencing with Brazil, of having framework laws.[62] The rationale was to deal with previous scattered and conflicting previous legislative enactments on the environment. Due to the multiple sub-sectors within the environment sector, each of the sectors had their own laws and institutions governing them. Even though they focused on dealing with environmental degradation, their scattered nature hampered optimal regulation and thus limited sustainable management of the environment. Such an approach was complex, cumbersome and inefficient.[63] It also failed to view the environment as a comprehensive whole and could end up pitting one regulatory approach against another. The solution was to adopt a much more comprehensive view to environmental regulation, one which

57 C Odote, 'Retracing Our Ecological Footsteps: Customary Foundations for Sustainable Development and Implications for Higher Education in Kenya' [2015] *University of Nairobi Law Journal*, 8 at 1, 43-57.

58 Ibid.

59 HWO Okoth-Ogendo, 'The Tragic African Commons: A Century of Expropriation, Suppression and Subversion' [2003], *University of Nairobi Law Journal*, 113 at 1, 107-117.

60 Constitution of Kenya (2010), Art 2(4).

61 Ibid, art 69(1) (c).

62 JR Nolon, 'Fusing Economic and Environmental Policy: The Need for Framework Laws in the United States and Argentina' [1995-1996], *Pace Environmental Law Review* 13 at 686-745, 711.

63 Ibid, 700.

treated the environment as a single interconnected medium and appreciated that the activity in one part of the environment had the potential of affecting another part. Consequently, it was proposed that 'environmental regulatory system would be more effective today if it had been created originally as a unitary and comprehensive system.'[64]

A framework law does not seek to oust the existing institutions or repeal the extant sectoral laws. Instead, it provides a mechanism for coordination within the sector. In addition, it provides a legal framework for implementing sustainable development by providing avenues for balancing environmental and development considerations in processes in society. Creation of a central coordinating agency is a central feature of framework laws. In Chile, for example, the framework law had two principal features, namely, 'the creation of a centralized national agency, the National Commission on the Environment (CONAMA), and the extensive use of environmental impact assessment.'[65]

Kenya's legislation adopted a framework approach. It has a law whose object is to establish a legal and institutional framework for the management of the environment.[66] At the heart of the institutional design is the National Environment Management Authority (NEMA),[67] whose objective is to 'to exercise general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of government in the implementation of all policies relating to the environment.'[68] NEMA coordinates and supervises the work of sectoral institutions, which the law refers to as lead agencies, denoting the fact that they are responsible for taking lead action within their sub-sectors. The EMCA empowers NEMA to direct lead agencies to undertake their responsibilities and should they fail, NEMA can perform the same functions and recover the costs from the lead agencies.[69]

The EMCA requires that laws that were in effect before its enactment and commencement should be applied only to the extent that they complied with it.[70] However, this provision does not fully make EMCA the framework law because 'while the drafters of EMCA sought to subordinate all existing sectoral environmental laws to EMCA, they did not envisage that subsequent sectoral laws might conflict with EMCA'.[71]

Additionally, in practice, challenges of efficacy at NEMA, relationships with lead agencies, and other implementation bottlenecks make the issue of a framework law problematic to implement.

E. Linkages between environmental law and policy making

Environmental law making

The responsibility for making, amending or repealing environmental law statutes is vested in Parliament. Following the adoption of the Constitution, 2010, Kenya's law-making was aligned to the presidential system of government, in which Parliament has sole law-making responsibility.

64 Ibid, 700-701.
65 Ibid, 711.
66 Environmental Management and Coordination Act No. 8, of1999.
67 Ibid, s 7(1).
68 Ibid, s 9.
69 Ibid, s 12.
70 Ibid, s 148.
71 Migai Akech, 'Governing Water and Sanitation in Kenya', in CO Okidi, et al (Eds) *Environmental Governance in Kenya: Implementing the Framework Law* (East African Educational Publishers, Nairobi) (2008), 305-334 at 325.

The responsibility to make environmental law is largely vested in the National Assembly,[72] with input from the Senate when aspects that affect counties are part of the legislative proposals.[73] While amending the Environmental Management and Coordination Act in 2015 to align it with the Constitution, the National Assembly and Senate were involved. In this instance, once the Bill is passed by one house of Parliament, it is submitted to the next. When there is concurrence between the two houses, the law is submitted to the President for assent. The procedure for passing Bills is governed by the Constitution.[74]

Before the adoption of the 2010 Constitution, Bills were categorized as either Government Bills or Private Members Bills, with the latter being introduced to Parliament by private members and the former by the Government. Lawmaking, now being a preserve of the legislature, means Bills can only be introduced by members of the legislature. With ministers not being part of the legislative arm of Government, it is not possible for the executive to directly introduce any environmental law to Parliament for consideration. Such powers are vested in any member or in a committee of Parliament.[75]

In practice, government agencies or even members of the public with innovative legislative proposals can still develop them. However, they will have to convince a member of Parliament or a relevant committee, in the case of environmental issues the departmental committee on environment and natural resources, if the National Assembly, and the Land, Environment and Natural Resources committee of the Senate.

Parliament has legislative drafters who help members to translate their legislative proposals into legal drafts. An important innovation of the law making process is what is referred to as pre-publication scrutiny.[76] This provision enables the Speaker to refer a legislative proposal, which is not sponsored by a committee, to the relevant departmental committee to undertake a scrutiny and file a report within 21 days indicating whether the Bill should proceed for publication and eventual consideration. This stage offers members of the public an initial opportunity to provide inputs into a proposed legislative initiative. This is to ensure that by the time the Bill is published, it complies with the Constitution, it has addressed the issue of whether or not it is a money Bill, and other procedural and overriding issues should have been dealt with to pave way for the consideration of the Bill on its merits once published.

Under every law relating to the environment, there is a power to make subsidiary legislation. The Environmental Management and Coordination Act[77] vests the power to make regulations governing specific aspects of the environment on the Cabinet Secretary responsible for environmental matters.[78] The National Environment Management Authority is expected to recommend the regulations after consulting lead agencies.[79] Thus, if the Cabinet Secretary were to make regulations governing water resources, they would need to consult the Water Resources Authority. This procedural requirement aims to ensure that regulations have the concurrence of

72 Constitution of Kenya (2010), Art 95(3).
73 Ibid, Art 96(2).
74 Constitution of Kenya (2010), Art110-116.
75 Ibid, Art 109(5).
76 Republic of Kenya, *The National Assembly Standing Orders, 4th Edition*, Standing Order Number 114.
77 Environmental Management and Coordination Act No. 8 of 1999.
78 Ibid, s 147
79 Ibid.

the agencies responsible for their implementation and reinforce the position of the EMCA as a coordination and framework law.

In 2013, Parliament enacted the Statutory Instruments Act[80] to "provide for a comprehensive regime for making, scrutiny, publication and operation of Statutory Instruments".[81] The legislation recognizes that regulations are part of laws and should adhere to the minimum requirements for lawmaking. Consequently, when the Cabinet Secretary for the environment makes any regulations under the EMCA, he is required to ensure that they align to the law-making process. The key highlights of the legislation included the provision requiring consultations to be undertaken before any regulations are developed and adopted.[82] This is to ensure adherence to the constitutional principle of public participation and avoid rules being sneaked on Kenyans without any prior consultation and public input. For each regulation to be approved for operation, it must include a memorandum explaining that public consultation was undertaken as part of the process of its development.[83] Second, where the proposed regulation will impose a significant cost on the community, the responsible authority is obligated to undertake a regulatory impact assessment detailing a cost-benefit analysis and justifying the option chosen under the regulation as a pre-condition for adoption.[84] The analysis is expected to focus on 'economic, environmental and social impact and the likely administration and compliance costs, including resource allocation costs.'[85] The Cabinet Secretary is required to issue a certificate of compliance confirming that a regulatory impact assessment has been undertaken,[86] and table the same in Parliament together with the regulatory instrument.[87]

Since Parliament has the residual constitutional law-making power, all statutory instruments are made under delegated authority from Parliament. Consequently, the Statutory Instruments Act requires that all adopted instruments be laid before Parliament through either the relevant departmental committee or the Committee on Delegated Legislation for scrutiny. [88] This action clothes such instruments with the cover of legality.

Despite this elaborate procedure, there is continuing contestation over lawmaking functions between the National Assembly and the Senate, and between the two levels of government in areas of concurrent mandate, or where a function is not expressly vested in either level of government but still requires legislation to ensure its implementation.

Environmental policy making

Unlike lawmaking that is expressly governed by both the Constitution and Standing Orders of Parliament, policy making is much more eclectic. Invariably, policymaking is led by the relevant departmental agency in government. While the policy-making cycle traditionally involved several interrelated stages starting from agenda setting, policy formation to policy legitimation with the stages for policy implementation, policy evaluation and policy maintenance, succession or

80 Statutory Instruments Act No. 23 of 2013.
81 Ibid, s 3.
82 Ibid, s 5.
83 Ibid, s 5A.
84 Ibid, s 6 and 7.
85 Ibid, s 7(2).
86 Ibid, s 7(4)
87 Ibid, s 7(5).
88 Ibid, s 11.

termination,[89] have not always been followed consistently in Kenya. For example, there are many instances when policies are formulated but never adopted. The process of policy adoption is not fully clear in the country. Are the relevant ministries, the Cabinet or the legislature responsible for policy adoption? The normal practice has been that not all policies are taken to Parliament, with only significant ones being laid before the legislature, and once adopted allocated sessional paper numbers. However, there is no clarity on how to determine significance and thus choose when to lay a policy proposal before the legislature.

The consequence is that policymaking ends up being subjective and inconsistent. The environmental policy-making scene in Kenya is indicative of this danger. In 1999, the country developed a Sessional Policy on Environment and Development.[90] It was presented to Cabinet, which adopted it.[91] However, it was neither presented to Parliament nor implemented. In 2007, the process of developing a National Environment Policy commenced again but was not completed until 2013.[92] It is not fully clear what the adoption process for this policy is. No hard copy seems to be readily available in circulation, a demonstration of the lack of seriousness on policymaking in Kenya. This is despite the fact that Kenya's 2010 Constitution recognizes policy as a tool of Governance. This is evident by its mention of the word policy 23 times[93] within the text of the Constitution. The Constitution has, arguably constitutionalized policymaking.[94] This is despite it not providing guidance on the procedure for its conduct. The recognition of policy is evident from requirements that any person making or implementing public policy decisions upholds and promotes the national values and principles of governance.[95] One of the national values of governance is sustainable development. This chapter not only recognizes public policy making but also sees it as a tool for delivering on sustainable development, hence demonstrating the importance of environmental policy and environmental policy-making.

Related is the linkage between environmental policy-making and lawmaking. Ideally, policy-making should precede lawmaking. While policies give expression to government commitments and priorities, laws enable the translation of these policy stipulations into legislative action. By their nature, policies are an expression of political direction, choice and commitment. Once agreed upon, these are then given legislative anchorage. In Kenya's governance sphere, though, environmental policy has not received high priority as evidenced by the casual treatment of the country's National Environment Policy. Second, the enactment of legislation has not been preceded by policy conversation, identification of policy options and choosing the most desirable out of the available alternatives.

89 See <https://online.pointpark.edu/public-administration/policy-making-cycle/> (Accessed on 18/2/2020).

90 Sessional Policy No. 6 of 1999 on Environment and Development.

91 Republic of Kenya, Kenya National Assembly, Official Report, 21st January, 2009. <https://books.google.se/books?id=LBvh_xOU-CwC&pg=PT14&lpg=PT14&dq=Sessional+Policy+Number+6+of+1999&source=bl&ots=fdu3DTPLVY&sig=ACfU3U0ZqBFtgdQNbMDulcJv9LU1PO35sQ&hl=en&sa=X&ved=2ahUKEwiq7oz94drnAhVhmYsKHW1IBzwQ6AEwAHoECAUQAQ#v=onepage&q=Sessional%20Policy%20Number%206%20of%201999&f=false> (accessed 18 February 2020).

92 Republic of Kenya, *National Environment Policy* (Nairobi, 2013) page vii. Available at <http://www.environment.go.ke/wp-content/uploads/2014/01/NATIONAL-ENVIRONMENT-POLICY-20131.pdf> (accessed 18 February 2020).

93 Ben Sihanya, 'Unlike in the Past, Policy-making an Integral Part of the New Constitution', *Daily Nation,* Thursday arch 24, 2011. Available at < https://www.nation.co.ke/oped/opinion/Unlike-in-the-past-policy-making-an-integral-part-of-new-law/440808-1132204-900vuvz/index.html> (accessed 16 February 2020).

94 Ibid.

95 Constitution of Kenya (2010), Art 10.

Public participation imperatives

The Rio Declaration on Environment and Development[96] prescribes that environmental decision-making should be undertaken with the involvement of the public; that there should be access to information; and that there should be access to avenues for redress in cases of disputes.[97] The Declaration also requires states to enact effective environmental legislation.[98] Effective legislation is not just about its content, but also about the process through which the law is made. One of the critical debates is about public participation in lawmaking. Public participation creates a balance between governing *for* the people and governing *by* the people, and hence the concept emphasizes the need to further enhance inclusion and meaningful participation of the citizenry in the process of decision making within governance structures.[99]

Participation has been instrumental in guarding against abuse of office by public servants and political leaders. It has also provided a control against excessive discretion being vested in civil servants in public procedures.[100] Lack of public participation, therefore, results in arbitrariness by those tasked with policy formulation and implementation thus requiring the creation of checks and balances to ensure that the rule of law subsists at all times.

The principle of public participation in the legislative process derives from the provisions of the Constitution, starting with Article 10(2), which identifies participation of the people as one of the national values and principles of governance. It binds anybody who enacts, applies or interprets law.[101] Further, Article 259 provides that the Constitution is to be interpreted in such a manner that promotes national values and principles. In addition to these general provisions, the Constitution also expressly recognizes the need for public participation in the lawmaking process.[102]

The bigger debate is no longer whether or not public participation should be adhered to in the process of making environmental law in Kenya. That has been settled by the Constitution. The more germane question that continues to vex the minds of policymakers and the public in Kenya is how to actualize this constitutional imperative.

The South African case of *Doctors of Life International v Speakers of Life and Others*[103] remains the benchmark for judicial determination on public involvement in lawmaking processes. The Constitutional Court of South Africa has in the past held that public participation is a core necessity to any lawmaking process, and has also declared legislation which has not complied with this requirement to be invalid and thus struck down.[104] The court in this case held that citizen participation entailed the duty, first, to provide meaningful opportunities for public participation in the lawmaking process, and the duty to provide meaningful participation by ensuring that the people are able to take advantage of the opportunities provided for participation, and that

96 a/Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972 (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), chap. I. See< https://www.cbd.int/doc/ref/rio-declaration.shtml> (Accessed on 21 November 2020).
97 Ibid, Principle 10
98 Ibid, Principle 11.
99 Francis Kairu, Mary Maneno, 'Public Participation: Kenya's Best Weapon against Graft and Poor Governance,' *Adili 135,* Nairobi
100 Ibid.
101 Constitution of Kenya (2010), Art 10(1)(a),
102 Ibid, Art 118(1)(b).
103 *Doctors of Life International v Speakers of Life and Others*, [2006] ZACC 11.
104 Ibid.

this could be by ensuring that the public is able to access the necessary information for them to be able to effectively participate.[105] The court defined public participation as follows:

> The phrase 'facilitate public involvement' is a broad concept, which relates to the duty to ensure public participation in the lawmaking process. The key words in this phrase are 'facilitate' and 'involvement'. To 'facilitate', means to 'make easy, or easier', 'promote', or 'help forward'. The phrase 'public involvement' is commonly used to describe the process of allowing the public to participate in the decision-making process. The dictionary definition of 'involve' includes to 'bring a person into a matter', while participation is defined as '[a] taking part with others (in an action or matter); … the active involvement of members of a community or organization in decisions which affect them'. According to their plain and ordinary meaning, the words public involvement or public participation refer to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participates in the legislative process. That is the plain meaning of section 72(1)(a). This construction of section 72(1)(a) is consistent with the participative nature of our democracy. As this Court held in New Clicks, '[t]he Constitution calls for open and transparent government and requires public participation in the making of laws by Parliament and deliberative legislative assemblies.' The democratic government that is contemplated in the Constitution is thus a representative and participatory democracy which is accountable, responsive and transparent and which makes provision for the public to participate in the lawmaking process …[106]

The above cases have been relied on in Kenyan courts to essentially make the same point. One of the landmark decisions on this issue, although not an environmental matter, remains that of Judge Odunga in the case of *Robert N. Gakuru & Others v Governor Kiambu County & 3 Others*.[107] The case revolved around application for striking out the Finance Act of Kiambu County for want of public participation. In holding that no public participation had been undertaken, the judge was express that public participation must be meaningful and provide citizens with a real opportunity to engage with and input into the legislative process. This is the only way that it can help give effect to the prerequisites of Kenya's constitutional democracy and requirements. The judge pointed out that:

> In my view, public participation ought to be real and not illusory, and ought not to be treated as a mere formality for the purposes of fulfilment of the constitutional dictates. It is my view that it behooves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough, in my view, to simply 'Tweet' messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and, where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous.[108]

105 Ibid.
106 Ibid.
107 *Robert N. Gakuru & Others v Governor Kiambu County & 3 Others,* (2014) eKLR.
108 Ibid.

The above position has been affirmed by the Court of Appeal,[109] which went further to guide that "the bottom line is that public participation must include and be seen to include the dissemination of information, invitation to participate in the process and consultation on the legislation."[110] In environmental legislation, just like other laws in Kenya, involving the public in lawmaking is a constitutional imperative. Taken together with the international commitment to ensure public participation in all decision-making processes, its importance in lawmaking and policy-making acquires an even higher significance.

In the context of the environment, the case of *Mohamed Ali Baadi and Others v Attorney General & 11 Others,*[111] provides a very extensive discussion of the meaning, importance and application of public participation in the realization of environmental rights and governance of the environment. The case underscores public participation as an important component of democracy, capturing its participatory elements. Applied to the environmental field, the concept of environmental democracy requires public participation, access to information and justice. The case discusses several reasons that make public participation in environmental decision-making and policy making important. First, involving the public ensures more effective implementation of the goals of sustainable development since the public will bring in an expanded knowledge base. Second, it helps identify and address environmental problems at an early stage, hence saving on scarce resources. In addition, at the implementation stage, public participation helps to ensure that environmental threats and violations are identified and dealt with through citizen monitoring. Third, public participation improves 'the credibility, effectiveness and accountability of governmental decision-making processes. This is a result of broad-based consensus for environmental programmes that flows from involvement of the public at the infancy stages of the decision making processes.'[112]

In addition to the foregoing reasons justifying public participation, the case spoke about the link between public participation and environmental law and policy making. The court was categorical that 'developing environmental laws and policies is a very resource-intensive area. Hence, the public input comes in handy, especially in developing countries, in supplementing scarce government resources for developing laws and policies. In addition, at the implementation stage, public vigilance is critical for monitoring, inspection and enforcement of environmental laws and policies by identifying and raising with the appropriate authorities, environmental threats and violations.'[113]

F. The role of devolved governments in environmental law and policy making

The 2010 Constitution introduced a devolved system of governance. The environment and natural resource sector is a shared regulatory space between national government and county government. The Fourth Schedule of the Constitution provides for functional distribution between the two levels of government. National government is vested with the responsibility of "[p]rotection of the environment and natural resources with a view to establishing a durable and

109 *Kiambu County Government & 3 others v Robert N. Gakuru & Others,* [2017] eKLR.
110 Ibid.
111 *Mohamed Ali Baadi and Others v Attorney General & 11 Others,* [2018] eKLR.
112 Ibid.
113 Ibid.

sustainable system of development."[114] In discharging this overall responsibility, the national government is specifically mandated to oversee fishing, hunting and gathering; protection of animals and wildlife; water protection, securing sufficient residual water, hydraulic engineering and the safety of dams; and energy policy.[115] This would imply that overall environmental management vests in the national government. This view is reinforced from the reality that the National Environment Management Authority, established under EMCA, remains the preeminent overall body with powers to supervise and coordinate all aspects of environmental management in Kenya. Operationally, though, it is a national government agency, hence implying that it is the duty of national government to oversight environmental management.

However, the provisions of the Constitution demonstrate that counties have a role to play in environmental management. The Fourth Schedule gives counties the role of 'implementation of specific national government policies on natural resources and environmental conservation.'[116] These include the sectors of soil and water conservation,[117] and forestry.[118] The practical debate is about what implementation implies. What exactly is the role of national government and what is that of county government in the environment and natural resource sectors? How do you balance between the national government's role of policy formulation and the county government's role of implementation? What does this balance mean for the legislative power and action of both levels of government? In addition, when there is violation of the stipulated rules, whose responsibility is it to ensure compliance and hold those responsible to account? These challenges have played out in practice. Notably, the Cabinet Secretary issued a Gazette notice banning the use, manufacture and importation of single use plastic bags in the country with effect from August 2017.[119] While progress has been made in enforcing the ban on plastics, debate lingers on whether it is the responsibility of the national government or county governments. The same issue would arise in the context of noise pollution. There have been reports about the closure of certain bars and nightclubs in Nairobi. The Environment and Land Court, which ordered them closed for contravening noise pollution regulations under EMCA, confirmed these actions. NEMA and the county government were ordered to ensure that this happens. This is in conformity to the Fourth Schedule, which stipulates that controlling noise pollution is the role of the county government.[120] The case was filed by residents of Kilimani in Nairobi, arguing that the operations of the nightclubs in their residence interfered with their right to a clean and healthy environment. The court upheld this argument and ordered that '[a] mandatory injunction is hereby issued against the 5th, 6th and 8th respondents (Director of Environment, Nairobi County Government, NEMA and Nairobi County Government, respectively) compelling them to issue and enforce closure notices against the 1st, 2nd, 3rd and 4th respondents for being in contravention of the EMCA (Noise and Excessive Vibration Pollution) (Control) Regulation 2009, LN No. 61 of 2009.'[121]

The relationship between NEMA and the counties in environmental management has been held by the courts to be cooperative, but where the counties as lead agencies under the EMCA fail

114 Constitution of Kenya (2010), Fourth Schedule, Function, 22.
115 Ibid.
116 Constitution of Kenya (2010) Schedule 4, Function 10.
117 Ibid, Function 10(a).
118 Ibid, Function 10(b).
119 The Kenya Gazette, *Gazette Notice Number2356I, Vol.CXIX-No.31,* 14th March 2017.
120 Ibid (n 116), Function 3.
121 *Kilimani Project Foundation v B Concept Limited t/a B Club Nairobi & 7 others*, [2019] eKLR.

to perform their duties, then NEMA has residual powers to compel the performance of that duty by the lead agency. This was the decision of the court in the case of *Republic v National Environment Management Authority & Another Ex-Parte Philip Kisia & City Council of Nairobi*.[122] The court stated that:

> I have considered the arguments on this issue and I agree with the applicants that lead agencies (government ministries; departments; parastatals and state corporations; and local authorities), which are per law mandated to control or manage the environment or natural resources, should cooperate with NEMA in the preservation and protection of the environment. NEMA is, however, given the mandate to "exercise general supervision and coordination over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the environment" see Section 9 of EMCA.[123]

Clearly, while there is a cooperative mandate between NEMA as a national government agency and counties, ultimate responsibility rests with NEMA. As the court correctly pointed out:

> The EMCA is, therefore, clear that the buck stops with NEMA as regards environmental matters. NEMA assists and guides lead agencies in the preservation and protection of the environment but when a lead agency fails to comply with the directives given by NEMA, then NEMA has no option but to engage the powers granted to it by EMCA.[124]

As the lead agencies, counties should be at the forefront of taking action to ensure that the environment and natural resources are sustainably managed. In doing so, there is need for NEMA to collaborate with the national government. This is because the Constitution envisages a cooperative process[125] in the management of the environment and natural resources. In addition, counties should also enact laws that seek to ensure implementation of their responsibilities.[126] Their performance in this aspect has largely been below par, with an audit carried out in 2018, for example, concluding that while the natural resource sector is largely a shared regulatory space between national and county government,[127] there has been little legislative intervention by counties.[128]

G. Implementation challenges and realities

The existence of laws and policies does not always translate to the desired results. Consequently, bridging the divide between law and policy, on the one hand, and practice on the other, is at the heart of the jurisprudential school of thought that focuses on realism, and sociological school of thought. Both schools see laws not in the context of how they are defined and captured in texts but in how well they operate in practice. Kenya has made progress in designing laws and policies to deal with myriad environmental challenges. Despite this, the country is still saddled

122 *Republic v National Environment Management Authority & Another Ex-Parte Philip Kisia & City Council of Nairobi* ,(2013) eKLR.
123 Ibid
124 Ibid.
125 Council of Governors and Kenya Law Reform Commission, *Report on the Audit of National and County Policy and Legislation in Natural Resource Management Sector* (Nairobi, 2018), 56.
126 Environmental Management and Coordination Act, 1999, s147A.
127 Council of Governors (n 125), 56.
128 Ibid, 57.

with many environmental problems, ranging from air pollution, water pollution, land pollution, plastic and other waste, and land degradation, as well as biodiversity loss, among others. The 2019 National Economic Survey records an increase in the total number of environmental crimes reported to the National Environmental Management Authority in 2018 to 527 crimes up from 386 reported in 2017.[129] Of these, there was a noted increase in water pollution cases from 11 to 41; air pollution from 97 to 156; and illegal movement or dumping of waste from 253 to 328 cases.[130] This is an indicator of increased environmental challenges in the country.

Several reasons account for the continued status of environmental crises and environmental degradation despite a wide range of laws and policies in the country. The first challenge is increased environmental fragmentation. At the time the EMCA was enacted, there were some 77 laws governing different aspect of the environment.[131] The laws were largely sectoral focusing on natural resource sectors or functions.[132] The enactment of the EMCA was intended to ensure coordination and synchronization of the legal framework and the institutional mechanisms for governing the environment. However, in practice, the multiplicity of laws and institutions still continues in the environment sector. As opposed to integration, which is the essence of sustainable development, Kenya's legal and policy sector continues to be characterized by fragmentation. In addition, many sectoral policies and laws are not harmonized with each other.[133]

Related to the fragmentation challenge is a rule of law challenge. The concept of rule of law, which is about everybody and every institution being subject to and accountable to the law, law that is fairly and objectively applied and enforced, and about having a government based on law, is well accepted. However, a rule of law approach to environmental management is fairly recent.[134] Its first usage was by the UNEP Governing Council when in a resolution on Advancing Justice, Governance and Law for Environmental Sustainability member states asked the Executive Director to:

> [L]ead the United Nations system and support national governments upon their request in the development and implementation of environmental rule of law with attention at all levels to mutually supporting governance features, including information disclosure, public participation, implementable and enforceable laws, and implementation and accountability mechanisms including coordination of roles as well as environmental auditing and criminal, civil and administrative enforcement with timely, impartial and independent dispute resolution.[135]

The country is faced with several environmental rule-of-law challenges. First, is the status of the implementation of environmental laws and policies. As the National Environment Policy correctly notes, there is weak enforcement of laws and implementation of policies in the environment sector.[136] In addition to implementation challenges, the lack of effective involvement

129 Kenya National Bureau of Statistics, *Economic Survey, 2019* (2019), 273.
130 Ibid.
131 A Angwenyi, 'An Overview of the Environmental Management and Coordination Act', in CO Okidi, et al (eds) *Environmental Governance in Kenya: Implementing the Framework Law* (East African Educational Publishers, Nairobi,2008) 52.
132 Ibid, 53.
133 Republic of Kenya, *National Environmental Policy, 2013*, 4.
134 C Odote, 'The Role of the Environment and Land Court in Governing Natural Resources in Kenya', in P Kameri-Mbote, et al, *Law, Environment, Africa (Nomos, 2019)* 335-355 at 338.
135 UNEP Governing Council Resolution 27/9 of 2013. Available at https://www.informea.org/en/decision/advancing-justice-governance-and-law-environmental-sustainability (Accessed 21 February 2020).
136 Ibid, 4.

of all stakeholders in the formulation and implementation of environmental laws and policies, despite the constitutional requirement of public participation, hinders the full realization of the intention of the environmental regulatory framework. Corruption is by far the greatest rule of law challenge facing Kenya. It is endemic and systemic and pervades almost all sectors of the Kenyan society, including the environment sector. It hinders the objective application of the law and the realization of the laws' intent. Even implementers of environmental law are not immune from corruption allegations, as evidenced by the arrests in relation to the development of the Arror and Kimwarer dams in 2018. In this case, some of those who were charged in court were officials of the National Environment Management Authority, resulting in the then Director General of NEMA, Professor Geoffrey Wahungu, stepping aside to allow for the conclusion of investigations.[137] The case is evidence of the fact that success in the fight against corruption is an essential component of enhancing the implementation of environmental laws and policies in the country.

Another critical determinant is the level of constitutionalism. While the country has a robust constitutional framework on environmental management, translating its provisions into sound management of the environment requires a culture of fidelity to the Constitution among the citizenry and the leaders. In 2016, the EIA fees levied by NEMA were scrapped in a move that was argued as seeking to ease the burden on investors but, as confirmed by the Cabinet Secretary for Environment, Keriako Tobiko, this negatively impacted on the operations of the environmental agency.[138] While the Cabinet Secretary spoke about financial impacts of the decision, the larger issue relates to the impact of political pressure on constitutionalism and sustainable development.

The role of the various stakeholders and their capacities is another bottleneck. Despite acceptance that for public participation to be a guiding principle in the implementation of the EMCA,[139] there is still insufficient engagement by the public in the implementation of environmental law. One of the determinants is capacity. Building the capacity of stakeholders enables them to acquire the necessary information so that their engagement in environmental governance is both informed and meaningful. Environmental education and awareness campaigns are, consequently, essential capacity building measures. Several capacity building measures have been undertaken for various cadres of stakeholders across the country. For example, Prof Charles Okidi, a renowned environmental law expert, is credited with designing and implementing capacity building measures for a wide range of stakeholders including private sector, lawyers and judges.[140] Capacity building has also been undertaken for civil society, media and community groups. Despite this, the levels of awareness and capacity of key stakeholders is such that information asymmetry is largely with government. It is, consequently, imperative that implementation measures must incorporate elements of capacity building so as to ensure that legal stipulations in the environmental sector are translated into practical dividends.

137 https://www.the-star.co.ke/news/2019-07-24-nema-names-acting-boss-after-wahungus-arraignment-over-dams-scandal/#:~:text=Nema%20Chief%20Executive%20Officer%20Wahungu,defraud%20and%20abuse%20of%20office.

138 *Business Daily* 'Tobiko seeks to reinstate NEMA construction fee' Thursday, 13th August, 2020. https://www.businessdailyafrica.com/bd/economy/tobiko-seeks-to-reinstate-nema-construction-fee-2298536. (Accessed 21 November 2020).

139 Robert Kibugi, 'Development and the Balancing of Interests' in M Fraure and W du Plessis (eds), *Balancing of Interests in Environmental Law in Africa,* (Pretoria University of Law Press, 2011), 167-195 at 180.

140 Patricia Kameri-Mbote and C Odote, 'A Fitting Tribute to Charles Odidi Okidi: The Father of Environmental Law', in P Kameri-Mbote and C Odote, *Blazing the Trail: Professor Charles Okidi's Enduring Legacy in Development of Environmental Law*, (School of Law, University of Nairobi (2019), 2-10 at6.

The other challenge is development deficits and disparity. Balancing development imperatives with environmental stipulations is a critical challenge of environmental law. At the Stockholm Conference in 1972, the contestation between developing and developed countries related to poverty alleviation, with developing countries arguing that eradicating poverty was a top priority that could not be sacrificed at the altar of environmental management.[141] Within the country, the challenges continue unabated. The state of the environment in Kenya faces significant challenges from the spiraling levels of poverty.[142] The latest Kenya National Bureau of Statistics data on the state of poverty in the country indicate that slightly over a third of country's population is very poor and cannot afford or can barely afford their basic needs.[143] Environmental management in this context is seen as an effort to slow down, if not frustrate, the country from achieving its development targets. During the first term of the Mwai Kibaki government, between 2003 and 2007, the Minister for Planning once quipped that NEMA must, in discharging its environmental mandate, refrain from frustrating the realization of the country's economic vision as captured in the *Economic Recovery Strategy* document. The clarification in the Sustainable Development Goals that poverty elimination is a central plank of the quest for sustainable development[144] is apt as it reinforced the reality that it is impossible to have sustained development in a context where the environment is being degraded or exploited without concern for the future needs of society.

Conserving the environment requires resources. The amount of financial allocations to the environment sector affects the levels of implementation of environmental law and, consequently, sustainable management of the environment sector. An analysis of the 2019/2020 Budget Policy Statement shows that the environment, water and natural resource sector was pegged at a ceiling of 4.5 per cent of the national budget. With limited budgetary allocations, delivering on implementation requirements for the environmental sector becomes problematic.

H. Conclusion

Laws are an important tool for managing the environment and promoting sustainable development. They need to help provide the balance between societies' quest to develop and the demand that in the process of developing the society does not exploit its environment and natural resource base without due regard to sustainability imperatives. In the environmental field, laws have to bear in mind balancing both anthropocentric and ecocentric perspectives so that a mutually beneficial equilibrium is reached since human beings and the environment have a symbiotic relationship with each other.

The international legal regime provides broad guidance and principles that should underpin the content of laws and policies on environmental management. However, these principles are only a guide. In developing its own national laws and policies, Kenya has to take into account its unique circumstances since lawmaking must avoid adopting foreign templates without

141 Adil Najam, 'Developing Countries and Global Environmental Governance: From Contestation to Participation to Engagement' 5 *International Environmental Agreements* (2005) 303–321. Available at <https://link.springer.com/article/10.1007/s10784-005-3807-6.> (accessed on 21 November 2020).

142 Kibugi (n 139) 170.

143 Kenya National Bureau of Statistics, *Basic Report on Well-Being in Kenya*: Based on the 2015-2016 *Kenya Integrated Household Baseline Survey* (Nairobi, 2018), 44.

144 United Nations, Transforming our World: the 2030 Agenda for Sustainable Development, UNGA Resolution A/Res/70/1. Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (accessed 21 February 2020).

considering context. The success of the law will depend on the extent to which it responds to the realities that obtain in the country.

Consequently, our theories and approaches to environmental regulation need to keep pace with societal developments and change. As Tony Arnold has aptly pointed out, the developments in environmental law have moved through several epochs to a stage where we have what he describes as fourth-generation environmental law, which is characterized by a situation where '[ecological and social forces of change — and the policy imperatives that they will create will move the next generation of environmental law towards integrationist and multimodal methods of addressing complex, interdependent, dynamic, and multiscalar environmental problems.'[145] This environmental law must be much more inter-disciplinary, multifaceted and avoid the silo approach. In the Kenyan context, it is not enough to have a framework law. The law needs to appreciate that environment is not national; it is international. It needs to realize that while there are several loci of engagements, the interventions that law provides must respect and take into account the interconnected nature of the environment. Environmental law also needs to link with and borrow from other disciplines to effectively respond to the complex and ever emerging environmental challenges confronting the country and the globe. Technological innovations, for example, bring with them new ideas but also new challenges. How this responds to environmental challenges is an area that environmental law will require an adaptive and innovative approach to respond to effectively.

Such a response requires that approaches to developing laws should be more in tune with the current status of society. We have to learn from the experiences of the past while at the same time preparing for the uncertain challenges of the future. The lawmaking and policy-making process must, therefore, be more evidence-based. As the country makes new laws and policies or amends existing ones, rigorous studies require to be undertaken to produce scientific knowledge that can inform identification of alternatives and the choice of appropriate options. Proposed changes should be guided by a 'systems lens of environmental protection, integrating regulatory requirements for multiple resource concerns where possible with an eye toward practical implementation.'[146]

It is only by focusing on implementation that the rules in the law will translate to practical change on the ground. While Kenya's framework environmental law was introduced in the country with a lot of pomp,[147] the extent to which it has resulted to improved environmental governance is still contested. A critical appraisal of the theory and structure of the law and the implementation challenges helps to ensure that necessary adjustments are undertaken to make the law fit for purpose and to ensure that its implementation proceeds smoothly to result in sustainable development for the country. This task requires the collaborative effort of all stakeholders in Kenya due to the multidimensional nature of environmental challenges facing society.

145 CA Arnold, 'Fourth-Generation Environmental Law: Integrationist and Multimodal' 35(3) *William and Mary Environmental Law and Policy Review* [2011], 771-884.

146 L Ristino and S Kalen, 'Is Environmental Law Serving Society?' 26(4) *National Resources and Environment*, Retail [2012], 52-53 at 53.

147 See generally, CO Okidi, 'Concept, Structure and Function of Environmental Law' in CO Okidi,, et al (Eds) *Environmental Governance in Kenya: Implementing the Framework Law* (EAEP, Nairobi) (2008), 3-60.

CHAPTER 8

The Evolving Application of International Environmental Governance Mechanisms in Kenya

Tom Kabau

A. Introduction

This chapter seeks to contribute to a more consistent, justifiable and utilitarian application of international environmental governance mechanisms in the Kenyan legal system. Transnational mechanisms are vital as they create avenues for state co-operation and collective action for purposes of addressing global and regional environmental protection challenges.[1] This evaluation of the evolving application of international environmental governance mechanisms in Kenya is undertaken in the context of the quest for the realisation of the right to a clean and healthy environment, which is affirmed in article 42 of the Constitution.[2] International environmental governance mechanisms include legal norms originating from diverse sources,[3] soft law rules and self-regulatory mechanisms of relevant non-state actors such as transnational corporations, among others.[4] The main focus of the chapter is on the application of transnational legal norms and 'soft law' rules, which are more contentious in the case of Kenya.

Despite the merits of the direct application of some transnational legal norms on environmental governance by virtue of articles 2(5) and 2(6) of the 2010 Constitution,[5] the nature and extent of their application remains uncertain and problematic in some vital aspects. First, there is the question of the transnational legal norms implied by the rather ambiguous phrase, 'general rules of international law' under article 2(6) of the Constitution.[6] Second, there is the question of the significance and hierarchical position of environmental treaties and 'general rules of international law' in relation to other sources of law under the municipal legal order.[7] Third,

1 States establish and adopt international environmental governance mechanisms partly out of the realisation that they cannot effectively resolve ecological problems individually. In essence, the transnational and global nature of environmental problems necessitates collective action and measures. Daniel M Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) *American Journal of International Law* 596, 604.

2 Constitution of Kenya (promulgated 27 August 2010) <http://www.kenyalaw.org/lex/actview.xql?actid=Const 2010> accessed 20 August 2018.

3 Based on the sources of international legal norms recognised under the Statute of the International Court of Justice, they may include treaties, customary international law, general principles of law, and decisions of international courts and tribunals. Art 38(1) of the Statute of the International Court of Justice (26 June 1945) Annexed to the United Nations Charter (24 October 1945) 1 UNTS XVI.

4 For an overview of the diverse international environmental governance mechanisms, see: Maria Carmen Lemos and Arun Agrawal, 'Environmental Governance' (2006) 31 *Annual Review of Environment and Resources* 297, 298-299; Gavin Bridge and Tom Perreault, 'Environmental Governance' in Noel Castree and others (eds), *Companion to Environmental Geography* (Blackwell 2009) 442, 476.

5 The concept of direct application of international legal norms, as discussed in this chapter, implies that the rights and obligations espoused in such transnational sources of law are legally binding in Kenya without the necessity of prior incorporation or transformation into the national law through municipal legislation.

6 See: Michael Wabwile, 'The Emerging Juridical Status of International Law in Kenya' (2013) 13(1) *Oxford University Commonwealth Law Journal* 167, 174; Maurice Oduor, 'The Status of International Law in Kenya' (2014) 2(2) *Africa Nazarene University Law Journal* 97, 98.

7 For instance, see: Tom Kabau and Chege Njoroge, 'Application of International Law in Kenya under the 2010 Constitution: Critical Issues in the Harmonisation of the Legal System (2011) 44(3) *Comparative and International Law Journal of Southern Africa* 293, 293-310; Tom Kabau and J Osogo Ambani, 'The 2010 Constitution and the Application of International Law in Kenya: A Case of Migration to Monism or Regression to Dualism?' (2013) 1(1) *Africa Nazarene University Law Journal* 36, 36-55.

the direct application of ratified treaties may not necessarily resolve the necessity for specific domestic incorporation of non-self-executing treaty provisions through legislation.[8] Fourth, there is the question of whether the post 2010 constitutional dispensation has an implication on the enforcement of decisions of international courts and tribunals to which Kenya is a party. Fifth, there is the question of whether environmental 'soft law' rules adopted under the auspices of intergovernmental organisations have legal force domestically.

It is on the basis of the enumerated uncertainties and potential challenges in the municipal application of international environmental governance mechanisms that the chapter evaluates their theoretical and practical significance in the Kenyan legal system in order to contribute to a more consistent, justifiable and utilitarian domestic application of such norms. After this introduction, part two of the chapter examines existing uncertainties in the context of the international legal norms relating to environmental governance that are directly applicable in Kenya. Section three proceeds to address ambiguities relating to the hierarchical position and significance of the international legal norms in the domestic legal order, while part four is essentially the conclusion of the chapter.

B. Uncertainties on the Applicable International Legal Norms

Legal Norms Implied by General Rules of International Law

The uncertainty in the application of international legal norms relating to environmental governance is partly induced by the phrasing of article 2(5) of the Constitution, which provides that the 'general rules of international law' are part of the Kenyan law. Since there is no source of international law specifically referred to as 'general rules of international law', the constitutional provision is on the face of it ambiguous, and there is even the question of whether it was a case of defective drafting of the Constitution.[9] More specifically, there is the question of which sources of international legal norms are referred to by article 2(5) of the Constitution, as vital and well known non-treaty sources of the law of nations include *jus cogens* (peremptory norms), customary international law and principles. In an attempt to ascertain the import and meaning of article 2(5) of the Constitution, reference may be made to article 38(1) of the Statute of the International Court of Justice (ICJ).[10] The Statute only makes reference to 'the general principles of law recognized by civilized nations' as constituting sources of transnational legal norms in article 38(1)(c).[11] The sources of law outlined under article 38 of the Statute of the ICJ are a vital reference point for any queries regarding international legal norms, although there are still other sources not expressly enumerated under the provision.[12]

It should be noted that when evaluated superficially, the constitutional phrase is different from general principles stated in 38(1)(c) of the Statute of ICJ.[13] On one part, article 2(5) of

8 Kabau and Ambani (n 7) 43-44; Daniel P O'Connell, 'The Relationship between International Law and Municipal Law' (1960) 48(3) *Georgetown Law Journal* 431, 452.

9 See, for instance: Wabwile (n 6) 174; Oduor (n 6) 98.

10 Statute of the International Court of Justice (n 3).

11 Ibid.

12 Firew Kebede Tiba, 'Multiplicity of International Courts and Tribunals: Implications for the Coherent Application of Public International Law' (PhD thesis, University of Hong Kong 2008) 35; Shabtai Rosenne, *Practice and Methods of International Law* (Oceana Publications 1984) 17-19.

13 Wabwile (n 6) 173.

the Constitution provides that 'general rules of international law' are sources of binding legal norms in Kenya. On the other part, article 38(1)(c) of the Statute of ICJ provides that the Court, whose function is to resolve disputes in accordance with international law, shall rely on 'the general principles of law'.[14] This is after the preceding article 38(1)(b) of the Statute of ICJ providing that the Court shall also be guided by 'international custom, as evidence of a general practice accepted as law'.[15] In that context, a superficial evaluation of the constitutional phrase also seems to imply that it does not directly correlate to customary international law, which is alternatively referred to as general international law. The expression 'general international law' implies 'customary international law' particularly due to the fact that such legal norms are usually binding upon all states.[16] Kunz opines that only custom comprises 'general' international law, while treaties generally establish 'particular' international legal norms.[17] However, Kunz explains that in some exceptional cases, custom may also establish particular international law, although treaties do not likewise create general international legal norms.[18] It should be noted that in some cases, particular customary international law may exist in relation to fewer states, for instance, within a geographical region, or even in the context of only two countries.[19]

It is noteworthy that courts in Kenya have justifiably interpreted article 2(5) of the Constitution as implying, among other transnational legal norms, customary international law and principles. In the *Mitu-Bell* case at the Supreme Court, the superior Court affirmed that 'the words general rules of international law in article 2(5) of the Constitution refer to customary international norms, including *jus cogens*.'[20] By virtue of article 53 of the 1969 Vienna Convention on the Law of Treaties, a *jus cogens* is a peremptory norm of international law from which no derogation is permitted.[21] It is still noteworthy that the Supreme Court in the *Mitu-Bell* case was still not exhaustive in its evaluation of the legal norms implied by the phrase 'general rules of international law' under article 2(5) of the Constitution, particularly in the context of principles. It has credibly been argued that in the above cited *Mitu-Bell* case, the Supreme Court erred in interpreting the phrase general rules of international law to constitute only 'customary international law and *jus cogens*.'[22] The constitutional provision has previously been rightly interpreted by lower courts as permitting the application of general principles of law. For instance, in the *Kituo Cha Sheria* case, the High Court relied on the principle of non-refoulment of refugees.[23] Nonetheless, the restrictive approach of interpreting the sources of international law directly applicable in Kenya by the overriding Supreme Court in the *Mitu-Bell* case is unmerited, as it can potentially restrict the application of other vital sources of transnational legal norms such as principles.

14 Statute of the International Court of Justice (n 3).

15 Ibid.

16 Tullio Treves, 'Customary International Law' *Max Planck Encyclopedia of Public International Law* (November 2006) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1393?prd=EPIL> accessed 20 August 2018.

17 Josef L Kunz, 'General International Law and the Law of International Organisations' (1953) 47(3) *American Journal of International Law* 456, 457.

18 Ibid.

19 Treves (n 16).

20 *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* Supreme Court [2021] KESC 34 (KLR) para 140.

21 Vienna Convention on the Law of Treaties (adopted 22 May 1969, entry into force 27 January 1980) 1155 UNTS 331.

22 Ian Mwiti Mathenge, 'A critique of the Supreme Court's Pronouncements on International Law and the Right to Housing in Kenya in *Mitu-Bell Welfare Society*' (2022) 6 *Kabarak Journal of Law and Ethics* 1, 17.

23 *Kituo Cha Sheria and 8 others v Attorney General* [2013] eKLR, paras 70-71.

In addition, beyond the restriction of the direct applicability of principles of international law in Kenya, a restrictive and narrow interpretation, by the courts, of the international legal norms envisaged under article 2(5) of the Constitution may potentially disregard other sources of binding environmental governance obligations such as unilateral declarations by states,[24] obligations *erga omnes*,[25] and resolutions of the United Nations Security Council (UNSC).[26] Consequently, it should be appreciated that there are diverse sources of international legal norms relating to environmental protection and conservation that may potentially apply in the context of the constitutional phrase 'general rules of international law'.

It may be that the reference to general rules of international law under the Constitution was deliberate, rather than an outcome of poor drafting, and was aimed at providing a wide scope of diverse legal norms that may potentially apply in the domestic realm. This may be due to the fact that it may not have been reasonable to list all potential sources of international legal norms beyond treaties. As explained, other sources of binding international legal norms include unilateral declarations by states, obligations *erga omnes* and resolutions of the UNSC. Contrary to the explained restrictive approach adopted by the Supreme Court in the *Mitu-Bell* case, such international legal norms may qualify as sources of general rules of international legal norms.[27] They may universally apply to any state, and may not involve the expression of specific or particular consent to be bound, unlike the case with treaties, whose direct domestic application is separately provided for under article 2(6) of the Constitution.

It has been argued that the domestically applicable general rules of international law should be interpreted as referring to a specific form of legal norms, as they cannot be representative of diverse forms.[28] For instance, Oduor argues that if 'it is accepted that "general rules of international law" mean the same thing as "general principles of law", then the idea that the same phrase also refers to customary international law becomes untenable.'[29] Drawing from the foregoing explanation, Oduor's opinion may, however, be negated by the view that the usage of the word 'general' in the Constitution is simply to infer non-particular, all-inclusive and universal rules that may be binding on any state without the necessity of specific and explicit consent, unlike the case with treaties, whose direct application is separately provided for under article 2(6). It is instructive to note that even article 38(1) of the Statute of ICJ explicitly utilises the term 'general' in two distinct sources of transnational legal norms, namely, customary international law and principles of law.[30]

24 In the *Nuclear Tests* case, the ICJ stated that it was well settled that declarations made through unilateral acts by states with regard to 'legal or factual situations' could have the effect of establishing binding legal obligations. *Nuclear Tests (Australia v France)* (Judgment) ICJ Rep [1974] 253, 267.

25 The ICJ in the *Barcelona Traction* case stated that *erga omnes* obligations are a concern of all states due to the nature of the rights and duties involved. Since all states are generally affected, they are thus taken as having a legal interest in the observation of such obligations. *Barcelona Traction, Light and Power Company Limited* (*Belgium v Spain*) (Judgment) [1970] ICJ Rep 3, para 33.

26 The UNSC has the power to determine that certain activities within a state that are detrimental to the environment constitute a threat to international peace and security and, thus, authorise intervention by states to remedy the matter, whether through the use or non-use of military force by virtue of its powers under arts 24, 25 and ch VII of the UN Charter. See, United Nations Charter (24 October 1945) 1 UNTS XVI.

27 See *Mitu-Bell* Supreme Court, para 140.

28 See, for instance, Oduor (n 6) 107.

29 Ibid.

30 Statute of the International Court of Justice (n 3).

Application of Peremptory Norms of International Law

The direct application of peremptory norms in Kenya by virtue of article 2(5) of the Constitution has been affirmed by the courts.[31] The often cited examples of *jus cogens* include 'principle of non-use of force; the right of self-determination; and the prohibitions of slavery, genocide, *apartheid*, crimes against humanity, and torture.'[32] Peremptory norms may be relevant to environmental governance in Kenya. For instance, the subjugation of a group of people may partly be due to widespread and gross destruction of their environment and natural resources, which in turn threatens their economic and social sustenance, thus entitling them to assert the right to self-determination.

Application of Customary International Law

The Kenyan courts have already addressed the uncertainty in the drafting of article 2(6) of the Constitution by stating or implying that customary international law is among the transnational legal norms envisaged to directly apply within the Kenyan municipal legal system.[33] The existence of customary international law relating to environmental protection and conservation requires an examination of state practice and *opinio juris sive necessitates.*[34] The concept of *opinio juris* implies the notion that the conduct of a state in a particular way is actually necessitated or influenced by its belief that the act is required for purposes of conforming to a legal obligation.[35]

The existence of specific international environmental governance legal norms has been asserted on the basis of customary international law. For instance, Bodansky acknowledges the claims that the prohibition of trans-frontier damage has essentially developed under customary international law.[36] Kenyan courts have explicitly made reference to customary international law while dealing with legal obligations for the protection and preservation of the environment. In *Mohamed Ali Baadi* case, the High Court specifically affirmed that 'public participation in environmental law issues and governance has risen to the level of a generally accepted rule of customary international law.'[37]

A challenge that has been identified in relation to the enforcement of international customary norms relating to environmental governance is that they should 'have a relatively high degree of specificity in order to exert a constraining influence on states.'[38] In cases of high levels of vagueness, states, including Kenya, may essentially undertake certain actions at their full discretion and justify whatever activities through the argument that it is consistent with

31 See, for instance: *Mitu-Bell* Supreme Court, para 140; *Kituo Cha Sheria* (n 23) para 71 (referring to the direct application of principle of non-refoulement of refugees in Kenya and asserting that it is also a peremptory norm of international law. However, the assertion that the principle of non-refoulement also constitutes a peremptory norm is open to debate).

32 Ulf Linderfalk, 'The Effect of *Jus Cogens* Norms: Whoever Opened Pandora's Box, Did You Ever Think about the Consequences?' (2007)18(5) *European Journal of International Law* 853, 856 (italics in the original).

33 See: *Mitu-Bell* Supreme Court *(*n 20) para 140; *Mohamed Ali Baadi and others v Attorney General and 11 others* [2018] eKLR para 221; *Karen Njeri Kandie v Alssane Ba and another* [2015] eKLR, 7-8.

34 The ICJ has clarified that the formation of customary international rules requires both settled state practice and *opinio juris sive necessitates.* See, *North Sea Continental Shelf* (*Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands*) (Judgment) [1969] ICJ Rep 3 para77.

35 Ibid.

36 Daniel Bodansky, 'Customary (and Not so Customary) International Environmental Law' (1995) 3(1) *Indiana Journal of Global Legal Studies* 105, 106-107. See also, Alexandre Kiss and Dinah Shelton, *International Environmental Law* (3rd edn, Transnational Publishers 2004) 49.

37 *Baadi* (n 33) para 221.

38 Bodansky 'Customary' (n 36) 118.

customary international law.[39] In that context, Bodansky argues that general rules of customary law should set the terms of international negotiations for the adoption of treaties and undertakings of concrete actions.[40]

Application of Principles of Environmental Law

Principles of environmental law, as sources of transnational legal rights and obligations, are premised on the 'principles that are common to the major legal systems of the world, if not all of them.'[41] At the transnational level, significant environmental governance principles include: sustainable development, prohibition of transboundary environmental damage, sustainable use, precautionary principle, polluter pays principle, international cooperation in management of natural resources, prevention principle, and common but differentiated responsibilities, among others.[42] Some of the international legal principles on environment and natural resources management have specifically been affirmed by the Constitution and sectoral legislation.[43]

Both international and Kenyan courts have affirmed that general principles are a source of international legal obligations. For instance, in the *Advisory Opinion on the Legality of Nuclear Weapons* case, the ICJ affirmed that '[r]espect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.'[44] In the Kenyan context, the High Court in the *Kituo Cha Sheria* case relied upon the principle of non-refoulment of refugees.[45] Nonetheless, as already discussed, one of the faults of the Supreme Court judgment in the *Mitu-Bell* case was its failure to evaluate the question of applicability of principles of international law in Kenya, despite the Court having the opportunity to provide extensive guidance on the effect of articles 2(5) and 2(6) of the Constitution in the context of all relevant transnational legal norms.[46]

Application of Treaties

Treaties provide states with a mechanism for developing more detailed rules and supervisory machinery for environmental governance.[47] By virtue of article 2(6) of the Constitution, treaties ratified by Kenya are direct sources of law in the domestic legal system. However, the provision is also potentially problematic with regard to applicable international environmental conventions, especially in the context of non-self-executing treaties, and pacts ratified before the adoption of the 2010 Constitution.

International treaties on environmental governance are legally binding to states that have ratified the agreements.[48] In that context, with international law directly applicable in Kenya, it is expected that the rights and duties expressed in ratified environmental treaties will be

39 Ibid.
40 Ibid 119.
41 Kiss and Shelton (n 36) 49-50.
42 Kariuki Muigua, Didi Wamukoya and Francis Kariuki, *Natural Resources and Environmental Justice in Kenya* (Glenwood Publishers 2015) 17.
43 Ibid.
44 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) ICJ Rep [1996] 226, 242.
45 *Kituo Cha Sheria* (n 23) paras 70-71.
46 See *Mitu-Bell* Supreme Court (n 20).
47 Bodansky 'Customary' (n 36) 106.
48 Kiss and Shelton (n 36) 42.

enforced domestically without the need for national legislation. However, it should be noted that at times, treaties may have few precise duties created, with their provisions largely relating to the mechanisms and regulations that states should adopt in order to achieve the objectives of the convention.[49] Such obligations, usually articulated in general terms within the treaty, certainly require domestic legislative, policy or executive action for implementation, and may be referred to as non-self-executing treaty provisions.[50] Therefore, environmental treaties may contain both self-executing and non-self-executing obligations.[51] The concept of non-self-executing treaty provisions exemplify one of the paradoxes of the direct application of international law in states, since implementing legislation is still necessary.[52] O'Connell clarifies that:

> [T]he constitution may permit a specific category of treaty [law] to be internally operative, but if a particular treaty within this category is not intended for immediate internal application some further action would seem to be necessary. Hence, for a treaty to apply internally, *ex proprio vigore,* it must be self-executing in both international law and municipal law.[53]

It seems that one of the concerns of article 21(4) of the Constitution is the domestic implementation of non-self-executing treaties.[54] Article 21(4) of the Constitution requires legislation to be enactment and implemented to facilitate the protection and realisation of human rights and fundamental freedoms established under international law. It should be noted that some of the core general principles of law, which are also affirmed in international environmental treaties,[55] have been incorporated in the Kenyan framework law and sectoral statutes relating to the protection of the environment. This increases opportunity of satisfying international legal obligations and enhances prospects for greater protection of the environment in cases where some of the responsibilities enshrined in some of the treaties are not self-executing. For instance, section 3(5) of the Environmental Management and Co-ordination Act provides that the Environment and Land Court (ELC), in resolving environmental disputes, shall be guided by the principles of sustainable development.[56] Section 3(5) of the Act proceeds to specifically articulate some of the principles of sustainable development that should guide the ELC, which include the pre-cautionary principle, the polluter-pays principle, the principle of intergenerational equity, and the principle of international co-operation in the management of transnational environmental resources.[57] Section 4(2) of the Climate Change Act requires the relevant public officers to 'ensure promotion of sustainable development under changing climatic conditions' in the discharge of their duties.[58]

49 Ibid.
50 Ibid.
51 Ibid.
52 Kabau and Ambani (n 7) 43.
53 O'Connell (n 8) 452.
54 Kabau and Ambani (n 7) 44.
55 Treaties often affirm general principles of law, such as that of sustainable development. For instance, art 8(e) of the Convention on Biological Diversity obligates states to undertake 'sustainable development' in areas neighbouring protected regions in order to further the preservation of such ecosystems. Convention on Biological Diversity (adopted 5 June 1992, entry into force 29 December 1993) 1760 UNTS 79.
56 Environmental Management and Co-ordination Act, No 8 of 1999.
57 Ibid.
58 Climate Change Act, No 11 of 2016.

As Kiss and Shelton observe, '[n]on-self-executing provisions of treaties encompass an obligation on the part of states to enact the necessary legislation or regulations.'[59] In that context, for the rights or obligations enshrined in a treaty to be effectively and practically implemented, realised or enforced in Kenya, domestic legislation and regulations are essential. An example of non-self-executing treaty obligation is article 8(k) of the Convention on Biological Diversity (CBD), which requires states to develop appropriate legislative and regulatory mechanisms 'for the protection of threatened species and populations.'[60] In addition, article 5(2) of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation to the Convention on Biological Diversity requires states to take legislative and policy measures to ensure that communities receive fair and equitable benefits arising from the utilisation of genetic resources that they have historically held and preserved.[61] Further, article 5(e) of the United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa requires states to enact relevant legislation, policies and action programmes to combat desertification.[62]

On the other part, self-executing treaty provisions may refer to those rights and obligations that can be enforced even in the absence of further domestic legislation or regulations. For instance, under article 8(h) of the CBD, state parties are required, as far as possible and appropriate, to '[p]revent the introduction of, control or eradicate … alien species which threaten ecosystems, habitats or species:'[63] In that context, it is plausible to argue that public interest litigation can be undertaken through the Kenyan courts to compel the Government to stop importation into Kenya of varieties of plant propagating materials that result in noxious vegetation that is detrimental to the environment, on the basis of the CBD provision, even in the absence of a similar obligation under domestic legislation.

The Supreme Court in the *Mitu-Bell* case argued that the debate on 'whether a state is monist or dualist, is increasingly becoming sterile' as modern treaties 'are Non-Self Executing, which means that, they cannot be directly applicable in the legal systems of states parties, without further legislative and administrative action.'[64] The finding by the Supreme Court that the monist and dualist debate is increasingly sterile due to the lack of direct applicability of non-executing treaty obligations seems inappropriate, particularly given that it not even backed by any empirical evidence by the Court. In particular, the Supreme Court provided no evidence to suggest that international treaty making by the relevant actors was increasingly resulting in non-self-executing obligations rather than self-executing ones. In that sense, that suggestion of increasing reduction in self-executing treaty obligations without evidence of the same cannot be a basis of negating the relevance of theoretical underpinnings, particularly the monist and dualist dichotomy, in evaluating and interpreting the nature and scope of the application of international law in a state. Further, it is plausible to expect existing treaty obligations relating to

59 Kiss and Shelton (n 36) 42.

60 Convention on Biological Diversity (n 55).

61 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation to the Convention on Biological Diversity (adopted 29 October 2010, entry into force 12 October 2014) UN Doc UNEP/CBD/COP/DEC/X/1 (29 October 2010).

62 United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (adopted 17 June 1994, entry into force 26 December 1996) 1954 UNTS 3.

63 Convention on Biological Diversity (n 55).

64 *Mitu-Bell* Supreme Court (n 20) para 133.

environmental protection to constitute both self-executing and non-self-executing obligations, as has been demonstrated in the context of articles 8(h) and 8(k) of the CBD.[65]

Beyond the issue of self-executing and non-self-executing treaties, it should be noted that an outstanding peculiarity of environmental agreements is that they at times include measures to support developing states such as Kenya conform to and implement their obligations. An example is the Global Environment Facility (GEF), which is engaged in funding and supporting the Kenyan Government in diverse areas of sustainable development.[66] The general principle of sustainable development is affirmed in treaties such as the CBD.[67] The GEF support significantly contributes to the financial and technical capacity of Global South states such as Kenya to implement their treaty obligations. For instance, a vital component of sustainable development is reliance on green renewable sources of energy. In that context, GEF has funded feasibility studies, trainings and equipment procurement by the Kenya Electricity Generating Company Limited (KENGEN) for purposes of developing geothermal energy sources.[68] As a consequence, GEF has contributed to the commissioning of some geothermal power stations by KENGEN, such as those in Olkaria, Naivasha.[69]

Despite the foregoing discussion on the issue of self-executing and non-self-executing treaties in the post-2010 constitutional context, it is worthy to point out that the previous dualist legal system under the repealed Constitution had evolved to an extent that treaties could be relied upon for persuasive purposes, and to fill lacunas in the law, where not in conflict with domestic sources of law.[70] For instance, in the *Peter K Waweru* case, the High Court affirmed the right to satisfactory environment that is favourable for development, as enshrined in article 24 of the African Charter on Human and Peoples' Rights.[71]

Application of treaties adopted before the 2010 Constitution

Another potentially problematic issue in the context of the direct application of environmental treaties is with regard to the conventions adopted before the promulgation of the 2010 Constitution and the subsequent enactment of the Treaty Making and Ratification Act (TMRA).[72] This is due to the fact that article 94(5) of the Constitution provides that with the exception of Parliament, no entity has the authority to legislate for the country, except where such a power is granted by the Constitution or legislation. Articles 8 and 9 of TMRA require that Parliament provides prior consent before a treaty is ratified by Kenya, thus permitting parliamentary involvement in the generation of transnational norms that have legal force in Kenya.[73]

With regard to treaties ratified before the adoption of the 2010 Constitution, Wabwile is of the view that they should not be applicable domestically as it would amount to retrospective

65 Convention on Biological Diversity (n 55).

66 See, Global Environment Facility, 'Kenya: Transformative Support' (20 October 2016) <https://www.thegef.org/news/kenya-transformative-support> accessed 6 February 2018.

67 See, for instance, art 8(e) of the Convention on Biological Diversity (n 55).

68 Global Environment Facility (n 66).

69 Ibid.

70 See generally, the Court of Appeal arguments in *Mary Rono v Jane and William Rono* [2005] KeCA paras 21-24. See also, Kabau and Njoroge (n 7) 296-297.

71 *Peter K Waweru v Republic* [2006] eKLR 11; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entry into force 21 October 1986) OAU Doc CAB/LEG/67/3 rev 5.

72 Treaty Making and Ratification Act, No 45 of 2012.

73 Ibid.

application of the law.[74] He points out that although the Constitution fails to unambiguously address the status of conventions adopted before its promulgation, it does not seem to provide for their retrospective direct application.[75] He argues that the use of the words 'shall form part of the law' in article 2(6) of the Constitution indicates that only treaties that will be ratified after its promulgation and in the future should apply directly.[76] The issue presents challenges to Kenyan courts and tribunals with regard to whether they can directly apply the diverse treaties ratified before 2010 in relation to environmental governance. It seems, however, inappropriate to argue that the mere direct utilisation of treaties adopted before the 2010 Constitution amounts to a retrospective application of the law. This is due to the fact that the act or omission has occurred after the adoption of the 2010 Constitution, and the application of the treaties is certainly not in relation to earlier activities. Affirming the applicability of treaties ratified before the promulgation of the 2010 Constitution, the High Court in *Karen Kandie* case observed that there is no constitutional cut-off period or futuristic imperative on the domestic application of conventions.[77]

However, even after justifying the non-retrospectivity of the application of treaties ratified before 2010, there is the question of whether such conventions, in addition to those that may have been ratified after the promulgation of the 2010 Constitution but before the adoption of the TMRA, are in conflict with article 94(5) of the Constitution. The constitutional provision, as explained, requires that legislation be by Parliament, or an entity authorised by the Constitution or statute. In that case, it seems the most plausible basis for the direct application of all treaties ratified before the adoption of the TMRA is through the explicit recognition of the direct application of conventions ratified by Kenya under article 2(6) of the Constitution from the date of its promulgation.

Decisions of International Courts and Tribunals

There is uncertainty on the relevance of the decisions of international courts and tribunals in relation to the domestic application of international environmental law obligations, and it is in two contexts. The first aspect is in relation to the Kenyan courts reliance on international judicial decisions to determine and ascertain relevant international legal norms on environmental governance. The second issue is whether decisions of international courts and tribunals on a specific matter in which Kenya is the subject have direct legal force in the country, and as such, should be complied with.

There is no doubt, with regard to the first issue, that Kenyan courts have discretion to refer to the decisions of international courts and tribunals to ascertain various rights and duties espoused by international legal norms in the context of environmental governance. There seems to be no constitutional or legal obligation for Kenyan courts and tribunals to be bound by precedents established by transnational judicial institutions. Kenyan courts cite decisions of international courts and tribunals as persuasive interpretative guides, but not due to the fact that they are a binding precedent.[78]

74 See, Wabwile (n 6) 179.
75 Ibid.
76 Ibid.
77 *Kandie* (n 33) 8.
78 Archibold Ombongi Nyarango, 'A Jigsaw Puzzle or a Map? The Role of Treaties under Kenya's Constitution' (2018) 62(1) *Journal of African Law* 25, 42.

In particular, it should be noted that even amongst international courts and tribunals, there is no explicit obligation to follow precedent, and consistency with earlier decisions is usually a discretionary approach by the subject judicial institutions. In that context, article 59 of the Statute of the ICJ states that the Court's decisions have 'no binding force except between the parties and in respect of that particular case.'[79] It should be noted, however, that in practice, the ICJ and other international courts and tribunals often refer to earlier precedents for guidance.[80] In relation to the ICJ's prevalent practice of relying on earlier decisions, Shaw observes that the Court has striven to follow its previous judgments and insert a measure of certainty in the adjudicative process.[81]

Similarly, although Kenyan courts and tribunals are not bound to follow precedent while addressing a similar issue that has been decided upon by an international court or tribunal, where circumstances permit, it may be necessary to rely on the judicial reasoning of the transnational judicial institution for purposes of establishing certainty and coherence in the law. This is due to the fact that the direct application of international legal norms has resulted in the unity of international and domestic law and, therefore, Kenyan courts should harness certainty, coherence and consistency in the interpretation of the resultant rights and obligations. It is also apparent that Kenyan courts may have to rely on international courts and tribunals decisions to conceptualise and delineate some sources of international law on environmental governance such as *jus cogens*, obligations *erga omnes* and unilateral declarations by states.

With regard to the enforcement of decisions of international courts and tribunals concerning environmental rights and obligations in which Kenya is the subject, it seems plausible to argue that if the state has ratified the constitutive instrument establishing the judicial institution, then its decisions should be implemented and complied with. Some of the treaties that Kenya has ratified also establish courts and tribunals that are mandated to 'make binding decisions upon member states.'[82] In that context, Kenya is bound by the decisions of the African Court on Human and Peoples' Rights (African Court) by virtue of its ratification of the Protocol that established the regional judicial organ.[83] In *African Commission on Human and Peoples' Rights v Republic of Kenya* (*Ogiek* case), the African Court was of the view that Kenya had violated the right to development of the Ogiek indigenous community by evicting its members from their ancestral land in the Mau Forest without their consent and meaningful consultation.[84] In an effort to implement the African Court's findings in a complex environmental conservation matter, the Government formed an advisory Task Force on 25 October 2018.[85] The Task Force was to recommend modalities of implementing the African Court's judgment, in addition to generally

79 Statute of the International Court of Justice (n 3).

80 Ian Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press 2008) 21.

81 Malcolm Shaw, *International Law* (6th edn, Cambridge University Press 2008) 110.

82 Nyarango (n 78) 41-42.

83 See, Protocol to the African Charter on Human and Peoples` Rights on the Establishment of an African Court on Human and Peoples` Rights <http://www.achpr.org/instruments/court-establishment/> accessed 6 February 2019.

84 *African Commission on Human and Peoples' Rights v Republic of Kenya* [2017] African Court on Human and Peoples' Rights, Application No 006/2012 (Judgment), paras 202-211.

85 See, Kenya Gazette, 'Task Force on the Implementation of the Decision of the African Court on Human and Peoples' Rights in Respect of the Rights of the Ogiek Community of Mau and Enhancing the Participation of Indigenous Communities in the Sustainable Management of Forests' Vol CXX - No 134 (2 November 2018) 3824-3825

advising on the appropriate mechanisms for sustainable and participatory management of forests that are also the ancestral habitats of indigenous communities.[86]

Legal Value of International 'Soft Law' Norms

The phrase 'soft law' refers to various 'non-legally binding' norms that, nevertheless, regulate the conduct of states and international organisations.[87] Despite the fact that the soft law norms are not legally binding solely on their own, they are frequently cited in order to interpret or fill lacunas in the law.[88] Kenyan courts have in some instances commendably relied on soft law rules such as resolutions and declarations of intergovernmental organisations in order to affirm rights and obligations. For instance, in the *Mohamed Ali Baadi* case, the High Court affirmed the provisions of Principle 10 of the 1992 Rio Declaration, pointing out that it obligates states to 'establish a process for citizens and civil society to obtain environmental information, participate in environmental decision-making and access justice in environmental matters.'[89]

However, the COA in *Mitu-Bell* case seems to have erroneously regressed the role of international soft law rules when it disregarded the United Nations Guidelines on Evictions, including the High Court's reliance on such norms in arriving at the appealed decision.[90] The COA proceeded to specifically state that the UN and other intergovernmental organisations are not complementary legislatures for Kenya.[91] In *Mitu-Bell* at the Supreme Court, the COA was criticised for its disregard of the Guidelines.[92] The Supreme Court correctly pointed out that whereas resolutions, declarations, comments and guidelines by intergovernmental organisations such as the UN do not constitute binding legal norms, they are in the form of vital soft law.[93] The Supreme Court instructively pointed out that such declarations and resolutions can evolve into legal norms, including in the form of customary international law, as was the case with the 1948 Universal Declaration of Human Rights.[94] The Court also noted that the Guidelines constitute 'tools or aids directed to states parties to help the latter in implementing' the respective treaty obligations.[95] Consequently, the Supreme Court affirmed that nothing bars a Kenyan Court from 'making reference to the Guidelines as an interpretative tool aimed at breathing life into article 43 of the *Constitution*.'[96]

Soft law rules have immense legal value as interpretative guides that assist in filling lacunas in the law, and Kenyan courts should progressively utilise them in interpreting obligations relating to environmental protection. Further, it is noteworthy that the UN and other an intergovernmental organisation that generate soft law are formed through the sharing and pooling of sovereignty by states, including Kenya.

86 Ibid.
87 Shahla Ali and Tom Kabau, 'Non-State Actors and the Evolution of Humanitarian Norms: Implications of the Sphere Charter in Health and Nutrition Relief' (2014) 5(1-2) *Journal of International Humanitarian Legal Studies* 70, 79.
88 Dinah Shelton, 'International Law and "Relative Normativity"' in Malcolm D Evans (ed), International Law (4th edn, Oxford University Press 2014) 137, 161.
89 *Baadi* (n 33) para 253. See also, Rio Declaration on Environment and Development, UN Doc A/CONF.151/26 (Vol I) (12 August 1992).
90 *Kenya Airports Authority v Mitu-Bell Welfare Society and 2 others*, Court of Appeal [2016] eKLR, paras 115-118.
91 Ibid.
92 *Mitu-Bell* Supreme Court (n 20) para 136.
93 Ibid, para 141.
94 Ibid. See Universal Declaration of Human Rights, UNGA Res 217A (III) (10 December 1948).
95 *Mitu-Bell* Supreme Court (n 20) para 143.
96 Ibid.

C. The Hierachical Position of International Legal Norms

There has been ambiguity in the context of the relationship between international and domestic law in the Kenyan legal system in the post-2010 Constitution, which has been demonstrated by divergent decisions of the Kenyan courts. To demonstrate the uncertainty on the hierarchical position of international law in Kenya, the approaches adopted by the courts, and the implication of the 2021 Supreme Court judgment in the *Mitu-Bell* case, it may be appropriate to evaluate the issues in the context of two periods. The first relates to the period between the promulgation of the 2010 Constitution and the 2021 *Mitu-Bell* judgment by the Supreme Court. The second one is in the context of the hierarchical position of international law in the post *Mitu-Bell* judgment period.

The Post 2010 Constitution to the 2021 Mitu-Bell Case Period

In the 2012 *Beatrice Wanjiku* case, the High Court explicitly acknowledged that there was uncertainty on the relationship between international legal rules and domestic law.[97] As an illustration of the uncertainty on the hierarchical position on international legal norms in Kenya during the period, it is instructive to examine some of the jurisprudence from the courts. First, in the *Zipporah Mathara* case, the High Court held that the provisions of article 11 of the International Convention on Civil and Political Rights (ICCPR) superseded statutory provisions while declining to commit a judgment debtor to civil jail.[98] Second, the COA in the *Karen Kandie* case stated that 'international treaties and conventions are part of the laws of Kenya and are at least at par with other laws enacted by Parliament.'[99] Third, in the *Beatrice Wanjiku* case, ratified treaty obligations were subordinated to a position below both the Constitution and statutory legislation.[100] Nonetheless, it is arguable that the doctrine of applying judicial precedents established by superior courts could have assisted in resolving the uncertainty regarding hierarchical relationship during that period, with the High Court and lower courts and tribunals required to consistently adopt the approach postulated by the COA in the *Karen Kandie* case.[101]

The uncertainty on the hierarchical position of international law had also been exacerbated by theoretical ambiguities on the nature and extent of the application of transnational legal norms in Kenya. For instance, in the *Karen Njeri Kandie* case, the Court of Appeal was of the questionable view that under the 2010 Constitution, Kenya transitioned 'from a dualist country to a monist one'.[102] On the other hand, the former Chief Justice, David Maraga, had credibly argued that article 2(6) of the Constitution introduced a paradigm shift in Kenya's approach to the application 'of treaty provisions from dualism to neither pure dualism nor pure monism.'[103]

97 *Beatrice Wanjiku and another v Attorney General and another* [2012] eKLR, para 18. See also, Wabwile (n 6) 176-177.

98 See, *Re the Matter of Zipporah Wambui Mathara* [2010] eKLR paras 6-10. See also, International Covenant on Civil and Political Rights (adopted 16 December 1966, entry into force 23 March 1976) 999 UNTS 171.

99 *Kandie* (n 33) 8. See also similar reasoning in *Charles Lutta Kasamani v Concord Insurance Co Ltd and Deputy Registrar, Milimani High Court, Commercial and Admiralty Division* [2018] eKLR, para 35.

100 See, *Wanjiku* (n 97) para 20; Nicholas Wasonga Orago, 'The 2010 Kenyan Constitution and the Hierarchical Place of International Law in the Kenyan Domestic Legal System: A Comparative Perspective' (2013) 13 *African Human Rights Law Journal* 415, 433.

101 *Kandie* (n 33) 8.

102 Ibid.

103 David Kenani Maraga, 'The Legal Implications of Article 2(6) of the Constitution of Kenya 2010' (LLM thesis, University of Nairobi 2012) 83.

It is essential to appreciate that monism is not merely the unity of both national and international legal norms. As explained by Kelsen, besides the unity of both international and domestic systems, one of the two legal orders has full supremacy over the other under monism.[104] As one of the eminent theorists associated with the formulation and articulation of monism, Kelsen's views are certainly weighty and authoritative. For instance, writing in the 1960s, O'Connell observed that at the time, monism was 'associated with the doctrine of Kelsen.'[105] Further, just like Kelsen, O'Connel points out that monism is based on the supremacy of either international law over all municipal law, or the domestic law over international legal norms, though he qualifies the second form as monism in reverse.[106] It seems plausible to argue that if Kenya subscribes to monism in the post 2010 Constitution context, 'international law would either be at the top of the hierarchy, prevailing over all domestic legislations including the Constitution, or be at the bottom of the legal order, inferior to all municipal law.'[107] As discussed in the section below, Kenya could not be regarded a monist state in the period between the promulgation of the 2010 Constitution and the 2021 *Mitu-Bell* judgment as there was the interaction between international and municipal legal norms without the clear cut supremacy of either.

The theory of harmonisation perspectives

Using the explanation given by Ludwikowski to describe the Kenyan legal system during the period between the promulgation of the 2010 Constitution and the 2021 *Mitu-Bell* judgment, it was one in which international and domestic legal regimes overlapped and penetrated each other, barring 'the concept of clear-cut supremacy of one single set of legal norms over all others.'[108] In that sense, it was apparent that as former Chief Justice David Maraga postulated, the constitutional dispensation during the period was neither monist nor dualist in the context of the application of international law in Kenya.[109] The practice in Kenya was partly due to the continuing globalisation of the law, which is occurring in other states as well. As Ludwikowski points out, the legal systems of states are increasingly being affected by the globalisation of the law, resulting in the elimination of the classical distinctions between monism and dualism through their adoption of multi-focal approaches.[110]

Consequently, the constitutional contextualisation of the application of international law in Kenya during the period was most appropriately describable from neither the monist nor dualist perspective, but rather, from the theory of harmonisation context. The conceptualisation of the application of international law in Kenya through the theory of harmonisation during the period by Kabau and Njoroge had subsequently been endorsed by other commentators.[111]

104 Hans Kelsen, *Principles of International Law*, Robert W Tucker (ed), (2nd edn, Holt, Rinehart and Winston 1967) 580.
105 O'Connell (n 8) 433.
106 Ibid 432.
107 Kabau and Ambani (n 7) 39.
108 Rett R Ludwikowski, 'Supreme Law or Basic Law? The Decline of the Concept of Constitutional Supremacy' (2001) 9 *Cardozo Journal of International and Comparative Law* 253, 253-254.
109 Maraga (n 103) 83.
110 Ludwikowski (n 108) 253-254.
111 For the conceptualisation of the application of international law in Kenya through the theory of harmonisation, see, Kabau and Njoroge (n 7) 295-296; For subsequent analysis, see: M Kiwinda Mbondenyi and J Osogo Ambani, *The New Constitutional Law of Kenya: Principles, Government and Human Rights* (Clarion Ltd 2012) 31; Kabau and Ambani (n 7) 39-40; Wabwile (n 6) 178.

The theory of harmonisation is premised on the notion that international law is part of domestic law and, therefore, available for utilisation in domestic courts.[112] However, in the exceptional instances of a conflict between the international and domestic legal norms, the theory postulates that the judge is obliged to resolve the inconsistency in accordance with his jurisdictional rules.[113] In the context of the theory of harmonisation, there is no elevation of one legal order over the other, but both international and municipal law operate on the same level in the domestic legal system.[114] Dugard and his collaborating authors have also explained that the realisation that it is practically not possible to have international legal norms supersede basic municipal laws, such as the constitution, has resulted in the emergence of the theory of harmonisation through qualification to the traditional monist approach.[115]

As a further endorsement of the theory of harmonisation in the absence of an overriding legal regime, it is argued that what actually occurs in the context of the application of, and interaction between, international and domestic legal norms is essentially a conflict of obligations, a concept originally associated with Gerald Fitzmaurice.[116] In that context, granting the judges the discretion to harmonise the two sources of legal obligations in their application in the domestic realm is propounded as being more practical than an approach that postulates the automatic supremacy of one legal order over the other.[117] For instance, more recent or specific domestic legislation, or one that is legislated in order to resolve a particular mischief, may supersede inconsistent earlier rules of international law, and vice versa, in the application of the two sources of legal norms by Kenyan judges. Relying on the Kenyan jurisdictional rules to address a potential conflict between treaty provisions and statutory clauses during the period, the High Court in *Charles Lutta Kasamani* case commendably observed that in cases where 'two statutes appear to contradict each other it is a general principle of statutory interpretation that as much as possible, the statutes should be read and interpreted in a manner that brings harmony.'[118]

The Post *Mitu-Bell* Case Period

In the 2021 *Mitu-Bell* case, the Supreme Court affirmed that articles 2(5) and 2(6) of the Constitution required Kenyan Courts 'to apply international law (both customary and treaty law) in resolving disputes before them, as long as the same are relevant, and not in conflict with, the *Constitution*, local statutes, or a final judicial pronouncement.'[119] The Supreme Court proceeded to opine as follows:

Where for example, a court of law is faced with a dispute, the elements of which, require the application of a rule of international law, due to the fact that, there is no domestic law on the same, or there is a lacuna in the law, which may be filled by reference to international law, the court must apply the latter, because, it forms part of the law of Kenya.[120]

112 O'Connell (n 8) 440.
113 Ibid. See also, John Dugard, Daniel L Bethlehem and Max Du Plessis, *International Law: A South African Perspective* (3rd edn, Juta and Company Ltd 2008) 47-48.
114 O'Connell (n 8) 440.
115 Dugard, Bethlehem and Plessis (n 113) 47-48.
116 IA Shearer, *Starke's International Law* (11th edn, Oxford University Press 1994) 66.
117 Ibid.
118 *Kasamani* (n 99) para 36.
119 *Mitu-Bell* Supreme Court (n 20) para 132.
120 Ibid.

The *Mitu-Bell* judgment represented a significant departure from the earlier merited harmonisation approach in the post 2010 constitutional dispensation context, with the overriding Supreme Court subordinating international legal norms to municipal laws in the hierarchy of legal norms. It is noteworthy that the Supreme Court deficiently failed to make any reference to African customary law, a vital source of legal norms at the domestic level. Indeed, as Magnus Killander and Horace Adjolohoun argue, in an African state context such as Kenya, the direct applicability of international law requires constitutional and statutory interpretation, and may have a bearing on the development of common law and customary law.[121] Whereas the Supreme Court did not explicitly make reference to the African customary law, it can be implied from its *Mitu-Bell* judgment that it impliedly affirmed the superiority of such norms to international law. This may be implied from the assertion by the Supreme Court that international law is to be relied upon only in the context of lack of a domestic law on a matter, or a lacuna that necessitates reference to transnational legal norms.[122]

The pronouncement by the Supreme Court has noteworthy demerits, the first being that it is regressive, by subordinating the applicability of international law to the position similar to the dualist legal regime in Kenya before the promulgation of the 2010 Constitution.

In the 2005 *Mary Rono* case, the COA (the highest Court then) affirmed that both customary international law and treaty law could be applied by the Kenyan courts even in the absence of implementing legislation, 'provided that there … [was] no conflict with existing state law'.[123] The COA pronouncement in the *Mary Rono* case reflected the developments in jurisprudence at the time, in which international law was being relied upon by Kenyan Courts as an interpretative aid, and to fill legal gaps, provided it was not in conflict with domestic law. It is thus doubtful that the intent of explicitly pronouncing the direct applicability of international law in Kenya as part of constitutional reforms in 2010 was to, nonetheless, stagnate its significance and relevance at the very subordinate position that it previously occupied. It is unpersuasive that international law, explicitly recognised as a direct source of law in Kenyan under the Constitution, can operate as being merely an interpretative aid, or to only fill gaps in the domestic legal regime. Highlighting the demerit of the Supreme Court pronouncement in the 2021 *Mitu-Bell* case, Mathenge credibly argues that:

> In a true sense, international law then is not applicable in Kenya unless … there is a gap in the law. This raises the question of how a part of Kenya's laws can be merely a gap filler. Does international law form part of Kenya's legal order? If yes, what bars international law from applying in all situations? The Supreme Court holding has no constitutional backing since international law forms part of the laws of Kenya.[124]

It is noteworthy that such a subordinate positioning of international law may result in Kenyans not benefiting from the more progressive developments in the international legal regime,

121 Magnus Killander and Horace Adjolohoun, 'International law and Domestic Human Rights Litigation in Africa: An Introduction' in Magnus Killander, *International law and Domestic Human Rights Litigation in Africa* (Pretoria University Law Press 2010) 3, 15.

122 *Mitu-Bell* Supreme Court (n 20) para 132.

123 *Rono* (n 70) para 21.

124 Mathenge (n 22) 11.

particularly those relating to the environmental and human rights protection. The harmonisation approach adopted by the COA in the 2015 *Karen Kandie* case, in which international law was regarded to being, on the minimum, 'at par with other laws enacted by Parliament' is a more merited approach, as it permits Kenyans to benefit from progressive developments in the transnational legal regime.[125] As Shearer postulated, affording domestic courts the discretion to rely upon and harmonise the rights and obligations arising from both the international and the national legal regimes is propounded as being more practical that the notion of the spontaneous supremacy of one legal order over the other.[126]

Second, as Mathenge also points out, the subordination of international legal norms was made by the Supreme Court without any explanation on how it arrived at that hierarchical order, for instance, the justification for statutes superseding international law.[127] Given the significance of the issue of the nature and extent of the application of international law in Kenya, the Supreme Court was under a duty to arrive at a well-reasoned comprehensive decision.[128]

D. Conclusion

The direct application of the diverse and vital international legal norms relating to environmental governance in Kenya enhances prospects for the realisation of the constitutional right to a clean and healthy environment. However, as explained in the chapter, there has been uncertainty on the various forms of international legal norms that are applicable in Kenya, in addition to ambiguity with regard to their hierarchical position in the domestic legal pyramid. The continuing uncertainty is evident in some of the decisions of the Kenyan courts and commentaries relating to the direct application of international law in Kenya.

In that context, the chapter has evaluated the uncertainties in an effort to contribute to a more consistent, justifiable and utilitarian application of the vital international environmental governance mechanisms in Kenya. The Supreme Court in the 2021 *Mitu-Bell* case partially resolved the uncertainty in respect to the hierarchical position of international law in Kenya. Nonetheless, the Court was not exhaustive in its evaluation of some vital transnational legal norms particularly in the context of principles and obligations *erga omnes*, and its spontaneous subordination of transnational legal norms to the role of gap filling in the domestic legal order was unmerited. The subordination of international law in Kenya's legal order by the Supreme Court is regressive, and may contribute to Kenyans not benefiting from the more progressive developments in the international legal regime relating to environmental and human rights protection. As has been argued, the COA judgment in the *Karen Kandie* case had offered a more practical, beneficial and merited approach, in which international law would be at par with Kenyan statutory provisions, affording courts the opportunity to appropriately harmonise the transnational and domestic legal regimes in their interpretation of rights and duties.[129]

125 See *Kandie* (n 33) 8.
126 Shearer (n 116) 66.
127 Mathenge (n 22) 4.
128 Ibid 6.
129 See *Kandie* (n 33) 8.

PART II

LAND AND ENVIRONMENTAL GOVERNANCE

CHAPTER 9

Land Tenure and Sustainable Environmental Management within the Context of the Constitution of Kenya, 2010

Patricia Kameri-Mbote

A. Introduction

Property is an abstract constitutional right whose full impetus is appreciated by looking at what it encapsulates. Property establishes entitlements through recognition and protection.[1] Honore's[2] incidents of property define the range of entitlements that a property owner has over their property. Change in the range of justified claims of competing public interest threatens property.[3] In the case of land, increasing concerns for sustainable development, relating largely to resources on land has eaten into the range of entitlements for landowners. The 2010 Constitution has effected this change through its provisions on: sovereignty; national values and principles of governance; Bill of Rights with a right to property that has some constitutionally sanctioned fetters;[4] and devolution.[5] Article 66 is explicit on the regulatory power of the State over land "in the interest of defence, public safety, public order, public morality, public health, or land use planning". Moreover, under the Constitution's Fourth Schedule, local planning and development is the role of county governments. These provisions make it easy, at least in theory, for courts to mediate between assertions of rights to property and concerns for sustainable management of land and land-based resources. This is a radical departure from the previous constitutional dispensation where land rights were held to be sacrosanct.[6] Once land was registered and a title issued, the owner was presumed to have "the sole and despotic dominion over land to the total exclusion of all others".[7] These rights were presumed to be to use and abuse their land, and incursions into those rights only came by way planning as required by administrative law and specific land use laws.[8] The National Land Policy[9] noted the abuses and ad hoc procedures attendant to the exercise of police power by State and local government agencies. There was also lack of accountability and non-adherence to the planning regulations by land users.[10] Through the 2010 Constitution, Kenyans agreed that existing rights and entitlements to land in the legal system were no longer immune to change.[11] They could be affected for a number of reasons, including environmental sustainability.[12]

There are still, however, questions that need to be addressed as the constitutional provisions on regulation of land rights are implemented. Some of these questions have been discussed in

1 LS Underkuffler. 'Property and Change: The Constitutional Conundrum', (2016) *Texas Law Review* Vol 91:2015 p. 2
2 AM Honore, 'Ownership' 1961 in *Oxford Essays in Jurisprudence* 107 (A.G. Guest Ed.)
3 Ibid. (n1) p. 2
4 Constitution of Kenya, (2010), Articles 40; 66; 67 2 e; 69 1 b, f, g, h
5 Ibid (n.4) Chapter 11
6 Constitution of Kenya, (Amendment) Act, (1964) Section 25.
7 H Demsetz, 'Towards A Theory of Property Rights', (1967). *American Economic Journal,* 347–359. Ownership, Control and the Firm.
8 Agriculture Act (Cap 318) Revised Edition 2012 (1986).
9 Republic of Kenya, Sessional Paper No. 3 of 2009, The National Land Policy (Nairobi: Government Printer, 2009).
10 Ibid.
11 Ibid (n.1) p 2.
12 Ibid. (n.4) Articles 10, 40, 60 and 66.

the US Supreme Court without resolution. One sticky issue is the line between regulation and the 'taking' of property that should entitle one to compensation. In this regard, the concern with environmental sustainability is that the full extent of human actions on the environment is not known, hence the adoption of precaution as one of the cardinal principles in international environmental law.[13] This principle holds that the lack of certainty on the impacts of proposed actions on the environment should not justify the failure to take preventive measures.[14] The increasing environmental threats such as loss of species, loss of habitat and climate change, provide bases for interfering with landowners' rights, which were not foreseen at the time Blackstone[15] wrote on property. The despotic hold on land anticipated in Blackstone's time is no longer tenable. Indeed, as Alexander and others argue, property "promotes life and human flourishing whose pursuit bears on social relationships, just distribution and democracy ... attentiveness to the effects of claiming and exercising property rights on others, including future generations and on the natural environment and the non human world".[16]

Land as property is the loci for natural resources. There is a very close link between land and terrestrial, marine and aquatic resources. There can be no discussion of sustainable development without land. The link between sustainable development and land is underscored in the Sustainable Development Goals (SDGs).[17] SDG 15 specifically deals with life on land. The realization of many other SDGs is predicated on how land is held and used. These SDGs include, but are not limited to, SDG 1 (No Poverty); SDG 2 (Zero Hunger); SDG 3 (Good Health and Well Being) SDG 5 (Gender Equality); SDG 7 (Affordable and Clean Energy); SDG 11 (Sustainable Cities and Communities); SDG 13 (Climate Action); and SDG 14 (Life Below Water). Conversely the realization of other SDGs will facilitate better land management and use. These include SDG 6 (Clean Water and Sanitation); SDG 9 (Industry, Innovation and Infrastructure); SDG 10 (Reduced Inequalities); SDG 12 (Responsible Production and Consumption); and SDG 16 (Peace, Justice and Strong Institutions). The aspirations of Africa Union's Agenda 2063[18] can also not be achieved without sustainable land use, which is predicated on how land is held and used. Coming after the AU Framework and Guidelines on Land Policy,[19] and the AU Declaration on Land,[20] it is safe to assume that the attainment of the objectives of these documents is critical to the realization of the 2063 Agenda. Indeed a prosperous Africa based on inclusive growth and sustainable development must be pegged on how land is owned, governed and used.

It is within this context that this chapter discusses the provisions of the 2010 Constitution and laws passed to implement it, specifically focusing on land tenure and sustainable environmental and natural resources' management. This chapter is divided into six parts. Part A; is the introduction. Part B lays the constitutional basis for the discussion on land tenure and sustainable environmental management. Part C looks at land tenure, environment and natural

13 WCED. *Our Common Future, From One Earth to One World* (1987)

14 Ibid.

15 W Blackstone, 'II Commentaries on the Laws of England', (Wayne Morrison ed. 2001) 1765-1769

16 GS Alexander, EM Penalver, JW Singer & LS Underkuffler, 'A Statement of Progressive Property', (2009) *Cornell Law Review Special Issue Property and Obligation* Vol. 94 No. 4 p. 743 -744

17 UN General Assembly, 'Transforming Our World: The 2030 Agenda for Sustainable Development', (2015) https://www.refworld.org/docid/57b6e3e44.html (20 November 2020).

18 African Union, 'Agenda 2063: The Africa We Want', (2013)

19 African Union, 'Framework and Guidelines on Land Policy in Africa', (2010).

20 African Union, 'Declaration on Land Issues and Challenges in Africa', (2009) ,https://www.refworld.org/docid/4a69b4d22.html [20 November 2020].

resources' management under different tenure categories in Kenya while Part D addresses the roles that land institutions play in sustainable natural resources management. Part E looks at the regulatory power of the State over land use as a way of imbuing sustainability, while Part F concludes the chapter.

B. Laying the constitutional basis

I argue in this chapter that the 2010 Constitution provides a firm grounding for aligning land tenure with sustainable environmental and natural resources' management, and that this has been carried into the laws passed to implement the Constitution. Unlike the repealed Constitution,[21] its 2010 successor includes a whole chapter on land and the environment; has both rights to property and a healthy environment in the Bill of Rights; has sustainable development as a national principle of governance; and explicitly provides for the regulation of land rights, which opens space for imbuing sustainability in land use.

The 2010 Constitution radically altered land governance in Kenya by clarifying three distinct land tenure typologies: public, community and private. Simultaneously, the Constitution clarified the framework for sustainable environmental management. Article 60 of the Constitution outlines the national land policy principles. It states that land in Kenya 'shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable".[22] The specific principles outlined are:

- equitable access to land;
- security of land rights:
- sustainable and productive management of land resources;
- transparent and cost effective administration of land;
- sound conservation and protection of ecologically sensitive areas;
- elimination of gender discrimination in law, customs and practices related to land and property in land; and
- encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution.

The Constitution's land policy principles encapsulate both moral/equity approaches to land, and utilitarian/productive use of land.[23] While different laws espouse the two approaches, it is clear that they do not represent an either-or situation but are both important for land governance in different contexts. This was a departure from the previous constitution, which had minimal provisions on land and none on the environment.

Land hosts renewable and non-renewable resources, and the way in which land is governed and managed has implications for the management of the resources on the land. Significantly, the laws passed to implement the Constitution have recognized the link between land and sustainable environmental management. There is, underlying these laws, the appreciation that sustainable management initiatives are required for all land. This is a clear departure

21 Constitution of Kenya, (Amendment) Act, (1964).

22 Ibid (n.4) Article 60

23 P Kameri-Mbote, 'The Land Question and Voting Patterns in Kenya', in Kimani Njogu & P. Wafula Wekesa, *Kenya's 2013 General Election: Stakes, Practices and Outcomes*, Twaweza Publications (2015) pp. 34-47.

from the previous dispensation where environmental management was perceived as the remit of the State and largely applicable on private land. In the constitutional chapter on land and environment, the State is required to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, as well as ensure the equitable sharing of the accruing benefits;[24] work to achieve and maintain a tree cover of at least 10 per cent of the land area of Kenya; [25] protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; [26] encourage public participation in the management, protection and conservation of the environment;[27] protect genetic resources and biological diversity;[28] eliminate processes and activities that are likely to endanger the environment;[29] and utilise the environment and natural resources for the benefit of the people of Kenya.[30]

The introduction of a new mode of governance in the Constitution through devolution, and the assignment of functions to the national and county governments, also nuances the role of land in sustainable environmental management. Devolution is predicated on territory for both the national government and the counties. Both the national and county governments have roles in the sustainable management of resources on land.

Beyond devolution, the Constitution changed the institutional outlay of land governance institutions. Notably, new institutions (the National Land Commission and the Environment and Land Court) were birthed. This is in addition to the reconfiguration of the role of extant institutions such as the ministry responsible for land. The National Land Policy, 2009, set the tempo for land reform in Kenya. It was concluded before the 2010 Constitution and, therefore, does not canvass the devolution framework. The policy, however, clearly enunciated principles on land tenure and sustainable land and environmental management that are useful for analysis in this chapter.

C. Land tenure in Kenya: Environment and natural resource management

Land tenure connotes the terms and conditions under which rights to land and land-based resources are acquired, retained, used, disposed of, or transmitted.[31] In Kenya, the Constitution recognizes three tenure systems: public, private and community land. It provides for the conversion of land from any of the three tenure systems to another, laying out strict procedural requirements geared towards protecting property rights. The delineation of these three tenure types masks a greater complexity as other forms of tenure are present on the Kenyan land rights map. These include tenure to land in informal settlements and at the coastal strip.[32] With regard to the former, a rapid increase in population and the movement of people from rural to urban areas in the search for jobs has led to the mushrooming of informal settlement and

24 Ibid (n.4) Article 69 (1) (a).
25 Ibid (n.4) Article 69 (1) (b).
26 Ibid (n.4) Article 69 (1) (c).
27 Ibid (n.4) Article 69 (1) (d).
28 Ibid (n.4) Article 69 (1) (e).
29 Ibid (n.4) Article 69 (1) (g).
30 Ibid (n.4) Article 69 (1) (h).
31 Ibid (n.9).
32 P Kameri-Mbote, 'Kenya Land Governance Assessment Framework', (2016) *World Bank Project*.

squatter problems. These defy categorization under any of the three tenure systems defined in the Constitution. Informal settlements are found on public, private and community land. The National Land Policy identified the coastal strip as an area requiring special intervention. The coastal strip is part of the Kenyan coast that was governed by the Sultan of Zanzibar before independence.[33] The question that we seek to answer in this chapter is the extent to which the new constitutional dispensation and laws under it take on sustainable development as an informing paradigm on all categories of land.

In my prior work, I discussed the disjuncture between land tenure laws and concerns for sustainable management of resources on the land.[34] Laws on natural resources were framed with the aim of facilitating the exploitation of resources through extraction.[35] With the advent of environmental concerns and the emergence of a solid body of international environmental law, as well as regional and national environmental laws and policies, many countries not including Kenya not have imbued their natural resource laws with the ethos of sustainability. The expectation is that these laws will influence other laws that have a bearing on natural resource management such as land tenure and use laws. In Kenya, this did not happen and the interrogation of the 2010 constitutional norms and laws under it is an important place to start. A number of the key environment-related provisions in the Constitution have been highlighted here. Subsequently, we delve into those provisions and their relation to land tenure and use. Each category of land holding – public, community and private – underscores the way in which resources on the land will be managed and by whom. This is a radical departure from the repealed constitution,[36] which had minimal provisions on land; none on natural resource management, and did not anticipate any fetters being put on landowner rights for conservation imperatives. The only provisions pertaining to land dealt with land as property, compulsory acquisition and setting apart (a form of compulsory acquisition) of trust land by the President.[37]

The 2010 Constitution vests rights in the respective entity while laws are passed to elaborate processes for the management of the resources on the land. With respect to public land, however, the Constitution categorically designates the National Land Commission (NLC) as the manager. It is worth noting that traditionally, public land was the only category of land where environmental conservation was carried out in protected areas – national parks, gazetted forests, and marine parks, among others. Laws passed under the 2010 Constitution have now designated natural resource management roles for communities and private landowners.[38]

Public land

Article 62 of the Constitution defines public land and vests it in the county or national government to hold in trust for people residing in the specific counties and for the people of Kenya in the case of the national government. Article 62(2), (3) and 67(2) (a) provide that public land is

33 Ibid (n.9).
34 P Kameri-Mbote, 'Property Rights and Biodiversity Management in Kenya: The Case of Land Tenure and Wildlife', (2002).
35 Ibid.
36 Ibid (n .21).
37 Ibid (n .21) Section 25 and 26.
38 Community Land Act, (2016).

managed by the National Land Commission (the Commission) on behalf of the two levels of government. It is estimated that public land accounts for about 20 per cent of Kenya's land.[39]

With regard to counties, Article 62 vests all unalienated government land, land transferred to the State by way of sale, land in respect of which no individual or community ownership can be established by any legal process, land in respect of which no heir can be identified by any legal process and lawfully held, used or occupied by any State organ, except land occupied by the State organ as lessee under a private lease and not used or occupied by a state organ is vested in the respective county governments. The national government holds all land that is held by a State organ (except on private land leases), minerals and mineral oils, government forests, wildlife reserves, water catchment areas, water ways and water bodies, the territorial sea, the exclusive economic zone and the sea bed, the continental shelf, all land between the high and low water marks, and any land not classified as private or community land under the Constitution in trust for the people of Kenya.[40] The imputation of trust is important, considering the history of government holding of land where public functionaries treated such land as their 'private land' and allocated it wantonly without the participation of the citizenry.[41]

In keeping with the constitutional provisions, Parts II and III of the Land Act[42] confer upon the Commission expansive powers on the management, administration and disposition of public land. In this regard, Section 8 requires the Commission to evaluate, resource, map and keep a database of all public land and share the data with the relevant government bodies. This includes natural resources on the land. In any conversion of land from public to any of the two other categories, Section 9 requires that the two levels of government submit their requests to the Commission for evaluation and approval. Relatedly, the Commission is mandated to formulate rules and regulations to guide the conversions, particularly those involving substantial transactions that may require county assembly or the National Assembly approvals.[43] Similarly, Section 10 requires the Commission to formulate guidelines to govern the management of public land by government agencies. In line with this provision, the Commission incorporated the guidelines in Regulation 5 and the First Schedule of the recently approved Land Regulations, 2017 (the Land Regulations).[44] Section 11 of the Land Act further requires the Commission to regulate and take appropriate measures to preserve the ecologically sensitive areas within public land. This includes land with endemic or endangered species of flora and fauna; and critical habitats or protected areas.[45] Among the actions that the NLC may take is action to prevent environmental degradation or climate change.[46] The Commission must also ensure that in allocation of public land, it does not allocate land subject to erosion, floods, earth slips or water logging;[47] forests, wildlife reserves;[48] and wetlands, watersheds, rivers and stream catchments, public water reservoirs, lakes and beaches.[49] The first NLC (2013-2019) started the process of preparing an inventory of natural

39 Ibid (n.4) Article 62(2), (3) and 67(2) (a).
40 Ibid (n.4) Article 62(3).
41 Ibid (n.34)
42 Land Act, (2012) Parts II and III.
43 Ibid. (n.42) Section, 9(5).
44 Land Regulations, (2017) Legal Notice No. 280 of 2017.
45 Ibid. (n.42) Section 11(1)
46 Ibid. (n.42) Section 11(2)
47 Ibid. (n.42) Section 12(2) (a)
48 Ibid. (n.42) Section 12(2) (b_
49 Ibid. (n.42) Section 11(2) (c)

resources and by the time its tenure ended in 2019, it is estimated that 60 per cent of the work had been completed and a natural resources' atlas and portal[50] were under preparation. The first Commission took time establishing a secretariat and institutionalizing; reviewing grants and dispositions of public land among other functions. Some of the land reviewed includes forest land.[51] The Commission was also involved in the national government's quest to reclaim riparian land that had been encroached on by private developers. [52]

Section 15 provides for the Commission's powers to, on its own volition, or on the application of a management body, reserve public land including natural resources on it for the public interest. This is a pathway to imbue sustainable natural resource management into public land. Section 19 requires the Commission to make rules and regulations for the sustainable conservation of land-based natural resources.[53] Part III of the Land Act provides for the dispositions in public land including licences, leases, charges and any agreements relating to public land.[54] This is predicated on planning principles.

The Land Registration Act, 2012, provides for the general registration of interests in land for all the categories of land including public land but exempts registration systems of interests relating to mining, oil, petroleum, geothermal and other land-based resources in respect of public land.[55] In the registration and mapping process, Section 17 requires the institution responsible for surveys to submit to the Commission cadastral maps and information relating to the public land.

Government forests form part of public land and are governed by the Forest Conservation and Management Act, 2012. Section 7 of this law establishes the Kenya Forests Service (the Service) and key among its functions is to conserve, protect and manage all public forests. Under Section 21, forests that fall within the classification of public land and which are held in trust are to be managed by county governments. As noted above, national parks and game reserves also form part of public land and are managed and governed by the Wildlife Conservation and Management Act.[56] This law establishes the Kenya Wildlife Service, chief among its functions being to conserve and manage national parks, wildlife conservation areas, and sanctuaries under its jurisdiction.[57]

The Water Act, 2016, vests all the rights in any water resource in the national government to hold in trust for the people of Kenya.[58] Section 2 of this law defines water resources as any lake, pond, swamp, marsh, stream, watercourse, estuary, aquifer, artesian basin or other body of flowing or standing water, whether above or below the ground, and includes sea water, and transboundary waters within the territorial jurisdiction of Kenya. Essentially, water on private and community land extends only to the use of the water but not ownership rights. The Commission has not directly participated in the management of forest land, national parks and water towers despite the clear assignment of the management role in them. The bodies tasked with managing wildlife,

50 National Land Commission 2013–2019 First Commissioners End Term Report (2013).
51 Ibid
52 Ibid
53 Ibid. (n.42) Section 19.
54 Ibid. (n.42) Section 20-36.
55 Ibid. (n.42) Section 3 and 4.
56 Wildlife Conservation and Management Act, (2013).
57 Ibid, Section 7.
58 Water Act, (2016) Section 3.

forests and water act as agents of the Commission but this agency role is not articulated and Kenya Wildlife Service, Kenya Forest Service and the Water Regulatory Authority go about their business with no recourse to the Commission. Devolution and the creation of counties also brought new actors into an already congested space. Other institutions operating in land where natural resources are found include the National Environment Management Authority (NEMA),[59] which is tasked with ensuring that environment impact assessments are carried out for certain activities on land, which include extraction and establishment of infrastructure.[60] The goal is to identify potential threats and propose mitigation measures where that is possible. NEMA is also responsible for taking stock of natural resources; advising on land use planning; regulating, monitoring and assessing activities to ensure that the environment is not degraded; and enforcing environmental standards, among others.[61] These functions have a bearing on land tenure and land use. The overlapping mandates over land and natural resources on the land predispose the different actors to conflicts as they perform their roles. This explains the tensions between these agencies.

All the minerals in Kenya are vested in the national government, to be held in trust for the people of Kenya, regardless of any right or ownership of or by any person in relation to any land in, on or under which any minerals are found.[62] All petroleum existing in its natural condition in strata lying within Kenya and the continental shelf vests in the government under Section 3 of the Petroleum (Exploration and Production) Act.[63] Relatedly, the Geothermal Resources Act[64] vests all the un-extracted geothermal resources under or in any land in the government.

It is clear from the discussion above that the Constitution and laws implementing its provisions on public land do not just assign rights to public land. They also spell out measures that should be taken to sustainably manage natural resources on that land.

The Land Act reiterates the values and principles of land management and administration, including the sustainable and productive management of land resources and conservation and protection of ecologically sensitive areas that bind all private persons, public and state officers in management of land in all tenures.[65] In relation to environmental and natural resource management in public land, the NLC, counties and the national government through the various state agencies are responsible for the environment and natural resource management falling within their jurisdictions.

Section 8 of the Land Act provides for the obligations of the National Land Commission to manage land by developing land resource maps, imposition of conditions, and covenants on use of any public land. Further, section 10 requires the Commission to develop guidelines to guide and indicate management priorities and operational principles for the management of public land resources for identified uses. Pursuant to this section, the Commission has developed the guidelines as contained in Regulation 5 and the First Schedule Land Regulations,

59 Environment Management and Coordination Act, (1999) Section 7.
60 Ibid. Section 9(1).
61 Ibid. Section 9(2).
62 Ibid (n.4) Article 62 (1) (f).
63 Petroleum (Exploration and Production), (1984) Section 3.
64 Geothermal Resources Act, (1982).
65 Ibid. (n.42) Section 4(2).

2017. Notable guidelines include the requirement to undertake due measures to conserve, and protect the ecologically fragile ecosystem and to ensure long-term development plans that are environmentally sound.

State agencies in occupation of public land are required to develop plans and should consider any conservation, environmental or heritage issues relevant.[66] Under Section 19, the Commission is required to formulate guidelines to govern the conservation of land-based natural resources, including measures to protect critical ecosystems and habitats, incentives for communities and individuals to invest in income-generating natural resource conservation programmes, measures to facilitate the access, use and co-management of forests, water and other resources by communities who have customary rights to these recourses. Additionally, the Commission, in any dispositions touching on private land, may impose conditions and covenants for purposes of maintaining resources and using them sustainably.

The management of the environment and natural resources in the specific sectoral laws such as the forests and wildlife conservation may be discerned from the discussions on public land tenure above.

Community land

Article 63 of the Constitution defines community land as land lawfully registered in the name of group representatives under the provisions of any law, land lawfully transferred to a specific community by any process of law, land that is lawfully held, managed or used by specific communities as community forests, grazing areas or shrines, ancestral lands and lands traditionally occupied by hunter-gatherer communities as community land. Unregistered community land is held as trust land by the county governments for the benefit of the entitled community, while registered community land vests in the registered community pursuant to Article 63(1).

Reiterating the provisions of the Constitution, Section 4 of the Community Land Act vests community land in the community, which is however subject to State regulation as contained in Article 66. Section 4(3) provides that the land may be held under various tenure systems including customary, freehold and leasehold. In protecting community land, Section 5 reiterates the constitutional principle that places community land at par with other tenure systems. Compensation is also required for compulsory acquisition of this land. Section 6 reiterates the trust relationship on unregistered land held by the county governments, and states that in case of any benefits and compulsory acquisition, the compensation shall be held by the county government to be passed on to the community once it has been registered. It requires communities to be registered as owners of the land for legal recognition.[67] The Land Act defines a community as an organized group of users made up of citizens of community land who share a common ancestry, culture, socio-economic interest, geographically or ecologically sharing or ethnicity. Land Act protects and promotes the right of communities to manage their lands, which is important for natural resource management. In holding systems, the land may be held as customary, freehold or leasehold, and through any other tenure recognized by written law.[68] It also provides for

66 Ibid. (n.42) Section 17(2).
67 Community Land Act, (2016) Section 6
68 Ibid Section 4(3).

the registration of the land as communal, family and clan, or reserve. The maintenance of a community land register for each registration unit is required. It should contain: a cadastral map showing the extent of the community land, and identified areas of common interest; the name of the registered community; a register of members of the registered community, which shall be updated annually; the user of the land; and such other particulars of members of the registered community as the Registrar may determine.[69] Section 17 underscores the rights of a registered community as proprietor of land whether acquired on first registration or subsequently for valuable consideration or by an order of court. It is categorical that such rights "shall not be liable to be defeated except as provided in this Act or any other written law, and shall be held on behalf of the community, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever", subject to leases, charges and other encumbrances and to the conditions and restrictions, shown in the register; and such overriding interests as may affect the land. It remains to be seen how titling of community land will impact on natural resource management. It is important to note that easements on community land facilitate the designation of wildlife migratory routes and hence co-existence between communities and wildlife.

Under Section 12, there are different classes of holding community land, which include: communal; family or clan; and reserve land. The provision for reserve land opens a pathway for the use of community land for conservation. Indeed, among the uses for which a community may reserve land is community conservation.[70] Related to this is the provision that enables a registered community to submit a plan for the development, management and use of their land for approval to the county government on its own volition or at the request of such government.[71] The community is required to consider any conservation, environmental or heritage issues relevant to the development, management or use of the land before submitting such a plan.[72]

Section 15 of the Community Land Act provides for the establishment of both a community assembly (consisting of all adult members of the community) and a community land management committee. These institutions are responsible for the management and administration of community land; coordinating the development of community land use plans in collaboration with the relevant authorities; and prescribing rules and regulations. The community assembly ratifies the rules and regulations, and governs the community operations. These two institutions are, therefore, responsible for the formulation of natural resource management policy within the respective community land.

Section 20 is devoted to conservation of natural resources on community land. It provides that registered communities should abide by applicable laws, policies and standards on natural resources, and further that they should establish measures to protect critical ecosystems and habitats. Registered communities are also required to provide: incentives for communities and individuals to invest in income-generating natural resource conservation programmes; measures to facilitate the access, use and co-management of forests, water and other resources by communities who have customary rights to these resources; procedures for the registration

69 Ibid Section 10.
70 Ibid (n.67) Section 13(3).
71 Ibid (n.67) Section 19.
72 Ibid (n.67) Section 19(2)(a).

of natural resources in an appropriate register; and procedures for the involvement of communities and other stakeholders in the management and utilization of land-based natural resources. If implemented, these measures can bridge the divide between land rights holding and conservation. They can also stem the impoverishment of communities by conservation initiatives that exclude them.[73]

Under Section 28 of the Community Land Act, pastoral communities are entitled to grazing rights within community land. This entitlement is, however, subject to conditions that may be imposed such as: the kind and number of livestock that may be grazed; the part of land the pastoralists may graze on; and a grazing plan. Despite Section 13 of the Act providing for exclusivity of special purposes, the provision has not been strictly observed, leading to the prevalence of cultural practices that lead to unsustainable land use and inappropriate ecosystem management.[74] This has led to severely degraded rangelands, reduced productivity levels and led to unsustainability due to overgrazing, poor land husbandry practices, and conversion of rangeland to crop farming and ultimately to the reduction of land available for wildlife conservation.[75]

The National Land Use Policy (2017) proposes that the government should address the problem of rangelands degradation to secure pastoralists' livelihoods and tenure to land by: planning and developing rangelands according to their potential in livestock production, tourism, mining and energy production; establishing mechanisms for enforcing adherence to the optimum stocking rates for each area; establishing a framework for livestock management in rangelands, including provision of water, pasture and fodder development; discouraging open access to grazing land by, and among, pastoralists by developing communal grazing area plans; establishing suitable methods for defining and registering land rights in pastoral areas while allowing pastoralists to maintain their unique land systems and livelihoods; ensuring that the rights of women in pastoral areas are recognized and protected; providing for flexible and negotiated cross-boundary access to protected areas, water, pastures and salt licks among different stakeholders for mutual benefit; mainstreaming climate change adaptation and mitigation in rangeland management; and ensuring that all land uses and practices under pastoral tenure conform to the principles of sustainable resource management.[76]

Section 29 of the Community Land Act provides for setting aside some land within the community land for special purposes, which include community conservation areas. Such areas can only be used for those specific purposes. The community could set up wildlife conservation areas using this provision. Section 35 requires the resources found in the community land to be sustainably and productively used for the benefit of the whole community, including future generations. Indisputably, the community assembly, community land management committee, and community members bear a burden of conserving the wildlife resources in community land and sharing the benefits that accrue from such use.[77]

As is the case with public land, deliberate steps have been taken to align community land ownership with sustainable land management. It is important to note that communities have

73 CO Okidi, P Kameri-Mbote & M Akech, *Environmental Governance in Kenya: Implementing the Framework Law*. (2008)
74 Ministry of Lands and Physical Planning, *National Land Use Policy* (2017) Sessional Paper No. 1.
75 Ibid.
76 Ibid.
77 Ibid (n.73).

organized to manage wildlife, forests, and water resources even without the secure tenure provided by the post-2010 constitutional dispensation. The linkage of land tenure with land use through national and county land use planning, which is cascaded to the community lands, should foster community natural resource management initiatives. This is important, considering that community land is estimated to be over 60 per cent of Kenya's land.

The Community Land Act substantively governs the management of community land and the resources within such lands. At the helm of the management of the environment and natural resources in community land are the community assembly, and the community land management committee. These institutions are required to come up with rules and regulations[78] to ensure that natural resources found in community land are used and managed sustainably and productively, for the benefit of the whole community including future generations - and are transparently managed so that the benefits accrue to the communities.[79] The community lands are, however, subject to the national and county laws on environment and natural resource management.

Agreements relating to investments on community land are subject to free, open and consultative processes relating to environmental, social and economic impact assessment; stakeholder consultation and community participation; continuous monitoring and evaluation of the impact of the investment on the community; payment of compensation and royalties; measures to mitigate any negative effects; capacity building of the community and transfer of technology; and requirement to rehabilitate the land upon completion or abandonment of the project. These provisions underscore the link between land, land use and management and the lives of communities.

Private land

Article 64 of the Constitution defines private land as any registered land held by any person under any freehold tenure, land held by any person under leasehold tenure, and any other land declared private land under an Act of Parliament. Private land may be owned in freehold or on leasehold basis.[80] Only Kenyan citizens can hold freehold interests under the Constitution. Land rights for non-Kenyans are limited to leasehold rights for a maximum of 99 years.[81] A non-Kenyan includes a body corporate whose shares are not wholly owned by Kenyans or trusts whose beneficial interests are not wholly for Kenyans.

Previously, there was no limitation on the maximum number of years leasehold would subsist for non-Kenyans. Accordingly, 999 and 9999-year leaseholds were granted to non-Kenyans under the now repealed Government Lands Act[82] and the Registration of Titles Act of 1920. The Constitution requires the conversion of all leases beyond 99 years held by non-Kenyans to 99 years. Accordingly, the Land Regulations, 2017, were promulgated to guide the conversion. Regulation 14 requires the National Land Commission to undertake conversions of all freeholds and leases of more than 99 years held by non-Kenyans to 99 years within five (5) years from the effective date of the regulations.

78 Ibid (n.38) Section 37.
79 Ibid (n.38) Section 35
80 Ibid (n.4) Article 64
81 Ibid (n.4) Article 65
82 Government Lands Act, (1984).

Section 13 of the Land Act and the Land (Extension and Renewal of Leases) Rules, 2017, provide for the extension of leases on expiry, which land may revert to the county and national government. Five years prior to the expiry of a lease, the Commission should notify the holders of such leases of the impending expiry and their right of pre-emption.[83] The holders may also apply for extension to the Commission before expiry.[84] Upon application, the Commission should forward the application to the County Executive or Cabinet Secretary responsible for land in the county and the national government, respectively, for consideration. If the county or the national government has no desire to put the land into use, the leases may be renewed.

The Land Act also regulates the dispositions in private lands including leases, transfers, transmissions, licences, creation of charges (formal and informal) easements, and other analogous rights. The Land Registration Act, 2012, on the other hand provides for and gives effect to the registration of interests in private land. Importantly, any disposition or dealing in land is ineffective and unenforceable until the interests are registered.[85] Private land may be held under joint tenancy or tenancy in common.[86] In the former, the interests in land are held in undivided shares and the doctrine of survivorship applies upon death, while in the latter, the interests distinct are separately transferable.[87]

The sustainable management of land on private land is largely through police power in the form of planning regulations. The role of private landowners in natural resource management has not been optimized. It is, however, worth noting that many private landowners have opened their land up for wildlife conservation.[88] With the limitation of the estate of non-Kenyans from freehold and leases beyond 999 years to 99 years, wildlife conservancies have become attractive as a way of encumbering the land particularly in arid and semi-arid areas. It is important to note that such land use conversion has no effect on the tenure to the land. In other instances, non-Kenyans have sought to dispose of their land to citizens. In these cases, the Latin maxim *Nemo dat quod non habet* (roughly translated to mean that one cannot pass a greater right than the one they have) applies unless the transfer was made before the date of the Constitution's promulgation on August 27, 2010.[89] The provisions of the Constitution on environmental management,[90] which require the contribution of all and require the increase of the forest cover to 10 per cent,[91] can benefit from the enlistment of private landowners to the sustainable environmental management cause. This should go to addressing regulatory mechanisms for the voluntary acts of landowners. Like communities, private landowners should be given incentives to contribute to sustainable natural resource management on their land.

Land principles and values contained in Section 4 of the Land Act bind all persons, including private landowners, in the use and management of land and the resources found therein. Given

83 Ibid. (n.42) Section, 3.
84 Land (Extension and Renewal of Leases) Rules, (2017) Regulation 2.
85 Land Registration Act, (2012) Section 24
86 Ibid (n.42) Section 2 and 50.
87 Ibid (n.42) Section 91.
88 Robert Kibugi, 'Evaluating the Role of Private Land Tenure Rights in Sustainable Land Management for Agriculture in Kenya', (2017) in *International Yearbook of Soil Law and Policy 2016* (pp. 219-235). Springer, Cham.
89 Ibid (n.4) Schedule 6.
90 Ibid (n.4) Article 69.
91 Ibid (n.4) Article 69.

that the use of private land is subject to land planning laws and developmental control, the use and management of resources must adhere to these regulations.

Sustainable natural resources management is negatively affected by competing demands for land for other uses such as cultivation and grazing. In regard to policy on development, preservation and utilization of agricultural land, the Cabinet Secretary, on the advice of the Agriculture, Fisheries and Food Authority established under the Agriculture, Fisheries and Food Authority Act,[92] and in consultation with the National Land Commission, is empowered to provide general guidelines. These are referred to as land development guidelines and are applicable in respect of any category of agricultural land.[93] The land guidelines are to be implemented by the respective county governments, taking into account the circumstances of the respective areas under their jurisdiction.[94] The guidelines may require the adoption of such system of management or farming practice, or other system in relation to land in question, including the execution of such work and the placing of such things in, on or over the land, as may be necessary for the proper development of land for agricultural purposes.[95]

The Cabinet Secretary is also empowered, on the advice of the Authority, and in consultation with the National Land Commission, to make general rules for the preservation, utilization and development of agricultural land.[96] The rules may prescribe the manner in which owners, whether or not also occupiers, shall manage their land in accordance with rules of good estate management; prescribe the manner in which occupiers shall farm their land in accordance with the rules of good husbandry: advise on the control or prohibition of the cultivation of land or the keeping of stock or any particular kind of stock thereon; advise on the kinds of crops which may be grown on land; provide for controlling the erection of buildings and other works on agricultural land; and provide for such exemptions or conditional exemptions from the provisions thereof as may be desirable or necessary vulnerable groups, including women.[97]

An owner of agricultural land is deemed to fulfill his or her responsibilities to manage it in accordance with the rules of good estate management if, having regard to the character and situation of the land and other relevant circumstances, it enables an occupier of the land reasonably skilled in husbandry to maintain efficient production as respects both the kind of produce and the quality and quantity thereof.[98] The occupier of agricultural land is deemed to fulfill his or her responsibilities to farm it in accordance with the rules of good husbandry if the occupier is maintaining a reasonable standard of efficient production as respects both the kind of produce and the quality and quantity thereof, while keeping the land in a condition to enable such a standard to be maintained in the future.[99]

Former President Daniel Arap Moi's exhortation to land owners to check soil degradation through bench terracing and encouragement to plant two trees for each one cut were successful initiatives and have contributed to the attainment of cleaner rivers and reforestation of many

92 Agriculture, Fisheries and Food Authority Act, (2013).
93 Ibid, Section 21(1).
94 Ibid, Section 21(2).
95 Ibid, Section 21(3).
96 Ibid, Section 22 (1).
97 Ibid, Section 22(2).
98 Ibid (n.92) Section 22 (3) (a).
99 Ibid (n.92) Section 22 (3) (b).

landscapes in Central Kenya.[100] While one may have reservations about the use of coercion to ensure compliance with these measures, the fact that they resulted in better management of land and land based resources should be noted and ways of enlisting the participation of landowners in identifying effective mechanisms and incentives pursued. Under the 2010 Constitution, county governments are mandated to implement specific national government policies and laws on soil and water conservation.[101] This provides an entry point for support for sustainability actions in land management.

C. Special categories of land tenure and implications on sustainable environmental management

The National Land Policy identified special categories of land tenure requiring special intervention. These included the coastal strip and land hosting slums or informal settlements, which are important for sustainable development. The Ten-Mile Coastal Strip in Kenya is a piece of land approximately 10 nautical miles wide from the high-water mark of the Indian Ocean. The land tenure system in the Ten-Mile Coastal Strip has been dictated by the changing political circumstances in the area. Under the East African Regulations of 1897, people living in the Ten-Mile Coastal Strip were issued with certificates of ownership for a term of 21 years in the form of short-term leases.[102] While one might place this land under public land as defined in Article 62 of the Constitution, difficulties abound in separating the public estate from the private land claimed by individuals.[103] Yet, how this land is held has implications for sustainable management of natural resources in the land-sea interface.

Informal land tenure, on the other hand, refers to a situation where the actual occupation and use of land is without legal basis. Informal land settlements cannot be categorized into any of the three classifications of land tenure provided for under the Constitution. Under this arrangement, groups of people occupy public or private land without the permission of the owner.[104] For a long time, the law in Kenya did not recognize the existence of this tenure. However, since the promulgation of the 2010 Constitution, informal tenure has been recognized in law and the government has put in place mechanisms for provision of secure tenure for informal settlements through the Kenya Informal Settlements Improvement Programme (KISIP).[105] Most informal settlements are in urban areas, which are under county management.[106]

Coastal Strip land tenure

Traditionally, the Registration of Titles Act, 1908, (RTA) created a different regime for land within the coastal strip after adjudication of claims: a few elites got private land rights while most land remained public and was occupied by local communities.[107] Many private landowners in the

100 G De Giusti, P Kristjanson, & MC Rufino, 'Agroforestry as A Climate Change Mitigation Practice in Smallholder Farming: Evidence from Kenya', (2019) *Climatic Change*, 153(3), 379-394.
101 Ibid (n.4) Fourth Schedule.
102 Ibid (n.32).
103 HWO Okoth-Ogendo, 'African Land Tenure Reform' in J Heyer, J Maitha and W Senga (eds.), *Agricultural Development in Kenya: An Economic Assessment* (Nairobi; Oxford University Press, 1976) 156-182.
104 Ibid (n.32).
105 Ibid (n.32).
106 Ibid (n.4) Article 184 and Urban Areas and Cities Act, (2011).
107 Registration of Titles Act, (1908),

coastal strip are also absentee landlords.[108] The result is that local communities are squatters on their own land. Many have paid rent to the absentee landlords for many years. This ambivalence of land rights holding is inimical to sustainable management of resources on land.

Article 67(2) (e) of the Constitution mandating the Commission to investigate historical land injustices and recommend appropriate actions was meant to cure injustices in areas such as the coastal region. Section 15 (2) of the National Land Commission Act provides that the Commission should investigate instances that resulted in the displacement of people from their habitual place of residence, and thereafter may give a wide range of remedies, including affirmative action programmes for marginalized groups and communities as well as resettlement on alternative land.[109]

Unlike previously where land ownership in the coastal strip was largely governed by the Land Titles Act and the Government Lands Act, and Presidential Decrees, the situation has changed. The Land Act, the Land Registration Act, and the Community Land Act are now the substantive and procedural laws on land. In *Attorney General & 6 Others v Mohamed Balala & 11 Others [2014] eKLR*, the status of Presidential Decrees was challenged and presidential consent held to be an illegal and discriminative practice against owners of first and second row beach plots and, therefore, null and void and lacking any legal backing.

The amendment of the land laws in 2016, through the Land Laws Amendment Act, decreed that all land "within a zone twenty five (25) kilometers from the inland national boundary of Kenya; within the first and second row from the high water mark of the Indian Ocean; and any other land as may be declared controlled land under any law or statute" was a controlled transaction. The amendment states that no transactions in the controlled land to any ineligible person shall be valid unless it has the express consent of the Cabinet Secretary. An ineligible person is stated to be any person who is not a citizen of Kenya, or a company wholly owned by Kenyans, or any foreign government, or political subdivision of any other country.

The Land Act has also recognized the coastal strip tenure system by incorporating settlement programmes under Section 134 and putting in place eviction procedures. These processes are discussed under informal settlements. Hopefully, sustainable resource management imperatives will be integrated in the implementation of these mechanisms. Moreover, the recognition of coastal strip tenure provides a pathway for application of regulatory controls over its use. These include the requirement for planning, environmental impact assessments, and strategic environmental assessments, where applicable.

Tenure in informal settlements

As pointed out in the foregoing discussion, urban areas have not kept pace with the increasing rural-urban migration and increased population in urban areas. Demand for affordable houses and social amenities are high with little supply. This has led to increased informal settlements. The Constitution, in Article 42 and 43, provides for the right to the highest attainable standard of health, which includes the right to healthcare services, including reproductive healthcare, to accessible and adequate housing, and to reasonable standards of sanitation. The Kenya Government has in response been involved in various programmes, including infrastructure

108 Ibid.

109 National Land Commission Act, (2012) Section 15(9).

development in informal settlements as evidenced by Kenya Informal Sector Improvement Programme.[110]

The National Land Policy, 2009, recognized the existence of informal settlements.[111] Section 152B of the Land Act provides that it is unlawful to conduct evictions otherwise than in accordance with the law whether on public, private or community land. In the case of public land, the Commission is required to give a three-month notice of such evictions in the Kenya Gazette and at least one newspaper of nationwide circulation, as well as announcements in local language radio stations.[112]

If the occupation and use is in unregistered community land, the County Executive Committee member should issue a notice similar to the one given by the Commission.[113] On private land and the registered community land, the registered community or the owner or the persons in charge of such places shall issue notices indicating any terms and conditions as to the removal of buildings, the reaping of growing crops, and any other matters as the case may require. This notice should be served on the deputy county commissioner in charge of the area as well as the officer commanding the police division of the area.[114]

Section 152G of the Land Act provides for the mandatory procedure to be followed for evictions. First, those taking part in the demolition and eviction should properly identify themselves, and must have formal authorization to carry out the process. The eviction must be carried out in a manner that respects human dignity, right to life, and security of those affected. The eviction procedures must be cognizant and take special measures to ensure effective protection to groups and people who are vulnerable such as women, children, the elderly, and persons with disabilities. Further, there ought to be diligence to ensure that illegal deprivation of property does not result from the eviction and property left behind involuntarily due to the destruction. Importantly, the evictions should only use necessary and proportional force and the affected persons should be given the first right to demolish and salvage their property.

These provisions seek to ensure orderly evictions, which are important for sustainable management of land. In urban areas, where waste is a problem, minimizing debris from damage to property contributes to sustainable management of the urban environment.

The Land Act also substantively provides for the regulation of settlement schemes aimed at making land available for access by squatters, people displaced or moved. Section134 provides for the establishment of settlement schemes by the national government in consultation with the Commission and the county governments. The Commission is required to reserve land for settlement, or if unavailable, the board of trustees of the Land Settlement Fund should purchase land for such purposes.[115] In the same vein, Regulation 9 of the Land (Allocation of Public Land)

110 Kenya Informal Sector Improvement Programme, http://projects.worldbank.org/P113542/kenya-informal-settlements-improvement-project-kisip?lang=en (20 November 2020).
111 Ibid (n.9).
112 Ibid (n.42) Section 152C.
113 Ibid (n.42) Section 152D.
114 Ibid (n.42) Section 152E.
115 Ibid (n.42) Section 134(5) and 135

Regulations, 2017, allows the allocation of public land to a targeted group of persons. Proper implementation of these provisions can facilitate sustainable management of urban land through planned resettlement. This, in turn, can ensure ambient air quality, access to housing, water and reasonable standards of sanitation, planned provision of energy, reduced pollution and creation of open spaces for recreation.

E. Derivative rights

Primary rights to land granted to individuals and communities allow for grant of rights derived from the primary estate as long as that grant does not exceed the primary right. The Land Act provides for grants of leases and licences. With regard to leases, there is provision for registration of long-term leases.[116] Whether registered or not, leases comprise substantial grants of rights and the use of the land during the lease duration can impact on long-term sustainability. The terms and conditions of a lease provide an entry point for requiring sustainable management of land during the duration of the lease. This is especially the case for long leases granted out of public land and private land. With respect to public land, the fact that this land is held in trust[117] by both the counties and the national government imports the requirement of sustainable management.[118]

Another derivative right that is relevant for sustainable natural resource management is the easement. Easements are proprietary rights in land and involving the limitation of private property rights necessary for the enjoyment of private property. They ordinarily run with the land and are recognized in English Common Law to enhance a landowner's enjoyment of their rights to land,[119] attached to land, and generally classified as incorporeal hereditaments.[120] They are, however, real property and not merely a privilege for the benefit of corporeal land.[121] For an easement to subsist, Common Law required the existence of a servient (land to be burdened by the easement) and a dominant (land to benefit from the easement) tenement owned by different persons.[122] Common Law frowned upon easements in gross (which did not require the existence of a dominant tenement) and generally did not recognise them. It favoured easements that were related or appurtenant to specific land, imposing restrictions or obligations upon adjoining land and whose benefit ran with the land.

Easements in gross do not run with the land, as they are not related/appertunent to any land.[123] It is this category of easements that has increasingly been used for sustainable development imperatives. Easements can be positive or negative. The former require some things to be done on the burdened land for the benefit of the other land, such as the establishment of a right of way, while the latter prohibit doing some things on the burdened land for the benefit of the other land.[124] Both positive and negative easements can be used for environmental sustainability. Easements

116 Ibid (n.42).
117 Ibid (n.4) Article 62 (2) and (3).
118 Considering also that sustainable development is a national value and governance principle under Article 10 and also under Article 60 (1), Ibid (n.4).
119 Simpson, S. R. "Land law and registration," (Vol. 105). (1976) Cambridge: Cambridge University Press.
120 Wade, H. W. R., & Megarry, R. E. **The Law of Real Property** (1984) Stevens, London. p. 604.
121 Ibid.
122 *Re Ellen Borough Park Case [1956] Ch. 131*
123 G Nyokabi, 'Easements and Wildlife Conservation in Kenya', (2007) in N. Chalifour et al. (eds.), ***Land Use for Sustainable Development,*** Cambridge University Press, New York 120-131
124 Ibid.

can be created by statute; *inter partes* by express grant or reservation by deed; by implication, by implied grant or reservation by common intention; by prescription; or by the court.[125]

Easements are provided for in the Land Act, the Environment Management and Coordination Act, 1999 (EMCA), and the Wildlife Conservation and Management Act. They are rooted in the Constitution's Articles 40, 69 and 72, which confer property rights and provide for sustainable exploitation, utilization, management and conservation of the environment and natural resources. The Land Act provides for creation of easements to do something over, under or upon land, or a right prohibiting doing of something in the subservient land.[126] Under Section 138(3), an easement terminates upon expiry of a specified day or upon the happening of an event, and it incorporates the privity of easements in that it runs with the title in case of any depositions. The EMCA provides for the creation of environmental easements for the advancement of the objectives and purposes of the Act, which include sustainability of the environment.[127] The EMCA envisages two ways of creating easement: through court orders[128] or through voluntary agreements.[129] The Act prioritizes voluntary agreements and requires that people negotiate and enter into voluntary agreements for the conservation and management of the environment and creation of easements. The applicants are required to apply to the court, and the court may impose conditions on such orders calculated to advance the object of an environmental easement.[130] Upon creation of the easements, the applicant should pay the owner of the land compensation for the burdening commensurate to the value of the loss for the use of the land.[131]

Easements are enforceable through court by the beneficiaries of the easements, and the court has wide discretion on remedies including issuing a restoration order.[132] Easements are registrable as encumbrances under the Land Registration Act, and in the absence of such registration code, the easements are registrable by the County Environmental Committee.[133] According to Section 143, failure, neglect or refusal to comply with an easement order is a criminal offence for which, upon conviction, one is liable to a fine of not less than Ksh2 million and not more than Ksh4 million, or imprisonment for not less than a year and not more than four years, or both fine and imprisonment.

The Wildlife Conservation and Management Act provides for wildlife conservation easements by voluntary private arrangement or by application to the Environment and Land Court.[134] It anticipates the use of agreements[135] or the grant of wildlife conservation orders or easements by the Environment and Land Court.[136] The purposes for which such an easement may be granted include: furthering principles of sustainable wildlife conservation and management; preservation of fauna and flora; creation or maintenance of migration corridors and dispersal areas for wildlife preserving scenic views; preventing or restricting the scope of mining or

125 Ibid
126 Ibid (n.42) Section 138.
127 Environmental Management and Coordination Act, (1999), Section 9.
128 Ibid (n.27) Section 112(a)
129 Ibid (n.27) Section 112(5A).
130 Ibid (n.27) Section 113.
131 Ibid (n.27) Section 116.
132 Ibid (n.27) Section 114.
133 Ibid (n.27) Section 115
134 Wildlife Conservation and Management Act, (2013) Section 65 (1)
135 Ibid Section 65 (2).
136 Ibid Section 65 (3).

mineral or aggregate working or agricultural or other land use activities that would adversely affect wildlife conservation.[137]

For all the enumerated purposes, the easements do not require a dominant tenement and are, therefore, easements in gross. They are also both positive and negative easements. It is worth noting that Section 68 of the Wildlife Conservation and Management Act states that,

Where an order or easement is created on land the title of which is registered under a particular system of land registration, the easement shall be registered in accordance with the provisions of the Act applicable to that particular system of registration.

Besides facilitating registration, the effect of this provision is to substantively retain the land use for the land not ceded for purposes of the establishment of the wildlife corridor by dint of the substantive law under which the land in question has been registered. For example, if the land is registered under the Community Land Act (CLA), the easement would be registered under the registration system for that land. The same would apply to the land under the Land Act. The only other limitation would be the applicable national and local land planning regulations. These provisions align land tenure, land use, and sustainable management of natural resources.

F. The role of land institutions in sustainable environmental management

The vertical and horizontal dispersal of powers under the 2010 Constitution yielded a plethora of land governance institutions. These institutions are critical for sustainable natural resource management in the different categories of land as has already become clear from the foregoing discussion. This part of the chapter highlights the role of some of the most critical institutions in land governance, and the roles that they play in ensuring sustainable natural resource management. These include: the national government; the NLC; registries; community land institutions, dispute resolution institutions, and counties.

The national government

The first critical actor is the national government, which has a role not just in land governance, but also in sustainable environmental management. Article 60 spells out the land principles, including sustainable and productive management of land resources, which principles are implemented through a national land policy developed by the national government upon recommendation by the National Land Commission.[138] Relatedly, Article 69 requires the State to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and to ensure the equitable sharing of the accruing benefits. According to the Executive Order No. 1 of 2018, the Ministry of Lands and Physical Planning is responsible for national land policy and management, land use planning, public land administration and rural settlement planning. It, therefore, places the ministry at the heart of sustainable environmental management.

Under Section 6 of the Land Act, the Cabinet Secretary is responsible for developing policies on land, implementation of land policies, monitoring and regulating land performance, and

137 Ibid Section 65(4).
138 Ibid (n.4) Article 67(2)(b).

administering and regulating private land interests. All these functions import a regulation aspect on the part of environmental management and resource utilization. Similarly, under the Fourth Schedule of the Constitution, the national government is responsible for the formulation of the general principles of land planning and the coordination of planning by the counties. Undoubtedly, planning plays an important environmental and resource management role. Under the Land Control Act, the Cabinet Secretary is responsible for designating any area in Kenya as a controlled transaction.[139] This allows for special measures to be taken in such an area, including measures to ensure sustainable development. The Physical and Land Use Planning Act, 2019, consolidates the planning functions within the 2010 constitutional dispensation and provides for planning, use, regulation and development of land.

The National Land Commission

The National Land Commission, established under Article 67 of the Constitution, plays an important role in the management and sustainable use of environmental resources. NLC manages public land on behalf of county and national governments, which term has been interpreted to be wide enough to include natural resource management on public land. In managing public land, NLC is required to evaluate and map land resources, conduct research on their potential use, develop resource evaluation data for land planning,[140] and develop guidelines for the management of public land occupied by public bodies.[141] NLC is also required to take appropriate actions to conserve ecologically sensitive public land with endangered or endemic species of flora and fauna, critical habitats or protected areas.[142] In this regard, the Commission should identify, map and demarcate resources and take any other action for purposes of preventing environmental degradation and climate change.

NLC is also responsible for formulating and proposing a National Land Policy to the national government for approval. While the land policy is directive, it contains important provisions on sustainable use and management of land-based resources and their beneficial uses. Additionally, the Commission is mandated to conduct research on issues related to land and the use of natural resources, and to make recommendations to appropriate authorities.[143] These recommendations are important for sustainable management of environmental resources. Notably, the Commission is responsible for monitoring and overseeing land use and planning throughout the country.[144]

In the allocation of public land, NLC is required to ensure that no land comprising ecologically sensitive areas is allocated.[145] Further, in approving development plans for reserved land for public institutions, NLC is mandated to consider any conservation, environmental or heritage issues relevant to the development, management or use of the public land before granting approval.[146] Section 19 of the Land Act gives NLC wide-ranging powers to formulate rules and

139 Ibid (n.42) Section 5.
140 Ibid Section 8
141 Ibid (n.42) Section 10
142 Ibid (n.42) Section 11
143 National Land Commission Act, (2012)
144 Ibid.
145 Ibid (n.42) Section 12(2) defines this land as: land falling within forests and wild reserves, mangroves, wetlands or in such buffer zones for the reserves or of environmentally sensitive areas, land along rivers, watershed, and such other water bodies in public land.
146 Ibid (n.42) Section 17

regulations that may contain measures to protect vital ecosystems, incentives to communities for sustainable use and conservation of natural resources programmes, rights, duties and co-management of forests by communities as well as registration of natural resources. In granting leases of public land, NLC may impose conditions geared towards sustainable management of natural resources on the leased land.[147]

Land registries

In Kenya, most land dispositions are enforceable and effective only after registration in the land register, maintained in accordance with Section 7 of the Land Registration Act. A land register contains the property details, proprietorship details, encumbrances, users or any other information as the Cabinet Secretary may determine. Registration of interests in land is the culmination of processes ranging from seeking consent from county governments to the NLC in leasehold properties. Registries are important institutions in ensuring compliance with laws by requiring evidence of compliance with sustainable resource management in the conveyance completion documents.[148]

Section 76 of the Land Registration Act provides that the Registrar may enter restrictions upon land for purposes of preventing fraud, improper dealings or *for any other purposes*. A restriction may prohibit or restrict dealings in land. Arguably, this power is wide enough to demand compliance with environmental requirements such as environmental impact assessments, in the case of developments, and land control board consents for controlled transactions, among others.

The first step to sustainable management of natural resources is to ensure the availability of accurate information on resource availability. Accordingly, natural resource management institutions such as NEMA, KWS and KFS are powerless without accurate land records. Updated, accurate cadastral maps and information generated through geographic information systems collected and stored by land registries is critical in achieving sustainable natural resource management and utilization.

Community assembly and community land management committees

Community Assemblies are established under the Community Land Act as gatherings of the registered adult members of a community.[149] It is the highest decision making body on community land. The assembly chooses seven to 15 of its members to constitute the Community Land Management Committee (the committee). It also ratifies the rules and regulations proposed by the committee to govern community land, and approves any investment agreements between the community and investors.[150]

Community institutions under the Community Land Act, 2016, are different from institutions under the repealed Land (Group Representatives) Act[151] and the Trust Land Act.[152] With regard to the group ranches, elected leaders carried out the day-to-day management of the land. The boundaries of group ranches, however, bore little relation to the social organisation of the

147 Ibid (n.42) Section 55
148 Land Registration Act, (2012) Section 7(c).
149 Community Land Act, (2016) Section 15.
150 Ibid Section 15(4) (e).
151 Land (Group Representatives) Act, (1970).
152 Trust Land Act, (1939).

communities and did not take into account the traditional units organised along kinship lines and the indigenous leadership system and methods of resolving disputes by arbitration. Groups that had very little in common were lumped together, leading to the erosion of the tenurial basis of traditional authority.[153] This paved way for unmitigated deterioration of the environment as the registered occupants had absolute control of the land with minimal checks. Similarly, the tenure system in trust land changed from trust status where it fell under the local government authority, and any dealing in it had to take into account the interests of other community member

Section 15 of the Community Land Act provides for the functions of the committee, which acts a secretariat performing the day-to-day management functions on the community land. It manages the land and coordinates development plans. It is also responsible for implementing the environmental and natural resources management framework.[154] Part IV of the Act requires the resources within the community land to be used sustainably, productively, and for the benefit of the whole community. The community is required to make rules and regulations on conservation and rehabilitation of the land, land use and physical planning.

Regulation 21 of the Community Land Regulations, 2018, requires the committee to assist and encourage the community to adhere to the principles of use and the management of environment and natural resources. Additionally, as the management body, it is responsible for the implementation of Section 19 of the law, which requires the submission of conservation, environmental or heritage issues relevant to the development, management or use of the land for input into the county development plans. Moreover, Section 20 of the law requires the community to abide by conservation and resource management laws in dealing with community land.

As previously noted, all land in Kenya belongs to the people collectively, as a nation, as communities, and as individuals. Article 62 defines public land and vests some of it in the county government in trust for the people resident in the county.[155] NLC administers and manages public land on behalf of the county governments and is required to identify and maintain a database for public land. It may issue conditions for the use of the land.[156] Article 63 vests the use and management of unregistered community in the county governments, which hold it in trust on behalf of the community.

As previously pointed out, the NLC is required to develop guidelines on sustainable use of public land and the resources on it. County governments are important stakeholders in implementing sustainable use mechanisms on the public land under their care. Second, Section 20 and 35 of the Community Land Act requires county governments, as trutees of unregistered community land, to promote sustainable conservation of land-based natural resources within community land. As trustees, the county governments must adhere to sustainable environmental management principles.

Section 19 of the Community Land Act provides for communities to submit developmental plans to the county governments for approval. The county governments must consider any conservation, environmental or heritage issues relevant to the development, management or use of the land and adhere to the developmental laws at the national and county level before

153 JW Bennett, *Political Ecology and Development Projects Affecting Pastoralist Peoples in East Africa*, 15 (1984).
154 Community Land Act, (2016) Part VII.
155 Ibid (n.4) Article 62(2).
156 Ibid (n.4) Article 67.

granting approval. The county government is thus an important institution in ensuring that community lands and the resources therein are used sustainably and can enforce this through the approval processes.

Section 29 of the Community Land Act further provides for the designation of community land for specific purposes, including reservations, farming, conservation and any of other purposes as the county government may prescribe for the public interest. Accordingly, the county government has the additional responsibility of ensuring that land is reserved for purposes beneficial to the public, among which is sustainable environmental and natural resource management.

Counties

Article 1 of the Constitution provides that sovereignty belongs to the people of Kenya and is exercised at national and county levels. The designation of both the national and county boundaries entails delineation of territories demarcated as land parcels. At the national level, the national government and institutions under it exercise this sovereignty while county governments exercise sovereignty at the county level. The Fourth Schedule of Constitution delineates functions for each level of government by creating three types of jurisdiction: exclusive, residual and concurrent. Importantly, the two levels of government are distinct and interdependent, and are required to conduct their mutual relations through consultation and cooperation.[157] County governments are important stakeholders in land and sustainable environmental management. They are responsible for land and land-based resources within their jurisdiction including forests,[158] and thus important in its sustainable use and productivity in this regard.

Article 185 requires County Assemblies to "receive and approve plans and policies for the management and exploitation of the county's resources and the development and management of its infrastructure and institutions." They also legislate and provide for enforcement of national policies related to conservation. County Assemblies are, therefore, also active participants in planning affairs in the counties. Counties are important stakeholders in land and sustainable environmental management through control of pollution, county planning, and implementation of specific national government policies on natural resources and environmental, soil water and forestry conservation.

The County Government Act provides for the general principles of county planning and development facilitation, including: self-fulfillment within the county communities; responsibility to future generations; and protection and development of natural resources in a manner that aligns national and county government policies.[159] Section 103 outlines the objectives of county planning, which include: to facilitate the development of a well-balanced system of settlements; ensure productive use of scarce land, water and other resources for economic, social, ecological and other functions across a county; and achievement and maintenance of a tree cover of at least 10 per cent of the land area of Kenya. Section 104 obliges counties to plan and requires the planning to integrate economic, physical, social, environmental and spatial planning.

157 Ibid (n.4) Article 6(2) and Article 189(1).
158 Forest Conservation and Management Act, (2016) Section 21.
159 Environment Management and Coordination Act, (1999) Section 102

The County Government, through the Governor, appoints the County Environment Committee to take responsibility for the proper management of the environment and develop a county strategic environmental action plan every five years.[160] The county environmental action plan provides for substantive contents of the action plans, which have huge implications on sustainable environmental management.[161] It is also responsible for the reforestation and afforestation.[162]

Within urban areas, management boards are required to maintain a safe and healthy environment and to prepare environmental management plans.[163] Article 66 of the Constitution (discussed hereafter) provides that the state "may regulate the use of any land, or any interest in or right over any land, in the interest of defence, public safety, public order, public morality, public health, or land use planning". The county government and national government may thus limit the use of any category of land for public benefit. In relation to land use and planning, the county governments are responsible for "county planning and development, including statistics, land survey and mapping, boundaries and fencing, housing and electricity and gas reticulation and energy regulation". Although this is a shared function (concurrent jurisdiction), the substantive planning and developmental control is expressly in the province of the county governments. County governments should, therefore, have very elaborate planning departments to execute their mandate.

G. Dispute resolution institutions in sustainable environmental management

Disputes are bound to occur in land and resource management particularly because of the two dominant and competing approaches to environmental conservation: ecocentric and anthropocentric. While the latter anchors conservation of environmental and natural resources on the beneficial attributes that these offer to humans (institutions, individuals or communities), the latter calls for the conservation of these resources for their own survival and good.[164] Additionally, given the many stakeholders using resources and engaged in their management, with multiple roles, laws and actors, disputes are inevitable. Below, we look at some of the institutions involved in mediating disputes over land-based natural resources.

Courts

The Constitution broadly recognizes two types of dispute resolution mechanisms: court and alternative dispute resolution (ADR).[165] Article 159 establishes the Judiciary as the ultimate arbiter of disputes. It also provides that the court should encourage alternative dispute resolution including mediation, arbitration, reconciliation, and traditional dispute resolution mechanisms. Article 162(2) provides for the establishment of the Environment and Land Court with the status of the High Court to resolve disputes emanating from land and environment dealings. Pursuant to this Article, Parliament enacted the Environment and Land Court Act, 2011, establishing the court. Section 13 of this law provides for the jurisdiction of the court, which is to determine

160 Ibid Section 30
161 Ibid Section 38
162 Ibid Section 46
163 Urban Areas and Cities Act, (2011).
164 J Rülke, M Rieckmann, JM Nzau & M Teucher, 'How Ecocentrism and Anthropocentrism Influence Human–Environment Relationships in a Kenyan Biodiversity Hotspot',(2020) *Sustainability, 12(19), 8213.*
165 Ibid (n.4)

disputes relating to environmental planning and protection, climate issues, land use planning, land administration and management and enforcement of rights under Articles 42, 69 and 70. In line with Article 159, Section 20 of the Act allows the court either on application or on its own motion to adopt alternative dispute resolution in any case. Given the close nexus between land and environment, it is not surprising that the court is designated as an Environment and Land Court.

Articles 22, 23, 162(2) of the Constitution and Section 13 of the Act confer upon this court the jurisdiction to address the denial or threats of the rights relating to a clean and healthy environment. As a court, its role in resolving disputes related to sustainable development extends not only to its interpretative jurisdiction; it also applies, enforces law in disputes relating to sustainable development. In exercising these powers, the court is required to adhere to principles of sustainable development, and it also develops jurisprudence around this area.[166] Under Article 162 (2) of the Constitution, the ELC is established 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. There was initial confusion on the meaning of a 'special & distinctive' court and what constituted a land matter, especially with the establishment of the High Court Land Division in 2011. Administrative convenience and the quest to deal with case backlog resulted in the assignment of cases under specialised courts to High Court judges and conversely assignment of other cases to judges of specialised courts. Clarity of jurisdiction is a very critical issue as was underscored in *Owners of Motor Vehicle 'Lilian S' v Caltex Oil Kenya Limited,* where it was held that: Jurisdiction is everything. Without it, a court has no power to make one more step. Where a "court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."[167]

The issue of the jurisdiction of the ELC went up to the Supreme Court, highlighting the importance placed on its functions.[168] The case arose from gazettement of judges to hear and determine criminal appeals to clear backlog during the Service Week in October 2013 by the Chief Justice. Karisa Chengo and others had been convicted for robbery with violence by the magistrates court. Their appeal was heard and dismissed during the Service Week by a panel comprising of High Court and ELC judges. They appealed to Court of Appeal, which held that the panel lacked jurisdiction because it included an ELC judge. The Supreme Court upheld the Court of Appeal decision, drawing on the history of the establishment of specialised courts, and noted that the reason for anchoring the ELC and its jurisdiction in the Constitution was to clarify its specialized status and avoid jurisdictional challenges.

More cases are progressively being heard by the court as illustrated in *Joseph Leboo & 2 Others v Director Kenya Forest Services & Another*,[169] and it is hoped that a robust endogenous jurisprudence on land tenure, land use and sustainable development will emerge from the court. It is also important to note that the High Court has a division dealing with constitutional matters

166 See e.g. *Kwanza Estates Limited by Kenya Wildlife Services* 2013 eKLR; *Joseph Leboo & 2 Others v Director Kenya Forest Services & Another* (2013) eKLR and *Friends of Lake Turkana v Attorney General and Others* (2014) eKLR

167 *Owners of Motor Vehicle 'Lilian S'* v *Caltex Oil Kenya Limited* (1989) KLR 1653(CA).

168 *Republic v Karisa Chengo and Others* Supreme Court Petition No. 5 of (2015).

169 *Joseph Leboo & 2 Others v Director Kenya Forest Services & Another* (2013) eKLR

and has dealt with some land and environment matters[170] In this case, a group of residents from Lamu County filed a case against the Attorney General and the heads of several ministries (collectively "the government") responsible for approving the port project, alleging that the Lamu Port-South Sudan Ethiopia Transport corridor (LAPSSET) project was designed and implemented in violation of the Constitution and applicable laws, such as the Environmental Management and Coordination Act (EMCA). The Lamu residents expressed concern about the far-reaching and potentially irrevocable environmental, economic, and cultural impacts of the project, which were not adequately considered during the planning phases. The court ruled in favour of the applicants.

The Magistrates Court Act[171] also grants magistrates' courts jurisdiction over any matter touching on the environment. The Court of Appeal in *Law Society of Kenya (Malindi Branch) v Malindi Law Society of Kenya and Others*,[172] where the issue of jurisdiction of the Magistrates' Courts on environmental matters was raised, held that that magistrates' courts have jurisdiction over environment and land matters arguing that:

> In our view, conferring jurisdiction on magistrates' courts to hear and determine does not diminish the specialization of the specialized courts considering that appeals from the magistrates' courts over those matters lie with the specialized courts. As urged by Mr Kanjama, under the doctrine of judicial precedent, the decisions of the specialized courts would bind the magistrates' courts and the specialized courts would, therefore, undoubtedly imprint the 'specialized jurisprudence' on the magistrates' courts.[173]

Section 104 of the Land Act, Section 101 of the Land Registration Act, Section 42 of the Community Land Act and the Land Control Act[174] also designate the ELC as the proper forum for resolving environment related disputes. Similar references exist in Section 10 of the EMCA, Section 70 of the Forest Conservation and Management Act, and Section 108 of the Wildlife Conservation and Management.

Alternative Dispute Resolution

Article 159 urges the encouragement of alternative disputes resolution mechanisms as noted earlier. In environment and land related disputes, Article 60 specifically provides for the use of alternative dispute resolutions and mandates the NLC to encourage resolution of disputes using ADR in Article 67. In similar parlance, Section 4 of the Land Act, Section 39, 40 and 41 of the Community Land Act, Section 119 of the Water Act, 2016 and Section 117 of the Wildlife Conservation and Management contain provisions for ADR in environmental and natural

170 See e.g. *Mohamed Ali Baadi and Others v Attorney General & 11 Others* [2018] eKLR Petition 22 of 2012 - Kenya Law A case arising out of the Lamu Port-South Sudan Ethiopia-Transport Corridor project (LAPSSET), a large-scale transportation and infrastructure scheme with many individual components, including a railway, oil pipelines, oil refineries, tourism development, and a 32-berth port at Manda Bay in Lamu, Kenya.

171 Act No. 26 of 2015. The question of the jurisdiction of magistrate's courts to hear environment and land matters was canvassed in *Law Society of Kenya (Malindi Branch) v Malindi Law Society of Kenyan and Other*s Malindi Civil Appeal, 287 of 2016. This was part of the process of delineating the jurisdiction of the specialized court on environment and land. See also generally *Republic v Karisa Chengo and Others* Supreme Court Petition Number 5 of (2015).

172 *Law Society of Kenya (Malindi Branch) v Malindi Law Society of Kenyan and 6 Other*s (2017) eKLR.

173 Ibid.

174 Land Control Act, (1989).

resources management. It is instructive to note that these are anticipated to be both formal and informal, bringing the role of traditional dispute resolution into sharp focus in sustainable environmental management.

Tribunals

The Constitution contemplates tribunals as dispute resolution channels in Article 1(3)(c). Consequently, Parliament through legislation, has established various tribunals that exercise quasi-judicial powers. Section 125 of the EMCA establishes the National Environmental Tribunal, having a wide mandate to resolve disputes arising from the Act. Additionally, Section 70 of the Forest Conservation and Management Act and Section 26(2) of the Wildlife Conservation and Management Act provide that disputes arising under the Act should be referred to the National Environmental Tribunal. Section 31 of the EMCA establishes the National Environmental Department as a committee of NEMA mandated to investigate and resolve disputes between members of NEMA, and cases involving environmental degradation. Under the Water Act, 2016, Section 119 establishes the Water Tribunal with jurisdiction to hear and determine appeals related to water arising from the Act. The Land Control Board establishes various bodies for hearing and determining appeals arising from the Act, including the Central Land Control Appeals Board. All these tribunals indirectly deal with land as the resources are based on land.

H. Regulation of land rights for sustainable environmental management

The regulatory role of the State over land rights is a difficult area as land owners guard their rights jealously against incursions by outsiders, including the State. In the United States, where it is most developed, the Supreme Court jurisprudence has been characterized as 'essentially *ad hoc*, factual decision making".[175] Underkuffler argues that 'all constitutional adjudication is *ad hoc* to some extent because it involves the application of broad legal principles to particular factual situations.'[176] Alexander further argues that even in a jurisdiction like the US that venerates individual rights, there exists what he calls a 'social obligation norm', which is neither explicitly recognized nor systematically developed.[177] This, in his view, is what enables human beings to flourish.[178]

With regard to the environment and natural resources, the nature and concept of property rights in water, rivers, seashore and oceans and their public benefit and utilization gave rise to the public trust doctrine (PTD). PTD acknowledges that some natural resources are limited yet so critical and too important to be allocated to private individuals.[179] Their benefits should accrue to the general public for use and enjoyment, though in a regulated manner.[180] In such cases, the rights to such resources are vested in the State to hold in trust for the people, for all to use and enjoy under set regulations.

In Kenya, PTD has significantly gained prominence after the promulgation of the 2010 Constitution, where the public is increasingly interested in protecting essential public natural resources and

175 Ibid (n.1) p.2.
176 Ibid (n.1) p.2.
177 GS Alexander, 'The Social Obligation Norm in American Property Law', (2009) *Cornell Law Review Special Issue Property and Obligation Vol. 94* No. 4 p. 745 -820.
178 GS Alexander, 'Property and Human Flourishing'. (2018) Oxford University Press.
179 P Kameri-Mbote. 'The Use of Public Trust Doctrine in Environmental Law', (2007) *Law Env't & Dev*.
180 Ibid.

functions. Article 62 of the Constitution vests public land in the people of Kenya to be held in trust by the national and county government and managed by the NLC. In the management and administration of such land, the government is required to ensure that Kenyans benefit.

In further entrenching PTD, Section 5 of the Water Act, 2016, vests all water resources in the national government in trust for the people of Kenya. Accordingly, private individuals have the right to use water, subject to regulation. Similarly, Section 6 of the Mining Act vests all the minerals in Kenya in the national government in trust for the people of Kenya regardless of any right or ownership of or by any person in relation to any land in, on or under which any minerals are found. Similar provisions exist in Geothermal Resources No. 12 of 1982 and Petroleum (Exploration and Production) Act[181] as highlighted in the discussions earlier in this chapter. Two mechanisms are used to secure the PTD over land in Kenya: police power and eminent domain.

Police power

The State is vested with power to regulate the manner in which people use land. The rationale is that although property is privately owned, the State as the guardian of the public interest has a responsibility to ensure that land is sustainably, resourcefully and productively used in a manner that does not cause harm to the public. This ensures that all enjoyment and use of land and resources on it is subject to the protection of the public interest. Accordingly, use of private land may be regulated for health, safety, morals and other public interest considerations as pointed out earlier in this chapter.

In Kenya, this power is constitutionally recognized under Article 66, which provides that the "State may regulate the use of any land, or any interest in or right over any land, in the interest of defence, public safety, public order, public morality, public health, or land use planning". In achieving any of these public interest imperatives, the State may restrict the use and prohibit certain acts or developments in the land. Article 67(h) gives the NLC the responsibility of monitoring and overseeing responsibilities over land use planning throughout the country.

Obviously, development control through town and physical planning for sustainability and order is the most dominant exercise of police power. Under the Fourth Schedule, the national government and the counties share planning functions, with the former developing the planning policy and being the primary planning institution in Kenya. As discussed previously, the County Government Act and the Urban Areas and Cities Act provide substantively for county planning taking into account environmental sustainability.

Another primary legislation that regulates use and enjoyment of land is the Physical and Land Use Planning Act.[182] Under this law, county governments (planning authorities) must approve all developments and key among the considerations is the impact that proposed developments may have on the environment. Indeed, Section 36 of the law requires planning authorities to require applicants for development to conduct environmental impact assessments so as to ensure that they are consistent with the sustainability of the surrounding environment.

The EMCA is another important legislation in police power for sustainable environmental management. Under Section 9, the National Environment Management Authority (NEMA)

181 Petroleum (Exploration and Production), (1984) Section 3.
182 Physical and Land Use Planning Act, (2019).

is obligated to examine land use patterns to determine their impact on the quality and quantity of natural resources, make recommendations on land use planning, and carrying out of environmental impact assessments that form the basis for approval of any use of land. Additionally, through environmental impact assessments, NEMA is able to control land use for the sustainable management of the environment.

Under the Water Act, Section 22 and 23 provide for the expansive powers of the Water Resource Authority to restrict and prohibit activities in any land for the benefit of water resources. Section 6 of the Land Control Act requires the consent of the Land Control Board for any dealings in any agricultural land. In granting approvals, the board should consider the effect of productivity of the land after such dealings. Similarly, Section 72 and 74 of the Wildlife Conservation and Management Act, 2013, requires that the use of land in wildlife areas be compatible with wildlife conservation, and KWS may impose restrictions to this effect.

A key area of concern is the lack of coordination between conventional physical planning at county and national levels and development control, on the one hand, and management planning for natural resources such as public forests and national parks, on the other. This definitely affects the efficacy of development planning/police power. There is need to interface police power and EIA to ensure that both contribute to sustainable development.

Eminent domain/compulsory acquisition

Compulsory acquisition in Kenya is anchored in the Constitution, which authorizes the State to compulsorily deprive land rights for public purpose or in the interest of the public.[183] This power, also referred to as eminent domain, flows from the State's position as the trustee of land on behalf of all Kenyans. Eminent domain is derived for the Latin term *Dominium eminens.*[184] The acquisition of the land must be carried out in in accordance with the Constitution and written law, which requires that just and prompt payment of compensation be made in full to the affected persons, and provides for rights of redress in court.

The Land Act provides substantively on the manner, process and considerations in carrying out compulsory acquisition. It defines public purposes for which land may be compulsorily acquired in an exhaustive manner, implying that any action that is taken for the public benefit falls within this category, including acquisitions for sustainable environment management.[185] It recognizes, in Section 9, that private land may be converted to public land through compulsory acquisition. Further, Section 5 and 22(1) of the Community Land Act provide that community land may be acquired for public purposes, and in the manner provided under the Land Act. Section 28 of the Land Registration Act, 2012, lists compulsory acquisition as one of the overriding interests in any land that does not have to be registered.

NLC is mandated to carry out compulsory acquisitions on behalf of the county and national governments (both levels are hereinafter referred as the government). Whenever the

183 Ibid (n.4) Article 40(3) (b)

184 Hugo Grotius, *De Jure Belli et Pacis* (1625) It means supreme lordship. Under dominium eminens the property of subjects is under the eminent domain of the State, so that the State or one who acts for it may use and even alienate and destroy such property, not only in the case of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility. But when this is done the State is bound to make good the loss to those who lose their property.

185 Ibid (n.42) Section 2.

government is satisfied that any land may be acquired for public purposes and desires it to be acquired, the Committee Executive Member or the Cabinet Secretary submits the request to the Commission.[186] NLC is required to satisfy itself that the purpose for which land is required is squarely within the public purpose realm, and may reject or approve the request.[187] Additionally, NLC must be satisfied that the acquiring body has the requisite funds for the acquisition and that the land has been surveyed and geo-referenced.[188]

The Registrar should enter in the title the intended acquisition, which serves to prevent any further dealings, including disposition of the land. In the case of community land, the notice served on the community land management committee should be brought to the attention of the community assembly for information and other purposes.[189] Upon successful acquisition, NLC takes possession of the land on behalf of the government.[190]

I. Conclusion

The 2010 Constitution ushered in a new era for both land tenure and sustainable development. The classification of land into public, private and community, and provisions for the management of each under implementing legislation clarified the status of land-based natural resources. It is particularly noteworthy that tenure to land is aligned with the management of resources on the land, thus addressing one of the major causes of unsustainable use by land owners. Moreover, the inclusion of the sustainable development principle as one of the national values and principles of governance; provision for the right to a clean and healthy environment; predicating land rights on regulatory controls for both sustainability and the public interest; dedication of a whole chapter in the Constitution; devolution of functions, including natural resource management, among others, point to a commitment to managing land-based natural resources sustainably. The institutions created by the Constitution, such as the Community Land Management Committees; the National Land Commission, and the Environment and Land Court, also provide support for synergizing land tenure with sustainable management of land-based resources.

A lot of progress has been made in putting up frameworks for sustainable management of land-based natural resources. It is notable that environmental easements are now included in law. It would help matters, however, if the legal provisions on easements in the different laws were linked for ease of application and enforcement. Another area that needs to be addressed is the overlapping mandates of institutions over land and resources thereon. Conflicts arising from overlapping mandates can be avoided if the functions of different agencies are synchronized and ways of working together framed to facilitate sustainable management of land and land-based resources. The operationalization and enforcement all the constitutional provisions and implementing legislation on sustainable land and natural resource management will definitely deliver sustainable development as envisioned in the 2010 Constitution of Kenya.

186 Ibid (n.42) Section 107
187 Land Regulations, (2017) Regulation 22.
188 Ibid Regulation 22(3)
189 Community Land Regulations, (2018) Regulation 15
190 Ibid (n.187) Regulation 29(6).

CHAPTER 10

Assessing Kenya's Physical and Land Use Planning Legal Framework against the Sustainable Land Use Objectives in the Constitution

Peter Mburu

A. Introduction

Land is a principle instrument for fostering social justice, development, provision of decent dwellings and health conditions; and its use should, therefore, reflect the interest of the society as a whole. Key challenges face the optimal and sustainable use of land in Kenya. One of the major challenges the country faces is striking a balance between satisfying human livelihood needs and sustainable use of resources for posterity.[1]

Unregulated land use, poor physical planning and lack of proper development control is precarious and hazardous; this is evinced by collapse of several buildings mostly residential, demolition of illegal developments, uncontrolled urban sprawl coupled with expansion of slum areas, informal settlements and illegal structures, heavy traffic on the major roads, floods and sewer spillages in urban areas, and poor drainage systems, among other predicaments.

As pressure on land increases due to population growth, there are emerging and conflicting interests in land leading to demand for multiple land uses. These new and emerging ecosystem demands are causing conversion of expansive agricultural lands to other uses, for instance reforestation and biofuels, as well as urbanization and industrialization. The proper management of these competing interests on land is key to the achievement of sustainable land use.[2] Spatial and land use planning are tools employed to contribute to sustainable land management.

There is evidence that physical plans and development control, among other tools, provide the nexus between land tenure and environmental management. This is because proper land use planning builds up towards development control, which in turn protects land from unsustainable encroachment due to uncontrolled urbanization. Planning also facilitates preservation of ecological and wildlife migratory corridors and the establishment of appropriate buffers between development and coastal estuaries. Land use planning also re-affirms and enhances land tenure security.[3]

This chapter discusses the concepts of physical planning, land use, and development control in Kenya. It highlights the policy, legal and institutional frameworks governing these concepts and goes further to assess the current legal situation before concluding by suggesting possible propositions that can be adopted to achieve sustainable use of land and land resources.

1 Republic of Kenya, National Land Use Policy Sessional Paper No. 1 of 2017, Government Printer, Nairobi.
2 G Metternicht, 'Land Use Planning' [2017] UNCCD - Global Land Outlook Working Paper, University of South Wales, Sydney, Australia 4.
3 Ibid

B. Background

Poor land governance ultimately results in insecurity of tenure, conflicts over land, poor land use planning and, eventually, 'environmental degradation'. Good governance promotes responsible land use, which enhances not only environmental benefits but also improves food security and peace resulting from secure land tenure.[4] In 2004, the Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land chaired by Paul Ndung'u (popularly 'The Ndung'u Report') recognized that Kenya's government over the years made illegal and irregular land allocations, which it recommended be revoked. The report decried that such awards were highly unsustainable.[5]

The final report of the Constitution of Kenya Review Commission in 2005 lamented environmental degradation due to a breakdown in natural resource management, particularly common property resources, for instance, vide de-gazettement and alienation of forest reserves in some cases long used and occupied by indigenous people. This, the report added, was due to widespread and deeply rooted corruption in the alienation of government lands.[6] Kenyans views, further echoed in the report, stipulated that stiffer penalties should be meted out on individuals involved in environmental degradation.

Environmental degradation is closely linked to the way land is used. On the realization that proper land use, physical planning, and development control are akin to sustainable development, Kenya has enacted several laws governing these concepts. There are also several regulations governing these realms at the national and county governance levels. Whereas having laws and regulations to govern land use, physical planning and to control development is a laudable effort, their half-hearted implementation and/or observance is enervating and demoralizing.

Several proponents put forward the view that Kenya lacks sufficient legislation to properly govern the varied uses of land, physical planning, and development control. While this may be true, it is my proposition that effective land use, physical planning and development control cannot only be achieved by increasing legislation and regulations. There has to be concerted effort to educate the public so as to ensure optimum adherence to the law and social norms touching on proper use of land.

Definitions of fundamental concepts

Land use refers to the different ways that geographical space can be exploited or utilized. Sessional Paper No. 1 of 2017, the National Land Use Policy, defines land use as the activities to which land is subjected, and is often determined by economic returns, socio-cultural practices, ecological zones and public policies. In the context of this policy, land use is defined as the economic and cultural activities practised on the land. In Kenya, key land uses include agriculture, industrial, commercial, infrastructure, human settlements, recreational areas, rangelands, fishing, mining, wildlife, forests, national reserves and cultural sites, among others spread across the high, medium and low rainfall areas.[7]

4 Ibid 8

5 R Southall, 'The Ndungu Report; Land and Graft in Kenya', *Review of African Political Economy* [2005] No. 103:135-204 ROAPE Publications Ltd.

6 'The Final Report of Constitution of Kenya Review Commission' (2005), s18.2.5 < http://kenyalaw.org/kl/fileadmin/CommissionReports/The-Final-Report-of-the-Constitution-of-Kenya-Review-Commission-2005.pdf> accessed 23rd August 2018

7 R Southall, 'The Ndungu Report; Land and Graft in Kenya', *Review of African Political Economy* [2005] No. 103:135-204 ROAPE Publications Ltd.

Land use planning, on the other hand, is the process of designating, regulating, evaluating, zoning and organizing the present and future use and development of land in all its geographical areas and its resources to secure the physical, economic and social efficiency, health and well-being of urban and rural communities.[8] Land use planning has also been defined as the systematic assessment of land and water potential, alternatives for land use, and economic and social conditions in order to select and adopt the best land use options. Its purpose is to select and put into practice those land uses that will best meet the needs of the people while safeguarding resources for the future.[9]

Key principles of land use planning include integration into State institutions, public participation, gender inclusiveness, transparency, being future oriented, visionary, legally binding, consideration of local knowledge, and traditional methods applicable to land use as well as multi-disciplinary cooperation.[10]

Spatial planning means the methodology and approach used to influence the distribution of people and activities to achieve optimal utilization of physical, economic and socio-cultural resources.[11] It is a multi-disciplinary approach to organizing and utilizing space. Spatial planning integrates policies for the development and use of land with other policies and programmes, which influence the nature of places and how they function. It ensures linkages between sectors and agencies at various levels of governance in order to accommodate multiple aspirations and respond to emerging challenges with a focus on the common good and respect for future generations.[12]

A spatial plan outlines the spatial expression to national and county development policies, and also integrates proposals from various sectors that include identified priority investments.

Physical planning means the active process of organizing the physical infrastructure and its functions to ensure orderly and effective siting or location of land uses: it encompasses deliberate determination of spatial plans with an aim of achieving the optimum level of land utilization in a sustainable manner.[13] From the foregoing definitions, it is evident that physical planning is an amalgam of land use and spatial planning aspects, and not a form of land use planning or spatial planning. Rather, the latter are subsets of physical planning.[14]

Development means carrying out of any works on land or making any material change in the use of any structures on the land. On the other hand, **development control** means the process of managing or regulating the carrying out of any works on land, or making of any material change in the use of any land or structures and ensuring that operations on land conform to spatial development plans as well as policy guidelines, regulations, and standards issued by the planning authority from time to time in order to achieve a purposeful utilization of land in the interest of the general welfare of the public.[15]

8 Republic of Kenya *Physical and Land Use Planning Act* No. 13 of 2019 (Government Printer) s 2
9 supra n 2, 5
10 Ibid 13
11 supra n 7
12 supra n 2
13 supra n 7
14 Government of Kenya, Ministry of Lands & Physical Planning, *'Purpose and Benefits of Planning',* (2017)
15 supra n 7

Development control is a key aspect of physical planning that enables developments to be aligned with the approved development plans, policy guidelines and relevant standards.[16] If development control is properly carried out, it should result in orderly physical development, ideal land use, proper execution, implementation of approved physical development plans, and conservation of the environment.[17] Development control is based on seven principles, which include equity, sustainability, transparency, participation, efficiency, facilitative coordination and consistency. It involves a number of development proposals and specific measures as defined in the Physical and Land Use Planning Act. Development proposals include erection of buildings, land subdivisions, amalgamations, change of use, extensions of use and extensions of lease.

According to the National Land Use Policy, development control has not been extensively used to regulate the use of land and to ensure sustainability.[18] Section 2 of the Physical and Land Use Planning Act declares that development control is an integral part of the planning process that ensures every development complies with land use and land management regulations outlined in any approved spatial development plans. It also ensures developments comply with land use and planning standards.

The County Spatial Planning Guidelines of 2018 stipulate that, matters subjected to development control cut across several development proposals, which must meet the specified criteria as defined in the Physical Planning Act, including,[19] (now the Physical and Land Use Planning Act). These proposals include Building Plans, which are aimed at ensuring conformity with approved development plans, regulations, and standards in the subject area; land subdivision,[20] which aims at ensuring conformity with approved development plans, regulations, and standards in the subject area; and amalgamation[21] that is aimed at ensuring conformity with approved development plans, regulations, and standards in the specific area.

Change of use[22] and extension of use,[23] which should ensure compatibility and compliance to the set regulations and standards. There is also extension of lease,[24] and renewal of lease, which follows the lapse of an old lease period.[25]

The rudimentary understanding of the procedure for development control involves presenting an application for development permission by a developer to the planning authority, consideration of the application, and grant of approval, deferment or rejection of the application in prescribed forms. Development control is a function carried out by county governments.[26]

16 Ministry of Lands & Physical Planning. *Development Control Manual*,

17 Ministry of Lands and Physical Planning & Council of Governors, *County Spatial Planning Guidelines;Towards Sustainable Development and County Effectiveness* (2018).

18 supra n 1

19 supra n 16.

20 Subdivision refers to parceling of land into two or more portions.

21 Amalgamation refers to the combination of two or more parcels of land into one.

22 Change of use refers to; any alteration in the use, purpose or level of activity within any land, space or building that involves a material change which does not conform to the existing plans and policies.

23 Extension of use refers to the introduction of a new user in addition to the existing use within the same building or site while maintaining the dominance of the existing use. The rule of the thump is that the additional use should be compatible with the existing use and the neighborhood character.

24 Extension of lease, involves the lessor of land extending the lease period to a lessee before expiry of the lease period following an application for the extension.

25 Renewal of lease; Involves the lessor of land getting into a new lease agreement with the lessee for a new lease period (and new lease conditions) following the lapse of the old lease period which is usually followed by an application for the renewal.

26 Physical and Land Use Planning Act 2019, Section 55.

C. Regulatory framework for physical and land use planning

The statutory framework governing land use, physical planning and development control include the Constitution,[27] the Physical and Land Use Planning Act,[28] the Urban Areas and Cities Act,[29] the National Land Commission Act,[30] the Land Act,[31] and the Environmental Management and Coordination Act,[32] among others. The policy instruments buttressing the above-mentioned statutes include the National land policy,[33] Sessional Paper No. 1 of 2017 on the National Land Use Policy,[34] Kenya's Vision 2030,[35] and the National Spatial Plan 2020-2045.[36]

Constitution

Overview

The Constitution has laid a good foundation for most, if not all, physical and land use planning (PLUP) laws. Indeed, the statutes analyzed hereafter are variously well anchored in the Constitution of Kenya, 2010. Many land use laws find their footing in Chapter Five and particularly Article 60 of the Constitution. The laws that preceded this supreme law may be slightly out of tune, however, and thus most are in the process of being amended to reflect the constitutional spirit.

Protection of the environment is an obligation of the government and country's residents under the Constitution. Indeed, the preamble pays homage to this, stating; 'Respectful of the environment, which is our heritage, and determined to sustain it for the benefit of future generations'. Article 10 provides for the national values and principles of governance, which bind all State organs, State officers and public officers while interpreting any law including the Constitution. These values, among others, include patriotism, sharing and devolution of power, human rights, inclusiveness, participation of the people, non-discrimination and sustainable development.

Sustainable development is development that meets the needs of the present generation without compromising the ability of future generations to meet and cater for their own needs.[37]

In *Mohamed Baadi v Attorney General,*[38] the petition concerned the design and implementation of the Lamu Port-South Sudan-Ethiopia-Transport Corridor project (LAPSET). The petitioners were the residents of Lamu County and claimed they were not adequately involved in the conceptualization, design and implementation of the project. They informed the court that they were not opposed to the LAPSSET Project as a mega infrastructural development; rather, they opposed the manner in which it was conceptualized, designed and implemented in violation of the Constitution and statutory law without putting in place adequate measures to mitigate the adverse effects of a project of its kind.

27 Republic of Kenya, The Constitution of Kenya 2010 Government Printer Nairobi
28 supra n 7
29 Republic of Kenya, Urban Areas Cities Act 2011 Government Printer Nairobi
30 Republic of Kenya, National Land Commission Act 2012 Government Printer Nairobi
31 Republic of Kenya, Land Act 2012 Government Printer Nairobi
32 Republic of Kenya, Environment Management and Coordination Act 1999 Government Printer Nairobi
33 Republic of Kenya National Land Policy Sessional Paper No 3 2009 Government Printer Nairobi
34 supra n 1
35 Republic of Kenya, Vision 2030, 2008 Government Printer Nairobi
36 Republic of Kenya, *National Spatial Plan*, 2015-2045, 2016 Government Printer Nairobi
37 The World Commission on Environment and development, *Our Common Future*, Oxford University Press, Oxford (1987) (see also) Republic of Kenya, (1999) Environmental Management and Co-ordination Act 1999 (EMCA, 1999).
38 *Mohamed Ali Baadi and Others* V *Attorney General & 11 Others* [2018] eKLR

In particular, the petitioners' case was that the manner in which the LAPSSET project was being implemented, violated statutory and constitutional principles and values, among them sustainable development, transparency, public participation, accountability and specifically violates their constitutional rights to earn a livelihood, a clean and healthy environment, cultural rights and the right to information. The petitioners further averred that the project implementers failed to put in place measures to protect the local population.

The court, in its ruling, agreed with the petitioners and found that the people and the County Government of Lamu were not adequately involved, thus violating the public participation principle under the Constitution and the Environmental and coordination Act (EMCA). This rendered both the Environment and Social Impact Assessment and the Strategic Environmental Assessment procedurally infirm.

Right to property and its limitations

Article 40 of the Constitution provides for the protection of the right to property as a basic human right. It stipulates that '[s]ubject to Article 65, every person has the right, either individually or in association with others, to acquire and own property; (a) of any description; and (b) in any part of Kenya'.

This Article further provides that no individual should be deprived of the right to property unless such deprivation is a result of compulsory acquisition, which must be subject to prompt and adequate compensation. This right does not extend to any property that is deemed to have been acquired unlawfully. This protection of property is further moderated by the provisions of Article 66, which assigns the State the power to regulate land use and use of any rights thereof in the interest of public safety, public defence, public health, public morality and land use planning. This means, therefore, that the ownership of property as a human right is not absolute and it is, among other elements, subject to regulation for the sake of land use planning.

Article 70 provides for the enforcement of environmental rights stipulating that:

> If a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.[39]

An important limitation to the right to property arises from the Common Law concept of adverse possession as seen in *Mtana v Kahindi.*[40] In this case, the respondent, through an originating summons, asked the High Court to declare him as the absolute owner of the parcel of land known as TEZO/ROKA/374, registered in the name of the appellant by reason of having been in open, peaceful and continuous occupation, without interruption, for a period exceeding 12 years; and that the Registrar of Lands be directed to issue to the respondent the title to the suit property. The court agreed with him in line with the doctrine of adverse possession.

The registered owner (appellant in this matter, Mtana Lewa) appealed against this decision. The respondent, Kahindi Ngala Mwagandi, as plaintiff, had filed in the trial court originating

39 supra n 26

40 *Mtana Lewa v Kahindi Ngala* [2014] CA No. 56 of 2014 eKLR

summons dated April 1, 2011 seeking a declaration that title to the suit premises had by operation of the principle of adverse possession devolved to him. The preliminary objection challenged the jurisdiction of the court to entertain the claim for the reason that Section 38 of the Limitation of Actions Act was in conflict with Article 40 of the Constitution, as read together with the doctrines/maxims of *ex turpi causa non oritur actio* and *ex dolo malo no oritur action* and, therefore, unconstitutional. The maxims mean that no action should be founded on illegal or immoral conduct, and/or that the plaintiff will be unable to pursue legal remedy if it arises in connection with his own illegal act and/or that no right of action can have its origin in fraud.

Counsel for the appellant relied on Section 7 (i) of the Land Act, which recognizes that title to land may be acquired through any manner prescribed by statute. Section 28 of the Land Registration Act, too, recognizes the right to land acquired by virtue of any written law relating to the limitation of actions, or other rights acquired by any written law.

The Court of Appeal, in agreeing with the respondent, stated that acquisition of land by adverse possession is not inconsistent with Article 40 (2) (a) of the Constitution, and found no fault in the ruling of the High Court, thereby dismissing the appeal without costs.

Principles of land use

Article 60 of the Constitution enumerates the principles of land policy and provides the guidelines for the formulation of land use and land management policies by providing that:

(1) Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles—

- (a) equitable access to land;
- (b) security of land rights;
- (c) sustainable and productive management of land resources;
- (d) transparent and cost effective administration of land;
- (e) sound conservation and protection of ecologically sensitive areas;
- (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 recognized local community initiatives consistent with this Constitution.

(2) These principles shall be implemented through a national land policy developed and reviewed regularly by the national government and through legislation.

Read together with Article 69, the Constitution encourages proper utilization and conservation of the environment and natural resources. Article 69 (1) and (2) obligates the State and every person to protect and conserve the environment. It provides that:

(1) The State shall—

- (a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;

(b) work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya;

(c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;

(d) encourage public participation in the management, protection and conservation of the environment;

(e) protect genetic resources and biological diversity;

(f) establish systems of environmental impact assessment, environmental audit and monitoring of the environment;

(g) eliminate processes and activities that are likely to endanger the environment; and

(h) utilise the environment and natural resources for the benefit of the people of Kenya.

(2) Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.

Institutions mandated under the Constitution

The Constitution creates, appoints and empowers the National Land Commission (NLC) vide Article 67 (h) to monitor and have oversight authority on land use planning. The Fourth Schedule to the Constitution Part I (21), mandates the national government to be in charge of the general principles of land planning and the coordination of planning by the counties. The county governments, through the Fourth Schedule, Part 2 (8) are, on the other hand, mandated to provide for county planning and development. Under Part 1 (32) of the Fourth Schedule, capacity building and technical assistance to the counties is the mandate of the National Director of Planning, who is tasked with assisting the counties to acquire requisite personnel and skills to competently carry out the planning function. These constitutional provisions underscore the need for proper coordination of national and county governments in matters planning and development control.

Indeed, the national and county governments are required to carry out their mutual functions through consultation and cooperation. Article 6 (2) provides that "[t]he governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation." This is an important provision because in matters of land administration, the government has been accorded different roles at different levels as the foregoing discussion indicates.

Further, the Fourth Schedule to the Constitution provides that national government functions (among many others) include the management of water resources, construction of national trunk roads and railways, housing policy, and general principles of land planning and coordination of planning by the counties. County governments, on the other hand, have been assigned duties in agriculture, pollution control, and county transport system including county roads, county planning, survey and housing. It is, therefore, clear that if there are no mutual relations, all these goals that relate to land use and physical planning will not be achieved.

Article 162 (2) establishes the Environment and Land Court. This is the wing of the judiciary mandated to resolve all disputes that relate to land and the environment. This court has the power to hear and determine matters touching on physical and land use planning and development control because these are all issues ancillary to land and environment. The Constitution has, from the foregoing, laid a good foundation for most if not all physical planning and land use laws. Indeed, all the statutes analyzed here below are well anchored in the Constitution variously. Many land use statutes have their footing in Chapter Five, and particularly Article 60. The laws that preceded this supreme law may be slightly out of tune and thus most are in the process of being amended to reflect the constitutional spirit.

Impact of right to a clean environment on right to land

Article 42 of the Constitution provides for the right to a clean and healthy environment as a basic human right. This includes the right to have the environment protected for the benefit of the present and future generations through legislative and other measures. The courts have also pronounced themselves on this basic human right.

In *Kamotho* v *Council of Governors*,[41] Mr Kamotho sought a declaration that the respondents had breached Article 42 of the Constitution (right to a clean and healthy environment). He also sought a prohibitory order to restrain the respondents, their agents, employees or any person acting on their behalf from charging any fee, or obstructing citizens from accessing or using existing public sanitary facilities or toilets. Further, he sought an order of mandamus to direct the respondents to set up and operate hygienic sanitary facilities, including functional public toilets within their lawful jurisdictions and throughout Kenya's road network within 60 days. The petition was supported by the petitioner's affidavit, sworn on January 19, 2017 in which he deponed that Article 42 of the Constitution entitles every citizen to a clean and healthy environment and reasonable standards of sanitation. He averred that sanitation is a first generation right that citizens should not be arbitrarily denied. He averred that in places where there are public toilets in Kenya, citizens are charged a fee and those who cannot afford to pay are turned away. He stated that due to the lack of options for proper sanitary facilities, motorists and commuters urinate, defecate and excrete human waste on the streets, road reserves, adjacent bushes or open spaces.

The court held that a clean and healthy environment includes the physical infrastructure and road aesthetics, which behooves the authorities to plant trees and suitable vegetation on the road reserves. Where trees are cut during road construction, they must be replaced once the roads are completed. Article 69, which enjoins the State to work towards achieving and maintaining a tree cover of at least 10 per cent of the land area in Kenya, binds the roads authorities and the county governments.

The 1st Respondent was ordered to constitute a committee under Section 20 of the Inter-governmental Relations Act to liaise with the 2nd to 4th respondents through the ministry in charge of transport in the formulation and implementation of the policy for the provision of toilets and other sanitation facilities along the Kenyan road network to give effect to Articles 42 and 43 on the right to a clean and healthy environment with reasonable standards of sanitation.

41 *Adrian Kamotho Njenga v The Council of Governors & 3 Others* [2020] eKLR

The right to land is limited to the extent that its use must ensure that the neighbours' right to a clean and healthy environment is not infringed upon. In *Edward Onsongo v Job Mogusu*, the plaintiff filed a plaint dated July 17, 2017 seeking orders of permanent injunction to restrain the defendant from digging a hole for water discharge next to the plaintiff's house.[42] He also sought an environmental restoration order for refilling the hole dug next to his house. The plaintiff argued that while he is a neighbour to the defendant, the defendant had dug a hole for water discharge next to his house without any due regard for safety and that the hole pose a danger and nuisance to the said house.

While the court dismissed the plaintiff's suit, it observed that NEMA had issued restoration orders, which the defendant was obliged to adhere to. The court also observed that both parties had made environmentally unfriendly structures in that while the defendant dug a dangerous hole to contain the flood waters, the plaintiff had put up a wall adjacent to his neighbour's land to keep out the storm waters that the defendant was trying to contain.

The court observed that the county government's planning department must be held to account as to what action it had taken to safeguard the citizens in the parties' neighbourhood from floods. Had the planning department done its job properly, the parties in the suit could not have been allowed to use their lands with almost what appeared to be absolute powers without due regard to each others' right to a clean and healthy environment.

Powers of the State under Article 66 (1)

Article 66 of the Constitution assigns the State the power to regulate land use and use of any rights thereof in the interest of public safety, public defence, public health, public morality and land use planning. This is referred to as police powers. This is also in a way an extension of Article 40 (3), which provides for eminent domain. The State exercises its power to protect public interests variously and through several State agencies. These include, among others, the courts and the NLC.

In the case of *Compar Inv. Ltd v NLC*, the petitioner challenged the decision of the National Land Commission, to review its grant of title to the suit property with a view to revoking it.[43] The petitioner acquired the suit property through purchase in 2001 for the consideration of Ksh70 million. It had at all times paid rates and rents as required and also allegedly invested substantially on the suit property whose stock was valued in the region of Ksh650 to Ksh700 million by M/s Lloyd Masika Valuers. The petitioner claimed that it was a *bona fide* purchaser for value and thus its right to property under Article 40 of the Constitution would be violated if the court did not stop the NLC.

The petitioner said that the NLC should not be allowed to arbitrarily take over its property without compensation. It relied on the Ugandan Court of Appeal precedent in *Katende v Haridas,*[44] where the court defined a *bona fide* purchaser. It also relied on the decision of *Kuria Greens Ltd v Registrar of Titles* where it was held that due process of law must be followed in revoking title to land.[45]

42 *Edward Onsongo v Job Mogusu* [2019] eKLR
43 *Compar Inv. Ltd v NLC & Others* [2016] eKLR
44 *Katende v Haridas & Co Ltd* [2008] 2 EA 173
45 *Kuria Greens Ltd v Registrar of Titles & Another* [2011] eKLR

The court stated that the NLC is a constitutional commission established under Article 67 and whose functions are set out under the said Article as well as under the NLC Act. These functions *inter alia* are to manage public land on behalf of the national and county governments, and to monitor and have oversight responsibilities over land use and planning throughout the country. The Commission, under Section 5(2) of the NLC Act, also bears other responsibilities including power to alienate public land on behalf of, and with the consent of the national and county governments, monitoring the registration of all rights and interests in land, and ensuring that public land and land under the management of designated State agencies is sustainably managed for the intended purpose and for future generations.

The court held that the petitioner could not now claim to be a *bona fide* purchaser for value in the face of the illegalities established by the NLC, which is the body mandated by law to review the legality or otherwise of all grants to land.

Legislation and policy governing physical and land use planning

Overview

The following section now analyses specific legislation that relates to physical planning, land use and development control. This part will also gauge the relevance of the selected statutes in relation to the constitutional provisions and how these have aided Kenya to achieve sustainable development.

Physical and Land Use Planning Act No 13 of 2019[46]

This law came into force on August 5, 2019, repealing the Physical Planning Act of 1996. The law is an attempt to harmonize physical planning and land use rules and principles with the Constitution of Kenya, 2010. The Physical and Land Use Planning Act (PLUPA) provides for the principles and standards for the preparation and implementation of physical development plans at the national, regional, county, urban, and cities levels. This statute aligns itself to the constitutional provisions as pertains to national values in Articles 10 and 232, the principles of land policy set out in Article 60, and the leadership and integrity principles in Chapter 6 of the Constitution.[47] It also makes provision for the procedures of development control and regulations of physical planning and land use.

Institutions created and/or recognized under PLUPA

Under Section 6, PLUPA creates the National Physical Planning Consultative Forum, which provides for consultation on the national and physical development planning. This forum is formed to promote effective coordination and integration of physical development planning, as well as sector planning in Kenya, advise and mobilize for adequate resources for the preparation and implementation of physical development plans and strategies and to advise on strategic physical development projects for national, inter-county or county authorities.

The function of the National Land Commission under this law is to monitor and oversee physical planning in Kenya and prepare status reports on the preparation and implementation of physical development plans. The Cabinet Secretary in charge of physical and land use planning, who is

46 supra n 7
47 Ibid s 4

the forum's chairperson,[48] is tasked with the responsibility of initiating the formulation of the national policy on physical planning and approval of National Physical Development Plans.[49]

The Act creates the office of National Director-General of physical and land use planning, who is responsible for advising the national government on strategic physical and land use planning affecting the whole country. The director-general holds office for a term of three years, renewable once.[50] In the counties, there is position for county director of physical and land use planning responsible for physical planning. There is also established under the Act the inter-county joint physical and land use planning committee (Sec. 29), and, county physical and land use planning consultative forum in each county at Section 14. This forum is responsible for consultation on county and inter-county physical and land use development plans.

Where State agencies fall short, especially in the area of public participation and consultation as provided for, courts have been called upon to intervene. In the matter of *Okiya Omtatah v The NLC,* the petitioner was a public-spirited citizen and a member of Kenyans for Justice and Development Trust.[51] The respondent is a constitutional commission established pursuant to Article 67 (1) of the Constitution. The functions of the respondent are to manage public land on behalf of the national and county governments and to acquire land on behalf of national institutions and county governments, among others.

The facts in this matter were that the National Environment Management Authority (NEMA) granted an Environmental Impact Assessment (EIA) licence in respect of the construction of Phase 2A of the Standard Gauge Railway (SGR), Nairobi-Naivasha section. The petitioner and the Kenya Coalition for Wildlife Conservation and Management filed an appeal to the National Environment Tribunal (NET) against NEMA's grant of EIA licence for construction of the SGR, part of which was to pass through Nairobi National Park. As per Section 129 (4) of the Environmental Management and Coordination Act (EMCA), NET issued a stop order on April 5, 2017.

While the stop order was in force, the respondent on December 22, 2017 published an undated Gazette notice No. 12526 of its intention to acquire a huge chunk of land belonging to Nairobi National Park. This prompted the petitioner to file the petition, in which he sought the court's orders removing into the court the said Gazette notice for purposes of being quashed and for payment of costs of the petition with including any other remedy the court would deem fit to grant. Issues for determination among others were whether the notice in the Gazette was void for having been issued without public participation on LR No. 10758 belonging to the Nairobi National Park.

The court noted that public participation is a constitutional requirement. Any activity, which is likely to affect members of public, has to be subjected to public participation. Under Article 69 (1), (D), the State is under obligation to encourage the public in the management, protection and conservation of the environment. In the instant case, the petitioner contends that there was no public participation. It is important to note that this petition was filed after the petitioner had obtained a stop order following his appeal to NET. The petitioner's appeal, was that NEMA issued an EIA licence hurriedly without following the laid down procedures.

48 Ibid s 10
49 Ibid s 23 (2)
50 Ibid s 11
51 *Okiya Okoiti Omtatah* v *The NLC* [2019] eKLR

The petitioner did not, however, elaborate on how the public was not involved. Before an EIA licence is issued, there must be an EIA report made and before this report is prepared, there must be public participation, which includes all parties who will be affected by the project. In the instant case, other than the petitioner stating that there was no public participation, there is no evidence at all tendered from the matter pending before the NET to show the kind of public participation that was allegedly carried out if any.

The impugned Gazette notice was issued pursuant to the provisions of the Land Act, which deals with compulsory acquisition of land for public purposes. The Act gives elaborate steps the respondent was expected to take before the land was finally acquired. The court held that there was no evidence from the petitioner that any of those steps were not followed, and thus the petition lacked merit. The petition was dismissed, with each party bearing their own costs.

Levels of physical and land use planning

While the offices in place are generally policy and standards formulating organs, the PLUPA also establishes enforcement forums under Part VI. These are liaison committees at the national, county and local levels. They include (a) the national physical and land use planning liaison committee established under Sections 73, 74 and 75 of the Act, (b) the county physical and land use planning liaison committee in each county established under Sections 76 - 78 of the Act. Their role is to hear complaints and appeals from planning authorities established and recognized under the law. The county governments through the executive member in charge of physical and land use planning are charged with development control.

Just above these committees in hierarchy is the National Physical Planning Consultative Forum, established under Section 6, chaired by the Cabinet Secretary. There is then the director-general for physical and land use planning for the country and county directors in charge of planning in the respective counties. County directors are answerable to the CEC member in charge of planning.

Powers to approve or reject development proposals

The power to receive, consider, grant or reject applications for development is vested in the county executive committee member (CEC) in charge of physical and land use planning. The member can grant permission for development under the Act or demand that where developments are commenced without such permission, the land be restored to their original state.[52] In considering the applications for development, the county executive committee member shall be guided by comments from various authorities,[53] and the existing relevant approved national, county, local, city, town or special area plans.[54] Section 61 (2) stipulates that the decision to grant or reject an application for development made under the Act should be reached within 30 days after receiving the application and communicated to the applicant in writing.

The rejection should state the grounds for the decision while an approval may stipulate conditions that the county considers necessary. Appeals from the county executive member lie in the county liaison committee, and appeals from the county level lie in the Environment and Land Court. From a reading of the Act it is not clear which appeals role is placed on the national liaison committee. Approvals lapse if after three years from the date they were granted, no

52 Ibid s 57.
53 Ibid s 60.
54 Ibid s 61.

development has commenced. The county executive member can, however, extend this period for an additional year under Section 64 of the Act.

Types of plans

The Physical and Land Use Planning Act categorizes physical development plans into; (a) national physical and land use development plan, which is to be initiated by the Cabinet Secretary, covering an implementation period of 20 years and may be reviewed after 10 years or when special need arises;[55] (b) inter-county physical and land use development plans (at Sec. 29), which can be formulated by two or more counties by mutual agreement or out of compelling necessity. This plan shall be prepared and completed within two years from the time notice of intention was published.[56]

Other plans are; (c) the county physical and land use planning development plans, which are prepared by the county governments and have to conform with the national development plan; (d) the local physical and land use development plan, which covers a city, town or municipality or an unclassified urban area and is prepared by the county government under whose jurisdiction they fall; and finally (e) special planning area. A special planning area can be declared by a county on its own motion or on request by the national government upon areas that have unique development, natural resource, environmental potential or challenges.[57]

This may include a declaration that is meant to guide the implementation of strategic national projects; or guide the management of internationally shared resources. This is per Section 52 (1) (e). The counties, in conjunction with the national government have the power to plan for the protection of forests, wildlife and other strategic resources and projects. This is as read together with section 69 of PLUPA and the Physical and Land Use Planning (classification of strategic national or inter-county projects) Regulations, 2019.[58]

Implementation of development control functions

The Third Schedule to the Act deals with development control applications. Aspects of development control under the schedule include the following;

a. **Change of use**: factors to be considered in an application for change of use, include but not limited to provisions of an approved physical development plan, probable effects on the character of the neighborhood, current use, area zoning regulations and infrastructural establishments and adequacy.

b. **Extension of lease**: Considerations for the extension of the lease include whether or not the land is required for public purpose, whether or not the special conditions in the lease were adhered to, whether the land is developed, whether the buildings on the land have been well maintained and adherence to relevant approved physical development plans.

c. **Building Plans:** Where the development involves the erection of a building, the planning authority considers several key aspects such as the purpose of the building, the height of the building, the design and appearance of the building.

55 Ibid s 21.
56 Ibid s 31.
57 Ibid s 52.
58 Legal Notice 156 of 2019, Schedule ss 14 and 16.

d. Subdivision schemes and amalgamation proposals: Considerations to be deliberated on include; the design of the plan, provisions of relevant approved physical development plans, land reference number, size and shape of the land, the location, and may include surrender of land for public utilities.

There are disputes that arise from these applications as was witnessed in a subdivision matter in *Karanja v Mbochi*.[59] In this case, the plaintiff sought mandatory injunction compelling the defendant to remove forthwith any obstruction, barrier, impediment or hindrance that was in the way of the plaintiff's passage to his homestead and a permanent injunction retraining the defendant, his servants, agents, nominees or howsoever from returning to, entering or otherwise interfering with the suit parcel of land known as LR No. Limuru/Ngecha/2004.

The plaintiff averred that he was the absolute proprietor of the suit property, which he purchased from the defendant's brother. The defendant wrongfully pulled down his perimeter fence and thereafter placed obstructive objects on his gate and access path, thereby preventing him from using the same to access his home. The plaintiff further claimed that the defendant wrongfully claimed that he owned half of the access path to the suit property and had a right to use the same and that unless restrained by the court, the defendant would continue with the obstructions complained of.

In his defence, the defendant averred that the suit property was a portion of the original parcel of land known as Limuru/Ngecha/779, which after sub-division gave rise to Limuru/Ngecha/2004 owned by the plaintiff (the suit property) and Limuru/Ngecha/2153, which is owned by the defendant. The defendant further averred that the access path referred to was a private one created by his family with his permission to give access through his land to the grave of his mother and that John, his brother, had no right to transfer the said access path, which passes through the defendant's land, to the plaintiff without the defendant's permission.

On cross-examination, the defendant admitted that he owned a one-third share in the original Plot No. 779, while the remainder two-thirds share was owned by Joseph, who later sold this share to the plaintiff. The defendant contended that although he could access the main road from his Plot No. 2153, his children, who lived further down the property could not access the main road without using the disputed road.

The court entered judgment for the plaintiff against the defendant and awarded general damages for trespass at Ksh5,000 with interest from the judgment date until payment in full.

Where the development plans submitted do not meet the required standard, the planning authority shall communicate the areas that should be improved or corrected to the applicant, who should amend the development plans accordingly and re-submit them within the specified time. The building plans or drawings to be submitted for development include: development plan and drawings, architectural drawings, civil and structural engineers, electrical engineer's drawings and mechanical and plumbing drawings and specifications.

Processing of easements and way-leaves: These include applications for services such as telecommunications, electrical power supply, water and sewerage networks, oil pipeline, fibre optic cables and base transmission stations.

59 *Stephen Kimotho Karanja v Paul Wandati Mbochi* [2019] eKLR

Ngau argues that land use planning under the repealed Physical Planning Act (PPA), 1996, has been elusive owing to several factors. Some of these include the fact that the PPA did not suggest institutional reforms and that some provisions of the Land Control Act, Government Lands Act (now repealed), and the Local Government Act (now repealed) which it had intended repealed, were neither repealed nor amended.

He also rightly observes that majority of the land certificates under the Registered Land Act (now repealed), which forms the bulk of Kenya's land titles, do not contain any development control conditions. The land control boards, for instance, continued to approve land subdivision and other applications, without regard to the PPA. The land registrars and surveyors also continued to issue approvals on mutation without regard to planning.[60]

In light of the 2019 statute, it is hoped that development control will be exercised as a tool to achieve sustainable land use because PLUPA has provided for the establishment of the institutional framework and aligned itself to the constitutional principles on sustainable physical and land use planning. Indeed, it is the conclusion of this chapter that this law has met the constitutional threshold in as far as sustainable development is concerned.

County Governments Act[61]

This law, according to its preamble, was enacted to give effect to Chapter 11 of the Constitution on the devolved governments. It provides that the county governments shall carry out their functions as guided by the Fourth Schedule to the Constitution.[62] This schedule has assigned the county governments responsibilities in agriculture, pollution control, and county transport system including county roads, county planning, survey and housing.

With regard to planning and spatial planning in particular, the County Governments Act (CGA) prescribes general principles of planning and development to guide county planning. This is provided for under part XI, which runs from Section 102 to 115. It provides that county governments shall integrate national values in all processes and concepts; protect the right to self-fulfillment within the county communities, and develop and protect the natural resources with the responsibility to future generations.[63]

This statute recognizes the need for integrated development planning by providing that a county planning unit shall be responsible for coordinating integrated development planning, and ensuring integrated planning within the county.[64] The designated planning authority in the county is also required to organize for the effective implementation of the planning function within the county.[65]

The law provides that the city and municipal land use plans shall be the instruments for development facilitation and development control.[66] Public participation in the county planning processes is mandatory as provided for under Part VIII of the Act. The counties are mandated

60 P Ngau, 'Enactment of Urban Land Management Law in Kenya: The Case of The Physical Planning Act' (University of Nairobi,) (2010)
61 Republic of Kenya, County Governments Act No. 17 of 2012 Government Printer Nairobi
62 Ibid s 5
63 Ibid s 102
64 Ibid s 105
65 Ibid s 105 (2)
66 Ibid s 111(2)

to offer clear communication and carry out civic education in all its processes, which include matters of spatial planning.

Part XI of the law gives county governments the power to formulate and monitor implementation of county planning, including spatial planning. Section 110 provides for county spatial plans. This plan should provide for the formulation of 10-year geographical information management system (GIS) spatial plan database for each county. This plan should clearly indicate its linkage to regional and national and other counties' plans. This GIS-based plan must adhere to the principles of sustainable development. Section 110 (2) (c) requires among other aspects that this plan should indicate the desired land use patterns within the county. Other components of this county plan include indications of public and private developments, and shall indicate the areas designated for conservation and recreation.

Following this, Lamu County has formulated and published its spatial plan for the years 2016 to 2026. In line with the law, Lamu's 10-year plan addresses county challenges and makes proposals to improve the standards of living for the people through employment creation, reduction of poverty, and creation of wealth as well guide sustainable development. Creation of this plan was robust and inclusive exercise, which involved the people of Lamu as well as its friends and development partners. The preparation of Lamu's spatial plan was based on a GIS database that was carefully prepared capturing property boundaries of all surveyed land parcels in the entire county, including the ecologically sensitive areas and the world heritage site. It also indicates through careful zoning strategies the agricultural lands, the archipelago, mangrove forests and woodlands as well as the fishing grounds and the blue pearl among other ecologies in the county.[67]

Section 111 of the CGA provides for city and municipal plans and stipulates that for each city or municipality, there shall be the following plans:

(a) city or municipal land use plans;

(b) city or municipal building and zoning plans;

(c) city or urban area building and zoning plans;

(d) location of recreational areas and public facilities.

These plans (the law states) shall contain and provide development control mechanisms within the national housing and building code framework.

The Urban Areas and Cities Act, 2011[68]

This law provides for the appointment of boards to manage cities and towns, and creates proper administrative offices for the said management. It also provides for governance and management of urban areas, cities and of towns in Kenya.[69] It is a relevant statute in the context of land use and development control. Section 37 provides for inter-linkages between county plans and under Part V, the statute provides for integrated development planning with a concept

67 Lamu County, Spatial Plan (2016-2026) May 2017

68 An Act of Parliament to give effect to Article 184 of the Constitution; to provide for the, classification, governance and management of urban areas and cities; to provide for the criteria of establishing urban areas, to provide for the principle of governance and participation of residents.

69 supra n 28 s 31.

that forms the basis for the preparation of environmental management plans and the overall delivery of basic services including provision of water, electricity, health, telecommunications and solid waste management.

Section 36 requires that all the cities and municipalities operate within the framework of integrated development planning, which provides for development control and achievement of sustainable development. It also provides for the management of cities and municipalities.[70] This law was amended in March 2019,[71] principally to change the criteria for classification of areas to be regarded as cities, municipalities, towns and market centres. For instance, for an area to be classified as a city, the population mark was reviewed downwards from 500,000 to 250,000.

The city should also have capacity to provide essential services to its residents, including planning and development control, disaster management, conference and other enabling facilities, a city economic development plan, and others as indicated in the First Schedule to the amendment law. The law classifies an area as a municipality if it has a population of between 50,000 to 249,000 residents and is capable of offering services to its residents as per the First Schedule. The implication of the 2019 amendments is that Kenya may, in the near future, have more cities and municipalities. In terms of conveyancing, the amount of stamp duty chargeable upon property transfers will also be raised from 2 to 4 per cent where areas that were previously referred to as rural are brought under the purview of municipalities.[72]

Section 7 provides that the President may, on recommendation of the Senate, confer city status on an area formerly classified as a municipality. This law creates management boards for cities, boards of municipalities, as well as town administrators and town committees. It is clear from the law that these boards are agents of the county governments. These boards are answerable to the county governments and accountable to the residents of the areas they manage.

The functions of these boards, as per Section 20, among others, include to formulate and implement an integrated development plan; and to control land use, land sub-division, land development and zoning by public and private sectors for any purpose, including industry, commerce, markets, shopping and other employment centres, residential areas, recreational areas, parks, entertainment, passenger transport, agriculture, and freight and transit stations within the framework of the spatial and master plans for the city or municipality as may be delegated by the county government; and to develop and manage schemes, including site development in collaboration with the relevant national and county agencies.

The cities and municipalities boards membership include the county executive member for the time being responsible for urban areas and cities, or her/his representative. There is as discussed earlier the county physical and land use planning liaison committee established under Sections 76 – 78 of the PLUPA, and whose membership includes the executive member in charge of physical and land use planning. The role of this committee, among other functions, is to advise the county executive committee member on broad physical and land use planning policies, strategies and standards; and hear appeals with respect to enforcement notices. There

70 Ibid s 10.

71 Ibid

72 KN Law LLp, 'An Overview of the Urban Areas & Cities (Amendment) Act 2019' *(*2019) < https://kn.co.ke/wp-content/uploads/2019/05/Newsletter-2..pdf> accessed 23rd August 2018

is thus a nexus for the county governments in planning and implementation of policies and projects under the PLUPA as well as the Urban Areas and Cities Act.

There is also established under PLUPA the county physical and land use planning forum, where the CEC in charge of planning as well as others sit to create a consultative forum for matters related to county and inter-counties development plans. This forum is also charged with the responsibility of sourcing for resources for implementation of land use plans and strategies.

A quick look at the actual state of urban areas and cities shows that the law has not been fully implemented as there is overwhelming evidence of poor sanitation, lack of basic social amenities, poor transit and transport infrastructure, lack of proper garbage and refuse disposal locations. As if that is not enough, there have been numerous periodic recurrences of flooding in urban areas and incidences of buildings collapsing, taking down (with them) many lives and causing grievous harm to many. It is, indeed, the right time for human rights observers to take up these matters against the mandated agencies and sue them for negligence and causing loss of lives and unsustainable planning.

The Environmental Management and Coordination Act[73]

The Environmental Management and Coordination Act (EMCA) was enacted in 1999 to provide for the appropriate legal and institutional frameworks for the management, protection and conservation of the environment. It reiterates the provisions of Article 43 of the Constitution, which declares that every person has an entitlement to a clean and healthy environment.

Its most popular creation is the National Environment Management Authority (NEMA) at Section 7. NEMA's mandate under Section 9(2) includes to make recommendations to the relevant authorities with respect to land use planning, examine land use patterns and to determine their impact on the quality and quantity of natural resources. NEMA is also mandated to promote public education and awareness on the need for sound environmental management. In this regard, it has powers to publish and disseminate manuals, codes or guidelines relating to environmental management and prevention or abatement of environmental degradation.

Section 44 of the EMCA provides for protection of hilltops, hillsides and mountain areas and forests, while Section 42 provides for the protection of rivers, lakes and wetlands. Section 54 provides for protection of the environmentally significant areas that bear natural beauty or species of indigenous wildlife.

The preservation of biological diversity is provided for under Section 50, which includes the identification and protection of the endangered and rare biological species. The relevant agencies are called upon to uphold land use practices that promote conservation of the biological diversity in-situ: this would imply that physical and land use planning should make policies and plans that consider protection and conservation of animals and plants. Section 48 in that regard provides for the protection of forests, while taking into account the traditional interests of the local communities that customarily reside in the forested and mountainous regions. This has to be read together with Sections 52 and 69 of PLUPA, which enable planning for forests and wildlife and other strategic areas provided for under the regulations to that statute.

73 Supra n 31

EMCA requires every development or project likely to have an impact on the environment to undergo an environmental impact assessment (EIA) before commencement of any works. The Second Schedule to the Act enumerates all projects that are required to undergo environmental impact assessment prior to their commencement.

Under Section (58) (1), an environmental impact assessment licence has to be issued before any works or project, which has the likelihood to adversely affect the land/environment, is carried out. This section provides that:

> Notwithstanding any approval, permit or licence granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.

The environmental impact assessment study and report has to be done by an EIA expert authorized by NEMA. The environmental impact assessment is carried out in accordance with the regulations, guidelines, and procedures stipulated under the law. This is also in line with Article 69 (1) (f) of the Constitution. Projects that are required to undergo EIA before commencement include, among others, activities in the forested areas such as timber harvesting, reforestation and afforestation, large-scale agricultural activities and use of pesticides, processing and manufacturing industries. Others include electricity generation and transmission, waste disposal and the creation of game parks, national parks, wilderness areas and the formulation or the modification of forests and water catchment management policies.[74]

This law additionally creates several other institutions for the protection of the environment. They include the county environment committees under Section 29, the National Environmental Complaints Committee under Section 31, and the National Environment Tribunal at Section 125. These institutions are all discussed in greater detail in the other chapters of this book. Some of the very important aspects this Act addresses include the strategic environmental assessment (SEA), environmental impact assessment, environmental audit (EA), effluent discharge and water quality, solid waste regulation and solid waste strategy.

The functions of NEMA and those of the agencies mandated to carry out physical planning are intertwined because these functions are a part of development control. Whenever NEMA exercises its powers under the law, it must consider what various areas are planned for and what land use is permitted so as to issue or decline permits, licences or approvals. Even in its evaluation of EIA, SEA and EA applications, one of the elements to consider is the permitted land use per land title or zoning regulations.

74 Ibid Second Schedule

Water Act[75]

Overview

This legislation was enacted in 2016 to provide for the regulation, management and development of water resources, water and sewerage services, and for other connected purposes.[76] Under this law, the term 'water resource' is defined as any lake, pond, swamp, marsh, stream, watercourse, estuary, aquifer, artesian basin or another body of flowing or standing water, whether above or below the ground.[77]

The term water, on the other hand, is defined to include drinking water, river, stream, watercourse, reservoir, well, dam, canal, channel, lake, swamp, open drain, or underground water. Under the provisions of Section (5), every water resource is vested in the State, subject to any user rights granted by or under the law or any other written law, and is held in trust for the people of Kenya.

The Water Act established the Water Resources Authority (WRA) as a State corporation under Section 11.[78] WRA replaced the Water Resources Management Authority (WARMA), which had been created under the now repealed Water Act of 2002. The Authority is an agent of the national government and is responsible for the regulation and management of water resources. The Water Act makes extensive provisions on the Authority's role in regulating the use and management of water resources.

WRA's functions include the formulation and enforcement of standards, procedures and regulations for the management and use of water resources and flood mitigation, receiving water permit applications for water abstraction, water use and recharge. It then determines, issues, varies water permits, and enforces the conditions attached to those permits as well as advising the Cabinet Secretary generally on the management and use of water resources.[79]

A permit is required for purposes of (a) any use of water from a water resource, except as provided by Section 37 of the Act (which provides the exempted uses),[80] (b) the drainage of any swamp or other land and (c) the discharge of a pollutant into any water resource. This is an important aspect of land use control, which requires obtaining permits for the above-mentioned land use transactions. The Authority also maintains a register of permits, which contains the details of the permit holders, the respective terms and conditions of each permit, and the results of any monitoring and enforcement action taken by the authority in respect to each permit.

WRA and NEMA have on a number of occasions been faulted for failing to properly perform their duties; a case in point is the Solai Dam/Patel Dam tragedy**.** In this matter, a man-made dam within the vast Patel Coffee Estates located in Solai, Nakuru, broke its banks gushing out 190 million litres of water, washing away settlements downstream at around 7.30 pm on May 9, 2018**.**[81]

75 Republic of Kenya, Water Act No. 43 of 2016, Government Printer Nairobi

76 Ibid preamble

77 Ibid s 2

78 The Authority was operationalized vide *Legal Notice No. 60* on 21 April 2017

79 Republic of Kenya, Water Act No. 43 of 2016, Government Printer Nairobi

80 Such as for the storage of water in or the abstraction of water from a reservoir constructed for the purpose of such storage and which does not constitute a water course.

81 *Daily Nation* <https://www.nation.co.ke/counties/nakuru/Damned-damswithReport-blames-State-for-Solai- tragedy/1183314-4651142-n3b004z/index.htm> (accessed on 23rd of August 2018).

The Kenya Human Rights Commission, Freedom of Information Network and Mid Rift Human Rights network released a fact-finding report on the Patel dam tragedy on June 29.[82] The report, *Damned Dams: Exposing Corporate and State Impunity in the Solai Tragedy,*[83] blamed government agencies tasked with managing water resources and the environment and farm's management for the tragedy that killed innocent residents. In a ruling that annoyed many, the magistrate handling the matter dismissed the criminal case against the Solai dam management, WRA and NEMA officials in Feb 2020, citing lack of cooperation from the office of the Director of Public Prosecutions.[84]

The National Development Plan[85] for the years 2002 to 2008 recognized Kenya as a water scarce country, majorly because the water demand exceeds renewable freshwater sources. There are numerous disparities in urban clean water access in the urban settings with informal settlements recording lower levels or limited access to.

Development and management of riparian land

The phrase 'riparian land' refers to land which by virtue of its proximity to a water body, imposes management obligations on the owner of the land by the Authority.[86] The water resources rules provide that the riparian land on each side of a watercourse is defined as a minimum of six metres and up to a maximum of 30 metres unless otherwise determined by a water resources inspector. The riparian land shall be measured from the top edge of the bank of the watercourse and this will apply to seasonal and perennial watercourses.[87]

Unless otherwise determined by a water resources inspector, the riparian land adjacent to a lake, reservoir or stagnant body of water (and an ocean) is defined as a minimum of two metres vertical height or 30 metres horizontal distance, whichever is less, from the highest recorded water level (or the highest water mark in case of the ocean).[88]

According to clause 118 of the rules, the owner of a riparian land cannot engage in the activities listed in the Seventh Schedule unless such activities have been approved by the Authority, in consultation with relevant stakeholders. Such authorization or permit may be accompanied by an order for a soil and water conservancy plan. Where there are proscribed activities along the riparian land, the Authority can demand that the landowner or land user desist from such activities and/or to carry out other necessary acts to improve the quality of soil and water on the riparian land. Such improvement may be carried out by the Authority at the cost of the landowner/user.

Activities proscribed on riparian land are:

(a) Tillage or cultivation;

(b) Clearing of indigenous trees or vegetation;

82 *Daily Nation* < https://www.nation.co.ke/counties/nakuru/Damned-damswithReport-blames-State-for-Solai-tragedy/1183314-4651142-n3b004z/index.html> (accessed on 23 August 2018).

83 Kenya Human Rights Commission Freedom of Information, Network and Mid Rift Human Rights Network; *Damned Dams: Exposing Corporate and State Impunity in the Solai Tragedy. (*2018)

84 *Daily Nation* <https://www.nation.co.ke/news/No-justice-for-Solai-dam-victims/1056-5442938-mqaa1q/index.html> accessed 20 May 2020

85 Republic of Kenya,2001 'National Development Plan 2002-2008', January (Unpublished).

86 Republic of Kenya, Water Resources Management Rules, 2007 (Government Printer) s 2

87 Ibid s 116

88 Ibid

(c) Building of permanent structures;

(d) Disposal of any form of waste within the riparian land;

(e) Excavation of soil or development of quarries;

(f) Planting of exotic species that may have adverse effect to the water resource

(g) or any other activity that in the opinion of the Authority and other relevant stakeholders may degrade the water resource;[89]

In a case concerning the Green Park Housing Estate in Athi River, *Superior Homes (K) PLC v Water Resources Authority*,[90] the petitioner's and the interested parties' (Superior Homes PLC) case was that on May 31, 2018, WRA, the respondent, issued enforcement orders requiring the demolition and removal within 21 days of eight houses that were situate on part of the suit property for reason that in that particular property, the riparian area should be measured from the flood flow and not the normal flow of a river and that there should be no buildings in a flood zone of a river.

WRA averred that the petitioner did not seek its guidance on construction of a dyke and that they proceeded to construct the eight houses on the flood plain while aware that the area was prone to flooding due to the property's proximity to Stoney Athi River, thus breaching the Water Management Rules. The court held that as at the time, Superior Homes acquired the suit property and constructed the houses, its perimeter wall was and is beyond the minimum required distance of six metres and maximum required distance of 30 meters of the riparian reserve.

It also held that WRA could not use the unprecedented rains and floods of March 2018 and May 2018 to determine the *'river bank'*. Such a determination is not only an affront to the petitioner's and the interested parties' right to own property but is also contrary to the definition of what riparian land is as contemplated under Rules 116(1) (2), (3) and 116(4) of the Water Resources Management Rules. Consequently, the enforcement notices dated August 31, 2018 issued by WRA were declared illegal, null and void.

Effluent discharge

Effluent means gaseous waste, water or liquid, or other fluid of domestic agricultural, trade or industrial origin treated or untreated and discharged directly or indirectly into the aquatic environment. Clause 81 of the water management rules states that, "No person shall discharge or apply any poisonous, toxic, noxious or obstructing matter, radioactive waste or other pollutants or permit any person to dump or discharge such matter into any water resource unless the discharge of such poisonous, toxic, noxious or obstructing matter, radioactive waste or pollutant is treated to permissible standards as authorized by the Authority.

The rules further warn that "no person shall discharge into any water resource or onto land, waste water or effluent, or effluent from a sewage treatment plant, trade or industrial facility without a calibrated flow measuring device approved by the Authority, and without a valid discharge permit from the authority.

Any authorization for discharge must conform to the effluent discharge standards prescribed at the Fourth Schedule of the rules. The Authority has power to take sample water for purposes of quality control and can prosecute any person discharging effluent that causes pollution. The

89 Ibid Seventh Schedule

90 *Superior Homes (K) PLC v Water Resources Authority* (2019) eKLR

WRA shall maintain water quality data, which is public information that can be provided to any person upon payment of the requisite prescribed fee.

WRA's exercises its functions, to an extent, in conjunction the Cabinet Secretary in charge of the environment (with respect to water quality standards) in that the Secretary shall establish criteria and procedures for the measurement of water quality on recommendation by NEMA. It can also recommend minimum water quality standards for all the waters of Kenya and for different uses, including —

(a) drinking water;
(b) water for industrial purposes;
(c) water for agricultural purposes;
(d) water for recreational purposes;
(e) water for fisheries and wildlife;
(f) and any other prescribed water use;
(g) analyse conditions for discharge of effluent into the environment;
(h) issue guidelines or regulations for the preservation of fishing areas, aquatic areas, water sources and reservoirs and other areas, where water may need special protection
(i) recommend measures necessary for the treatment of effluents before being discharged into the sewerage system; and
(j) make any other recommendation that may be necessary for the monitoring and control of water pollution.

The Authority shall consult and take into consideration the views of lead agencies before making the recommendations to the Cabinet Secretary.

NEMA also has power to issue licences for discharge of effluent under Sections 75 and 76 of EMCA. The WRA issues permits while NEMA grants licences for effluent discharge. These two authorities thus have to work together in ensuring water quality throughout the country. Indeed, the Solai dam case saw officials from WRA and NEMA charged for negligence in the discharge of their duties.

The National Land Commission Act[91]

This statute makes additional provisions on the powers of the National Land Commission (NLC), a constitutional body established under Article 67. Key objects of this Act provide for; the management and administration of public lands in accordance with the principles of the land policy set out in Article 60 of the Constitution and the National Land Policy.[92] The Commission has several duties, including but not limited to, conducting research on land and the use of natural resources, and making recommendations to appropriate authorities. It also has the duty to recommend a National Land Policy to the national government and to manage public lands on behalf of the national and county governments.[93]

91 supra n 29, s 3.
92 Ibid.
93 Ibid s 5.

Under the National Land Use Policy, the NLC is in charge of monitoring implementation of the land use policy as well as oversight. The NLC has also been assigned various other duties under other statutes, for instance, the Land Act. The statutes are in concurrence with each other and with the Constitution in assigning the NLC its functions. The NLC has, however, faced some challenges during its constitutive years in the form of cases in court between the Ministry of Lands and the Commission over the latter's functions.

The Supreme Court advised that the governing principle in the relationship between the NLC and the national government is that of checks-and-balances. Hence, each of the functions the NLC and the ministry are mandated to carry out is checked by the one or the other, in order to avoid abuse of power in matters relating to land. The unchanging theme throughout the Constitution is that the relationship between these two bodies is inter-dependent and based upon co-operation; it is not an agency relationship. As the ministry conducts its functions, the NLC acts as a watchdog to ensure compliance with the Constitution, and with legislation. Likewise, the NLC as an oversight body, maintains its functional, financial and operational independence, while still being overseen and checked by the public, by other independent offices, and by the three arms of government.[94]

Land Act[95]

This law was enacted to revise, consolidate and rationalize land laws with a view to provide sustainable administration and management of land and land-based resources. It provides that any officer carrying out functions under its provisions shall adhere to the following values and principles:

a) Equitable access to land; security of land rights;
b) Sustainable and productive management of land resources;
c) Transparent and cost effective administration of land;
d) Conservation and protection of ecologically sensitive areas;
e) Elimination of gender discrimination in law, customs and practices related to land and property in land;
f) Encouragement of communities to settle land disputes through recognized local community initiatives;
g) Participation, accountability and democratic decision making within communities, the public and the Government;
h) Technical and financial sustainability;
i) Affording equal opportunities to members of all ethnic groups;
j) Non-discrimination and protection of the marginalized; and
k) Democracy, inclusiveness and participation of the people; and
l) Alternative dispute resolution mechanisms in land dispute handling and management.96

A quick look at these principles reveals concurrence with Article 60 of the Constitution, especially on principles (a) to (f). This is expected owing to the supremacy of the Constitution and the fact that the Land Act was enacted two years after the promulgation of the Constitution. The

94 Supreme Court Advisory Opinion No. 2 of 2014 eKLR
95 supra n 30
96 Ibid

Cabinet Secretary in charge of lands has been assigned an important role in the management and administration of land in Kenya. Section 6 states that the Cabinet Secretary shall coordinate the formulation of standards of service in the land sector; regulate service providers and professionals, including physical planners, surveyors, valuers, estate agents, and other land-related professionals to ensure quality control; and monitor and evaluate land sector performance.

This study observes that the provision pertaining to the regulation of service providers, as noble as it sounds, may result in duplication. This is so because most of these land professionals have statutes that guide their functioning and boards or societies that regulate and standardize their ethos. Maybe the best approach would be to regulate them in conjunction with other professional bodies. The standardization of services in the land sector is, however, an excellent role the CS could carry out, through regular meetings with the professional bodies like the Institute of Surveyors of Kenya or the Law Society of Kenya.

Section 8 ropes in the National Land Commission, and in identifying its role of managing public lands, requires it to maintain a database of all public lands. The NLC can also require that lands be used for specific purposes, subject to such covenants, conditions, encumbrances or reservations as are found fit. The Commission is mandated, in conjunction with other authorities, to identify and demarcate the ecologically sensitive areas and take further necessary action to prevent environmental degradation and climate change.

Section 12 (2) calls upon the NLC to ensure that public land identified for allocation does not fall in the following categories:

(a) public land that is subject to erosion, floods, earth slips or water logging;
(b) public land that falls within forest and wildlife reserves, mangroves, and wetlands or fall within the buffer zones of such reserves or within environmentally sensitive areas;
(c) public land that is along watersheds, river and stream catchments, public water reservoirs, lakes, beaches, fish landing areas riparian and the territorial sea as may be prescribed;
(d) public land that has been reserved for security, education, research and other strategic public uses as may be prescribed; and
(e) natural, cultural, and historical features of exceptional national value falling within public lands; or
(f) reserved lands.

Section 12 (7) further provides that "the public land shall not be allocated unless it has been planned, surveyed and guidelines for its development prepared according to Section 17 of the Act". Any public land allocated under the Land Act cannot be sold, disposed of, subleased, or subdivided unless it is developed for the purpose for which it was allocated. If land is not used or developed in accordance with the terms and conditions stipulated in the grant, it shall automatically revert to the national or county government, as the case may be, when time stipulated for such development or use lapses.

The NLC can also reserve identified public lands for a particular use and place them under the care or control of public authorities or statutory bodies to be used for the reserved purpose.[97]

The National Land Commission is mandated, under Section 17(1), to approve development plans for reserved public land. The development plans are prepared and implemented according to the physical planning regulations and any other relevant law. Under Section 17(2), before submitting a development plan for approval, the registered owner or managing body of any reserved public land shall;

> Consider any conservation, environmental or heritage issues relevant to the development, management or use of the public land in its managed reserve for the purpose of that managed reserve; and incorporate in the plan a statement that it has considered those issues in drawing up the plan; submit an environmental impact assessment plan pursuant to existing law on environment; and comply with the values and principles of the Constitution.

Section 19 mandates the NLC to formulate rules and regulations for the conservation of land-based natural resources and also attempts to set guidelines for such formulation. The Environment and Land Court is vested with exclusive jurisdiction to hear and determine disputes and actions of lands, subject to Section 150 of the Land Act. The Act is, according to this study (and in light of physical planning and land use), meant to identify different categories of lands and also set out parameters on how to manage them. This law has fulfilled its mandate in this regard. It has, to a good extent, conformed to the constitutional standard for land use and sustainable development.

Land Control Act[98]

This law provides for the control of dealings in agricultural land. The Land Control Act regulates development, land use, subdivision, amalgamation, sale or any other disposal of agricultural land. The statute was designed to ensure that agricultural land is used and developed in such a way that good farming practices are not compromised or interfered with.

The Land Control Act of 1967 provides, at Section 5, for the establishment of land control boards, which carry out their mandate in accordance with the law. The composition of these boards is provided for under the First Schedule to the Act. The major function of the boards, which were established in every district (now every county or sub-county), is to control disposal of lands in agricultural areas. This law stipulates that all controlled transactions must receive consent from the board before registration. The Act voids any of the listed dealings carried out within a controlled area if consent is not obtained prior to the registration.

This statute further provides for modalities for application, issuance or refusal of consents on all controlled transactions. Consent to transact would be denied if the person to whom the land is intended to be disposed is unlikely to farm it, or unlikely to develop it profitably or that they have enough agricultural land.[99] Indeed, the land registrar or registrar of titles is required to refuse to register an instrument effecting a controlled transaction unless he is satisfied that any

97 Ibid ss. 15 & 16.
98 Republic of Kenya, Land Control Act of 1967 (revised ed. of 2017) Government Printer, Nairobi.
99 Ibid s 9 (b).

consent required has been obtained.[100] The provisions of this Act do not apply to transmission of land through a will or intestacy, unless such transmission gives rise to subdivision of the land in a controlled area.

The land control boards are required to ascertain that several conditions are met before granting consent but it is pertinent to note that there are no guidelines for land control boards in the issuance of consents. It is debatable whether or not the land control boards have promoted economic development in agriculture. It is, however, a good thing that the boards have existed over the years to watch over transactions in land, and especially the subdivisions in agricultural areas. In the same breadth, it is not clear how or why some areas in Kenya have witnessed untenable subdivisions of land without the intervention of the land boards.

This study proposes that the promulgation of guidelines and practice rules to be adhered to by all the land boards in uniformly watching over agricultural lands across the nation. Innovative ways of dealing with the subdivisions in inheritances or other necessary partitions of land, which may go beyond certain degrees of agricultural viability and sustainability, should also be devised.

Community Land Act[101]

The Community Land Act of 2016 provides for recognition, protection, management and registration of community land rights. It establishes a community land management committee responsible for the coordination of development of community land use plans, among other functions, in collaboration with relevant authorities. Section 3 states that:

> In the performance of the functions and exercise of powers under this Act, every person dealing with community land shall be guided by the following principles—
>
> (a) the principles of land policy set out in Article 60 of the Constitution; and
>
> (b) the national values and principles of governance set out in Article 10 of the Constitution.

These constitutional principles include, but are not limited to, sustainable and productive management of land resources; and sound conservation and protection of ecologically sensitive areas. Section 19 (1) of this law provides that:

> [A] registered community may, on its own motion or at the request of the county government, submit to the county government a plan for the development, management and use of the community land administered by the registered community for approval.

It, therefore, means that a community has the right to develop or carry out projects on its land in line with approved development plans. Community lands may be used for any purpose, subject to the provisions of the Act and other applicable laws. For example, community land in the pastoral community shall be used for grazing of livestock. Section 29 provides that a registered community may reserve or designate special purpose areas. Additionally, the county governments or national government may designate areas for the promotion of public interests in community land.

100 Ibid s 20.

101 Republic of Kenya, Community Land Act No 27 2016 Government Printer, Nairobi.

Among other components of a community land register are: the name of the registered community, the land use and a cadastral map showing the community land, and the identified areas of common interests. The community may reserve land for special purposes, including farming, settlement, cultural or heritage sites as well as for urban development.[102]

With respect to sustainable conservation of natural resources, Section 20 (2) provides that communities shall establish:

(a) Measures to protect critical ecosystems and habitats;
(b) Incentives for communities and individuals to invest in income generating natural resource conservation programmes;
(c) Measures to facilitate the access, use and co-management of forests, water and other resources by communities who have customary rights to these recourses;
(d) Procedures for the registration of natural resources in an appropriate register; and
(e) Procedures on the involvement of stakeholders in the management and utilization of land-based natural resources.

In addition to the above rules, the Act also calls for equitable sharing of extractive resources found in the community lands, and continuous monitoring and evaluation of impact to the society at large. Further, measures to mitigate any negative impacts and to rehabilitate the land upon completion or abandonment of a project on community land, whether extractive or not, are supposed to be put in place.[103]

This law, being new, has fairly good and advanced provisions with regard to sustainable development and land use. Its operationalisation over the next couple of years, through subsidiary legislation, pave way for a good evaluation of its utility. This study observes, however, that a good and transparent enforcement of this statute could yield positive results in terms of sustainable use of community lands. It will hopefully bring to an end the unsustainable subdivisions hiving off and grabbing of community lands without the stakeholders' involvement, which has been rampant in the past.

National policies

National Land Policy

Sessional Paper No. 3 of 2009 contains recommendations identified, analyzed and agreed upon by various stakeholders in Kenya's land sector. The dialogue attempted to settle one of the most emotive and culturally sensitive issues in Kenya. Though arguably overtaken by events and the Constitution of Kenya, 2010, it is still relevant in offering policy direction in matters of land administration and legislative frameworks. Indeed, there was recognition that the policy is a living document that should be reviewed every 10 years.[104]

102 Ibid s 13.
103 Ibid s 36.
104 supra n 32 Para 10 (clause 1.5.4)

The policy decried Kenya's lack of a national land use framework, which manifested in terms of unmitigated urban sprawl and squalor, land use conflicts, environmental pollution and degradation, spread of slum developments, and low levels of land utilization, destruction of forests and desertification, among others.[105] It thus proposed development of a national land use policy, which was formulated and passed in 2017. At Clause 1.5, the policy lays out the land policy principles and values to include:

Land policy principles

The formulation of this Policy was guided by the following principles:

(a) Equitable access to land for subsistence, commercial productivity, settlement, and the need to achieve a sustainable balance between these uses;
(b) Intra- and inter-generational equity;
(c) Gender equity;
(d) Secure land rights;
(e) Effective regulation of land development;
(f) Sustainable land use;
(g) Access to land information;
(h) Efficient land management;
(i) Vibrant land markets; and
(j) Transparent and good democratic governance of land.

Guiding Values

The national land policy formulation process was designed to be:

(a) Consultative;
(b) Participatory;
(c) Interactive;
(d) Inclusive;
(e) Consensus-based;
(f) Timely and professional;
(g) Transparent;
(h) Gender sensitive;
(i) Innovative; and
(j) Cost-effective.

By and large, these principles map the policy principles as enumerated under Article 60 of the Constitution, save for the fact that the policy does not cover what is provided for under sub-articles 1 (e) and (f) of the supreme law. Because this policy has already declared itself as a living document, this disparity is not so delicate as to declare it as wholly irrelevant. In any case, the policy has provided for slightly more principles in addition to the values.

The National Land Policy (in Clause 3.2.1.1) asserts that the State can exercise its powers of compulsory acquisition, and makes proposals to enhance the existing laws on the subject. This was subsequently provided for under Article 40 (3) of the Constitution. The policy also stipulates that while development control is the State's power to regulate land rights to achieve

105 Ibid para 24, 25 and 103

sustainability, it cautions that development control should not be turned into compulsory acquisition. This policy recognizes the fact that development control has not been applied effectively in line with sustainable land use patterns. This is evident in the 2019 demolitions of irregular developments in Nairobi, sanctioned by the Nairobi Regeneration Committee comprising of, among others the City County Governor and several Cabinet Secretaries.

The NLP further proposes land use planning issues as follows:

(a) Preparation of land use plans at national, regional and local levels on the basis of predetermined goals and integrating rural and urban development;
(b) Review and harmonization of existing land use planning laws;
(c) Actualization of spatial frameworks for orderly management of human activities to ensure that such activities are carried out taking into account considerations such as the economy, safety, aesthetics, harmony in land use and environmental sustainability;
(d) Review of strategies for human settlement in relation to service centres, growth centres, transport and communication network, environmental conservation and rural development;
(e) Efficient and sustainable utilization and management of land and land based resources;
(f) Establishment of an appropriate framework for public participation in the development of land use and spatial plans; and
(g) Establishment of an effective framework for coordination of land use plans to ensure implementation of the planning proposals and regulations. 106

The National Land Policy does recognize land use principles and the local, regional and national development plans, and mandates Parliament to enact relevant legislation, and other authorized agents to develop plans with regard to all lands including urban, peri-urban, rural, agricultural, informal sector as well as urban agriculture and forestry.

The NLP acknowledges the disconnect between the plan preparation, implementation and development control. It also argues, and correctly so, that agricultural activities are being abandoned and large farms are increasingly underutilized due to lack of facilitative infrastructure. The policy proposes that the government should institute measures to ensure optimal productivity and sustainable use of all land and land resources while introducing innovations anchored in law, regulating land sizes, adhering to land restoration and reclamation practices where appropriate.

Other than land use planning, compulsory acquisition and development control, the policy has introduced environmental assessment and audit as a land management tool. It emphatically proposes that environmental audits be carried out on all projects on land that are likely to degrade the environment. It further proposes enforcement mechanisms such as enhancement of the polluter-pays principle, and introduces use of incentives to promote clean and sustainable production.[107]

106 Ibid para 104.
107 Ibid para 141.

While there is agreement that the National Land Policy needs to be reviewed or replaced entirely, this chapter reiterates that indeed according to the NLP itself, it ought to have been reviewed in 2019. The policy has thus not been irrelevant in as far as land use and development control are concerned. It served its purpose during the earlier years of adoption. It informed the land chapter in the Constitution in 2010, albeit to a limited extent. It similarly contributed to the enactment of the land laws that have been enacted after its adoption.

National Land Use Policy[108]

The National Land Use Policy was formulated and adopted to harmonise legal, administrative, institutional and technological frameworks for optimal and productive utilization of land-related resources in a sustainable and desirable manner at national, county and community levels.[109] The National Land Use Policy is a statement of intent setting out long-term goals on land use management. It addresses issues directly relating to the use of land and its resources. It also incorporates all activities that are likely to have an impact on the use of land and its resources.[110]

The policy seeks to strike a balance between human satisfaction of their needs from the land and sustainable use of the land. This is because the lack of this balance, or unsustainable use of land, has adverse effects such as desertification, destruction of water catchment areas, reduced food productivity, poor air and water quality, which pose risks for life on earth. The policy thus intends to promote efficient use of land and application of appropriate technologies in rural and urban setups for intensification but optimal land use. It further enumerates land uses to include agriculture, pastoralism, water catchments, nature reserves, urban and rural settlements, industry, mining, infrastructure, tourism and recreation, cultural sites, fishing, forestry and energy.[111]

The policy also provides an implementation framework under Chapter Four making provision for the establishment of the National Council for Land Use Policy, chaired by the Head of Public Service. The rationale for creating the council was to take full responsibility for coordination, sectoral integration and mobilization of resources for implementing the policy[112] through the National Technical Implementation Committee and the County Technical Implementation Committees.

The policy also pinpoints several sectoral laws and policy frameworks that will be revised to bring them into accord with this policy.[113] At paragraph 1.6, the policy enumerates the guiding principles and values of national land use as hereunder:

108 supra n 1.
109 Ibid (v).
110 Ibid 4.
111 Ibid 1.
112 The principal functions of the Council shall be;
i. Steering organ for the implementation of the Policy;
ii. Mobilization of resources for effective performance of land use and management function;
iii. Coordination and integration of sectoral programmes for effective implementation of this Policy.
113 These include, the Agriculture Food and Fisheries Act, 2013, Survey Act, Cap 299, the Environmental Management and Coordination (Amendments) Act, 2015, the Water Act, the Wildlife Conservation and Management Act, 2013, the Kenya Maritime Authority Act, Cap 370, 2012, the Roads Act, the Climate Change Act, 2016, the Physical Planning Act, Cap 286, the Land Act, 2012, the National Land Commission Act, 2012, the County Governments Act, 2012, the Land Registration Act, 2012, the Urban Areas and Cities Act, 2012, the Forestry Act, 2005, and the Protected Areas Act. The policies include; the, National Urban Development Policy, National Transportation Policy, Agriculture, Food and Fisheries.

(a) Efficient and sustainable land use management.
(b) Ecological sustainability.
(c) Integrity and adherence to the rule of law.
(d) Food security.
(f) Access to land use information.
(g) Amicable resolution of land use conflicts.
(h) Equity, inclusivity and transparency in decision-making
(i) Effective public participation.
(j) Elimination of discrimination and respect for human rights in land use.
(k) Public benefit and interest.
(l) Order and harmony in land use.
(m) Adoption of technology in land use management.

The mission of the policy is 'to promote best land use practices for optimal utilization of the land resource in a productive, efficient, equitable and sustainable manner.' At paragraph 2.2, it has been indicated that there is no land in Kenya that can be regarded as low potential, but that all land is indeed potent and can be used for various economic and social activities. It goes on to call for land use and spatial planning. The policy also divides the country into several ecological or climatic zones, and briefly proposes and describes best land use for each zone.

The National Land Use Policy aims to address various environmental issues connected to agriculture, the coast and marine conservation, environmental degradation, rangelands and pastoral land uses, urban lands management, the extractive industries, arid and semi-arid lands, climate change, ecological biodiversity and the cultivation of marginal lands and fragile ecosystems amongst others.

This being one of the recent and most modern policies in the land sector, its implementation is seen as the answer to many land administration challenges. This study lauds its provisions but also proposes that the composition of the national technical implementation committee should include the directors of land administration, land registration and land valuation.

In *Kimutai v County Govt of Uasin Gishu & Others,*[114] a petitioner approached the court on his behalf and that of members of the public against the respondents. He contended that the respondents, without following the requirements of the law as provided for under the Fourth Schedule of the Constitution of Kenya, Part 2 (7), designated a parcel of land as its administration offices and started construction works contrary to the law and without public participation of the petitioner and members of the public.

The court observed that the suit land was previously meant for recreation and public *barazas* and not for office blocks. This raised a *prima facie* case with a likelihood of success. Moreover, the National Land Commission had not been involved in setting the land apart for ward offices. The law provides that the balance of convenience and public interest tilts in favour of the petitioner due to the fact that he was using the land for recreation, crusades and public *barazas* before he was evicted from it. Conservatory orders were granted halting further construction on the suit property until the petition was heard and determined.

114 *Kimutai Kirui v County Gov.t of Uasin Gishu & Others* (2019) eKLR.

The Kenya Vision 2030

Kenya's development agenda is anchored on Vision 2030, which is the nation's development plan that seeks to create a globally competitive and prosperous country with a high quality of life by 2030. It aims to transform Kenya into a newly industrialized, middle-income country providing high quality of life to all its citizens in a clean and secure environment. Vision 2030's key goal is the attainment of a nation living in a clean, secure and sustainable environment driven by the principles of sustainable development. It is based on the three pillars: political, social and economic advancement with attainment of sustainable growth.[115]

The objective of the social pillar is investing in the people of Kenya in order to improve the quality of life for all Kenyans by targeting human and social welfare projects and programmes, specifically, health, environment, housing, and urbanization.

The National Spatial Plan[116]

The National Spatial Plan (NSP) was prepared by the National Department of Physical Planning, in the Ministry of Lands and Physical Planning, exercising its mandate of preparing national policies on physical planning. The National Spatial Plan envisions the implementation of the flagship projects under Kenya Vision 2030. It proposes the provision of spatial locations for these projects and at the same time creates a framework for absorbing their impacts.

It provides for coordination in sectoral planning, which has been lacking in the country, and it seeks to address the long-standing gap between physical and economic planning. This is expected to result in efficient, prudent, rational, competitive and sustainable use of the national space.[117] One of the major objectives of the plan is to optimize utilization of land and natural resources for sustainable development. These will in turn pave way for balanced regional development creating a livable human habitat with secure and high quality of life.[118]

The key principles under the NSP, which all regional, county and local development and spatial plans should to adhere to include: effective public participation, urban containment, liveability, smart and green urban growth, sustainable development, promotion of ecological integrity, and the promotion of public participation over private participation.

The challenges that the NSP intends to address include: under-exploitation of resources, weak rural-urban linkages, dilapidated infrastructural facilities and services, slow adoption of technology and innovation, and low productivity. These are especially rural-based problems. Urban challenges in Kenya, almost all of which are centered around Nairobi, include skewed distribution of urban centres, centrality of Nairobi (and partly Mombasa), urban sprawl characterized by inorganic and unplanned growth of peri-urban areas, informal settlements, unreliable transport network, and problems of solid waste management. Other challenges include poor implementation of development plans, land governance issues which mature into corruption, and lack of specialized towns with only a few in this category. Examples of specialized towns include the growth of Thika as an industrial city and Malindi as a tourist destination.[119]

115 United Nations Development Programme, *Sustainable Development in Kenya: Stocktaking in the run up to Rio+20* < https://sustainabledevelopment.un.org/content/documents/985kenya.pdf> accessed 23rd August 2018

116 supra n 3.

117 Ibid 10.

118 Ibid 11.

119 Ibid 111.

Considering that global trends indicate that a higher number of people will be residing in the urban areas in the not-too-distant future, the NSP urges the government to plan with this in mind. It proposes that this be done by domesticating Sustainable Development Goal 11 on ensuring that cities and human settlements are inclusive, safe and sustainable. The main infrastructural adjustments that are highlighted in the plan as pertains human settlements include development and application of innovations in housing schemes, provision of proper sanitation, electricity and water provision, incorporation of green belts for carbon sinking and recreational facilities, development of disaster management and mitigation schemes, and the provision of integrated transportation systems, among others.

Other guidelines laid out in the plan include mapping out and stopping development in and around fragile and ecologically sensitive areas; use of green energy; promotion of private public partnerships; continuous research; adoption of new and appropriate technologies; upgrading the institutional capacities and making use of informed and meaningful public participation.[120] This plan proposes the establishment of a coordination framework in addition to the existing one. It calls for the establishment of a National Physical Planning Council, chaired by the President, the National Technical Committee chaired by the National Director of Physical Planning, and the county physical planning committees comprising of Governors as chairs.

This being one of the most recent government guidelines on matters planning and land use, it has aligned itself to the constitutional provisions. It is forward-looking, with very ambitious spatial planning rules suitable for modern and probably post-modern developments. It is quite strategic but also takes a multi-disciplinary approach. In line with its proposals, PLUPA was enacted in 2019 and, among other suggestions, PLUPA created various committees including the National Physical Planning Consultative Forum chaired by the Cabinet Secretary in charge of physical and land use planning.

PLUPA, in line with NSP proposals, further establishes the inter-county joint physical and land use planning committee at Section 29, the county physical and land use planning consultative forum in each county at Section 14, the national physical and land use planning liaison committee under Sections 73, 74 and 75 of the Act, the county physical and land use planning liaison committee in each county established under Sections 76 to 78, and the office of the county director of physical and land use planning in each county.

The New Urban Agenda

The New Urban Agenda is an urbanization action blueprint by the UN-Habitat adopted at the United Nations Conference on Housing and Sustainable Urban Development (Habitat III) in Quito, Ecuador, on October 20, 2016. The UN General Assembly endorsed it at its 68th plenary meeting of the 71st session on December 23, 2016. The New Urban Agenda represents a shared vision for a better and more sustainable future.[121] There is no single prescription for improving urbanization and achieving sustainable urban development, but the New Urban Agenda provides the principles and tested practices to bring its vision to life, off the pages and into reality.[122]

120 Ibid 131.
121 United Nations New Urban Agenda, Habitat (iii) A/RES/71/256 done at Ecuador (2017).
122 Ibid, v.

The New Urban Agenda affirms the global commitment to sustainable urban development as a critical step for realizing sustainable development in an integrated and coordinated manner at the global, regional, national, sub-national and local levels, with the participation of all relevant actors.[123] It impresses upon member States to move towards an urban paradigm shift for a New Urban Agenda that will readdress the way we plan, finance, develop, govern and manage cities and human settlements, recognizing sustainable urban and territorial development as essential to achieving sustainable development and prosperity for all.

D. Institutional arrangements for physical and land use planning

Overview

The Constitution of Kenya apportions responsibility for planning to both national and county governments. Under the Fourth Schedule of the Constitution on the distribution of functions, Part 1(21) and (32) gives the national government responsibility to formulate general principles of land planning, coordination of planning by the counties, capacity building and technical assistance to the counties. On the other hand, Part 2(8) allocates county planning and development to devolved governments.

The laws of Kenya have in this regard created several offices to deal with physical planning, land use and development control. Some have been examined earlier in this chapter and a few others are discussed in the subsequent sections. By way of summary, these offices are as follows: (a) Those under the Constitution are the government ministries, the Cabinet Secretaries, County Governments, the relevant county executive officers, the Environment and Land Court under Article 162 (2), and the National Land Commission (Article 67).

(b) The Physical and Land Use Planning Act creates the offices of the Director-General of PLUP at Section 11, the National PLUP Consultative Forum at Section 6, County PLUP Consultative Forum under Section 14, and the County PLUP Director at Section 19. This law also establishes the inter-county joint PLUP committees under Section 29, the National PLUP Liaison Committee under Section 73, and the County PLUP Liaison Committee at Section 76. The Act recognizes the PLUP functions of the NLC, the Cabinet Secretaries and the CEC members in Sections 9, 10 and 17, respectively.

(c) The Environment Management and Coordination Act establishes the National Environmental Management Authority in Section 9, and grants it powers in Section 11. It further creates the NEMA board at Section 10, and the National Environment Trust Fund, at section 24, which states that:

> The object of the Trust Fund shall be to facilitate research intended to further the requirements of environmental management, capacity building, environmental awards, environmental publications, scholarships and grants.

Other offices created under the EMCA include and the County Environment Committees, at Section 29, to be established by Governors through Gazette notices in each county, the National Environmental Complaints Committee at Section 31, the Technical Advisory Committee on EIA at Section 61, and the National Environment Tribunal at Section 125. This law also establishes the environmental inspectors, at Section 117, whose function is to monitor compliance with

123 Ibid, 4.

the environmental standards established under the statute, and environment assessors, appointed by the NET chair under Section 131 to offer their specialist skills to the Tribunal in the determination of any matter brought before it. The judiciary's function is recognized at Section 130.

(d) Various statutes have created other offices, including the WRA under Section 11 of the Water Act; the land control boards under Section 5 of the Land Control Act; community land management committees responsible for the coordination of development of community land use plans in collaboration with relevant authorities under the Community Land Act; and the cities and municipalities boards established under the Urban Areas and Cities Act.

At national government level

The Fourth Schedule to the Constitution, Clause 21, charges the national government with the responsibility of formulating general principles of land planning and coordination of planning by counties and capacity building. In fulfillment of this mandate the national government performs the functions of:

a, formulating general principles, policies, standards, and guidelines of land planning
b. preparation and approval of national physical development plan
c. coordination of regional spatial plans and
d. capacity building and technical support to counties.[124]

Ministry of Lands and Physical Planning

The Ministry of Lands is a major institution in physical planning, land use, and development control. Through the physical planning department, the ministry prepares regional and local physical development plans, and practicability studies into matters concerning physical planning. It also advises the national government on matters concerning alienation of land and the appropriate uses of land. The department also grants approvals for applications touching on land use such as changes of use, extension of use, extension of leases, subdivision of land and amalgamation of land.[125] Under Executive Order No.1/2016, the ministry is charged with developing national land policies and management of land transactions, among other functions.[126]

National Environment Management Authority (NEMA)

The National Environment Management Authority is established under the Environmental Management and Co-ordination Act (EMCA) as the principal agent of government for the implementation of all policies relating to the environment. It is the regulatory body for the Ministry of Environment, under which it handles environmental coordination throughout Kenya. However, it is important to underscore that environment being a multi-sectoral phenomenon, there are several other government agencies and ministries that play a role in it as they manage their sectors. These include ministries in charge of water, physical planning, agriculture, wildlife, roads, housing and forestry, among others.

Other departments deal with the management of water resources and utilization, and farming practices to prevent soil erosion in areas with the sloping land. They also ensure sufficient food

124 supra n 16 v.

125 Department of Physical Planning; <http://lands.go.ke/department-of-physical-planning> accessed on 23 August 2018.

126 Republic of Kenya, 'Organization of the Government of the Republic.of Kenya', Executive Order No. 1/201 2016.

production while promoting the adequate cultivation of cash crops to support the economy at various levels. These agencies work in collaboration with NEMA. The EMCA mandates the Authority to exercise general supervision and coordination over all matters relating to the environment, and to be the principal instrument of the government in implementing all policies relating to the environment.[127]

NEMA has been a key player in land use, development control and the protection of the environment. Notable instances of its intervention include the plastic ban directive, which outlawed the use, import or manufacture plastic carrier bags in Kenya proclaimed under the Gazette notice No. 2334 of March 14, 2017[128] to reduce pollution through plastic bags. The Environment and Land Court upheld the plastic bags ban in a petition challenging it in the matter of *Kenya Association of Manufacturers v Cabinet Secretary, Ministry of Environment and Natural Resources & 3 Others*.[129]

The petition was triggered by the decision of the Cabinet Secretary, Ministry of Environment and Natural Resources and NEMA to ban the use, manufacture and importation of certain types of plastic bags used for commercial and household packaging. The petitioner sought orders making a nullification declaration voiding the Gazette notices No. 2356 and No. 2334 of 2017 published March 14, 2017 and a further declaration that these notices were unconstitutional, for among other reasons, having been issued without public participation contrary to Articles 10 and 69(1) of the Constitution, and Section 5 of the Statutory Instruments Act.

Relying on, among others, the ruling in *Oposa v Factoran*[130] the court observed:

> The Supreme Court of Philippines in a case which involved grant of timber licence agreements to corporations for commercial logging purposes, the petitioners through their parents sought to stop the Department of Environment and Natural Resources from issuing licences to cut timber, invoking their right to a healthy environment enshrined in the Constitution of the Philippines. The court stated that the right to a balanced and healthy ecology incorporated in the Constitution carried with it the duty to refrain from impairing the environment and implies among other things, the judicious management and conservation of the country's environment.

The three-judge bench held that the limitation of rights imposed by the impugned Gazette notice was reasonable and justifiable because, although some ordinary Kenyans could suffer social and economic losses as a result of the ban, it was for the common good of the general public and as such lawful. The court dismissed the petition and declined to annul the notices.

On August 6, 2018, NEMA issued a press release on the 'demolition of structures on riparian reserves', which explained that the exercise was an inter-ministerial and multiagency activity

127 supra n 31 s 9.

128 According to the Gazette notice No. 2334 of 14 March 2017, all plastic carrier bags regardless of their thickness or colour used as secondary packages were banned with effect from 28 August 2017.

129 Kenya Association of Manufacturers & 2 Others v Cabinet Secretary, Ministry of Environment and Natural Resources & 3 Others [2017] eKLR.

130 *Oposa v Factoran* 224 SCRA 792.

under the Nairobi Regeneration Initiative aimed at clearing the Nairobi River and its tributaries of any illegal structures.[131]

NEMA also conducted various demolitions including one against a Java House outlet and Shell fuel station in Kileleshwa, Nairobi. NEMA followed the demolitions by moving in to reclaim riparian land in Nairobi County.[132] Local daily newspapers reported that a multi-agency taskforce comprising of NEMA, Kenya Urban Roads Authority (KURA) and Nairobi County Government would continue bringing down illegal structures in the capital city, especially buildings located on riparian reserves and river valleys.[133] These demolitions reveal a lot of irregularities and illegalities in physical and land use planning and development control in Kenya at large.

National Environment Tribunal

The National Environment Tribunal (NET) is established under Section 125 of the Environmental Management and Coordination Act. NET's main function is to receive, hear and determine appeals arising from decisions of the National Environment Management Authority on issuance, denial or revocation of environmental impact assessment licences. The licences are statutory permissions to undertake developmental transactions on a specified parcel of land.

The Tribunal hears appeals on environmental matters[134] from individuals who wish to undertake developments but are denied EIA licences by NEMA or seek to overturn certain conditions imposed prior to issuance of permits. This can be illustrated by the decision of the Tribunal in the case of *Phenom Limited v National Environment Management Authority,*[135] where the appellant (Phenom Limited), appealed against NEMA's conditions on its proposed housing development, which the respondent (NEMA) conveyed by letter dated October 19, 2004. The Tribunal upheld NEMA's conditions and directed that the appellant re-draws the building plans to conform with the allowable ground coverage of not more than 35 per cent of the plot, and that once satisfied that the condition was fulfilled, NEMA would be at liberty to issue an EIA licence in accordance with applicable zoning and building regulations and policies.

Environment and Land Court

The Environment and Land Court has played a key role in land use, physical planning and development control. It is established under the Constitution, and its functioning set out in the Environment and Land Court Act.[136] The court has original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of the Constitution relating to environment and land. This court has in several instances declined to issue orders to stop the demolition of illegal developments on riparian and road reserves.

131 The Nairobi Regeneration Programme is a joint effort between National Government and the County Government of Nairobi focuses on a set *of economic* and social initiatives that will improve the livelihoods of Nairobi residents. The Nairobi Regeneration team is led by Tourism CS Hon. Najib Balala and co-chaired by the Nairobi County Governor Hon. Mike Sonko. The thematic areas are led by respective Principal Secretaries and County Executives.

132 'Demolition of Java House and Shell Fuel Station Outlets in Kileleshwa: NEMA demolishes Java coffee shop, Shell fuel station in Kileleshwa', *The Standard* (August 6th 2018) accessed on <https://www.standardmedia.co.ke/article/2001290876/java-house-shell-fuel-station-brought-down>, accessed, 6 August 2018.

133 Ibid.

134 supra n 31 s 129 (1)

135 Phenom Limited v National Environment Management Authority [2005] eKLR Tribunal Appeal Net

136 Republic of Kenya, Environment and Land Court Act No. 19 of 2011, s 4 Government Printer Nairobi.

Several cases have been instituted seeking protection of the right to a clean and healthy environment as envisioned under Article 42 of the Constitution. In *Wainaina Kinyanjui v Andrew Ng'ang'a,*[137] an injunction was issued restraining the defendant from carrying on the business of a student hostel in Hardy Estate, Lang'ata, Nairobi. This is a perfect illustration of how this court has upheld spatial planning and land use rules.

The case was premised on the grounds that the development of a student hostel on the defendant's land was unauthorized and illegal, as the buildings housing it had not been vetted or approved by the relevant authorities. No approval had been obtained to convert the use of the suit property from the zoned residential user to the business of a student hostel, and further that the development of a student hostel required the sanction of NEMA and public participation of stakeholders including the residents of the estate, which had not been done. This suit was premised on the holding of the court in *Ocean Freight EA Limited v Esmaili & Another,*[138] where the court found the breach of the law regarding the planning of and use of land was a material consideration for granting an injunction.

County governments

The county governments have responsibility for county planning and development control under Part 2, (8) of the Fourth Schedule of the Constitution. In undertaking this mandate, the counties are expected to perform the functions of: formulating county-specific policies, strategies and guidelines; preparation of county spatial plans and urban spatial plans; implementation of the plans; undertaking research on spatial planning within their areas of jurisdiction; and participating in the preparation of regional spatial development plans.[139] The County Government Act establishes county planning and development under Sections 102 to 115. This provides for the principles of planning and development to guide physical and land use planning in the counties.

The county governments have the following key responsibilities on matters planning and development control;

a) Implementing national policies, standards, and guidelines,
b) Formulating county specific policies,
c) Preparation, approval, and implementation of county spatial development plans, local physical development plans, development control and enforcement.

County legislation

Nairobi City County Solid Waste Management Act[140]

The County Assembly of Nairobi passed this law in 2015 for the management of solid waste in the city county. According to this legislation, solid waste is any waste in solid form deposited in the environment in such volumes or composition likely to cause an alteration of that environment. Solid waste management refers to those activities that are administrative or operational used in the handling, packaging, treatment, conditioning, reducing, recycling, re-use, storage and disposal of solid waste so as to protect the environment against possible resultant adverse effects.[141]

137 Wainaina Kinyanjui & 2 others v Andrew Ng'ang'a [2013] eKLR.
138 *Ocean Freight E.A. Limited v Esmaili & Another* (2004) **e**KLR 463.
139 supra n 7.
140 Nairobi City County, Nairobi City County Waste Management Act, 2015, Government Printer, Nairobi
141 Ibid s 2.

Solid waste includes agricultural waste, biomedical and clinical waste, domestic waste, construction and demolition waste, hazardous e-waste, plastic, junk, industrial waste, and market waste, among others. This Act aligns the Constitution, which provides for the right to a clean and healthy environment, and mandates all residents of the city county to protect and enhance their environment.

This law authorises the county executive member, in consultation with the governor and with the approval of the county assembly, to impose a charge upon a generator of waste so as to meet the management costs. It also divides the city county into zones for purposes of collection and management of solid waste. The city's authorized officer, who may be the chief officer or the director of environment, may at any reasonable time in the performance of his/her duties enter any land or premises within the county and prohibit or order any person to immediately cease the generation, transportation, handling, storage or disposal of waste if there is imminent and substantial danger to public health and the environment.

Section 15 prohibits the production, distribution or even possession of plastic bags of thickness of less than 30 microns and of a size not less than 8 inches by 12 inches, and of a colour other than specified by the Kenyan standard. This law allows the city county to engage in the business of solid waste collection from the streets and any other public place, but places the responsibility to collect, clean and cause to be cleaned houses or premises and clean the 10-metre radius around their houses but which radii shall not include a main road or a street on property owners.

Litter bins, liner bags and other solid waste bags shall be coded to enable the segregation and proper management of solid waste using the following colour codes;

a) green liner container for organic waste,
b) blue liner container for plastics and paper waste,
c) brown liner container any other waste.

Any person who deposits solid waste other than in the manner prescribed commits an offence. The CEC can, however, publish regulations that prescribe other colour codes. The service providers for solid waste collection should label their waste bags or liners as prescribed under Section 21 of this Act. Their liners should contain their address and phone numbers.

This study observes that these provisions are quite progressive, especially in terms of labeling but they are hardly followed by the city dwellers and the county insofar as the prescribed labeling and coding of the waste bags is concerned. If this law were to be followed strictly, waste management in the city would be slightly better.

H. Conclusion

The Constitution of Kenya, 2010, has fulfilled its duty in addressing physical and land use issues for effective management of natural resources to attain sustainable development. Much needs to be done, however, in terms of legislation to bring the laws and policies that were in place before 2010 in line with the *grund-norm*. Several pieces of legislation are ripe for repeal while others require amendment.

From the foregoing discussion, it is evident that the institutions enumerated, especially the Environment and Land Court and the National Environment Tribunal have played a major role in promoting proper land use, development control and physical planning. The two institutions

have on several instances declined to aid the violation of the law on physical planning and development control, which is laudable. NEMA and WRA are other institutions that are putting in some commendable efforts.

There are numerous polemical issues that arise from the concepts of land use, physical planning, and development control as can be ferreted from the discussions in this chapter. It would be an unforgivable heresy to claim that this chapter covers all the arising issues on the topic of discussion and provides the suggested appropriate remedies to address the same. In lieu of a conclusion, it is suggested that the following need to be addressed.

(a) Allocation of land and issuance of titles should be carried out on the basis of approved physical development plans, approved survey plans, approved local area zoning regulations, and policy guidelines. All loopholes allowing irregular issuance of land titles should be sealed.
(b) The county governments' planning frameworks should integrate economic, physical, social, environmental and spatial planning.
(c) To promote public participation, non-state actors and ordinary citizens should be incorporated in the planning processes by all authorities.
(d) The government should facilitate full adherence to the relevant laws, regulations and practice rules for effective and transparent development control and efficient monitoring and evaluation.
(e) The relevant agencies should hasten the repeal and amendment of policies and laws that are not in tune with the Constitution on matters of land management, physical and land use planning, and development control.
(f) There should be adequate and proper capacity building for all physical and land use planning, land administration and environmental conservation agencies.

In all matters of land management, land use and physical planning and environmental protection, the government should carry out its mandate in collaboration with research institutions and land administration as well as land use experts.

PART III

COMPLIANCE AND ENFORCEMENT

CHAPTER 11

The Law and Practice on Environmental Assessment in Kenya under the 2010 Constitution

Patricia Kameri-Mbote, Nkatha Kabira & Boru Gollo Jattani

A. Introduction

This chapter critically examines the law and practice on environmental assessment under Kenya's 2010 constitutional order. Its primary goal is to evaluate the challenges of implementing environmental assessment, focusing on the scope to which the Constitution of Kenya, 2010, has transformed the law and practice on environmental assessment in Kenya. The authors assess how the Constitution embodies various national values and principles that should be used to manage and protect the environment, alongside the rights of every person in Kenya to a clean environment. They further examine how these values, principles and rights are captured in various Acts of Parliament, including the Environmental Management and Coordination Act, and briefly highlight various international treaties Kenya has ratified with binding principles to manage and protect the environment. The chapter dives into the institutional and legislative framework that governs environmental assessment in Kenya. It will demonstrate that while the Constitution and legislation have provided for institutional and legal mechanisms to monitor and ensure environmental protection and management, the practice continues to be at variance with the laws on the books because project proponents, the National Environmental Management Authority and other decision-makers are still yet to fully comply with the provisions of the local and international legal frameworks on environmental assessment.

B. Normative exposition of environmental assessment

While explaining the law and practice around environmental assessment, it is essential to provide a definition of environmental assessment. Under the EMCA, the Environmental Impact Assessment (EIA) has been defined as 'a systematic examination conducted to determine whether or not a programme, activity or project would have any adverse impacts on the environment.'[1] On the other hand, EIA has been defined by the International Association for Impact Assessment (IAIA) as 'the process of identifying, predicting, evaluating and mitigating the biophysical, social, and other relevant effects of development proposals prior to major decisions being taken and commitments made.'[2] The EMCA also defines Strategic Environmental Assessment (SEA) as 'a formal and systemic process to analyse and address the environmental effects of policies, plans, programmes and other strategic initiatives.'[3] The NEMA Guidelines (2011) define SEA as 'a range of analytical and participatory approaches to integrate environmental consideration into policies, plans, or programmes (PPP) and evaluate the interlinkages with economic and social considerations'.[4]

1 Section 2, Environmental Management and Coordination Act.
2 International Association for Impact Assessment, 'Principles of Environmental Impact Assessment Best Practice' [1999].
3 *Ibid.*
4 National Environmental Management Authority, National Guidelines for Strategic Environmental Assessment in Kenya [2011] iv.

These definitions are aligned to various environmental governance principles. For instance, the SEA definition in the NEMA Guidelines requires that when planning and conducting SEA, the proponents of a project must go further past that which usually is regarded 'conventional' impacts on environment by a project.[5] Instead, there are mere expectations placed on project proponents to just assess and make a full report on the costs of their project.

From the foregoing definitions, it can also be deduced that the primary objective of conducting SEA or EIA is to ensure that environmental effects are explicitly addressed before any major projects are given the green light to commence. IAIA has also outlined EIA's objectives to avoid or minimize adverse significant environmental impacts of development projects and to sustainable aid development.[6]

In 1992, the United Nations Conference on Environment and Development (also commonly known as *Rio 92*) was held in Rio de Janeiro, Brazil.[7] The conference was a landmark gathering that restated the Declaration of the United Nations Conference on Human Environment that was adopted in 1972 at Stockholm and acknowledged EIA as a common technique to inform decision-making regarding vital environmental issues.[8] One of the crucial documents adopted at this conference was the *Rio Declaration on Environment and Development,*[9] with 27 sets of principles, which are binding on the State pursuant to Article 2(5) of the Constitution.[10] Principle 15 of the Rio Declaration, also known as the Precautionary Principle, essentially acknowledges the constraints on science to precisely prognosticate the likely environmental effects of activities and appeals, therefore, to taking precaution in any environmental matters where there is uncertainty. The upshot of the principle is that scientific uncertainty concerning significant possible environmental damage is not a viable reason for refraining from taking precautionary measures.[11] This principle has been reiterated in various Kenyan laws, including the EMCA and the Environment and Land Court Act. The principle is also found in international treaties to which Kenya is a signatory, including the Convention on Biological Diversity (CBD),[12] the Cartagena Protocol on Biosafety to the Convention on Biological Diversity[13] and the UN Framework Convention for Climate Change.[14]

Environmental Impact Assessment, Environmental Audit, and Environmental Monitoring[15] are among the various precautionary measures that States may institutionalize. Principle 17 of the Rio Declaration provides for the need for EIA for projects that might have significantly affected the environment.

5 *Mohamed Ali Baadi and Others v Attorney General & 11 Others* [2018] eKLR para. 195.
6 Supra note 2.
7 Rio Declaration on Environment and Development 1992 < https://www.cbd.int/doc/ref/rio-declaration.shtml > 9 November 2020.
8 Luis E. Sanchez, Peter Croal; 'Environmental Impact Assessment, from Rio-92 to Rio+20 and Beyond', <http://www.scielo.br/scielo.php?script=sci_arttext&pid=S1414-753X2012000300004 > 9 November 2020.
9 Supra note 7.
10 *County Government of Kitui v Sonata Kenya Limited & 2 Others [2018] eKLR para. 43.*
11 Patricia Kameri-Mbote, 'Towards A Liability and Redress System under the Cartagena Protocol on Biosafety: A Review of the Kenya National Legal System', *East African Law Journal,* (2004).
12 Preamble of the Convention of Biological Diversity.
13 Preamble, Article 1 and Article 10(8) of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity.
14 Article 3, United Nations Framework Convention on Climate Change.
15 Charles O. Okidi, 'Concept, Function and Structure of Environmental Law' in CO Okidi, P Kameri-Mbote and M Akech, *Environmental Governance in Kenya: Implementing the Framework Law*, East African Educational Publishers (2008) 3-60.

Closely related to the precautionary principle is the prevention principle, which decrees that the environment can best be protected by preventing environmental damage in the first place instead of dealing with the aftermath of the damage using compensation or other forms of remedies.[16] Justice J. Olola in *Amina Said Abdalla & 2 others v County Government of Kilifi & 2 Others*[17] has remarked that the rationale behind the principle of prevention is that prevention is less expensive than permitting environmental harm to take place and then taking remedial measures.[18] As the saying goes, prevention is better than cure.

In addition to the principles above, the Rio Declaration has laid down in Principle 16 the polluter-pays principle, which is also at the heart of environmental assessment. Principle 16 provides that responsible authorities should encourage the approach that the polluter bears the costs of their pollution.

The polluter-pays principle has been given effect in the Common Law tort of nuisance, trespass, negligence and the strict liability rule in *Rylands v Fletcher,*[19] all of which reflect different aspects of the polluter's liability.[20] The effect of the principle is that the costs of prevention or the costs of minimizing environmental harm because of the pollution must necessarily be borne by the persons who are behind the pollution.[21] Justice A.I. Hayanga observed in his ruling in *Rodgers Muema Nzioka & 2 Others v Tiomin Kenya Limited*[22] that the polluter -pays principle does not certainly guarantee that a payment will adequately reverse some environmental harm, which is the reason EIA is necessary to make such determination before development projects are approved. In the ruling, it was also stated that it is inescapable to employ the polluter pays principle to cover the obligations of any person to carry out their activities in an environmentally sympathetic manner because anyone conducting any activity on the environment ought to know and take responsibility for environmental damages as a result of such activity.[23]

As earlier mentioned, the above principles have been incorporated in the EMCA under Section 3(5) as principles of sustainable development that should guide the Environment, and Land Court (ELC) in exercising its jurisdiction. Section 63 of the EMCA also provides that NEMA after being satisfied with an EIA study, may issue a licence on such conditions as may be necessary to facilitate sustainable development and sound environmental management. Consequently, the courts in Kenya have pronounced themselves on the construction of the principle of sustainable development. In the *Rodgers Muema* case, Justice A.I. Hayanga quoted *Environmental Law* by John D. Leeson,[24] and expressed the view that the constitutive viewpoint of the phrase sustainable development should be development that matches the needs of the present generation without jeopardizing the ability of future generation to meet their needs. This reflects the

16 Principle 6, Stockholm Declaration; See also *Amina Said Abdalla & 2 Others v County Government of Kilifi & 2 Others [2017] eKLR* para 18; See also *County Government of Kitui v Sonata Kenya Limited & 2 Others [2018] eKLR* para.

17 [2017] eKLR.

18 *Amina Said Abdalla & 2 Others v County Government of Kilifi & 2 Others [2017] eKLR* para 18.

19 (1868), LR 3 HL 330.

20 Albert Mumma, 'The Continuing Role of Common Law in Sustainable Development' in CO Okidi, P Kameri-Mbote and M Akech, *Environmental Governance in Kenya: Implementing the Framework Law*, East African Educational Publishers (2008) 90-109.

21 *Rodgers Muema Nzioka & 2 Others v Tiomin Kenya Limited [2001] eKLR.*

22 *Ibid*.

23 *Ibid*.

24 John D. Leeson, *Environmental Law* [1995].

Brundtland Report's[25] definition, and Edith Brown Weiss'[26] discussion on intergenerational and intragenerational equity. One is, therefore, required to consider whether they can prevent or reduce actions that constitute a nuisance or pollution.

C. The impact of the Constitution of Kenya, 2010, on environmental assessment

The independence constitution of 1964[27] did not expressly provide for the 'environment'. However, in Section 71 of the Constitution, the 'right to life' was interpreted to include the right to a clean environment.[28] The 2010 Constitution has, however, made a significant improvement by elevating respect for and protection of the environment through express provisions. The Constitution contains a number of robust substantive and procedural environmental governance and management principles. The Preamble, which generally describes the core values that the Constitution exists to achieve, states that Kenyans are respectful of the environment and are determined to sustain it for the benefit of future generations. It is from this statement in the Preamble that the rest of the provisions in the Constitution derive their inspiration for the management and protection of the environment. The intergenerational equity principle in the preamble signifies that the present generation should make sure that when exercising their environmental rights for their beneficial use, the health of the environment is sustained or increased for the benefit of future generations.[29] This principle is contained in the EMCA and the Environment and Land Court Act, under Section 3(5)(d) and Section 18(iv), respectively. The latter provision, states that one of the sustainable development principles that should guide the ELC is that of intergenerational equity.

In additional to these aspirations, Article 10 of the 2010 Constitution sets out the structural foundation in the national values and principles. These include the principles of sustainable development, integrity, good governance, transparency and accountability, the rule of law and participation of the people, which are important in the pursuit for environmental protection and management.

Article 42 of the Constitution provides explicitly that every person in Kenya has the right to an environment that is clean and healthy. This right includes the right to have the environment protected for the sake of the present and future generations by enacting legislation and taking other measures, especially those considered in Article 69,[30] and to honour obligations concerning to the environment provided for under Article 70.[31] The EMCA describes the right of the present

25 United Nations. Report of the World Commission on Environment and Development. Resolution adopted by the General Assembly 42/187 (42nd session, Agenda item 82e). New York: United Nations, 1987.

26 Edith Brown Weiss, 'In Fairness to Future Generations and Sustainable Development', *American University International Law Review 8, No. 1* [1992] 19-26.

27 Repealed.

28 Prof P Kameri-Mbote, 'Towards Greater Access to Justice in Environmental Disputes in Kenya: Opportunities for Intervention' [2005], Geneva: International Environmental Law Research Centre, Working Paper 2005-1; See also A. Mumma, 'Constitutional Issues Relating to Natural Resources' [2003], Nairobi: Constitution of Kenya Review Commission; See also, Angela Mwenda and Thomas N. Kibutu, 'Implications of the New Constitution on Environmental Management in Kenya', [2012], 8/1 *Law, Environment and Development Journal*; See also G.M. Wamukoya and F.D.P. Situma, 'Environmental Management in Kenya: A Guide to the Environmental Management and Coordination Act' [2003], 2 (Nairobi: Centre for Environmental Legal Research and Education (CREEL).

29 Supra note 2.

30 Article 42(a) of the Constitution of Kenya, 2010.

31 Article 42(b), *Ibid*.

generation to equal entitlement to a healthy and clean environment as intragenerational equity.[32] Article 42 of the Constitution has been reiterated in Section 3(1) of the EMCA.

The State's obligations with regard to the environment are presented extensively in Chapter Five (5) of the Constitution. More particularly, on environmental impact assessments, Article 69 (1) provides that the State has an obligation to establish systems of EIA, monitoring of the environment and environmental audit. This is a new and significant improvement on the situation before because the provision expressly provides for EIA. Consequently, Part VI and Part VII of the EMCA is dedicated to Integrated Environmental Impact Assessment, and environment audit and monitoring, respectively. Also, Section 6A of EMCA mandates the Cabinet Secretary to come up with guidelines for the practice of Integrated EIA and Environmental Audits. The systems envisioned in the Constitution have been established through the institutional and legal framework that will be discussed here.

The rest of Article 69 details the State's obligations with respect to the environment, including the obligation to protect biological diversity and genetic resources and to eradicate processes and activities that might endanger the environment. The Article also provides for the obligation of every citizen to cooperate with the government and any other person to conserve and protect the environment as well as use natural resources and ensure ecologically sustainable development.[33]

The enforcement of environmental rights has been improved, as Article 70 of the Constitution relaxes the rule on *locus standi* and effectively, there is no need for the petitioner to prove a specific injury or loss to them.[34] This provision is replicated in Section 3(3) of the EMCA. Article 62(2) mandates Parliament to establish the Environment and Land Court with equal status as the High Court, and with jurisdiction to determine disputes relating to the environment and land.[35] Consequently, the ELC was established under Section 4 of the Environment and Land Court Act, 2011.

Article 72 of the Constitution provides that the Parliament must enact legislation to give effect to the provisions on the environment. The Fifth Schedule of the Constitution stipulates that legislation regarding the environment in Article 72 must be enacted within four (4) years of promulgating the Constitution in 2010. Pursuant to this provision, the EMCA, which was enacted in 1999, was amended in 2015 after the promulgation of the 2010 Constitution; and various other sectoral environmental management laws have since been enacted.[36]

Under the Fourth Schedule to the Constitution, the national government is charged with the responsibility to protect natural resources and the environment to establishing a sustainable development system.[37] County governments, on the other hand, are charged with the protection of the environment by implementing specific national government policies on natural resources.[38]

32 Supra note 2.
33 Article 69(2), Constitution of Kenya, 2010.
34 Article 70(3), *Ibid*.
35 Article 162(2), *Ibid*.
36 *Inter alia*, the Land Act, 2012, and the Land Registration Act, 2012.
37 Fourth Schedule, Part I, Paragraph 22, the Constitution of Kenya, 2010; See also, Article 191(2)(c)(vi) of the Constitution of Kenya, 2010.
38 Fourth Schedule, Part II, Paragraph 10, the Constitution of Kenya, 2010.

D. Legislative and institutional framework

This section discusses various legislative and institutional frameworks governing environmental assessment in Kenya.

Legislative framework

The Environmental Management and Coordination Act

The Environmental Management and Coordination Act, 1999, came into force on February 14, 2000.[39] It is the primary legislation providing for the establishment of an appropriate institutional and legal framework for the management and protection of the environment in Kenya.[40] The law provides for the establishment of various institutions that generally govern environmental assessment, which include National Environmental Management Authority (NEMA),[41] and Environmental Complaints Committee.[42]

Part VI of the EMCA provides at length and in depth for environmental assessment in Kenya. Section 57A of the law provides that all policies, plans and programmes for implementation must be put through SEA and that any associated costs must be borne by the applicant.[43]

Section 58 of the EMCA provides that applicants of low, medium or high-risk projects[44] must undertake and submit to NEMA a comprehensive Environmental Impact Assessment (EIA) report before they can be issued with any licence or approval to proceed with the project. The EIA must be conducted and the report prepared by individual experts authorized by NEMA.[45] It is an offence for any person to knowingly submit a report that contains false or misleading information; and such a person is liable on conviction to a fine of not more than Ksh5 million or an imprisonment term of not more than three years, or both.[46]

Once NEMA receives the EIA report, it is mandated to publish it in the Gazette and in at least two (2) newspapers circulating in the proposed area of the project or issue a notice of the report to the public through radio.[47] Later, the Director-General of NEMA is required to request a government ministry, parastatal, state corporation or local authority conferred with the function of management of the environment or natural resources to give their comments within 30 days.[48] A technical advisory committee may also be set up to advise the Director-General on the EIA report.[49] For purpose of ensuring the accuracy and exhaustiveness of the EIA report, the project proposer may be requested to carry out a further evaluation.[50] Eventually, after being satisfied on the adequacy of an EIA report, NEMA may issue an EIA licence as may be appropriate and necessary to facilitate development and sound environmental management.[51]

39 Date of Commencement, the Environmental Management and Co-ordination Act.
40 *Ibid*. Object Clause
41 *Ibid*. Section 7
42 *Ibid*. Section 31,
43 *Ibid*. Section 57A and 57A(3)
44 *Ibid*. Second Schedule.
45 *Ibid*. Section 58(5)
46 *Ibid*. Section 58(10)
47 *Ibid*. Section 59(1)
48 *Ibid*. Section 60,
49 *Ibid*. Section 61
50 *Ibid*. Section 62
51 *Ibid*. Section 63

The EMCA also criminalizes various actions on the environment, more particularly relating to EIA. Section 138 of the EMCA provides that any person who fails to prepare an EIA report or fraudulently makes false statements in an EIA report commits an offence and is liable to imprisonment for a term not exceeding 24 months on conviction, or a fine of not more than Ksh2 million – with or both.

Section 64 of the EMCA provides that the Authority may at any time after issuing an EIA licence direct the licencee to submit a fresh study at its own cost where there is a substantial change in the project,[52] or where the project poses environmental threats which could not have been reasonably foreseen at the time the initial study was under taken,[53] or where it is established that the information given by the licencee was false or inaccurate or misleading.[54] Where NEMA directs that a fresh EIA study be undertaken, the EIA licence issued before may be canceled, revoked or suspended.[55]It is important to note that an EIA licence can be transferred to another person only in respect of the project for which it was issued.[56]

As will be discussed below under institutional framework, NEMA has the power to cancel, revoke or suspend any licence it issues,[57] but the licencee can appeal against the decision to the National Environment Tribunal.[58]

The Land Act, 2012

The Land Act provides for, among other things, management of land and sustainable administration of land-based resources.[59] Particularly on environmental assessment, Section 17 of the Land Act, 2012, provides that a public corporation, statutory body or a public agency must provide an EIA plan to the relevant authority (NEMA) before submitting any plan for management, development and use of a reserved public land to the National Land Commission.

The Mining Act, 2016

Section 176(2) of this law provides that a mining licence should not be granted unless the applicant has obtained an EIA licence, social heritage assessment, and the environment management plan (EMP) has been approved. This provision has been reiterated in *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 Others,*[60] where the court held that to the extent that the Commissioner of Mines was not provided with a NEMA licence, the Commissioner could not issue a valid licence for mining. The particular mining licence the Commissioner issued was declared null and void. Additionally, Section 103(c) of the Mining Act, 2016, provides that a mining licence can be issued by the Cabinet Secretary if he is satisfied that the applicant has obtained an approved social heritage assessment, EIA licence, and EMP in respect of the proposed mining operations. These provisions similarly appear in Section 106 and 109 of the Mining Act, 2016.

52 *Ibid*. Section 64(1)(a)
53 *Ibid*. Section 64(1)(b)
54 *Ibid*. Section 64(1)(c)
55 *Ibid*. Section 64(3)
56 *Ibid*. Section 65 (1).
57 *Ibid*. Section 67(1)
58 *Ibid*. Section 129
59 The Object Clause, the Land Act, 2012.
60 [2017] eKLR.

Environmental (Impact Assessment and Audit) Regulations of 2003

Regulation 4(1) of the Environmental (Impact Assessment and Audit) Regulations, 2003, provides that a proponent should not be allowed to proceed with a project that might cause environmental damage or for which an EIA is required unless the environmental impact assessment has been conducted and approved. No licence should be issued for any project unless the applicant produces a licence from NEMA to carry out an EIA study.[61] More importantly, the EIA Regulations, 2003, provide that any authority responsible for issuing a commercial, trading or development licence in Kenya should not issue it for any project that might have significant environmental harm before it satisfies itself that a strategic environmental plan with mitigation measures has been approved by NEMA. Pursuant to Regulation 42, lead agencies have the responsibility to work closely with NEMA to carry out a SEA. Additionally, regulation 42(3) commits the government and all lead agencies to incorporate principles of SEA in the development of national or regional or sector policy.

Environment Management Plans (EMP) is another imperative feature of the EIA study. Section 2 of EIA Regulations, 2003, defines EMP to mean 'all the details of project activities, impacts, mitigation measures, schedule, costs, responsibilities and commitments proposed to minimize environmental impacts of activities, including monitoring and environmental audits, during the implementation and decommissioning phases of a project'. The EIA Regulations, 2003, emphasize the development of an EMP for every project as a mechanism for assessing and monitoring compliance.[62] An EMP should indicate the cost of the measures for mitigation and the timelines for implementing them.[63] As part of monitoring compliance with environmental parameters, NEMA has the duty to carry out control audits whenever it deems it fit for any project or examine and verify self-auditing reports.[64] A control audit must confirm that the EMP of the project has been complied with or verify the sufficiency of the EMP in mitigating or eliminating any negative impacts of a project to the environment.[65] Separate from the control audit to be conducted by the Authority, a project proponent is required to carry out a self-audit study on a regular basis and prepare an environmental audit to be submitted to NEMA every year after the approval of the EIA study report.[66] The self-audit must adhere to the EMP developed during the EIA process.[67]

National Environment Management Authority SEA Guidelines (February 2011)

These guidelines largely provide for Strategic Environmental Assessments (SEA), whose basic principles are provided for in Chapter 1.2 of the Guidelines while the Benefits of SEA are outlined in Chapter 1.3. Chapter 2 details the process of SEA, the steps and stages for undertaking SEA at plan, policy and programme level while Chapter 3 establishes the context for SEA – with a discussion on the need for SEA, and preparatory tasks before initiation. Chapter 4 discusses the implementation of SEA and its scope while chapters 5 and 6 conclude with the discussion around SEA review processes, engaging stakeholders, and monitoring decisions taken on policies, plans and programmes.

61 Regulation 4(2), the Environmental (Impact Assessment and Audit) Regulations, 2003.
62 *Ibid* at section 16(d) and 18.
63 *Ibid*.
64 *Ibid* at section 33(1)
65 *Ibid* at section 33(2)
66 *Ibid* at section 34(1), (a), (b),
67 *Ibid* at section 34(1), (c)

E. Institutional framework

Environment and Land Court

Article 162(2)(b) of the Constitution vests responsibility in Parliament to establish up a court with equal status as the High Court to determine disputes that relate to the environment and land. Kenya's Parliament enacted the Environment and Land Court Act, 2011, to give effect to Article 162(2)(b).[68] Section 4 of the ELC Act establishes the ELC as a superior court of record with the same status as the High Court. The ELC has appellate and original jurisdiction to hear and determine all disputes pursuant to Article 162(2)(b) of the Constitution, and in accordance with the ELC Act or any other law applicable in Kenya relating to land and environment.[69] The ELC, when exercising its jurisdiction under Article 162(2)(b) of the Constitution, has the power to hear and determine disputes that relate to, *inter alia*, land use planning, environmental planning and protection, minerals and land administration, and management.[70]

Additionally, the ELC has the power to hear and determine applications for redress, among other things, infringement of or threat to fundamental freedom or rights that relates to a clean and healthy environment provided for under the Constitution.[71] According to the EMCA, Section 130(1), the ELC has appellate jurisdiction over any order or decision of the National Environmental Tribunal (NET), including jurisdiction to hear and determine disputes relating to issuance of EIA licence. The ELC has, in resolving various environment disputes, declared issuance of EIA licences without conducting an EIA study to be illegal, unconstitutional and in contravention of the provision of EMCA and the EIA Regulations, 2003.[72] Pursuant to Section 130(5), the decision of ELC on any appeal under that section is final.

Ministry of Environment and Forestry

The Ministry of Environment and Forestry was created through a presidential Executive Order No. 1 of 2018. Some of the responsibility for the ministry include, among other things, to come up with a National Environment Policy and Management, Protection and Conservation of Natural Environment and Pollution Control.[73] One of the commitments the ministry has is enabling legal, regulatory and policies reforms for promoting the growth and sustainability of the environment and forest resources, while at the same time, reducing the effects of climate change.[74]

The Cabinet Secretary for Environment and Forestry has functions outlined in the EMCA and include, among others, to set up objectives and national goals and determine priorities and policies for the protection and management of the environment, and to promote cooperation among public and private sector, and such other organizations that engage in protection of the environment.

68 Object Clause, the Environment and Land Court Act, 2011.
69 *Ibid* at section 13(1),
70 *Ibid* at section 13(2),
71 *Ibid.*
72 *Benson Ambuti Adega & 2 others* V *Kibos Sugar and Allied Industries Limited & 4 others; Kenya Union of Sugar Plantation and Allied Workers(Interested Party) [2019] eKLR.*
73 Ministry of Environment and Forestry, < http://www.environment.go.ke/?page_id=6250 > 10 November 2020.
74 Ministry of Environment and Forestry, <http://www.environment.go.ke/?page_id=6250 > 10 November 2020.

National Environmental Tribunal (NET)

The National Environment Tribunal (NET) is established under Section 125 of the EMCA with an appellate jurisdiction against any order or decision made by NEMA, including the decision to grant an EIA licence; Section 129 of the EMCA provides that the Tribunal has power to receive appeals from any person who has grievances against a decision of NEMA to grant or refuse a permit or licence under the EMCA or any of its regulations,[75] revocation, suspension or variation of licence[76] or decision to impose an environmental restoration order or environmental improvement order.[77] The decision may be appealed within 60 days of the decision being rendered.[78] Furthermore, any decision by NEMA under the EMCA, is subject to an appeal to the NET.[79] Section 129(3) of the EMCA provides that the Tribunal may set aside, confirm or vary the order or decision in question. NEMA can also refer to the NET for the Tribunal to inquire into a certain matter and make determination thereof.[80]

National Environment Management Authority (NEMA)

Section 7(1) of the EMCA establishes the National Environment Management Authority, while Section 9(1) of the same law outlines that the primary purpose of the Authority – supervising all matters concerning the environment and acting as the principal instrument of government for implementing all policies that relate to the environment. Section 9(2) of the framework law gives NEMA the mandate to 'monitor and assess activities, including activities being carried out by relevant lead agencies in order to ensure that the environment is not degraded by such activities, environmental management objectives are adhered to, and adequate early warning on impending environmental emergencies is given'.

As noted, Section 63 of the EMCA gives NEMA the mandate to issue EIA licences on such conditions as may be appropriate and necessary to facilitate sound environmental management and sustainable development. After issuance of an EIA licence, NEMA can cancel, revoke,[81] or suspend such licence for any time not exceeding 24 months where the licencee contravenes the terms and the conditions of issue.[82] Reasons for such revocation, suspension or cancellation must be communicated to the licencee in writing.[83] Any person who is aggrieved by the decision to suspend or cancel a licence can appeal to the NET.

NEMA is required to maintain a register of all EIA licences issued under the EMCA. The register is a public document, and may be inspected at reasonable hours by any person after payment of the requisite fee.[84]

75 *Ibid* at section 129 (1) (a)
76 *Ibid* at section 129 (1)(c)
77 *Ibid* at section 129 (1),
78 *Ibid* at section 129 (2),
79 *Ibid*
80 *Ibid* at section 126(2),
81 *Ibid* at section 67(1)(a)
82 *Ibid* at section 67(1)(b),
83 *Ibid* at section 34(1A)
84 *Ibid* at section 67(3),

Technical Advisory Committee on Environmental Impact Assessment

NEMA may set up a technical advisory committee, whose terms of reference and rules of procedure the Director-General must lay down, to advise the Authority on EIA-related reports.[85] Interpretation of provision, which uses discretionary language, implies that such a committee is *ad hoc* – established as and when the need arises.[86]

F. Challenges in implementing EIA in Kenya

Although the EMCA and other laws and regulations require the conduct of an EIA study and consequently make EIA licenses mandatory for major projects in Kenya, these studies and licenses have not met the expectations of many Kenyans in terms of their full implementation.[87] Thus, this section highlights major challenges in the effective implementation of the EIA process in Kenya. Some of these challenges will be demonstrated using available case law.

Failure to undertake EIA studies or submit reports

One of the main challenges facing the implementation of the EIA process is the failure by project proponents to conduct EIA studies or submit EIA reports. In *Benson Ambuti Adega & 2 Others v Kibos Sugar and Allied Industries Limited & 4 Others; Kenya Union of Sugar Plantation and Allied Workers (Interested Party) [2019] eKLR* the respondent, Kibos Sugar, undertook to process tonnes of sugar. They then conducted what was referred to as Environmental Project Report (EPR) and submitted it to NEMA. In the report they indicated that the project was to process '500 tonnes of sugar cane per day', which the court understood to mean that it was a small project and took it that NEMA was satisfied that the project had no significant impact on the environment or, the EPR disclosed sufficient mitigation measures. NEMA then issued the respondents with an EIA license. The petitioners alleged that the licence was issued without the respondents conducting an EIA study and submitting a report.

The ELC noticed that the respondents increased the sugar processing capacity from 500 tonnes to 1,650 tonnes per day. The court was of the opinion that when EIA licenses result in change in nature and capacity (size) of the project and location or site, then NEMA ought to only act upon receiving an EIA study report prepared in accordance with Part II of the Regulations.

The court held that failure to require the EIA study to be undertaken before the variation on the application was considered and certificate issued denied the petitioners and other residents in the area where the factories are located the opportunity to be heard, and their views to be considered, contrary to Regulation 17 on public participation. Eventually, the court granted a declaration that the EIA license issued by NEMA to the respondents without carrying out an EIA study and submitting a report was unconstitutional, illegal and in contravention of provisions of the EMCA and its regulations.

85 *Ibid* at section 61

86 Anne N. Angwenyi, 'An Overview of the Environmental Management and Coordination Act', in CO Okidi,, P Kameri-Mbote and M Akech, *Environmental Governance in Kenya: Implementing the Framework Law* (East African Educational Publishers) (2008).

87 John O. Kakonge, 'Environmental Impact Assessment: Why it fails in Kenya' <https://www.pambazuka.org/land-environment/environmental-impact-assessment-why-it-fails-kenya > 11 November 2020.

However, on appeal, the Court of Appeal overturned the ELC decision in its entirety.[88] The Court of Appeal found that the learned judge erred in all his findings; including deciding to cancel the appellants' licenses and variation because no EIA studies had been conducted and ordering a fresh EIA study. In disagreeing with the trial judge, the Court of Appeal coiled the issue for determination as whether the variation required a fresh EIA Study. The appellate judges observed correctly the scenarios when a fresh EIA study must be carried out after an EIA license has already been issued, which include where there is a substantial change or modification in the development project, or the project poses environmental threats that could not have been reasonable foreseen at the time of the initial study; or if it is established that the data or information given by the project proponent was false, inaccurate or misleading.[89] Arising from these established condition precedents, the appellate judges framed two other issues: whether there was evidence on the record to indicate that the condition precedents were fulfilled, and who decides whether these conditions have been fulfilled.

On the first issue, the court was of the view that the only evidence on record was the increased capacity of sugar production and power generation. The record did not show that any information provided by the project proponent was false, inaccurate or misleading. On the second issue, the appellate judges were of the view that the trial judge ignored the provisions of Section 64(3) of the EMCA, which provides that where NEMA directs that a fresh EIA be conducted, the Authority may cancel, revoke or suspend any licence it had previously issued. The Court of Appeal was of the opinion that NEMA – not with ELC – had the discretion decide whether or not a licence was to be cancelled, revoked or suspended.

The Court of Appeal established that NEMA had, vide one of its letters to the project proponent, approved the variations instead of cancelling or revoking the EIA licence. The Court of Appeal considered that discretion once exercised by a responsible competent organ under the EMCA, in this case NEMA, could only be appealed against at the National Environmental Tribunal and not to the ELC. The appellate judges found that the trial judge erred in substituting his own exercise of discretion and setting aside discretion already exercised by NEMA in not cancelling, revoking or suspending the appellant's EIA licences. The Court of Appeal reiterated that the trial judge did not have the jurisdiction to cancel the licence as NEMA's decision could only be challenged through an appeal to the Tribunal under Section 129 (1)(a)(b) or (c) of the EMCA.

Further, the Court of Appeal noted that in NEMA's Compliance and Status Report forwarded to the Clerk of National Assembly, it had indicated that the appellant completed and submitted a detailed compliance plan of its activities with regard to the prevention, pollution and sustainability of the ecological systems within the area, which per se fulfilled the condition precedent in Section 64(1)(b) of the EMCA. Consequently, the Court of Appeal was satisfied that there was no evidence on record to demonstrate that the condition precedent for requiring a fresh EIA report was fulfilled.

It is noteworthy that although the Court of Appeal delved into the condition precedent under Section 64(1)(b) and (c) of EMCA, the judges arguably missed to explore the issue whether the increase in the production of sugar capacity fulfilled the condition precedent under Section

88 *Kibos Distillers Limited & 4 Others v Benson Ambuti Adega & 3 Others* [2020] eKLR.
89 Section 64(1) of the Environmental Management and Coordination Act.

64(1)(a) of the EMCA, which was the main part of the judgment of the trial judge. It is arguably not sufficient for the Court of Appeal to find that all the conditions were not fulfilled without exploring all the condition precedents.

Licencees not adhering to EIA licence conditions

In the case of *Mohamed Ali Baadi and Others v Attorney General & 11 Others,*[90] the court noted that the EIA license conditions were categorical that the fishermen had to be compensated in financial terms and further that the local fishermen should be assisted to acquire modern fishing boats, which could sail further into the ocean for deep sea fishing due to the expected drastic reduction in quantities of fish in the bay after construction of the new berths at Lamu Port started. The court found that the respondents in this case failed to meet these conditions in the EIA licence. The court observed that the EIA license conditions impose obligations on the project proponents, not choices upon which they can choose if and when to comply. The court held that failure to adhere to the EIA licence conditions was a definite violation of EIA terms.[91]

Lack of or inadequate public participation in EIA process

One of the other main challenges to the implementation of EIA process is the failure to involve the public before the issuance of an EIA licence. In the case of *John Kabukuru Kibicho & Another v County Government of Nakuru & 2 Others* [2016] eKLR, the National Environmental Management Authority and the County Government of Nakuru issued an EIA and planning licence, respectively, to Merati Investment Limited to commence multiple storey developments within the Milimani residential area of Nakuru. The petitioners wrote to the authorities indicating their objection to the proposed development, contending that Milimani has always been a low-density residential area; that the sewer system in place cannot sufficiently contain the intended increase in residence; and that there would be further nuisance from noise and pollution. The petitioners claimed that despite their objections, the authorities approved the project. The court was of the view that it is a requirement that persons around the project be consulted and their views taken into account as specified in Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations, 2013. In this case, the court held that there was no indication that Regulation 17 was complied with at all. The court found that the respondents did not even suggest who was the proponent of the project, and there were no posters in strategic places in the vicinity of the project affixed to alert the public of the upcoming project during the EIA exercise. Neither was there any public advertisement in the newspaper inviting comments. Most importantly, the court found that there was no intimation of any meeting held with the surrounding community or recording of any oral or written comments by any person within the vicinity of the project.

The court was of the impression that if any EIA study was conducted, it was done clandestinely and was shrouded in secrecy, It further held that there was violation of Regulation 17.

In *Mohamed Ali Baadi,*[92] the court was of the view that the standard of ascertaining whether there is adequate public participation in environmental matters is the reasonableness standard,

90 [2018] eKLR.
91 Supra note 5 Para. 189.
92 Ibid.

which must include compliance with prescribed statutory provisions on public participation.[93] This means that if a person does not comply with the set statutory provisions, then there is no adequate public participation, and the question is not one of substantial compliance with statutory provisions but one of compliance. The court held that there was no evidence tendered before it to demonstrate that there was adequate public participation in the lines prescribed by the regulations. The respondents called a public meeting, which lasted some three-odd hours. No details were given as to whether there was any education, information, review, reaction, consultation, dialogue and interaction at the meeting. Eventually, the court found that the public were not adequately involved in the mega infrastructure project, contrary to Regulations 17, 22 and 23 of the Environmental (Impact Assessment and Audit) Regulations, 2003.

Deliberately submitting false and misleading EIA report

Section 58(5) of the EMCA provides that a person who knowingly submits a report that contains information that is false or misleading commits an offence and is liable, on conviction, to a fine of Ksh5 million or three years imprisonment – or both. Despite this provision, applicants for EIA licences submit false and misleading EIA reports. To illustrate this, in the case of *National Environment Management Authority & Another v Gerick Kenya Limited [2016] eKLR,* an application was made to Environment and Land Court seeking a restoration order stopping the defendant from continuing with the construction of a petrol station near riparian land. NEMA argued that it issued the defendant with an EIA licence in good faith, believing in the truthfulness and accuracy of the EIA project report the defendant submitted. Soon after the issue of the EIA licence, there were complaints from the Nyamira County Government and its residents regarding the commencement of construction activities on the defendant's site, resulting in NEMA inviting stakeholders for a joint inspection of the defendant's site. The County Government of Nyamira, drew the attention of NEMA to the fact that the Authority had previously declined to approve the construction of a petrol station on the site and that the High Court had upheld its decision. NEMA argued that the defendant had deliberately submitted a false and inaccurate EIA project report without disclosing material information, with the intention of misleading the Authority to issue the EIA licence, and that it thus issued environmental restoration orders under Section 108 of the EMCA. Further, NEMA prayed for demolition of the structures erected on the site. Upon full review and evaluation of all the submissions of the rival parties, the court ruled as follows at paragraph 31:

> I am satisfied the 1st Plaintiff was within its rights to issue the environmental restoration order for the stoppage of the construction works being undertaken by the defendant at the project implementation site. However, the 1st Plaintiff in the circumstances ought to have required the defendant to submit a fresh EIA study report, pursuant to the provisions of Section 64 of the EMCA to enable a re-evaluation of the project to be done. In coming to this determination, I have taken consideration of the precautionary principle which, under Section 18 of the **Environment and Land Act No. 19 of 2011,** this court is enjoined to be guided by in matters/issues of sustainable development.

93 Supra note 5 Para. 234.

The court, however, rejected NEMA's request for demolition as it considered the same to be premature since a fresh EIA study report could result in the project being approved.

G. Conclusion

Environmental impact assessments have become part of law and practice in Kenya. They are useful tools for ensuring the attainment of the environmental standards set in the Constitution and the realization of sustainable development. Indeed, Kenya arguably has the right theoretical, legal and institutional framework to fully implement EIA and SEA. From the foregoing discussion, however, it is clear that Kenya still has a long way to go to realize the full benefits of implementing EIA and SEA in practice. The challenges that impinge on the effectiveness of the assessments are, however, not insurmountable. They can be overcome through deliberate efforts and having the right attitude towards EIA and SEA.

As demonstrated in this chapter, most of the provisions in the legislation regarding environmental assessment align with the vision and provisions of the Constitution. This clearly shows that there are adequate and effective laws to govern environmental assessment in Kenya. However, it is also apparent – as shown – applicants or decision makers do not adhere to most aspects of the environmental assessment process. This creates the variance between the law in the books and the practice around environmental assessment. This variance in turn jeopardizes the ability of EIA and SEA to protect the environment and the rights of every person to a clean and healthy environment. It is important for stakeholders in environmental assessment processes not to pick and choose which part of the process they can follow and which they can circumvent. The law and the process laid down should be followed to the letter.

PART IV

SECTORAL ENVIRONMENTAL GOVERNANCE

CHAPTER 12

Access and Benefit Sharing of Genetic Resources

Peter G. Munyi

A. Introduction

The promulgation of the Constitution of Kenya, 2010, gave heightened prominence to matters concerning access to genetic resources and sharing of benefits arising from their utilization (access and benefit sharing) in various ways that were absent in the former constitutional order. Through Articles 11, 39 and 71, genetic resources are explicitly recognized as being constituents of natural resources or wider indigenous and cultural embodiments that warrant constitutional mention. In these Articles, the framers of the Constitution confer upon the State a basic obligation to protect genetic resources, either in themselves or as natural resources and, arguably, give Parliament powers to generally oversee access and benefit sharing transactions either directly or through legislation. The creation of a two-tiered system of governance, the attendant redistribution of functions between these two tiers, attempts to review and revise statutes to conform to the new constitutional order, and the recognition of international treaties ratified as part of national laws, have also contributed to the reawakened concern over access and benefit sharing. All these elements contribute, albeit variously, to the reshaping the ever-evolving contours of access and benefit sharing.

This chapter is divided into four parts. The first part is a reflection, in brief, of the status quo on access and benefit sharing before the 2010 Constitution. This reflection is a necessary basis for setting the stage for the part that follows, which examines the constitutional provisions on access and benefit sharing. The third part dwells on the statutory responses to the constitutional provisions and the challenges these responses have brought about to the access and benefit sharing regulatory order. In the final part, some conclusions are made.

It is observed that three significant events appear to shape and influence regulatory dynamics in access and benefit sharing at the national level. The first is perhaps coincidental that the Nagoya Protocol[1] was adopted about two months after the promulgation of the Constitution and came into force during the very early periods of its implementation. Kenya's ratification of the Nagoya Protocol during this period[2] clothed the instrument with the status of a 'national law', courtesy of Article 2(6) of the Constitution.[3] The second coincidence relates to discovery of oil resources, and grant of mining exploration rights to numerous parties in different parts of Kenya since the period immediately prior to promulgation of the Constitution and continuing thereafter. These discoveries and grants of exploration rights have animated public discussions on benefit sharing from the context of local content, and calls for these extractive sectors to be more transparent. Indeed, since 2015, a proposed legislation on local content has been under discussion. Public participation principles ingrained throughout the Constitution,[4] specifically

1 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (came into force on 12 October 2014).

2 Kenya signed the Nagoya Protocol on 01 February 2012 and later ratified the instrument on 07 April 2014.

3 Further discussions about how international treaties and conventions which Kenya has ratified form part of the law of Kenya are contained in Chapter 8 in this volume.

4 See Constitution of Kenya, 2010, Articles 69, 118, 196 and 201.

in the management, protection and conservation of the environment and increased awareness of rights by the public only complement the benefit sharing discussions and debates taking place in the oil and mining spheres. The final event, which is grounded in the Constitution itself, is the reinstatement of community rights and cultural ways of life,[5] and the correspondent rediscovering of these rights and ways of life that has ensued through practices, statutes, policies and judicial pronouncements. This rediscovery calls for a recalibration of 'entitlements' to rights over natural resources generally, a process which presents challenges. These three events are a recurring theme throughout this chapter.

B. Status quo before the 2010 Constitution

Considerations for a regime on access and benefit sharing in Kenya have been in place since the enactment of the Environmental Management and Coordination Act (EMCA) in 1999 as the primary biodiversity regulatory instrument. Section 53 of the EMCA provided the anchorage through which access and benefit sharing activities would take place. Whereas the Minister in charge (later renamed Cabinet Secretary) was given powers to generally set measures for access and benefit sharing, a number of principles were prescribed in the statute, which the rules must meet. These principles included sharing of benefits derived from genetic resources accessed; taking of biosafety measures where biotechnology is involved; taking of measures to regulate access and transfer of biotechnology; taking of measures to regulate import and export of genetic resources; recognition, protection and enhancement of indigenous knowledge; and, sustainable management and utilization of genetic resources.[6]

While access and benefit sharing regulations were not in place until 2006,[7] the enactment of the EMCA in 1999 institutionally empowered the National Environment Management Authority (NEMA) to permit access and benefit sharing activities, with all others referred to as relevant lead agencies playing a subordinate role. The access and benefit sharing regulations promulgated in 2006 confirm this position. Rule 9 of these regulations is explicit: any person who intends to access genetic resources in Kenya shall apply to NEMA for an access permit. The subsidiarity roles played by other 'relevant lead agencies' are confined to, where applicable, grating Prior Informed Consent (PIC), and a research clearance certificate (by the National Council for Science and Technology, later renamed by statute as the National Council for Science, Technology and Innovation NACOSTI). Thus, notwithstanding acceptance that genetic resources occur in different spheres (animal, plant, marine, forestry, microbial, among others), may have different uses and lie either in in-situ or ex-situ conditions in areas falling under the jurisdiction of different authorities (protected areas, forestry, local authorities, gene banks, among others), a centralized permitting system was put in place with NEMA playing the apex role. Other key features of the regulatory system designed by the access and benefit sharing regulations included: (a) a requirement for access to be preconditioned upon PIC of 'interested parties and relevant lead agencies' (b) issuance of the permit on conditions (c) requirement for there to be benefit sharing mechanisms in access and benefit sharing agreements and (d) exclusion of certain activities from being within the scope of the regulations themselves.

5 See Constitution of Kenya, 2010, Articles 11, 19, 27, 32, 44, 60, 63, 89 and 188.

6 Environmental Management and Coordination Act, 1999, S 53(2).

7 Legal Notice No. 160 of 2006. The Environmental Management and Coordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2006.

With respect to PIC, the access and benefit sharing regulations leave the content of what may constitute PIC to the parties involved, notwithstanding that Part III of the First Schedule to the regulations hints that the consent should be in writing and the document recording the consent deposited with NEMA. While NEMA, as the permitting authority, has powers to receive and scrutinize applications for grants of permits, it is not clear whether such scrutiny could extend to examination of the detail of the document on which consent is granted, i.e., the access and benefit sharing agreement, including the terms thereof.

As regards permitting conditions, Rule 15 of the regulations is extensive. It requires, among others, that duplicates and holotypes should be deposited with the relevant lead agencies; that regular reports should be made to the providers of the genetic resources and NEMA; and, restrictions on third party transfers of the material are provided for. Non-adherence to the conditions may lead to the suspension or revocation of the access permit, and thereby frustration of the access and benefit sharing agreement.

Benefit sharing mechanisms in an access and benefit sharing agreements may be monetary or non-monetary in nature. The list of monetary and non-monetary benefits contained in Rule 20 of the access and benefit-sharing regulations is generally derived from the Bonn Guidelines,[8] which were later adopted as an annex to the Nagoya Protocol. As such, monetary benefits that may be found in an access and benefit agreement may include, among others, access fees; up-front payments; milestone payments; licence fees; salaries on preferred terms; and research funding. With respect to non-monetary benefits, these may include, *inter alia*, sharing of research development results; collaboration and cooperation in research and development; knowledge transfer; capacity building; and, joint ownership of intellectual property rights. It is worthwhile to note that it is left to the parties to mutually agree on the monetary or non-monetary benefits that best fit the access situation at hand, and the law is not prescriptive in this regard. Suffice to say the regulatory expectation is that an access and benefit sharing agreement must contain either, or a mix of monetary and non-monetary benefits.

Finally, access and benefit sharing activities whose scope fall outside the regulations are provided for. These activities are (i) exchange of genetic resources and their derivative components by members of any local Kenya community between themselves and for their own consumption (ii) access to genetic resources derived from plant breeders in accordance with the Seeds and Plant Varieties Act (iii) human genetic resources, and (iv) approved research activities intended for educational purposes within recognized Kenyan academic and research institutions, which are governed by relevant intellectual property laws.[9] These exclusions warrant some comment. The exclusion relating to exchange of genetic resources between communities is obviously based upon the rationale that access and benefit sharing regimes are not intended to interfere with traditional ways of life of communities. However, limiting this exclusion to consumptive uses of genetic resources only is surprising given that local communities are traditionally known to employ genetic resources for other uses (medicinal for instance) that are not necessarily

8 Adopted by the Conference of the Parties to the Convention on Biological Diversity in 2002, The Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization constituted voluntary measures that countries were free to adopt during the interim period as a Protocol to the Convention on Biological Diversity was being negotiated. The Protocol that emerged for adoption in 2010 following eight years of negotiations is the Nagoya Protocol.

9 Environmental Management and Coordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2006, rule 3.

consumptive. As relates to the rationale for exclusion of genetic resources that are the subject of the Seeds and Plant Varieties Act (plant genetic resources for food and agriculture, or PGRFA) this remains unclear for two reasons. First, the Seeds and Plant Varieties Act is a statute that deals with matters concerning seed quality, certification and plant breeders' rights, and does not provide for a system of access and benefit sharing of PGRFA on its own. Secondly, while at the international level a multilateral system for exchange of PGRFA exists under the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) to which Kenya is a party, this system is limited to the PGRFA of 64 crops contained in Annex I to this Convention that are under the management and control of the contracting parties and in the public domain. In this regard, Kenya has included into the Multilateral System a total of 30 genera comprising of 12,873 accessions of the Annex I crops and, therefore, germplasm held in the collections of these genera is available to users under the conditions set out under the Standard Material Transfer Agreement of the ITPGRFA.[10] However, Kenya's ex-situ PGRFA collections are in excess of 893 genera and 2,000 species from a repository of at least 50,000 plant accessions,[11] implying that a vast majority of PGRFA potentially fall within the area of unregulated access. With respect to exclusion of approved research activities intended for educational purposes within recognized Kenyan academic and research institutions, this was hinged upon the fact that research activities in Kenyan academic and research institutions is regulated separately under the Science, Technology and Innovation Act, Act No. 28 of 2013 (previously under the Science and Technology Act, now repealed), and as such this law is expected to sufficiently capture genetic resources related research activities and thus stem biopiracy. However, the addition in the exclusion about academic and research institutions being governed by relevant intellectual property laws is superfluous as these laws do not govern either academic or research institutions, but rather only provide an avenue through which innovations arising from activities in these institutions may be protected.

In sum, the Constitution inherited a centrally structured system of access and benefit sharing anchored under the EMCA and enabling regulations, with other institutions playing a peripheral role and supporting NEMA in undertaking its roles. At the same time, genetic resources were not mentioned in the previous constitution. This is not surprising given the fact that there was no specific reference to biodiversity in that constitution, and natural resources were only considered in the context of assertion of the right to property.[12]

C. The constitutional situation of access and benefit sharing of genetic resources

The promulgation of the Constitution in 2010 ushered in a new era in genetic resources management. That genetic resources are an inseparable constituent of natural resources[13] and also form part of cultural aspects of lives of communities is now not in doubt. Access and benefit sharing of genetic resources is, therefore, an integral part of natural resources use and management.

10 Notification reference KARI/6/044 dated 7 March 2011 from Kenya Agricultural Research Institute to the International Treaty on Plant Genetic Resources for Food and Agriculture.

11 Kenya Agricultural and Livestock Research Organization, Genetic Resources Research Institute (GeRRI) Policy Brief 3, August 2015.

12 See Constitution of Kenya (now repealed), s 74.

13 See Constitution of Kenya 2010, Article 260.

Separate from the State being required to ensure sustainable exploitation, utilisation, management and conservation of natural resources, it must also protect genetic resources.[14] An element that was previously lacking in the national architecture for genetic resources management related to the linkage between genetic resources themselves and associated traditional knowledge. However, this relationship is well captured in the Constitution in at least two ways: first under Article 69(1)(c), it is recognized that indigenous (otherwise referred to traditional) knowledge in biodiversity and the genetic resources of the communities exists, and thus the State is obligated to ensure its protection and enhancement. Secondly, under Article 11, the recognition of the role of indigenous technologies in Kenya's development is fortified by an obligation on the State to enact measures to ensure communities receive compensation for the use of their culture and cultural heritage and, protect indigenous seeds and plant varieties.

As noted in Article 11 and 69, indigenous knowledge and, indigenous seeds and plant varieties, biodiversity and genetic resources, are seldom owned by individuals but rather by communities. This realization is very complementary to the corresponding recognition of community rights, including rights to community land,[15] which the Constitution has enabled. Genetic resources are intrinsically linked to communities, who not only are essential in their conservation over time but also host knowledge of their uses. To this end, enabling constitutional construction of community rights both in tangible property (land) and intangible property (indigenous knowledge) strengthens the manner in which these rights are protected, asserted and enjoyed. The Constitution goes beyond mere recognition of communities as entities capable of enjoying rights, and owning property by further making special provision for marginalised communities who are defined broadly to include pastoralists and those communities that continue to maintain their traditional lifestyles.[16] In the context of genetic resources and related indigenous knowledge there is an implicit acknowledgement that traditional lifestyles, cultural identities, and pastoral practices among others, are important in their conservation.

Through Article 2(6), the Constitution also aids in domestication of international norms and principles relating to protection, governance, sharing and management of some genetic resources that have been codified through international law. The genesis of codification of access and benefit sharing norms and principles can be traced to the Convention on Biological Biodiversity. Article 15 of the Convention anchors two international instruments, which Kenya has ratified, (besides the Convention itself) in the past decade and are relevant: The International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) and the Nagoya Protocol. While these instruments are primarily concerned with inter-state relations on access and benefit sharing, operationalization of some of the principles contained in them, such as PIC and mutually agreed terms (MAT) are only possible if provided for at the national level through legislation, regulatory or policy measures. However, it should be noted that some

14 See Constitution of Kenya 2010, Article 69.

15 Constitution of Kenya 2010, Article 63.

16 In Article 260, a marginalised community is defined to mean (a) a community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole; (b) a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole; (c) an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or (d) pastoral persons and communities, whether they are— (i) nomadic; or (ii) a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole.

of the provisions of the ITPGRFA, such as the standard material transfer agreement under the multilateral system on access to PGRFA are designed such that national measures do not necessarily have to be in place to give them effect.

A final feature of the Constitution that is intended to affect access and benefit sharing of genetic resources is devolution. As a creature of the Constitution, devolution is intended to among others, ensure equitable sharing of national and local resources throughout Kenya; decentralize State organs and their services from Nairobi; and, recognize the rights of communities to manage their own affairs and further their development,[17] particularly the distribution of functions between national and county governments. The Fourth Schedule to the Constitution does not distinguish the functions of the national government and county governments as far as access and benefit sharing is concerned. While it is generally acknowledged that the functions of the national government are mainly policy setting and this would follow as far as agricultural policy (including, therefore, PGRFA policy setting) is concerned, the same is not the case when access and benefit sharing is considered from the perspective of protection of the environment and natural resources, which genetic resources are part of. The Fourth Schedule, without any distinction, simply provides that protection of the environment and natural resources with a view to establishing a durable and sustainable system of development is a function of the national government. A distinctive line can hardly be drawn, therefore, in the delineation of roles between those of the national government and county governments, insofar as access and benefit sharing is concerned. The blurry construction of roles between these two tiers of government in access and benefit sharing has been accentuated by the current institutional structures where NEMA still retains the 'apex' permitting role while county governments, notwithstanding the high constitutional profiles they have, retain the subsidiary role of 'lead agencies' under the EMCA and the emergence of a third set of devolution institutions (Council of Governors and the Intergovernmental Technical Relations Committee), which also stake a claim in these affairs. Arguably, all these are intended to safeguard, and are for the benefit of, the public interest.

Statutory responses to the constitutional order

Article 261 of the 2010 Constitution is fairly instructive on how legislation generally ought to have been brought into conformity with the new constitutional order. On the whole, and as detailed by the Fifth Schedule to the Constitution, it was expected that within five years from promulgation, all legislation without exception would conform to the laid out constitutional principles.

The new constitutional order has presented opportunities for statutory reviews to be undertaken across several sectors. In some sectors, such as agriculture, statutory review commenced prior to the eventual constitutional promulgation[18] and as such the alignments occurred as a matter of course. However, for other sectors, such as protected areas and forestry, statutory revisions only commenced after the promulgation of the Constitution. The prominence given to protection of indigenous knowledge at the constitutional level and the reawakening of community rights and restatement of community land rights has also presented an opportunity for the enactment of statutes that have a bearing on genetic resources' governance.

17 See Constitution of Kenya 2010, Article 174.

18 Reforms in the agricultural sector began in 2003 and culminated in the enactment of three statutes in 2013: the Crops Act; the Kenya Agricultural and Livestock Research Act; and, the Agriculture and Food Authority Act.

Obviously, the provisions of Article 261 and the Fifth Schedule of the Constitution, encapsulate matters concerning access and benefit sharing. The resultant landscape in this area appears to contain several regulatory niches that continue to be curved out of the 'regulatory whole' that existed prior to the promulgation of the Constitution. This has occurred against the background of the EMCA having been reviewed to conform with Article 261 but with the outcome of the review having not disturbed the provisions of this statute that relate to access and benefit sharing of genetic resources in any way. In this regard, it is notable that the regulations enacted in 2006 to give better effect to the statutory provisions on access and benefits sharing under the EMCA[19] have remained unchanged. As such, while NEMA has generally remained the 'apex' institution issuing access to genetic resources permits, regulatory carve-outs have emerged in at least three spheres: (a) in regulating access to genetic resources in protected areas, (b) in dealings concerning access to PGRFA, and (c) in granting access to marine or aquatic resources. Another matter that has emerged is the institutional architecture, specifically the role of counties in granting PIC and whether institutions established to coordinate relationships between the national and county governments particularly the Inter-Governmental Relations Technical Committee (IGRTC), have a role in the permitting process. Overall, legal uncertainty still remains in a number of key areas concerning genetic resources governance.

Traditional knowledge and traditional cultural expressions of communities often do not exist alone but largely over genetic resources and biodiversity generally. Indeed, Posey[20] argues that effective protection of traditional knowledge can only be achieved within the framework of recognition and protection of a 'basket of rights', including the right to land, traditional territories, sacred sites, biological and other resources as well as indigenous peoples' rights to freely carry on their own religious practices, organize themselves according to their own criteria and to apply their own customary laws. This is a matter that is acknowledged internationally in the Nagoya Protocol,[21] and locally by statute: the Protection of Traditional Knowledge and Cultural Expressions Act, 2016 (the TK Act).[22] Enacted to give better meaning to Articles 11, 40 and 69(1) of the 2010 Constitution, this statute has a direct bearing on how genetic resources governance occurs, particularly in relation to traditional knowledge associated with it, recognizing that protection of traditional knowledge is also dependent upon realization of other rights such as those to land.[23] To this extent, the statute draws a distinction between access to traditional knowledge associated with genetic resources, and access to the genetic resources. Section 24 of the TK Act provides that access to the genetic resource is subject to a legislative procedure separate and distinct from that which access to traditional knowledge associated with genetic resources is subject to. Thus, where an applicant wishes to access a genetic resource and also its associated traditional knowledge, two separate procedures apply. Yet, the only distinction that the Nagoya Protocol appears to draw between access to genetic resources on the one hand and associated traditional knowledge on the other is respect to its emphasis that since associated traditional knowledge is held by indigenous and local communities, their PIC must

19 *Ibid note 7*.

20 D Posey, *Traditional Resource Rights: International Instruments for Protection and Compensation for Indigenous Peoples and Local Communities*, Gland, IUCN (1996).

21 One of the preambular paragraphs in the Nagoya Protocol, states, *'Noting the interrelationship between genetic resources and traditional knowledge, their inseparable nature for indigenous and local communities…'*

22 Traditional knowledge is defined in Section 2 of the Protection of Traditional Knowledge and Cultural Expressions Act, 2016 to include inter alia, knowledge associated with genetic resources or other components of biological diversity.

23 *Ibid note 20*.

be obtained,[24] and further encouraging parties to support development of community protocols, minimum mutually agreed terms and model contractual clauses for benefit sharing.[25] This is in recognition of the fact that as societies, indigenous and local communities are vulnerable.

Another creature of the Constitution that has been followed through in the statutes is recognition of communities as entities capable of holding and transmitting property, including land, which according to Odote and Kameri-Mbote,[26] is a correction of a historical fallacy that has existed in Kenya since the start of the colonial period. This is important from the perspective that inasmuch as the law does not give clarity on the question of ownership of genetic resources, it is evident that genetic resources occur or are found on land whose ownership is attributable to an individual or a group. Article 63 of the Constitution then forms the broader basis upon which communities have *locus standi* to grant PIC on access to genetic resources or traditional knowledge associated with genetic resources found on land, which they own. While under the previous constitutional regime community land carried a narrow legal construction of trust land or land registered under group representatives, under the current regime the term is much broader. In the genetic resources sphere, some complementarity is achieved in harmonisation of the definitions of a 'community' in the TK Act and in the Community Land Act, 2016.[27] This common understanding of what constitutes a community provides legal clarity, at least in identifying one of the parties who should give PIC in the access process. The reinstatement of customary land rights including giving these rights equal status as freehold and leasehold rights under Section 5 of the Community Land Act, 2016 is also critical in establishing *locus standi* of communities in claims to genetic resources in their jurisdiction. Communities have for many generations developed systems and practices for sharing and utilizing resources among themselves or with third parties, and the restatement of these practices as rights is an important acknowledgement that these systems and practices remain invaluable.

Access to genetic resources' regulatory carve-outs since the promulgation of the Constitution have occurred in protected areas, in PGRFA and in marine or aquatic resources, notwithstanding the provisions of the EMCA and the regulations made under it. In the sphere of protected areas, the tone of Section 22 of the Wildlife Conservation and Management Act, 2013, is instructive: for one to engage in bio-prospecting of wildlife resources, a permit must be obtained from the Cabinet Secretary in charge, on the advice of the Kenya Wildlife Service (KWS). The Wildlife Conservation and Management Act uses the term 'bio-prospecting'[28] to essentially refer to access to genetic resources for their utilization. Further, while wildlife resources are not specifically defined under the WCMA, the term 'wildlife' is defined rather broadly to include everything under the sun in Kenya.[29] In laying out the permitting procedures for bio-prospecting activities, Section 22 emphasizes the central role that the KWS plays both in granting access and in sharing benefits arising in the process. For example, under Section 22(6), it is only the KWS that

24 Nagoya Protocol, Article 7.

25 Nagoya Protocol, Article 12.

26 Collins Odote and Patricia Kameri-Mbote (eds); *Breaking the Mould: Lessons for Implementing Community Land Rights in Kenya* (Strathmore University Press, Nairobi) (2016).

27 In both statutes a community is defined to mean a homogeneous and consciously distinct group of the people who share any of the following attributes- (a)common ancestry; (b) similar culture or unique mode of livelihood or language; (c) geographical space; (d) ecological space; or (e) community of interest.

28 'bio-prospecting' means the exploration of biodiversity for commercially valuable genetic and biochemical resources.

29 'Wildlife' means any wild and indigenous animal, plant or microorganism or parts thereof within its constituent habitat or ecosystem on land or in water, as well as species that have been introduced into or established in Kenya.

may be a joint partner on behalf of the people of Kenya, in bioprospecting activities involving wildlife resources. The point at which the permitting process under the WCMA interacts with the provisions of the EMCA is not explicitly stated. Sections 26 and 27 of the WCMA, which import the EMCA in the conservation and management of wildlife, offer little direction in this regard since it would appear that the only requirement that is necessary to be complied with in granting bio-prospecting permits is the precondition for conducting environmental impact assessments prior to making an application.

The case for the carve-out of PGRFA from the main access regime under the EMCA only found a statutory anchor in 2013 following the enactment of the Kenya Agricultural and Livestock Research Act (KALR Act). This statute established the Kenya Agricultural and Livestock Research Organisation (KALRO) whose functions, *inter alia,* include promotion, streamlining and regulation of research in crops, livestock and genetic resources.[30] KALRO remains primarily a research organisation. However, that KALRO also regulates access to PGRFA is perhaps rationalized by the fact that traditionally, the National Gene Bank housing ex-situ collections of PGRFA has been a department of KALRO. Upon enactment of the KALR Act, that specific department with the National Gene Bank was elevated to a semi-autonomous unit, known as the Genetic Resources Research Institute (GeRRI). Furthermore, prior to the enactment of the KALR Act, KARI was the national focal point for the ITPGRFA, to which Kenya is a party. Thus, Kenya through KARI, has included into the Multilateral System a total of 30 genera comprising of 12,873 accessions of the Annex I crops and, therefore, germplasm held in the collections of these genera is available to users under the conditions set out under the Standard Material Transfer Agreement of the ITPGRFA.[31] This notwithstanding, it remains evident that most of PGRFA continues to exist in in-situ conditions and in the hands of farmers and as such GeRRI cannot stake a jurisdictional claim for all PGRFA. Moreover, the procedures of exchange of material in the Multilateral Systems do not extend to material not in the system. Arguably, therefore, access to genetic resources procedures under the EMCA apply for PGRFA not in the Multilateral System. In any event, as stated earlier, the idea that GeRRI is now the custodian of ex-situ collections of PGRFA is perhaps a result of a historical accident and convenience given that as the leading agricultural research institute the Kenya Agricultural Research Institute (now KALRO), it was necessary to make ex-situ PGRFA material available to researchers, and hence the initial constitution of GeRRI as a department within the then KARI. Consideration for enactment of regulations to specifically deal with PGRFA has been made. While these regulations are yet to come into force, the only instrument available to facilitate access to PGRFA remains the Standard Material Transfer Agreement of the ITPGRFA. As Article 8 (c) of the Nagoya Protocol requires parties to consider the importance of genetic resources for food and agriculture and their special role for food security, it is evident that arguments for regulating access to all PGRFA (including that in in-situ conditions) outside the main access regime under the EMCA will continue to be made. PGRFA are strategic goods for crop breeding through farmer selection, conventional plant breeding and modern biotechnological techniques.[32] Already, evidence abounds that all regions

30 Kenya Agricultural and Livestock Research Act, 2013, s 5.

31 Ibid note 10.

32 Marleni Ramirez, Rodomiro Ortiz, Suketoshi Taba, Leocadio Sebastian, Eduardo Peralta, David E. Williams, Andreas W. Ebert and Anne Vezina, 'Demonstrating Interdependence on Plant Genetic Resources for Food and Agriculture', in Michael Halewood, Isabel Lopez Noriega and Selim Louafi, *Crop Genetic Resources as A Global Commons* (Bioversity International. Rome, Italy) (2013) 39-61.

of the world are dependent on PGRFA from other regions to a high degree and with world food security, depending to a large extent on the continued improvement of plant crops.[33]

A separate access and benefit-sharing regime for fisheries and aquatic resources came into being in 2016 following the enactment of the Fisheries Management and Development Act, 2016 (FMDA). Section 4 of this statute is emphatic that it applies to, among others, utilization of fish and genetic material derived from fish, with fish being a term employed to mean any marine or aquatic animal or plant, living or not and processed or not, and any of their parts and includes any shell, coral, reptile and marine mammal.[34] Whereas the FMDA deals with numerous aspects concerning fishing and fisheries, it is scanty in detail on regulating access to fisheries genetic resources. However, it is worth noting that export of live fish is strictly regulated regardless of the purpose for which export occurs, so is introduction and release of fish into Kenyan waters except for indigenous wild fish caught in Kenya.[35] Reference is made to the EMCA in the Fisheries Management and Development Act with respect to several activities that have an environmental bearing, such as introduction of fish and dealing with aquatic waste. However, as regards access to fisheries genetic resources, no reference is made to the EMCA. Unlike Wildlife Management and Conservation Act, which contains a boiler-plate provision generally on-boarding the EMCA, no similar provision exists in the Fisheries Management and Development Act. As such, to decipher the extent to which the Fisheries Management and Development Act interacts with the EMCA on access to genetic resources matters is not without hardship.

Devolution, and the interaction between the national and county governments remains conflictual even where statute has been in place to parcel out roles and responsibilities for each government. Expectedly, some statutory interventions on devolution impact on the access and benefit-sharing regime that is presently in place. Regulating access to genetic resources between the national and county governments is a blurry affair, not only for revenue sharing reasons but also identity, and the clamour for counties to be seen as champions of the rights of their constituents. It is obvious, for example, that where a county is the custodian of public or community land,[36] then in that event PIC must be obtained from the county in question. However, there is no elaboration on how in that event, the consent would be sought from the county government and the relevant county government organ that has *locus standi* to give the consent required. At an institutional level, matters concerning access to genetic resources have become a preoccupation of the Intergovernmental Relations Technical Committee (IGTRC) established under the Intergovernmental Relations Act, 2012, for purposes of, among others, providing a framework for cooperation and collaboration between the national and county governments. Notwithstanding that neither the IGTRC nor its organs such as the Summit and the Council of Governors are directly seized of access to genetic resources issues, the potential genetic resources (as constituents of natural resources) hold in contributing towards poverty alleviation and building capacity of local communities have brought these issues within their

33 Gerald Moore and Witold Tymowski; *Explanatory Guide to the International treaty on Plant Genetic Resources for Food and Agriculture* (IUCN, Gland, Switzerland and Cambridge, UK, xii+212 pp) (2005). Also, AP Kameri-Mbote, P Cullet, 'Agro-biodiversity and International Law - A Conceptual Framework' [1999], *Journal of Environmental Law* Volume 11 Issue 2, at 257–279, <https://doi.org/10.1093/jel/11.2.257 > 8 November 2020.

34 Fisheries Management and Development Act 2016, s 2.

35 Fisheries Management and Development Act 2016, s 66.

36 For example, under Section 6 of the Community Land Act, 2016, a county government is entrusted to hold unregistered community land in trust for the community for which it is held.

sights. Related also are discussions concerning petroleum revenue and minerals royalties' sharing that have been occuring in various counties where exploration of extractives is taking place. That discussion is not only informative to communities but also reshaping traditional perceptions on benefit sharing from biodiversity and natural resources generally.

It is manifest that the statutory response to the new constitutional order on access and benefit sharing appears to create a state of legal uncertainty with respect to the access regime established under the EMCA and the extent to which it applied for genetic resources in protected areas, PGRFA and fisheries and aquatic genetic resources. While the impact of this legislative design to access to genetic resources in Kenya remains unknown, suffice it to say that legal certainty is identified in the Nagoya Protocol as a core tenet of any access and benefit-sharing regime.[37] However, the fact that communities are now recognized as legal entities capable of owning property including land, and granting PIC in access to genetic resources and associated traditional knowledge, is certainly an advancement.

D. Conclusion

The Constitution has certainly brought about opportunities to heighten prominence of access and benefit sharing, coupled with, among others, affirmation of the status of communities and community rights, including their rights to land. The Constitution's call for protection of genetic resources and indigenous knowledge informed and triggered statutory interventions in these matters. However, the resulting intervention appears to depart from the legislative construction present prior to the Constitution, whereby there was a unified system of access and benefit sharing. Now, sectoral approaches to access and benefit sharing seem to be taking root without repealing the regime that existed before the promulgation of the Constitution. This state of affairs is creating legal uncertainty in the access and benefit-sharing arena, especially when the blurry nature of the role of counties in these affairs is taken into account. This presents a backdrop for a discussion to take place on whether a unified statute on access and benefit-sharing needs to be considered, taking into account all sectors and actors involved.

37 Thomas Greiber, Sonia Pena Moreno, Mattias Ahren, Jimena Nieto Carrasco, Evanson Chege Kamau, Jorge Cabrera Medaglia, Maria Julia Oliva, Frederic Perron-Welch in cooperation with Natasha Ali and China Williams; *An Explanatory Guide to the Nagoya Protocol on Access and Benefit-Sharing* (IUCN, Gland, Switzerland. Xviii+372 pp.) (2012).

CHAPTER 13

Governing Modern Biotechnology in Kenya: Law, Policy and Politics

Patricia Kameri-Mbote

A. Introduction

Biosafety regulation has been discussed extensively at various international, regional and national level forums.[12] The discussion revolves around the potential risks of genetically modified organisms to human health and the environment.[3] The competing socio-economic, environmental, ethical and political interests that have polarized the global community into two opposing camps with proponents and opponents of genetically modified organisms (GMO) with complicate this debate. Above the din, discussions have centered on the development of institutions and appropriate legal frameworks to achieve a balance between potential risks and benefits.[4] The concern is to maximize the benefits while minimizing the risks. Several institutional and legal frameworks have been developed at the international, regional and national levels to this end.

The discourse on biotechnology and biosafety in Kenya has been ongoing since the 1990s when Kenya began work on GMOs. Kenya's Biosafety Act was passed in 2009 with the aim of regulating research activities in GMOs by facilitating responsible research into, and minimizing the risks that may be posed by GMOs; ensuring an adequate level of protection for the safe transfer, handling and use of GMOs that may have an adverse effect on human health and the environment; and establishing a transparent, science-based and predictable process for reviewing and making decisions on the transfer, handling and use of GMOs and related activities.[5]

It establishes a National Biosafety Authority[6] to supervise and control the transfer, handling and use of genetically modified organisms, as well as the safety of human and animal health. The main impetus is to ensure the safety of human and animal health and provide protection of the environment.[7]

The Biosafety Act was passed before the 2010 Constitution was promulgated. Global application of GMOs has increased since then. While Kenya's research on GMOs has increased in terms of the crops covered and the stages along the innovation path, the country's policy on GMOs demonstrates ambivalence to the technology. Since the law was enacted, there have been contradicting policy positions ranging from acceptance of the technology to a moratorium on GMOs for health reasons. Farmers have also been divided in their views of the technology, with

1 J Komen, 'The Emerging International Regulatory Framework for Biotechnology' (2012) *GM Crops & Food,* 3:1, 78-84, DOI:
2 4161/gmcr.19363.
3 D Prakash, S Verma, R Bhatia and BN Tiwary, 'Risks and Precautions of Genetically Modified Organisms' *ISRN Ecology*, vol. 2011, Article ID 369573, 13 pages, (2011) https://doi.org/10.5402/2011/369573.
4 J Mugwanga, 'Alone or Together? Can Cross-national Convergence of Biosafety Systems Contribute to Food Security in SSA?' 22 *Journal of International Development* (2010):352-366 at 353.
5 Biosafety Act, (2009) Section 4.
6 Biosafety Act, (2009) Section 5.
7 Biosafety Act, (2009) Section 7.

a group with Kenya Small Scale Farmers Forum – going to court to stop intended lifting of the ban on GMOs arguing that the public is not well informed about the technology.[8] At the heart of the contestations for and against GMOs is the concern for environmental sustainability and human and animal health. The Biosafety Act is modeled on international agreements[9] and takes on board the principle of precaution that requires risk assessment and management. GMO research brings science and the people together, with law and policy mediating. Participation and sharing of information are critical issues in the regulatory framework.[10]

This chapter looks at the governance of modern biotechnology (mainly GMO technology) within the context of the 2010 Constitution. It argues that the Biosafety Act and the 2010 Constitution have many points of interface, which if integrated will improve the regulatory framework. We assess the Biosafety Act, and the regulations and guidelines currently guiding GMO work to gauge the extent to which they adhere to the Constitution. Considering that agriculture is a devolved function under the Fourth Schedule of the Constitution, and that farming is both a source of national income and people's livelihood, we will interrogate the extent to which critical actors such as county governments and farmers are involved along the continuum in GMO decision-making. The involvement of these actors in decisions on what GMO crops are developed, knowledge and awareness of the technology are also critical issues deserving attention.

This chapter is divided into four parts. Part A is the introduction, while Part B discusses the relevant international, regional and sub-regional instruments. Part C addresses the national regulatory framework while Part D discusses the status of genetically modified organisms research in Kenya. Part E is the conclusion.

B. International and regional laws and policies on GMOs

International law

The Convention on Biological Diversity[11] (CBD) was the first instrument that addressed GMOs. It remains the core treaty addressing GMOs. Protocols to the CBD with the Cartagena Protocol on Biosafety[12] and the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety[13] (the Supplementary Protocol) subsequently elaborated the provisions of the CBD. Some World Trade Organization Agreements[14] (the WTO Agreements) with Agreement on Sanitary and Phytosanitary Standards[15] (SPS Agreement), the Agreement on Technical Barriers to Trade[16] (TBT Agreement) and the Agreement on Trade-Related Aspects of Intellectual Property Rights[17] (TRIPS) with are also relevant for GMO regulation. We will now discuss these.

8 *Kenya Small Scale Farmers Forum* v *Cabinet Secretary Ministry of Education, Science and Technology & 5 others* [2015] eKLR.
9 Convention of Biological Diversity, (1992).
10 Constitution of Kenya, (2010) Article 10.
11 Convention on Biological Diversity, (1992).
12 Cartagena Protocol on Biosafety to the Convention on Biological Diversity, (2000).
13 Nagoya - Kuala Lumpur Supplementary Protocol on Liability and Redress, (2010).
14 World Trade Organization Agreements, (1995).
15 Agreement on Sanitary and Phytosanitary Standards, (1995).
16 Agreement on Technical Barriers to Trade, (1995).
17 Agreement on Trade-Related Aspects of Intellectual Property Rights, (1995).

Convention on Biological Diversity[18]

The Convention is the main international instrument addressing biodiversity issues.[19] It was among the key outcomes[20] of the United Nations Conference on Environment and Development held in 1992 in Rio de Janeiro. A growing concern for the conservation and sustainable use of biodiversity led to the negotiation[21] and finalization of the Convention. The Convention was opened for signature at the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro[22] and entered into force on December 29, 1993. Currently, 196 countries are parties to the Convention.[23]

The Convention's tripartite objectives are spelt out in its Article 1 as: to provide a comprehensive and holistic approach to the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.[23] The Convention recognizes the importance of biotechnology under Article 8(g), 16 and 19. Article 8(g) deals with measures that State parties should take at the national level.[24] It seeks to ensure the establishment of an appropriate regulatory framework to control or manage the risks associated with the use of living modified organisms resulting from biotechnology, which are likely to have adverse effects on environment and human health. Article 19(1) & (2) reflects the same provision.[25]

Article 16 of the Convention, for its part, provides, among other things, for the access to and transfer of technologies, including biotechnology that are relevant to the attainment of the objectives of the Convention.[26] Article 19(3) introduces the concept of Advance Informed Agreement (AIA) in biotechnology. This is a core part of biosafety regulation as will be discussed subsequently.[27] Indeed, Article 19(3) sets the stage for the development of an internationally binding instrument to address the issue of biosafety, the Cartagena Protocol.[28] Article 28 specifically provides for general power for parties to cooperate in the formulation and adoption of protocols to the Convention.[29]

The Convention also recognises the need to ensure equitable allocation of ownership rights and intellectual property rights to biotechnology by explicitly spelling out the rights of State parties to their natural resources and the rights of innovators to intellectual property rights for products of biotechnology.30 While it stresses the need for recognition of intellectual property rights, Article 16 of the Convention provides that such rights should support the objectives of the Convention. The Cartagena Protocol[31] to the Convention on Biological Diversity.

18 Convention on Biological Diversity, (1992).
19 Ibid.
20 United Nations Conference on Environment and Development, (1992).
21 O Rivera-Torres, 'The Biosafety Protocol and the WTO' 26 B.C. Int'l & Comp. L. Rev. 263 (2003), http://lawdigitalcommons.bc.edu/iclr/vol26/iss2/7
22 Cartagena Protocol on Biosafety to the Convention on Biological Diversity, (2000).
23 List of Parties, https://www.cbd.int/information/parties.shtml (16 November 2020). 23 Convention of Biological Diversity, (1992) Article 1.
24 Convention of Biological Diversity, (1992) Article 8(g).
25 Convention of Biological Diversity, (1992) Article 19(1) & (2).
26 Convention of Biological Diversity, (1992) Article 16(1).
27 Convention of Biological Diversity, (1992). Article 19(3).
28 Cartagena Protocol on Biosafety to the Convention on Biological Diversity, (2000).
29 Convention of Biological Diversity, (1992). Article 28.
30 P Kameri-Mbote, 'Regulation of GMO Crops and Foods: Kenya Case Study' (2009) 36. 31 Convention of Biological Diversity, (1992). Article 16.
31 Cartagena Protocol on Biosafety to the Convention on Biological Diversity, (2000).

In November 1995, the Conference of the Parties to the Convention established an Open-ended Ad Hoc Working Group on Biosafety to develop a draft protocol on biosafety. After more than five years of negotiations, the Cartagena Protocol on Biosafety to the Convention on Biological Diversity was finalized and adopted in Montreal on January 29, 2000. The Protocol was opened for signature in Nairobi in May 2000 and Kenya was the first country to sign it.[32] It came into force on September 11, 2003. By November 16, 2020, some 173 countries had ratified or complied with accession requirements of the protocol[33] and, depending on a country's legal system, it is a legally binding international agreement for the countries that have ratified or acceded to it.[34]

> The objectives of the protocol are to contribute to ensuring an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health, and specifically focusing on trans-boundary movements.[35]

The two cornerstones of the protocol are Advanced Informed Agreement (AIA) and the precautionary approach.[36] AIA enables an importing country to subject all first imports of living modified organisms to risk assessment before taking a final decision on import. To this effect, Articles 7, 8, 9 & 10 of the Protocol provide detailed procedure on AIA from application, notification, acknowledgement of receipt of notification and the decision. The Protocol embraced the precautionary approach as contained in Principle 15 of the Rio Declaration, and provides under Article 11 as follows:

> [L]ack of scientific certainty due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects of a living modified organism on the conservation and sustainable use of biological diversity in the party of import, taking also into account risks to human health, shall not prevent that party from taking a decision, as appropriate, with regard to the import of that living modified organism intended for direct use as food or feed, or for processing, in order to avoid or minimize such potential adverse effects.

Article 27 of the Cartagena Protocol requires the Conference of the Parties to the CBD serving as the Meeting of the Parties to the Cartagena Protocol to adopt, at its first meeting, a process with respect to the appropriate elaboration of international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms.[37] During the first meeting of the Conference of the Parties serving as the Parties to the Cartagena Protocol held in Kuala Lumpur, an Ad Hoc Open-ended Working Group of Legal and Technical Experts on Liability and Redress was established to analyze issues, elaborate

32 Kenya First to Sign Biosafety Protocol, < https://www.iatp.org/news/kenya-first-to-sign-biosafety-protocol> (16 November 2020). 34 The Cartagena Protocol on Biosafety < http://bch.cbd.int/protocol> (16 November 2020).

33 Secretariat of the Convention on Biological Diversity, Cartagena Protocol on Biosafety Ratification List https://www.cbd.int/doc/lists/cpb-ratifications.pdf (16 November 2020).

34 Cartagena Protocol on Biosafety Takes Effect 11 September <https://www.un.org/press/en/2003/envdev735.doc.htm#:~:text=MONTREAL%2C%209%20September%20(UNEP),on%20Thursday%2C%2011%20September%202003> (16 November 2020)

35 Cartagena Protocol on Biosafety to the Convention on Biological Diversity, (2000) Article 1.

36 J Komen, 'The Emerging International Regulatory Framework for Biotechnology' (2012) 79. 39 Ibid 80.

37 Cartagena Protocol on Biosafety to the Convention on Biological Diversity, (2000) Article 27.

options, and propose international rules and procedures.[38] Later on, the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety (Supplementary Protocol) was adopted and this supplementary protocol and its approaches to Biosafety issues will be discussed next.

The Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety

The Supplementary Protocol was adopted on October 15, 2010 and in accordance with its Article 17, it was opened for signature on March 7, 2011. On March 5, 2018, the Supplementary Protocol entered into force. As of November 16, 2020, there were 48 parties to the Supplementary Protocol, all of whom are bound by it.[3940] Since its adoption, the function of the Supplementary Protocol has been seen as two-fold. On the one hand, it is expected to prevent damage and, on the other hand, act as a confidence-building measure in the development and application of modern biotechnology.[43] These dual functions are reflected in Article 1 of the Supplementary Protocol, which outlines its objective as: to contribute to the conservation and sustainable use of biological diversity, taking into account risks to human health by providing international rules and procedures in the field of liability and redress relating to the living modified organisms (LMOs).

The Supplementary Protocol applies to damage resulting from LMOs, which are the subject of transboundary movement.[41] 'Damage' has been defined under Article 2 of the Supplementary Protocol to mean an adverse effect on the conservation and sustainable use of biological diversity that is measureable or otherwise observable and significant, taking also into account risks to human health. The protocol provides an indicative list of facts that should be used to determine the significance of an adverse effect. Article 4 of the Supplementary Protocol provides that a causal link between the damage and the LMO must be established.

Significantly, the Supplementary Protocol adopts an administrative approach to addressing response measures in the event of damage resulting from LMOs.[42] Article 5 provides that States parties must require operator(s) to take responsive measures in the event of damage resulting from LMOs. 'Operator' is defined as any person in direct or indirect control of the LMO.[43] The operator(s) must also take response measures where there is a sufficient likelihood that damage will result if timely response measures are not taken. Response measures may also be taken by the competent authority if the operator(s) fails to do so. The protocol defines 'response measures' under Article 2 as reasonable actions to prevent, minimize, contain, mitigate or otherwise avoid damage, as appropriate, or reasonable actions to restore biological diversity.

In addition to providing for response measures and how they should be imposed, the Supplementary Protocol obligates State parties to develop, in their national law, specific legislation concerning liability and redress for material or personal damage or continue applying

38 Nagoya - Kuala Lumpur Supplementary Protocol on Liability and Redress, (2010).

39 Nagoya – Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety < https://bch.cbd.int/protocol/supplementary/> (16 November 2020).

40 October 2020 Press Release on Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress celebrates tenth anniversary < https://www.cbd.int/doc/press/2020/pr-2020-10-15-bs-liability-en.pdf> (16 November 2020).

41 Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety, (2010) Article 3.

42 Ibid.

43 Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety, (2010) Article 5.

existing legislation on civil liability.[44] The Supplementary Protocol responded to major concerns of parties to the Convention on Biological Diversity with respect to damage arising from LMOs.

WTO Agreements

The Word Trade Organization agreements that are relevant for GMOs and biosafety are the Agreement on Sanitary and Phytosanitary Standards[45] (SPS Agreement), the Agreement on Technical Barriers on Trade[46] (TBT Agreement), and The Agreement on Trade-Related Aspects of Intellectual Property Rights[47] (TRIPS).

The SPS Agreement does not explicitly deal with GMOs and biosafety, but it sets out the basic rules for food safety and animal and plant health standards.[48] Article 2(2) of the Agreement encourages State parties to set their own standards to protect human, animal, plant health or life, but these standards must be scientifically justified.[49] Article 2(3) of the Agreement prohibits State Parties from arbitrarily or unjustifiably discriminating between countries where identical or similar conditions prevail. [50]

Similarly, the TBT Agreement aims to ensure that its members do not use technical regulations, standards, testing and conformity assessment procedures to discriminate against countries and cause unnecessary obstacles to international trade.[51] At the same time, the TBT Agreement encourages its members to implement measures to achieve legitimate policy objectives, such as the protection of human health and safety, or protection of the environment.[55] In assessing such risks, relevant elements of consideration must be made such as available scientific and technical information, related processing technology or intended end-uses of products.[56]

The TRIPS Agreement[52] is also relevant in cases where the GMOs in question are the subject of intellectual property rights such as patents. The agreement establishes a minimum level of protection that each member State has to accord patent rights of other member States. Article 27(1) of TRIPS Agreement provides that patent rights must be enjoyed without discrimination as to place of invention, the field of technology and whether products are imported or locally produced.[53] However, Article 27(2) of the TRIPS Agreement puts a caveat and provides that member States may exclude inventions from patentability to protect human, animal, or plant life or health or to avoid serious prejudice to the environment.[54]

44 Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety, (2010) Article 12.
45 Agreement on Sanitary and Phytosanitary Standards, (1995).
46 Agreement on Technical Barriers to Trade, (1995).
47 Agreement on Trade-Related Aspects of Intellectual Property Rights, (1995).
48 Understanding the WTO Agreement on Sanitary and Phytosanitary Measures <https://www.wto.org/english/tratop_e/sps_e/spsund_e.htm (16 November 2020).
49 Agreement on Sanitary and Phytosanitary Standards, (1995) Article 2(2).
50 Agreement on Sanitary and Phytosanitary Standards, (1995) Article 2(3).
51 Agreement on Technical Barriers on Trade, (1995) Article 2.2. 55 Ibid. 56 Ibid.
52 Agreement on Trade-Related Aspects of Intellectual Property Rights, (1995).
53 Agreement on Trade-Related Aspects of Intellectual Property Rights, (1995) Article 27 (1).
54 Agreement on Trade-Related Aspects of Intellectual Property Rights, (1995) Article 27 (2).

Regional initiatives

African model law on biosafety

The African Model Law on Safety in Biotechnology (now renamed African Model Law on Biosafety) was developed in 1999 by the Organization for African Unity (OAU, as it was called then) to harmonize the approach towards biosafety in African countries.[55] The draft was later adopted in July 2001 by OAU.[56] The African Model Law was adopted to help African countries to fulfil their obligations under the Cartagena Protocol and to contribute to ensuring an adequate level of protection in the making, safe transfer, handling and use of GMO products.[57]

However, instead of encouraging open dialogue between the stakeholders on the pros and cons of biotechnology in Africa, the African Model Law on Biosafety (model law) divided the Continent into two camps with strong opposing views and little dialogue.[58] Some viewed the model law as restricting agricultural development in Africa.[59] It is, therefore, not surprising that the model law has been revised a number of times to accommodate new experiences and political pressures.[60]

Although the model law is not binding on parties, it is a reference point for many countries in the making, importation, exportation, contained use, release or placing on the market of any GMO products in the countries of the member states.[61] Article 3 lists institutions that should be established by member States. These include a National Focal Point, which is responsible for circulating information among other relevant bodies,[62] a Competent Authority to regulate the implementation of the model law,[63] a National Biosafety Committee to provide policy recommendations to the Competent Authority[64] and Institutional Biosafety Committees that regulate the safety mechanisms of institutions that make, import, export, handles or place on the market GMO products.[65]

Another key provision of the model law is on public participation. Article 5 of the model law provides that before making any decision, the Competent Authority must take into account the views and concerns of the public with regard to any proposed import, contained use, release or placing on the market of any GMO product. Articles 6 and 7 subsequently outline the decisionmaking process and the procedure for reviewing decisions, respectively.

In terms of risk assessment, Article 8 of the model law provides that the Competent Authority should not make any decision without the assessment of risks to the environment, biological diversity or human health, including the socio-economic conditions on cultural norms. The applicant or the competent authority can carry out risk assessment on a case-by-case basis.[66]

55 Capacity Building in Biosafety in Africa <http://nepad-abne.net/wp-content/uploads/2015/11/Biosafety-Africa-Part4-6.pdf> (16 November 2020).
56 Ibid.
57 H Swanby, 'The Revised African Model Law on Biosafety and the African Biosafety Strategy' (June 2009) 6.
58 Capacity Building in Biosafety in Africa <http://nepad-abne.net/wp-content/uploads/2015/11/Biosafety-Africa-Part4-6.pdf> (16 November 2020).
59 H Swanby, 'The Revised African Model Law on Biosafety and the African Biosafety Strategy' (June 2009) 8.
60 H Swanby, 'The Revised African Model Law on Biosafety and the African Biosafety Strategy' (June 2009) 6.
61 African Model Law on Safety in Biotechnology, (2001) Article 2.
62 African Model Law on Safety in Biotechnology, (2001) Article 3(1).
63 African Model Law on Safety in Biotechnology, (2001) Article 3(2).
64 African Model Law on Safety in Biotechnology, (2001) Article 3(3).
65 African Model Law on Safety in Biotechnology, (2001) Article 3(4).
66 African Model Law on Safety in Biotechnology, (2001) Article 8(3).

Article 11 of the model law provides that any GMO product must be identified and labelled as such and that the identification must specify the relevant traits and characteristics given in sufficient detail. The Article also requires the Competent Authority to put in place measures to ensure GMO products are identified properly.[67] Article 12 provides for Confidential Business Information. The Article states that the Competent Authority shall protect information it considers confidential after a claim for such confidentiality has been made. However, it is categorical that information relating to description of the GMO, methods and plans for monitoring the GMO and the risk assessment cannot be kept confidential. Articles 13 and 14 provide for export and capacity building, respectively.

In terms of liability and redress, Article 15 of the model law states that liability must be borne by the applicants and developers of GMOs for any harm caused by such GMO product. Article 16 provides for offences and related penalties. For example, any person who violates any conditions attached to the grant of approval under the law shall be guilty of an offence and, upon conviction, prohibited from engaging in any GMO activity.

African Strategy on Biosafety

After the adoption of the African model law, the African Union (AU) agreed to take a common approach on biosafety and began developing the African Strategy on Biosafety.[68] The main objective of the strategy is to harmonize procedural and substantive laws on biosafety in Africa to facilitate the development of the continent.[69] The strategy calls on AU members to put in place national biosafety policies and laws.[70] This objective is yet to be realized as African countries have approached genetic modification in diverse ways. Some, like South Africa, Burkina Faso and Sudan have gone very far with the technology and are among global leaders.[71] Expected leaders such as Kenya continue to be ambivalent on the use of the technology despite having functional biosafety laws, policies, institutions and structures.

The Common Market for Eastern and Southern Africa (COMESA) Guidelines

The Common Market for Eastern and Southern Africa (COMESA) has endorsed a Regional Approach to Biotechnology and Biosafety Policy in Eastern and Southern Africa (RABESA).[72] RABESA was conceived as a project at the request of COMESA ministers of agriculture in 2001, with the objective of undertaking stakeholder analysis on opportunities and challenges related to biotechnology, estimating impacts of genetically modified crops on farm incomes, estimating potential commercial export risks associated with planting of GM crops in the region and reviewing a range of regional policy options and common position towards GM crops for the COMESA countries.[73] Since its inception, the RABESA initiative has been implemented in close collaboration with the COMESA secretariat, the Programme for Biosafety Systems (PBS), the Policy Analysis and Advocacy Programme (PAAP) of ASARECA and ISAAA Africa.[74]

67 African Model Law on Safety in Biotechnology, (2001) Article 11(1).

68 H Swanby, 'The Revised African Model Law on Biosafety and the African Biosafety Strategy' (June 2009) 5.

69 H Swanby, 'The Revised African Model Law on Biosafety and the African Biosafety Strategy' (June 2009) 5.

70 H Swanby, 'The Revised African Model Law on Biosafety and the African Biosafety Strategy' (June 2009) 6.

71 ISAAA, 'Global Status of Commercialized Biotech/GM crops: 2016' (2017) Brief 52.

72 M Waithaka, G Belay, M Kyotalimye and M Karembu, 'Progress and Challenges for Implementation of the Comesa Policy on Biotechnology and Biosafety' (2015) (<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4519696/>

73 M Waithaka, G Belay, M Kyotalimye, and M Karembu, M, (2015).

74 COMESA, 'Draft Policy Statements and Guidelines for: Commercial Planting of GMOs, Trade in GMOs and Emergency Food Aid with GMO Content.' (2013).

In May 2006, a COMESA regional workshop held in Nairobi during the first phase of the RABESA initiative made three recommendations relevant for regional policy on GMOs:

1) Development of guidelines on procurement of GM food aid at the regional level, which guidelines would then be used by each country to make decisions;
2) Adoption of a centralized regional risk assessment so as to standardize and make more transparent, cost effective procedures and enable the sharing of resources, information and expertise; and
3) Establishment of a central regional clearing-house to provide guidance to member states on commercial trade in GM products.[75]

The second phase of RABESA initiative was endorsed at a meeting of COMESA ministers of agriculture in March 2007 in Khartoum. The main focus of this second phase was to harmonize regional biosafety policies and guidelines concerning three priority areas of GMO governance: Commercial Planting of GMOs, Trade in GMOs and Emergency Food Aid with GMO Content.[76] In a meeting in Seychelles in 2008, COMESA ministers of agriculture called upon member states to initiate the drafting of regional biosafety guidelines and policies for:

i) handling commercial planting of GMOs; ii) trade in GMOs; and iii) procurement of emergency food aid with GM content.

In response to the call by COMESA ministers of agriculture, Policy Statements and Guidelines for Handling Commercial Planting of GMOs, Trade in GMOs and Emergency Food Aid with GMO Content were developed.[82] On commercial planting of GMOs, the policy statement provides for the establishment of a COMESA Biosafety and Centralized GMO Risk Assessment Desk.[77] The main responsibility of the desk is to manage all aspects related to application for risk assessment of GMOs intended for commercial planting and communicating with member States on matters related to the centralized regional risk assessment audit process and outcomes. The policy refers to several conventions, including CBD, WTO Agreements and the Cartagena Protocol as some of the instruments that are important for the development and reading of the policy.[78] The policy statement also provides for the establishment and operations of GMO Risk Assessment Sub-Committees (GRASCOMs) whose main task is to review applications for risk assessment.[79] The guiding principles for the risk assessment committees include transparency, independence, excellence, integrity and participation of all stakeholders.[80] Section 3.6 and 3.7 of the policy statement provides for the notification procedures and the application requirements, respectively, while Section 3.9 provides for public participation and information. Member States are obligated to conduct public consultations relating to risk assessment.[81]

75 COMESA, 'Draft Policy Statements and Guidelines for: Commercial Planting of GMOs, Trade in GMOs and Emergency Food Aid with GMO Content.' (2013).

76 Ibid. 82 Ibid.

77 COMESA, 'Draft Policy Statements and Guidelines for: Commercial Planting of GMOs, Trade in GMOs and Emergency Food Aid with GMO Content,' (2013) Section 3.2.

78 COMESA, 'Draft Policy Statements and Guidelines for: Commercial Planting of GMOs, Trade in GMOs and Emergency Food Aid with GMO Content,' (2013) Section 2.1.

79 COMESA, 'Draft Policy Statements and Guidelines for: Commercial Planting of GMOs, Trade in GMOs and Emergency Food Aid with GMO Content,' (2013) Section 3.4.

80 COMESA, 'Draft Policy Statements and Guidelines for: Commercial Planting of GMOs, Trade in GMOs and Emergency Food Aid with GMO Content,' (2013) Section 3.5.

81 COMESA, 'Draft Policy Statements and Guidelines for: Commercial Planting of GMOs, Trade in GMOs and Emergency Food Aid with GMO Content,' (2013) Section 3.9.

Section 4 of the policy statement provides for commercial trade in GMOs. The main objectives of the section is to provide centralized guidance on COMESA trade in GMOs; to provide harmonized mechanisms for decision-making on trade in GMOs among member States; and to provide guidance on handling of GMOs in transit for sale within the COMESA region.

In terms of handling food aid with GM content, Section 5 of the policy statement has the objective of harmonizing procedures of food aid with GM content in the COMESA region and to expedite delivery of food aid, which may contain GM content to the needy during emergencies. The section provides for general guidelines and procedures for handling food with GM content.

Section 6 of the policy statement provides for capacity building.[82] COMESA is encouraged to take the necessary steps and initiatives to mobilize resources for continuous and strategic capacity building of member States. The section continues to provide for the establishment of programmes dedicated to the creation of awareness on the existence and potential benefits and risks of GM products.

C. Regulation of GMOs in Kenya

The politics

As pointed out earlier, Kenya's policy on GMO has been ambivalent. Even though GMO research has been going on in the country since the 1990s, there remains strong suspicion of the technology. This has been exemplified by the contradictory stances that different groups have taken over time. For instance, when the Biosafety Act was first placed before Parliament in the early 2000s, a Member of Parliament, Hon. Davis Nakitare placed a private member's Bill before the same House calling for a ban on GMOs.[83] More recently, the debate on GMO food acquired powerful political overtones when the government of Kenya banned the commercial sale of GM food in the country. Hon. Beth Mugo, the then Public Health minister, in bringing the issue before Cabinet and then President Mwai Kibaki, recommended the ban on GM products reportedly citing the Seralini study that linked cancer in rats to the consumption of GM foods.[84] The President accepted her recommendation and decreed the ban without consulting the National Biosafety Authority.[85] In a democracy, the use of Executive Orders to suspend the provisions of law is a tractable issue. Other than a group of small-scale farmers opposed to the lifting of a ban in a case[86] discussed hereafter, no entity has questioned this ban in court.

Prof Gilles-Eric Seralini had published an article titled 'Long Term Toxicity of a Roundup Herbicide and a Roundup-tolerant Genetically Modified Maize' in *Food and Chemical Toxicology* journal in November 2012. The article described a two-year study in which rats had been fed with GM maize and as a result developed cancerous tumours. The paper became a favourite reference for anti-GMO activists and was often cited as evidence that GMO foods are harmful.[87]

82 COMESA, 'Draft Policy Statements and Guidelines for: Commercial Planting of GMOs, Trade in GMOs and Emergency Food Aid with GMO Content,' (2013) Section 6.

83 P Kameri-Mbote, 'Regulation of GMO Crops and Foods: Kenya Case Study' (2009).

84 'Seralini Paper Influences Kenya Ban of GMO Imports' <https://www.forbes.com/sites/emilywillingham/2012/12/09/seralinipaper-influences-kenya-ban-of-gmo-imports/#2796f07168a0> (16 November 2020).

85 Ibid.

86 *Kenya Small Scale Farmers Forum v Cabinet Secretary Ministry of Education, Science and Technology & 5 Others* [2015] eKLR.

87 'The Seralini GMO Study – Retraction and Response to Critics' <https://sciencebasedmedicine.org/the-seralini-gmo-studyretraction-and-response-to-critics/> (16 November 2020). 94 Ibid.

Some scientists, however, largely criticized the paper as based on a fatally flawed study,[94] with many raising concerns on the methodology, design and objective of the study.[88]

One year after the publication, the *Food and Chemical Toxicology* journal retracted the Seralini paper, announcing that while the findings in the paper were not incorrect, they were inconclusive and, therefore, falling below the threshold of publication for the journal.[89] Interestingly, the moratorium on the importation of GM food has remained intact many years after the retraction of the Seralini paper as the following discussions illustrate. On 3rd October 2022, President William Ruto, issued executive communication authorizing open cultivation and importation of white genetically modified maize.[90] He vacated the 8th November 2012 ban on open cultivation of genetically modified crops and the importation of food crops and animal feeds produced through biotechnology innovations.[91] He cited the recommendations of the Taskforce to Review Matters Relating to Genetically Modified Foods and Food Safety; the guidelines of the National Biosafety Authority and applicable international treaties, including the Cartagena Protocol on Biosafety, as the authority for the action.[92] It is still too early to gauge the impact of this action on the ground.

Despite Kenya being the first country in the world to sign the Cartagena Protocol in 2000, its ambivalence to GMO remains and is demonstrated by its approach to the technology in both law and policy-making. It is worth noting that it took the country nine years after this momentous event to pass the Biosafety Act, 2009, to regulate GMOs activities. Other laws relevant to the regulation of GMOs in Kenya include the framework environmental legislation, the Environmental Management and Coordination Act passed in 2000 (revised in 2015) and the Constitution of Kenya, 2010. We will now discuss the laws, regulations and policies that govern GMOs and biosafety in Kenya.

Kenya's national law

Constitution of Kenya, 2010

Prior to the promulgation of the Constitution of Kenya, 2010, Kenya followed the dualist system of domesticating the treaties it ratified before applying them.[93] Article 2(5) and 2(6) of the 2010 Constitution provide that the general rules of international law and any treaty or convention ratified by Kenya forms part of the law of Kenya. These Articles have implications on the Kenyan GMO law since the country is a member of many international organizations and has ratified instruments that have implications for GMOs and Biosafety including those discussed earlier in this chapter with WTO Agreements, the CBD and the Cartagena Protocol. The question as to whether there is need for domestication before international legal norms are applied in Kenya after the 2010 Constitution is much discussed by jurists, with some arguing that the need for domestication has now been removed while others opine that it is still necessary. This debate is

88 Open Forum on Agricultural Biotechnology (Kenya Chapter), 'Deficiencies in Study Linking GM Maize to Cancer', *Global Scientific Perspective* (Issue 2, January 2013) 1.

89 'Elsevier Announces Article Retraction from Journal Food and Chemical Toxicology' <https://www.elsevier.com/about/pressreleases/research-and-journals/elsevier- announces-article-retraction-from-journal-food-and-chemical-toxicology> (16 November 2020).

90 'Despatch from Cabinet', Cabinet Office, Executive Office of the President, 3rd October 2022.

91 Ibid.

92 Ibid.

93 *Okunda v Republic*, [1970] EA 453 at p. 455.

beyond the scope of this chapter, but it is worth noting that courts in Kenya have applied norms from international treaties directly in the absence of norms on canvassed issues in national law.[94]

The Constitution recognizes the role of science and technology in national development. In dealing with culture,[95] the State is mandated to promote science;[96] recognize the role of science and indigenous technologies in national development;[97] and promote the intellectual property rights of the people of Kenya.[102] The Constitution, under Article 69(1)(c), also obligates the State to protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities. The Constitution further requires the State to protect genetic resources and biological diversity.[103] Under Article 69(1)(g), the State is obligated to eliminate processes and activities that are likely to endanger the environment and also to utilize the environment and natural resources for the benefit of the people of Kenya.[98] The State is also obliged to establish systems of environmental impact assessment, environmental audit and monitoring of the environment.[105]

The Constitution further provides that consumers have the right to goods of reasonable quality,[99] and to the protection of their health, safety and economic interests.[100] Additionally, Article 40 of the Constitution provides for property rights and the State is particularly obligated to support, promote and protect intellectual property rights. The grant of intellectual property rights to innovations has implications for access to those innovations. For example, the owner of the intellectual property enjoys the rights to the exclusion of non-owners. If the ownership and control of intellectual property rights are granted to the innovator of a biotechnology application, the issues of exclusion for the persons who nurtured the raw materials also has to be addressed.[101] This raises the issue of fair and equitable sharing of benefits arising from biotechnology innovations,[102] which the Constitution also requires.[103]

Biosafety Act, 2009

The Biosafety Act, 2009, was enacted in December 2008, and received presidential assent on February 12, 2009 before coming into force on July 1, 2011.[111] The law was enacted three years after the adoption of the Kenya National Biotechnology Development Policy, which was approved in September 2006. [104] The policy charts the vision of the government towards the development and safe application of biotechnology.[105] It applies to all biotechnology activities and genetic engineering.[106] It covers research, development and use of biotechnology in various

94 *Rono v Rono Civil Appeal No 66 of 2002,* (2008) 1 KLR (G&F) 803, ILDC 1259 (KE 2005), 29th April 2005, Kenya; Uasin Gishu; Eldoret; Court of Appeal.

95 Constitution of Kenya, (2010) Article 11.

96 Constitution of Kenya, (2010) Article 11 (2) (a).

97 Constitution of Kenya, (2010) Article 11 (2) (b). 102 Constitution of Kenya, (2010) Article 11 (2) (c.) 103 Constitution of Kenya, (2010) Article 69(1) (e).

98 Constitution of Kenya, (2010) Article 69(1) (h). 105 Constitution of Kenya, (2010) Article 69(1) (f).

99 Constitution of Kenya, (2010) Article 46(1) (a).

100 Constitution of Kenya, (2010) Article 46(1) (c).

101 Kameri-Mbote, P, Regulation of GMO Crops and Foods: Kenya Case Study (2009).

102 Ibid.

103 Constitution of Kenya, (2010) Articles 66 (2) and 69 (1) (a). 111 Biosafety Act, (2009) Section 1.

104 International Service for the Acquisition of Agri-Biotech Applications <http://www.isaaa.org/resources/publications/pocketk/28/default.asp > (16 November 2020).

105 International Service for the Acquisition of Agri-Biotech Applications <http://www.isaaa.org/resources/publications/pocketk/28/default.asp > (16 November 2020).

106 International Service for the Acquisition of Agri-Biotech Applications <http://www.isaaa.org/resources/publications/pocketk/28/default.asp > (16 November 2020).

fields such as agriculture, environment, human and animal health.[107] The policy charts the vision of the government towards the development and safe application of biotechnology.[108] It applies to all biotechnology applications and genetic engineering,[109] and covers research, development and use of biotechnology in various fields such as agriculture, environment, human and animal health.[110]

The objectives of the law are to facilitate responsible research into, and minimize the risks that may be posed by GMOs to ensure an adequate level of protection for the safe transfer, handling and use of GMOs that may have an adverse effect on the health of the people and the environment, and to establish transparent, science-based and predictable process for reviewing and making decisions on the transfer, handling and use of GMOs and related activities.[111] The law also establishes the National Biosafety Authority, whose functions are to exercise general supervision and control over the transfer, handling and use of GMOs with a view to ensuring safety of human, animal health and the environment.[112]

The Biosafety Act has faced opposition from anti-GMO activists, farmers and traders from the date it was passed. Anti-GMO lobbyists were quoted saying:

> The developers of GMOs have exerted great pressure to ensure that the Biosafety Act of 2009 serves the interests of foreign agribusiness, rather than farmers and consumers.[113]

Owing to the politically heated debates on the risks and benefits of GMOs and the general ambivalence to the technology, importation of GMOs has been officially banned in Kenya since November 2012 as noted above.[114] In August 2015, the Deputy President, William Ruto, stated that the government was going to lift the ban on GMOs.[115] As an illustration of their protest, Kenya Small Scale Farmers Forum went to court to challenge this intended action by the government in the case of *Kenya Small Scale Farmers Forum v Cabinet Secretary, Ministry of Education, Science and Technology & 5 Others.*[116] The petitioner, using newspaper reports to demonstrate a threat of violation of their constitutional right, pegged their arguments on the fact that various international reports had all scientifically pointed to the fact that genetically modified foods and organisms are harmful and dangerous to both man and nature. The petition was dismissed to give the Cabinet an opportunity to make a decision on the ban before a judicial process could be invoked. While dismissing the petition, Judge Onguto had this to say on GMOs:

107 International Service for the Acquisition of Agri-Biotech Applications <http://www.isaaa.org/resources/publications/pocketk/28/default.asp > (16 November 2020).

108 International Service for the Acquisition of Agri-Biotech Applications <http://www.isaaa.org/resources/publications/pocketk/28/default.asp > (16 November 2020).

109 International Service for the Acquisition of Agri-Biotech Applications <http://www.isaaa.org/resources/publications/pocketk/28/default.asp > (16 November 2020).

110 International Service for the Acquisition of Agri-Biotech Applications <http://www.isaaa.org/resources/publications/pocketk/28/default.asp > (16 November 2020).

111 Biosafety Act, (2009) Section 4.

112 Biosafety Act, (2009) Section 1(1).

113 *Business Daily*, 'Kenya Opens Up to GMO Crops in War on Hunger' <https://www.businessdailyafrica.com/corporate/Kenya-opens-up-to-GMO-crops-in-war-on-hunger/539550-1194564-bxw3liz/index.html > (16 November 2020).

114 Francis Nang'ayo, 'Kenya's Ban on Imports GM Crops' <https://www.aatf-africa.org/opion-kenya-ban-on-gm > (16 November 2020).

115 *Daily Nation* <https://www.nation.co.ke/news/William-Ruto-ban-GMOswithlift/1056-2829368-ixd3/index.html > (16 November 2020).

116 *Kenya Small Scale Farmers Forum* v *Cabinet Secretary Ministry of Education, Science and Technology & 5 Others* [2015] eKLR.

> Whilst it is true that public interest may be served if genetically modified organisms (GMOs) were introduced it is also equally true that public interest may be affected negatively. I state so because there are real and perceived risks of genetically modified organisms (GMOs). I state so too because genetically modified organisms (GMOs) may also have negative effects. It is dependent on which side of the divide one is. Political and economic considerations may lead a person to conclude that genetically modified organisms (GMOs) positively assist the human species. Yet another person's religious considerations may lead to a vilification of genetically modified organisms (GMOs) altogether. There is no consensus on the benefits, (dis)advantages, risks and effect of genetically modified organisms and foods generally. This battle has raged on since 1975, when the first recombinant deoxyribonucleic acid (DNA) molecules were used through biotechnology to manipulate natural genes. This battle continues.[117]

Indeed, despite the lifting of the ban through the Cabinet Despatch discussed above, the battle is likely to continue because anti-GMO activists are still active and will likely challenge this action.[118] It is also instructive to note that the findings of the taskforce established immediately after the ban to advise on the way forward is yet to be made public despite reference to them by the President. The President in the Despatch noted that Cabinet had authorized the commercialization of genetically modified *Bacillus Thuringiensis* (BT) cotton hybrids resistant to pests in 2019.[119] The difference however is the fact that cotton is not a food crop and white maize is a staple food for many Kenyans.

Under the Biosafety Act, 2009, different regulations have been made. These include: Biosafety (Contained Use) Regulations, 2011; Biosafety (Import, Export and Transit) Regulations, 2011; Biosafety (Environmental Release) Regulations, 2011; and Biosafety (Labelling) Regulations, 2012. They are yet to be fully implemented. The objective of the Biosafety (Contained Use) Regulations, 2011, is to ensure that potential adverse effects of GMOs are addressed to protect human health and the environment when conducting contained use activities.[120] An Institutional Biosafety Committee is established under the regulations and its functions, among others, are to prepare applications for contained use activities and refer the applications to the National Biosafety Authority for approval. The committee is also required to review and ascertain the suitability of both physical and biological containment and control procedures appropriate to the level of assessed risk involved in research, development and application activities.[121]

The Biosafety (Import, Export and Transit) Regulations, 2011 seeks to ensure safe movement of GMOs into and out of Kenya while protecting human health and the environment.[122]The Biosafety (Environmental Release) Regulations, 2011 has the objective of ensuring that potential adverse effects of GMOs are addressed to protect human and environment when conducting environmental release.[123] The regulations do not apply to GMOs that are pharmaceuticals for human use.[124]

117 Ibid.

118 See e.g. J. Manjanja, *VOA,* 'Mixed Reactions Over Kenya's Move to Lift Ban on Genetically Modified Crops', <https://www.voanews.com/a/mixed-reactions-over-kenya-s-move-to-lift-ban-on-genetically-modified-crops-/6780976.html>

119 Despatch from Cabinet, *supra* note 90

120 Biosafety (Contained Use) Regulations, (2011) Section 3.

121 Biosafety (Contained Use) Regulations, (2011) Section 6(3) (a).

122 Biosafety (Import, Export and Transit) Regulations, (2011) Section 3.

123 Biosafety (Environmental Release) Regulations, (2011) Section 3.

124 Biosafety (Environmental Release) Regulations, (2011) Section 4.

Lastly, the Biosafety (Labelling) Regulations, 2012, have the objectives of ensuring that consumers are made aware that food, feed or a product is genetically modified so that they can make informed choices and to facilitate the traceability of GMO products in the implementation of appropriate risk management measures where necessary.[125] Labeling is critical to the implementation of the ban on GMOs. The issue is whether the ban is on all GM presence including negligible adventitious presence or whether there is an allowed threshold. The implementation of the ban bars all GM foods and requires zero presence of GM in imports. The punitive measures that accompany offences under the law have not deterred importers from bringing in GM products. In 2015, for instance, the author's attention was drawn to the presence of products on sale in supermarkets in Kenya, which contained GM starch. A trader whose merchandise had been impounded and who was facing an action in court for unlawfully importing GM food shared his experience of having imported the same merchandise with the same labeling with no hassles a month before. This points to the haphazard implementation of the ban.

The Environment Management and Coordination Act, 1999 (revised in 2015)

The EMCA is the legal framework on environmental management and conservation. The legislation provides that every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment.[126] The law establishes the National Environment Management Authority, whose functions include supervising and coordinating all matters relating to the environment, and to be the principle instrument of government in the implementation of all policies relating to the environment.

The law also makes provision for conservation of biological diversity. Section 50 of the Act mandates the Cabinet Secretary[127] to prescribe measures necessary to ensure the conservation of biological diversity in Kenya. Further, the law requires strategic environmental impact assessments for specified projects including projects undertaken for biotechnology.[128] An example of an EIA project report for Bt Cotton has been provided in Table 13.3.

Institutions dealing with biotechnology in Kenya

The National Biosafety Authority (NBA) was established under the Biosafety Act No. 2 of 2009 to exercise general supervision and control over the transfer, handling and use of genetically modified organisms (GMOs). GMOs are products of modern biotechnology that involve the manipulation of the genetic material of organisms through genetic engineering procedures.

The Authority was established to regulate research and commercial activities involving GMOs with a view to ensuring human and animal health safety, and the provision of an adequate level of protection for the environment. The Authority is empowered to establish a transparent science-based and predictable process to guide decision making on applications for approval of research and commercial activities involving GMOs.

The National Biosafety Authority implements the Cartagena Protocol on Biosafety in order to address safety for the environment and human health in relation to modern biotechnology. The

125 Biosafety (Labelling) Regulations, (2012) Section 3.
126 Environmental Management and Co-ordination Act, (1999) Section 3(1).
127 Environmental Management and Co-ordination Act, (1999) Section 50.
128 Environmental Management and Co-ordination Act, (1999) Section 57A.

National Biosafety Authority is under the Ministry of Higher Education Science and Technology, charged with the following duties and responsibilities:

- The National Biosafety Clearing House (BCH).
- Data sharing with the Biosafety Clearing House in Montreal Canada.
- Be the National Focal Point of the Cartagena Protocol on Biosafety.
- Collaborate with relevant government departments and universities' faculties to develop strategies in the fields of biotechnology and biochemistry.
- Identifying research areas that could lead to the formulation of policies to foster science education and popularization of science as well as evolving project proposals in line with modern biotechnology.
- Liaising with the other government ministries, relevant government organizations, relevant stakeholders and relevant international organizations.
- Coordinating biotechnology and biosafety issues in the country among all the relevant stakeholders.

Work in close collaboration with the following regulatory agencies specified in the Biosafety Act. These institutions are also regulators as provided by the law that established them and perform regulatory roles in regard to relevant GMOs.

1. **Department of Public Health,** which safeguards the health of consumers through food safety and quality control, surveillance, prevention and control of food borne diseases/illness.
2. **Department of Veterinary Services** (DVS), which is charged with protection and control of animal diseases and pests to safeguard human health, improve animal welfare, and increase livestock productivity through production of high quality livestock and their products.
3. **Kenya Bureau of Standards** (KEBS), which is responsible for standardization in industry, trade and consumer protection. It also performs regulatory and conformity roles including standards development, quality assurance and testing.
4. **Pest Control Products Board** (PCPB), which regulates importation and exportation, manufacture, registration and use of pest control products.
5. **Kenya Plant Health Inspectorate Service** (KEPHIS), which offers inspectorate and vigilance services on all matter related to plant health, quality control of agricultural input s and produce. It also implements the national policy on introduction and use of genetically modified organisms.
6. **National Environmental Management Authority** (NEMA), which implements policies relating to approval, through NBA, and conducts environmental impact assessment of GMOs intended for release into the environment.
7. **Kenya Wildlife Service** (KWS), which focuses on biodiversity and biotechnology in wildlife and forestry related matters.
8. **Kenya Industrial Property Institute** (KIPI), which is responsible for addressing intellectual property issues arising from modern biotechnology.

D. Status of GMO research in Kenya

Since its establishment, the National Biosafety Authority has granted approvals for National Performance Trials (NPTs) and Confined Field Trials (CFTs). CFTs are undertaken for genetically modified organisms in a controlled space where specific measures are in place to ensure safety for humans and the environment.[129] KEPHIS carries out the National Performance Trials for all seed varieties following protocols approved by the National Performance Trials Committee (NPTC) to ensure that only superior varieties in terms of yields and other attributes are released for commercialization to the farming community.[130] The National Biosafety Authority grants approval for environmental release of GMO crops following successful NPTs and the successful conclusion of the EIA and Environmental Social Impact Assessment (ESIA) as required by the law.

Approvals for national performance trials

The National Biosafety Authority granted a conditional approval for environmental release for the purpose of conducting National Performance Trials (NPTs) and collecting compositional analysis data of Bt Maize (MON 810).[131] In its approval, the Authority prohibits cultivation, importation or placing on the market of the Bt Maize. The Approval was granted to the Kenya Agricultural and Livestock Research Organization (KALRO) and African Agricultural Technology Foundation (AATF) after its application in June 2015.

On September 2, 2016, the National Biosafety Authority approved environmental release of MON 15985 event (commonly known as Bt Cotton) for purposes of conducting limited NPTs.[132] The approval was granted following the application by Monsanto Kenya Limited in October 2015 seeking approval for 'environmental release, cultivation and placing on market'.

Approved Confined Field Trials activities of GMOs

The National Biosafety Authority has approved quite a number of projects for Contained Field Trials, which include water-efficient/drought tolerant transgenic maize at KARI Kiboko, virusresistant transgenic Cassava at KARI Alupe, Vitamin-A-enhanced cassava at KARI Alupe, Biofortified sorghum at KARI Kiboko and virus-resistant cassava at KARI Mtwapa. [133] The National Biosafety Authority gave the approvals after thorough risk assessments and after considering the risk management measures in place, which they found acceptable. Table 13.1 outlines the approvals.

129 The Biosafety (Contained Use) Regulations, (2011) Legal Notice No. 96.

130 Kenya Seeds and Plant Varieties Act, (2012).

131 National Biosafety Authority Decision on GM Maize Application < http://www.biosafetykenya.go.ke/images/Public_Notice.pdf> (16 November 2020).

132 National Biosafety Authority Press Release on MON 15985 Event BT Cotton Application <http://ke.biosafetyclearinghouse.net/cotton_application.pdf > 16 November 2020). 139 Ibid.

133 Biosafety Clearing-House Kenya Approved Genetically Modified Organisms Projects <http://ke.biosafetyclearinghouse.net/approvedgmo.shtml > 16 November 2020).

Table 13.1: Confined Field Trials (CFTs)

No.	Applicant	Application title	Location/ Site of Trial	Introduced/ Modified Trait (s)	Date
	Kenya Agricultural Research Institute (KARI)	Application to introduce Transgenic maize with water efficiency event MON 87460 to carry out confined field trials under moisture stress at Kiboko in Kenya	KARI, Kiboko sub-station, Makueni County	Water efficiency/ Drought tolerance	Aug 16, 2010
	Kenya Agricultural Research Institute (KARI)	Application to conduct confined field trial of transgenic Cassava expressing siRNA and G5 protein for resistance to cassava Mosaic Disease in Kenya	KARI Alupe Sub-centre, Busia County	Virus resistance	Jan 18 2011
	Kenya Agricultural Research Institute (KARI)	Application to introduce transgenic cassava containing Pro-vitamin A (DXS+PSY) genes for confined field trials in Kenya.	KARI Alupe Sub-centre, Busia Count	Nutritional change; Vitamin A enhanced cassava	Jan 18 2011
	Kenya Agricultural Research Institute (KARI)	Application to conduct a CFT of transgenic sorghum containing pro-vitamin A, improved sorghum protein quality, digestibility, enhanced iron and Zinc availability	KARI, Kiboko sub-station, Makueni County	Nutritional change; Bio-fortified sorghum	Aug 11, 2011
	Kenya Agricultural Research Institute (KARI)	Application by KARI to conduct confined field trial of transgenic cassava expressing siRNA for resistance to cassava brown streak disease in Kenya	KARI Mtwapa Centre, (Kilifi County)	Virus resistance	Apr 27, 2012
	Kenya Agricultural Research Institute (KARI)	Application to conduct Confined Field Trial of transgenic maize with Bt event MON810 containing Cry1ab gene to evaluate the efficacy of Bt delta (δ) endotoxin against maize stem borers in Kenya.	KARI, Kiboko sub-station, Makueni County	Insect resistance	Oct 30, 2012
	Kenya Agricultural Research Institute (KARI)	Application to introduce cassava containing Cassava Brown Streak Disease (CBSD) genes for confined field trials in Kenya.	KARI Alupe Research Sub-Centre (Busia County) and KARI Mtwapa Research Centre (Kilifi County	Virus resistance	Sep 26, 2013
	Kenya Agricultural Research Institute (KARI)	Application for the evaluation of transgenic Gypsophila paniculata (Baby's breath) containing PAP-1 Gene for pink flower colour stability at a CFT Facility at Beauty Line Farm, Naivasha, Kenya.	Beauty Line Flower Company-Naivasha, Nakuru County	Pink colour flower stability	Dec 9, 2013

	Masinde Muliro University of Science and Technology (MMUST)	Application for confined field trial (CFT) on the evaluation of transgenic cassava expressing African cassava mosaic virus (ACMV) and cassava brown streak virus (CBSV) resistance in Kenya	KARI–Alupe Sub Centre, Busia Count	Virus resistance	Mar 6, 2014
	Kenya Agricultural Research Institute (KARI)	Application to conduct Confined Field Trial (CFT) to evaluate sweet potato containing genetic elements conferring siRNA resistance to sweet potato virus disease.	KARI, Kakamega (Kakamega County	Virus resistance	July 21, 2014
	Kenya Agricultural and Livestock Research Organization (KALRO)	Application to conduct confined field trials (CFT) of transgenic sorghum containing Pro-Vitamin A and enhanced Iron and Zinc Bio-availability.	KALRO, Kiboko Centre (Makueni County)	Nutritional enhancement through biofortification	Mar 4, 2015
	Kenya Agricultural and Livestock Research Organization (KALRO)	Application to conduct Confined Field Trial of transgenic bananas for resistance to Banana Xanthomonas Wilt (BXW) disease	KALRO Alupe centre, Teso District, Western Province	Disease Resistance -Banana Xanthomonas Wilt (BXW)	Nov 7, 2016

Source: National Biosafety Authority

Approved contained use research activities of GMOs

The National Biosafety Authority has approved quite a number of projects for Contained Use Trials (research), which include bacterial-wilt-disease-resistant banana, insect-resistant pigeon pea, stress-tolerant cassava and nematode-resistant and virus-resistant yam.[134] The National Biosafety Authority gave approvals after a thorough risk assessment and the risk management measures put in place were found acceptable.

134 Ibid.

Table 13.2, sourced from the National Biosafety Authority, outlines the approvals. Table 13.2: Contained Use Trials (CFTs)

No.	Name of Applicant	Application title	Location/Site of Facility	Desired Trait	Date Approved
	International Livestock Research Institute (ILRI)	Application to carry out genetic transformation of cassava for stress tolerance under laboratory and greenhouse conditions in Kenya	ILRI facility-Nairobi	Stress tolerance	Mar 11, 2011
	International Livestock Research Institute (ILRI)	Application to carry out genetic modification of banana for disease resistance under laboratory and greenhouse conditions in Kenya	ILRI facility-Nairobi	Bacterial wilt disease resistance	Mar 11, 2011
	International Livestock Research Institute (ILRI)	Application to carry out genetic transformation of cassava for stress tolerance under laboratory and greenhouse conditions in Kenya	ILRI facility-Nairobi	Stress tolerance	Mar 11, 2011
	International Livestock Research Institute (ILRI)	Application to carry out genetic modification of Yam (Dioscorea spp) for nematode resistance in laboratory and greenhouse conditions in Kenya	ILRI facility-Nairobi	Nematode resistance	Mar 11 2011
	International Livestock Research Institute (ILRI	Application to carry out genetic modification work of cassava for resistance to cassava brown streak disease under Laboratory and greenhouse conditions in Kenya	ILRI facility-Nairobi	Virus resistance	Aug 11, 2011
	International Livestock Research Institute (ILRI)	Application to carry out genetic modification of banana for development of doubled haploid plants under laboratory and greenhouse conditions in Kenya.	ILRI facility-Nairobi	Double haploidy to speed up the breeding process	May 11, 2012
	International Livestock Research Institute (ILRI) in collaboration with Kenyatta University	Application to introduce Genetically modified sweet potato with weevil resistance for contained use in laboratory and greenhouse trials in Kenya	ILRI facility and Kenyatta University-Nairobi County	Insect resistance	Apr 6, 2010
	International Livestock Research Institute (ILRI) in Collaboration with International Potato Centre (CIP)	Application to conduct research on late blight resistant potato containing resistance genes under laboratory and green house conditions in Kenya	ILRI Facility-Nairobi	Disease resistance	Nov 5, 2012
	International Livestock Research Institute (ILRI	Application for contained use activities involving genetic modification for cassava expressing resistance to Cassava Bacterial Blight Disease (CBB)	ILRI Biosafety Level 2 Facility, Nairobi County	Disease resistance – Cassava Bacterial Blight	Apr 14 2014

	International Livestock Research Institute (ILRI)	Application to develop a transformation system for common beans under contained use; for transformation of tepary bean, Arabidopsis thaliana and Tobacco; and to identify factors involved in plant-aphid interactions under contained laboratory, greenhouse and growth chambers.	ILRI BeCA hub-Nairobi (Nairobi County)	Genetic research (Transformation protocol development)	July 21, 2014
	International Livestock Research Institute (ILRI)	Application for contained use activities involving genetic transformation of banana for resistance against nanoviruses, caulimoviruses and aphid vectors under laboratory and glasshouse conditions.	ILRI BeCA Hub- Nairobi (Nairobi County)	Insect resistance and virus resistance	June 30, 2015
	Kenyatta University	Application for contained use of genetically engineered maize for drought tolerance under laboratory and greenhouse conditions.	Plant Transformation Laboratory (PTL), Kenyatta University, Main Campus- Thika Road	Drought tolerance	Jan 15, 2016
	International Livestock Research Institute (ILRI)	Application to conduct contained use activities involving uncoupling interaction between maize chlorotic mottle virus (MCMV) and sugarcane mosaic virus (SCMV) to develop MLND resistant maize	ILRI BeCA Hub- Nairobi (Nairobi County)	Virus resistance	May 20, 2016
	International Livestock Research Institute (ILRI)	Application for modified sweet potato for weevil resistance through RNAi technology for contained use under laboratory and greenhouse trials in Kenya.	ILRI BeCA Hub- Nairobi (Nairobi County)	Insect resistance using the RNAi Technology.	May 31, 2017
	International Livestock Research Institute (ILRI)	Application to conduct contained use activity involving genome editing of yam expressing disease resistance and enhanced Vitamin- A, under laboratory and greenhouse conditions.	ILRI/BeCA Hub- Nairobi (Nairobi County)	Disease resistance and nutritional enhancement.	Jan 26, 2018
	International Livestock Research Institute (ILRI)	Application involving development and testing of transgenic potato with resistance to bacterial wilt using pflp and efr genes, under laboratory and greenhouse conditions.	ILRI - CIP (Nairobi County)	Disease resistance.	Jan 26, 2018
	International Livestock Research Institute (ILRI)	Application to conduct contained use activity involving banana and plantain research for nematode resistance under laboratory and greenhouse conditions.	ILRI BeCA Hub- Nairobi (Nairobi County)	Nematode resistance	Apr 26, 2018

Source: National Biosafety Authority TABLE 13.3

BRIEF ON THE ENVIRONMENTAL IMPACT (EIA) PROJECT REPORT FOR THE PROPOSED NATIONAL PERFORMANCE TRIALS (NPTS) ON Bt-COTTON AT FIVE KALRO STATIONS SITES (MWEA, KA-TUMANI, KAMPI YA MAWE, BURA TANA AND PERKERRA)

DETAILS OF THE APPROVAL PROCESS

1. Submission

The EIA Project Report for the proposed project for National Bt-Cotton Trials at five sites (Mwea, Katumani, Kampi ya Mawe, Bura Tana and Perkerra) was submitted on January 23, 2018.

2. Summary of comments from lead agencies and other stakeholders

- On February 14, 2018 the National Biosafety Authority recommended that the proponent should adhere to the laid down procedure of KEPHIS and NEMA in setting up the project; follow the biosafety laws; demonstrate that project will contribute to economic growth in regards to industrialization and poverty reduction; highlight the project's strategic contribution in abating ball worm pest threat.
- Decision was reached that the project should be given due support given that it will have minimal impacts to the environment, it has potential to increase healthy cotton harvests, the project should be allowed to commence and NPTs activities be managed within the provided environmental management plan, National Performance Guidelines. The project should be allowed to commence and NPTs activities be managed within the provided EMP, NPT guidelines and Kenyan Biosafety Laws.
- On February 22, 2018 the County Director of Environment Kirinyaga County stated that the trial site ideal given that its within a designated research station under the Management of KEPHIS.
- On April 5, 2018 the Society for Biotech farmers of Kenya (SOBIFAK) expressed their support for the proposed project and were hopeful that they would access the Bt Cotton Seeds by end of 2018 as promised by the Government.
- On March 28, 2018 the Ministry of Health recommended that they agree with the EIA report save for the solid waste from the Bt Cotton seeds packaging materials laced with seed preservatives should managed in line with the WHO and NEMA standards and that negative externalities might result in unintended effects on non-target organisms and other ecosystem disruption therefore the need for proper regulatory approaches to prevent adverse effects to both human and environmental health and safety.
- On May 28, 2018 the County Director of Environment Tana River County recommended that the site is ideal for the proposed project but however cautioned that measures must be put in place to abate genetic escape between Bt-Cotton fields and other Cotton Fields.
- On June 6, 2018 the County Director of Environment Machakos County recommended that the proposed trial site is ideal given that it is within trial farms of KALRO Katumani in Machakos County.

3. Review and issuance of record of decision

A technical review was undertaken and the proposed project was licensed with sixty (60) conditions on May 30, 2018. Some of the conditions included that the license shall be valid for 24 months from the date of granting the licence and that the introduction of the Bt Cotton National Performance Trials (NPTs) is strictly for the National Performance trials and data collection and NOT for cultivation or importation or placing on the market of Bt Cotton.

The Kenya Government approved the commercial planting of Bt Cotton at the end of 2019[135] and began distributing genetically modified (GM) and hybrid seeds in a bid to increase cotton production in March 2020.[136] It will be interesting to follow these developments, considering that the jury is still out on whether Bt Cotton delivers better yields for small-scale farmers. This is important, considering that doubts have been raised from South Africa and Burkina Faso, the two African countries that have been used to promote GM crops for poor farmers.[137]

E. Conclusion and way forward

Kenya has a regulatory framework for the governance of GMOs. This is outlined in the Constitution; the Biosafety Act and Regulations under it; the Environment Management and Coordination Act; and the Biotechnology Policy. That the ban on GMOs remained in place for ten years despite the work that has been ongoing and at various stages is testament to the ambivalence to GM that continues to pit opposing groups against one another. The October 2022 Despatch from Cabinet has lifted the ban but is still too soon to gauge whether this will deal with the impacts of the ambivalence. A number of things need to be done moving forward. One is the release to the public of the report by the committee appointed to advise the government after the ban on the importation of GM foods was instituted. So far bits and pieces of it have been reference including in by the President in the Despatch but full access to the public will go a long way in facilitating informed decision-making. It should be followed by a new report taking the developments of the period between 2012 and 2022 into account. This can be the basis for an informed decision on the way forward. Second and relatedly, the concerns of the opponents of the technology should be addressed.

135 ISAAA, Crop Biotech Updates (December 2019).

136 V Meeme, 'Kenya Pushes GMO Cotton Farming to Meet Soaring Demand for Mask' https://allianceforscience.cornell.edu/blog/2020/04/kenya-pushes-gmo-cotton-farming-to-meet-soaring-demand-for-masks/ 16 November 2020).

137 B Dowd-Uribeand MA Schnurr, 'Briefing: Burkina Faso's Reversal on Genetically Modified Cotton and the Implications for Africa', *African Affairs* (2016) 1-12

CHAPTER 14

Electronic Waste Management in Kenya: The Implications of Environmental Governance

Mercy Wanjau

A. Introduction

The consequences of the digital age are no longer a pending question or guessing game. Four decades since the invention of the mobile phone,[1] six decades from the invention of the personal computer,[2] and one century from the first home use refrigerator was placed in an average income home;[2] the advantages have been immeasurable. Technological advances have continued to drive innovations, leading to a constant launch of new product ranges that lay a claim to being 'faster', 'smarter', 'lighter' and, therefore, offering more value to the user than the 'old and out of date' gadgets already in the market. This proliferation of gadgetry is pushed at an astonishing rate by the consumer-oriented nature of the society today.[3] The high proliferation of technology has also led to increased rates of obsolescence. A system to sustainably dispose of, recycle or reuse these electronic gadgets is an issue that cannot be overlooked any more considering the fact that old, damaged, and outdated electronic devices become waste.

Waste Electronic and Electrical Equipment (WEEE), also known as e-waste, is the term given to old, end-of-life electronic appliances that have ceased to be of any value to their owners.[4] A practical definition is ' any electronically powered appliance that fails to satisfy the owner for its originally intended purpose.'[6] These electronic appliances contain toxic substances in some of their components, making them hazardous objects if carelessly released into the environment.

Electronic waste or e-waste is one of the emerging problems in developed and developing countries worldwide. Electronics have taken up such a prominent place in our lives and affairs yet not many pause to reflect on what happens to these gadgets when we discard or upgrade. The world is hungry for electronic devices and this is witnessed in developing countries by the high uptake of the mobile phone and computers. Given the decreased lifespan of these gadgets, this waste stream can only continue to increase. Urbanization, the emergence of a global culture and the ever-increasing use of microprocessors in common objects are other key factors that continue to contribute to the increase in electronic devices and in time, e-waste. Kenya is no exception in this trend.

B. Regulatory framework for e-waste management in Kenya

The management of e-waste in Kenya is governed by a number of instruments. These include international agreements that Kenya is a signatory to and domestic laws that provide for the legal and institutional framework for waste management.

1 S Maggie, BBC interview with Martin Cooper, BBC News (21 April 2003) 2 'The IBM 610 Auto-Point Computer', Columbia University.

2 'Refrigerator', Wikipedia (2018) <https://en.wikipedia.org/w/index.php?title=Refrigerator&oldid=863768933> accessed 20 October 2018

3 Fact Sheet: Management of electronic waste in the Unites States. Available at <www.epa.gov/osw/conserve/materials/ecycling/docs/fact7-08.pdf > accessed 20 October 2018

4 https://www.calrecycle.ca.gov/electronics/whatisewaste (Accessed 4 Feb, 2019) 6 www.unep.fr/scp/waste/ewm/faq.htm#1 (Accessed 20 October 2018)

Domestic legislation

The Constitution

The Constitution of Kenya, 2010, in its preamble states:

> We, the people of Kenya-
> …….
> RESPECTFUL of the environment, which is our heritage, and determined to sustain it for the benefit of future generations:
> …….
> ADOPT, ENACT and give this Constitution to ourselves and to our future generations".[5]

Article 42, under the Bill of Rights in the Constitution, further elaborates the rights and fundamental freedoms of every person to a clean and healthy environment. Article 69 sets out obligations in respect to the environment, among them being the elimination of processes and activities that are likely to endanger the environment.[6]

Recognizing the sensitivity of environmental resources, the Constitution further provides that every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.[7] Article 70(2) of the Constitution empowers courts to make orders, or give any directions considered appropriate, towards the enforcement of environmental rights. It is worth noting that for purposes of the enforcement of environmental rights, the Constitution does not require an applicant to demonstrate that any person has incurred loss or suffered injury.[8] This provision demonstrates the fragility and finite nature of environmental resources and resonates with the overall spirit of constitutional interpretation towards promotion of good governance.[9]

Within the Bill of Rights are articulated rights and fundamental freedoms that have a direct bearing on access to information and communication technologies (ICTs). Article 33 provides that every person has the right to freedom of expression, which incudes the freedom to seek, receive or impart information or ideas. Article 34 provides for the freedom of media, and articulates the freedom of establishment of broadcasting and other electronic media. The implementation of these rights and fundamental freedoms calls for the development of robust, quality and affordable ICT infrastructure and a supporting ecosystem of gadgets in order to foster inclusion in the digital economy.

One of the main shifts in governance in Kenya that was introduced through the promulgation of the 2010 Constitution was the devolution of government and the formation of counties as units of governance,[10] alongside the national government. Counties are outlined in the Constitution's First Schedule.[11] The functions of the county and national governments are spelt out in the Constitution's Fourth Schedule. Protection of the environment is the function of the national

5 Constitution of Kenya, 2010.
6 Ibid at Art 69(1)(g).
7 Ibid at Art 69(2).
8 Art 70 (3).
9 Art 259(1)(d).
10 Constitution of Kenya, 2010, Art 176; Chapter 11 deals with the structures of the devolved government, Part 1 on the objects and principles of devolved government and Part 2 on county governments
11 Ibid at Art 6

government, while county governments have the role of implementing all national policies on environmental conservation.[12]

The Environment Management and Coordination Act No. 8 of 1999

The management of electronic waste in Kenya can be traced to legislative efforts made towards safeguarding the environment in an effort to domesticate several treaty commitments. The EMCA heralded these efforts towards management and disposal of e-waste.

The preamble of the EMCA establishes it as:

> An Act of Parliament to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and for matters connected therewith and incidental thereto.

The law reinforces the right to a clean and healthy environment as stipulated in the Constitution, and elaborates the procedure for redressing infringements of this right. The EMCA also provides a forum where infringements can be channeled, the Environmental and Land Court established under the Constitution.[15] International environmental law principles, such as the precautionary principle and the polluter-pays principle, are among the guiding beacons for the court.[13] It is, however, important to note that this law predates the Constitution, 2010, having come into force almost a decade earlier. This is indeed a positive recognition of sensitivity to environmental governance and the subsequent constitutional anchorage of the right to a clean and healthy environment aligned the stars perfectly.

The EMCA established the National Environment Management Authority as the environmental governance body in the country entrusted with a number of functions including:

> to co-ordinate the various environmental management activities being undertaken by the lead agencies and promote the integration of environmental considerations into development policies, plans, programs and projects with a view to ensuring the proper management and rational utilization of environmental resources on a sustainable yield basis for the improvement of the quality of human life in Kenya.[17]

The EMCA establishes that one of the objects of NEMA is 'to monitor and assess activities, including activities being carried out by relevant lead agencies, in order to ensure that the environment is not degraded by such activities.'[14] This, in the context of e-waste management, makes it part of the roles of NEMA to assess the disposal of e-waste and ensure that the environment is not degraded by its disposal. Through mechanisms such as strategic environmental impact assessment[15] and environmental audits and monitoring,[16] NEMA is mandated to work and coordinate with the county government and relevant stakeholders to ensure ecologically sound methods of e-waste management are established and adopted. NEMA is also mandated to monitor compliance with national and county environmental action plans, and to take any steps it deems fit to determine if the plans are being complied with.[17]

12 Ibid at Fourth Schedule Part 1, No. 22 for national government read together with Part 2, No. 10 15 Ibid at Art 162(2)(b)
13 Environment Management and Coordination Act, s 2. 17 Ibid, s 9.
14 Ibid.
15 Ibid 57A.
16 Ibid Part VII.
17 Ibid s 41A(1).

The Constitution also makes it a function of the county government to handle refuse removal, refuse dumps and solid waste. Case law has since evolved and clearly enunciated that one of the functions of the county government is to handle **all** waste management as contemplated under the Fourth Schedule. This judicial pronouncement in the case of *Martin Osano Rabera, John Ndung'u Kinyanjui v Municipal Council of Nakuru, NEMA and County Government of Nakuru*[18] can authoritatively be interpreted to include e-waste.

In this case, the petitioners were residents of Nakuru living near Gioto waste disposal site. They sought a declaration that their right to a clean and healthy environment under Article 42 of the Constitution had been violated. In his judgment, Ohungo J. observed that the obligation to ensure a clean and healthy environment imposed on everybody – from the State to all persons with be they natural, juridical, association or other group of persons whether incorporated or not.[19] In the build-up to their case, the petitioners quoted JB Ojwang' SCJ from the book, *The Constitution of Kenya, 2010: An Introductory Commentary,* stating as follows:

> The environment is accorded an eminent place in the governance agenda of the Constitution. Governance, which is required to be performed as a service to the people, must comply with 'national values and principles', one of which is sustainable development. It is common knowledge that the first principles of sustainable development relate to the basic elements that sustain life: and the conservation of the environment is invariably the first component of this principle. The complexities of the environment, and its vulnerability to inappropriate human activity, render it a sensitive sphere of disputes in respect of which the judicial role is mandatory. A constitution so pre-occupied with safeguards for social welfare has necessarily to accord primacy to the environment and to the judicial role therein.[20]

He found that while the 2nd Respondent had a statutory mandate to offer technical support on environmental matters in Kenya, including waste disposal, the primary obligation in waste disposal and management rested with the county governments.[21] He found for the petitioners.

From this judgment, the centrality of the county set up within the framework of environmental governance is apparent. NEMA is established to promote environmental conservation within the national and county coordination framework.[22] The object and purpose for which the Authority is established is to exercise general supervision and coordination over all matters relating to the environment and to be the principal instrument of government in the implementation of all policies relating to the environment.[23]

Through the mechanism of the County Environmental Action Plans, every county is required within one year of the commencement of the revised EMCA, to prepare a County Environmental Action Plan for adoption by the County Assembly. The purpose of the Action Plan is to secure

18 Petition No. 53 of 2012 (eKLR).
19 Ibid para 49.
20 PLO Lumumba & L Franceschi (Strathmore University Press, 2014)196-197.
21 *Martin Osano Rabera, John Ndungu Kinyanjui v Municipal Council of Nakuru, NEMA & County Government Of Nakuru* ,para 47.
22 Environmental Management and Coordination Act s 7.
23 Ibid s 9(1), 28 Ibid s 40(1).

the protection of the environment across the country.[24] Consequently, all policies, plans and programmes for implementation shall be subject to strategic environmental impact assessment, particularly those that the Authority determines are likely to have significant effects on the environment.[25] The Second Schedule of the Act stipulates the kind of projects requiring submission of an Environmental Impact Assessment Report. Curiously, there is no inclusion of ICT infrastructure in the categories, despite the growing volumes of e-waste.

The law recognizes the existence of different standards of waste and prohibits dangerous handling and disposal of wastes.[26] It requires that every person whose activities generate waste shall employ measures essential to minimize wastes through treatment, reclamation and recycling.[27] The law also provides for a mechanism for determining standard criteria for the classification and management of hazardous wastes.[28] Additionally, the law recognizes the peril of transboundary movement of hazardous wastes and provides regulatory cautions against importation of hazardous waste into and out of Kenya.[29] It provides that penalties under this category shall, upon conviction, be a fine of not less than Ksh1 million shillings or imprisonment for a term of not les than two years, or both.[30] Further, a person found guilty of trafficking in hazardous wastes shall, in addition to the prescribed penalty, be responsible for the removal of waste from Kenya and for its safe disposal.

It is not disputed that Kenya has been acclaimed as a global leader in technology innovation. The Constitution articulates the need for environmental protection in no uncertain terms. A statute exists to govern matters of environmental governance in Kenya. It is, however, worth noting that given that e-waste is one of the fastest growing waste streams in Kenya, there are no elaborate guidelines and provisions to deal with e-waste specifically. The penalties provided for are not only low, but they also do not have flexibility for adjustment to fit the magnitude of non-compliance.

In the absence of a prescription, Kenya largely handles e-waste in a manner similar to conventional municipal waste. Unlike conventional municipal waste, however, certain components of e-waste contain toxic substances, which can pose a threat to human health and the environment. Due to the presence of these substances, recycling and disposal of e-waste should be treated as a critical matter to demonstrate Kenya's readiness to deal with the future challenges of e-waste.

International statutes

Kenya is a signatory to a number of international instruments dealing with the transboundary movement of hazardous waste. It has also enjoined itself to instruments that recognize the importance of a clean and safe environment. It recognizes that economic and social rights relating to the environment are closely linked to, and affect, the quality of life and safety of individuals.

24 Ibid s 41A(1)(ii).
25 Ibid s 57A, (2)(b).
26 Ibid s 87.
27 Ibid s 87(4).
28 Ibid s 91(1),(2).
29 Ibid s 91(3),(4).
30 Environment Management and Coordination Act, s 91(6), s 141. 36 Ibid s 91(6).

The Banjul Charter

The African Charter on Human and Peoples' Rights, popularly known as the Banjul Charter, is an international human rights instrument that is intended to promote and protect human rights and basic freedoms on the African continent.[31] Kenya ratified the charter on January 23, 1992, making the Banjul Charter's provisions obligatory since they are part of Kenyan law. Article 24 of the charter provides that 'All peoples shall have the right to a general satisfactory environment favourable to their development.' The establishment of this right in the charter assures every person on the African continent the right to a clean and healthy environment, and is in harmony with Article 42 of the Constitution of Kenya.

The Bamako Convention

African nations created the Bamako Convention, a treaty prohibiting the importation of any hazardous (including radioactive) waste.[32] The Convention came into force in 1998 and was prompted by negotiations of the Basel Convention.[33] During the negotiations for the Basel Conventions, it became apparent that this treaty did not prohibit trade of hazardous waste to less developed countries (LDCs).[34] There was a frightening realization that many developed nations were actually exporting toxic wastes to Africa.[35] Scary information about the importation of hazardous waste into the sleepy village of Koko in Nigeria was the trigger for discussions around the Bamako Convention.[36] Obviously, the less developed nations lacked the infrastructure to effectively handle the waste.[37]

The Bamako Convention covers more wastes than those included under the Basel Convention. It not only includes radioactive wastes, but also includes any waste with a listed hazardous characteristic or a listed constituent as a hazardous waste. It defines hazardous waste under Article 2 and supplements it with a list of materials to be regarded as hazardous. It also requires all parties to the Convention to take appropriate legal, administrative and other measures within the area under their jurisdiction to prohibit the importation of all hazardous wastes, for any reason, into Africa from non-contracting parties. It obligates all the parties to the Convention to 'ensure the availability of adequate treatment and/or disposal facilities for the environmentally sound management of hazardous wastes which shall be located, to the extent possible, within its jurisdiction.'While the treaty may not have clearly made provision for e-waste, having been negotiated at the dawn of the technology revolution, its spirit was aligned to handle emergent concerns, such as the need to minimize the consequence of pollution for the sake of human health and the environment.

31 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force on 21 October 1986). < http://www.achpr.org/instruments/achpr> accessed on 20 October, 2018.

32 The Bamako Convention (adopted in January 1991, entered into force on 21 April 1998). <http://www.unenvironment.org/exploretopics/environmental-governance/what-we-do/strengthening-institutions/bamako-convention> accessed 20 October 2018.

33 Ibid accessed 4 February 2019.

34 Ibid.

35 Ibid.

36 <https://timeline.com/koko-nigeria-italy-toxic-waste-159a6487b5aa> accessed 4 February 2019 In the mid 1980s, Italy could only process 20 per cent of the toxic waste it generated. The rest was quietly sent abroad. Why not, when you could pay a poor African community to store your dangerous chemicals? The small fishing village of Koko, Nigeria, made international headlines in 1988 when it was discovered that two Italian firms had arranged for the storage of 18,000 drums of hazardous waste with Koko residents. The containers were disguised as building materials and offloaded into a local man's vacant yard for $100 per month.

37 < https://www.informea.org/en/treaties/bamako/text > accessed 20 October 2018.

The Basel Convention

Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, or the Basel Convention in short, is an international treaty with the overarching objective of protecting human health and the environment against the adverse effects of hazardous wastes.Its main aims are the reduction of hazardous waste generation and the promotion of environmentally sound management of hazardous wastes, wherever the place of disposal, and the restriction of transboundary movements of hazardous wastes except where it is perceived to be in accordance with the principles of environmentally sound management. The Convention acknowledges the risk of damage to human health and the environment caused by hazardous wastes, and places a number of obligations on the signatories to the convention. Primary among them is the need to take necessary measures to ensure that the management of hazardous wastes is consistent with the protection of human health and the environment.

The Convention, under Annex VIII, categorizes waste electrical and electronic assemblies or scrap as hazardous and as such falling within the purview of the Convention.[38] It goes a step further and lists a number of compounds and elements[39] that it deems to be hazardous and as such requiring a specialized level of care in their management and disposal. The Convention places an obligation on all parties to ensure the availability of adequate disposal facilities for the environmentally sound management of hazardous wastes and other wastes.[40] The Convention also places an overarching obligation on each party to take appropriate legal, administrative and other measures to implement and enforce its provisions, including measures to prevent and punish conduct in contravention of the Convention.[41]

Kenya acceded to the Basel Convention on June 1, 2000. At the time, the 1963 Constitution with its amended versions (running until August 2010) did not specify the applicability of international law in Kenya. The lack of constitutional engagement on this issue led it to be practised in an ad hoc manner.[42] The emerging practice that developed over time was of dualistic application, where treaties gained force of law in Kenya through transformation into municipal law.[43] The legislative efforts that led to the enactment of the Environment Management and Coordination Act (EMCA)[44] within this time period were, therefore, part of the process of domesticating the respective treaty commitments that Kenya had made.

38 Ibid Annex VII: A1180.

39 Examples include: Metal wastes and waste consisting of alloys of any of the following: • Antimony • Arsenic • Beryllium • Cadmium • Lead • Mercury• Selenium• Tellurium• Thallium, Ashes from the incineration of insulated copper wire, Dusts and residues from gas cleaning systems of copper smelters, Wastes having as constituents or contaminants any of the following: Arsenic; arsenic compounds ,Mercury; mercury compounds, Thallium; thallium compounds, Leaching residues from zinc processing, dust and sludge such as jarosite, hematite, spent electrolytic solutions from copper electro refining and electro winning operations etc.

40 Basel (n 51) Art 2.

41 Basel (n 51) Art 4.

42 JN Maina, 'Do Articles 2(5) and 2(6) of the Constitution of Kenya 2010 Transform Kenya into A Monist State?' (2013) SSRN p 9 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2516706> accessed 8 February 2019.

43 Ibid p 9. Though widely considered that the emerging practice was of dualistic application, the ad hoc practice created a state of ambiguity in treaty practice, generally, in terms of determining which treaties were binding on Kenya and those that were not. Some treaties were considered binding upon ratification, regardless of not fulfilling the dualist requirement of transformation, while on the other hand, some treaties gained the force of law in Kenya following the dualist practice to completion, meaning they were first transformed into municipal law.

44 Act No. 8 of 1999.

Following the enactment of the Constitution of Kenya on August 27, 2010, Articles 2 (5) and 2 (6) clarified the previous treaty making tradition, which had been characterized by many anomalies and inconsistencies.[45] Article 2(5) provided that the general rules of international law shall form part of the law of Kenya; and Article 2(6) provided that any treaty or convention ratified by Kenya shall form part of the law of Kenya.

To guide the implementation of this provision, Parliament enacted the Treaty Making and Ratification Act.[46] This law aims to give effect to the provisions of Article 2 (6) of the Constitution, and to provide the procedure for the making and ratification of treaties. Among other things, this law provides for the involvement of the National Executive, the Cabinet and the National Assembly in initiating negotiations[47] and obtaining approval before ratification of a treaty. The Constitution gives more clarity on the relationship of international law in the Kenyan legal system, thus obviating the need for 'domestication' as was the case before the 2010 Constitution came into force. By and large, the Constitution steps up the incorporation of international law into the national legal system through a largely monist approach.

The Nairobi Declaration on the Environmentally Sound Management of Electrical and Electronic Waste

The parties concluded this declaration to the Basel Convention during their eighth meeting.[48] The parties acknowledged that all countries were benefitting from increasing access to electrical and electronic products and noted that the rapid expansion of the production and use of e-products resulted in an increase in the generation of used and end-of-life e-products. This increase was underpinned by risks to the environment and human health arising from the toxic and hazardous nature of e-waste. With that in mind, the declaration included a number of provisions geared specifically towards e-waste management.

The parties agreed to 'encourage national, regional and global comprehensive actions for the environmentally sound management of e-waste and end-of-life equipment through shared responsibilities and commitments from all concerned stakeholders'.[49] The declaration also established a road map for e-waste management outlining the need for 'integrated waste management in order to reduce the harm caused by the hazardous components contained in e-waste by ensuring proper collection of end-of-life equipment and its separation from household or municipal waste, achieving this through cooperation with municipalities and nongovernmental organizations, and the full participation of the general public'.[50]

The Nairobi Declaration recognized the importance of law in the effective management of e-waste and called for 'improvement of waste management controls through the establishment of robust national policies, legislation and diligent enforcement, including producers' and traders' responsibilities as well as take-back and recycling schemes and their targets'.[51]

45 JN Maina (n 59) p 11.
46 Act No. 45 of 2012.
47 Ibid Section 4(1) provides that subject to the provisions of this Act, the National Executive shall be responsible for initiating the treaty making process, negotiating and ratifying treaties.
48 Eighth meeting of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Nairobi, 27 November–1 December 2006).
49 Declaration 6.
50 Declaration 7.
51 Declaration 7. 68 Article 27.

From the foregoing, it is clear that Kenya has consistently taken a lead role in treaty making efforts geared towards upholding the right to a clean environment. The various instruments have elucidated roles and obligations of various stakeholders, and encouraged governments to collaborate with the various stakeholders locally and internationally in finding effective solutions.

Due to government's commitment to adopt the e-platform for delivery of public services, Kenya has witnessed a progressive adoption of ICTs as a platform for the realization of other rights and fundamental freedoms, such as the right to equality and freedom from discrimination, human dignity, privacy, economic and social rights, language and culture and consumer rights.[52] Due to the scalable nature of ICTs, this growth trend would be expected to continue, hence the need for comprehensive frameworks to govern handling of e-waste.

C. Drivers of e-waste in Kenya

The ICT sector has experienced profound growth in the past two decades, with all key indicators for access pointing to a positive trend.[53] This has been accelerated mainly by the increased adoption of ICT products, ICT processing technologies and ICT support services.[54] The devolution of government created demand centres where none existed before, which has in turn increased the demand of ICT equipment.

The continued implementation of the Broadband[55] Access Strategy[56] is expected to drive Internet penetration and the achievement of socio-economic advantage for Kenyans.[57]

Vision 2030[58] recognizes the enabling role of ICTs and anchors some of its key aspirations upon the availability and adoption of broadband technologies. The continued realization of this advantage is expected to be achieved in keeping with the policy, legal and regulatory framework

52 Ibid Art 46.

53 Communications Commission of Kenya, 'Annual Report 2007-2008' <https://ca.go.ke/wp-content/uploads/2018/02/AnnualReport-for-the-Financial-Year-2007-2008.pdf > accessed 7 February 2019 The ICT sub-sector recorded a growth of 31.6 per cent in 2007. Mobile telephony dominated the telecommunications market by posting a rise of 39 per cent in the subscriber base to stand at 12.9 million in June 2008 up from 9.3 million in June 2007. In the 2016/2017 Financial Year, the number of mobile subscribers stood at 40.3 million representing a penetration rate of 88.7 per cent. In 2016/17, there was an uptake of broadband services, leading to a rise in subscriptions from 10.8 million in the previous year to 15.4 million. The subscriptions for Data/Internet services stood at 29.4 million. With respect to the number of registered dot .KE domain names, there was an increase from 58,206 to 66,724 domains.

54 'Foundation for the Pillars' < https://vision2030.go.ke/enablers-and-macros/#80> accessed 20 October 2018.

55 <https://www.techopedia.com/definition/794/broadband> accessed on 7 February 2019. Broadband is a high-data-rate connection to the Internet. The technology gets its name as a result of the wide band of frequencies that is available for information transmission.

56 The National Broadband Strategy: A Vision 2030 Flagship Project <https://ca.go.ke/wp-content/uploads/2018/02/NationalBroadband-Strategy.pdf> accessed on 12 December 2019. Broadband is a strategic infrastructure for a 21st Century economy. Not only does broadband secure inclusion within the global economy, it also goes a long way to underpin the competitiveness of a nation and its success is progressing the achievement of the Millennium Development Goals. Having a National Broadband Strategy gives Kenya a competitive edge in the region as very few countries in Africa have established a similar framework. Subsequently, the broadband definition in Kenya for the period 2013- 2017 is as follows: Connectivity that is always on and that delivers a minimum of 5mbps to homes and businesses for high-speed access to voice, data, video and applications for development. The speeds proposed from 2017 onwards are subject to review based on technological developments and other factors that may influence their revision.

57 Broadband Strategy (n 79) accessed 12 January 2019.

58 'Kenya Vision 2030 (Popular Version)' < https://vision2030.go.ke/publication/kenya-vision-2030-popular-version/> accessed 7 February 2019. This vision aims to transform Kenya into a newly industrializing, middle-income country providing a high quality of life to all its citizens by 2030 in a clean and secure environment. It was launched in 2008 by then President Mwai Kibaki. The Vision is anchored on three pillars – social, economic and political whose foundations are sector specific enablers. In the ICT sector, the inspiration is to upgrade national ICT infrastructure, improve public service delivery through ICT, achieve significant development of the ICT industry and provide robust personal computers at a low cost to the local market. 80 Ibid pp 10.

of the sector, but also in fidelity with other complementary frameworks and overall, to the Constitution.

The removal of tax levies on computers; promotion of e-learning in institutions of higher learning; and the launch of the e-government strategy (2004) with the aim of mainstreaming ICT in Kenya created a huge demand for computers and related accessories.[59] The adoption of e-government strategies[60] and the one-laptop-per-child government programme[61] have also enhanced access to and availability of electronic gadgets within the country. The high rate of obsolescence of smart electronic gadgets ensures that the pull for more gadgets is constant.

Kenya also has a youthful population,[62] also referred to as 'digital natives', who spend a substantial time online. Their online access is through electronic gadgets, especially mobile devices. In other quarters, donations of ICT equipment from the West, massive disposal of ICT equipment by government, and the rising trends of consumerism also fuel the rise of electronic equipment within the country and ultimately the resulting e-waste.

Current statistics on mobile phone subscriptions are a good demonstration of the increase of electronic gadgets. As at June 30, 2022, the number of mobile service subscriptions in the country stood at 64.6 million..[63] This was an increase of 13 per cent when compared to the 57.0 million subscriptions recorded as at June 30, 2020.[64] This has resulted in increased mobile penetration of 130.9 per cent during the subject quarter from 119.9 per cent reported in the quarter ending 30th June 2020.[87]

In the broadcasting sub-sector, the switch from analogue broadcasting to digital transmission of radio and TV signals in 2015 in Kenya led to massive procurement of Set-Top Boxes (STBs). These boxes were necessary to allow owners of analogue TV sets to access digital signals. While the switch-over did not lead to automatic abandonment of analogue TV sets, the marketing hype around it resulted in many consumers upgrading their TV sets to digital versions.[65]

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59 Otieno & Omwenga, 'E-waste Management in Kenya: Challenges and Opportunities (2015) 6 JETCIS 662.

60 AN Mungai, 'E-government Strategy Implementation and Performance of the Public Sector in Kenya' [201] 2 IAJHRBA 305 <http://www.iajournals.org/articles/iajhrba_v2_i3_301_338.pdf> accessed 8 February 2019. The e-government strategy is a mechanism developed to reach the public and to promote performance by enhancing e-participation and e-consultation in the policy/ decision- making process. ICT infrastructure is a pre-requisite to e-government. Other elements include e-level applications, e-government institutional framework, e-government legal framework, data management capability, information security and programme capability.

61 'Account for laptop project'< https://www.nation.co.ke/oped/editorial/Account-for-laptop-project/440804-4678068117ba3y/index.html> accessed 7 February 2019. The one-laptop-per-child programme, launched in 2013, was a political party promise under Jubilee's Digital Learning Programme.

It is meant to entrench information and communication technology (ICT) in the teaching and learning process in primary schools. The idea was itself noble and timely, coming at a time when the world was experiencing a dizzying technological revolution.

62 'Kenya's youth percentage among the highest globally' *Business Daily Africa* (Nairobi 27 August 2017) <https:// www.businessdailyafrica.com/economy/Kenya-youth-percentage-among-the-highest-globally/3946234-4072946jvv2x2/index.html> accessed 9 February 2019. According to data from US-based Population Reference Bureau (PRB), Kenya's ratio of youth (aged 15-24) to the population stands at 20.3 per cent, above the world's average of 15.8 per cent and 19.2 per cent for Africa.

The millennials add up to 10.1 million out of Kenya's population of 49.7 million.

63 Communications Authority of Kenya, 'Fourth Quarter Sector Statistics Report for the Financial Year 2021/2022 (April – June 2022)' Pg 1 < https://www.ca.go.ke/wp-content/uploads/2022/09/Sector-Statistics-Report-Q4-2021-2022.pdf> accessed 11 October 2022.

64 Communications Authority of Kenya, 'Fourth Quarter Sector Statistics Report for the Financial Year 2019/2020 (April – June 2020)' Pg 8 < https://www.ca.go.ke/wp-content/uploads/2020/10/Sector-Statistics-Report-Q4-2019-2020.pdf> accessed 11 October 2022.

65 M Wanjau, Chapter 7, 'E-waste: *Whose responsibility?'* Trends in Telecommunication Reform (2011) 2-4

In the computing and information sub-sector, there has been not only a drastic reduction in size but also an increase in the memory of devices like compact discs, digital video discs, flash disks, memory cards and hard drives. This has led to the demand for equipment with faster processing speed, larger memory and Liquid Crystal Display/Thin Film Technology (LCD/TFT) units, which are lighter and occupy less space. This has led to a high turnover of obsolete accessories, which in turn has resulted in the generation of e-waste.[66]

Despite growing international interest in e-waste, official statistics are scanty. In 2017, only 41 countries in the world collected statistics on e-waste.[67] Between 2017 and 2019, only nine countries (apart from EU Countries) have started compiling e-waste statistics under a harmonised measurment framework. [68]

In Kenya, the only documented baseline study on e-waste was conducted between December 2007 and April 2008. The study estimated that approximately 3,000 tonnes of e-waste was generated annually from computers, monitors and printers alone.[69] The study also observed that there was a great likelihood of an increase given the growth dynamics of the ICT industry and the increased importation of equipment to satisfy the rising demand.[70] The year-on-year trends have validated the observations made in the baseline study.

D. Handling of e-waste

Having purchased electronic gadgets dearly, the trend is for consumers to store equipment that is at the end of its life in their houses. The non-existence of a clear collection system promotes the hoarding of gadgets in the hope that some use for them might arise in the future. The lack of some kind of incentive to surrender the gadgets might also contribute to the tendency to hold onto e-waste.

Collection and re-cycling

According to a UNEP report, the structure in the recycling chain for e-waste consists of three main steps: collection, sorting/dismantling and pre-processing (meaning sorting, dismantling, mechanical treatment), and end-processing (meaning refining and disposal).[71] The efficiency of the entire recycling chain depends on the efficiency of each step and on how well the interfaces between these interdependent steps are managed. Typically, in developing countries and economies in transition, the design of an effective e-waste recycling system revolves around the small enterprises in the informal sector that are numerous and difficult to regulate.[72] This is the case in Kenya, which had 15.3 million persons employed in the informal sector in 2021.[73] Given the sheer scale of the informal sector, its role in e-waste management should be embraced and leveraged upon.

66 M Wanjau, Chapter 7,'E-waste: Whose responsibility?' Trends in Telecommunications Reform (2011) pg. 10.

67 Global e-waste monitor < https://www.itu.int/en/ITU-D/Climate-Change/Documents/GEM%202017/Global-E-waste%20Monitor%202017%20.pdf> (2017) pp., 24, accessed 12 January 2019.

68 Global e-waste monitor <https://ewastemonitor.info/wp-content/uploads/2020/11/GEM_2020_def_july1_low.pdf > (2020) pp., 26, accessed 12 October 2022.

69 M Mureithi & T Waema, 'E-waste Management in Kenya'. Kenya ICT Action Network (KICTANet) (2008) pg 3.

70 Ibid.

71 *E-waste Volume II: E-waste Management Manual*, UNEP (2007) < http://wedocs.unep.org/bitstream/handle/20.500.11822/9801/EWasteManual_Vol2.pdf?sequence=3&isAllowed=y>pg. 13, accessed 20 October 2018.

72 Ibid p 11.

73 Economic Survey 2022 (https://www.knbs.or.ke/wp-content/uploads/2022/05/2022-Economic-Survey1.pdf > pp., 68, accessed 12 October 2022.

In the Kenyan context, a policy framework designed to create jobs within the devolved government structure would give the informal sector a vital role in waste management. It would also provide a balanced approach that ensures that e-waste is pulled out of the environment. It would provide mechanisms for waste collection from streets, markets, households, industries, and companies such as hotels or restaurants among others.[74] This would establish the place of the informal sector in the collection stage of e-waste management. This stage is critical in e-waste management as it is the foundation before moving to the sorting stage, where the e-waste is separated into the different categories depending on a number of factors.[75] With the right infrastructure in place, the informal sector can be responsible for the effective collection of e-waste. The collection stage of e-waste management poses the biggest challenge in Kenya because, as noted above, majority of Kenyans keep their old and out-of-use electronic and electrical equipment in their homes. However, with the right training, facilities and safeguards to protect the health of collectors from the hazardous nature of some of the components found in e-waste, they would effectively act as informal sorting centres before the e-waste is processed.

Extended product responsibility

This principle (also known as the polluter-pays principle) is the outcome of increased environmental awareness that has led to new government regulatory measures that address the disposal of e-waste. This strategy was designed to promote the integration of environmental costs associated with goods throughout their life cycle into the product's market price.[76] The principle would see to it that the cost involved in the cleanup, damage rectification and pollution prevention is reflected in the cost of the goods as the polluter bears the cost of ensuring the environment is in an acceptable state.[77]

The principle aims at promoting the internalization of the costs of returning the environment to an acceptable state in the cost of producing goods and services, usually through take-back legislation.[78] It seeks to achieve the following: the cost of production rises and hence the output of the polluting product declines; that the polluter may pass on part of the increased cost of production to the consumer in form of price alteration; and finally the polluter may switch from polluting to less polluting technologies or materials in an effort to reduce costs.[79]

While this principle would ease the burden on governments that may lack adequate resources and infrastructure to effectively handle e-waste, shifting the burden onto the manufacturer and consumer is premised on a high level of order and transparency in the market to allow for ease of tracing products to the manufacturer to insure the funding model.[80] Second, in a price sensitive market such as Kenya, it is likely that no-name, historical or orphaned products, which tend to be cheaper, comprise a significant part of e-waste and are not traceable to the manufacturer.[103]

74 "BODO: Why Informal Sector Will Produce the next Growth Story In Kenya (Nairobi, Business Daily Africa) <https://www.businessdailyafrica.com/analysis/ideas/informal-sector-will-produce-the-next-growth-story-in-Kenya/4259414-4287768-qs9a3p/index.html> accessed 20 October 2018..

75 Key factors taken into consideration include: Is the item of value and due for refurbishment or donation?, Does it contain hazardous material that requires specialized processing? Is it due for recycling and extraction of valuable metals such as gold and palladium?

76 M Wanjau (n 90) 26.

77 D Pearce, 'The Polluter Pays Principle' (1989) <http://pubs.iied.org/pdfs/8044IIED.pdf?> accessed 20 October 2018.

78 M Wanjau (n 90) 26.

79 Ibid.

80 Ibid at pp. 28, 103 Ibid.

This would lead to a faulty funding model with numerous free riders – a situation that would be ineffective and unsustainable.

Unmarked imports of ICT equipment

Unmarked shipments containing electronic waste, in the name of 'donations' or 'free trade', do make their way to parts of the world that have little capacity to interdict illegal imports or safely recycle electronics at the end of useful life. These digital dumping grounds are located primarily in Ghana, Nigeria, Pakistan, India and China.[81] This transboundary movement is pushed by some industries in the West because they have strict laws controlling the disposal of e-waste.[82] It is, therefore, cheaper to ship outdated and damaged computers to developing countries under the 'donation' label than to properly recycle.

Given Kenya's rising demand for electronic equipment, it remains vulnerable to dumping of useless equipment. Officers at ports of entry require specialized training for them to spot e-waste as it is often camouflaged as 'reusable' equipment. In other cases, some exporters may deliberately leave difficult-to-spot, obsolete or non-working equipment mixed within loads of working equipment (through ignorance, or to avoid more costly treatment processes).

E. Barriers to e-waste management

The policy response to the issue of e-waste is fragmented, with different government departments handling aspects of the cause–effect linkages in an uncoordinated manner. While traditional sector-specific policy making may have worked in the past, a more integrated system to identify and deal with cross-sector issues related to e-waste management, and at the same time manage attendant risks, would be more ideal. A coordinated approach between government departments in developing a comprehensive regulatory framework would go a long way in ensuring that key stakeholders at the national and county level are identified, and their roles and responsibilities recognized and articulated early. The current policy and regulatory space is not adequate to meet this challenge.

The possibility for embedding a collection system within the informal sector through a well thought out mechanism would be an effort to support local initiatives and drive job creation. It would also deter improper disposals in landfills and promote safer working conditions for workers in informal recycling. Promotion of public awareness and the need for e-waste management systems as well as responsible consumer behaviour would enhance public participation and ownership, creating momentum.

81 G Visionaries, 'Digital Dumping: an inside look at e-waste' <https://gvisionaries.wordpress.com/2011/05/02/digital-dumping-aninside-look-at-e-waste/> accessed 12 January 2019.

82 J Lepawsky, 'Legal Geographies of E-waste Legislation in Canada and the US: Jurisdiction, Responsibility and the Taboo of Production' (2012) 43 EG 1194-1206. By the end of 2010, 6 Canadian provinces and 24 US states passed e-waste legislation. The legal geographies of Canadian and US e-waste governance generate limits to, and extensions of, provincial and State jurisdiction: they limit democratic decision making to wastes already produced and refuse to, as it were, extend it beyond the factory gate into the manufacturing of products that will eventually be bought and used by consumer–citizens in Canada and the US. At the same time, they implicitly and explicitly extend jurisdiction beyond the territorial borders of the provinces and States in which they are promulgated by regulating for where, under what conditions, and who may rightfully receive and work with potentially valuable post-consumer electronics. Thus, more fundamental issues are at stake in the legal technicalities of managing a particular waste stream. In those technicalities, the social is being assembled in a legal way that corrals democratic action to the purview of waste already produced and extends market action to additional appropriations of value (beyond the purchase price) by manufacturers, e-waste recyclers, and a variety of para-market organizations. 106 M Wanjau (n 90) 17.

The lack of adequate legislation in Kenya is worrisome given the clear constitutional pronouncement on environmental protection. It suggests a halfhearted approach to e-waste management. The sad case of Agboblobshie in Ghana is illustrative of the havoc that can be wreaked by e-waste if concerted efforts are not taken to deal with it.[83] It is, therefore, critical that the treaties and soft law instruments that Kenya is a signatory to are revisited to chart a more robust implementation path. The need for a clear policy and enabling legislation for the management of e-waste is critical. This approach would also send a signal to polluting entities to address e-waste as a critical issue.

Given that components of e-waste contain hazardous material, it is proposed that specific guidelines on treatment be provided. This would be a key step in ensuring that e-waste is not treated as part of municipal waste. This recognition would shape a funding mechanism for e-waste management and drive inventorization and capacity building in key agencies that deal with e-waste management and inflows of ICT equipment. Without data and statistics to speak to an issue, assessment is left to forecasting based on related parameters. A focused approach would drive interest in this critical topic at both levels of government, and put in place mechanisms for data collection and related research. No single tool is adequate, but together, they can complement each other to deal with this issue.

F. Conclusion

The ICT sector in Kenya has experienced profound growth in the past two decades, with all key indicators for access pointing to a growing positive trend. The continued enhancement of competition, implementation of universal access and broadband access strategies is expected to drive penetration of ICTs and the attendant gadgets in the ecosystem that ultimately result in e-waste. There is much evidence of the devastating damage that improperly handled e-waste can cause to the environment. It is, therefore, imperative to determine a path that will ensure that while Kenya continues to enjoy increased access to ICTs and the benefit of digital transformation at many levels, it does not sacrifice the heritage of a rich environment.

This chapter has attempted to explore the interaction of e-waste governance frameworks in Kenya with complementary frameworks on environmental governance. This has been done against the backdrop of constitutional aspirations on safeguarding environmental resources. In doing so, it has emerged that the rapid ICT sector growth trends have not been matched with robust e-waste governance frameworks. Kenya does not have a formal system in place to measure its e-waste. This is notwithstanding the fact that e-waste is now recognized as one of the fastest growing waste streams today. With this scenario, placing e-waste under the general banner of municipal waste under the EMCA leads to ineffective and un-ecologically sound methods of handling e-waste. This is due to the hazardous nature of e-waste. Due care and expertise are required to safely handle it. A deeper assessment of the impact of classifying

83 'Agbogbloshie: From Wetland to Wasteland'< https://earthunpublished.com/2017/03/28/agbogbloshie-from-wetlandto-wasteland/> accessed 9 February 2019. Agbogbloshie is a former wetland located in the suburbs of the Ghanaian capital, Accra. This is allegedly the centre of an illegal exportation network for the dumping of outdated, broken and unusable products from Western nations under the guise of 'donations'. It is a wasteland of electronics with mountains of abandoned motherboards, computer monitors and hard drives littering the landscape. The soil and water have high concentrations of lead, mercury, thallium, hydrogen cyanide and PVC. Living conditions amid black smoke and the stench of burning plastic are so harsh that locals have nicknamed it 'Sodom and Gomorrah'.

e-waste is thus recommended. This exercise would highlight the relevance of the institutional frameworks in place and assess their suitability for responsiveness in order to better achieve the enjoyment of environmental rights as provided for in the Constitution.

The institutionalization of counties in Kenya represents a ray of hope. The decentralization of governance and the comprehensive framework provided for under the EMCA presents a platform for incisive assessment of environmental impacts from the ICT sector at county and national levels. Monitoring these activities, it is hoped, will generate information that will guide the way forward with clarity. Perhaps due to the novelty of ICTs, the policy focus has largely been on their transformative nature through increased access, and to a lesser extent on the impact of electronic waste on the environment.

Moving forward, there is urgent need for an integrated perspective between ICT sector policy and environmental policy. This will ensure a balanced approach in driving access to ICTs against the backdrop of structurally sound mechanisms for electronic waste management to achieve constitutional safeguards. It is noteworthy that other rights, such as the right to life, and the rights to access clean water, ride on the back of the right to a clean environment. Moreover, policies and legislation shall frame the setting of a workable and fair financial and economic model, which must be sustainable to function properly.[84]

For Kenya to sustain its pace in technology and innovation, there is a need to adopt urgent measures to tackle the issue of e-waste. Multiple efforts through technical and policy level interventions, complemented with comprehensive stakeholder engagement, capacity building and awareness, will go a long way in helping Kenya deal with these problems going forward. It will also set up a platform for designing a variety of creative incentives to promote more sustainable methods of e-waste management.

84 C Balde, V Forti et al, 'The Global E-waste Monitor, 2017: Quantities, Flows and Resources' <https://www.itu.int/en/ITU-D/Climate-Change/Documents/GEM%202017/Global-E-waste%20Monitor%202017%20.pdf> Pp. 48, accessed 12 January 2019.

CHAPTER 15

Renewable Energy in Kenya: Legal and Regulatory Approaches[1*]

Omondi R. Owino

A. Introduction

In Africa, Kenya ranks highly in the uptake of non-hydro renewable energy together with Egypt and South Africa, and it bears significant unexploited potential for investment in renewable energy sources.[2] In 2014, the Renewables 2014 Global Status Report listed Kenya with an investment of US$249 million as a leading renewable energy investor in Africa, second only to South Africa.[3] Along with the great international community commitments, to which Kenya is a party, the country has put in place general and renewable resource specific legislation and policy framework to shape up and optimize utilization of existing and potential renewable energy resources.

This chapter evaluates the key features of the renewable energy regulatory framework and assesses the nature and the reach of the regulatory approaches adopted by Kenya as a means of shoring up its proportion of renewable energy in the overall energy mix. More specifically, the chapter examines the policy underpinnings of the renewable energy regulation and discusses specific renewable energy drivers and dampeners that are discernible in the regulatory bulwark. It also makes relevant recommendations. This analysis proceeds against the backdrop of international developments in the renewable energy arena.

B. International regulatory paradigms

The international realm has witnessed a proliferation of policies that regulate the renewable energy sector in recent times.[4] This part of the chapter discusses the regulatory approaches to renewable energy adopted at the international law level.

On the international plane, the renewable energy sector is regulated mainly through soft law instruments owing to its dual international and domestic character that defies regulation through traditional, binding hard law instruments.[5] Soft law instruments enjoy unparalleled 'flexibility and evolutionary capacity', which makes them a suitable tool in addressing legal issues that lie in the twilight zone between international environmental and energy law.[6] Action by the United Nations and other key players in the international arena has spawned noteworthy policy and

1* Acknowledgment – "Funded by the Deutsche Forschungsgemeinschaft (DFG, German Research Foundation) under Germany´s Excellence Strategy – EXC 2052/1 – 390713894"

2 REN21, *Renewables Global Status Report 2018*, REN21 45 (Paris) (2018); Leonard Onyango, 'Kenya Ranked High for Renewable Energy', *Daily Nation* (6 June, 2018) <https://www.nation.co.ke/news/Kenya-ranked-high-for-renewableenergy/1056-4597554-30vswa/index.html> accessed 8 August 2018.

3 REN21, *Renewables Global Status Report 2014*, REN21 70 (Paris) (2014).

4 Stuart Bruce, 'International Law and Renewable Energy: Facilitating Sustainable for All' [2013], 14 *Melbourne Journal of International Law* 2–36 7.

5 *Ibid*, 12.

6 *Ibid*

soft law instruments that relate to renewable energy over a period of time. The UN, for instance, adopted an intergovernmental policy for renewable energy arising out of the United Nations Conference on New and Renewable Energy convened in 1981 in Nairobi, Kenya, which was the first conference ever on renewable energy. The intergovernmental policy for renewable energy, in turn, led to the establishment of a committee on Development and Utilization of New and Renewable Sources of Energy.[7]

Following closely on the outcome of the 1981 renewable energy conference, concerns about sustainable development had gripped the world's attention after the release of the report of the World Commission on Environment and Development titled, *Our Common Future* (the Brundtland Report), in 1987.[8] The report documented concerns for global warming, among others, and recommended the adoption of the principle of sustainable development in making energy choices and utilizing energy resources.[9] The report further noted that sustainable energy pathways can only be implemented effectively by States within a regional and integrated approach.[9]

C. Institutional framework

The spirit of the Brundtland report led to the adoption of strategies to achieve sustainable energy utilization at different regional levels. Governments have facilitated adoption of renewable energy by sponsoring various conferences and studies that have produced resolutions, declarations and other initiatives. Notable International Renewable Energy Conferences (IRECs) include Bonn 2004; Beijing 2005; Washington 2008, Delhi 2010; Abu Dhabi 2013; South Africa 2015; and Mexico City 2017. The resolution adopted at the 2004 Bonn conference supported the establishment of the International Renewable Energy Agency (IRENA) as the first intergovernmental organization mandated to promote renewable energy. IRENA was eventually founded in 2009 and its statute entered into force on July 8, 2010.

The statute of IRENA delineates it as:

> …a centre of excellence for renewable energy technology and acting as a facilitator and catalyst, providing experience for practical applications and policies, offering support on all matters relating to renewable energy and helping countries to benefit from the efficient development and transfer of knowledge and technology, …[10]

The institution is mandated to 'promote the widespread and increased adoption and the sustainable use of all forms of renewable energy'.[11] This mandate was motivated by the need for global energy security in the aftermath of the 1973 world oil shock.[12] IRENA is a critical hub that has heightened discussions and intergovernmental cooperation with regard to renewable energy finance, technology and knowledge.[13] However, from a governance perspective, IRENA is perceived as having 'weak regulatory power and takes a soft-governance approach centered on

7 *Ibid*, 13.
8 United Nations Department of Economic and Social Affairs, *Report of the World Commission on Environment and Development* (1987) <http://www.un.org/documents/ga/res/42/ares42-187.htm> accessed 8 August 2018.
9 UNGA, *Report of the World Commission on Environment and Development* (A/42/427, 1987) 192. 9 *Ibid*.
10 Statute of the International Renewable Energy Agency (IRENA) 2009, Article IV.
11 *Ibid*, Article II.
12 Bruce (n 3) 9.
13 *Ibid*, 29.

the positive framing of renewable energy'.[14] Bearing in mind IRENA's young age as an institution and its evolutionary nature, the jury is still out on its effectiveness in discharging its mandate.

D. Evolution of renewable energy law

The international community's concern for improving investment in and regulation of renewable energy resources has witnessed a transition in the regulatory approach from reliance on nonbinding soft laws to more enforceable commitments. This is evidenced by increased activity in developing binding agreements than waiting for principles to develop into customary international law.

One of the earliest Declarations codifying the push for sustainability is the United Nations Declaration of the United Nations Conference on Human Environment (UNCHE) of 1972. This conference took place in Stockholm and came up with the Stockholm Declaration, which documented the world's concerted approach to solving human problems.[15] The Declaration identified the need for UN member States to invest in capacity building to promote renewable energy sources.[16] This approach, as was correctly identified by the Declaration, would initiate the reduction of toxic emissions into the world environment.[17]

Twenty years after UNCHE, the Rio Declaration was adopted during the 1992 Earth Summit.[18] The Earth Summit also adopted a 21-point agenda for the world environment, commonly referred to as 'Agenda 21'.[19] The ninth agendum, which focuses on atmospheric protection, requires States to develop their own mechanisms for tracing inventory for emissions and to promote the use of renewable energy.

The United Nations Framework Convention on Climate Change (UNFCCC), also concluded during the 1992 Earth Summit, addressed concerns that non-renewable sources of energy lead to excess toxic emissions into the environment. In its preamble, the Convention highlights the fact that for developing countries to experience sustainable economic growth, their energy demands will grow and there is a need to achieve energy efficiency and control greenhouse gas emissions through, among others, application of new technologies. It tasked each State party to develop a legislative and policy framework to mitigate the prevailing challenge. [20]

The Paris Agreement 2015, adopted in furtherance of the UNFCCC objectives, has influenced the movement towards the adoption of renewable energy as a strategy for shifting towards clean energy. The preamble to Draft Decision -/CP.21 for the adoption of the Paris Agreement expressly acknowledged the 'need to promote universal access to sustainable energy in developing countries, in particular in Africa, through the enhanced deployment of renewable energy'.[21]

14 Indra Overland and Gunilla Reischl, 'A Place in the Sun? IRENA's Position in the Global Energy Governance Landscape' [2018] 18(3) Int Environ Agreements 335–350 336.

15 Günther Handl, 'Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992' (2012) 1 <www.un.org/law/avl> accessed 27 August 2018.

16 United Nations, 'Stockholm Declaration on Human Environment,' *Report of the United Nations UN Doc.A/CONF.48/14* 2 & Corr.1, Principles 3 & 5.

17 *Ibid*, Principle 6.

18 Rio Declaration on Environment and Development (vol 31 ILM, 1992) 874 Principles 1 and 3.

19 United Nations, 'Agenda 21, UNCED DOC A/CONF 151/4 1992' (1992).

20 United Nations Framework Convention on Climate Change (vol 31 ILM, 1992) 874, Article 4(1)(a).

21 UNFCC COP, 'Draft decision -/CP.21. Adoption of the Paris Agreement FCCC/CP/2015/L.9/Rev.1' (Decisions Adopted by the Conference of the Parties at its Twenty-First Session Paris, 30 November to 11 December 2015) 2.

Adoption of renewable energy and energy efficiency options will be a critical pathway in helping most nations achieve their Nationally Determined Contributions (NDCs) for cutting global emissions under the Paris Agreement. The Paris Agreement affords parties national discretion to determine the substance of their NDCs while adopting stringent top-down legally binding procedural requirements.[22]

The Agreement adopts a number of international rules that serve to limit but not to eliminate national discretion.[23] For instance, whereas parties are free to decide on the level of ambition of their NDCs, the requirement for preparation, communication and maintenance of successive NDCs that a party aims to achieve is mandatory.[24] Further, the Paris Agreement establishes legally binding information requirements for parties in communicating their NDCs to foster clarity, transparency and understanding.[25]

Setting of targets

The United Nations adopted Sustainable Development Goals (SDGs) in 2016.[26] The SDGs are a collation of varied targets that the UN member States aspire to achieve by the year 2030. SDG 7 focuses on ensuring access to affordable, reliable, sustainable and modern energy for all. It sets out several targets that are instrumental in the realization of access to affordable, reliable, sustainable and modern energy for all. In summary, SDG 7 aspires to increase the share of renewable energy; improve the global rate of efficiency by double digits; enhance international cooperation for research in renewable and clean energy technologies; and expand infrastructure and technology for supply of sustainable modern energy services by 2030.[27]

Other renewable energy initiatives

Apart from the options discussed above, further initiatives exist in the international realm that complement efforts to regulate renewable energy. The Sustainable Energy for All (SE4ALL)[28] initiative was launched by the United Nations General Assembly through General Assembly resolution number 65/151. The initiative has a three-pronged objective of ensuring universal access to energy; redoubling the share of renewables in the global energy mix and; and improving the rate of energy efficiency.

The initiative secures political will for renewable energy implementation at the highest political level through its advisory board, which brings together key world leaders such as the United Nations Secretary General and the head of the World Bank Group. Another notable initiative is the Renewable Energy Policy Network for the 21st Century,[29] which is an international policy

22 *Ibid* see Annex, Article 3.

23 Daniel Bodansky and Elliot Diringer, 'Building Flexibility and Ambition into A 2015 Climate Agreement' [2014], Centre for Climate and Energy Solutions 5.

24 Paris Agreement 2015, Article 4 (2).

25 *Ibid*, Article 4(8).

26 Sustainable Development Goals: 17 Goals to Transform the World <https://www.un.org/development/desa/statements/wp-content/uploads/sites/12/2016/01/Overview_SDGs_EN.pdf> 12 February 2019.

27 Sustainable Development Solution Network, *Indicators and A Monitoring Framework: Launching a Data revolution for the Sustainable Development Goals (Indicators by Target: 2018)* <http://indicators.report/targets/> 28 August 2018.

28 See Sustainable Energy for All <https://www.seforall.org> 12 February 2019. 29 See REN21: Renewables Now <http://www.ren21.net> 12 February 2019.

think tank. The initiative's major objectives are to promote the exchange of information and development of partnerships in affecting the global revolution towards renewable energy.

Regionally, the European Union has adopted the Energy Charter Treaty,[29] which is one of the first multilateral agreements on energy.[30] Though the charter lacks specific obligations for promotion of renewable energy the European Union, which is the body established by it, has imposed specific obligations on its members. For instance, the European Union through its Renewable Energy Directive sets the target of ensuring that it derives 20 per cent of energy from renewable energy sources by the year 2020.[31] This target places the European Union at the forefront in the quest for achieving clean energy development. The Energy Charter Treaty also has the Protocol on Energy Efficiency and Related Environmental Aspects,[32] whose link with the regulation of renewable energy is obvious.

The African continent has addressed the issue by establishing a framework to harmonize the diverse state approaches. In 2013, Africa adopted the Africa Bioenergy Policy Framework and Guidelines.[33] The aim of the policy is to harmonize development of sustainable bioenergy in the whole of Africa. The Policy framework was developed against the backdrop of uncertainty in the fossil fuel costs and its negative impacts on the environment. As a result, the policy seeks to improve the reliance on alternative renewable forms of energy that are environment friendly.[34]

The African continent has also adopted certain initiatives that promote reliance on renewable energy. The initiatives include African Clean Energy Corridor (ACEC) for Eastern and Southern Africa Power Pools and Programme for Infrastructure Development in Africa[35] to promote reliable energy. This initiative is pivotal in accelerating access to reliable energy.[36] Through ACEC, Africa has been able to collect data on the potential of renewable energy sources, conduct proper mapping of the renewable energy zones in Africa as well as to enable capacity building.[37] One major goal of the ACEC is to ensure the bankability of the generation and transmission of renewable energy as well as promotion of investment in renewables.[38]

National regulatory instruments

Many countries are adopting a range of renewable energy policy instruments to accelerate the deployment and penetration of renewable energy. Relevant instruments include: Feed-in

29 Energy Charter Secretariat, *The Energy Charter and Related Documents: A Legal Framework for International Energy Cooperation* (Brussels, Belgium 2004) 39-92.

30 Bruce (n 3) 22.

31 European Union, *DIRECTIVE 2009/28/EC of the European Parliament and of the Council of 23 April 2009* Official Journal of the European Union 16–62, 27.

32 Energy Charter Secretariat (n 30) 139.

33 African Union Commission-Economic Commission for Africa, *Africa Bioenergy Policy Framework and Guidelines: Towards Harmonizing Sustainable Bioenergy Development in Africa* (EC/RITD/NRP/2012/05, Addis Ababa 2013) <https://au.int/sites/default/files/documents/32183-doc-africa_bioenergy_policy-e.pdf> 28 August 2018.

34 *Ibid*, 8.

35 See IRENA, 'Africa Clean Energy Corridor' <https://www.irena.org/cleanenergycorridors/Africa-Clean-Energy-Corridor>accessed 12 February 2019; PIDA <http://www.au-pida.org> 12 February 2019.

36 Grace C Wu and others, 'Renewable Energy Zones for the Africa Clean Energy Corridor' [2015], International Renewable Energy Agency and Lawrence Berkeley National Laboratory 20 <https://ies.lbl.gov/sites/all/files/mapre_africa_re_zones_lbnl_2016.pdf> 25 August 2018.

37 *Ibid*.

38 *Ibid*.

Tariffs; Renewable Portfolio Standards or Quotas; Tradable Renewable Energy Certificates; Net Metering; Public Investment, Loan or Financing; Public Competitive Bidding; Capital Subsidies, Grants, Rebates; Investment or other Tax Credits; Sales, Energy or Excise Tax or VAT Reduction; and Energy Production Payments or Tax Credits.[39] Different countries have adopted a mix of these policy instruments reflective of their stages of renewable energy development and energy market peculiarities. In this regard, a review of the Kenyan legal framework is germane.

E. Kenyan renewable energy legal and regulatory framework

Constitutional framework

The Constitution of Kenya, 2010, is the supreme law of the land.[40] Article 260 of the Constitution defines land to include natural resources on or under the surface or in the airspace. By dint of the foregoing provision, most renewable energy resources in Kenya fall under the Constitutional definition of land. The spirit of the Constitution regarding sustainability in resource utilization is well captured in the preamble's pronouncement on the need to protect and sustain the environment to benefit the future generations.[41] The Constitution requires all State organs, public officers, State officers and all persons to adhere to its provisions and further spells out sustainable development as a national value and principle of governance.[42]

The Fourth Schedule to the Constitution of Kenya provides for the division of roles between national and county Governments. The Kenyan Constitution, 2010 embraces a devolved system of government that establishes 47 devolved units (counties) as semi-autonomous units with specific governance roles and mandates that are distinct and separate from those of the national government.[43] The national and county governments are, however, interdependent and discharge their mandates on the basis of consultation and cooperation. The Fourth Schedule to the Constitution recognizes that the national government is responsible for the formulation of energy policy, including among others energy regulation.[44] On the other hand, the county governments are responsible for county planning and development, which includes energy and gas reticulation.[45] The Constitution generally establishes a conducive legal environment for the regulation of renewable energy through specific instruments.

Legislation

This section mainly focuses on renewable energy-related legislation in Kenya. For this reason, the recently enacted Petroleum Act No. 2 of 2019 is not discussed. Focus is given to statutes with provisions that engender the adoption of renewable energy.

39 GIZ, *Legal Frameworks for Renewable Energy: Policy Analysis for 15 Developing and Emerging Countries* (Bonn and Eschborn 2012), GIZ 16–25. Geller Howard, *Energy Revolution: Policies for A Sustainable Future* (Island Press) (2003) 47.
40 Constitution of Kenya 2010, Article 2(1).
41 *Ibid*, Preamble to the Constitution.
42 *Ibid*, Article 10(2)(d).
43 *Ibid*, Article 6.
44 Constitution of Kenya, 2010, Fourth Schedule, Part 1: Paragraph 31.
45 Constitution of Kenya, 2010, Fourth Schedule, Part 2: Paragraph 8. 47 Energy Act 2019.

Energy Act No.1 of 2019

The Energy Act, 2019, was promulgated with the objective of consolidating energy laws in Kenya and more specifically to stipulate the distinct functions of the national and county governments in relation to energy.[47] The law is focused on promotion of renewable energy as well as commercialization of geothermal energy among other objectives. It establishes four main entities, to wit, the Energy and Petroleum Regulatory Authority (EPRA); the Energy and Petroleum Tribunal (EPT); the Rural Electrification and Renewable Energy Corporation (REREC) and; the Nuclear Power and Energy Agency.

The Energy Act, 2019, repealed the Energy Act, 2006, as well as the Geothermal Resources Act, 1982. The Energy Act provides a more robust legal framework for regulating renewable energy in Kenya compared to the repealed Energy Act, 2006 ,for several reasons.

First, the Energy Act introduces a net metering system.[46] The net metering system allows a consumer who owns an electric power generator of not more than one megawatt upon application, to enter into a net-metering agreement with a distribution licencee or retailer to operate a net-metering system.[47] Net-metering arrangements bear significant promise of bolstering national uptake of renewable energy because the electric power injected back into the grid by consumers will mainly come from abundant solar energy sources. If the system generates adequate buy-in from the public, net metering arrangements will help stabilize the grid by absorbing peak load and eliminating resort to load shedding measures. Sinking electricity bills for beneficiaries of the net-metering system are likely to trigger a race to the top by consumers that can result in a virtuous cycle for renewable energy generation in Kenya. Strathmore University in Nairobi has been a forerunner in adopting the net-metering systems in which it signed a 20-year power purchase agreement (PPA) with the national utility, Kenya Power and Lighting Company (KPLC), pegged at a rate of Ksh12.36 (0.12$) per unit of solar it will inject into the national grid.

Second, the Energy Act, 2019, establishes a renewable energy sector specific institution called the Rural Electrification and Renewable Energy Corporation (REREC) as a body corporate.[48] The function of the REREC shall *inter alia* be to develop and update renewable energy master plans; undertake feasibility studies and maintain readily available data for developers of renewable energy resources; collaborate with other agencies to develop appropriate local capacity for manufacture, installation, maintenance and operation of renewable energy technologies such as tidal waves, biodiesel and fuel-wood, among others; formulate a strategy for coordinating renewable energy research; and promote international cooperation programmes on renewable energy technologies.[49] The operation of the corporation is to be funded by among others, the consolidated energy fund for promotion and development of renewable energy initiatives.[52]

The establishment of specific institutional structures and strong financial backing coupled with clearly outlined tasks for the Renewable Energy Corporation will create much-needed technical focus and financial muscle necessary to drive forward the renewable energy agenda in Kenya.

46 Energy Act 2019, s 162.
47 *Ibid*, section 162(1).
48 *Ibid*, Section 43.
49 *Ibid,* Section 44. 52 *Ibid*, Section 53 53 *Ibid*, Section 73.

Third, the Act under Part IV, introduces an innovative approach to the regulation of renewable energy by vesting any unexploited renewable energy resources under or in any land exclusively in the national government subject to written law.[53] The implication of this provision is that the national government will enjoy inherent authority to exploit and realize the full potential of renewable energy resources that might exist on private land but which a private owner may not have capacity to exploit. It is however clear in this provision that the vesting of unexploited renewable energy in the government will not be arbitrary and must be interpreted in light of Article 40 of the Constitution, which safeguards the right to property.

The Energy Act also requires the preparation of a resource map and renewable energy resources inventory within one year of its enactment.[50] Further, the law establishes the renewable energy resource advisory committee composed of key stakeholders in the energy sector to advise the Cabinet Secretary.[55] The assessment and mapping of renewable energy will be critical in facilitating utilization and optimization of extant renewable energy capacity. This is critical because the availability of 'high quality, publicly available data on renewable energy potential' resulting from the resource mapping will help bridge the gap for development of informed policy on pertinent renewable energy issues such as 'zoning guidance, transmission network planning, and price regulation incentives'.[51]

Fourth and finally, the Energy Act establishes a renewable energy tariff system,[52] whose objective is to promote electricity generation from renewable energy sources, encouraging renewable energy uptake, promoting innovation, and achievement of clean energy through discouraging energy production from non-renewable sources.

The Energy Act captures the need for energy efficiency initiatives in Kenya, which complement the promotion of renewable energy. Accordingly, the law requires EPRA to 'coordinate the development and implementation of prudent national energy efficiency and conservation programmes'.[53] EPRA is also required to collaborate with the Kenya Bureau of Standards to ensure that only energy-efficient and cost-effective appliances and equipment are imported into Kenya.[54] Designation of the energy efficiency status of buildings and energy appliances is also a mandate of EPRA.[55] The Energy Act recognizes, therefore, that renewable energy is not an end in itself but that deliberate efforts must be made to promote energy efficiency which complements renewable energy options.

Climate Change Act, 2016

The Climate Change Act No. 11 of 2016 provides a framework for enhancing response to climate change as well as making provisions for mechanisms to achieve low carbon development in Kenya.[56] The law obligates the Cabinet Secretary for the time being responsible for the

50 Ibid, Section 74. 55 Ibid, Section 76.
51 WORLD BANK IBRD.IDA, *Assessing and Mapping Renewable Energy Resources* (2016), The World Bank. 025/16 1.
52 Energy Act 2019, Section 91.
53 *Ibid*, Section 187.
54 *Ibid*, Section 10(n).
55 *Ibid*, Section 188.
56 Climate Change Act No. 11 of 2016.

environment to coordinate the preparation of policies and strategies on climate change.[57] Specifically, this mandate is to be executed through the formulation of a National Climate Change Action Plan, which ought 'to enhance energy conservation, efficiency and the use of renewable energy in industrial, commercial, transport, domestic and other uses', among other things.[58]Further, the law establishes the obligations for both the public and private sectors as far as response to climate change is concerned.[59] The Cabinet Secretary responsible for environment and climate change affairs has power to impose a climate change duty on a public entity. The specific obligations related to the public sectors, apart from the one imposed by the Cabinet Secretary, are reporting on greenhouse gas emissions, and integration of the climate change action plan into internal processes and functions of the national government.[60]

This law also sets the pace for initiatives for climate change by recognizing that the investment in renewable energy resources is one of the means of eliminating greenhouse gas emissions.[61] Accordingly, the Cabinet Secretary responsible for environment and climate change affairs is obligated to consult with the Cabinet Secretary for Finance to encourage the utilization of renewable energy.[62] Other institutions that are established by the law include the Climate Change Council, which is mandated to consider and approve the National Climate Change Action Plan.[63] The Director of Climate Change who works at the Directorate of Climate Change is tasked with the duty of collaborating with other agencies in developing strategies for obtaining low carbon development mechanisms, monitoring and review, and enforcement of sustainability mechanisms.[64] The National Environmental Management Authority implements all these obligations.[65]

The law requires that institutional actors be guided by a certain set values and principles whenever they undertake their duties related to response to climate change.[66] The principles include the need to ensure promotion of sustainable development under the dynamic conditions of the climate.[67]

Regulations

The Energy Act, 2019, empowers the Cabinet Secretary responsible for energy to make specific renewable energy regulations in respect of a laundry list of issues stipulated under the law.[68] The law, however, adopts a drafting style that requires the making of Regulations under each substantive part but also confers a general power on the Cabinet Secretary to make further regulations.[69] Prior to the entry into force of the Energy Act, 2019, the government adopted

57 *Ibid*, Section 13.
58 *Ibid*, Sections 13(1) and 13(3)(j).
59 *Ibid*, part IV.
60 *Ibid*, Section 15(5)(a)-(f).
61 *Ibid*, Section 26(1)(a).
62 *Ibid*, Section 26(1).
63 *Ibid*, Sections 5 and 13(2). The prominence given to the council is self-evident with the President of Kenya as the chairperson of the Climate Change Council, pursuant to Section 5(2) of the Climate Change Act, 2016.
64 *Ibid*, Section 9(8)(d).
65 *Ibid*, Section 17(1).
66 *Ibid*, Section 4.
67 *Ibid*, Section 4(2)(c).
68 Energy Act 2019, Section 93.
69 *Ibid*, Section 208.

several regulations under the repealed Energy Act, 2006. These Regulations are however expressly saved under the Energy Act, 2019, which means that they are not affected by the repeal of the 2006 Act and are deemed to have been adopted under the Energy Act, 2019.[70]

Energy (Solar Photovoltaic Systems) Regulations, 2012

The Energy Regulatory Commission (ERC), now renamed the Energy and Petroleum Regulatory Authority (EPRA) (under the Energy Act, 2019), promulgated these regulations for households and commercial areas in view of the increasing use of solar systems. The regulations stipulate that the designers of solar photovoltaic systems and persons responsible for installations are required to obtain licences from the EPRA.[71] The requirement for licensing, which is inevitably linked to quality control and achieving optimal efficiency also applies to vendors, distributors, contractors and even manufacturers of solar photovoltaic systems.[72] The regulations place a premium on environmental standards to underscore the sustainability of the solar photovoltaic systems. Accordingly, the regulations restate the commitment to ensure compliance with the standards in the Environmental Management Coordination Act,[73] and the Occupational Safety and Health Act.[74] In terms of the overall responsibility for quality, the vendors are tasked with the accountability for the specifications of the solar photovoltaic systems unless different components are procured with different vendors.

The Energy (Energy Management) Regulations, 2012

The ERC, now EPRA, promulgated these regulations pursuant to its powers under the Energy Act.[75] The scope of the actors governed by the regulations ranges from institutions and industries to commercial premises in Kenya.[76] The regulations' approach is a tripartite strategy of reducing greenhouse gas emissions into the environment. First, the regulations require the conduct of energy audits by auditors who are duly licensed by the EPRA.[77] The audit period shall be every three years and the report presented to the Commission at each particular reporting period.[83] The audits are aimed at ensuring efficiency in energy utilization through mapping and eliminating the existing risk to the environment. Second, the owners of the facilities are obliged to prepare energy management policies and file them with the EPRA.[78] Lastly, the owners of the facilities are required to prepare a three-year Energy Investment Plan in advance, which plan must be registered under the clean development mechanisms or carbon finance.[85]

EPRA's monitoring power is pivotal as it receives the outcomes of the energy audits, which are implementation plans and energy policies. Further, the minimum mandatory compliance rate with the audit recommendations is capped at 50 per cent to ensure a gradual improvement in

70 *Ibid*, Section 224.
71 Energy (Solar Photovoltaic Systems) Regulations, r 4.
72 *Ibid*, r 5 and r 6.
73 Environmental Management and Coordination Act No. 8 of 1999.
74 Occupational Safety and Health Act No. 15 of 2007.
75 Energy (Energy Management) Regulations 2012, LN 102/2012.
76 *Ibid*, r 2.
77 See *Ibid*, r 13 and 14 for the process of licensing of auditors. 83 *Ibid*, r 6.
78 *Ibid*, First Schedule, para. 1 provides for the guidelines on preparation of Energy Management Policy, which includes a commitment to energy efficiency and conservation through compliance with laws and formulation of a strategic plan. 85 *Ibid*, r 7.

efficiency.[79] The other tool for ensuring compliance is the imposition of criminal sanctions for persons who do not comply with the regulations.[80]

The Energy (Solar Water Heating) Regulations, 2012

These regulations in effect require all buildings within the jurisdiction of local authorities that consume more than 100 litres of hot water per day to install solar heating systems. The implementation of the regulation has, however, been thrown into question in view of the punitive penalties it prescribes and which have been challenged in court as unconstitutional.[81]

Geothermal Resources Regulations, 1990

These regulations apply to geothermal resources in Kenya. First, an individual who desires to prospect for geothermal resources must make an application in the prescribed form[82] to the Cabinet Secretary responsible for energy.[83] Further, the regulations provide the framework for applying for geothermal resources licences. Regulation 4 provides the minimum specifications in an application for the licence, which include name and nationality, statement of financial status, delineation of the area, statement of the programme of exploration, among many others. The licence granted is renewable annually.[84] Further, the regulations exclude certain places such as burial grounds, public roads, townships, aerodrome areas and national parks from exploration for geothermal resources[85] unless competent authorities authorize the entry.[86]

The Cabinet secretary responsible for energy is mandated to maintain the register of geothermal resources, authorities, licences and renewals, and any notice of drilling must be served on the Cabinet Secretary.[94] A drilling licencee is obligated to comply with the conditions on depth requirements, survey of wells and ensure safety of equipment and procedures in accordance with the provisions of the Second Schedule to the Regulations.[87] The conduct of geothermal operations is expected to conform to the requirements and conditions stipulated under Regulation 13.[88] In order to ensure compliance with the conditions of the licences, the Cabinet Secretary for the time being responsible for energy has powers to inspect geothermal operations.[89] This power is also supplemented by the powers of inspectors, who operate pursuant to the Regulation 18(2).

Net Metering Regulations 2022

Kenya has developed draft Net Metering Regulations 2022 to operationalize section 162 of the Energy Act. This provision allows a consumer "who owns and electric power generator of a capacity not exceeding" 1 MW to conclude a net-metering system agreement with a distribution licensee or retailer.

79 *Ibid*, r 8.
80 *Ibid*, r 18 and 19.
81 'ERC Barred from Crackdown on Buildings without Solar Water Heaters', *The Star,* (28 May, 2018) <https://www.the-star.co.ke/news/2018/05/28/erc-barred-from-crackdown-on-buildings-without-solar-water-heaters_c1765002> accessed 31 August 2018.
82 Geothermal Resources Regulations, r 2(a)-(d) provides for the specifications of the application to be made to the Cabinet Secretary responsible for energy.
83 *Ibid*, r 2.
84 *Ibid*, r 5.
85 *Ibid*, r 6(1).
86 *Ibid*, r 6(2). The competent authority refers to a body that is empowered under a written law to authorize access. 94 *Ibid*, r 8 & 9.
87 *Ibid*, Appendix 1 Delineation of Licence Area.
88 *Ibid*, r 13.
89 *Ibid*, r 16.

The Regulations provide that all forms of renewable technologies including biomass, geothermal, small hydropower, solar, wind, solid urban waste and biogas are eligible for net-metering.

Operators of a net-metering system are required to comply with all other relevant technical, legal and regulatory requirements applicable in Kenya. Penalties spelt out under Section 168 of the Energy Act are upheld for offences committed under the Regulations.

These Regulations bear great potential for upscaling the adoption of renewable energy technologies in Kenya. This is particularly in view of the incentive structure for licensees in terms of costs, tariffs and billings chargeable to prosumers for supply of electricity under Regulation 10. The nascent net-metering regulations when finalized will provide a regulatory basis for piloting and development of a more mature regime in Kenya.

Policy Environment

The regulatory framework expands to cover the energy sector-specific policies, plans and strategies that have set the necessary pathway for targets in the achievement of renewable energy access and development in Kenya. The most relevant policies have focused on the exemption from value added tax, setting of Feed-in-Tariff, public investment and standardsetting.

Feed in Tariff Policy, 2012

The government enacted the policy in 2008 through the Ministry of Energy. The scope of the policy covers the generation of electricity from wind, bioenergy as well as power from various hydros.[90] First, it requires all operators of systems to connect plants that generate renewable energy. The capacity-specific tariffs set are based on technology and expected to last for about 20 years.[99] The policy was revised in 2012 to provide for, among others, standard templates of power purchase agreements, which requires the grid operators to connect small scale renewables.[91] Most importantly, the revision strengthened the mechanism for monitoring and reporting progress. It also increased the list of renewable energy sources that can be covered by the Feed-in-Tariff. Accordingly, it covered the projects for which investment offers had been made but were lacking in the initial policy. Such renewable energy resources included biomass, geothermal, hydro as well as solar.

The policy seeks to promote investments in renewable energy since it enables producers of power from renewable energy sources such as wind to sell their power for connection to the grid at set tariffs.[92] The tariffs, which are to be stipulated in the power purchase agreements, do not change over time. The structure in the Feed-in-Tariff system support has the first level capped

90 Ministry of Energy and Petroleum, *Feed-In-Tariffs Policy on Wind, Biomass, Small-Hydro, Geothermal, Biogas and Solar Resource Generated Electricity* (2012). 99 *Ibid*.

91 The policy has been revised twice in 2010 and 2012 to include more projects that were listed in the renewable energy portal of the Energy Regulatory Commission.

92 UNEP, *Green Economy Fiscal Policy Scoping Study-Kenya* (2015) 21 <http://www.greenfiscalpolicy.org/wp-content/uploads/2015/12/Kenya-Fiscal-Scoping-Study-Working-Paper.pdf> 30 August 2018.

at 10 MW and the other above 10 MW.[93] For large producers,[94] the policy requires the bidding process to be competitive and for standardized power purchase agreements to be used.[95]

On the flipside, the Feed-in-Tariff Policy has been significantly criticized for making lower tariffs for solar energy, which lessens the investment in solar technologies in Kenya.[96]

Kenya Vision 2030

Vision 2030 promotes clean energy through utilization of renewable energy resources. The vision targets the foundations of the Kenyans economy, one of which is the energy sector. Specifically, the vision for the energy sector is to achieve efficiency of energy resources through investment in the renewable sources of energy.[97] The provisions of the vision relating to energy are implemented using five-year medium-term plans. The second medium-term plan that ran between 2012 and 2017 and focused on improving Kenya's reliance on green energy.

Energy Policy, 2004

The policy was formulated in 2004[98] with the objective of creating a fair balance in the achievement of efficiency, adequacy and affordability of energy, on the one hand, and conserving the environment, on the other.[99] It recognizes that this objective can only be achieved through utilization of natural resources such as hydro, geothermal, biogas, cogeneration, solar and wind.[100] Accordingly, the policy discourages overreliance on thermal sources of energy.[101] The policy's advocacy for renewable energy focuses on domestic renewable sources such as industrial waste and biogas due to their environmental friendliness.[102]

The 2014 Draft Energy Policy envisages a 100 per cent connection of public facilities with solar photovoltaic systems and sets the target of connecting electricity of at least 200 MW from solar by the year 2022, which capacity is to increase to 500 MW by the year 2030.[103]

VAT Exemptions

The government has improved the uptake of solar energy through the Value Added Tax (VAT) Act No. 35 of 2013 as amended by VAT (Amendment) Act, 2014, which exempts solar photovoltaic systems from payment of VAT.[104] With VAT in Kenya standing at 16 per cent, the exemption means a reduction in the rising cost of the systems by a similar percentage and a consequential boost in uptake.[105]

93 *Ibid*.
94 Large producers are those who produce power above 10 megawatts.
95 Richard Boampong and Michelle A Phillips, 'Renewable Energy Incentives in Kenya: Feed-in-tariffs and Rural Expansion' [2016] 11 <https://bear.warrington.ufl.edu/centers/purc/docs/papers/1610_Boampong_Renewable%20energy%20incentives%20 in%20 Kenya.pdf> 30 August 2018.
96 *Ibid*, 18.
97 Government of Kenya, *Kenya Vision 2030* (2007), Chapter 3.
98 Ministry of Energy, *Sessional Paper No. 4 of 2004* (2004).
99 *Ibid,* 4.
100 *Ibid*.
101 *Ibid*, IX.
102 *Ibid*, 18.
103 Ministry of Energy and Petroleum, *Draft Energy Policy* (2014) 59.
104 See Value Added Tax No. 30 of 2013, First Schedule, Part I 'Goods Exempt Supplies – Part A'.
105 Izael P Da Silva, 'Lessons from Kenya about What's Holding Back Solar Technology in Africa' (The Conversation, 2016) <http://theconversation.com/lessons-from-kenya-about-whats-holding-back-solar-technology-in-africa-64185> 30 August 2018.

Action plans

Green Economy Strategy and Implementation Plan 2016-2030

The government through the Ministry of Environment and Natural Resources adopted the Green Economy Strategy and Implementation Plan (GESIP) in 2017.[106] The plan has a target of achieving clean energy, energy efficiency and reducing greenhouse gas emissions into the environment.[116] The plan sets up mechanisms for increasing investment in green energy, bioenergy and overall renewable energy resource utilization as a way of achieving this target.[117]

Least Cost Power Development Plan, 2011-2031

The plan has been developed by the ERC (now EPRA) pursuant to powers conferred on it by the Energy Act to prepare indicative plans in the energy sector.[107] The plan is designed to take 20 years and to have annual updates.[108] It encapsulates other plans, including the Least Cost Expansion Plan, which envisages an increase in reliance on renewable energy sources in Kenya's energy mix.[109] Specifically, the plan also records Kenya's target of expanding its reliance on geothermal resources to 5,530 MW up from 198 MW during the planning period of the plan.[121]

The plan also seeks to diversify the sources of energy in Kenya by promoting investment in renewable energy technologies.[110] Part 3.2.1 of the plan specifically deals with renewable energy sources in Kenya. The plan targets development in domestic renewable energy with an aim of reducing overreliance on oil imports for the production of electricity.[111] Accordingly, the plan sets the stage for establishing a framework for governance, including development of wood-fuel as well as promotion of clean and efficient energy in Kenya.[124]

National Climate Change Response and Action Plan, 2013-2017

The Action Plan was formulated to establish a decisive low carbon resilience pathway for Kenya. It generally suggests that there should be investment in renewable energy to deal with climate change and variability in arid and semi-arid areas. The plan recognizes that renewable energy resources are more reliable than fossil fuels and oil, which are imported, as it can exist amid extreme weather conditions.[112] To ensure sustainability, the plan requires that there should be balanced utilization of renewable energy resource to avoid overreliance on hydro energy.[113]

106 Government of Kenya, *Green Economy Strategy Implementation Plan 2016 - 2030* (2017). 116 *Ibid.* 117 *Ibid*.

107 Energy Act 2006, s 5(g). This power was executed by forming a committee that brought on board all the stakeholders as well as technical assistants.

108 Ministry of Energy and Petroleum, *Updated Least Cost Power Development Plan 2011-2031* (2011) 13.

109 *Ibid.* The renewable energy sources envisaged by the Least Cost Expansion Plan include geothermal, hydro and wind power 121 *Ibid*.

110 *Ibid*, 43.

111 *Ibid*, 49. 124 *Ibid*, 50.

112 Government of Kenya, *National Climate Change Action Plan* (2013) 36.

113 *Ibid.*

F. Renewable energy drivers

Concerns for energy security

Kenya has great unexploited renewable energy potential.[114] However, it continues to rely heavily on hydro power, which in turn heightens its reliance on the thermal plants during dry seasons. Thermal plants are, however, not only intensive on polluting fossil fuels but expose the country to energy insecurity due to volatility of the oil sector.[115] The volatility has raised concerns about sustained energy security in the country. Increasing the share of renewable energy in the overall energy mix will, therefore, wean Kenya off its overreliance on imported oil and set the country on the path to sustainable, sufficient renewable energy.

Rural electrification design

Given the nature of grid planning in Kenya that was historically focused on urban areas, most rural areas were literally left in the dark. Rural electrification initiatives launched by the government (such as Last Mile Connectivity) though laudable, have been unable to reach individual households and the larger mass of rural population.[116] Accordingly, the owners of various households have opted for off-grid solutions largely characterized by solar systems to meet their needs such as charging phone batteries and lighting.[130] This has been prompted by the record increase in the use of electricity resources in Kenya and the constant challenge of access by the poor members of society. In very remote areas where the grid connectivity is missing, most of the populations have adopted small scale renewable energy technologies such as solar home systems, lanterns, and photovoltaic applications, which have effectively substituted kerosene and improved livelihoods.[117]

Prohibitive costs of non-renewable energy

The costs of selling and connecting energy to the consumers have been spiralling in Kenya.[118] This is partly attributable to the process of importing oil for thermal plants, which is highly prohibitive as it prejudices the consumers of electricity especially when there is an increase in prices.[119] Accordingly, some consumers with high electricity needs in Kenya have opted to establish their own plants in order to access cheaper energy.[120] Non-Governmental Organizations also complement efforts to quench the thirst for clean and cheap energy by supplying various energy devices that utilize renewable energy sources.[121] Reduction in cost has effects on other production factors of the economy, which is also a key driver to reliance on renewable energy.[122] The National Climate Change Action Plan recognizes that renewable energy, such as geothermal power, has base load generation that is low and thus economically viable.[123] For instance, reliance on solar energy increased because of its comparatively lower costs and higher efficiency.[124]

114 Boampong and Phillips (n 104) 5.
115 Ministry of Energy and Petroleum, *Updated Least Cost Power Development Plan 2011-2031* (n 119) 44.
116 Boampong and Phillips (n 104) 16. 130 *Ibid*.
117 *Ibid.*
118 Ministry of Energy and Petroleum, *Updated Least Cost Power Development Plan 2011-2031* (n 119) 48.
119 Ibid, 44.
120 Boampong and Phillips (n 104) 19 give an example of how Williamson Tea Kenya Limited has developed a 1-Megawatt Solar Plant to assist in its operations.
121 *Ibid.*
122 *Ibid*, 22.
123 Government of Kenya, *National Climate Change Action Plan* (2013) (n 125) 67.
124 Ministry of Energy and Petroleum, *Updated Least Cost Power Development Plan 2011-2031* (n 119)89. 139 *Ibid*, 98.

Clean energy transition and positive regulatory environment

Kenya has thermal power plants that are driven by diesel to generate electricity. Diesel has negative impacts on the environment through air, water and noise pollution.[139] The global wind of energy revolution is blowing over Kenya and has triggered a transition towards the adoption of low carbon emissions in production activities. This transition is reflected in the adoption of multifarious regulatory and policy instruments discussed in this chapter, such as the Feed-In-Tariff Policy, 2012; VAT exemptions for solar panels under the VAT Act; net metering arrangements in the Energy Act, 2019; and the establishment of the REREC. It is envisaged that these developments will gather enough momentum to catapult Kenya into a new dispensation of green, adequate, affordable energy.

G. Renewable energy dampeners

High initial capital costs

Certain renewable energy solutions are extremely expensive at incipient stages of investment in comparison to fossil fuel sources.[125] Part of the reason is that conventional fossil fuels enjoy high government subsidies, which are not extended to renewable energy sources. Further, the cost of fossil fuels does not internalize the full costs of their use such as health and environmental costs. Renewable energy investments are, therefore, capital-intensive at face value and lack of finances remains a major hurdle for small local players. Investments at utility scale characterized by heavy infrastructural costs necessary to initiate and successfully complete projects are left to donors and major international financiers.[126] The costs of research and development associated with renewable energy are significant and local universities are yet to contribute in a meaningful way due to financial constraints.

Low awareness

Despite the current surge in renewable energy investments and adoption of relevant regulatory instruments in Kenya, there is still low awareness among the citizenry. Low awareness is accompanied by lack of reliable information on energy options in Kenya; viability of the options; and licensing processes that a person requires in establishing a renewable energy resource. This challenge is particularly experienced in the rural areas where there is a remarkable lack of entrepreneurial sense for the promotion of modern renewable energy technologies.[127]

Limited technical capacity

Successful adoption and deployment of renewable energy resources in Kenya require highly specialized knowledge across the diverse technologies. Presently, Kenyan companies have limited technical capacity, particularly small players in the energy market.[128] The limited technical capacity hampers local players from effectively partnering with international actors in the promotion, development and deployment of renewable energy sources.

125 Boampong and Phillips (n 104) 13.
126 *Ibid*, 5.
127 Izael P Da Silva, 'Lessons from Kenya about What's Holding Back Solar Technology in Africa' (n 114).
128 Government of Kenya, *National Climate Change Action Plan* (2013) (n 125) 88. 144 GIZ (n 40) 16–25.

H. Conclusion and recommendations

Conclusion

An ideal renewable energy regulatory environment can employ a mixture of several critical instruments. These instruments conventionally include a range of options, to wit, Feed-in Tariffs; Renewable Portfolio Standards or Quotas; Tradable Renewable Energy Certificates; Net Metering; Public Investment, Loan or Financing; Public Competitive Bidding; Capital Subsidies, Grants, Rebates; Investment or other Tax Credits; Sales, Energy or Excise Tax or VAT Reduction; and Energy Production Payments or Tax Credits.[144] It is noteworthy that the foregoing policy options can be employed in combination at different market developmental stages of renewable energy technologies to realize full scale deployment.

An assessment of the Kenyan renewable energy regulatory framework against the foregoing criteria reveals that the regulatory framework encompasses instruments that include: Feed-inTariffs; VAT and Excise Tax exemptions on solar panels; Net Metering; and several renewable energy projects under loan or financing. Kenya's Feed-In-Tariff system has been identified as a major contributor to securing investments for the 310 MW Lake Turkana wind project, which brought on board several private and public international investors.[12932]

Whereas there is an apparent lack of renewable energy portfolio standards accompanied by clear renewable energy targets in Kenya, the country's evolving regulatory framework and other positive developments in the sector rank highly globally and in Africa. Climate Scope, an index that ranks countries on clean energy competitiveness observed:

> The top 10 highest scoring nations this year consist of three from Asia (China, India, and Vietnam), four from the Latin America/Caribbean region (Brazil, Mexico, Chile, and Uruguay), two from Africa (South Africa and Kenya), and one from the Middle East (Jordan).[133]

The Energy Act, 2019, which if implemented and complemented by the conducive renewable energy policy climate, will help cement Kenya's advance as an emerging renewable energy leader in Africa.

Recommendations

Renewable energy mandates

The government should establish a requirement that a percentage of Kenya's energy needs should be satisfied from renewable energy sources. Several developing countries such as India, Indonesia, Sri Lanka and Nicaragua have adopted this option.[130] This option must, however, be adopted based on sound country research to identify and address potential incongruences; undesirable outcomes; areas of conflict with the extant policy and legal framework; and to reflect specificities of the Kenyan energy market.

129 GIZ (n 40) 16–25.

130 Gabriela E Azuela and Luiz A Barroso, *Design and Performance of Policy Instruments to Promote the Development of Renewable Energy: Emerging Experience in Selected Developing Countries* (World Bank Pub.) (2011) 15.

Government procurement policies

The government is no doubt the largest procuring entity in the country. Renewable energy friendly procurement policies would require government departments to meet a percentage of all their procurement needs through renewable energy options. This will no doubt help to insure a growing share of investment in renewable energy sources.

Strategies to alleviate dampeners

This chapter has identified several dampeners in the quest for shoring up the proportion of national renewable energy use. Clear strategies should be adopted in the long term to address the high initial cost of investment in renewable energy; low levels of awareness and limited technical capacity.

CHAPTER 16

The Governance of Biological Heritage in Kenya

Francis Mwaura

A. The nexus between biological heritage and sustainable development

Biological heritage is a critical asset in the provision of natural capital for sustainable development. It comprises the capital, which exists within the flora and fauna or biodiversity, and commonly distinguished as genetic resources, species diversity and ecosystem variety. The World Heritage Convention in Article 1 recognizes world heritage properties with threatened biodiversity values and aims at protecting many of the most important ecosystems and biodiversity hotspots on the planet.[1] Such heritage properties are considered critical sites for *in-situ* conservation because they contain a high number of rare, threatened and endemic species with outstanding universal value for scientific and conservation reasons (criteria x).[2] So far, over 156 out of over 1,100 World Heritage Sites of high biodiversity significance have been designated with a total coverage of approximately 1.1 million km^2 or about 0.8 per cent of the earth's surface, which comprises about 6.6 per cent of the world's terrestrial protected areas.[3]

Biological heritage is usually regarded highly due to its socio-economic, cultural and spiritual functions. This was recognized during the 2002 Earth Summit in Johannesburg, where the 'WEHAB' initiative was launched as a cross-sectoral integration framework that emphasizes the role of biological heritage in the water, energy, health and agriculture sectors at national and international levels.[4][5]The strong link between biological capital, sustainable development and human well-being has been recognized around the world, including their contribution to the global 2030 agenda, in which most of the seventeen sustainable development goals (SDGs) are heavily dependent on biodiversity.[6]

Kenya is a top advocate for the global 2030 SDG Agenda since adoption in 2015 and has made good progress in the implementation of the SDGs.[7] Comprehensive mapping of the 17 SDGs was undertaken in the Second Medium-Term Plan (MTP2 2013-2017) to align the SDGs with Kenya's Vision 2030. The MTP2 considered biological heritage through SDG 14 and 15. The main target for SDG 14 in MTP2 was the conservation and sustainable use of oceans and marine resources

1 Lynn Meskell, 'UNESCO's World Heritage Convention at 40: Challenging the Economic and Political Order of International Heritage Conservation' [2013], 54 *Current Anthropology*, 483-494.

2 *Ibid*.

3 Ali Mariam Kenza et al.; *Terrestrial Biodiversity and the World Heritage List: Identifying Broad Gaps and Potential Candidate Sites for Inclusion in the Natural World Heritage Network* (IUCN Publication) (2013).

4 WEHAB Working Group, *A Framework for Action on Biodiversity and Ecosystem Management* (Johannesburg: United Nations World Summit on Sustainable Development) (2002).

5 Charles Okidi; *Environment, Natural Resources and Sustainable Development in Kenya's Constitution-making* (Institute for Law and Environmental Governance, Nairobi) (2003); Edward Barbier; *Natural Resources and Economic Development* (Cambridge University Press)(2007)

6 Arjan Ruijs et al., 'Natural Capital Accounting for the Sustainable Development Goals: Current and Potential Uses and Steps Forward', in Arjan Ruijs et al. (eds) *Forum on Natural Capital Accounting for Better Policy Decisions: Taking Stock and Moving Forward* (World Bank; WAVES) (2017) 83-99; Stefan Bringezu *et al*., 'Multi-Scale Governance of Sustainable Natural Resource Use - Challenges and Opportunities for Monitoring and Institutional Development at the National and Global Level' [2016], 8 *Sustainability.*

7 Ministry of Devolution and Planning, 'Implementation of the Agenda 2030 for Sustainable Development in Kenya' [2017] Republic of Kenya.

for sustainable development through the Blue Economy agenda. For SDG 15, the government aimed at protection, restoration and sustainable use of terrestrial ecosystems, especially forests, combating desertification, as well as halting and reversing land degradation and biodiversity loss[8].

Seven key development sectors were identified to serve as key enablers for delivering the 10 per cent annual economic growth target for the Kenya Vision 2030. These include tourism, agriculture, manufacturing, wholesale and retail trade, science and technology, financial services, oil, gas and mining[9]. In the recent past, the blue economy has been added to the list in order to exploit the vast quantities of untapped potential in the coastal and marine environment within the Indian Ocean including fisheries and other opportunities. Biological heritage is clearly an important requirement for prominent enabler sectors in Vision 2030, namely, tourism, agriculture, manufacturing and the Blue Economy. In this regard, good governance of biological heritage should be considered as an important bedrock for Kenya Vision 2030 and Global Agenda 2030. **Figure 16.1** shows some of the direct and clear links between biological heritage and SDGs in Kenya.

Biological heritage governance in Kenya is largely undertaken within ecosystems as the natural platforms within which the assets are found. Ecosystem-based management (EBM) is therefore considered as an adaptive strategy for biodiversity governance, which encompasses sustainable utilization and conservation of natural heritage in an integrated manner.[10] It is a global strategy which seeks to ensure utilization and governance of ecosystems and their biological heritage by striking a balance between the benefits accruing from natural capital while maintaining ecosystem integrity. Most countries have now adopted the EBM as advocated in a wide range of multilateral environmental agreements (MEAs), including the Convention on Biological Diversity (CBD) through CoP5, Decision V/6, Convention on Migratory Species (CMS) or Bonn Convention through the 2011 CoP, Ramsar Convention through CoP9[11] and the Johannesburg Programme of Implementation (JPOI), among others.[12,13] The Government of Kenya has embraced the EBM approach by domesticating the concept in various natural heritage governance policies as highlighted in **Table 16.1**.

8 Ibid

9 Ibid

10 Richard Smith and Edward Maltby, 'Using the Ecosystem Approach to Implement the Convention on Biological Diversity: Key Issues and Case Studies' [2003] IUCN Publication.

11 Max Finlayson et al., 'The Ramsar Convention and Ecosystem-Based Approaches to the Wise Use and Sustainable Development of Wetlands' [2011], 14(3) Journal of International Wildlife Law and Policy 176-198.

12 Parita Shah, 'Domestication and Application of Biodiversity Related Multilateral Environmental Agreements (MEAs) in Kenya' (Ph.D thesis, University of Nairobi) (2016).

13 Ministry of Fisheries Development, *National Oceans and Fisheries Policy,* (Nairobi: Government Printer) (2008).

SDG	Goal	Selected targets	Linkages with biological heritage in Kenya
	Ending poverty	**1.1**-Eradicating extreme poverty for all persons living on less than $1.90 a day by 2030	Biological heritage provides tradable goods and services, which is the backbone for a wide range of economic sectors including agriculture, livestock, forestry, fishing and tourism. The average GDP contribution by these sectors in Kenya range from over 20% for agriculture, 12% for the livestock sector, 10% for tourism, 3-4% for forestry and less than 1% for the fishery sector.[1]
	Ending hunger, and malnutrition	**2.3**-Doubling agricultural productivity by 2030	The production of up to 75% of food and cash crops including potatoes, beans, peas, tomatoes, onions, apples, oranges, mangoes, watermelons and coffee depend on insect pollinators. In 2016, the contribution to the GDP in Kenya by coffee alone was about 3.9%.[2]
	Ensuring healthy lives and human well-being	**3.8**-Achieving universal health coverage and access to quality healthcare	Most medicines, drugs and vaccines in the world are manufactured using natural compounds in plants and animals with up to 120 drugs derived from plant materials. This includes common drugs such as aspirin, artemisinin, quinine, morphine and codeine. In addition, over two thirds of the people in Kenya rely almost entirely on traditional medicine for their primary healthcare needs.[3]
	Ensuring reliable water supply	**6.1**-Achieving universal access to safe and affordable drinking water for all by 2030 (20 litres /person/day)	Many urban centres in Kenya have their local water companies, which rely on forest watersheds for water supply.[4] For example, the Nairobi City Water and Sewerage Company (NCWSC) supplies over 0.5 million cubic metres of water daily to over 4 million people with most of the water originating from the Aberdares forest.[5] Similarly, a lot of the water consumed in the city of Mombasa originates from Mzima Springs, which are recharged by the Chyulu Hills Forest in Makueni County.
	Ensuring access to affordable and reliable energy	**7.2**-Increase the share of renewable energy in the energy mix	The rivers in Kenya have a maximum hydropower potential of 7,800MW but only less than 1000 MW has been exploited.[6] HEP is associated with key forest catchments in Kenya such as Mount Kenya and the Aberdares, from where the Tana River originates.
	Sustainable economic growth, and employment creation	**8.5**-Achieving productive employment and decent work	Biological heritage in Kenya is the backbone for a wide range of economic sectors which create substantial employment around the country, including agriculture (40%), wildlife tourism (6-7%) and fisheries (2 million people).[7]
	Combating climate change	**13.1**-Strengthening mitigation and adaptation strategies	The Government of Kenya is targeting GHG emission reductions of up to 10.4 $MtCO_2e$ by 2023, through forest restoration, afforestation and reforestation, and deforestation reduction.[8]

Figure 16.1: Natural heritage and SDGs in Kenya

Table 16.1: Integration of EBM in national policy frameworks for natural heritage governance in Kenya

Policy framework	Ecosystem-based management (EBM) obligation and prescriptions	Application
National Oceans and Fisheries Policy, 2008[21]	Guiding Principle 3.2(ii) advocates the holistic approach in the management of oceans and fisheries while Policy Statement 4.2.2 prescribes the EBM approach for sustainable management	The policy is implemented within specific fishery areas such as lakes, dams, rivers and coastal and marine environments (including the Exclusive Economic Zone (EEZ)
Sessional Paper No. 10 of 2014 on the National Environment Policy[22]	Guiding Principles 3.2(c) advocates for integrated ecosystem approach for sustainable environmental management in order to ensure that all ecosystems including mountains, forests, lakes and wetlands are managed in an integrated manner	EMCA Cap 387 and other frameworks such the WCMA Cap 376 has provisions for environmental management within specific ecosystems such as mountains, forests, rangelands, wetlands and coastal areas
National Forest Policy, 2014[23]	Guiding Principle 3.4(b) advocates the integrated ecosystem approach in the management and conservation of forests	s12 of the Forest Act prescribes the management of forests within ten regional conservancies (Western, Nairobi, Eastern, Nyanza, Coast, North Rift, Central Highlands, Mau Complex, North Eastern and Ewaso North)
Integrated Coastal Zone Management (ICZM) Policy, 2017[24]	Guiding Principle 3.4(i) advocates the adoption of the ecosystem-based approach in order to effectively consider the relationships and inter-linkages between all components in the coastal zone	The ICZM (2017) recognizes the value of distinct coastal areas such as the coastal forests, coral reefs and mangrove ecosystems

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The Constitution of Kenya, through Articles 71 recognizes the important role of international agreements and legislation in the governance of environment and natural resources, including biodiversity. Consequently, Kenya is a State party to all the five biodiversity-related conventions, having ratified the CBD[14] on July 26, 1994; the Ramsar Convention[15] on June 5, 1991; WHC[16] on June 5, 1991; CITES[17] in 1978; and CMS[18] on May 1, 1999. In addition to the global MEAs, Kenya is also a State party to a number of regional biodiversity-related agreements, including the Protocol on Environment and Natural Resources Management (2006),[19] and the Nairobi Convention for the Western Indian Ocean Region (1995).[20] **Table 16.2** highlights some of the principal obligations in global biodiversity MEAs that should be domesticated for effective governance of biological heritage at country level. Majority of the obligations are focused on issues concerning conservation and sustainable utilization of biological heritage, biodiversity monitoring, threat minimization and international collaboration. Other obligations include dealing with equitable access and benefit sharing, alien invasive species, biosafety and the involvement of local community and private sector in biodiversity management.

14 The Convention on Biological Diversity (1760 U.N.T.S. 69) (Signed 5 June 1992).
15 Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat (1971).
16 Convention for the Protection of the World Cultural and Natural Heritage (1037 U.N.T.S.) (Signed 16 November 1972).
17 Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973).
18 Convention on the Conservation of Migratory Species of Wild Animals (1979).
19 Protocol on Environment and Natural Resources Management (2006).
20 Nairobi Convention for the Western Indian Ocean Region (1995).

The country has made significant steps towards the sustainable management of its biological heritage as demonstrated by the formulation and enactment of a wide range of policy and legal frameworks for the governance of critical ecosystems. This is in line with the obligations proclaimed in the Constitution of Kenya 2010 especially Chapter 5 on land and environment and Articles 71 and 72 regarding the ratification of international agreements and enactment of legislation relating to environment and natural resources. Some of the policies dedicated to the management of biological heritage include Sessional Paper No. 6 of 1999 on Environment and Development,[21] Sessional Paper No. 10 of 2014 on the National Environment Policy,[22] National Forest Policy (2020),[23] National Oceans and Fisheries Policy, 2008,[24] Sessional Paper No. 8 of 2012 on National Policy for the Sustainable Development of Arid and Semi-Arid Lands,[25] Sessional Paper No.12 of 2014 on National Wetlands Conservation and Management Policy[26] and Sessional Paper No. 1 of 2020 on Wildlife Policy.

Table 16.2: Summary of the key MEA obligations for biological heritage governance at country level

Biodiversity MEA	Governance obligations	Relevant Policy Frameworks in Kenya
CBD	1. Conservation, sustainable use and equitable sharing of biodiversity (Article 1) 2. International cooperation in biodiversity usage and conservation (Article 5) 3. Developing national strategies, plans and programmes for conservation (Article 6a) 4. Identification of threats and monitoring of biodiversity and habitat status (Article 7) 5. In-situ conservation (Article 8a) 6. Prevention of alien species (Article 8h) 7. Innovation, integration of indigenous knowledge and involvement of local communities (Article 8j) 8. Ex-situ conservation (Article 9) 9. Cooperation between government and private sector in the sustainable use of bioresources (Article 10) 10. Research and training for conservation and sustainable use of biodiversity (Article 12) 11. Public participation, education and awareness (Article 13) 12. Minimizing negative impacts on biodiversity through EIAs (Article 14) 13. Access and equitable sharing of genetic resources (Article 15) 14. Safe handling of biotechnology products (Article 19)	Sessional Paper No. 6 on Environment and Development (GoK, 1999), Sessional Paper No. 10 of 2014 on the National Environment Policy (GoK 2014), National Forest Policy 2020 (GoK 2020), Sessional Paper No. 1 of 2020 on Wildlife Policy, National Oceans and Fisheries Policy, 2008 (GoK 2008), Integrated Coastal Zone Management (ICZM) Policy 2017 (GoK, 2017), National Wetlands Conservation and Management Policy (GoK, 2015), National Policy for the Sustainable Development of Arid and Semi-Arid Lands

21 Sessional Paper No. 6 of 1999 on Environment and Development (1999).
22 Sessional Paper No. 10 of 2014 on the National Environment Policy (2014).
23 National Forest Policy, 2014.
24 Ministry of Fisheries Development, *National Oceans and Fisheries Policy*, (Nairobi: Government Printer) (2008).
25 *National Policy for the Sustainable Development of Arid and Semi-Arid Lands*, (Nairobi; Government Printer) (2017).
26 National Wetlands Conservation and Management Policy, (Nairobi; Government Printer) (2015).

CITES	1. Listing of endangered species in the right Annexes (Article 2) 2. Regulating trade in endangered species (Article 3) 3. Granting of licenses for trade in biological products (Article 6a) 4. Formation of biodiversity management authorities to control trading permits (Article 9.1a) 5. Formation of scientific authorities for monitoring species population trends (Article 9.1b) 6. Cooperation between countries (Article 13)	Sessional Paper No. 1 of 2020 on Wildlife Policy, National Policy for the Sustainable Development of Arid and Semi-Arid Lands
CMS	1. Conservation of migratory species and their habitats (Article 2.1) 2. Engagement in regional and international agreements on conservation of migratory species in Appendix 1 and II (Article 5) 3. Listing of and protection of endangered migratory species in Appendix 1 (Article 3) 4. Conservation of migratory wildlife areas through the use management plans (Article 5.5b) 5. Prevention of alien species (Article 5.5e) 6. Conservation of migratory wildlife corridors and dispersal areas (Article 5.5g) 7. Reducing threats to migratory corridors and migratory species (Articles 5.5h and i) 8. Communication, education and public awareness (CEPA) on Convention matters (Article 5.5n)	Sessional Paper No. 1 of 2020 on Wildlife Policy, National Policy for the Sustainable Development of Arid and Semi-Arid Lands
Ramsar Convention	1. Conservation, wise use and management of wetlands and migratory waterfowl habitats (Article 1.6) 2. Formulation and implementation of wetland management plans (Article 3) 3. Promoting wetland research and monitoring (Articles 4.3 and 4.5) 4. Promoting waterfowl population increase in wetlands (Article 4.4) 5. International cooperation in the management of transboundary wetlands (Article 5)	National Wetlands Conservation and Management Policy (GoK, 2015), Sessional Paper No. 6 on Environment and Development (GoK, 1999), Sessional Paper No. 10 of 2014 on the National Environment Policy (GoK 2014), National Water Policy
WHS	1. Identification and conservation of natural heritage assets (Article 4) 2. Formulation and adoption of natural heritage policies and plans (Article 5a) 3. Undertaking scientific research to support for heritage protection (Article 5c) 4. Submission of heritage property information to the World Heritage Committee (Article 11)	National Policy on Culture and Heritage (GoK, 2009), National Policy for the Sustainable Development of Arid and Semi-Arid Lands

Sessional Paper No. 10 of 2014 on the National Environment Policy recognizes that Kenya is losing her biodiversity due to a wide range of challenges, including unsustainable utilization, habitat destruction and environmental pollution. Section 4.9 of the policy advocates the conservation and sustainable use of biodiversity, including equitable sharing of benefits in accordance with international law through relevant legal frameworks and the National Biodiversity Strategy and Action Plan (NBSAP). The vision of the Kenya NBSAP 2019-2030 is to reduce biodiversity loss and promote biodiversity conservation for improved community livelihoods. Sessional Paper No. 8 of 2012 on National Policy for the Sustainable Development of Northern Kenya and other Arid Lands recognizes that the ASALs occupy upto 85 per cent of the country, including a wide range of distinct rangeland biodiversity, which is not fully exploited. Sessional Paper No.12 of 2014 on National Wetlands Conservation and Management Policy recognizes wetlands as important biodiversity hotspots whose natural habitats support a wide variety of plants and animals, including endemic, endangered and migratory waterfowl species such as the flamingoes. This is further echoed in the National Oceans and Fisheries Policy of 2008, which recognizes the importance of biological capital especially in the form of fisheries and other marine and aquatic resources in the Indian Ocean, coastal zone, lakes and rivers. The framework is supported by the ICZM policy of 2017, whose vision is 'a coastal zone with healthy ecosystems and resources that sustain the socio-economic development and well-being of the current and future generations'.

In addition, the Government of Kenya has enacted various legal frameworks and subsidiary regulations to support the implementation of national policies for the management and conservation of biological heritage. These include the Environmental Management and Coordination Act No. 8 1999 revised 2015 [27] and related regulations (such as the Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing Regulations,[28] and the Wetlands, River Banks, Lake Shores and Sea Shore Management Regulations).[29] Others legal frameworks for the governance of biological heritage in Kenya include the Wildlife Conservation and Management Act 2013,[30] Forest Conservation and Management Act, No. 34 of 2016, Fisheries Management and Development Act No. 35 of 2016,[31] Biosafety Act 2009,[32] and the National Museums and Heritage Act.[33] The following general appraisal shows the strengths, weaknesses and gaps in the domestication in national policies of key MEA obligations for effective biological heritage governance in Kenya.

B. Governance of terrestrial biological heritage

Mountains

The governance of the biological heritage in the mountain ecosystems of Kenya is undertaken by various national and county institutions through two key policies, namely, Sessional Paper No. 6 of 1999 on Environment and Development,[34] and Sessional Paper No. 10 of 2014 on the

27 Environmental Management and Coordination Act, 1999.
28 Environmental (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2006.
29 Environmental (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulations, 2009.
30 Wildlife Conservation and Management Act, 2013.
31 Fisheries Act, 2012.
32 Biosafety Act, 2012.
33 National Museums and Heritage Act, 2006.
34 Ministry of Environment nd Mineral Resources, *Sessional Paper No. 6 of 1999 on Environment And Development*, (Nairobi: Government Printer) (1999).

National Environment Policy.[35] The two policies have a number of weaknesses and gaps. One of the weaknesses in Sessional Paper No. 6 of 1999 on Environment and Development is the lack of a clear framework on the management of mountain ecosystems as agreed in the 1992 United Nations Conference on Environment and Development (UNCED). Agenda 21 included Chapter 13 on 'Managing Fragile Ecosystems: Sustainable Mountain Development' which recognized mountains as reservoirs of precious biodiversity, home to a wide range of endangered species, powerhouses for biogeochemical cycling, and hotpots for critical ecosystem services including water recharge. Consequently, a critical landscapes in Kenya such as Mt Kenya has been accorded multiple gazettement as a national park and forest reserve since colonial times, a UNESCO-MAB Biosphere Reserve in 1978 and a UNESCO World Heritage Site in 1997.

The need for more serious consideration of mountains and their heritage was also recognized during the 2002 International Year of Mountains (IYM) including the need for governments to define the legal status of mountains and their place in national policies.[36] Subsequently, national mountain policies were formulated in countries like France and Switzerland. In Switzerland, a national mountain policy was formulated to deal with deforestation, which is still a major challenge in Kenya.[37] At the moment, most mountain ecosystems in Kenya are protected either as national parks, forest reserves or as critical catchment areas. Despite these efforts, environmental degradation of mountains continues to be a major challenge. This is probably because up to 10 per cent of Kenya's population lives within five kilometres of such ecosystems, which increases the risk of encroachment by human settlements and agriculture as well as a wide range of illegal activities such as logging and arson fires.

In 2013, Kenya joined the African Mountain Partnership (AMP), a self-governed voluntary partnership involving governments (including the African Ministerial Conference on the Environment), civil society, and private sector for sustainable management of mountain ecosystems. The vision and mission of the AMP, whose focal point in Kenya is the Kenya Water Towers Agency (KWTA), is to encourage good governance through the development of policies, laws and regulations for sustainable mountain development. KWTA was established in 2009 in order to coordinate the sustainable management of all water towers in the country initially through the implementation of Sessional Paper No. 10 of 2014 on the National Environment Policy which supports the development and implementation of strategies and action plans for sustainable management of mountain ecosystems as key water towers.

At the time of its gazettement, the mandate of KWTA was mainly centred around 18 towers, namely, the Aberdare Ranges, Cherangany Hills, Chulyu Hills, Huri Hills, Kirisia Hills, Loita Hills, Marmanet Forest, Mathews Range, Mau Forest Complex, Mount Elgon, Mount Kenya, Mount Kipipiri, Mount Kulal, Mount Marsabit, Mount Njiru, Ndotos, Nyambene Hills, and Shimba Hills. However, the country has other critical water towers, which require serious governance effort for effective protection and conservation.

35 Ministry of Environment, Water and Natural Resources, *National Environment Policy,* (Nairobi: Government Printer) (2014).
36 Daniel Maselli, 'Promoting Sustainable Mountain Development at the Global Level' [2012], 32(S1) *Mountain Research and Development* 64-70.
37 Ibid.

One of the challenges facing the KWTA mandate is lack of a clear institutional policy and legal framework. However, Parliament has recently initiated the Kenya Water Towers Coordination and Conservation Bill, 2019, and policy 2020 which are expected to transform the agency into an authority with more powers and legal mandate for the protection of critical water towers in the country. The justification for this action is associated with the continuing deterioration of such areas through enforcement of other legislations such as the EMCA, the Forest Conservation and Management Act, and the Water Act. Recently, the Wildlife Conservation and Management (Joint Management of Protected Water Towers) Regulations of 2016 were developed to facilitate partnership between KWS and KWTA in the water towers, which are also designated as wildlife protected areas.

The engagement of several jurisdictions in the management of a single ecosystem, including their dual gazettement as in the case of Mt Kenya (which is a forest reserve and national park) and the Chyulu Hills (which comprises the Chyulu National Park and Kibwezi Forest Reserve), is often criticized because of the likely power struggle and institutional duplication of effort. However, the combined effort and multiagency approach might be desirable for critical mountain ecosystems where one agency could serve as a watchdog or partner of another. In some mountain areas of Kenya, partnerships between Community Forest Associations (CFAs) under the Forest Act (KFS) and Water Resource User Associations (WRUAs) under the Water Act (WRA) have been found to reduce the risk of wildlife poaching, which is under the Wildlife Management and Coordination Act.

One of the challenges of mountain ecosystem governance in the country is the unclear custodianship mandate for biological heritage in ungazetted hills and mountains, which are outside the national network of protected areas (e.g. Kiambere and Hurri Hills in Embu and Marsabit Counties). The governance of such mountain heritage could be improved through the introduction of a national mountain policy as advocated in the CBD. One of the goals for such a policy would be to clearly prescribe limits in mountain areas beyond which human settlements and most other land uses should be disallowed. The policy could also provide direction for suitable alternative options for mountain use including carbon trade. The latter is a good strategy for ensuring the preservation of mountain ecosystems as demonstrated in the case of the Mount Kasigau Corridor REDD+ Project in Taita Taveta County which aims at protecting the Kasigau forest strictly for carbon sequestration, water supply, wildlife conservation and tourism.[38] The project is expected to mitigate the emission of over 54 million tonnes of CO_2 over its 30-year life and offer alternative community livelihood options for nearly 100,000 people instead of logging and charcoal burning.

Forests

Biological heritage in forest ecosystems in Kenya is governed by various national and county institutions through several national policy frameworks, including Sessional Paper No. 6 of 1999 on Environment and Development, Sessional Paper No. 10 of 2014 on the National Environment Policy,[39] and the National Forest Policy of 2014. The main policy strength in Sessional Paper No.

38 Juliet Kariuki, Regina Birner and Susan Chomba, 'Exploring institutional factors influencing equity in two payments for ecosystem service schemes' [2018], 16 *Conservation and Society* 320-337.

39 Ministry of Environment, Water and Natural Resources, *National Environment Policy,* (Nairobi: Government Printer) (2014). 52

6 of 1999 is the requirement for the protection of key forest ecosystems such as Mt. Kenya, the Mau Forest, Mt Elgon, Kakamega Forest, Aberdares, Shimba Hills, Arabuko Sokoke and Tana floodplain forests in line with Article 1 of the CBD. Consequently, upto 6 per cent of the forests in Kenya are protected within national parks, forest reserves and conservancies mostly in the Central, Coastal, Rift Valley and Eastern regions. The sessional paper advocates for the continuous increase of the total forest cover, mainly through reforestation and agroforestry in line with Article 9 of the CBD. This goal is gradually being realized based on the 2021 national forest and tree cover estimates at 8.83% and 12.13%, respectively as provided in the 2021 National Forest Resources Assessment (NFRA) Report which is a huge improvement from the 5.3 per cent in 2013 or less 3 percent in the 1980s and 1990s.[40]

The main strength in the National Forest Policy of 2014 in relation to relevant biodiversity MEAs is a clear advocacy for participatory forest management as prescribed in Article 8(j) of the CBD on integration of indigenous knowledge and involvement of local stakeholders in the management of biological heritage. Article 8(j) requires State parties to ensure collaborative management of forests at country level through partnership with local communities and other stakeholders, including the private sector. In Kenya, this is implemented through the involvement of Community Forest Associations (CFAs). Section 46(2) of the Forest Act, 2016, allows the CFAs to be involved in the conservation and management of state, local and communal forests in partnership with national and county government agencies. In recent years, over 325 CFAs have been registered across the 10 forest conservancies in the country, namely Nairobi, North Eastern, Nyanza, Western, Eastern, Ewaso North, North Rift, Mau, Coast and Central Highlands.[41] Out of the 325, some 156 CFAs have developed forest management plans. However, a 2018 study revealed that upto 226 CFAs were operating without formal agreements with Kenya Forest Service (KFS).[55]

One of the weaknesses in the National Forest Policy of 2014 is the lack of a clear requirement for preparation of regular state of the forests reports, especially for the water towers in line with Article 7 of the CBD. The policy is also mute on the issue of *ex-situ* conservation of forest genetic resources in line with the CBD[42] including the establishment of national forest gene banks. However, the above policy gaps are addressed in the Forest Conservation and Management Act, which requires KFS to provide National Forest Status Reports (NAFRA) to the Cabinet Secretary every two years. The government has also established some *ex-situ* conservation facilities, including the National Genebank of Kenya (NGBK) and the Kenya Forestry Seed Centre in Muguga.[43]

The National Forest Policy of 2014 is generally weak on the valuation of forests and establishment of a national forest resource accounting system in line with Article 6(b) of the CBD, as well as Aichi Biodiversity Targets 1 and 2. Consequently, only a limited number of forest ecosystem valuations have been undertaken in Kenya. The low level of awareness on the monetary value of forest heritage may have contributed to the widespread destruction of such ecosystems around the country.

40 Ministry of Environment and Forestry, *A Report on Forest Resources Management and Logging Activities in Kenya – Findings and Recommendations,* (2018).

41 Ibid.

42 The Convention on Biological Diversity (1760 U.N.T.S. 69, (Signed 5 June 1992).

43 Kenya Agricultural Research Institute (KARI), *Country Report to the FAO on the State of World's Plant Genetic Resources in Kenya* (2009).

The other areas of weakness in the National Forest Policy of 2014 are related to the issues of forestry biotechnology and biosafety especially in commercial tree breeding as advocated in Article 19 of the CBD. This is a serious gap, given that forest biotechnology has already been embraced in Kenya. In 1997, for example, the International Service for the Acquisition of Agri-biotech Applications (ISAAA) commissioned a 'Tree Biotechnology Project' in the country involving genetically engineered biotech eucalyptus through a partnership between the then Forestry Department, KEFRI and Mondi Forests, a South Africa's pulp and paper giant. Clear policy guidelines for risk management in commercial forest biotechnology are necessary because such activities are likely to increase in future.

The above policy gap is partly considered in Part III of the Biosafety Act which is supported by a number of subsidiary regulations, including the Biosafety (Environmental Release) Regulations of 2011. Both the law and subsidiary regulations prohibit the introduction of genetically engineered species into the environment without approval.[44] However, neither KFS nor KEFRI are included in the list of regulatory agencies, with most powers delegated to KEPHIS whose interests are directed more to the agricultural sector, particularly horticulture. The public participation space for biotech introductions is also seriously curtailed by the fact that the biosafety law, regulations and the Fourth Schedule for environmental release have no mandatory requirement for EIA through which stakeholder consultation can be accommodated.

Rangelands

The rangelands have sometimes been considered as the 'forgotten giant of Kenya' for a number of reasons, including their expansive coverage, strategic position as a gateway to important neighbouring countries such as Ethiopia and South Sudan, and their untapped biological heritage, which has significant economic potential.[45] Apart from their role as habitats for wildlife heritage in Kenya, the rangelands have a wide array of other important biological goods, such as frankincense, gum, resins and herbal medicines from iconic dryland species such as *Acacia senegal, Boswellia neglecta, Commiphora spp* and *Aloe spp*.

Sessional Paper No. 6 of 1999 on Environment and Development, as one of the holistic environmental policies, was quite weak on the governance of biological heritage in the rangelands despite their huge coverage. Although the policy discourages inappropriate conversion of critical rangelands especially the savanna into agriculture, the prescription has failed in counties such as Narok and Laikipia, which support high wildlife populations. The rapid encroachment of such areas by wheat and barley farming is desirable in terms of food security but portend a serious problem in terms of wildlife conservation as a mainstay for the tourism industry. In 2021, the tourism industry earned Kenya Ksh 146 billion despite the COVID-19 pandemic.[46]

The policy requirement for the integration of wildlife, tourism and livestock sectors in the management of rangelands has only worked in private ranches while most of the pastoral areas

44 Biosafety Act, 2009, s 19(i).

45 AM Abass and Francis Mwaura, 'Remembering the Drylands of Kenya Integrating the ASAL Economies in Vision 2030', in George Gona and Mbugua wa-Mungai (Eds) *(Re)Membering Kenya (Volume 2) Interrogating Marginalization and Governance* (Goethe-Institut Kenya, Ford Foundation, Twaweza Communications) (2013) 88-111.

46 Elisabeth Valle and Mark Nelson Yobesia, 'Economic Contribution of Tourism in Kenya' [2009], 14 Tourism Analysis, 401-414. See also George Ojwang et al., 'Wildlife Migratory Corridors and Dispersal Areas: Kenya Rangelands and Coastal Terrestrial Ecosystems' [2017].

are characterized by widespread human-wildlife conflicts (HWCs). Although the wildlife heritage in Kenya is known to generate a lot of revenue through tourism as already indicated, societies in wildlife frontlines, especially around conservation areas, have continued to suffer great losses as a result of HWC. In 2014-2016, for example, the burden of the pending compensation claims for HWC-related losses was estimated at Ksh4.6 billion (US$ 4,457,368). The Third Schedule of WCMA, 2013, provides for compensation of HWC losses (human death and injuries, crop damage, livestock predation and property damages) only for a range of wildlife species including snakes, elephants, buffalo, lions, leopards and crocodiles through Regional Wildlife Committees.[47] However, the National Assembly has recently amended the law and withdrawn snakebite compensation from the list due to hefty claim levels, which had reached Ksh4.5 billion by 2017.

In recent years, the government has formulated the National Policy for the Sustainable Development of Arid and Semi-Arid Lands (2017) but the policy is inadequate on to the domestication of relevant obligations for biodiversity MEAs. The policy is also mute on the CBD and yet Kenya is part of the Horn of Africa biodiversity hotspot (>1.5 million km^2). Similarly, the policy is oblivious of the CITES obligations, especially Article 3 and 8.1 on prohibition of trade in endangered species, yet these areas have some of the highest wildlife densities in Kenya. These weaknesses could result in the continued deterioration of rangeland biodiversity, including wildlife crime and proliferation of alien invasive species such as *Prosopis juliflora,* which has affected a large number of rangeland counties almost to the point of being declared as a national disaster.[48]

C. Governance of aquatic biological heritage

Coastal and marine heritage

Biological heritage in coastal and marine ecosystems in Kenya is governed through three key policies, namely, Sessional Paper No. 10 of 2014 on the National Environment Policy, National Oceans and Fisheries Policy of 2008,[49] and the Integrated Coastal Zone Management (ICZM) Policy, 2017.[50] These instruments are supported by a number of legal frameworks including the Maritime Zones Act which allows the government to control the use of marine resources and the Continental shelf Act (Cap 312) which regulates the use of territorial waters and Exclusive Economic Zone (EEZ). One of the goals of the National Environment Policy is the promotion of sustainable use of marine resources, including the conservation of vulnerable coastal ecosystems as advocated in Article 1 of the CBD. This is addressed through the ICZM Policy, whose implementation is largely undertaken by the national government through NEMA, Coast Development Authority (CDA) and other relevant agencies such as KMA, KPA and KFS. County governments are marginally involved in the implementation of the ICZM policy.[51] The National Environment Policy of 2014 also advocates for the promotion of regional cooperation in the conservation and management of marine migratory species according to Article 5 of the CBD. This goal is well considered in the 1995 Nairobi Convention for the Protection, Management

47 Wildlife Conservation and Management Act, 2013.

48 Daniel Mwania, 'Distribution and Density of the Invasive Plant Species, "Prosopis juliflora", in the Western Turkana Region of Northern Kenya' (M.Sc thesis, Voinovich School of Leadership and Public Affairs) (2017).

49 Ministry of Fisheries Development, *National Oceans and Fisheries Policy,* (Nairobi: Government Printer) 2008.

50 Government of Kenya, *Integrated Coastal Zone Management (ICZM) Policy,* (Nairobi: Government Printer) (2017).

51 Lenice Ojwang et al., 'Assessment of Coastal Governance for Climate Change Adaptation in Kenya' [2017], 5 *Earth's Future* 1119–1132.

and Development of the Marine and Coastal Environment of the Western Indian Ocean. This is a partnership between governments, civil society and the private sector for a prosperous Western Indian Ocean. The State parties comprise Comoros, France, Kenya, Mauritius, Madagascar, Mozambique, Seychelles, Somalia, United Republic of Tanzania and Republic of South Africa.

Paragraph 4.2.3 of the National Oceans and Fisheries Policy of 2008 advocates for international cooperation, especially with the Distant Water Fishing Nations, regarding the shared use of highly migratory fish stocks in the Indian Ocean. The policy aims at ensuring sustainable harvesting and collaborative management of marine fisheries in line with Article 5 of the CBD.[52] This is important because in recent years, the Government of Kenya has introduced the blue economy as the seventh enabler sector for Vision 2030 in line with Goal 6 of the African Union Agenda 2063 on the use of marine resources for accelerated economic growth.[53] In this regard, the Ministry of Agriculture, Livestock and Fisheries in 2014 spearheaded the formulation of the Tuna Fisheries Development and Management Strategy 2013-2018 as part of the blue economy agenda. The strategy aims at transforming artisanal-based tuna fisheries to modern commercially oriented coastal and oceanic fisheries.

One of the key governance challenges which is likely to face the blue economy in Kenya is the problem of illegal fishing in territorial waters and EEZ by outsiders especially Chinese and European Union vessels due to poor surveillance. It is estimated that Kenya is losing up to Ksh10 billion annually to illegal, unreported and unregulated fishing activities within the EEZ.[54] Consequently, the government in 2017 established the Monitoring Control and Surveillance Centre in Mombasa as an multi-agency entity expected to deal with the challenges in line with the National Oceans and Fisheries Policy of 2008.[55]

The two main policy gaps in the National Oceans and Fisheries Policy of 2008 are associated with the management of alien marine invasive species and conservation of endangered species. The national policy is silent on the prevention of alien species as obligated in Article 8(h) of the CBD, yet the Kenya maritime sector continues to grow, thereby increasing the risk of marine infestations especially through the use of ballast water in the shipping industry. The recent expansion of the Port of Mombasa and the establishment of the Port of Lamu through the LAPSSET programme requires the formulation of tight regulations to avoid the introduction of invasive species, which could seriously affect coastal economic sectors such as fishery and tourism. A recent survey established that upto 345 marine species are thriving at the Port of Mombasa, including two Bryozoan alien invasive species, namely *Bugula neritina* and *Tricellaria occidentalis*.[56] Currently, there are no binding provisions under the Nairobi Convention that are directly related to marine alien invasive species. However, the State parties have endorsed a Regional Strategy and Action Plan on Ballast Water with a view to incorporating it into the programme of work for the Convention. NEMA is also developing a National Invasive Alien Species Strategy to address this policy gap.

52 Ministry of Fisheries Development, *National Oceans and Fisheries Policy of 2008* (Nairobi: Government Printer).
53 African Union Commission (AUC), *Agenda 2063 – The Africa We Want,* (2015).
54 Willy Bett, Cabinet Secretary, Agriculture, Livestock and Fisheries, 'Keynote Address' (Official opening of the National Marine and Ocean Inter-agency Monitoring Control and Surveillance Centre, Mombasa, 2 August 2017).
55 Ministry of Fisheries Development, *National Oceans and Fisheries Policy of 2008* (Nairobi: Government Printer).
56 Adnan Awad, *Report on the Invasive Species Component of the MEDA's, TDA and SAP for the ASCLME Project*, (Cape Town, South Africa, Consultant report).

In terms of marine endangered species, the National Oceans and Fisheries Policy of 2008 is silent on the issues of *ex-situ* conservation as prescribed in Article 9 of the CBD, which calls for the establishment of safe havens for critically endangered coastal and marine species. In Kenya, these include the marine turtles and dugong dugong. Good governance may eventually require the establishment of marine orphanages and sanctuaries for the protection of such species under controlled environments.

The main areas of strength in the ICZM Policy of 2017 include clear governance prescriptions on the conservation of coastal forests, establishment of marine protected areas and management of marine alien species. Section 4.3.1(vi) of the ICZM of 2008 advocates for the strengthening and enforcement of regulations governing protection of coastal forests, including mangrove ecosystems, to facilitate their conservation according to the governance prescriptions in Article 1 of the CBD.[57] Section 4.3.5(viii) raises the need for the monitoring and control of alien invasive species in accordance with Article 8(h) of the CBD. In addition, Section 4.3.1 (v) of the ICZM Policy advocates the undertaking of EIAs for proposed development projects adjacent to mangrove forest areas in line with Article 14 of the CBD. The ICZM Policy (2008) also advocates the establishment of flagship MPAs for conservation of critical and endangered heritage such as mangrove forests, coral reef and seagrass habitats. So far, a total of four State MPAs have been established in Kenya for the purpose of protecting coastal and marine biological heritage as well as generating tourism revenue.[58]

The ICZM Policy, in Section 4.3.1(vii), emphasizes the need for the development and implementation of site-specific management plans for coastal forests including mangrove ecosystems in line with Article 6(a) of the CBD. In response to this, the government in 2017 formulated the National Mangrove Management Plan (2017) to enhance the integrity of mangrove ecosystems in Kenya. In support of this effort, the Mombasa Mangrove Forest Participatory Management Plan (2015-2019) was developed to ensure the sustainable use and conservation of mangrove ecosystems in various parts of Mombasa County such as Mtwapa Creek, Tudor, Changamwe, Kilindini and Mwache.[59] One of the weaknesses in the ICZM Policy (2017), just like the Oceans and Fisheries Policy (2008), is the silence on *ex-situ* conservation as required by Article 9 of the CBD.

In addition to the National Oceans and Fisheries and ICZM policies, the governance of coastal and marine biological heritage is also covered in the National Wildlife Policy 2020[60] because the region of Kenya is characterized by important global biodiversity hotspots. These include the Coastal Forests of Eastern Africa Hotspot (308,220 km^2) and the Indian Ocean Islands Hotspot (600,461 km^2). Section 5.3(10) of the National Wildlife Policy advocates the promotion of regional cooperation in the conservation and management of marine migratory species in line with Article 13 of the CITES and Article 2.1 of the CMS, while Section 5.3(7) supports the involvement of local communities in the management of MPAs in the spirit of participatory

57 Government of Kenya, *Integrated Coastal Zone Management (ICZM) Policy,* (Nairobi: Government Printer) (2017).

58 Angelica AD Chirico, Timothy McClanahan, and Johan S. Eklof, 'Community and Government-managed Marine Protected Areas Increase Fish Size, Biomass and Potential Value' [2017], 12(8) *PLoS ONE.*

59 Ministry of Environment, Natural Resources and Regional Development Authorities, *National Mangrove Ecosystem Management Plan*, (Nairobi: Government Printer) (2017).

60 Ministry of Forestry and Wildlife, *National Wildlife Policy*, (Nairobi: Government Printer) (2020).

wildlife management. However, although Section 5.3 advocates the establishment of additional MPAs through appropriate participatory mechanisms as provided in Article 5.5(g) of the CMS, very little progress has been made in this regard. This is in contrast to the remarkable achievement in the rangelands of Kenya where over 100 community wildlife conservancies have been established, thereby boosting the network of biological heritage conservation areas in the country.

Rivers and lakes

The management of biological heritage in rivers and lakes in Kenya is considered under water resources and wetlands, whose policies include the National Water Policy, National Environment Policy and the National Wetlands Conservation and Management Policy. Although the country relies heavily on use of rivers and lakes as sources of water for society and the economy, the National Water Policy is silent on the issue of environmental sustainability, including the need for SEA and EIA in the implementation of large water development programmes and projects such as inter-basin water transfers. This can have major impacts on the aquatic biological heritage. However, Section (40)(4) of the Water Act provides for EIA in water related works in rivers and lakes as required in the EMCA.[61]

Wetlands

Biological heritage within the wetland ecosystems in Kenya is governed through the National Wetlands Conservation and Management Policy of 2015.[62] This is a useful policy given that wetlands in Kenya only cover about 14,000 km^2 or about 3-4 per cent of the country. The key strengths in the policy relates to the provision for wetland conservation and prevention of wetland conversion and reclamation although these continue to happen around the country. Section 2.2.2 of the policy advocates the establishment of wetland conservation areas in accordance with Article 1.1 of the Ramsar Convention and so far, a total of six wetlands are designated as Ramsar sites. These include five Rift Valley lakes (Nakuru, Naivasha, Elementaita, Bogoria, Baringo) and the Tana Delta. Other sites proposed for nomination include Yala, Sio-Siteko and Saiwa swamps.

The National Wetlands Conservation and Management Policy in Section 2.2.1 recognizes the importance of wetlands even when under private ownership. It seeks to regulate, protect, manage and conserve all wetlands, including those within public, private and communal land in line with Articles 42 and 69 of the Constitution of Kenya 2010. The policy further discourages the reclamation and conversion of wetlands including their drainage, burning or introduction of inappropriate species. The EMCA was expected to support the wetlands policy through the application of Section 54 which has provisions for the gazettement of environmentally significant areas (ESAs) in private and communal land. However, very little progress has been made in that direction. At the same time, weak enforcement of the EMCA and the Environmental (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulations of 2009 has contributed to the continued loss and degradation of wetlands in urban and agricultural areas, especially along the riparian corridors and lake shores. The policy, in reference to Article 14 of the CBD, clearly

61 Environmental Management and Coordination Act, 1999, s 58(1).

62 Ministry of Environment, Water and Natural Resources, *Sessional PaperNo.12 of 2014 on National Wetlands Conservation and Management Policy,* (Nairobi: Government Printer) (2014).

prescribes the need for EIA, SEA and wide stakeholder consultations before any alteration of a wetland for public interest as highlighted earlier.

The implementation of the National Wetland Policy has not been very smooth, probably due to scattered mandate and conflict of interest in various institutions, including Ministry of Agriculture, Livestock and Fisheries, National Irrigation Authority, NEMA and WRA. Some critical wetlands, including Ramsar sites, have continued to face a wide range of problems including a high risk of encroachment and contamination. In 2008, for example, Lake Naivasha was almost transferred to the Montreux Record of threatened Ramsar sites due to increased ecosystem degradation.[63] Placing the site under the Montreux Record would have indicated that Kenya, as a State party, was not domesticating and implementing the Ramsar Convention obligations in an effective manner, thereby raising serious governance questions regarding suitability or implementation of the National Wetlands Conservation and Management Policy and related legal frameworks. In 2009, a large portion of the Tana Delta was almost lost in the Sh24 billion sugar cane growing project by Mumias Sugar Company and Tana and Athi River Development Authority (TARDA). Elsewhere, some parts of the Yala Swamp in Siaya County have been lost to rice irrigation by Dominion Company through the Lake Basin Development Authority (LBDA). However, these encroachments took place before the formulation of National Wetlands Conservation and Management Policy.

The other national policies dealing with wetland ecosystem governance include Sessional Paper No. 6 of 1999 on Environment and Development, Sessional Paper No. 10 of 2014 on the National Environment Policy, and the National Wildlife Policy of 2020. One of the strengths in Sessional Paper No. 6 of 1999 is a clear goal on the need for integrated management plans for sustainable management of wetlands in line with Article 6a of the CBD and Article 3 of the Ramsar Convention. A number of such management plans have been prepared for some wetlands in Kenya, such as Saiwa, Kimana and Tana Delta. It is very likely that the formulation of such plans in Kenya could be accelerated through the provision of a standard wetland-planning framework like the Protected Area Planning Framework prepared by KWS for protected areas including community conservancies. The goal in Sessional Paper No. 6 of 1999 on Environment and Development on the promotion of community participation in wetlands conservation and management has been strengthened by the National Water Policy through the introduction of Water Resource User Associations, which usually serve as the grassroot custodians of numerous small wetlands around the country. It is estimated that over 100 WRUAs have been registered around the country.

D. Summary, conclusion and recommendations

Summary and conclusion

Kenya has made remarkable efforts towards sustainable governance of biological heritage in both terrestrial and aquatic ecosystems around the country. This is demonstrated by the measures taken by the government to formulate relevant national policies through which the domestication of the global governance obligations in biodiversity-related MEAs is undertaken.

63 Parita Shah, 'Domestication and Application of Biodiversity Related Multilateral Environmental Agreements (MEAs) in Kenya' (PhD thesis, University of Nairobi) (2016).

The policy appraisal of governance instruments for biological heritage in Kenya showed a number of strengths, weaknesses and gaps as highlighted here.

The findings show that the country still lacks a policy on sustainable management of mountain ecosystems as prescribed in the CBD obligations. The policy could play a big and central role in addressing the environmental challenges facing biological heritage in mountains. Such areas are also dominated by forest ecosystems, whose heritage is needed in a wide range of sectors. The goal, in Sessional Paper No. 6 of 1999 on Environment and Development, of continuously increasing the total forest cover in Kenya beyond 10% in line with Article 9 of the CBD is gradually being realized through reforestation especially during the 2010-2020 decade. The establishment of CFAs as advocated in the National Forest Policy (2014) which is in line with Article 8(j) of the CBD obligation, has promoted significant participatory forest management in the country. However, the National Forest Policy is still weak in terms of economic valuation of forests for improved communication, education and public awareness (CEPA) in line with the Aichi Biodiversity Targets. The policy is equally weak in terms of biosafety and regulation of commercial tree breeding to avoid potential environmental disasters such as the spread in transgenic species in commercial forestry.

Although Kenya is dominated by arid and semi-arid areas, the 2017 National Policy for the Sustainable Development of Arid and Semi-Arid Lands is rather weak regarding the domestication of relevant obligations for biodiversity MEA. The policy is mute on most of the CBD obligations yet Kenya is part of the Horn of Africa biodiversity hotspot. Similarly, although the rangelands have some of the highest wildlife densities in Kenya, the ASAL policy is oblivious of the CITES obligations, especially on prohibition of trade in endangered species.[64] There is a need to strengthen the policy in order to effectively safeguard the biological heritage in such areas.

Regarding the coastal and marine heritage, the government has made great efforts towards the conservation and sustainable development of the coastal and marine heritage, especially through the formulation of the National Oceans and Fisheries Policy and ICZM Policy but the county governments are marginally involved in their implementation. The two main policy gaps in the National Oceans and Fisheries Policy are associated with the management of alien invasive species and conservation of endangered marine species. The invasive species challenge is likely to increase through the LAPSSET programme and the Blue Economy agenda.

The National Water Policy, through which rivers and freshwater lakes are governed, is silent on the issue of environmental sustainability -- including the need for SEAs and EIAs in large water development programmes and projects such as inter-basin water transfers, which can have major impacts on aquatic biological heritage. On the other hand, wetland biological heritage is well covered in the National Wetlands Conservation and Management Policy but weak enforcement of the related legal frameworks, including the EMCA and the Environmental (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulations has affected implementation of this important policy. Although the policy advocates restoration and rehabilitation of degraded wetlands, the government is yet to develop guidelines for the implementation of such programmes in partnership with local communities and the private sector despite the presence

64 See Convention on International Trade in Endangered Species of Wild Fauna and Flora (Resolution Conf. 16.3 (Rev. CoP17) (Adopted 3 March 1973, entered into force 1 July 1975) (CITES) art III and VIII (1).

of a large number of degraded wetlands. Similarly, there are also no guidelines provided for introduction, prevention, surveillance and control of wetland invasive species within different economic sectors.

Recommendations

The regular interrogation of policies associated with biological heritage governance in Kenya lies within the mandate of the Kenya Institute for Public Policy Research and Analysis (KIPPRA). However, the focus of this agency is heavily skewed more towards socio-economic policies and less towards non-environmental and natural resource policies. There is a need for KIPPRA to adopt a broader focus by also considering performance evaluation for environmental and natural heritage-related policies for effective governance of biological heritage in the country.

There is also needs to undertake a review of the following biological heritage-related policies for improved governance:

- National Forest Policy (2014) - to integrate the issues of forest valuation and biosafety. The Biosafety Act (2012) and related regulations should also be reviewed, especially with regard to the protocol for environmental release in biotechnology related commercial forestry to introduce mandatory requirements for EIA, which will create participatory space for public consultations.

- National Policy for the Sustainable Development of Arid and Semi-Arid Lands (2017) - to integrate relevant obligations for biodiversity MEAs, including the sustainable management of dryland mountains, rivers and wetlands as critical lifelines for people, livestock and wildlife in the rangelands. There is need for a clear policy direction regarding the conversion of rangelands into agro-ecosystems particularly within Ecological Zone IV, which could threaten the future of wildlife conservation in critical areas such as Laikipia, Narok and Kajiado counties.

- National Oceans and Fisheries Policy (2008) - to integrate the prevention, control and surveillance of marine alien invasive species according to the guidelines provided in the Global Invasive Species Programme (GISP).

- National Oceans and Fisheries Policy (2008) - to integrate the conservation of endangered marine species through the introduction of *ex-situ* safe house conservation facilities by institutions such as NMK and KMFRI for critically endangered coastal and marine species such as the marine turtles and dugong. In addition, there is need for fast-tracking the incorporation of the marine invasive species into the Programme of Work for the Nairobi Convention as well as the finalization and adoption of the National Invasive Alien Species Strategy by NEMA.

CHAPTER 17

The Role of Public and Stakeholder Participation in Enhancing Sustainable Water Resources Management in Kenya

Mwenda K. Makathimo

A. Introduction

The provisions of Sessional Paper No.1 of 1999 on National Policy on Water Resource Management and Development and the Water Act 2002 guided stakeholder participation in water resources management in Kenya prior to the promulgation of the 2010 Constitution. The policy specifically provided for stakeholder participation in water development projects and recognition of gender aspects in water use and management. The policy further provided for decentralization of water management through institutional reforms.[1]

The policy provided for the adoption of integrated water resources management (IWRM) while acknowledging that the sector had been adversely affected by the fragmented approaches taken by sectoral agencies.[3] IWRM provided a key foundational thrust upon which stakeholder participation has been pegged. The provisions of this policy were given legal force by the Water Act, 2002, and have been implemented since then. Following the adoption of the Constitution of Kenya, 2010, and experience drawn from two decades of implementing the water policy of 1999, a revision of the water policy was needed. New constitutional values, responsibilities and obligations required new policy directions. This need led to the formulation of the Sessional Paper No.1 of 2021 on National Water Policy. The National Water Policy, 2021, seeks to build on the success achieved by the 1999 policy and addresses the emerging challenges while ensuring constitutional alignment.[2] The National Water Policy of 2021 cites some of these challenges as being the incomplete devolution of functions to the basin level in water resource management, and conflict of interests in regulation and implementation.

The policy adopts IWRM and participatory approaches among key principles in addition to highlighting the need to increase public participation and its institutionalization.[3] These provisions give a more focused guide to stakeholder participation in comparison to the provisions of the 1999 water policy. In addition to the water policy, the National Environment Policy has also reinforced stakeholder participation.[4] This policy seeks to operationalize the constitutional provisions and has included the following among its objectives: promoting and enhancing cooperation, collaboration, synergy, partnership and participation in protection, conservation and better management of the environment by all stakeholders. It further provides for public participation and inclusivity.[7]

1 Sessional Paper No.1 of 1999 on National Policy on Water Resources Management Policy and Development, 1999. 3 *Ibid.*
2 Sessional Paper No.1 of 2021 on National Water Policy, 2021.
3 *Ibid.*
4 National Environment Policy, 2013. 7 *Ibid.*

In addition to the policy strides,legislative developments have also been recorded including enactment of the Water Act, 2016; the Environment Management and Coordination Act (EMCA) amendment in 2015; and the County Governments Act, 2012. These laws have substantially addressed stakeholder and public participation. The Constitution of Kenya, 2010, serves as the anchor for stakeholder participation upon which all the policy, legislative and administrative reforms are based. The section below reviews the constitutional provisions that relate to water resources management and stakeholder participation.

B. Constitutional provisions on stakeholder participation

The Constitution provides that all sovereign power belongs to the people and is to be exercised in accordance with the provisions of the Constitution.[5] It further provides for democracy and participation of the people; good governance; integrity; transparency; accountability and sustainable development as national values guiding how the power of the people is exercised.[6] These provisions give stakeholder participation the highest legal recognition in the country.

The rights of people to access water and participate in environmental management issues have also been anchored in the provisions of the Constitution of Kenya, 2010. Water is recognized as a basic human right in the Constitution. Article 43 (1)(d) affords every person the right to clean and safe water in adequate quantities. These provisions oblige the State to address the problems of water quality and quantity. They give people the basis for seeking redress in case of failure by State authorities to secure this right. The implication is that State authorities have to invest in approaches and management mechanisms that deliver these rights to avoid high judicial costs in case of breach. These two provisions put pressure on the State to implement management approaches like IWRM that are designed along the principles of sustainable development. They provide the foundation for the development of policies and establishment of institutions to secure rights to water, among other environmental resources.

Article 69(1)(a) gives the State the duty to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and to ensure equitable sharing of accruing benefits.[7] This provision correlates with the concepts of sustainable development and IWRM. It specifically brings to the fore the duty of addressing equity among the current generation and for the future generations. Under Article 69(1) (d), the State has the duty to encourage public participation in the management, protection and conservation of the environment.[11]This provision makes public participation not just a normative goal but also a duty that has foundations for institutionalization. Again this is in agreement with participatory requirements for IWRM. It makes it necessary, therefore, for water resource management policies and strategies to set mechanisms for ensuring effective participation at all levels of governance.

Article 69 (2) places on every person the duty to cooperate with State organs and other persons to protect, conserve the environment and to ensure ecologically sustainable development and

5 Constitution of Kenya, 2010.
6 *Ibid*, Art 10.
7 Constitution of Kenya, 2010, Art 69. 11 *Ibid.*

use of national resources.[8] This provision is useful since it makes it the responsibility of all members of the public to cooperate. This is critical in cases where regulations have to be enforced for the collective good of the public. Collective action necessary for sustainable management of water resources can be enforced under this provision.

The Constitution provides for devolution by creating 47 distinctive county governments. A key object of devolution is outlined in Article 174(c) as being to give powers of self-governance to the people and enhance participation of the people in the exercise of powers of the State and in making decisions affecting them. Article 174 (h) makes decentralization of State organs, their functions and services an object of devolution. County governments are additionally required by Part 2, Section 14 of the Fourth Schedule, to ensure and coordinate the participation of communities and people in governance at the local level.[9] They are also required to assist local people to develop administrative capacity for the effective exercise of functions and powers, and to participate in governance. These provisions suggest that devolution is intended to realize the principle of subsidiarity as provided for in Principle 10 of the Rio Declaration.[10] The provisions provide a basis for enhancing the role of the public in environmental decision-making.[11] With the duty of and responsibility for environmental management under Article 69(2) placed on all persons, all stakeholders have, by implication, an obligation to effectively participate in ensuring sustainable management of water resources in Kenya.

Given the foregoing constitutional provisions, the public is also required to fulfill the duty of protecting the environment and ensuring sustainable development and use of natural resources. They cannot, therefore, sit back and watch as degradation of the environment and misuse of natural resources goes on.[16]The Constitution, as the supreme law in Kenya, has comprehensively framed the role of citizens in water and environmental resources management. It has afforded a social contract to the citizens that guarantees sustainable development and consolidates their roles in its achievement. The broad constitutional principles and values discussed above set the foundation upon which the more specific statutory framework is developed to direct implementation. The section that follows reviews the legislation that addresses stakeholder participation in water resources management.

C. Legislation on stakeholder participation

Legislation governing stakeholder participation is discussed hereafter under three categories covering legislation on water resource management; legislation on environmental management and legislation on county governments.

8 *Ibid.*

9 Constitution of Kenya, 2010.

10 Rio Declaration on Environment and Development (U.N Doc. A/CONF. 151/26 (Vol. 1), reprinted in 31 ILM (Adopted 14 June 1992).

11 Robert Kibugi, 'Constitutional Basics of Public Participation in Environmental Governance: Framing equitable opportunities of national and county government levels in Kenya' in Hassane Cissé et al. (Eds.,) *The World Bank Legal Review: Fostering Development through Opportunity, Inclusion, and Equity* (World Bank, Washington DC) (2014) 307 – 327. 16 Kariuki Muigua, 'Towards Meaningful Participation in Natural Resource Management in Kenya' (2014)

Legislation on water resources management

Prior to the promulgation of the Constitution of Kenya, 2010, the Water Act, 2002, was the key statute governing water resources management in Kenya. It was enacted to provide a framework for implementing the reforms encapsulated in the 1999 national policy on water resources management and development. Section 7 of the law established the Water Resource Management Authority (WRMA), while Section 8 provided for its powers and functions.[12] Of key relevance to this discussion is Section 8(1)(f), which gave the Authority power to manage and protect catchment areas. Under Sections 14, 15 and 16, the Authority was given powers to designate catchment areas, formulate catchment areas management strategies, and form catchment area advisory committees.[13] These provisions provided the basis for making IWRM strategies operational, with the catchment area (hydrological unit) being used to organize water resources management rather than the administrative or political units. Stakeholder participation was provided for in the law under Section 107, where specific procedures for undertaking public consultations were prescribed. This opened up space for public voice and provided an avenue for public input into water management decisions.

Section 16 provided for the establishment of Catchment Area Advisory Committees (CAACs) with the appointment procedures for members' outlined in the First Schedule. These committees were charged with the duty of advising WRMA officers at the regional offices on matters relating to water resources conservation, use and apportionment; the grant, adjustment, cancellation or variation of any permit, and any other matters pertinent to proper management of water resources.[14]CAACs were thus set to provide the highest level at which stakeholders were expected to inform water management strategies. It was expected that the committee members would act as representatives of all stakeholders.

Section 15 (5) of the Water Act, 2002, provided for establishment of Water Resource Users Associations (WRUAs) as a platform for conflict resolution and cooperation in management of water resources. These associations provided a platform for stakeholders to participate in management of water resources. It must be observed, however, that this provision did not make the establishment of WRUAs mandatory but only required WRMA to encourage their formation through the catchment management strategy.

After the promulgation of the 2010 Constitution, there emerged the need to align all laws to the provisions of the Constitution. The Water Act, 2016, was thus enacted to provide for the regulation, management and development of water resources, water and sewerage services and other related purposes.[15] The law separates the regulatory and management functions of water resources and water use. Section 11 establishes the Water Resources Authority, while Sections 12 and 13 outline the functions and powers of the Authority, respectively. These provisions present a departure from the combination of regulatory and management of water resources and management of water resources function under one body (WRMA) under the provisions of the Water Act, 2002. The 2016 law recognizes basin areas as defined areas from

12 Water Act 2002, s 7.
13 Water Act 2002, ss 14, 15 & 18.
14 *Ibid*.
15 Water Act, 2016.

which rainwater flows into a watercourse, and designates these basin areas as management units for water resources. Section 25 provides for the establishment of Basin Water Resources Committees with the responsibility for managing water resources within the respective basin.[16] This differs from the CAACs under the Water Act, 2002, which only played an advisory role.

Section 26, together with the First Schedule of the Water Act, attempts to address the imbalance in the representation of various stakeholders earlier witnessed under the regime of Water Act, 2002. The process adopts the values provided for under Article 10 of the Constitution, namely; democracy and participation of the people; good governance; integrity and transparency. Section 29 of the Water Act provides for establishment and functions of WRUAs at the sub-basin level. These comprise community-based associations for collaborative management of water resources and resolution of conflicts concerning the uses of water resources.[17] This provision widens the scope of the roles of WRUAs to cover water resources management as opposed to just being a platform for conflict resolution as was the case under the provisions of the Water Act,2002. The Water Resources Regulations,2021 formulated pursuant to the Water Act,2016 have provided a clear process for registration of WRUAs. The Regulations require the Authority to equitably allocate financial resources to WRUAs for conservation and management of water resources. They further make provisions for entering into a Tripartite Memorandum of Understanding between the Authority, WRUAs and the respective County Governments [18]. It must be observed, however, that registration of WRUAs is done under the provisions of both the Societies Act and the Water Resources Regulations 2021. This serves to increase bureaucracy, inefficiency and compliance costs. Discretion is left to the Basin Water Resources Committees to contract WRUAs as agents to perform certain duties in water resources management. The statutory provisions cited enhance the role of stakeholders in water resources management though they do not address negative competition for water resources. Their implicit assumption is that given the public participation structure and strategies proposed, voluntary collective action that pursues goals of sustainability would take place.

Legislation on stakeholder participation in environmental management

The EMCA has been the framework law guiding environmental management in Kenya since 2000. This statute was amended by the EMCA (Amendment) Act, 2015, to align its provisions with the Constitution of Kenya, 2010. Section 3 of EMCA, created a 'liberal legal standing (access to justice) for anyone bringing an environmental action'[19] to court. This correlates with provision requiring access to judicial and administrative proceedings, including redress and remedy as advocated by Principle 10 of the Rio Declaration.[20]The EMCA also provides for public consultation as part of Environmental Impact Assessment procedures.[21] This internalizes consultation and

16 Water Act, 2016, s 25.

17 *Ibid,* s 29.

18 Legal Notice No.170 of 2021 on Water Resources Regulations, 2021, Part X.

19 Robert Kibugi, 'Constitutional Basics of Public Participation in Environmental Governance: Framing equitable opportunities of national and county government levels in Kenya' in Hassane Cissé et al. (Eds.,) *The World Bank Legal Review: Fostering Development through Opportunity, Inclusion, and Equity* (World Bank, Washington DC) (2014) 307 – 327.

20 Rio Declaration on Environment and Development (UN Doc. A/CONF. 151/26 (Vol. 1), reprinted in 31 ILM (Adopted 14 June 1992).

21 Environmental Management and Coordination Act, 1999, pt VI.

representation as forms of public participation.[22] These aspects of public participation though limited in scope, generally opened up the sphere of stakeholders' participation in environmental and water management decisions in Kenya.

The 2015 amendments to the EMCA generally align the law with the provisions in the Bill of Rights with respect to peoples' rights to a clean and healthy environment.[27] It further amends Section 3 of the principal law to open up space for people to seek judicial redress with respect to violations of environmental rights on their own behalf, on behalf of others, or in public interest. This aligns with the constitutional guarantees on access to justice.[23]

A new Section 3A was introduced to provide for access to information that is in the possession of the National Environment Management Authority, lead agencies ,or any other authority. This aligns with the right to access information provided for under the Constitution.[24] This operationalises a key element of effective stakeholder participation in environmental management and decision making. Section 5 of the principal law is amended to require the Cabinet Secretary to provide evidence of public participation in the formulation of policy and environmental action plans. This is a progressive provision seeking accountability of the highest policy office in the sector with respect to public participation.

Section 9(m) is amended to require NEMA to undertake and enhance environmental education, public awareness and public participation.[25] Sections 29 and 30 are repealed and replaced with new provisions establishing County Environmental Committees and providing for their functions, respectively.[26] Though Section 27 provides for diverse membership of the committee and addresses gender balance and representation of persons with disabilities and minorities, it fails to require the competitive recruitment or election of members. The duty of appointment is left to the governor.

A new Section 57A is inserted in Part IV of the principal law(EMCA, 2000), requiring Strategic Environmental Assessments to be carried out on all policies, plans and programmes. The guidelines for those assessments are subject to stakeholder consultations. Again, this requires accountability on the part of government authorities with respect to ensuring sustainable development. Section 71 of the principal law is repealed and replaced with a new section that places the duty of setting water standards on the Cabinet Secretary, on the recommendation of NEMA. The new provision eliminates the Enforcement and Review Committee, thus reducing bureaucracy.

Legislation on stakeholder participation at the county level

Other than the sector-specific legislation discussed previously, it is important to note that the County Government Act, 2012, contains provisions that give specific guidance on how public

22 Robert Kibugi, 'Constitutional Basics of Public Participation in Environmental Governance: Framing equitable opportunities of national and county government levels in Kenya' in Hassane Cissé et al. (Eds.,) *The World Bank Legal Review: Fostering Development through Opportunity, Inclusion, and Equity* (World Bank, Washington DC) (2014) 307 – 327. 27 Constitution of Kenya 2010, Article 43.

23 *Ibid,* Article 48.

24 Constitution of Kenya 2010, Article 35.

25 Environmental Management and Coordination Act, s 9.

26 Environmental Management and Coordination Act, ss 29 & 30.

participation should happen. Part II of the County Government Act, 2012, requires the county governments to ensure efficiency, effectiveness, inclusivity and participation of the people in the discharge of their duties.[27] The law further enumerates in detail the principles of citizen participation under Section 87. These largely align with the requirements of the Constitution with respect to public participation, including access to information; diversity across gender, communities and generations; judicial redress; adherence to requirements for sustainable development.[28] These statutory provisions afford the County Governments a sound base for ensuring effective stakeholders participation as they implement national government policies with regard to water and environmental management.

The provisions contained in the various statutes and the amendments reviewed before largely correlate with the elements of participation scoped by the Rio Principle 10, as well as the principles of sustainable development. Despite the legislative progress discussed here, the law that addresses general public participation, sets standards and provides a framework for all public institutions is yet to be enacted. This framework would be a guide on the information needed; determination of suitable media, forum, methods for participation; time frames; levels of engagement; process sequencing and other quality issues.[29]

D. Institutional arrangements for stakeholder participation

The institutions for stakeholder participation may be gleaned from the discussion on policies, the Constitution and legislation. These are institutions whose functions relate directly or indirectly to how citizens make decisions with respect to water resources management; obtain information; and access judicial or administrative proceedings. The Fourth Schedule of the Constitution places the duty of protecting the environment, including water, under the national government. In addition, the function of making policies for natural resources and environmental protection, including water conservation, is assigned to the national government. The county governments are assigned the roles of implementing the specific national government policies.[30]Stakeholder participation is required in the performance of these functions at both levels of government. A detailed discussion of the institutional arrangements at each of the levels now follows.

National government institutions for stakeholder participation

From an institutional point, the national government ministries making decisions on environment and water resources policies are the main executive entries at which stakeholder participation ought to take place. Section 8 of the Water Act,2016, gives the Cabinet Secretary powers to make regulations relating to all matters covered under the law. It is expected that in making regulations, stakeholder and public participation will be adhered to as required by the constitutional provisions outlined before. The executive, through the ministry, is also expected to engage stakeholders in discussions to formulate policies and strategies relating to water resources development and management. Section 10 of the 2016 Water Act requires the Cabinet Secretary, following public participation, to formulate and publish in the Gazette, a

27 County Government Act, 2012, pt 2.
28 Constitution of Kenya, 2010, Article 10.
29 Kariuki Muigua, 'Towards Meaningful Participation in Natural Resource Management in Kenya' (2014).
30 Constitution of Kenya, 2010. 36 Water Act, 2016, s 10.

National Water Management Strategy prescribing the plans, and programmes for the protection, conservation and control and management of water resources in Kenya.[36]

Once the executive formulates policies, they are forwarded to Parliament for debate and approval. The institution of Parliament (the National Assembly and the Senate) serves, therefore, as another national level platform where stakeholder participation is expected to occur. This participation takes the nature of submission of memoranda and oral presentations before the relevant committees of Parliament. As earlier observed, there is still no national framework law for public participation in Kenya and these processes are, therefore, left to sectoral laws and discretionary administrative procedures.

The other categories of National institutions for public participation comprise the Conflict and Dispute Resolution bodies. They include the Judiciary (Superior Courts and Subordinate Courts) and the respective Quasi Judicial Tribunals (Water Tribunal and National Environment Tribunal). They provide the public have an avenue for asserting and requiring the enforcement of their rights to participation in the management and enjoyment of their rights to water resources.

County government executive and oversight institutions

Given the provisions of the County Government Act, all county government institutions are obliged to facilitate effective stakeholder participation. The County Government Executive Committee is, therefore, the apex institution that is expected to implement these provisions. The County Executive Committee (CEC) member in charge of the department responsible for water and environmental matters is expected to spearhead the implementation of programmes and projects aimed at protecting and conserving water resources in a manner that is participatory. It has been observed,however, that counties have variably implemented the public participation requirements under the County Government Act, 2012. Some have established robust and clear public participation frameworks while others have only scattered administrative notices inviting public participation limited to their budget formulation processes.[31] It is, therefore, necessary that all county governments put in place clear frameworks for public participation. The executives in charge of water resources management should implement these frameworks to enhance stakeholder participation in the implementation of IWRM at the lowest levels of the devolved government.

The authority derived from Article 185 of the Constitution of Kenya, 2010, and the County Governments Act, 2012, gives County Assemblies the duty of debating the frameworks, projects, work plans and budgets from the County Executive Committee members, approving them and playing oversight roles with respect to their implementation. This authority includes matters relating to water management and conservation. In the performance of these duties, the County Assemblies are also required to allow for citizen participation. In this respect, on matters relating to water resources management, the County Assemblies have a duty to ensure effective participation of stakeholders in the decision making processes at the assembly level and the implementation processes undertaken by the executive.

31 Chrispine Oduor, Rose Wanjiru and Festus L Kisamwa, *Review of status of Public Participation, and County Information Dissemination Frameworks: A Case Study of Isiolo Kisumu Makueni and Turkana Counties (*Institute of Economic Affairs (IEA) (2015).

Besides the general review of national and county government institutions, it is important to revisit the water sector-specific institutions that afford stakeholders mechanisms for participation in water resources management in Kenya.

Water Resources Authority (WRA)

The Water Resources Authority (WRA) is established by provisions of Section 11 of the Water Act,2016, as a body corporate. It is the successor to the WRMA, which had been established under the Water Act, 2002. It is directed by a management board consisting the chairman, who is appointed by the President; four Principal Secretaries (Finance, Water, Land and Environment), four other members appointed by the minister and the chief executive officer. WRA is charged with formulating and enforcing standards, procedures, and regulations for management and the use of water resources as well asfloods mitigation; regulating the management and use of water resources; enforcing regulations and advising the Cabinet Secretary, among other duties bestowed on it by Section 12 of the Water Act.[32]

Given these wide functions, it is clear that WRA is the central organisation charged with the implementation of water management strategies, plans and programmes. Effective and meaningful participation of stakeholders in the performance of these functions is, therefore, critical. The actual and strategic participation of stakeholders taking part at policy and operational levels of WRA, under clear mechanisms and procedures, is important in achieving sustainable management of water resources in Kenya. Protection of water resource quality from adverse impacts, and protection of water catchments would, for instance, be effectively achieved if all stakeholders played positive roles and cooperated with WRA in the endeavours to perform its functions. Degradation of water resources by some of the stakeholders (users) would be tamed if their cooperation is ensured.

Transition from Catchment Area Advisory Committees to Basin Water Resources Committees

Before the enactment of the Water Act,2016,WRMA established CAACs under the provisions of Section 16(1) of the Water Act,2002, which required it to appoint a committee of not more than 15 members in respect of each catchment areain consultation with the Minister. CAACs had the duty of advising the regional office of the catchment area for which they were appointed in matters concerning water resources conservation, use and apportionment; the grant, adjustment, cancellation or variation of any permit; and any other matters pertinent to the proper management of water resources.[33] The CAAC members were drawn from among various stakeholders including government officials, representatives of farmers or pastoralists, business, community, and NGOs engaged in water resource management programmes within a catchment area.[34] Kibugi observes a key gap in relation to the formation of the CAAC where the law did not specify the proportion of members of the public relative to co-opted public officers.[35]

32 Water Act, 2016, s 12.

33 Water Act, 2002, s 16.

34 *Ibid.*

35 Robert Kibugi, 'Conceptualizing Regulatory Frameworks to Forge Citizens' Roles to Deliver Sustainable Natural Resource Management in Kenya' in Hassane Cisso *et al.* (Eds.,) *The World Bank Legal Review: Improving Delivery in Development: The Role of Voice, Social Contract, and Accountability* (World Bank, Washington DC) (2015) 171–194. 42 *Ibid.*

This made it difficult to assess how the public representatives would impact the threshold of decision making in the mandate of the CAAC.[42] The appointment of CAAC members by the minister as was provided under the First Schedule of the Water Act, 2002, did not provide any direct public role in the process. As much as the members were referred to as public representatives, their appointment by the minister, rather than election by the local community, nullified the argument that they were representing the local community interests.[36] In addition, the process was silent on how questions of gender and age equity were to be satisfied in constituting the committee. The role of the CAACs as provided for in the Water Act, 2002, was advisory. Whether their advice was taken up and heeded by the regional office of the Authority was a matter left to the discretion of the regional office and WRMA. There was also no legal obligation on the part of WRMA or the regional office to give any feedback to the committee members regarding the advice that they had given. This gap left room for the regional offices and WRMA to proceed with implementation of water resource management strategies or decisions even in instances where they may have disregarded relevant advice from the CAACs. The performance of the CAACs was also left to be monitored administratively, and not legally pegged to any form of objective appraisal mechanisms or standards. This created room for the CAACs to operate without accountability to the larger body of stakeholders and the public that they were meant to be representing.

It is worth noting that the Water Act, 2016, provides for the establishment of Basin Water Resources Committees (BWRCs) to replace the CAACs. These committees now have water resources management mandates beyond the erstwhile advisory roles. Section 27 of the Water Act, 2016, gives these committees the duties of conservation, use and apportionment of water resources in the basin area in an equitable manner; grant, adjustment, cancellation and variation of permits; and facilitating the operation of WRUAs within their jurisdiction. Section 28 of the law requires the BWRCs to prepare and implement the Basin Area Water Management Strategy. These provisions mark a positive enhancement of the roles that stakeholders play in water resources management. It should be observed, however, that their financing and administrative support is under WRA. This, therefore, limits their control over resources and operations. The First Schedule of the Water Act requires compliance with national values and gender equity requirements in the Constitution in the appointment of committee members. There is still no legal obligation on the part of WRA to give any feedback or reasons for accepting or rejecting advice from BWRCs. The performance of the committees is still left to administrative discretion and no objective evaluation is required. The tenure of the members is still not secured because the Cabinet Secretary (the appointing authority) retains the discretion of appointing and revoking appointments at any time.

Water Resource Users Associations (WRUAs)

Before 2016, the formation of WRUAs in Kenya was founded on a single reference under Section 5(5) of the Water Act, 2002. The other provisions relating to formation and registration of WRUAs were contained in the Water Rules of 2006. As observed by Rupert, the relationship between WRUAs and WRMA as provided for in the legal framework did not assure sustainability of operations of WRUAs.

36 *Ibid.*

The water rules defined WRUAs as an association of water users, riparian land owners, or other stakeholders who have formally and voluntarily associated for purposes of cooperatively sharing, managing and conserving a common water resource.[37]WRUAs provide value addition for sustainability in water utilization and play an instrumental role with regard to approval of permits for abstraction rights on any water resource.[38] For a WRUA to be considered for registration by WRMA, it had to be legally registered and have a constitution conducive to collaborative management of water resources, and which promoted public participation, conflict mitigation, gender mainstreaming and environmental sustainability.[39]Section 10(13) of the Water Rules provided that WRUA registration with the Authority did not confer any legal standing on the WRUA but clarified which entity is considered by the Authority to be a WRUA for a particular water resource.[40]

The requirement that WRUAs be registered under other laws and the scope of their wide functions being left to WRMA administrative discretion limited the pace with which they could be established. The voluntary nature of their membership also assumed the water users were willing to cooperate in and invest their time and resources in water management activities. It is further observed that despite the WRUAs registering some success in water resource management, their impact was diminished by low public awareness regarding their existence, roles, functions or utility as grassroot avenues for public participation. [41]

The provisions of the Water Act,2016, enhance the roles of WRUAs as opposed to their limited scope under the previous law. It is, however, important to observe that establishment of WRUAs is still left to the discretion of WRA . Further, the questions of representation, equity and accountability in the process of establishing WRUAs are not addressed. The Water Act,2016, does not address the challenges to the legal registration of WRUAs and the assumption that water users will volunteer to be members.

Section 97 of the Water Resources Regulations 2021, provides for the processes of registration of WRUAs; entering into a Tripartite Memorandum of Understanding with a WRUA and the respective County Government for the purposes of collaborative management of water resources. The section further stipulates that the Memorandum of Understanding may provide for administrative, technical or financial support to the WRUA by in respect of activities related to collaborative water resource management.[42] This provision gives no guarantees on sustainability of the WRUAs since the matter is left to the discretion of WRA and evasively made a subject of memoranda. As much as the Water Resources Regulations of 2021 require WRA to ensure equitable allocation of financial resources to WRUAs a comprehensive institutional budgetary support for WRUAs is not safeguarded.

37 Water Resources Management Rules, 2006.

38 Robert Kibugi, 'Conceptualizing Regulatory Frameworks to Forge Citizens' Roles to Deliver Sustainable Natural Resource Management in Kenya' in Hassane Cisso *et al.* (Eds.,) *The World Bank Legal Review: Improving Delivery in Development: The Role of Voice, Social Contract, and Accountability* (World Bank, Washington DC) (2015) 171–194.

39 Water Resources Regulations, 2021, S.97.

40 Ibid.

41 *Ibid.*

42 Ibid.

It is important to observe that the Water Act,2016, does not WRUAs a planning unit. The most the law has done is to require the BWRCs to formulate a management strategy that provides systems and guidelines for WRUAs to participate in managing water resources. This still leaves the duty of Integrated Water Resources Planning by WRUAs unaddressed and creates room for weak management practices at the lowest levels.

Ongor observes that several WRUAs have been formed in Kenya.[43] They serve as a mechanism for providing space to people to deliberate on how their local water resources will be managed. These associations are made up of water users who have common interests such as living near a river, a well or an irrigation scheme.[44] From their voluntary nature, the associations are assumed to function without any government funding. An assumption is also made that users will naturally cooperate. The power dynamics between and among the members of the WRUA is not addressed anywhere in the policy or legislation. While the WRUAs are assumed to be forums for conflict resolution, their resolutions have no binding force to sanction non-compliance. It is also assumed that the WRUAs will themselves be cohesive and collectively bring forth action in water resource management. These assumptions do not always hold and, therefore, the legal and administrative gaps will still need to be addressed.

Despite the noted gaps, Ongor observes that community participation in watershed management has been stimulated by the realization by the communities that they are the primary stakeholders in the watersheds where they live.[45] Their participation remains a critical strategy in ensuring sustainability of watersheds.[46]

E. Conclusion

From the foregoing, it is clear that Kenya has made tremendous progress in enhancing policy, legal and administrative mechanisms for stakeholder and public participation in water resources management. From the provisions of 1999 National Water Resource Management and Development Policy; the Session Paper No.1 of 2021 on National Water Policy; the Water Act of 2002; the Water Rules of 2006; the EMCA, 2000; the Constitution of Kenya, 2010; the EMCA(Amendment) Act, 2015; the Water Act, 2016, the County Government Act, 2012, the Legal Notice No.170 of 2021 on Water Resources Regulations,2021, sound foundations have been established for the public and stakeholders to take vantage roles in sustainable management of water resources. Despite commendable progress, there is need to address the emerging gaps with respect to planning and operational effectiveness of the institutions established at the basin and local levels.

43 Dan Ong'or, 'Community Participation in Integrated Water Resources Management: The Case of Lake Victoria Basin' [2005], 3 FWU.

44 *Ibid.*

45 Dan Ong'or, 'Community Participation in Integrated Water Resources Management: The Case of Lake Victoria Basin' [2005], 3 FWU.

46 *Ibid.*

CHAPTER 18

Appraisal of Kenya's Law and Practice for Implementing the Constitutional Human Right to Water in Context of Available Water Resources

Robert Kibugi

A. Introduction

The Bill of Rights in the Kenyan Constitution includes various human rights and fundamental freedoms.[1] Some are civil and political rights, including freedoms of speech, movement, conscience, or the right to universal suffrage. Others are socio-economic rights which include the highest attainable standard of health, accessible and adequate housing, reasonable standards of sanitation, freedom from hunger and entitlement to have adequate food of acceptable quality, education, social security, and the right to clean and safe water in adequate quantities.[2] These rights are inherent to each individual and can only be limited within limits prescribed by the Constitution, and only the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[3]The Bill of Rights is, however, binding on the State in all its actions.[4]There is, in addition, a fundamental duty of the State to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.[5]

These provisions are important, when examining the implementation of socio-economic rights because they respond to the views given by the Kenyan public during nationwide consultations for a new Constitution in 2002. In its 2005 final report, the Constitution of Kenya Review Commission (CKRC), indicated many people complained about "lack of safe and clean water."[6] The report further noted that the Kenyan public expected a new Constitution to "give us the chance to live a decent life: with the fundamental needs of food, healthcare, water…met by our own efforts and government assistance."[7]

In 2019, about nine (9) years into implementation of the Constitution the national water supply coverage was estimated to be 59%, with urban population coverage standing at 55%, and rural water coverage at 50%.[8] While the human right to water is subject to progressive realization as discussed below, the eventual goal under Sustainable Development Goal (SDG) 6 is to attain universal access to water supply.

SDG 6 also calls on States, by the year 2030, to substantially increase water-use efficiency across all sectors and ensure sustainable withdrawals and supply of freshwater to address water scarcity and substantially reduce the number of people suffering from water scarcity; and to implement integrated water resources management at all levels.

1 Constitution of Kenya, 2010, Article 19(1).
2 Constitution of Kenya, 2010, Article 43.
3 Constitution of Kenya, Article 24.
4 Constitution of Kenya, 2010, Article 19(3)(a) & 20(1).
5 Constitution of Kenya, 2010, Article 21.
6 Constitution of Kenya Review Commission (CKRC), *Final Report of the Constitution of Kenya Review Commission*(2005), 117.
7 Constitution of Kenya Review Commission (CKRC), *Final Report of the Constitution of Kenya Review Commission*(2005), 66. 8 Ministry of Water, Sanitation and Irrigation, *Kenya, Draft National Water and Sanitation Services Strategy*, (July 2020), 6.

Analysis of the human right to water requires an examination of the available water resources in order to ascertain the optimal manner of ensuring availability and accessibility of water to fulfil the constitutional entitlement. In governance terms, these water resources are classified as public land which includes "all rivers, lakes and other water bodies."[8] In practice the water resources include surface water bodies such as rivers and lakes, as well as groundwater when exploited such as through boreholes or wells. The Constitution requires the national government to protect the environment and natural resources, with a view to establishing a durable and sustainable system of development, including, in particular water protection, securing sufficient residual water, hydraulic engineering and the safety of dams.[9] This means that the management of water resources, whose adequate availability is critical to ensuring availability to fulfil the human right to water, must be undertaken in the context of sustainable development that ensures protection of the environment and natural resources. Sustainable development is already recognized as a national value and principle of governance that is binding on State organs when implementing the Constitution, making and implementing any law, or making public policy decisions.[10]

The human right to a clean and healthy environment is central to protecting the environment and natural resources, through which citizens can enjoy the guaranteed entitlements. Obligations on the State under the Constitution's article 69(1) on implementation of environmental rights are important for enhancing water resources' management. They include ensuring that there is sustainable exploitation, utilisation, management and conservation, and the equitable sharing of natural resources, which include water resources. There is an obligation to work to achieve and maintain a tree cover of at least ten percent of the land area of Kenya, which is an important element for catchment conservation.[11]

In this context, the chapter examines the status of Kenya's available water resources, per capita annually as estimated by the National Water Master Plan for years 2010, 2030 and 2050. This provides information on current and projected future of water scarcity and how this could impact the country's ability to implement the obligations of the human right to safe and clean drinking water in adequate quantities. Section 2 is an assessment of the available water resources, from surface and ground water, with specific focus on the average quantities that could be used per person annually. Section 3 evaluates the law and practice on implementation of the human right to water, reviewing how Kenya has applied the norms of the entitlement as specified by General Comment No.15.[11][12][13] These include requirements for water to be available (including minimum quantities and the concept of multiple uses); drinking water quality; access in terms of economic (tariffs) and physical proximity. Section 4 reviews strategic safeguards that Kenya should pay specific attention to ensure the obligations on the right to water are fulfilled. This includes the constitutional requirement to ensure progressive realization and ensuring there is no regression that undermines the right. There is also a need to ensure there is physical adequacy in terms of quantities of water available. The chapter analyses this by focusing on rules and

8 Constitution of Kenya, 2010, Article 62(1)(g).
9 Constitution of Kenya, 2010, Fourth Schedule Part 1, Section 22.
10 Constitution of Kenya, 2010, Article 10.
11 Ministry of Environment and Forestry, *National Strategy for Achieving and Maintaining Over 10% Tree Cover by 2022* (2019) par
12 4,12.
13 UN General Comment No. 15 (2002), UN Committee on Economic, Social and Cultural Rights (29th Session: 2002: Geneva) UNDoc E/C.12/2002/11.

standards to control and reduce non-revenue water, and conservation water resources, through implementation of legal provisions, to increase the quantity of renewable water resources.

B. Assessment of the available water resources in Kenya

The most recent assessment of available freshwater resources in Kenya is the National Water Master Plan 2030, which was developed in 2013.[14] The Master Plan defines renewable water resources as the available maximum amount of water resources, and it includes surface runoff and groundwater recharge.[15] Both the annual surface runoff and groundwater recharge are calculated based on the six catchment areas of Kenya: Lake Victoria North, Lake Victoria South, Rift Valley, Athi, Tana and Ewaso Ng'iro North.[16]

The estimated surface water runoff

The estimated annual surface water runoff (renewable surface water resources) of all the six catchment areas is indicated, in Million Cubic Metres per Year (MCM/Year) for 2010 (20,637 MCM/Year), 2030 (24,894 MCM/Year), and 2050 (26,709).[17] The annual surface water runoff in all six catchment areas is expected to increase except the Ewaso Ng'iro North Catchment Area which has a trend to increase toward 2030 but would then decrease toward 2050 due to the increase of the potential evapotranspiration.[17]

The estimated groundwater recharges

The estimated annual groundwater recharges (renewable groundwater resources) of the six catchment areas is, estimated, as follows: 2010 (21,470 MCM/Year), 2030 (19,407 MCM/Year), and 2050 (19,287).[19] According to the National Water Master Plan, the estimated renewable groundwater recharges are not fully usable, and the sustainable groundwater yield may reasonably be around 10% of groundwater recharge taking into consideration the aspects of hydrology, ecology, socio-economy and culture.[18] The 10% sustainable groundwater yield for all the six catchment areas is therefore, in Million Cubic Metres per Year (MCM/Year), 2010 (1,927 MCM/Year), 2030 (1,740 MCM/Year) and 2050 (1,728).[21]

The available water resources for utilization in Kenya

As indicated earlier, renewable water resources are computed as the available maximum amount of water resources, and it includes surface runoff and groundwater recharge. However, for purposes of consumption, it is the available water resources, rather than the renewable water resources, which are relevant. This is because the available water resources are computed as the total of annual surface water runoff and sustainable yield of groundwater resources. As highlighted in section 2.2, the sustainable yield of groundwater resources is estimated at 10% of the renewable groundwater recharges. The National Water Master Plan estimates the available water resources as follows: Year 2010 (22,564 MCM/Year), 2030 (26,634 MCM/Year),

14 Ministry of Environment, Water and Natural Resources, *National Water Master Plan 2030*, Republic of Kenya (2013).
15 Ministry of Environment, Water and Natural Resources, *National Water Master Plan 2030*, Republic of Kenya (2013), MA-20.
16 Ministry of Environment, Water and Natural Resources, *National Water Master Plan 2030*, Republic of Kenya (2013), p. MA-21
17 Ibid
17 Ibid. 19 Ibid.
18 Ministry of Environment, Water and Natural Resources, *National Water Master Plan 2030*, Republic of Kenya (2013), MA-22 21 Ibid.

and 2050 (28,437) across all six catchment areas.[19] These volumes represent the maximum available water resources for development in Kenya.[20]

This should be the basis for decision making on water supply, including permissions for drilling boreholes and surface water abstractions. These estimates are important to the discussions in this chapter because they depict the national capability, in terms of available water resources, to fulfil the human right to clean and safe water in adequate quantities, especially if investments are not made to enhance water efficiency, recycle water for some uses, or reduce non-revenue water. These interventions, which would provide more water, without a need to exploit more surface or ground water, are examined further in section 3.4 of the chapter. Below, the analysis is focused on unbundling the available water resources to demonstrate how much is available per capita (average per person), across each of the six water catchment areas, and with an estimate from 2010, 2030, and 2050. The year 2030 is critical because it is the target year for Kenya's economic development plan, Vision 2030, and equally the target year from SDG realization, as highlighted above.

The available water resources per capita

In order to provide sufficient connection between water resources and water supply, it is important to examine the available water resources, per capita (average per person). These volumes are indicated in m^3 per capita per year (m3/c/year) across all six catchment areas as seen in Table 1 below.[21]

It is evident, from the statistics in Table 1 that the per capita available water resources have significantly decreased toward 2030, which is, as highlighted above, a critical development planning year for Kenya under Vision 2030. Further the computations in Table 1 may be adversely impacted by the effects of climate change such as higher evapotranspiration, lower and erratic rainfalls, and reduced groundwater recharge as a result of deforestation, land degradation and loss of biodiversity.

Table 1: Per Capita Available Water Resources

Catchment Area	2010		2030		2050	
	Population (million)	Per Capita (m^3/c/year)	Population (million)	Per Capita (m^3/c/year)	Population (million)	Per Capita (m^3/c/ year)
Lake Victoria North	6.96	855	12.36	503	17.66	400
Lake Victoria South	7.37	959	12.72	618	18.17	503
Rift Valley	4.86	737	7.45	560	10.64	470
Athi	9.79	464	20.54	226	29.33	183
Tana	5.73	2,369	10.37	1,329	14.81	893
Ewaso Ng'iro North	3.82	1,933	4.40	1,735	6.28	989
Whole Country	38.53	1,093	67.84	653	96.89	475

Source: National Water Master Plan 2030, p. MA-23

19 Ibid.
20 Ibid.
21 Ibid.

A 2006 World Bank Report had estimated water demand to stand at 4,343 MCM/Year in 2010,[22] while the actual demand according to the 2013 Master Plan was 3,218 MCM/Year. The 2006 report had cautioned that the 2010 water demand was an overestimate because it made assumptions on significant adoption of water use efficiency in the supply system.[23] The report also recommended substantial investments in water resource development infrastructure to cater for both population growth and the increasing demand to meet the country's national development goals.[24] According to the 2009 National Census, the population of Kenya stood at 38,610,097 persons,[25] while in 2019 it was 47,564,296.[26] In the target year 2030, water demand will increase in all catchment areas, and water balance is expected to be tight in all areas. Water Demand includes domestic, industrial, irrigation, livestock, wildlife and inland fisheries.[27] For the year 2010, Athi Catchment Area had a higher water deficit than other catchment areas because it covers the cities of Nairobi and Mombasa, which are water demand centres on account of population size and economic activity.[28] According to the Master Plan, in the year 2030, the water deficit will increase in all catchment areas due to drastic water demand compared with the year 2010, especially for Athi, Tana, and Rift valley Catchments, while for Ewaso Ng'iro the deficit is likely to result from higher evapotranspiration and lower precipitation as the catchment area covers an arid and semi-arid zone.[29] This suggests that since fulfilment of the human right to water, in adequate quantities, depends on a large part to the available water resources, there is need to examine the estimates and projected deficit in context of potential water scarcity.

Examining the extent of national water scarcity

Kenya is classified by the U.N. as a chronically water-scarce country.[30] Water scarcity is defined as a gap between available supply and expressed demand of freshwater in a specified domain such as a country, under prevailing institutional arrangements (including both resource 'pricing' and retail tariffs arrangements) and infrastructural conditions[31] such as storage capacity, or transmission and distribution infrastructure. Scarcity is signalled by unsatisfied demand, tensions between users, competition for water, over-extraction of groundwater and insufficient flows to the natural environment.[32] Water scarcity may therefore result from policy failure or weakness such as the over-allocation of water use licences; suboptimal prioritization of water uses in a catchment; or wrong pricing such as cheap or subsidized water that results

22 Hezron Mogaka, Samuel Gichere, and Richard Davis, 'Climate variability and water resources degradation in Kenya: improving water resources development and management', World Bank Working Paper; No. 69, (2006) p. 11.

23 Hezron Mogaka, Samuel Gichere, and Richard Davis 'Climate variability and water resources degradation in Kenya: improving water resources development and management', World Bank Working Paper; No. 69, (2006) p. 11.

24 Hezron Mogaka, Samuel Gichere, and Richard Davis 'Climate variability and water resources degradation in Kenya: improving water resources development and management', World Bank Working Paper; No. 69, (2006) p. 11.

25 Kenya National Bureau of Statistics, *Population Distribution by Sex, Number of Households, Area and Density by County and District,*Republic of Kenya (2009)Online: <https://www.knbs.or.ke/?wpdmpro=population-distribution-by-sex-number-ofhouseholds-area-and-density-by-county-and-district>, 14 December 2020, p..

26 Kenya National Bureau of Statistics, *Kenya Population and Housing Census: Volume I*, Republic of Kenya (2019) , p. 10.

27 Ministry of Environment, Water and Natural Resources, *National Water Master Plan 2030*, Republic of Kenya (2013), p. MA-41.

28 Ministry of Environment, Water and Natural Resources, *National Water Master Plan 2030*, Republic of Kenya (2013), p. MA-42.

29 Ministry of Environment, Water and Natural Resources, *National Water Master Plan 2030*, Republic of Kenya (2013), p. MA-43..

30 Hezron Mogaka, Samuel Gichere, and Richard Davis 'Climate variability and water resources degradation in Kenya: improving water resources development and management', World Bank Working Paper; No. 69, (2006) p. 7.

31 Food and Agriculture Organization of the United Nations (FAO), *Coping with water scarcity: An action framework for agriculture and food security*, (FAO) Water Reports 38, (2012) p.5.

32 Food and Agriculture Organization of the United Nations (FAO), *Coping with water scarcity: An action framework for agriculture and food security*, (FAO) Water Reports 38, (2012) p.6.

in overuse.[33] The Food and Agriculture Organization of the United Nations (FAO) has proposed that water scarcity should be examined in three dimensions:[34]

i. Scarcity in availability of water of acceptable quality with respect to aggregated demand, such as through physical water shortage. This could result from overuse or environmental factors such as degradation, or adverse impacts of climate change. Water quality degradation from pollutants and discharge of untreated effluent can be a major cause of water scarcity.[35]

ii. Scarcity due to the lack of adequate infrastructure, irrespective of the level of water resources. This could result from financial or technical constraints as well as policy failures in terms of water resource development, harvesting and storage priorities.

iii. Scarcity in access to water services, because of the failure of institutions (including legal rights) in place to ensure reliable, secure and equitable supply of water to users. This dimension of scarcity can arise in close juxtaposition with water plenty, where there is no legal or institutional arrangement in place to improve access, or if the required infrastructure does not exist, is not functional or is poorly implemented. Illustrations of the latter include over-issuance of abstraction permits, high levels of non-revenue water, cheap or subsidized pricing of water, and general failure in enforcement of compliance with water resource allocation rules.

The best-known indicator of national water scarcity is volume per capita of renewable water per year (m^3/c/year) where threshold values of 500, 1,000 and 1,700 m^3/c/year are used to distinguish between different levels of water stress.[36] Thus, water scarcity is categorized as follows:[37]

i. Available per capita renewable water resources that are less than 500 m^3/c/year means absolute water scarcity.

ii. Available per capita renewable water resources that are between 500 and 1000 m^3/c/ year means chronic water shortage.

iii. Available per capita renewable water resources that are between 1000 and 1700 m^3/c/ year means regular water stress.

iv. Available per capita renewable water resources that is above 1700 m^3/c/year means occasional or local water stress.

Kenya's estimated natural per capita available water resources for the whole country, as seen in Table 1 above, in m^3/c/year stood at 1,093 m^3/c/year in 2010 and is projected to decline to 653 m^3/c/year in 2030. This is projected to decline further to 475 m^3/c/year by 2050. This means

33 Ibid.

34 Food and Agriculture Organization of the United Nations (FAO), *Coping with water scarcity: An action framework for agriculture and food security*, (FAO) Water Reports 38, (2012) p. 8.

35 Food and Agriculture Organization of the United Nations (FAO), *Coping with water scarcity - Challenge of the twenty-first century*, UN-Water (2007) <http://www.fao.org/3/a-aq444e.pdf> 14, December 2020, p.10.

36 Food and Agriculture Organization of the United Nations (FAO), *Coping with water scarcity: An action framework for agriculture and food security*, (FAO) Water Reports 38, (2012) p. 7.

37 Ibid

that the country is currently facing chronic water shortage, as reported by the World Bank in 2006[38] and if the per capita available water resources decline to 475 m^3/c/year by 2050, the country will be facing absolute water scarcity. Although estimates, these figures paint a gleam picture of Kenya's ability to fulfil the human right to water, in adequate quantities, while facing the potential of reaching absolute water scarcity by the year 2030, unless interventions are made in terms of sustainable water resources management, enhancements in water harvesting and storage, and reductions in non-revenue water losses.

In the next section, the chapter examines Kenya's water supply legal framework and practice in order to appraise the current approach in fulfilment of the human right to water. The discussion subsequently brings out various legal and administrative interventions that could be undertaken to aid Kenya shift to an approach that enhances sustainable water resources management to avoid exacerbated water scarcity, together with water supply interventions to ensure there is more available water resources to fulfil the human right to water.

C. Implementation of the human right to water through the supply system and standards

In this section, against the background of the foregoing examination of Kenya's available water resources, and projections on potential exacerbation of water scarcity, the chapter examines the current law and practice in fulfilment of the human right to water. This human right to water is now a global standard to frame obligations of States in providing clean drinking water to their populations. This right originates from the International Covenant on Economic, Social and Cultural Rights (ICESCR).[39] Article 11(1) of the ICESCR recognizes the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. According to General Comment No.15 of 2002, it is argued that use of the word "including" indicates that this catalogue of rights was not intended to be exhaustive.[40] Therefore, the General Comment takes the view that the right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival.[41] This concurs with United Nations General Assembly (UNGA) Resolution 64/292 which recognized the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.[42] UNGA Resolution 70/169 also recognized that the human right to sanitation is a component of the right to an adequate standard of living. The resolution affirmed that this right entitles everyone, without discrimination, to physical and affordable access to safe, hygienic, secure, socially, culturally acceptable sanitation, that provides privacy and ensures dignity.[43]

38 Hezron Mogaka, Samuel Gichere, and Richard Davis 'Climate variability and water resources degradation in Kenya: improving water resources development and management', World Bank Working Paper; No. 69, (2006) p. 7.

39 UN General Assembly, International Covenant on Economic, Social and Cultural Rights (CESCR), 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

40 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 15, The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, E/C.12/2002/11.

41 General Comment No. 15 Substantive Issues arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, Economic and Social Council: E/C.12/2000/5 3.

42 United Nations, General Assembly Resolution 64/292, The human right to water and sanitation, 28 July 2010, UN doc. A/RES/64/292.

43 United Nations, General Assembly Resolution 70/169. The human right to safe drinking water and sanitation, 17 December 2015, UN doc. A/RES/70/169.

General Comment No. 15 laid down the normative content of the human right to water, which this chapter applies to assess Kenyan practice of implementing the constitutional entitlements.
The normative content includes adequacy, availability, quality, and accessibility. The elements of the normative content are analyzed in content of the regulatory standards for water services.

The Water Services Regulatory Board (WASREB) is the body which, under the 2016 Water Act, is empowered with various powers including: (a) to determine and prescribe national standards for the provision of water services; (b) to evaluate and recommend water and sewerage tariffs to the county water services providers and approve the imposition of such tariffs in line with consumer protection standards; and (c) set licence conditions and accredit water services providers. [44] Under the Constitution, county governments are responsible for water and sanitation services.[45] The Water Act empowers county governments to establish water services providers (WSP). These water utilities are licenced and regulated by WASREB and on the basis of this licence, are responsible for the efficient and economic provision of water services so as to fulfil the right to water.[46]

Below, the chapter examines how this structure for delivering the human right to water obligations is aligned with the normative content of the right as set out by General Comment No.15. This normative content includes availability, quality, and accessibility of water. In doing so, the analysis is based on the performance standards for WSPs that are used by WASREB and reported on annually through publicly disseminated Impact Reports.

The availability of water

General Comment No.15 requires that the water supply for each person must be sufficient and continuous for personal and domestic uses, which ordinarily include drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene.[47] The World Health Organization (WHO) recommends a minimum volume of 7.5 litres per capita per day to provide sufficient water for hydration and incorporation into food for most people under most conditions.[48] In addition, adequate domestic water is needed for food preparation, laundry and personal and domestic hygiene, which are also important for health.[49] For all these needs, the daily minimum water need per capita per day is estimated to vary between 50 and 100 litres in order to ensure that most basic needs are met and few health concerns arise.[50] Access to 20-25 litres per person per day represents a minimum, but this amount raises health concerns because it is insufficient to meet basic hygiene and consumption requirements.[9]Concern arises whether the framework and delivery of water services integrates multiple uses (MUS), which is important to ensure that the supplied water is adequate, in quantity, to meet the domestic and productive needs of certain category of consumers.

44 Water Act No.43 of 2016, Section 72 (a,b,c).
45 Constitution of Kenya, 2010, Fourth Schedule, Part 2, Section 11.
46 Water Act No.43 of 2016, Section 91(1).
47 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 15, The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, E/C.12/2002/11,para 12(a).
48 World Health Organization, *Guidelines for safe drinking water*, (WHO Press, Geneva) (2011) p. 83.
49 World Health Organization, *Guidelines for safe drinking water*, (WHO Press, Geneva) (2011) p. 83.
50 UN Office of the High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 35, The Right to Water*, August 2010, p.8.

MUS is defined as whole water approach that responds to the many water needs of rural and peri-urban households, undertaken in a participatory manner that takes people's water needs as a starting point for providing integrated services.[51] This participatory approach, which should include the voice of the population segment most affected, ought to ensure that water supply responds to the full or complex range of water needs, including domestic uses, and productive activities such as agriculture, gardening, horticulture, livestock-raising, car-washing, arts, icemaking, brick making, pottery, butchery, and other small-scale commercial activities.[55] These water-dependent activities provide critical income streams, especially for the rural poor who often lack opportunities for wage and salary work.[56] While there are many elements of MUS in delivery of water services, examples include irrigation-plus, where priority for irrigation supplies integrates available water for domestic uses.[57] The other approach is referred to as domestic-plus which is designed specifically to prioritize domestic water uses at or around homesteads and provide services to meet other water-related basic needs. This approach, where adopted in law, policy and practice, can benefit many people for whom homesteads are the best or only place to use water productively, including women.[58]A study of forty-seven (47) water supply systems in Senegal to examine the structuring of domestic-plus systems found that 43 of the 47 systems had integrated a cattle trough, and others had at least a small water tank to provide water for small-scale agriculture.[59] This Senegal example shows a basic level of MUS water supply system.

In practice, availability of water should aim to achieve multiple uses such that prioritization of domestic water is specifically designed to integrate other productive uses. These should be identified through consultations with people concerned in order to identify unique needs for productive water, such as the domestic and productive requirements of women. The actual minimum amounts of water needed daily will therefore vary based on a particular context, individual health status,[60] as well as whether the water supply system is designed as MUS. The amount of minimum daily water available per person may depend on country policy, including whether such a minimum amount has been determined. In Kenya, water service delivery policy has not guaranteed minimum quantity of drinking water for vulnerable members of society, nor have they guaranteed a minimum quantity of water for each person in fulfilment the right. There has been no formal adoption or integration of MUS into the water supply legal and institutional framework, which means that the requirement for the water to be available in adequate quantities remains unfulfilled for many people.

Instead, the tariff setting mechanism for water services is based on the block tariff system which has a lifeline social tariff of the initial block that is subsidised by the other higher blocks.[61] According to WASREB, with a rising block tariff, the price per unit of water consumed must be lowest for the first block of consumption and higher in the second block such that higher tariffs apply for customers that consume beyond a threshold volume or each month, which is currently 6 m^3/month.[62]The efficacy of this approach in enhancing availability of water is undermined by a generally low proportion of households connected to water supply services and significant disparity on connectivity in the urban and rural areas within and across the country.[52]

51 Ralph Hall, Barbara Van Koppen, Emily Van Houweling, "Human Right to Water: The Importance of Domestic *and* Productive

52 Ministry of Water, Sanitation and Irrigation, Kenya, Draft Sessional Paper of 2020 on National Water Policy, August 2020, p. 24-25.

In the 2020 Impact Report for the 2018/19 period, WASREB reported that out of the total national population (46.7 Million), only 23,430,887 persons live within areas covered by water utilities that it regulates, and only 13,831,827 persons are actually served with piped connections.[53] In this category, the average water consumption per person per day was 90 litres, but this varied widely across cities and towns such as Nairobi (44 litres), Mombasa (21 litres), Kisumu (28 litres), Nyeri (72 litres), or Wajir (82 litres).[54] This may be informed by various factors including amount of water available for distribution, and the hours of service providedin every 24-hour cycle for each 100,000 persons served by a water utility.

In the 2018/19 period, WASREB reported the following hours of services: Nairobi (6 hours), Mombasa (5 hours), Kisumu (24 hours), Nyeri (24 hours), and Wajir was indicated as not having provided credible data.[55] The scale in terms of hours of services is rated as follows: (a) For a population exceeding 100,000 persons, below 16 hours is deemed unacceptable, 16-21 hours is acceptable, while 21-24 hours is classified as good; (b) for a population less than 100,000 persons, below 12 hours is deemed unacceptable, 12-16 hours is classified as acceptable, and 17-24 hours of service is classified as good.[56] Nationally, the average hours of service in every 24 hours cycle was measured by WASREB as 14 hours, rising marginally from 13 hours in 2017/18. This suggests that in terms of water availability for those with piped connections, the level of serviceto meet the human right to water remains low. For big cities such as Nairobi and Mombasa, 5 and 6 hours of services respectively remains unacceptably low and demonstrates poor availability of water supply.

The quality of water supplied

The water required for each personal or domestic use must be safe, therefore free from microorganisms, chemical substances and radiological hazards that constitute a threat to a person's health.[57] The 2016 Water Act conferred on WASREB the function of determining and prescribing national standards for provision of water services, which includes those reviewed in section 3.1 above, and also quality of water.[58] This is therefore one of the performance indicators against which each WSP's performance is measured against by WASREB which rates a quality less than 90% as unacceptable, 90-95% as acceptable, and above 95% as good water quality.[59]For drinking water, it should be free from pathogenic (disease causing) organisms; contain no chemicals that have an adverse or long term effect on human health; be fairly clear (low turbidity, little colour); not saline (salty); contain no compounds that cause an offensive taste or smell; and not cause an encrustation of the water supply system not staining clothes

53 Water Services Regulatory Board (WASREB), *Impact: A Performance Report of Kenya's Water Services Sector – 2018/19*, Water Services Regulatory Board, <https://wasreb.go.ke/downloads/WASREB_Impact_Report12.pdf>, 25 November 2020, P.33.

54 Ibid.

55 Water Services Regulatory Board (WASREB), *Impact: A Performance Report of Kenya's Water Services Sector – 2018/19*, Water Services Regulatory Board, <https://wasreb.go.ke/downloads/WASREB_Impact_Report12.pdf>, 25 November 2020, p. 40.

56 Ibid note 66 at 38.

57 General Comment No. 15 Substantive Issues arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, Economic and Social Council, E/C.12/2002/11 20 January 2003, para 12(b).

58 The Water Act, 2016, Section 72(1)(a).

59 Water Services Regulatory Board (WASREB), *Impact: A Performance Report of Kenya's Water Services Sector – 2018/19*, Water Services Regulatory Board, <https://wasreb.go.ke/downloads/WASREB_Impact_Report12.pdf>, 25 November 2020, p. 38.

washed in it.[60] The components of drinking water quality are the percentage of residual chlorine, and bacteriological quality.[61]

The bacteriological quality is very essential as microbes can have an immediate and significant impact on human health and must be analysed frequently.[62] For bacteriological tests, coliform tests will be used to show presence of bacteria, and their presence could indicate that pathogens are in the water and for this reason,upon confirmation of coliforms, a faecal coliform test has to be carried out to check for faecal contamination.[63] Presence of residual chlorine indicates sufficient disinfection of the water but does not specifically measure or quantify presence of bacteria.[64] High levels of residual chlorine than permitted, and lower bacteriological quality than required will mean that the supplied water is not potable and will likely impact human health adversely. The parameters of drinking water quality are: (i) above 95% (good), (ii) 9095% (acceptable), and (iii) less than 90% (not acceptable).[65] Using the same random sample of WSPs, the rating on drinking water quality was as follows:[66]

a. Nairobi: overall drinking quality rating of 91% comprising residual chlorine (95%) and bacteriological quality (88%).
b. Mombasa overall drinking quality rating of 74% comprising residual chlorine (74%) and bacteriological quality (74%).
c. Nyeri: overall drinking quality rating of 96% in every aspect; and
d. Kisumu: overall drinking quality rating of 93% comprising residual chlorine (91%) and bacteriological quality (96%).

In the 2018/19 period, the drinking water quality supplied by WSPs improved marginally from acceptable (95%) to good (96%).[67] This high average score on drinking water quality should be viewed in context of the disaggregated figures above, whereby Kenya's second largest city county of Mombasa, for instance, registered a "Not acceptable" rating across all elements of drinking water quality. The county's WSP, the Mombasa Water and Sewerage Company (MOWASCO) has registered declining water quality as reported by Impact Reports 10 and 11. In 2017/18 (Impact Report 11), Mombasa registered an overall drinking quality rating of 70% comprising residual chlorine (72%) and bacteriological quality (66%).[68] In 2016/17, the overall drinking water quality rating was 85% comprising residual chlorine (84%) and bacteriological quality

60 Water Services Regulatory Board (WASREB), *Guidelines on Water Quality and Effluent Monitoring*, Water Services Regulatory Board, 2008, <file:///Users/robertkibugi/Downloads/Water_Quality_&_Effluent_Monitoring_Guidelines. pdf>, 25 November 2020, P.11.

61 Water Services Regulatory Board (WASREB), *Impact: A Performance Report of Kenya's Water Services Sector – 2018/19*, Water Services Regulatory Board, <https://wasreb.go.ke/downloads/WASREB_Impact_Report12.pdf>, 25 November 2020, p. 90.

62 Water Services Regulatory Board (WASREB), *Guidelines on Water Quality and Effluent Monitoring*, Water Services Regulatory Board, (2008) p.13.

63 Water Services Regulatory Board (WASREB), *Guidelines on Water Quality and Effluent Monitoring*, Water Services Regulatory Board, (2008) p.13.

64 Water Services Regulatory Board (WASREB), *Guidelines on Water Quality and Effluent Monitoring*, Water Services Regulatory Board, (2008) p.13.

65 Water Services Regulatory Board (WASREB), *Impact: A Performance Report of Kenya's Water Services Sector – 2018/19*, Water Services Regulatory Board, <https://wasreb.go.ke/downloads/WASREB_Impact_Report12.pdf>, 25 November 2020, p. 38.

66 Water Services Regulatory Board (WASREB), Impact: A Performance Report of Kenya's Water Services Sector – 2018/19, Water Services Regulatory Board, <https://wasreb.go.ke/downloads/WASREB_Impact_Report12.pdf>, 25 November 2020, p. 90.

67 Water Services Regulatory Board (WASREB), *Impact: A Performance Report of Kenya's Water Services Sector – 2018/19*, Water Services Regulatory Board, <https://wasreb.go.ke/downloads/WASREB_Impact_Report12.pdf>, 25 November 2020, p. 28.

68 Water Services Regulatory Board (WASREB*), Impact: A Performance Report of Kenya's Water Services Sector – 2017/18*, Water Services Regulatory Board, (2019) p. 77.

(86%).[80] This indicates there is a need for improvement on all parameters of drinking water quality because without attaining a constant rating of acceptable or good, a critical element of the human right to water in Kenya is not being fulfilled. Fulfilling drinking water quality standards is important to meet requirements of SDG 6.3 which calls on States to improve water quality by reducing pollution.

Access to water

According to General Comment No.15, water supply services should be accessible to everyone without discrimination within an area of coverage.81 This element has several overlapping dimensions: Physical and economic accessibility, as well as non-discrimination. 82 Physical accessibility denotes that water supply services, such as piped connections, stand pipes, or wells must be within safe physical reach for all sections of the population, preferably within or in the immediate vicinity of a household.83 For a water source located outside a household, physical access is measured for convenience based on the average roundtrip time spent collecting water from a common source such as a public tap. For Nairobi, a roundtrip to a water source is estimated at 19 minutes roundtrip for 35% of people in poorest category.84 Ideally, when a person has to walk for more than 1 kilometre in a period exceeding 30 minutes for a roundtrip to collect less than 5 litres per person per day, this is considered as no access; while a distance less than 1 kilometre and a roundtrip of less than 30 minutes to collect around 20 litres per person per day is classified as basic access to water services.85 Intermediate access is where water services are provided on-site (e.g. on a plot) through at least one yard tap, and persons can access approximately 50 litres of water per capita per day.86 People are considered to have optimal access where there is supply of water through multiple taps within the house, providing an average of 100-200 litres per capita per day.87

The above levels of access, especially intermediate and optimal which appear adequate, should however be taken in the context of the hours of service in every 24-hour cycle, and the drinking water quality level. There is also preference for improved water sources (piped water into dwelling, yard or plot; public tap or standpipe within recommended distances and commute time; borehole, protected well, spring and rainwater harvesting).[88] Unimproved water sources include unprotected dug well; unprotected spring; cart with small tank or drum provided by canal, irrigation channel).[69]WHO considers bottled water to be an improved water source only when the concerned household uses drinking-water from an improved source for cooking and personal hygiene.[70]

A 2016 World Bank report on water provision to poor people in African cities concluded that at-home water supply has measurable benefits compared to shared water supply outside the home.[71] This at-home water supply, however, has to be reliable in terms of continuity of service (e.g., hours of service in a 24-hour period). If water supply in the home is reliable, it results in higher volumes consumed, greater practice of key hygiene behaviour (e.g., showers, laundry), improved water quality and a reduction in prevalence of musculo-skeletal adverse impacts associated with carrying water for long distances from outside the home.[72]

69 World Health Organization, *Guidelines for safe drinking water*, (WHO Press, Geneva) (2011) p. 85.
70 World Health Organization, *Guidelines for safe drinking water*, (WHO Press, Geneva) (2011) p. 85.
71 Chris Heymans, Rolfe Eberhard, David Ehrhardt, Shannon Riley, *Providing water to poor people in African cities effectively: lessons from utility reforms*, (World Bank Group) (2016) p. 8.
72 *Ibid.* Chris Heymans, Rolfe Eberhard, David Ehrhardt, Shannon Riley, *Providing water to poor people in African cities effectively: lessons from utility reforms*, (World Bank Group) (2016).

Accessibility also has an economic dimension where, according to General Comment No. 15, water supply services must be affordable for all such that the direct and indirect costs should not compromise the human right to water.[73]Households with the lowest levels of access to safe water supply frequently pay more for their water than do households connected to a piped water system which may result in preference for unimproved water sources with compromised quality.[74] A good example is Kenya's capital city, Nairobi where a 2018 study found that less than 60% of Nairobi households owned a legal water connection provided by the utility.[75] In Nairobi, a 2011 study found that pushcart vendors and tanker trucks were found to charge the highest average unit prices for water, at Kenya shillings (Kshs) 12.15 and 7.90 per 20-litre jerry can, respectively.[76] In 2018, another study found a wider range for informal and unregulated vendors, between Kshs 2 and Kshs 50 per 20 litre jerry can of water.[77] In the same period, Nairobi City Water and Sewerage Company, the WSP charged a regulated water kiosk a tariff of Kshs 35 per m^3 (1,000 litres), and permitted the kiosk to resell to individuals at Kshs 2 per 20 litre jerry can of water.[78]

Thus, under the rising block tariff for the same period, Nairobi charged a monthly fixed charge of Kshs. 204 for piped water consumption ranging from 0-6 m^3, which translates to Kshs. 34 per m^3 while the next block (7-20m^3) is levied at Kshs 53 per m^3.[79] In comparison, this means that a Nairobi resident with a piped connection, under the rising block (using the first two blocks [80]only) pays Kshs 34 per m^3 for the first 6m^3, which translates to Kshs 34 for 6,000 litres (Kshs 1 per 176.5 litres). In the second (7-20m^3) is levied at Kshs 53 per m^3 (1,000 litres), which translates to Kshs 1 for 18.87 litres.

In contrast, a person buying water at a regulated water kiosk pays Kshs 2 per 20 litre jerrican. In further comparison, where a person uses an unregulated vendor (cart pusher, kiosk, etc.), the 2018 costs were recorded to range between Kshs 2 and 50 per litre. On average, a 2016 study found that in Nairobi, a poor household with a monthly income of Ksh 6,2671, spent close to 10% (Kshs 596) of that income on water monthly, compared to 7% and 6% for Mombasa and Nyeri respectively. In comparison, a family with a piped connection and a similar income, using only the basic connection of 0-6m^3 (6,000 litres) monthly, would spend Kshs 204 monthly on water.

Importantly, a 2015 study found that the Nairobi City WSP only applies a binary differentiation in tariffs, between domestic and commercial consumption.[81] There is therefore no differentiated

73 General Comment No. 15 Substantive Issues arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, Economic and Social Council, E/C.12/2002/11 20 January 2003, para 12(c).

74 World Health Organization, *Guidelines for safe drinking water*, (WHO Press, Geneva) (2011) p. 85.

75 Water and Sanitation for the Urban Poor (WSUP), *A journey of institutional change: Extending water services to Nairobi's informal settlements, Water and Sanitation for the Poor* (WSUP) (2018) Online: <https://www.wsup.com/content/ uploads/2018/10/10-2018-A-journey-of-institutional-change-Extending-water-services-to-Nairobi's-informal-settlements.pdf> , 25 November 2020, p.12.

76 Degol Hailu, Sara Rendtorff-Smith and Raquel Tsukada, "Small-Scale Water Providers in Kenya: Pioneers or Predators?" (United Nations Development Programme) (2011) Online: <file:///Users/robertkibugi/Downloads/Kenya%20paper(web)%20(1).pdf> , 25 November 2020, p.16.

77 Water and Sanitation for the Urban Poor (WSUP), *A journey of institutional change: Extending water services to Nairobi's informal settlements, Water and Sanitation for the Poor* (WSUP) (2018) p.24.

78 Water Services Regulatory Board (WASREB), Gazetted Tariff for Nairobi City Water and Sewerage Company for the year2015/2016 to 2017/2018, online:<https://wasreb.go.ke/nairobi/> , 25 November 2020.

79 Water Services Regulatory Board (WASREB), Gazetted Tariff for Nairobi City Water and Sewerage Company for the year

80 /2016 to 2017/2018, online: <https://wasreb.go.ke/nairobi/>, 25 November 2020.

81 Celestine Musembi, "Watered Down: Gender and the Human Right to Water and Reasonable Sanitation in Mathare, Nairobi"in Anne Hellum, Patricia Kameri-Mbote, and Barbara van Koppen (Eds.,) *Water is Life: Women's Human Rights in National and Local Water Governance in Southern and Eastern Africa* (Weaver Press, Zimbabwe) (2015) p. 155.

tariff for low-incomes areas.[82] This differentiation would allow for lowered costs for low income families that may receive water from a regulated water kiosk, or even through a piped connection, in order to lower the overall portion of monthly income spent on water for domestic use. Additionally, if these systems were designed as multiple use the tariffs could take into account the productive needs of these households.

Therefore, in terms of affordability, a conclusion can be drawn that there is need to increase piped connections, and to increase the number of people with access (physical and economic) to safe and adequate water supply, towards the universal access anticipated by SDG 6.1. It is important to highlight that availability and accessibility of water services are critical to ensuring non-discrimination by taking into account the unique needs of vulnerable and marginalized people within the population served by a water service provider. One intervention would include shifting from the binary differentiation of tariffs between domestic and commercial consumption, to also integrate low-income households and persons. It is notable that section 94 of the Water Act explicitly provides that no one should be deprived of water services on the grounds that such are not commercially viable. This law requires county governments to put in place measures to supply water to such areas, with options for delivery including point sources, small-scale piped systems and standpipes while ensuring they meet standards prescribed by WASREB.

D. Legal safeguards enhance implementation of the human right to water

As highlighted earlier, the Constitutional guarantees the right to clean and safe water, in adequate quantities. According to the WHO, when measuring whether water supply is adequate, consideration should be had to whether other elements of the right have been fulfilled to the stipulated standards.[83] In section 3, the chapter examined the key parameters framed by General Comment No. 15 to examine whether Kenyan law and practice are meeting obligations to the required standard. These parameters, availability, access, and quality, were analysed in context of performance indicators prescribed by WASREB to govern provision of water supply by Kenyan WSPs. Overall, the ability to fulfil all the water supply indicators will be undermined further if the available water resources continue to diminish from the current chronic water scarcity level towards absolute scarcity. If this were to happen in Kenya, the country would face tremendous difficulties in meeting the constitutional requirement to ensure there is progressive realization of the human right to water. Such an outcome would mean that Kenya is unable to meet constitutional obligations concerning this right, and that there is regression rather than progression. Absolute water scarcity, for instance, could mean for instance that Kenya can no longer enhance guarantees to citizens in terms of availability, accessibility, and quality of clean and safe water.

This section argues, therefore, that there are certain key legal and practical safeguards that need to be implemented to ensure that, first, the principal parameters (availability, access, quality) are fulfilled. The relevant safeguard is ensuring there is progressive realization, and actions to mitigate against regression, including financial and other steps to enhance access for vulnerable persons. Second, it is necessary to ensure there is sufficient water available to meet the domestic or

82 Celestine Musembi, "Watered Down: Gender and the Human Right to Water and Reasonable Sanitation in Mathare, Nairobi"in Anne Hellum, Patricia Kameri-Mbote, and Barbara van Koppen (Eds.,) *Water is Life: Women's Human Rights in National and Local Water Governance in Southern and Eastern Africa* (Weaver Press, Zimbabwe) (2015) p. 155.

83 World Health Organization, *Guidelines for safe drinking water*, (WHO Press, Geneva) (2011) p. 83.

mixed-use consumption needs of domestic and commercial consumers. The relevant safeguards to assure this include actions to reduce non-revenue water; and enhancing sustainable water resources management in order to mitigate projected worsening of water scarcity. It also includes investments in adequate water harvesting and storage capacity and infrastructure.

Progressive realization towards implementation of the human right to water

Article 21(2) of the Constitution requires the Kenyan State to take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the socio-economic rights guaranteed under Article 43. The UN Committee on Economic, Social, and Cultural Rights has noted, in General Comment No.3, on the Nature of State Parties' Obligations under article 2(1) of the ICESCR that while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time.[84] The Limburg principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights urge that the obligation to achieve progressively the full realization of the rights requires State parties to move as expeditiously as possible towards the realization of the rights, and to begin immediately to take steps to fulfil their obligations under the Covenant.[85]The principles urge that particular attention should be given to measures to improve the standard of living of the poor and other disadvantaged groups.[105]

Kenyan courts have addressed the question of progressive realization severally. In *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others*, the Court of Appeal observed that realization of progressive social economic rights involve social redistribution programmes that seek to improve access to resources.[86] An earlier High Court decision, in *Mathew Okwanda v Minister of Health and Medical Services & 3 others*, had concluded that the progressive realization requirement for article 21 and 45 imply that the State must begin to take steps, and be seen to take steps towards realization of these rights.[87] In Matter of the Principle of Gender Representation in the National Assembly and Senate, the Supreme Court held that progressive realization of a human right refers to the gradual or phased-out attainment of a human rights goals since that right cannot, by its very nature, be achieved on its on unless first, a certain set of supportive measures are taken by the state. The exact shape of such measures will vary, depending on the nature of the right in question, and they may include legislative, policy, or programme initiatives including affirmative action.[88] Article 20(5) requires the State, where it claims lack of resources to implement a socio-economic right (such as water), to show that the resources are not available. Further, in allocating resources, the State is required to give priority to the widest possible enjoyment of the socio-economic right, having regard to prevailing circumstances including vulnerability of particular groups or individuals.

This element of the availability of financial resources to takes actions towards meeting the human right to water came under consideration by the High Court in *Isaac Kipyego Cherop v*

84 General Comment No.3 on the Nature of state Parties Obligations under article 2, para 1 of ICESCR 14 December 1990, UN doc. E/1991/23.

85 ESCR-Net - International Network for Economic, Social & Cultural Rights , "*Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*", ESCR-Net, Online: <https://www.escr-net.org/resources/limburg-principles-implementation-international-covenant-economic-social-and-cultural> , 14 December 2020, para 21. 105 Ibid note 104 at para 14.

86 *Kenya Airports Authority*V*Mitu-Bell Welfare Society & 2 others* [2016] eKLR, para 127.

87 *Mathew Okwanda*V *Minister of Health and Medical Services & 3 others* [2013] eKLR, para 15.

88 In Matter of the Principle of Gender Representation in the National Assembly and Senate, para 53.

State Ministry of Water & 142 others.[89]The Petitioner argued that Kenya's Ministry of Water and the Rift Valley Services Board had constructed Chemususu Dam to serve an estimated 300,000 people and livestock. The petitioner argued that a water supply project developed to distribute water from the dam excluded Maji Mazuri, Mumberes, Torongo, Raddad, Majimoto, Mugaria and Kisanana (Baringo County which had always been earmarked for the water supply. The Petitioner and the interested parties alleged that this decision would leave them economically deprived if the respondents were allowed to continue with the water distribution project according to the current distribution network. They claimed to have had reasonable legitimate expectations especially on economic advancement upon the completion of the distribution network which expectation was being rendered remote. In its judgment, the Environment and Land Court affirmed that the right to clean and safe water in adequate quantities under Article 43 of the Constitution can only be realized progressively. This, according to the Court, means that the State cannot realize this right for every Kenyan in one investment, and that the right to clean and safe water in adequate quantities is not a final product for direct dispensation but is aspirational to be achieved within the State's available resources.[90]

Progressive realization of the right to water is a pertinent element of adequacy, which constitutionally hinges on availability of financial resources. In *Kenya Airports Authority v MituBell Welfare Society & 2 others*, the Court of Appeal found article 20(5) of the Constitution on availability of resources for progressive realization of socio-economic rights to be a policy question falling within the political space. It was held that a court has no jurisdiction to make orders relating to policy formulation or give guidelines on who should participate in the formulation of government policy. The appellate decision overturned the trial court judgment in *Mitu-Bell Welfare Society v Attorney General & 2 others* where the State had been ordered to work with the petitioners, civil society organizations and government agencies with a view to identifying an appropriate resolution to the petitioners' grievances.[110] The Supreme Court agreed with the Appellate Court, finding that the order to share information on housing policies and programmes ought not to have involve non-state actors, who were not parties to the suit.

The evidence of such safeguards in Kenya's socio-economic rights was given by the trial court in *Mitu-Bell Welfare Society v Attorney General & 2 others.* With respect to the obligation of the State under article 43 socio-economic rights, the trial court had held that while they confer a positive obligation to ensure access by citizens to social economic rights within availability of resources, there is also a negative obligation not to do anything that impairs the enjoyment of these rights.[91] The trial court thus interpreted the provisions guaranteeing socio-economic rights to include an inherent obligation on the Kenyan State not take actions that bars enjoyment of the right. In other words, the trial court address the risk that exists that could lead to regressive action to impair widening the scope and quality of the socio-economic rights enjoyed by people in Kenya obligation against regression. This is because regression is problematic to the realization of the right to water, and by placing the burden of proof on the State to show unavailability of resources, article 20(5) of the Constitution is attempting to forestall this problem. The Supreme Court in *Mitu-Bell*, albeit using the right to housing, observed that the incredulous inequality

89 *Isaac Kipyego Cherop*V*State Ministry of Water & 142 others* [2017] eKLR, p. 1

90 *Isaac Kipyego Cherop* V *State Ministry of Water & 142 others* [2017] eKLR, p. 4. 110 *Mitu-Bell Welfare Society* V *Attorney General & 2 others*[2013] eKLR, para 79.

91 *Mitu-Bell WelfareSociety* V*Attorney General & 2 others*[2013] eKLR, para 55-56.

in our society, with the majority of the population condemned to grinding poverty, means that socio-economic rights remain but a pipe dream for many. This is worsened by each successive government erecting the defence of "lack of resources."[92]

The progressive realization of the human right to water, in addition to ensuring there are financial resources, also requires ensuring that claw-back provisions which may slow down or reverse actions towards universal access to water. In order to avoid such claw-back provisions in laws or policies, there should be a conscious integration of non-regression legal safeguards.

In the *Future We Want*, the outcome document from United Nations Conference on Sustainable Development (Rio+20), States acknowledged the problem of regression, noting that there were areas of insufficient progress and setbacks in the integration of the three dimensions of sustainable development, aggravated by multiple financial, economic, food and energy crises, which have threatened the ability to achieve sustainable development.[93] In its resolution to reinforce the principle of non-regression in environmental law, the World Conservation Congress observed that this principle was now part of constitutional law and internal regulations. [94]The Constitution of Ecuador, for instance, deems as unconstitutional any deed or omission of a regressive nature that diminishes, undermines or annuls without justification the exercise of rights.[95]Thus, States should not allow or pursue actions that have the net effect of diminishing legal protections.

It is important to note that regressive principles maybe contained in express constitutional provisions, jurisprudence, statutes, or subsidiary legislation. The lack of clear legal or policy provisions in Kenya on minimum water entitlements per person per day, and absence of statutory parameters concerning minimum distances and walking time to access shared water resources are regression risks to implementing the right to water. Similarly, the shortcomings in terms of availability (e.g., low hours of service) or drinking water quality including the decline for large WSPs such as Mombasa represents a regression on implementation of State obligations on the human right to water, and adversely impacts adequacy. Another approach to enhancing progressive realization, and avoiding regression, would be to integrate multiple use systems in the design of water supply; and to provide a tariff structure that takes into account low income or poor persons and households.

Reducing non-revenue water levels to enhance adequacy and increase available water resources

Non-revenue water is defined as the amount of water safe and clean water that is produced for distribution, but which is not accounted for as revenue for a WSP. [96]Water losses that comprise NRW have two components: (i) Commercial Losses which are non-physical losses of water

92 Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) [2021] eKLR, para 149.

93 United Nations, The *Future We Want*, Rio+20, (Outcome Document on the United Nations Conference on Sustainable Development, Rio de Janeiro, Brazil, 20-22 June 2012) UN doc. A/CONF.216/L.1, para 20.

94 World Conservation Congress, Reinforcing the principle of non-regression in environmental law and policy, (International Union for Conservation of Nature)WCC-2016-Res-074-EN. Online: <http://www2.ecolex.org/server2neu.php/libcat/docs/LI/WCC_2016_RES_074_EN.pdf>, 25 November 2020.

95 Constitution of Ecuador, 2008, article 11(8).

96 Ministry of Water and Sanitation, Kenya, Non-Revenue Water Management, Annual Report for 2018/2018, , (2018) p.2.

due to illegal connections (or water thefts), metering errors, meter reading inaccuracies and unmetered connections. (ii). Physical Losses which are the losses of water through leakages and/or bursts of distribution and/or services pipes, and overflows from water reservoirs.[97]WASREB reported that during the 2018/2019 period, the national average level of NRW by WSPs rose to 43% from 41%.[98] In revenue terms, the loss from NRW nationally can be computed at 43% of the overall turnover for WSPs which was Kshs 22.63 Billion in 2017/18.[99]

In the same 2018/2019 period for instance, Mombasa and Nairobi WSPs registered 50% NRW, Nyeri at 36% and Kisumu at 31%.[100] This means that Nairobi City Water and Sewerage Company for instance, does not generate any revenue from 50% of the potable water it purchases for purposes of distribution to consumers. For this reason, reducing NRW must become a priority for Kenya. The reduction of losses from NRW has potential to increase revenues for utilities while also reducing unit operating costs and thus unlocking savings that can be used to expand access and improve service delivery. The recommended parameters for NRW are good (less than 20%), acceptable (20-25%), and not acceptable (above 25%).[101] The reduction of the average national NRW level from 43% to the recommended 20% could achieve two positive outcomes. First, it would provide more revenue to WSPs and county governments to invest in water supply infrastructure, improved coverage, availability, quality and accessibility. Second, it could ensure there is 23% more water available for distribution, without putting additional pressure on the available water resources. It is therefore an important strategy for responding to water scarcity, which, as seen earlier, is a problem as the country is rapidly moving towards absolute water scarcity by the year 2050, unless such changes are made.

Enhancing water resource conservation and the harvesting and storage capacity

In addition to reducing NRW levels in the country to acceptable standards, implementing the legal standards governing abstraction of surface and groundwater is important to ensure there is adequate available water per capital per year. WASREB has argued that as the demand for water services continues to increase, so will the demand for water resources increase which implies that greater efforts will be required in water resources management and development.[102] As discussed earlier in section 2.3.2, water scarcity has multiple dimensions. This includes scarcity in the availability of water of acceptable quality resulting from physical water shortage. Scarcity can also due to the lack of adequate infrastructure, irrespective of the amount of water resources available.

Scarcity in terms of availability of water resources is an important aspect to be taken into account during issuance of abstraction permits. The 2016 Water Act has stipulated factors for the Water Resources Authority (WRA) to take into consideration, as relevant in each specific case, during issuance of water abstraction permits, which include:[103]

97 Ministry of Water and Sanitation, Kenya, Non-Revenue Water Management, Annual Report for 2018/2018, , (2018) p.3.
98 Water Services Regulatory Board (WASREB), *Impact: A Performance Report of Kenya's Water Services Sector – 2018/19*, Water Services Regulatory Board, (2020) p. 28.
99 Ibid note 117 at 52
100 Ibid note 117 at 74 120 Ibid note 117 at 26
101 Ibid note 117 at 38
102 Ibid note 117 at 84
103 Water Act No. 43 of 2016, section 43.

a) existing lawful uses of the water
b) efficient and beneficial use of water in the public interest
c) any basin area water resources management strategy applicable to the relevant water resource
d) the likely effect of the proposed water uses on the water resource and on other water users
e) the classification and the resource quality objectives of the water resource
f) the investments already made and to be made by the water user in respect of the water use in question
g) the strategic importance of the proposed water use
h) the quality of water in the water resource which may be required for the reserve;and
i) the probable duration of the activity or undertaking for which a water use is to be authorised.

While any of these factors can be considered during issuance of a permit, WRA is required to give precedence to water for domestic purposes when issuing a permit.[104] This prioritizes permits, for example, to be issued to entities abstracting water for purposes of bulk supply to WSPs. While provided in the above list as a consideration during permit issuance, the water required for the reserve is not set out as a priority concern.

The reserve is defined to mean the quantity and quality of water required for two outcomes: (a) to satisfy basic human needs for all people who are or may be supplied from the water resource; and (b) to protect aquatic ecosystems in order to secure ecologically sustainable development and use of the water resource.[105] The second outcome mirrors a constitutional obligation, under article 69(2) which imposes a legal duty on each person to cooperate with the State and with each other, in order to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.[106] For this reason, it is prudent to urge that prioritization of water for the reserve should be specified even if it is with respect to particular water resources, such as a river. Groundwater conservation can be enhanced by firm implementation of the rule which requires that any approvals for groundwater development (e.g., through boreholes) are preceded by development of an allocation plan for the specific aquifer by WRA[107] The allocation plan should take into account the existing boreholes or wells, including spacing; the individual aquifer characteristics, including water quality; existing aquifer use; and the existing bodies of surface water.[128]

The second dimension of water scarcity relates to lack of adequate infrastructure development for water storage is another important element for increasing available renewable water resources. The national total water storage volume is around 3,906 MCM including hydropower purpose storages.[108] The storage capacity is distributed across 26 medium or large dams, 4,037

104 Water Act No. 43 of 2016, Section 43(2).
105 Water Act No. 43 of 2016, Section 2.
106 Constitution of Kenya, 2010, Article 69(2).
107 Water Resources Management Rules, 2007, Section 73. 128 Water Resources Management Rules, 2007, Section 73.
108 Ministry of Environment, Water and Natural Resources,*National Water Master Plan 2030*, Volume - II Main Report 1/2 Chapter 7: Overall Concepts and Frameworks for Planning, (2013)p. MA-58.

small dams/water pans, and 12,444 boreholes without including wells.[109] This means that this water storage capacity is insufficient to meet current and future demands for various uses, including the human right to water because as seen earlier, total water demands will rise five times from the current 3,218 MCM in 2010 to 21,468 MCM/year in 2030 mainly due to the increase of population and irrigation areas.[110] For this reason, additional water harvesting, and storage capacity is required in order to meet current and future water demand for domestic, industrial, irrigation, inter-basin water transfers, and the reserve.

The 2016 Water Act has reconfigured the mandate of the National Water Conservation and Pipeline Corporation (NWCPC) and re-established it as the National Water Harvesting and Storage Authority (NWHSA).[111] This new entity is responsible, on behalf of the national government, for developing and maintaining national public water works for water storage and flood control.[112] This function is however not exclusive to the NWHSA and can also be undertaken by other agencies of the national government, county governments, private entities or persons. Fiscal incentives maybe required for this purpose, including to enhance installation of household rainwater harvesting and storage capacity, in the form of water tanks.

The actions discussed here should be accompanied by implementation of water efficiency, especially NRW reduction measures to provide more water for supply without exploiting additional water resources.

E. Conclusion

The Constitution guarantees human rights, which include the right to clean and safe water in adequate quantities as a socio-economic entitlement. The overall goal is to progressively realize this right. In 2019 however, national water supply coverage was estimated to be 59%, with urban population coverage standing at 55%, and rural water coverage at 50%. This chapter has argued that for the analysis of the implementation of the human right to water to be holistic, an examination of the available water resources is required to ascertain the optimal manner of ensuring availability and accessibility of water to fulfil the entitlement. In this context, the available water resources per capita per year has been declining from 1,093m^3/c/year in 2010, to 653m^3/capita/year in 2030. The estimate decline also shows Kenya sliding towards absolute water shortage by the year 2050, and 475m^3/c/year. It is likely that unless action is taken to increase available water resources per capita per year, Kenya will face chronic water shortage by 2030 based on the current estimates. Remedial legal and other actions are required to intervene to mitigate overuse or degradation of water resources and enhance storage infrastructure in order to enhance Kenya's ability to fulfil the human right to water.

The human right to water has critical elements which are used to measure whether it is being fulfilled according to standards. The availability of water relates to the minimum amount of potable water available per person daily to meet the needs for hydration and food, but also

109 Ministry of Environment, Water and Natural Resources, National *Water Master Plan 2030*, Volume - II Main Report 1/2 Chapter 7: Overall Concepts and Frameworks for Planning, (2013) p. MA-57.

110 Ministry of Environment, Water and Natural Resources, *National Water Master Plan 2030*, Volume - II Main Report 1/2 Chapter 7: Overall Concepts and Frameworks for Planning, (2013) p. MA-58.

111 Water Act, No. 43 of 2016, Section 30.

112 Water Act, No. 43 of 2016, Section 32(1).

personal hygiene. Kenya has not prescribed a minimum amount of water but applies a rising block tariff which charges a fixed amount for the first $6m^3$ of water consumed within a month, where this is supplied by a regulated WSP. The cost is higher where people purchase water from unregulated vendors. Equally the hours of service are indicative of availability, with Kenyan WSPs recording poor performance as discussed above.

The quality of water supplied is a core element to measure the fulfilment of the human right. WASREB has set national standards for water quality, including the water being free from pathogenic organisms, contain no adverse chemicals and not have offensive taste or smell. The standards thus test for bacteriological quality and residual chlorine with Mombasa and Nairobi WSPs performing poorly on drinking water quality. Accessibility relates to convenience in ease of accessing water at household level (together with hours of service) and the distance travelled to collect water, with a finding that Kenya is yet to prescribe minimum standards for physical accessibility. Affordability, or economic accessibility is another criterion, with studies showing that poor households that access water through unregulated vendors pay much more than those with piped connections.

Overall, the fulfilment of constitutional obligations on the human right to water depends on how the progressive realization is implemented, especially in ensuring that there is constant positive movement towards universal coverage. This progression will be undermined continuously so long as Kenya retains high commercial and system loss associated NRW levels. The reduction of NRW to the recommended 20% would avail at least 23% more water for supply without a need for investments in additional storage infrastructure, or abstraction of freshwater resources. There is however a need to enhance application of water resources needs, especially taking into account domestic water needs, and the requirements for the reserve when approving water abstraction permits in order to sustainably manage the available renewable water resources. Kenya also needs to invest in additional infrastructure in order to enhance storage capacity for harvested water, which would be available for the supply system.

CHAPTER 19

Innovations in Wildlife Conservation & Management in Kenya under the 2010 Constitutional Dispensation

Patricia Kameri-Mbote

A. Introduction

Kenya is endowed with diverse species of flora and fauna.[1] She has over 7,800 animal and plant species and various other species that constitute wildlife, counting as a key revenue earner for the government.[2] Wildlife is found in public, community and private land. It is estimated that 70 per cent of Kenya's wildlife resides outside protected areas as national parks comprise only 8 per cent of Kenya's land.[3] The greatest threats to wildlife are loss of habitat through land use change, human interventions in ecosystems, poaching and over-use of resources.[4] Wildlife has a considerably high impact on environment and the latter affects the very wellbeing of humanity and the economic development of the world. The biosystems that allow ecosystems to remain in balance and the environment at large to flourish rely on the individual roles that every organism plays.[5] This maintains balance in the environment and should inform the policy framework for wildlife conservation and management. This entails protecting not only the wildlife by securing their lives and their habitat but also looking at the roles that we all play and the obligations we owe.

Designing wildlife law and policy in Kenya proved complicated and took more than two decades.[6] Among the barriers identified were land tenure insecurity; failure to provide for multiple and compatible land uses through zoning; and the lack of a legal framework for involvement of local communities in sustainable wildlife management despite the fact that wildlife shares land with communities, and that the bulk of wildlife is outside protected areas.[7] These communities lacked both secure rights to land and any legal basis for claiming rights to wildlife or part of the benefits accruing from wildlife despite the fact that they were obliged to keep the wildlife on their land and bear the costs. These factors were disincentives for landholders to conserve wildlife on their land.[8]

It is within this context that the Wildlife Policy, 2020, was crafted.[9] The policy was preceded by the Wildlife Conservation and Management Act, 2013, which sought to align the wildlife law

1 Kahoka Kiambi & Monica Opole, 'Promoting Traditional Trees and Food Plants in Kenya' in David Cooper et al (eds), *Growing Diversity: Genetic Resources and Local Food Security* (Practical Action) (1992) 53.
2 World Conservation Monitoring Centre, *Kenya: Conservation of Biological Diversity and Forest Ecosystems* (UNEP-WCMC) (1988).
3 David Western, 'Ecosystem Conservation and Rural Development: The Case of Amboseli',in Charles Zerner, et al. (eds.,) *Natural Connections: Perspectives in Community-based Conservation* (Charles Zerner, et al. (eds.,) (1994) 15.
4 Robert J Steidl & Brian F Powell, 'Assessing the Effects of Human Activities on Wildlife' [2006] 23 (2) *The George Wright Forum: Visitor Impact Monitoring,* 50.
5 J Dorst, 'Impact of Wildlife on the Environment' [1991], *Revue Scientifique Et Technique* 10(3) , 557."plainCitation":"J Dorst, 'Impact of Wildlife on the Environment' (1991
6 The National Wildlife Conservation and Management Policy, April 2017, 6.
7 *Ibid.* 19.
8 *Ibid.* 7.
9 National Wildlife Policy, 2020.

with the Constitution of Kenya, 2010.[10] Constitutional provisions on stakeholder participation, sustainable development, access and benefit sharing, land tenure, land use and the need to take care of critical ecosystems informed the new law.[11]

This chapter looks at wildlife conservation in Kenya in the post-2010 constitutional dispensation. It is important to locate the Constitution within a historical context. The colonial and immediate post-independence policies on wildlife were geared to facilitate access for the white settlers. Indeed, African wild lands were perceived as playgrounds for settlers who hunted game for fun.[12] With growing concerns on the loss of wildlife, measures were put in place to protect wildlife from illegal takings. The colonial and immediate post-colonial policy on natural resources was incoherent and riddled with contradictions as the main aim was extraction of resources.[13] This was backed by State institutions, which were ruthless towards Kenyan natives who would be transgressing the boundaries between them and the resources. The chapter argues that the Constitution has provided a good anchorage for sustainable wildlife management. This gave impetus for a revised Wildlife Conservation and Management Act (WCMA), which brought previously excluded actors into wildlife conservation – communities and individuals.[14] WCMA also enhanced wildlife crimes in a bid to curb rampant poaching.

This chapter is divided into six parts. Part A is the introduction while Part B looks at the wildlife laws and policy before the promulgation of the 2010 Constitution. This provides the context for the discussion on wildlife management under the Constitution in Part C. Part D will isolate the innovative mechanisms for wildlife management that stand out in the Constitution, while Part E concludes noting that the path to decolonization of wildlife conservation and management in Kenya has started in earnest through the participation of diverse stakeholders in the sector.

B. Pre-2010 wildlife conservation policy and laws

Colonial game laws introduced norms that trumped the pre-existing norms governing forests and wildlife. It became impossible for local communities dependent on wildlife and forests to lead normal lives without breaking the law because of the new boundaries placed between them and their livelihood resources.[15] Moreover, the setting aside of large tracts of land for wildlife coincided with the alienation of land for settler purposes and increases in indigenous populations.[16] Conservation was a process removed from people, especially the native Kenyans. The guiding philosophy behind the establishment of parks was to protect the natural environment in Africa as a special kind of Eden for the purposes of the European psyche rather than as a complex and changing environment in which people lived.[17]

10 Wildlife (Conservation and Management) Act, 2013.

11 The Constitution of Kenya, 2010, cap.5.

12 EI Steinhart, 'Hunters, Poachers and Gamekeepers: Towards a Social History of Hunting in Colonial Kenya.' [1989], *The Journal of African History* 30, no. 2, 247-264.

13 Patricia Kameri-Mbote & Philippe Cullet, 'Law, Colonialism and Environmental Management in Africa' [1997], *Review of European Community and International Environmental Law* 6 no 1, 23.

14 *Supra* note 14, at s. 3 and 3B.

15 John Waithaka, 'Historical Factors that Shaped Wildlife Conservation in Kenya' [2012], *The George Wright Forum* 29 no. 1, 21-29, at 22.

16 Patricia Kameri-Mbote, 'Property Rights and Biodiversity Management in Kenya: The Case of Land Tenure and Wildlife.' [2002], ACTS Press, African Centre for Technology Studies: Policy Series No.10.

17 Jonathan S. Adams & Thomas O. McShane;*The Myth of Wild Africa: Conservation without Illusion* (London and New York, W. W. Norton) (1992) 266.[4]

Indeed, the reserves created in East Africa at the end of the 19thCentury were planned as an amenity for the use of European hunters and situated outside the areas occupied by the Europeans.[18] Colonial policies were, therefore, interventionist in most cases since, by seeking to protect wildlife and other resources from the Africans, they had to break the connections that existed between indigenous Kenyans and their physical environment. It can, therefore, be correctly stated that both hunters and sportsmen who wanted to secure their interests in the long term and latter-day environmental lobbies from developed countries were not concerned about the indigenous people. The wildlife conservation movement in Africa was a colonial project removed from the people. The environmental lobbies found it easier to promote conservationist measures in dependent territories than at home where the environment had already been seriously affected by industrialization.[19] The values attached to conservation were, for the most part, removed from the needs and aspirations of indigenous Kenyans for whom the whole process amounted to both the expropriation of their property rights and the severance of their relationship with their local environment and environmental resources.[20] This process continued into the independence period.

The first attempt at a comprehensive policy on wildlife management in Kenya is contained in Sessional Paper No. 3 of 1975, which was a radical departure from the preservationist policies preceding it. It recognised the value of wildlife within and outside protected areas. It identified the primary goal of wildlife conservation as the optimisation of returns from wildlife defined broadly to include aesthetic, cultural, scientific and economic gains, taking into account the income from other land uses.[21] Economic gains were specified to derive from both tourism and consumptive uses of wildlife. The need to identify compatible land uses was also cited as an integral part of the policy, along with the implementation of such uses and fair distribution of benefits derived therefrom.[22] The need to minimise depredations by wildlife on agricultural land and to support tourism were also underscored. Under the policy, the human-wildlife conflict was perceived to be a clash of interests of conservationists and non-conservationists and its solution considered to be an integrated approach to land that would maximise returns from all resources, including wildlife.[23]

The policy also recognised that wildlife needed space outside protected areas if it was to flourish without intensive management and ecological impoverishment.[24] It envisioned that additional space for wildlife management would be secured from landowners willing to accommodate wildlife. Such accommodation would arise by dint of policies encouraging landowners to incorporate wildlife with other forms of land use and reaping the benefits through tourism, cropping for meat and trophies, game ranching, live animal capture for restocking or export, and the use of value-added processing of animal products. These uses were to be promoted and

18 Richard SR Fitter & Peter Scott, *The Penitent Butchers*: *75 years of Wildlife Conservation*, (The Fauna Preservation Society) (1978).[13]

19 Richard Grove, 'Early Themes in African Conservation: The Cape in the Nineteenth Century' in David Anderson & Richard Grove (eds) *Conservation in Africa with People, Policies, Practice(*Cambridge University Press) (1987) 21. [22]

20 Patricia Kameri-Mbote, 'Land Tenure, Land Use and Sustainability in Kenya: Towards Innovative Use of Property Rights in Wildlife Management' [2005] IELRC Working Paper 4.

21 Republic of Kenya, Statement on the Future of Wildlife Management Policy in Kenya Sessional Paper No. 3 of 1975.

22 The National Wildlife Conservation and Management Policy, 2012. Par 1.3.

23 *Ibid.* par 1.3.

24 *Ibid.* par 1.3.

regulated by the wildlife authorities in the interests of making a net contribution to Kenya's economic and social development. Under the policy, wildlife authorities were to be facilitators, advisors and assessors working with landowners and residents in wildlife range areas in the country, and not policemen. The government also undertook the general responsibility of assisting with problem animal control in instances of wildlife impinging adversely on human life and property, within the limits of available resources. Moreover, the policy indicated a preference for flexible regulations able to capture local needs and anticipate future changes in generating optimum returns from wildlife rather than rigid legislative provisions.

The operative Wildlife (Conservation and Management) Act established the legal provisions for the 1975 policy.[25] It consolidated the wildlife protection and national parks laws in Kenya and merged the National Parks Organisation with the Game department. The law established the Wildlife Conservation and Management Department (WCMD) under the Ministry of Tourism and Wildlife to replace the National Parks Board of Trustees.[26] This department became the overall wildlife management authority for all wild animals. In particular, it was the responsibility of the department to ensure that wildlife resources gave the best possible returns to individuals and the nation in terms of cultural, aesthetic and economic gains.[27] In 1990, Kenya Wildlife Service (KWS) was formed to replace the WCMD. The word 'service' was deliberately used in designating this new body to convey the expectation that this body was to contribute to the welfare of local communities.[28] The new body was charged with the task of ensuring that wildlife resources were sustainably used for national economic development and for the benefit of people living in wildlife areas.[29] It was charged with the task of managing Kenya's national parks, national reserves and also wildlife outside protected areas.

The law,however, retained most of the provisions on conservation rather than ingraining sustainable management despite being cast within the framework of a far-reaching policy.[30] It vested the powers of management and control of protected areas in a consolidated service of the government, KWS. The stated objective of the statute was to ensure that wildlife is managed and conserved for the benefit of the nation generally and certain areas in particular. The system of wildlife conservation established under the lawwrapped nature in protected areas in which other forms of land-use were excluded. The minister responsible for wildlife was empowered by the law to declare any area of land a national reserve or game park after consulting with the relevant bodies.[31] These areas were put under public control for the propagation, protection and preservation of wild animal life and wild vegetation subject to minimal alteration or alienation for other forms of land-use activity.

The law provided for four types of wildlife-protected areas, namely, national parks, national reserves, local sanctuaries and game reserves.[32] The first three were vested in the central

25 Republic of Kenya, Statement on the Future of Wildlife Management Policy in Kenya (Sessional Paper No. 3 (1975).
26 Patricia Kameri-Mbote, 'Property rights and biodiversity management in Kenya: the case of land tenure and wildlife.' [2002], ACTS Press, African Centre for Technology Studies: Policy Series No.10, 6.
27 *Ibid,* at 6.
28 *Ibid,* at 6.
29 Wildlife (Conservation and Management) Act, 2013, s.3A.
30 Patricia Kameri-Mbote, 'Property Rights and Biodiversity Management in Kenya: The Case of Land Tenure and Wildlife.' [2002], ACTS Press, African Centre for Technology Studies: Policy Series No.10
31 Wildlife (Conservation and Management) Act, 2013, Part III.
32 *Ibid,* at Part III

government, with human activities completely excluded from national parks.[33] Various degrees of human activities were allowed within the national reserves as long as they were compatible with conservation efforts or requirements.[34] Game reserves were large conservation areas vested in local authorities (county councils) that administered them under the overall guidance and control of the Ministry of Local Government. This situation has radically changed with the introduction of counties as units of governance under the 2010 Constitution discussed hereafter.

The law made provision for owners of private land opening their land up for hunting of game.[35] Section 47 also authorised game ranching and cropping, subject to conditions set by the minister responsible for wildlife. This latter provision permitted landowners to kill meat producing animals under soundly managed procedures, and was in line with the objective of ensuring that landowners secured returns from hunting done on their land. However, with increased illegal taking of wildlife and the attendant threat from extinction of species such as rhino and elephants, the government, in response to worldwide pressure, banned all game animal hunting in 1977.[36] It also revoked all licences to trade in wildlife products.[37] This led to the closure of professional hunting companies and shops dealing with game trophies. Wildlife-based tourism was left as the only legal form of utilisation. This reduced the value of land for communities that had earned revenue through granting hunting concessions. Anti-poaching measures were put in place and patrols increased to enforce these measures. The government thus appropriated to itself the responsibility for all wildlife in the country including that on privately owned land, thus departing from measures taken from the late 1940s to the1970s to enlist the participation of individual and community land owners in wildlife management. Consequently, the public expects the government to pay for wildlife conservation and management-related costs.

This 1990 wildlife law, responding to increasing human-wildlife conflicts, provided for compensation to landowners who support wildlife on their land and for properties destroyed by wildlife. Further, KWS implemented a scheme for revenue sharing of park entrance fees with rural communities as a way of encouraging those communities to take part in wildlife conservation.

Despite its best intentions, Cap. 376 was widely perceived as inadequate in dealing with wildlife management problems in light of the changed circumstances. Some of the factors necessitating revisions to the law were: the ascendance of biodiversity to a position of prime importance internationally, evidenced by the coming into force of a plethora of international instruments for its conservation and sustainable use such as the Convention on Biological Diversity[38] and the continued inability of government agencies to integrate, harmonise and enforce land use policies and legislation intended to conserve wildlife and other natural resources. The three objectives of the Convention are conservation (not preservation), sustainable use and fair and equitable sharing of benefits emanating from biological resources. These principles are

33 *Ibid,* at s.6, s.7.

34 *Ibid.* at s.3.

35 Wildlife (Conservation and Management) Act, Cap 236 (repealed), at s.29(2).

36 The Wildlife (Conservation and Management) (Prohibition on Hunting of Game Animals) Regulations, 30 *Kenya Gazette Supplement* (May 20, 1977).

37 The Wildlife (Conservation and Management) (Revocation of Dealer's Licences) Act No. 5 of 1978, 35 *Kenya Gazette Supplement* (June 23, 1978).

38 United Nations Conference on Environment and Development: Convention on Biological Diversity - Done at Rio de Janeiro, June 5, 1992, *reprinted in* 31 I.L.M.818 (1992).

relevant to wildlife management and were deposited in the framework environmental law, the Environment Management and Coordination Act, 2000. The initiatives taken to create positive incentives for sustainable management of wildlife outside protected areas, such as community participation and the pilot-cropping programme were outside the law's purview and needed to be ingrained in a new wildlife legislation.

There were a number of attempts to come up with a new law beginning in the 1990s.[39] None delivered a changed law,however. The 2010 Constitution was, therefore, a breath of fresh air. It provides a great context for wildlife conservation considering the pre-2010 legal landscape. The right to a healthy environment was not part of the Bill of Rights in the former Constitution, and the legal framework for environmental management was largely non-existent and only discernible from other rights such as the rights to life and property.

C. Wildlife conservation and management legal regime post the 2010 Constitution

The Constitution

Wildlife conservation in Kenya is currently governed by various laws, which include the Constitution of Kenya, 2010; the Environment Management and Coordination Act (EMCA) 1999;[40] and the principal statute, the Wildlife Management and Conservation Act (WCMA).[41] As previously noted, environmental conservation was not part of the pre-2010 constitutional architecture. The 2010 Constitution's promulgation provided much necessary wind to the sails of wildlife conservation. Significantly, it incorporated the principle of sustainable development in the national values and principles of governance, which bind all State organs when they implement the Constitution; and make or implement any law or public policy decision.[42] This reflects the global recognition for managing natural resources sustainably. It also provides the necessary impetus for ensuring that Kenya domesticates its international and regional commitments to protect its environment.[43] It is worth noting that Article 2 (6) provides that any treaty or convention ratified by Kenya forms part of the law of Kenya. Details of the process of enforcing this provision are outlined in the Treaty Making and Ratification Act[44] and are discussed extensively in Chapter8of this book.

The Constitution recognises that 'every person has a right to a clean and healthy environment…'[45] The right to environment is an integral right that allows the enjoyment of other human rights, and this chapter focuses on the right to a clean and healthy environment as the anchor of broader natural resources and hence encompassing the protection of wildlife.[46]

39 Francesca Didi Wamukoya, 'Devolution of Wildlife Management in Kenya to Enhance Community Participation: An Assessment of Kenyan Legal Frameworks'(LL.M Thesis, University of Nairobi, School of Law) (2013).16.
40 Environmental Management and Coordination Act No. 8 of 1999.
41 Wildlife (Conservation and Management) Act, No. 47 0f 2013.
42 Constitution of Kenya, 2010, Article 10.
43 *Ibid,* at Article 2(6).
44 Treaty Making and Ratification Act, No 45 of 2012.
45 Constitution of Kenya, 2010, Article 42.
46 Kholisani Solo, 'Keeping a Clean Environment - The Case of Botswana' [1999], SAJELP 6(2), 237.

Article 42 does not stop at providing for the right to a clean and healthy environment. It includes 'the right to have the environment protected for the benefit of future generations through legislative and other measures…'[47] and 'to have the obligations relating to the environment fulfilled'.[48]

Besides this, Article 10 obligates all institutions and persons to ensure that sustainable development with namely development that meets the needs of the present without compromising the ability of future generations to meet their own needs[49] is ingrained in all initiatives. The Rio Declaration provides a number of guiding principles to achieve sustainable development, including Principle 4, which states:

> In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.[50]

The right is further elaborated in Article 43 of the Constitution on economic and social rights, which includes the right to water,[51] freedom from hunger, and to have adequate food of acceptable quality.[52] In efforts to fully realise Article 42, the legislature has reviewed and enacted a number of laws. Significantly, the Environmental Management and Coordination Act, 1999, had provided for the right to a clean and healthy environment[53] but there were arguments that this right was not at par with the right to life in the Bill of Rights. It was refreshing in the *Peter K Waweru* case[54] when the High Court, determining a case relating to Section 71 of the repealed Constitution, held that the right to life connotes more than 'keeping body and soul together'.[55] It permitted, in the court's view, admission of a broader right to a healthy environment.[56]The 2010 Constitution has now provided firm anchorage for the EMCA, which was also revised to align with the Constitution. The Forests Conservation and Management Act[57] and the Wildlife Conservation and Management Act[58] were also amended in line with constitutional provisions. Some of these shall be discussed further presently.

The Constitution creates a number of duties and obligations for the government to fulfill. Article 21 of the 2010 Constitution deals with the implementation of rights and fundamental freedoms and is relevant for wildlife management and conservation.[59] In allocating resources, the State is required to give priority to ensuring the widest possible enjoyment of the rights or fundamental freedoms. The right to a healthy environment and the duty to conserve wildlife must be seen within this context.[60]

47 Constitution of Kenya, 2010, Article 42 (a).
48 *Ibid.* at Article 42(a).
49 Brundtland Commission: Report of the World Commission on Environment and Development, United Nations World Commission on Environment and Development, 4 August 1987, [New York] : UN.
50 United Nations General Assembly: Rio Declaration on Environment Development, 12 August 1992, UN doc. A/CONF.151/26 (Vol. I), principle 4.
51 Constitution of Kenya, 2010, Article 43 (1) (d).
52 *Ibid*, Article 43 (1) (d).
53 Environmental Management and Coordination Act No. 8 of 1999, Section 3.
54 *Peter K. Waweru vRepublic*, Misc. Civ. Application 118 of 2004 (2006).
55 *Peter K. Waweru vRepublic*, Misc. Civ. Application 118 of 2004 (2006) 20.
56 *Ibid*.
57 Forests Conservation and Management Act, No.34 of 2016.
58 Wildlife (Conservation and Management) Act, No 47 of 2013.
59 Constitution of Kenya, 2010, Article 21: 'it is a fundamental duty of the State and State organs to observe, respect, promote and fulfill the rights and fundamental freedoms in the bill of rights'
60 *Ibid,* at Article 21.

The Constitution further, under Article 69, places a constitutional obligation on the State to ensure environmental protection. Here, the State is required to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and to ensure the equitable sharing of the accruing benefits;[61] work to achieve and maintain a tree cover of at least 10per cent of the land area of Kenya;[62] protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;[63] encourage public participation in the management, protection and conservation of the environment;[64] protect genetic resources and biological diversity;[65] eliminate processes and activities that are likely to endanger the environment;[66] and utilise the environment and natural resources for the benefit of the people of Kenya.[67] Under Article 69 (2), every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. This cooperation is critical for security of people living with wildlife; visitors to wildlife conservation areas, and wildlife resources.[68] Any form of insecurity in wildlife areas is a serious threat and challenge to sustainable wildlife conservation, and has national and regional security implications.

The constitutional obligations generally promote diverse aspects of sustainable wildlife management. It is also important to note that the constitutional requirement for public participation[69] applies to wildlife conservation and management. Wildlife conservation cannot be achieved without enlisting the participation of all owners of land hosting wildlife. As a fugitive resource, wildlife requires expansive land to thrive,[70] and protected areas are grossly inadequate as habitat for all the wildlife in Kenya. Indeed, 70 per cent of Kenya's wildlife is estimated as resident outside protected areas.[71] The interaction between humans and wildlife has been conflictual owing to competition for and incursions into each other's space.

Article 70 of the Constitution deals with the enforcement of environmental rights. It allows courts to make any order or give any directions it considers appropriate to prevent, stop or discontinue any act or omission that is harmful to the environment. This function has been well executed through case law[72] in the Environment and Land Court established in the Constitution.[73] Chapter 4of this book discusses ELC jurisprudence in great detail. The National Environment Tribunal established under the EMCA to hear disputes arising from decisions of NEMA on issuance, denial or revocation of licences has addressed contestations over approvals of developments in critical wildlife breeding areas and also deals with wildlife offences.[74]

61 *Ibid*, Article 69 (1) (a).
62 *Ibid*, Article 69 (1) (b).
63 *Ibid*, Article 69 (1) (c).
64 *Ibid*, Article 69 (1) (d).
65 *Ibid*, Article 69 (1) (e).
66 *Ibid*, Article 69 (1) (g).
67 *Ibid*, Article 69 (1) (h).
68 National Wildlife Policy, 2020.
69 The Constitution of Kenya 2010, Article 69.
70 Patricia Kameri-Mbote, *Property Rights and Biodiversity Management in Kenya* (ACT Press) (2002).
71 Robert J Steidl & Brian F Powell, 'Assessing the Effects of Human Activities on Wildlife' [2006] 23 (2) *The George Wright Forum: Visitor Impact Monitoring,* 50.
72 *Martin Asano Rabera and John Ndungu KinyanjuivMunicipal Council of Nakuru and National Environment Management Authority and County Government of Nakuru* Petition 53 of 2012.
73 The Constitution of Kenya, 2010, Article 162 (2).
74 *Maraba Lwatingu Residents Association & 2 Othersv National Environment Management Authority & 3 Others* [2019] eKLR, PAR. 51-55.

The National Wildlife Policy, 2020

The National Wildlife Policy, 2020, provides the overall roadmap for wildlife conservation in the post-2010 constitutional dispensation.[75] Replacing Sessional Paper No. 3 of 1975, it adopts conservation principles in multilateral environmental agreements in the 2010 Constitution and in the EMCA. These include the precautionary principle; wildlife as a public resource; integrated and ecosystem-based management; wildlife management asa form of land-use; sustainability, good governance and devolution; access and equitable sharing of benefits; intra- and inter-generational equity; inclusive and participatory approaches; and use of scientific and indigenous knowledge.[76]

The policy seeks 'to create an enabling environment for conservation and sustainable management of wildlife for current and future generations'.[77]Its overall objective is to provide a framework that is dynamic and innovative for re-engineering the wildlife sector. The specific objectives of the policy are to conserve Kenya's wildlife resources as a national heritage in perpetuity; increase access, incentives and sustainable use of wildlife resources; ensure equitable sharing of benefits; promote partnerships and incentives for wildlife-based enterprises; facilitate collaboration for effective governance and financing of the wildlife sector between communities, counties, national government and international partners; and promote management of viable wildlife populations and their habitats in Kenya. The process of reviewing the Wildlife Conservation and Management Act,2013, is under way to incorporate the policy proposals and to integrate international best practice in wildlife conservation and management.[78]

The EMCA

Besides the Constitution and the policy, other laws that constitute the wildlife conservation legal regime are: the framework environmental law – the EMCA; sectoral laws governing specific sectors impacting on wildlife such as those governing forestry, land and land use. Our attention here is limited to the EMCA and the Wildlife Management and Conservation Act, 2013.[79] Article 69 of the 2010 Constitution provides for State protection of biodiversity and natural resources, which include wildlife. This constitutional provision gives a legal and constitutional mandate to the State to put in place laws, measures and policies to ensure the sustainable exploitation, utilization, management and conservation of the environment and natural resources. The Wildlife Policy,2020, also anticipates review of the Wildlife Conservation and Management Act,2013, to address what it defines as outstanding issues to align Kenya's wildlife law with emerging issues and good practice.

The EMCA is over-arching and cross-sectoral in nature and has provisions that impact on wildlife conservation in general. For instance, the EMCA requires the conduct of an Environmental Impact Assessment (EIA) before any activity with potential negative consequences on the environment may be carried out.[80] Further, before the establishment of a protected area, such as a national

75 National Wildlife Policy, 2020.

76 *Ibid.*

77 *Ibid.*

78 Ministry of Tourism and Wildlife, 'Request for Expression of Interest for Consultancy Services for Review of the Wildlife Conservation and Management Act, No. 47 of 2013' 29 July 2020. In <https://www.tourism.go.ke/request-for-expression-of-interest-/> 18 November 2020.

79 For discussions on land-related issues in sustainable environmental management, see Patricia Kameri-Mbote's Chapter 9 in this volume; PKM Nomos chapter and Patricia Kameri-Mbote's Chapter 13 on Governing Biodiversity.

80 Environmental Management and Coordination Act, No.8 of 1999, S. 58.

park or a game reserve, an environmental audit and a licence issued by the relevant authority (National Environmental Management Authority) is required.[81] The law further designates KWS as the lead agency for matters relating to wildlife.[82]The EMCA also spells out powers that NEMA has over lead agencies such as KWS in respect of lead agencies. It can, for instance, direct a lead agency to perform an action within a specified time, failing which, NEMA can perform or get the activity performed and charge the lead agency for expenses. This power is yet to be exercised over KWS and county governments responsible for wildlife conservation.

Land laws

There are other laws whose subject matter has an important role in wildlife management and conservation. For instance, the Land Act governs land holding in Kenya.[83] It is important to point out that the Constitution provides that land in Kenya belongs to the people of Kenya collectively as a nation.[84] This is the basis of the public trust doctrine over land and land-based natural resources.[85] The Constitution goes on to provide that Kenyans can own land as communities and as individuals.[86] The Land Act governs both public and private land and includes provisions on the management of natural resources in this land. The principles of land policy at Article 60 also include sustainable and productive management of land resources, which include wildlife and sound conservation and protection of ecologically sensitive areas. This is a radical departure from previous laws on land that had no provisions on natural resource management on private land. The Community Land Act has extensive provisions on the management of natural resources on this category of land.[87] While the statute makes no mention of wildlife, it is fair to assume that wildlife is included in the resources on land.

Land use planning laws also have an impact on wildlife conservation as they direct the holding and utilisation of land in different parts of the country.[88] Article 66 of the Constitution provides that the State 'may regulate the use of any land, or any interest in or right over any land, in the interest of defence, public safety, public order, public morality, public health, or land use planning'. It is important to note that the 2010 Constitution introduced counties as a governance unit and designated 47 counties.[89] This is in addition to the national government. In this case, the divergence in law and practice is important to magnify management plans versus separate land use control under AFFA and physical planning laws (both planning and development control).

Devolution

Article 1 of the Constitution provides that sovereignty belongs to the people of Kenya and is exercised at national and county level. At the national level, the national government (NG) and institutions under it exercises this sovereignty while at the county level by county

81 *Ibid,* at S. 58, Second Schedule, par. 13.
82 Wildlife (Conservation and Management) Act, 2013, S.6.
83 The Land Act, 2012.
84 The Constitution of Kenya, 2010, Article 61 (1),
85 Patricia Kameri-Mbote, 'The Use of the Public Trust Doctrine in Environmental Law' [2007], *Law, Environment and Development Journal* 3/2, 195.
86 The Constitution of Kenya, 2010, Article 61 (1).
87 Patricia Kameri-Mbote, 'Wildlife Conservation and Community Land Rights in Kenya',inP. Kameri-Mbote et al (eds) *Law/ Environment/Africa* (Nomos Publishers) (2019) 221-246.
88 Physical Planning Act, Cap 286, Para 6 of the Second Schedule.
89 The Constitution of Kenya, 2010, Article 6(1).

governments (CGs). The Fourth Schedule of the Constitution delineates the functions of each level of government by creating three types of jurisdiction: exclusive, residual and concurrent. Importantly, the two levels of government are distinct and interdependent, and should conduct their mutual relations through consultation and cooperation.[90] The national State agencies such as KWS are required to devolve their services to the lowest possible units.[91]

The protection of the environment and natural resources, including animals and wildlife,[92] is the duty of the national government. The county governments,however, have a number of functions that touch on environment and natural resources: implementation of specific national government policies on natural resources and environmental conservation;[93] county planning and development[94] including land survey and mapping;[95] boundaries and fencing;[96] and ensuring and coordinating the participation of communities in governance at the local levels.[97] Land use planning is a critical aspect in natural resource management. Its potency lies in itsability to guide management of natural resources and it can lead to sustainable or unsustainable practices depending on how it is framed. In the case of wildlife, land use plans can facilitate the zoning of land to avoid conflicting uses on the same land, such as wildlife management and agriculture and urban development.[98] Conversely, land use plans can also be used to combine compatible land uses in ecosystems such as pastoralism and wildlife management.[99] Kenya's land use policy was only concluded in 2017.[100] This implies that land use has historically been haphazardly planned with no proper zoning according to ecological regions.[101]

Wildlife Management and Conservation Act (WCMA)

Overview

The WCMA replaced the previous statute discussed earlier in this chapter.[102] It aligns wildlife law to the 2010 Constitution. It captures the need for cooperation in its guiding values:

a) Devolution of wildlife conservation and management;
b) Effective public participation;
c) Conservation and management shall be encouraged using an ecosystem approach wherever possible;
d) Encouragement and recognition of wildlife conservation as a form of land use on public, community or private land;
e) Sustainability;

90 *Ibid.* Article 6(2), 189(1).
91 *Ibid.* Article 6(3).
92 *Ibid.* Para 22 (b) Part 1 of the Fourth Schedule.
93 *Ibid.* Para 10 Part 2 of the Fourth Schedule.
94 *Ibid.* Para 8 Part 2 of the Fourth Schedule.
95 *Ibid.* Para 8 (b) Part 2 of the Fourth Schedule.
96 *Ibid.* Para 8 (c) Part 2 of the Fourth Schedule
97 *Ibid.* Para 14 Part 2 of the Fourth Schedule.
98 Patricia Kameri-Mbote, 'Property rights and biodiversity management in Kenya: the case of land tenure and wildlife.' [2002], ACTS Press, African Centre for Technology Studies: Policy Series No.10.
99 *Ibid.*
100 Ministry of Lands and Physical Planning, National Land Use Policy, 2017.
101 National Land Policy, Sessional Paper No. 3 of 2009.
102 Cap 376 of the Laws of Kenya (repealed).

f) Benefits of wildlife conservation be derived by the land user in order to offset costs and to ensure the value and management of wildlife does not decline; and
g) Equitable sharing of the benefits accruing from wildlife conservation.

This statute further, as noted earlier, establishes KWS, whose functions are to:

a) Conserve and manage national parks, wildlife conservation areas and sanctuaries under its jurisdiction;
b) Set up a county wildlife conservation committee for each county;
c) Develop mechanisms for benefit sharing with communities living in wildlife areas;
d) Assist and advise in the preparation of management plans for community and private wildlife conservancies;
e) Undertake and conduct enforcement activities such as anti-poaching operations, wildlife protection, intelligence gathering, investigations and other enforcement mechanisms to effect the provisions of the law.
f) Promote and undertake extension programmes to enhance wildlife conservation, education and training;
g) Advise the National Land Commission, the Cabinet Secretary and the Council on the establishment of national parks, wildlife conservancies and sanctuaries;
h) Grant licences and monitor the observation of conditions of grant of such licences.[103]

Access to wildlife resources

Section 71 of the WCMA provides that 'every person has the right to reasonable access to wildlife resources and shall be entitled to enjoy the benefits accruing therefrom without undue hindrance and shall be exercised with due regard to the rights and privileges of other stakeholders'. This is a radical departure from the 'King's Game Concept',[104] adopted during the colonial times, which separated people from wildlife. The WMCA further provides that benefits for wildlife conservation shall accrue to the land user to offset costs and ensure conservation. Additionally, benefits accruing from the wildlife resources utilization shall be equitably shared between the county and national government, private landowners and communities.[105] Essentially, the WMCA introduces incentives to encourage conservation of wildlife by all stakeholders and as a source of income.[106] This is particularly pertinent for private and community landowners who have to forego other uses of their land. It also establishes a Wildlife Endowment Fund, whose functions are to: develop wildlife conservation initiatives; manage and restore protected areas and conservancies; protect endangered species, habitats and ecosystems; and support wildlife initiatives.[107]

Compensation for wildlife depredations

One of the complaints before the 2010 Constitution was the inadequate compensation for depredations of and injuries from wildlife. Communities were unhappy with actions by KWS

103 Wildlife Conservation and Management Act No 47 of 2013, sec 7.
104 Jan Geu Grootenhuis, Herbert H. T Prince, 'Wildlife Utilisation: A Justified Option for Sustainable Land Use in African Savannas', in Herbert H. T. Prins et al (eds), *Wildlife Conservation by Sustainable Use* (COBI vol.12) (2001) 460-482.
105 Wildlife Conservation and Management Act, 2013, Section 19.
106 *Ibid.* Section 70.
107 *Ibid*. Section 23 (3).

in instances where they killed wildlife in response to damage to crops and death of livestock.[108] They complained that the government valued wildlife more than it valued them.[109] Section 24 of the WCMA establishes the Wildlife Compensation Scheme to be used for financing compensation claims for human death or injury or crop and property damage caused by wildlife. Section 25 gives details of compensation for personal injury or death, or damage to property, and establishes the institutional mechanisms for administering the compensation such as County Wildlife Conservation and Compensation Committees. Cases for compensation are becoming more frequent.[110] In the *Bundi* case, the respondent was injured by a buffalo while she was irrigating her miraa trees at Kinameru near Meru National Park on March 8, 2015. The parties recorded a consent on liability at 80:20 as against the appellant in the lower court. The appellant raised the issue of the jurisdiction of the trial court had to determine the matter in light of the provisions of Section 25 of the Wildlife Conservation and Management Act detailing the procedure to be followed in resolving disputes arising from injury from wildlife. This issue had been canvassed in *Narok County Council v Trans Mara County Council and Another*,[111] where the court held that where the law provides a procedure to be followed, the parties must invoke that procedure before moving to court. The respondent argued that it was not mandatory to invoke the procedure in Section 25 before moving to court, citing the case of *Kenya Wildlife Service v Joseph Musyoki Kilonzo,*[112] where the Court of Appeal upheld that position. Another ground of appeal was whether the damages awarded to the respondent were excessive considering the injuries sustained by the respondent. The court, in the *Bundi* case, agreed with the respondent that the requirement to follow the laid out procedure was not mandatory, judging from the words used in the section:

> 25(1) Where any person suffers any bodily injury or is killed by any wildlife listed under the third schedule, the person injured, or in the case of a deceased person, the personal representative or successor or assign, **may** *launch a claim to the country wildlife conservation and compensation committee within the jurisdiction established under this Act. (Emphasis mine)*

The court, however, found the damages awarded excessive and reduced the award from Ksh1 million Ksh400,000 to align it with the margin of prevailing awards.

Establishment of national parks and reserves

Land is required for the conservation of wildlife. While in many pastoral areas of Kenya communities continue to share land with wildlife, it is impractical for humans to share land with wildlife in areas where land is under agriculture or other forms of fixed settlement.[113] Both scenarios are provided for in the WCMA. To conserve wildlife, the Cabinet Secretary, upon recommendation of the relevant county government and after consultation with the National Land Commission, may declare by notice in the Gazette any land under the jurisdiction of the county government to be a national reserve where such land is rich in biodiversity and wildlife

108 Gabriela Schieve Fleury, 'Lion and livestock conflict in the Amboseli region of Kenya' [2014], *Senior Honors Projects*409, 41.
109 *Ibid.* 28
110 *Kenya Wildlife ServicesvRoise Bundi* [2018] eKLR.
111 *Narok County Council vTrans Mara County Council and Another*, Civil Appeal No. 25 of 2000.
112 *Kenya Wildlife ServicevJoseph Musyoki Kalonzo*, Civil Appeal No.306 of 2015 [2017] eKLR.
113 Patricia Kameri-Mbote, *Property Rights and Biodiversity Management in Kenya* (ACT Press) (2002).

resources or contains endangered species or is an important wildlife buffer zone, migratory route or dispersal area.[114] In the same spirit, the Cabinet Secretary may acquire by purchase any land suitable to be declared a national park, wildlife corridor, migratory route or dispersal area under the Act,[115] or by notice in the Gazette publish a national list of wildlife ecosystems and habitats that are endangered and threatened and are in need of protection on the advice of the KWS and in consultation with the National Land Commission.[116]

Community involvement in wildlife management

The limitation of community tenure to trustland and group ranches constrained the involvement of communities in wildlife management. Local authorities held trustland on behalf of the communities and most group ranches were unregistered due to the costs of registration. In both cases, community rights to land were insecure because of the lack of accountability of the local authorities that wantonly alienated the land with no regard for community rights.[117] Many group ranches were also divided into individual holdings by unscrupulous leaders and in response to group members who wanted to have security of tenure like that provided for private/individual landholders.[118] Attempts to bring in communities were *ad hoc* and not anchored in law.[119]

In response to concerns about non-involvement of communities in wildlife management, and considering the presence of wildlife on community land, the WCMA provided the framework for setting up community wildlife associations or conservancies in Kenya.[120] Once registered, the conservancy is mandated to prepare management plans for the conservation of wildlife; assist KWS in combating illegal activities such as poaching and bush meat trade; assist in problem animal control; and keep regional wildlife conservation authorities informed of any development changes in their area that may affect wildlife.[121]

Landowners are encouraged to donate land to the national government, county government, community or educational institutions for wildlife conservation.[122] Any person or community who owns land inhabited by wildlife may individually or collectively establish a wildlife conservancy or sanctuary in accordance with the law and the Wildlife Conservation and Management (Conservancy and Sanctuary) Regulations, 2015. A community, under this regulation, is defined as a group of individuals or families who share a common heritage or interest in an unidentifiable piece of land or natural resources. The regulations provide a procedure for the establishment and registration of conservancies; promote the development of conservancies on private and community land; and to harmonize the standards for maintaining of the conservancies.

114 Wildlife Conservation and Management Act, 2013, sec 35 (1).
115 *Ibid*, sec 38 (2).
116 *Ibid,* sec 46 (1).
117 Patricia Kameri-Mbote, *Property Rights and Biodiversity Management in Kenya* (ACT Press) (2002).
118 *Ibid.*
119 Michael L. Kipkeu, Samson W. Mwangi, James Njogu, 'Community Participation in Wildlife Conservation in Amboseli Ecosystem, Kenya' [2014], IOSR-JESTFT. 8/14, 68-75.
120 Wildlife Conservation and Management Act, 2013, Section 40.
121 *Ibid.* Section 41.
122 *Ibid.* Section 42.

KWS is tasked with the duty of registering conservancies. To register a conservancy, the community is required to submit: a concept proposal in the format provided in the Fifth Schedule in not more than 1,000 words; a benefit sharing plan; minutes of conservancy members agreeing to the establishment of the conservancy; and a receipt signifying the payment of the requisite fee. Qualifications for registration are set out in Section 10 and include indication of the following: the acreage of the land to be dedicated to conservation; concept proposal by the applicant; land tenure system; socio-economic and ecological viability of the conservancy; diversity of the wildlife resources; and contiguous land use patterns and their effect on the proposed conservancy. Upon successful registration as a conservancy, a certificate is issued to the applicant. It is important to point out that many individuals and communities had already established conservancies before the enactment of the WCMA.[123]

Wildlife conservation easements

The WCMA introduces wildlife conservation easements and under Section 65(1) provides that 'Wildlife conservation easements may be created by voluntary private arrangement or upon appropriate application to the Environment and Land Court'. It is important to note that easements are rights recognised under English Common Law.[124] For easements appurtenant, a landowner (the dominant or benefiting land) has rights over the land of another (the servient or burdened land) to enhance enjoyment of their land.[125]They ordinarily run with the land and different persons must own the two parcels of land. The Land Act makes provisions for easements appurtenant.[126]

Section 136 (1) provides that:

(a) the land for the benefit of which any easement is created is referred to as the 'dominant land' and the land of the person by whom an easement is created is referred to as 'the servient land'; and

(b) an easement is, in relation to the dominant land referred to as 'benefiting that land' and is, in relation to the servient land, referred to as 'burdening that land'.

At subsection (2),the statute establishes that easements run with the land and provides that 'an easement shall be capable of existing only during the subsistence of the land or lease out of which they were created or in any other manner provided by any other legislation'.

Wildlife conservation easements fall into the category of easements referred to as easements in gross, which require no dominant tenement and were generally not recognised under Common Law[127] The provision at Section 136 (2) above '… or in any other manner provided by any other legislation' opens up the possibility of having easements through other statutes, such as WCMA and EMCA. It, however, falls short of making explicit provisions for conservation easements that do not require the dominant and servient tenements under Section 136 (1).

123 Northern Rangelands Trust, (NRT), *The Story of the Northern Rangelands Trust,* (Ascent Ltd.) (2013). The Northern Rangelands Trust had already established about 15 community conservancies in Northern Kenya and a number of community conservancies had been established in the Narok area. Private land owners had also established conservancies in areas like Laikipia and a Kenya Wildlife Conservation Association had been set up.

124 AJ Waite, 'Easements: Positive Duties on the Servient Owner?' [1985], *Cambridge Law Journal* 44-3, 458-476.

125 *Ibid.* 459.

126 The Land Act, No.6 of 2012, Section 136(1).

127 Nyokabi Gitahi, **'**Easements and Wildlife Conservation in Kenya', in Nathalie J. Chalifour et al (eds) *Land Use Law for Sustainable Development* (Cambridge Press) (2006) 120-131.

The EMCA pioneered in providing for conservation easements in 1999. Under Sections 112-116, the statute provides for the creation of environmental easements to facilitate the conservation and enhancement of the environment, by imposing one or more obligations on land use. This is predicated on a court order. To date, no environmental easements have been granted under the EMCA. The WCMA provides a more robust framework for environmental easements than the EMCA by allowing for voluntary easements.

Section 65(4)(c) of the WCMA provides that 'a wildlife conservation order or easement may be created so as to create or maintain migration corridors and dispersal areas for wildlife'. The EMCA's Section 112(4)(k) stating that 'an environmental conservation order may be imposed on burdened land so as to create or maintain migration corridors for wildlife' also anticipated easements benefiting wildlife.

On compensation for wildlife conservation orders and easements, the WCMA provides under Section 69(2) that:

> [W]here a wildlife conservation order or easement is imposed by the court on land on which any person has, at the time of creating the order or easement, any existing right or interest in the land and that such order or easement will restrict the right or interest, there shall be paid to that person, by the applicant for the order or easement such compensation as may be determined in accordance with this section.

This provision acknowledges the limitation on the use of the land by the landowner(s) where a corridor is established. Compensation is given to the landowner in exchange for the ceded right or interest. This is reiterated in Section 69(2) of the same statute,which provides that 'any person who has a legal interest in the land which is the subject of an order or easement imposed by the court, shall be entitled to compensation commensurate with the lost value of the use of the land.'

It is worth noting that under Section 68 of the WCMA, easements are to be registered under the respective system of registration. This opens opportunities for different categories of landowners to provide migratory corridors for wildlife. It states

> Where an order or easement is created on land the title of which is registered under a particular system of land registration, the easement shall be registered in accordance with the provisions of the Act applicable to that particular system of registration.

Besides facilitating registration, the effect of this provision is to substantively retain the land use for the land not ceded for purposes of the establishment of the wildlife corridor under the substantive law under which the land is question has been registered. For example, if the land ownership is in line with the provisions of the Community Land Act (CLA), then its substantive uses under the CLA would not be altered by the establishment of the easement in the section of the land that is appurtenant to the corridor. The same would apply to the land in question whose land uses would be determined by the Land Act and registered under the Land Registration Act while being limited by the applicable national and local land use planning regulations.

Part XI deals with offences and penalties. It substantially enhances the penalties for wildlife crimes.[128]

128 *RepublicvFeisal Mohamed Ali Alias Feisal Shahbal & 5 Others* Criminal Case No. 1098 of 2014.

Institutional framework

The laws governing wildlife conservation and management establish different institutions to execute various inter-related tasks. The WMCA, for instance establishes the KWS as the competent body responsible for protection, management, and custody of the wildlife resources in the country.[129] Its functions include liaising with communities and private landowners in management and consultation as well as offering security for wildlife.[130] Notably, wildlife resources are found in forests, lakes and maritime areas. This brings in other institutions.[131] As noted earlier in this chapter, the introduction of counties as governance units in the Constitution adds another institution to the wildlife management arena as wildlife is found in counties. Some individual and community land owners have wildlife on their land or have land neighbouring protected areas hosting wildlife. This calls for cooperation mechanisms between different actors for sustainable wildlife.

D. Innovations in the post-2010 wildlife conservation law

The evolution of wildlife law from the 1990s to date is phenomenal. Indeed, many of the law and policy challenges that dogged wildlife conservation have been dealt with in the Constitution and the WCMA. The main challenges, as pointed out in this chapter,included: lack of incentives; lack of a facilitative framework for wildlife conservation on private and community lands; lack of a framework for wildlife injuries and damage to property; and absence of a land use planning policy, among others. The inclusion of community participation; devolution; and sustainable development principles have provided a context for sustainable wildlife management. The devolved system of government facilitates engagement of people in natural resource management, which was a point of discontent with the previous legal framework.

As noted earlier, the framework for community wildlife conservancies has been established. It is worth noting that the Kenya Wildlife Conservancies Association (KWCA),[132] which was established before the WCMA was enacted, has found anchorage in the provisions of the law. As noted on the website of KWCA:

> Wildlife conservancies offer hope. Today, conservancies in Kenya cover more than 6.3 million hectares, directly impact the lives of more than 700,000 people and secure the 65 per cent of the country's wildlife that is found outside national parks and reserves.[133]

With the establishment of conservancies, there is increased cooperation between landowners – public, private and community – for sustainable wildlife management. Different communities are also working together to sustainably manage wildlife. A good example is the Northern Rangelands Trust (NRT), a community-based organization that enables communities to run conservancies that permit pastoralist communities to graze on the land while allowing for wildlife

129 Wildlife Conservation and Management Act, 2013, Section 6.
130 *Ibid.* Section 7.
131 Kenya Forest Service (KFS) under the Forest Conservation and Management Act No. 34 of 2016; and the National Environment Management Authority (NEMA) under the Environment Management and Coordination (Amendment) Act, No. 5 2015.
132 Kenya Wildlife Conservancies Association <https://kwcakenya.com/> accessed 19 November 2020.
133 *Ibid.*

conservation on the same land. The growth of NRT around the Lewa Wildlife Conservancy has brought close interactions between a formerly privately held estate with now held for Kenyans in perpetuity under an innovative arrangement that allows remaining private owners with land in or contiguous to the conservancy to work together to sustainably manage wildlife. There is close cooperation on patrols and security that has ensured healthy populations of Gravy's zebra and a sanctuary for both white and black rhinos, among other species. NRT member communities integrate wildlife conservation into their pastoral land use.[134]

It is worth pointing out that Lewa[135] piloted voluntary easements for conservation based on agreements between the landowners in 2000, long before the legal framework was put in place. The Craig family established Lewa in the 1990s to dedicate land to conservation for the benefit of local communities and to protect Kenya's natural heritage.[136] The realization that public land is not sufficient for all wildlife[137] and that most of the wildlife in Kenya inhabits areas outside national protected areas[138] calls for innovative ways of managing land taking wildlife habitat needs and the needs of individual and community land owners into account. Lewa works as a model and catalyst for wildlife and habitat conservation through species protection and management as well as support of community conservation and development programmes.[139]

From initial baby steps, there is what is now referred to as the conservancy movement enlisting both community and private land-owners in wildlife areas in Kenya. This spurred the formation of KWCA referred to earlier. Dickson Kaelo, the chief executive officer of KWCA, notes that conservancies are about reconnecting people with nature and their landscapes.[140] This is a critical reversal of the colonial history that separated Kenyans from wildlife as discussed in Part II of this chapter. The facilitative legal environment and the existence of a successful easement programme in Lewa have encouraged other landowners to consider similar arrangements. For instance,landowners between Aberdare and Mount Kenya are considering easements to create a corridor for wildlife migration joining the two mountains.[141]

F. Conclusion

The 2010 Constitution has far-reaching provisions that can change natural resource management in Kenya, and wildlife conservation and management specifically. In the Preamble, both respect for the environment as national heritage, and the determination to sustain it for the benefit of future generations and the commitment to nurturing and protecting the wellbeing of the individual, the family, communities and the nation are highlighted. Sustainable development is included among the national values and principles of governance. These provisions facilitate

134 Collins Odote (2013) 'The Dawn of Uhuru? Implications of Constitutional Recognition of Communal Land Rights in Pastoral Areas of Kenya', *Nomadic Peoples*, Volume 17 Issue 1 pp. 85-105.

135 Peter Szapary, 'The Lewa Wildlife Conservancy in Kenya: A Case Study', in Herbert H. T. Prins et al (eds) *Wildlife Conservation by Sustainable Use* (Springer LLC) (2000) 36.

136 Lewa Wildlife Conservancy Strategic Plan 2018-2022.

137 R Watson, KH Fitzgerald & N Gitahi, 'Expanding Options for Habitat Conservation Outside Protected Areas in Kenya: The Use of Environmental Easements' [2010] *African Wildlife Foundation Technical Papers* 8.

138 Kenya Wildlife Service <http://www.kws.go.ke/content/overview-0> accessed 30 October 2016.

139 Lewa Wildlife Conservancy Strategic Plan 2018-2022. <https://panorama.solutions/sites/default/files/lewa_strategy_plan-small.pdf> accessed 19 November 2020.

140 Kenya Wildlife Conservancies Association <https://kwcakenya.com/> accessed 19 November 2020.

141 Michael Gross, 'Fence Protection Progress' [2009], current biology 19-12.

the move towards decolonizing conservation in Kenya. While coloniality refers to the unfolding of Western civilisation from the colonial period till modern day,[142] decoloniality is the converse and encompasses a debunking of colonial laws.[143] The Constitution, the 2020 Wildlife Policy and WCMA provide a critical anchorage for this process through recognition and protection of community land rights; provisions on conservation on all land categories; wildlife easements; public participation and providing a framework for conservancies, among others. Broadening the range of crucial actors to include communities and individuals in conservation allows for enlistment of more stewards of the country's natural heritage and will hopefully result in better stewardship over the environment and natural resources. Beyond this, the role of counties in conservation and management of wildlife in the new dispensation is critical and needs to be explored through further research. The overlaps between national parks and gazetted forests as well as the need for effective management planning and zoning are also critical issues that require canvassing for successful and effective wildlife management.

142 Walter D Mignolo et al. (eds); *The Darker Side of Western Modernity: Global Futures, Decolonial Options* (Durham: Duke UP) (2011).

143 Walter D Mignolo, 'Delinking: The Rhetoric of Modernity: The Logic of Coloniality and the Grammar of De-coloniality' [2007], 21 (2-3) *Cultural Studies* 449.

CHAPTER 20

Governance of Forest Resources

Andrew Muma and Thuita Thenya

A. Introduction

As forest cover continues to decline globally, and deforestation still being a big challenge in Kenya, it is important to assess the governance structure both before and after the Constitution of Kenya, 2010, to gauge whether or not there are meaningful forest conservation and sustainable management practices. It is expected that with the Constitution in place, significant governance structure changes will lead to meaningful, sustainable forest management, which is what this chapter seeks to unravel.

Article 42 of the Constitution provides for the right to a clean and healthy environment. This has to be read together with Article 69, which sets out State obligations towards the environment, particularly Article 69(1)(b), which mandates the State to work towards establishing and maintaining a tree cover of at least 10 per cent of the land area in Kenya. Additionally, the Preamble to the Constitution indicates that Kenyans are 'Respectful of the environment which is our heritage and determined to sustain it for the benefit of future generations'; and Article 10 puts a premium on'public participation, good governance and sustainable development as national values and principles of governance that bind all State organs and State officers whenever interpreting the Constitution or enacting any law or making public policy decisions'. Forest governance must be undertaken in a sustainable manner, taking into account obligations like public participation, good governance, sustainable use of natural resources, equitable benefit sharing, protection of intellectual property and indigenous knowledge, and the protection of genetic resources and biodiversity.

Change in Kenya's forest governance has, however, remained slow and painful, coming from a highly command and control colonial style to participatory and community-based forestry. This chapter traces the history of Kenyan forest governance, laying out the governance styles that have been adopted to date, and concludes by providing a few insights into how the governance system ought to change in line with the Constitution. It will trace the evolution of forest law and governance in Kenya, highlighting salient features, key challenges and strategies adopted over the years, while pointing out the successes and failures in law, policy and practice that have shaped forest law with a focus on the shifts, expectations, promises and the realities. It ends by projecting what the future holds for forestry if the constitutional norms of sustainable forest management are entrenched.

B. Pre-colonial and colonial forest protection practices and governance

The history of forest management in Kenya predates the declaration of the country as a British protectorate in 1895. As early as 1880, missionary couple Rachel and Stuart Watt traversed the country journeying through 'interminable forest' in which they and their porters had to stoop through giant creepers and intertwining branches, which droop over the narrow and darkened

and tortuous tracks,[1] eager to satisfy their readers desires for tales of the impenetrable dark continent.[2] Forest management has since moved through a series of stages: the pre-colonial stage comprising traditional rules and rights, informal administrative and colonial explorative forestry (before 1890); the colonial stage comprising the initiation of formal administrative rule-gazettement and exploitative forestry (1891-1932) and ecological forestry (1932-1957)[3]; the post-colonial stage comprising social forestry (1957-1988) and now social-economic forestry. Each series reflects social, economic, and political realities of the time, with exploitative forestry cutting across all the stages. The objective of forest demarcation in the colonial period was to protect forests from destructive indigenous land-use practices, to prevent European settlers from obtaining private ownership, and to generate revenue for the forest department through the sale of timber and forest products. In the post-colonial period, the objectives were catchment protection, industrial forestry development, livelihood support and protection from encroachment by local communities.[4] Strong command and control laws dominated this period, but changes started occurring in the late 1990s, eventually culminating in greater stakeholder engagement.

Prior to 1895, the use of forest and other resources was controlled through a system of traditional rules and rights for most communities. A council of elders enforced these rules through sanctions and fines and ensured sustainable use of communal tree and forest resources.[5] A well-organised, well-defined forest management system was in place among indigenous communities, which system comprised scattered core areas, also known as sacred groves protected by religious sanctions, from which human interference was excluded.[6] Sacred groves represented an excluded forest area in which traditional ceremonies including sacrifices for bountiful harvests, rain, thanksgiving and rites of passage events were held.[7] Beyond the fragmented sacred groves, large forests were utilised under specific rules. Around Mt Kenya forest, for example, the Kikuyu and Embu (both agricultural communities) had evolved a system of land management in which forest land was owned by clans but only up to a maximum of two miles into the forest land above this cultivation line belonged to the community and its use was subject to consultation and consensus.

With the advent of colonialism, contradictory accounts of destructive indigenous practices like shifting cultivation and grazing practices of pastoral communities were advanced. This information was exaggerated by British forest 'experts', and it provided fodder for the expansion of the colonial bureaucratic forest department.[8] This, coupled with increasing population,

1 Rachel Watt & Stuart Watt, *In the Hearth of Savagedom, Reminiscences of Life and Adventure during a Quarter of a Century of Missionary Labours in East Equatorial Africa* (London Marshall Brothers Ltd) (1913) 30, 33.

2 Ben Paul Fanstone, 'The Pursuit of the Good Forest in Kenya c.1890-1963: History of the Contested Development of State Forestry within A Colonial Settler State' (PhD Thesis, University of Sterling) (2016).

3 Moses Imo et al, 'Professional and Societal Mismatch in Kenyan Forestry: Is there A Right Way to Manage Our Forests?', in DO Ogweno et al (eds.,) *Forest Landscape and Kenya's Vision 2030.* Proceedings of the 3rd Annual Forestry Society of Kenya (FSK) Conference and Annual General Meeting held at Sunset Hotel, Kisumu (October 2008).

4 Hewson Kabugi, 'Participatory Forest Management under Changing Policy and Legal Frameworks' in W Ayiemba, et al (eds.,) *Proceedings of the 2nd National PFM Conference: Enhancing Participatory Forest Management under the Devolved Governance Structure*, (KEFRI) (July 2014).

5 Q Luke and Robertson, 1993: 'Kenya Coastal Forests: Report of the NMK and WWF Coastal Forest Survey Project' (unpublished).

6 *Ibid.*

7 AP Castro, 'Southern Mount Kenya and Colonial Forest Conflicts', in JF Richards & RP Tucker, (eds.) *World Deforestation in the 20th Century* (Duke University Press) (1988). 8 *Ibid*.

8 TP Ofcansky, 'Kenya Forestry under British Colonial Administration, 1895-1963' [1984] *Journal of Forest History.*

resettlement patterns associated with urbanisation, shifting to western cultural practices, the formation of a formal political hierarchy by the colonial government, religious conversion to Christianity, mass education, and land privatisation gradually eroded traditional authority and diminished the status of sacred groves and traditional management systems.[9] This marked the beginning of the end for traditional authority and strategies in the management of forests.

It is at this point that forest boundaries were created, and the people who had inhabited the land were pushed out.[10] The creation of forest reserves in Kenya is a replica of the 'closing off the commons' in the 17th to 18th Century in Britain.[11] During this closing off time, wealthy merchants and aristocrats began a systematic campaign to privatise the commons and kick the peasants off their land, which lands were turned into sheep runs for the highly profitable wool industry.[12] This became known as the enclosure movement,[13] and is regarded as the birth of capitalism as we know it today.[14] Through imperialism, the enclosure movement found its way to other regions. In Kenya, for example, land was alienated to the settlers to ensure its productive and civilised use.[15] This came at a price to the local communities, as many of them were rendered landless or crammed up in reserves where productivity was declined at an alarming rate. The enclosure movement, as expected, came along with survey lines, fences and legal rules fostering access and transferability.[16]

Once colonial rule came into effect, Governors were given sweeping powers over resource management. Proclamation of the forest reserve and the removal of forest status, (now degazettement), were all a prerogative of the Governor. The Governor would also make rules of general application, or applying to particular forest areas prohibiting felling, cutting, grazing, burning, cultivation, regulating the use of pasture and forest produce. However, there were no rights in the forests on crown lands.[17] Boundaries were marked using beacons connected by a cleared line, which served as a fire trace path and a line of eucalyptus trees, which were the visual markers of a no-go zone.[18]

When the British arrived in Kenya, they embarked on an ambitious railway project from Mombasa to Uganda. From a forestry point of view, this meant a need for a large supply of timber for the wood-fired locomotives, leading to the first forest reserve and the first eucalyptus plantation.[19] As such, the salient features of the first legislations were not to conserve forests but to ensure a continuous supply of wood fuel.

9 AP Castro, 'The Southern Mount Kenya Forest since Independence: A Social Analysis to Resource Competition' [1991], *World Development*, Vol 19, No. 12.

10 Kendi Borona, *Reclaiming Indigenous Knowledge Systems: Towards Sustainable People-Forest Relationships in Kenya* (Cambridge Scholars Publishing) (2019).

11 CJ Reid Jnr, 'The Seventeenth Century Revolution in the English Land Law' [1995], 43 *Cleveland State Law Review*221.

12 T More; *IV Utopia The complete works of St Thomas More* (Yale University Press) (1965) 65-71. CJ Reid Jnr, 'The Seventeenth Century Revolution in the English Land Law' [1995], 43 Cleveland State Law Review 254.

13 *Supra* (n 14) 243.

14 Martin Kirk, Hickel Jason & Joe Brewer, 'Using Design Thinking to Eradicate Poverty Creation' [2015], *Stanford Social Innovation Review*9.

15 Caroline Elkins; *Imperial Reckoning: The Untold Story of Britain's Gulag in* Kenya (Holt Paperbacks) (2005)

16 Allan Greer, 'Commons and Enclosure in the Colonization of North America' [2012] *The American Historical Review*117, no 2, 365-86.

17 RS Troup, *Colonial Forests Administration* (Oxford University Press) (1940) 16 <http//www.cabdirect.org/cabdirect/abstract/19400625701> accessed 21 November 2019.

18 JP Logie and WG Dyson, 'Forestry in Kenya: A Historical Account of the Development of Forest Management in the Colony' [1962] Nairobi, Kenya Government Printers, 26.

19 Kenya Forest Service, *Participatory Forest Management Guidelines* (2008).

The first forest legislation was enacted in 1891, and it dealt with the protection of mangrove swamps in Vanga Bay before being extended to protect mangroves throughout the Coast region by 1900.[20] In 1897, the Ukamba Woods and Forest Regulations were published, and later amended in 1900 and 1901.[21] These regulations reserved trees within five miles of the courthouse in Nairobi and within two miles of the railway line, except on private land.[22] The later revisions of the regulations placed forests within one mile of the railway line under the direct control of the railway administration, other strips being controlled by the District Officer.[23] This was followed by the creation of a Forest Department and enactment of the East Africa Forestry Regulations in 1902. The department, in an attempt to legitimise and justify its existence, made a deliberate effort to consolidate, control and concentrate forests resources to itself by restricting entry, defining offences, imposing fines and penalties, and defining administrative structures for enforcement through the Forest Ordinances of 1911, 1915, 1916, and 1941, which kept expanding the provisions of the earlier laws.[24]

Kenya's first comprehensive forest legislation was the Forests Act, Chapter 385 of the Laws of Kenya of 1942 (revised in 1982 and 1992).[25] This legislation was enacted to provide for establishment, control and regulation of central forests. It provided for the creation of nature reserves within forests, consolidated the terms of service for forest guards, and established a Forest Advisory Committee with the mandate of formulating forest policy in the Colony.[26] Amendments to the law in 1949 and 1954 aligned forest administration to the political and constitutional changes within the colony by transferring responsibility from the Governor to the Cabinet Minister.[28] In addition, the law narrowly defined the offence of illegal entry into forests and provided for closure of forest rule restricting public access during seasons of high fires.[27]

In June 1963, Kenya attained internal self-governance as a dominion of the United Kingdom, headed by an African Prime Minister, but the Queen remained Head of State and was represented by a Governor. Forest law changed in 1964 when the country became fully independent with a President as Head of State and Government. The 1942 Forests Ordinance was then adopted as the Forests Act, Chapter 385 of the Laws of Kenya. The next section describes the evolution of forest governance in Kenya from independence to date.

C. The law and practice of forest governance after independence

The Forests Act provided for the establishment, control and regulation of central forests and forest areas in Nairobi and on un-alienated Government land by the Forest Department (FD). It provided for the declaration of unalienated government land as forest; alteration of forest

20 *Supra* (n 13).

21 P Wass (eds.), *Kenya's Indigenous Forests Status, Management and Conservation* (IUCN Forest Conservation Programme Gland, Switzerland and Cambridge, UK) xii-205 <*portals.iucn.org/library/sites/library/files/documents/FR-014.pdf*> accessed 21 November 2020.

22 *Ibid* Appendix 1 History of Kenya's Forest and Wildlife.

23 KFS, PFM, (2008), 4.

24 Forest Ordinances of 1911, 1915,1916 and 1941 (Government printer, Nairobi Kenya).

25 Forest Act, Chapter 385 of the Laws of Kenya of 1942 (Revised in 1982 and 1992) (repealed) (Government printer, Nairobi Kenya).

26 *Ibid.* 28 *Ibid.*

27 LO Wilson, 'Implementing Sustainable Environmental Management in Developing Countries: A Case Study of Community Participation in Forest Management in Kenya' (Master of Arts in International Studies Research Project, University of Nairobi) (2014).

boundaries; and the de-gazettement of forest areas by the minister, provided that a 28-day notice was given in the Kenya Gazette.[28] The forest law mandated the minister to create natural reserves for nature preservation and prohibit any form of consumptive use of the forest resources within the reserves. Section 7 authorised the Director of Forests to issue licences and permits, and to prescribe and collect royalties or fees from permitted users. Section 8 listed prohibited activities including unlicensed harvesting of forest produce, cattle grazing, cultivation and honey collection, with Section 10 allowing the Director of Forests to accept compensation for offences valued at not more than five times the damage. Sections 9-14 provided for enforcement while Section 15 empowered the minister to develop regulations for the sale and disposal of forest produce and use of forests for agriculture, cultivation, commercial and industrial activities and cattle grazing.

The legacy from the colonial period remained in the Forests Act, whose purpose was preservation, protection, centralisation and control of forestry. The 'command and control' approach adopted echoed that of colonial forestry objectives in Kenya. The law predated the 1968 Forest Policy and was not framed to meet the objectives of the policy. It is, therefore, important to note that no significant legislative changes in forests law occurred until 1982 when the 1968 policy was brought into operation. So, for over 40 years being the period since 1942 colonial forest policies firmly took root in independent Kenya.

The collapse of forest governance in Kenya

At independence in 1963, the forest legislation was only minimally amended to address rules made by the ministers in charge of forests as provided for in Section 15. These piecemeal changes did not accommodate new and emerging national and global forest-related challenges, such as community use rights. Rules and subsidiary legislation made under the provisions of the Forest Act, 1942, permitted local communities to use forest resources without licences or payment of fees by virtue of customary rights and practice.[29]In the 1957 policy, restated in 1968, communities or private group right holders were explicitly denied rights to gazetted forests resource ownership and management stating that:

> In principle the government view is that private rights in Forest Estates tends to endanger the objects for which the government manages the Estates and such rights are, therefore, objectionable.The government policy is, therefore, firstly to define and limit any existing rights; secondly, to negotiate or adjust on a reasonable basis the final eradication of those rights; and thirdly, to allow no new rights to arise.[30]

This was in stark contrast to the new wave of community forestry that was already beginning to take root.[31] In a bid to address water conservation and biodiversity needs, the conversion of indigenous forests to plantations was stopped in the 1970s.[32] From 1987 to 1988, the

28 *Supra* (n 28) Section 4.

29 F Kigeny, P Gondo, J Mugabe; *Practice Before Policy: An Analysis of Policy and Institutional Changes Enabling Community Involvement in Forests Management in Eastern and Southern Africa* (IUCN Forest and Social Perspectives in Conservation) (2002) No. 10 xii-54.

30 Sessional Paper No. 1 of 1968.

31 Don Gilmour; *Forty Years of Community-based Forestry: A Review of Its Extent and Effectiveness* (FAO) (2016).

32 E Mugo, C Nyandiga and M Gachanja (eds); *Development of Forestry in Kenya (1900-2007). Challenges and Lessons Learnt* (Kenya Forests working group, Nairobi, Kenya).

management of plantation establishment under the shamba (farm) system was altered and all forest villages destroyed, resulting in major landlessness and poverty.[33] The collapse of the shamba system resulted from politicians' infiltration through patronage. This led to poor or total lack of care for tree seedlings. Farmers ensured that seedlings do not survive by failing to plant, or cutting the roots of the planted ones, and thus prolonged stay in one area. The role of plot allocation in the plantation was also taken over by the provincial administration, rendering the professional forester less effective in supervision and management.

As a result of eviction, forest management was highly compromised, especially plantation establishment, due to shortage of labour after forest dwellers were evicted.

This system was re-introduced later as non-residential cultivation (NRC), in 1994, which invited the involvement of then provincial administrators and politicians, further complicating forest management. Other changes that affected forest management include the presidential directives that were used to regulate forest activities, for example, extraction of timber was banned through a presidential directive in 1999. Enforcement within the State forests and forest reserves was the responsibility of the minister under the Forest Act. Outside the protected forests, enforcement was by diverse agents through the Chief's Act, Trust Lands Act, the Local Government Act, Government Land Act, and Antiquities and Monuments Act. This directive, which did not have legislative basis, was again re-introduced in February 2018 by the Minister of Environment and Forestry now as the moratorium on logging activities in public and private forests.

These interferences in forest management by State mechanisms, such as provincial administration involvement in plantation location, continued to disfranchise the community as forest resources management remained under government control at the exclusion of other stakeholders. With broken down traditional regulatory practices and a reduced sense of responsibility and ownership at community level coupled with diminished access to forestland and its products, the communities became indifferent towards government initiated conservation efforts. There was also deforestation by the government through forest allocation for settlement in forests such as the Mau complex ecosystem, illegal sawmilling, private enterprises grabbing forests like Karura and Ngong forests, local communities farming in forests and illegal logging.

Civil society actions to protect forests

By mid-1990s, Kenyans started agitating for change, mainly driven by increased forest destruction, minimal stakeholder involvement, politically linked degazettement and allocation, resulting in the formation of advocacy groups like Kenya Forests Working group (KFWG) in

1994. The KFWG comprised a group of Kenyans seeking to change forest management in Kenya. It attracted academics, activists, civil society organisations like the Green Belt Movement (GBM), Forest Action Network (FAN), Nature Kenya, among others. By late 1990s, several communitybased groups emerged around the country to counter forest destruction, challenge status quo and protect forests including Arabuko Sokoke; Kereita in the Aberdare ecosystem; Upper Imenti and Kabaru in the Mount Kenya ecosystem; and Ngangao and Kitobo in Taita.[34]

33 T Thenya, BOB Wandago, ET Nahama and M Gachanja; *Participatory Forest Management Experiences in Kenya (1996-2007)*

34 T Thenya, Wandago and ET Nahama, *Participatory Forest Management Experience in Kenya (1996-2006)* (Kenya Forest Working Group) (2016).

The resistance to the allocation of Karura forest to politically connected entities led by Nobel Laureate the late Professor Wangari Maathai of GBM in 1998 is a good case of citizen's advocacy and demand for involvement and change. KFWG and GBM represent environmental movements that arose to resist forest environmental degradation in the country. This citizens' response was captured in Sessional Paper No. 6 of 1999 on Environment and Development, which identified some environmental challenges like minimal participation by communities in the management of forest resources.[35] The agitation for reforms in the forest sector eventually resulted in the enactment of the Forests Act 2005. Draft Forest Policies were developed in 2005,[36] and in 2014 but were never adopted, leaving the 1968 policy as the operative one.[37]

D. Forest governance under the Forest Act, 2005

The 2005 Act was seen as a solution to the many challenges that the sector had experienced for decades. It was perceived as the catalyst for the change in forestry management that existing legal policies and frameworks had failed to support, such as the involvement of communities in sustainable forest management. In order to address the challenges experienced in forest governance, a number of key changes were introduced:

Forest Department becomes the semi-autonomous forest service

The Kenya Forest Service (KFS) a body corporate with perpetual succession, capable of suing and being sued, acquiring and holding property, charging and performing all such things or acts for the proper discharge of its functions under the Act was established under Section 4 of the 2005 Forest Act.[38] This change was actualised in February 2007. The functions of KFS were detailed in Section 5 of the Act to include: the formulation of policy and guidelines regarding the management; conservation and utilisation of all types of forest areas in the country;[39]management of all state forests;[40] management of all provisional forests;[55] promoting forestry education and training;[41] research;[57] drawing management plans;[42] providing forest extension services;[43] collecting revenue due to government;[44] collaborating with communities in biodiversity utilisation and management and conservation of forests;[45] and empowerment of communities controlling forests;[46] managing water catchment areas;[47] tourism;[48] promoting the national interest in relation to international forest-related conventions;[49]regulating logging and charcoal making activities;[50] enforcement of the provisions of the Act;[51] and training

35 E Mugo, C Nyandiga and M Gachanja; *Development of Forestry in Kenya (1900-2007) Challenges and Lessons Learnt* (Kenya Forest Working Group) (2010).
36 Draft Sessional Paper No. 9 of 2005 on Forest Policy, Government Printer, Nairobi.
37 Sessional Paper No. 1 of 1968, Government Printer, Nairobi.
38 Forest Act, 2005 (repealed), Section 4(2)(a)(b) and (c).
39 *Ibid* Section 5(a).
40 *Ibid* Section 5(b). 55 *Ibid* Section 5(c).
41 *Ibid* Section 5(e). 57 *Ibid* Section 5(f).
42 *Ibid* Section 5(g).
43 *Ibid* Section 5(h).
44 *Ibid* Section 5(j).
45 *Ibid* Section 5(l).
46 *Ibid* Section 5(c).
47 *Ibid* Section 5(n).
48 *Ibid* Section 5(k).
49 *Ibid* Section 5(o).
50 *Ibid* Section 5(i).
51 *Ibid* Section 5(m).

of prosecutors in consultation with the Attorney General.[52] The role of KFS covered most aspects of the Forest Department's tasks but also included autonomy to enable it to engage communities in forest conservation and management. This was expected to remove the stigma of a government department that had for many years engaged in the command and control style of forest governance and excluded communities.

Legal framework for community participation in the management of state forests

Of key importance in this law was the introduction of community participation and empowerment of community associations in the management of state forests. Section 46 provided that a member of the forest community 'may together with other members or persons resident in the same area, register a Community Forest Association (CFA) under the Societies Act Chapter 108'.

CFAs could apply to the Director of KFS for permission to participate in the conservation and management of state forests or local authority forest. The application was to be accompanied by a list of members, a constitution, financial regulations, designation of the area of interest and a proposal for forest resource use and methods of conservation of flora and fauna.[53] A draft management plan was also required.[54] The functions of the CFA were set out in Section 47 of the Act to include conservation and management of forests according to the management agreement entered with KFS. Protection of sacred groves, controlling illegal harvesting of forest produce, updating KFS on developments, helping fight fires and formulating forest programs consistent with traditional forest user rights. In return members of CFAs were allowed to collect medicinal herbs, honey, timber or fuelwood, grass harvesting and grazing, community-based industries, ecotourism, scientific and educational activities, establish plantations and carry out silvi-cultural operations.[55] The service could terminate the management agreement by giving a 30-day notice, which decision could be appealed to the KFS board[72], presenting a clear case of conflict.

As KFS was taking shape and beginning to actualise its mandate under the 2005 Act, Kenya passed a new constitution in 2010, which brought with it new norms for sustainable environment and forest management. Going forward the ideals of the Constitution had to be realised through policy and legislation and to do so the Forest Act was replaced by the Forest Conservation and Management Act, 2016, which sought to implement the new constitutional norms including but not limited to sustainable management,[56] right to a clean and healthy environment[57] and state obligations towards the environment.[58]

E. Forestry law and policy to implement constitutional provisions

Article 72 of the Constitution mandated Parliament to enact legislation to give full effect to the provisions stated above. To this end, it is important to set out the constitutional provisions and establish how they are reflected in legislation, policies and programmes namely, the 2016 Forest Conservation and Management Act, Draft National Policy 2007, 2014 and 2020, and the 2016 National Forest Programme.

52 *Ibid* Section 5(q).
53 *Ibid* Section 46(3).
54 *Ibid* Section 46(4).
55 *Ibid* Section 48 (2), 72 *Ibid* Section 49,
56 The Constitution of Kenya, 2010, Article 10.
57 *Ibid* Article 42.
58 *Ibid* Article 69.

Constitutional provisions

The promulgation of a new Constitution in 2010 introduced devolution of government, which affected changes to forests management.[59] Article 10 of the Constitution sets out national values and principles of governance applicable whenever the Constitution or any Kenyan law or policy is enacted, interpreted or implemented. These principles include sustainable development, devolution of power and public participation. These values are mandatory on state organs, state officers, public officers and all persons when reading and interpreting forest laws and policies. The Constitution sets up a devolved governance structure with a new framework for operations, which defines transition to a two-tier government comprised of the national government and 47 county governments. The fourth schedule to the Constitution outlines the functions of each level of government and stipulates that functions of counties include the implementation of specific national government policies on natural resources and environmental conservation. Forest conservation is relevant in this regard.

The aim of conservation is defined to cover the interests of both the present generation and the generations to come.[60] This ought to be read together with Article 40, which sets out the right of every person to own property of any kind including land, in any part of Kenya. This is important with respect to forests, which fall on private and community land. In addition, forests are classified as public, private and community, depending on the category of land they are found on.

Article 42 of the Constitution provides the human right for every person to a clean and healthy environment, which includes the right to have the environment protected for the future generations by mitigating the impacts of climate change. Implementation of this rights is guided by state obligations specified in article 69 of the Constitution, that include the obligation to achieve and maintain a tree cover of at least 10 per cent of the land area in Kenya; encourage public participation in the management and conservation of the environment; establish systems of environmental impact assessment, environmental audit and monitoring of the environment; and eliminate processes and activities that are likely to endanger the environment.

In order to implement these constitutional obligations, Kenya enacted a new Forest Law, the Forest Conservation and Management Act 2016 (FCMA), which repealed the 2005 Forests Act. The objective of the FCMA is to implement article 69 of the Constitution and to provide for the development and sustainable management, including conservation and rational utilisation of all forest resources for the socio-economic development of the country.[61]

Draft Forest Policy, 2007

The Sessional paper No. 1 of 2007[62] was made to address local and global forestry issues and challenges to ensure a fair contribution of the forestry sector in economic development. It addressed indigenous forest management, farm forestry, forest health and protection, private sector involvement and participatory forest management. It noted that the last authoritative

59 *Supra* (n 35).

60 C Fimbel, B Curran & L Usongo, 'Enhancing the Sustainability of Duiker Hunting through Community Participation and Controlled Access in the Lobéké Region of Southeastern Cameroon' in H Yasuoka *African Study Monographs* 33 (November 2005).

61 Forest Conservation and Management Act, No. 34 of 2016.

62 Sessional Paper No 1 of 2007 on Forest Policy <www.iscrc.ilegkenya.org/docuemnts/Forest_policy.pdf> accessed on 25 November 2019.

statement on Kenya's forest policy was contained in sessional paper no 1 of 1968 and since then the country had not only increased in population significantly but had also witnessed a major decrease in forest cover leading to reduced water catchment, biodiversity and wildlife coupled with conflicts between forest managers and forest-adjacent communities. It was, therefore, necessary to prepare a new policy to guide the development of the forest sector and taking into cognisance other related policies on land use, tenure, agriculture, energy, environment, mining, wildlife and water it further takes into account international concerns and national will. Policy statements covered many issues including: sustainable forest management (SFM); farm forestry; forest plantations; dryland forestry; local authority forests; private forests; roadside tree planting. It also covered forest products and industries on timber and wood products; wood fuel; non-wood produce; forest industries; forest and wealth creation; trade-in forest products; legal and institutional arrangements; funding for forestry development; linkages with other sectors; research and education; forest user rights; international obligations; gender and youth; non-state actors; and HIV/Aids.

Draft Forest Policy, 2014

The Constitution necessitated the revision of the 2007 draft policy to align it with the constitutional provisions. The revision came in the 2015 draft Forest Policy, which was the same in structure but with a few additions including the realisation of stakeholder participation, and benefit-sharing, mainstreaming of climate change, encouragement of community and private sector partnership, quest to achieve 10% forest cover of the land area in Kenya and sustainable resource use. The draft policy clearly set out guiding principles including public good, ecosystem approach, SFM, good governance, public participation, polluter pays, commercialisation, research and education, livelihood enhancement, international and regional cooperation, indigenous knowledge and intellectual property. The 2016 Forest Conservation and Management Act was enacted without this policy seeing the light of day.

Draft Forest Policy, 2020

With the release on the Report on Forest Resources Management and Logging Activities in Kenya, April 2018 and its far-reaching recommendations including drastic institutional and legislative changes, the need arose to formulate a new policy to restructure forest governance and management arrangements for the efficient running of the forest sector. This new policy incorporates key pillars towards sustainable forest management including mainstreaming of forestry in land-use systems; integration of climate change mitigation in forest management; incorporating into the GDP green accounting through the valuation of ecosystem services, Division of responsibilities between public sector institutions, restructure the role of KFS, Create linkages between National Lands Commission, KFS and County Government, clarity in role of County Government in implementing national policies and county forest programs; devolution of community forest conservation and management; preparation of national strategy for 10% tree cover of the land area in Kenya; commercialisation of forest activities through private sector involvement; introduction of chain of custody system for timber and wood products and certification; adoption of ecosystem approach in the management of forests and establishment of national programmes to support community forest management afforestation on community and private land.

After the two draft policies (2007 and 2015) were not adopted, a National Forest Programme 2016 – 2030 was developed.[63] The NFP is an internationally recognised strategic framework for forest policy, planning and implementation to coordinate the sector's development. It is designed to sustain and restore the resilience of forests in the advent of climate change-related stresses like fires, drought, insects and diseases while retaining sustainable forests management norms.[64]

The NFP development process was a participatory, inter-sectoral and interactive engagement.

The NFP is intended to be a platform for integrating constitutional values and aspirations of Kenyans as captured in Vision 2030 as well as embrace devolution in forestry. It captured four key areas:

i. Background, which includes an introduction; forests in economic development; national policies and legal framework and Kenyan forests.

ii. A nexus between people, trees and forests and the key challenges and opportunities they present.

iii. NFP Strategic framework and thematic clusters and programs (forest productivity cluster, governance cluster, natural forest conservation and management cluster, water cluster, energy cluster, education and research cluster, forest and climate change cluster and forest financing cluster); and

iv. Implementation and monitoring.

This NFP was developed parallel to the 2016 Forest Conservation and Management Act and only partially influenced the drafting of the statute. It can inform future policy and legislation.

Forest Conservation and Management Act, 2016

This law was enacted to give effect to Article 69 of the Constitution specifically to provide for the development and sustainable management, conservation and rational use of all forests resources for socio-economic development of the country.[65] At Section 4 it provides key principles, which include good governance, public participation, community involvement, consultation and cooperation between national government and county governments, values and principles of public service as per articles 232 of the Constitution, protection of indigenous knowledge and intellectual property of forest resources and international best practices in sustainable forest management. Section 5 provides for the development of a national forest policy and a review of the same every five years; section 6 requires the Cabinet Secretary responsible for forestry to formulate a forest strategy which provides government plans and programs for protection, conservation and management of forest resources within one year from the enactment of the Act and every five years thereafter. Both these sections are yet to be complied with.

63 National Forest Programme 2016-2030 <http://apps.rcmrd.org/ofesa/kenya/National_Forest_Programme_2016_to_2030.pdf> accessed 25 November 2019.

64 National Forest Programme 2016-2030 <http://apps.rcmrd.org/ofesa/kenya/National_Forest_Programme_2016_to_2030.pdf> last accessed 25 November 2019.

65 Forest Conservation and Management Act, No. 34 of 2016, Preamble.

Section 30 of the FCMA classifies forests into three: public, community and private forests. Public forests are defined under Article 62(1) (g) of the Constitution as government forests other than forests to which Article 63(2)(d)(i) applies (namely lawfully held, managed or used by specific communities as community forests, grazing areas or shrines). In addition, public forestland also exists within the high and low water marks.[66] Forests under Article 63(2)(d)(i) are yet to be identified, and communities continue to lay claim on various forests. The Endorois,[67] Ogiek,[68] and Sengwer are examples of communities who claim forestland.[69] No formal registration has occurred in line with the Community Land Act.[70] Community forests include land registered in the name of a group representative, forests lawfully transferred to a specific community, forests on land declared community land by Parliament, community forests as per Article 63(2)(d)(i) held, forests lawfully held as trust land by the county government.[71] Private forests include forests on freehold; leasehold tenure land and any other land declared as private land under an Act of Parliament.[89]

Institutional arrangements

Like the Forests Act, 2005, the 2016 Forests Conservation and Management Act retains the KFS at Section 7. The functions of KFS remain the same as in the old law, with a few additional ones like assistance to county governments to build capacity in forestry and forest management, preparation of forest status reports every two years, recommend to the Cabinet Secretary for forestry on the establishment of forests and alteration of forest boundaries; establish forest conservancy areas; approve the provision of credit facilities for community-based industries; and update the database of all forests in Kenya.

The law also established the Kenya Forestry College to provide training courses in forest conservation and formulate training programmes.[72] It provides that the Kenya Forest Research Institute (KEFRI) as established under the Science and Technology Act, 2013, shall be the agency in forestry research and development.[73] The law mandates the KFS board, at Section 20, to establish forest conservation areas for proper and efficient management of forests. It also established a Forests Conservation Committee, to make recommendations to the board and county governments on conservation and utilisation of forests and identify areas to be set aside for the creation of public forests.[74] The membership of the committee is provided for and includes a chairperson, three appointees of the Board from CFAs, the County Executive Committee Member responsible for forestry, forest officer in charge and civil society organisation operating in the area. [75] This provision has not yet been operationalised.

66 The Constitution of Kenya, Article 62(1)(l), and the Forest Conservation and Management Act, No. 34 of 2016 Section 30(2).
67 *Centre for Minority Rights Development and AnothervThe Republic of Kenya*, Communication 276/2003, <http://www.minorityrights.org> accessed 27 November 2019.
68 *African Commission on Human and Peoples RightsvRepublic of Kenya,* Application No. 006/2012 Ruling <http:/en.african-court.org> accessed on 27 November 2019.
69 Ministry for Forestry and Wildlife and Ministry of Agriculture, *Embobut Forest Taskforce Report* (2009).
70 Community Lands Act, No. 27 of 2016.
71 Forest Conservation and Management Act, No. 34 of 2016 Section 30(3). 89 *Ibid* Section 30(4).
72 *Ibid* Section 17.
73 *Ibid* Section 22.
74 *Ibid* Section 20(3).
75 *Ibid* Section 20(4).

Section 21 requires each county to implement national policies on forest management and conservation and to manage all forests on public land defined under Article 62(2) of the Constitution. This is in line with the provisions of the Fourth Schedule part 1 (22) part 2(10) read together with Articles 174, 183, 185(2) 186(1) and 187(2) of the Constitution which in a nutshell require counties to implement National Government policies on forestry. The Act also establishes the Forest Conservation and Management Fund under Section 27, which has also not been operationalised though it was also in the 2005 Forests Act.

Management planning

Management plans are provided for at Section 47 of the FCMA. Every forest, nature reserve and provisional forest is required to be managed in accordance with a management plan that complies with the requirements prescribed by the CS in Regulations. KFS is tasked with ensuring preparation of the plans with respect to pubic forests, nature reserves and provisional forests. County Governments are responsible for the preparation of management plans for forests in the county, and a community that owns a forest may prepare a management plan for the community forest or request the relevant County Government to assist. All plans are to be prepared in consultation with the Forest Conservation Committees, and the Chief Conservator of Forests (CCF) who heads KFS shall, together with the relevant County Government or community or private entity supervise the implementation of the forest management plans depending on the type of forest concerned.

Community participation

Community participation is central to strategic forest management in the FCMA, which is a shift from colonial command and control forest management style. SFM is grounded in Articles 10, 42 and 69 of the Constitution of Kenya, which advocate good governance, public participation, inclusiveness, sustainable development, right to a clean and healthy environment. In addition, the Fourth Schedule devolves the implementation of forest policies to county governments, and some of the objects of devolution in the Constitution under Article 174 is self-governance; to enhance the participation of the people in making decisions affecting them;[76] recognition of the right of communities to manage their own affairs and further their development[77] and equitable sharing of national resources.[78]

FMCA has recognised these principles in Section 4 (b) and (c) and further at Section 48 it provides that a member of a forest community with others can register a CFA in accordance with the provisions of the Societies Act[79]. A CFA may then apply to KFS for registration and participation in the conservation and management of a public forest. The same requirements as those required under the 2005 Forests Act have been listed in section 46. Section 49 of the FMCA sets out obligations of a CFA, which are to protect, conserve and manage forests, implement sustainable forest programmes, protect sacred groves and trees and assist KFS in the enforcement of the Act and help in fighting fires. In return, CFA members have user rights such as the collection of

76 The Constitution of Kenya, 2010 Article 174 c.
77 *Ibid* Article 174 (d).
78 *Ibid* Article 174 (g).
79 Societies Act, No. 4 of 1968.

medicinal herbs, honey, firewood, timber, grass harvesting, grazing, ecotourism, education and science, plantation establishment and establishment of forest-based industries.[80]

Community Forest Associations can, with the approval of the Chief Conservator of Forests, assign their rights under section 50 of the FMCA. The CCF may terminate the management agreement by giving a 30-day notice. The decision to terminate a management agreement can be appealed to the Board within 30 days of notification. Over the years from the Forests Act 2005 to the FCMA, what was a welcomed involvement of the community in forest participation and was enthusiastically anticipated turned into a grim shadow with communities feeling shortchanged and asking for more in terms of benefit sharing. It is important at this point to highlight and assess various challenges that have impacted on aspects of forest governance highlighted above if SFM is to be achieved going forward.

F. Challenges facing forestry governance in Kenya

Several challenges face forest management in Kenya, with the greatest challenge being the establishment of the CFAs. Even though CFAs were the most ground-shifting introduction made under both the 2005 Forests Act (repealed) and the FCMA over the years, it has indeed turned out to be the most controversy-riddled forest governance style. Though it has succeeded in certain areas, as we shall see below, it has failed to gather the momentum and trust of the communities as was expected. Coupled with CFA problems, forests have faced threats from excisions and allocation of forestland for agriculture and settlement. In addition, governance through devolution has brought more confusion into a sector already riddled with a lot of problems. These problems are discussed briefly below.

Assessing the performance of CFAs

As stated above, CFAs have not been able to achieve what they were intended to achieve, that is SFM. The key obstacles they have faced include but are not limited to, engagement with the service (KFS-CFA), compliance with legal requirements, capacity challenges, management planning and decentralising and re-centralising.

Engagement between CFAs and KFS

While the formation of CFAs was clearly spelt out in the Act and the need for Participatory Forest Management Plan (PFMP) at the station level provided for the Act failed to provide clarity on CFA-KFS engagement beyond the user rights. The agreement provided for under 2005 (repealed) and 2016 Acts did not provide for KFS-CFA to work together, and this was left to open discussion, which could happen under the engagement agreement.[81] This lacuna meant that the level of negotiation is dependent on CFA knowledge and capacity to negotiate, which in most cases is low, characterised by low education levels of officials. A study on PFMP implementation carried out in 2012 involving 20 PFMP with over five years of implementation noted that in literally all the forest stations surveyed across the country, there is low systematic engagement between KFS and CFAs with KFS largely continuing to operate in a business-as-usual manner

80 Forest Conservation and Management Act, No. 34 of 2016 Section 49 (a) to (k).
81 *Ibid* Section 49(2)(k).

unless where labour is required from the CFA. For example, under plantation establishment, the CFAs had greater involvement due to labour and land demand, while procurement or sale of mature trees was KFS business alone. [82] Again, monthly and annual work plans did not feature unless where patrol required CFA input to enhance the manpower. The CFAs have complained over the years of lack of benefit sharing frameworks with the exception of places like Karura where KFS and the CFA run a joint account under PFMP, and a few other places like Dundori and Gathiuru where CFAs are allowed to charge some little fee above the statutory fees like grazing, mainly through local arrangements. The stations reviewed also lack clear evidence of implementation of PFMP proposed activities. It has been noted that CFAs are most active in sites with plantations due to farming-related activities, where the direct benefit is visible in terms of sale of farm produce. While several sites have great potential for tourism due to a number of factors among them proximity to urban areas, good infrastructure development, CFAs have not been able to take advantage of this, resulting in low transformation. This is partly attributed to low capacity among members of CFAs and specifically the leadership. [83] Well-performing sites like Karura and Ngong forests have leadership with high capacity. This has been recorded in other PFM sites recently meaning that little transformation is evident based on the PFM model.

Compliance with legal requirements and capacity challenges

With the enactment of the 2005 Forests Act and subsequently the 2016 FCMA, read together with Article 69 (d) of the 2010 Constitution, the communities' hope of greater involvement was raised, and several CFAs were formed at the forest station level. However, most of these CFAs operate without adhering to legislative requirements. The Report[84] on forest resources management and logging activities in Kenya found that CFAs are operating without registration by the Registrar of Societies; CFAs have membership beyond the community resident outside the forests; whilst the roles of CFAs are provided for in the FCMA, and the Forest (Participation in Sustainable Forest Management) Rules 2009; Many have not been granted permission by KFS through signed agreements; many operate without PFMPs, and many lack the capacity to manage their own affairs which is amplified by the poor governance practices of KFS. Many governance problems in CFAs stem from not holding elections, to KFS interference in their elections. It is worth noting that the peak of CFA formation was in 2007. It is estimated from information by KFS that a total of 325 CFAs have been registered across the ten conservancies being in Nairobi, North Eastern, Nyanza, Western, Eastern, Ewaso North, North Rift, Mau, Coast and Central Highlands.[85] Both foresters and private individuals, in the hope that they would gain control and reap greater benefits from the forest resources, formed these CFAs. According to Thenya,[86] most of the CFA were formed to address livelihoodrelated issues like income, especially in dry ecosystems. This has remained a pipe dream, and only forest sites with Plantation Establishment and Livelihood Improvement Scheme (PELIS) have recorded gains in livelihood. PELIS is the

82 Thenya Ngatia, Thuita Ngecu, 'PFM: A Case of Equity in the Forest Plantation Established and Livelihood Improvement Scheme in Gathiuru and Hombe Forests in Central Kenya' [2017] International Journal of Scientific Research and Management.

83 R Kweyu, T Thenya, J Emborg and J Kagomber, 'Policy on Conflict Resolution in Kenya: Forest-related Conflicts Management and Capacity Building, Forest Resources Utilization, Livelihood and Conflicts' [2018].

84 Taskforce to Inquire into Forest Resources Management and Logging Activities in Kenya, Appointed through Gazette Notice No. 28 of 26February 2018.

85 KFS, Community Forest Association Register, Kenya 9 March 2018.

86 T Thenya, BOB Wandago, ET Nahama and M Gachanja, *Participatory Forest Management Experiences in Kenya (1996-2007)* (Kenya Forests Working Group) (2008).

proscribed shamba (farm) system or formerly also referred to as non-residential cultivation (NRC), a system of the establishment of plantations in gazetted forest ecosystem.[87] The system involves the allocation of small plots of about a quarter hectare, to individual farmers mostly members of CFAs, who are permitted to clear bushes, plant trees and crops for three years, after which they vacate to allow trees to grow. In the past, especially under the shamba system also known as NRC from the 1980s to the early 2000s, challenges of farmers destroying young seedlings so as to stay longer on a particular plot had been recorded.[88] This was particularly so due to infiltration by politicians, poor forest governance, low financial and equipment capacity of the then forest department. Due to the direct benefit from the sale of crops, this system is very popular with CFAs, and the system has been termed as pro-poor, aiming to provide food and income to poor rural communities.[89] The thirst for livelihood support, especially income, is demonstrated by analysis of PELIS sites in Hombe and Gathiuru, where the initial idea of propoor engagement for food production has remained. The results in the study by Ngatia et al,[90] indicate that over 90% of PELIS farming is for commercial use. This is mainly because the muchanticipated income from forest ecosystems like beekeeping, tourism, control of fees paid for grazing and fuelwood collection has remained out of reach of CFAs due to legal complications and lack of financial capacity.[91]

Participatory forests management plans and cultivation

Although CFA in over 300 sites have prepared PFMPs, the signed management agreements focus mainly on traditional use of the forest. This is restricted since the country lacks benefitsharing legislation leaving KFS with the option of localised negotiations in forest areas where communities have high negotiation skills. For example, Karura CFA has managed to negotiate for fee collection, which is not the case in other forest areas. Although Forest Management Agreements (FMA) are negotiated with the Kenya Forest Service, CFAs lack capacity to hire lawyers to assist them in the negotiations, meaning that they are mainly instructed by KFS lawyers, and therefore no negotiation occurs. In sites with potential tourism sites, preference has been the engagement of high-end investors and not the CFAs. CFAs are deficient in a management capacity required for such joint ventures despite the clear concession provisions in Section 44 of the FCMA and Rule 27 of the Forest (Participation in Sustainable Forest Management) Rules 2009. Analysis of PFMPs developed between 2005 and 2013 in different forest sites in Kenya by Thenya et al, indicates that in spite of identification of sizeable income-generating potential, none has been developed. There is thus need for a paradigm shift in terms of empowerment CFAs for the exploitation of livelihood support systems, which would help to meet the high initial expectation associated with the 2005 Act (now repealed) and the FCMA and remedy the low societal transformation recorded over ten years later. While CFAs have lobbied for a share

87 Peter Allan Oduol, 'The Shamba System: An Indigenous System of Food Production from Forest Areas in Kenya' [1986], *Agroforestry Systems,* 365-373.

88 Joram K. Kagombe & James Gitonga, 'Plantation Establishment in Kenya: A Case Study on Shamba System' [2005] <http:// www.kenyaforestservice.org/documents/NRC%20review%202005%20case%20studies%2011th%20May.pdf> accessed 25 November 2019.

89 JM Ngatia, TP Thenya, W. NM**,** 'Forest Plantation Establishment: A Question of Subsistence or Commercial Farming in Gathiuru and Hombe Forests' [2017] *International Journal of Innovative Research & Development.* 6 (11): 2278–0211.

90 *Ibid*.

91 M Ngatia, T Thenya, M Ngecu, 'Participatory Forest Management: A Case of Equity in the Forest Plantation Establishment and Livelihood Improvement scheme in Gathiuru and Hombe Forests in Central Kenya' [2017] *International Journal of Scientific Research and Management* (IJSRM) vol. 5 Issue 11.

of income from timber harvesting, an interesting perspective emerges from the analysis of benefits from the PELIS programme in Gathiuru and Hombe forests ecosystem, based on return per investment, which indicates that among the three key players KFS, CFA and saw millers, the return is almost the same. Average ratios were 3.2:1 for KFS, 3.0:1 for the timber companies and 2.7:1 for communities. This means that proportionate input by different players gives the same income, meaning that one of the ways to raise the level of income for CFAs is increasing the capital base, which is a tall order for CFAs which will most likely continue to operate at the same level as the income generated.

One of the considerations proposed by different pro-PFMP actors is the conversion of protection efforts into monetary value and using them to bargain for greater inputs in conservation. Such an effort is only viable with the government engaged as the main stakeholder for it to contribute to community transformation without external financial support. To buttress this change, one of the key recommendations of the 2018 Taskforce Report is that PELIS should be progressively phased out in the next four years because of the challenges it faces. These include corruption in the allocation of plots by KFS, conversion of forest land to large commercial farms in total disregard of PELIS, weak supervision, poor supply of tree seedlings by KFS, lack of accountability, long-stay duration varying between 2- 6 years in some instances.[114] Specific financial benefits to the communities adjacent to the forests through the CFAs through the operationalisation of the Forest Conservation Management Trust Fund under Sec 27 of the FCMA can be used to pay community scouts participating in forest management and conservation and for payment of ecosystem services.[115]

Decentralising and recentralizing

PFMP was hailed as the panacea for community involvement and was expected to ease restricted access and encourage more inclusive decision-making in forest resources' management under the 2005 and FCMA. Communities' expectation was greater involvement in forest management and in the day-to-day management of the forest resources. It was under these expectations that several CFAs were formed per forest station triggering a series of conflicts among CFA groups around the country between 2005 and 2009. The conflicts were managed with the help of CSOs mainly, since the Kenya Forest Service was still being formed and umbrella CFAs had been formed at the station level to include all groups. Energy began to dissipate with the realisation that there was no involvement in decision-making. Assessment of 20 participatory forestry management plans (PFMP) sites in different regions of the country cutting across humid areas of Mount Kenya, Aberdares, Mau, Nandi and drier ecosystems of Laikipia noted that the involvement of CFAs in daily forest management was very low. While CFAs lack the muscle to push to ensure their inclusion in management activities, KFS has done little to involve CFAs outside plantations. Forest management has consequently remained very centralised.

> While all the forest stations are supposed to be managed using PFMPs and over 300 have been developed in the country with the use of these frameworks has remained low and remained irrelelvant to a large extent in forest management.116 This is often occasioned by non-allocation of and inadequate financial resources to facilitate the implementation of PFMPs. Significantly support of PFM is donordriven, with

most of the PFMPs largely financed by development partners.117 Unfortunately, support from development partners has focused on the development of PFMPs and strengthening CFAs. PFM development consists of seven stages, with the development of PFMP being a single step. With the focus of donor support being PFMP development, a greater spectrum of PFM implementation remains largely unsupported, making PFMPs less relevant. Expenditure targets for KFS at station level are set within Performance Contracts (PC), where the implementation of PFMPs is not prioritised. CFA establishment and PFMP development have been common PC targets for foresters at station levels but are not implemented. The FMCA provides for the establishment of Forest Conservation Committees (FCC)118 as earlier discussed, a multi-stakeholder structure at forest level charged with the responsibility of guiding PFMP implementation but all forests in the country lack FCC thus limiting benefits envisaged with PFMP approach since 2005.

Excisions and allocations of forests land for settlement and agriculture

Several forestlands in the country have been excised, alienated and allocated. The occupation or ownership of these areas has remained a complex scenario, unresolved for close to 20 years. The enactment of the repealed 2005 Forest Act raised hopes for the community by first securing the forest through stringent degazettement approach (publication of a legal notice in the Kenya Gazette); second, by requiring the collection of stakeholders' views in public; third by advertising the issue in three local dailies; and fourthly, by requiring it to go through Parliament. This markedly differed from the process under the old Forest Act Chapter 385, which only required the responsible Minister to indicate the intention to degazette. The 2005 Act thus protected community interests in forests, and it is worth noting that since its enactment, there has been no allocation of forestland, a major achievement for conservation in the forest sector.

The FCMA provides for the variation of forest boundaries and revocation of public forests through a petition to Parliament by any person.[92] The petition for such variation or revocation can be made before the National Assembly or Senate in accordance with the Parliament (Procedure) Act and Standing Orders.[93] The Cabinet Secretary is then required to submit a recommendation for approval subject to environmental impact assessment and public consultation within 30 days.[94] This process has not been invoked but may need to be looked at in light of the claims by the Ogiek, Sengwer, and Endorois discussed above and which were the subject of a taskforce's mandate.[95] The task force was specifically appointed to implement the decision of the African Court on Human Rights and Peoples Rights[96] issued against the Government of Kenya in respect of the rights of the Ogiek community to the Mau Forest and other related decisions.[97] The variation or revocation remains one of the options available to the government in addressing community claims.

92 Forest Conservation and Management Act, No. 34 of 2016. Section 34(1).

93 Forest Conservation and Management Act, No. 34 of 2016. Section 34 (3).

94 Forest Conservation and Management Act, No. 34 of 2016, Section 34(4).

95 Taskforce on the Implementation of the Decision of the African Court on Human and Peoples Rights Issued against the Government of Kenya in Respect of the Rights of the Ogiek Community of Mau and Enhancing the Participation of Indigenous Communities in SFM Gazette Notice No 11215 of 2 November 2018.

96 *African Commission on Human and Peoples RightsvRepublic of Kenya* Application No. 006/2012 Dated 12May 2017.

97 *Joseph Letuya and 21 OthersvAG and 5 Others* (2014) eKLR and *John K Keny and 7 OthersvPrincipal Secretary Ministry of Lands, Housing and Urban Development and 4 others* (2018) eKLR.

However, it is notable that several forestlands were allocated under Cap 385, and their titles are still held by different entities, which is a potential future challenge for forest management.[98] In July 2017 the National Land Commission (NLC) revoked 151 title deeds issued under dubious circumstances in the 1990s. In the mix of allocation and degazettement, the reference to cutline by forest-interested stakeholders makes the management of forestland very complex. Cut-line was mainly used to regulate forest use for grazing. The line was moved deeper into the forest during dry seasons and adjusted outward in the wet seasons.[99] However, this has been used over time to shift forest boundaries, and there are several forests with disputes on cut-line boundaries such as the eastern block of the Mau Forest.[127] Additionally, nearly thirty per cent of Karura Forest Reserve had been earmarked for housing developments[100] and some sections of the forest remain disputed under allocation made in the 1990s.[101] This is a threat that faces many forest ecosystems in the country.[102] Whether the NLC will provide the saviour blow for the Kenya forest sector or not remains to be seen The Mau complex ecosystem remains of great concern and in 2018, the government requested those with title deeds in Maasai Mau to surrender them, and some did.[103] The 2009 Mau Taskforce[104] had noted that 99.3 per cent of title deeds issued in the 2001 excisions were irregular with people already living and cultivating in these forest areas. It remains to be seen whether this forestland will be recovered. The 2009 Taskforce report noted that an estimated 2,500 households were encroaching in the protected forest areas of the Mau Forest Complex, mainly in South-Western Mau (23,296 hectares); Eastern Mau (35,301Ha); Ol Posimoru (20,155 hectares) and Molo Forest Reserve (901 hectares). Also affected as identified in the task force report were Chebyuk Forest (8700 hectares); Kakamega Forest (573 hectares); Leroghi Forest in Samburu; Kitalale Forest (1,860 hectares) (a gazetted forest reserve that is entirely settled) and Manzoni and Mautuma blocks of the Turbo Forest Reserve (2,862 hectares).[105] Occupants have no documentation to support their occupation of the land and the Government never expressed an intention to set aside those protected forest areas for settlement. In the Maasai Mau Trust Land, an estimated 2,147 households residing inside the Trust Land Forest, due to illegal extension of group ranches beyond their adjudicated boundaries, will be relocated.[106] Resettlement or compensation is dealt with on a case-by-case basis. In the 61,586.5 ha of forestland excised in 2001, families living in the most critical catchment areas have to be relocated from their plots and resettled or compensated as appropriate. There are also the forest-dwelling communities in the three of the five main water towers in Kenya namely, the Ogiek (Mt Elgon and Mau Forest Complex); the Sengwer (Cherangany Hills) and

98 Report on the Government Taskforce on the conservation of the Mau Forest Complex March 2009.

99 Benedetta Wasonga & Royan Ndegwa, 'Reclamation of Eastern Mau Forest Block' (Kenya Forest Service) <http:// www.kenyaforestservice.org/index.php?option=com_content&view=article&id=722:reclamation-of-eastern-mau-forestblock&catid=81&Itemid=538> accessed 25 November 2019. 127 *Ibid.*

100 'Karura Title Deeds Revoked', *Friends of Karura*<https://www.friendsofkarura.org/news-views/2033-2/karura-title-deedsrevoked/> accessed 25 November 2019.

101 Karura Forest Strategic Management Plan 2016-2020 <http://www.greenbeltmovement.org/sites/greenbeltmovement.org/files/Management%20Plan%20Karura%20Forest%202.pdf> accessed 25 November 2019.

102 Samuel Kariuki Mwaniki, 'The Role of the Kenya Forest Service in the Management of Land Degradation and Environmental Conflict in the Mau Forest Complex' (Master of Arts in International Conflict Management Research Project, University of Nairobi) (2016).

103 'Mau Forest: Three People Return Title Deeds', *The Standard,* (October 31, 2009) <https://www.standardmedia.co.ke/thestandard/article/1144027507/undefined> accessed 25 November 2019.

104 Prime Minister's Task Force on the Conservation of the Mau Forests Complex, *Report of the Prime Minister's Task Force on the Conservation of the Mau Forests Complex* (2009). 133 *Supra* (n 127).

105 Aerial Monitoring of Forest Boundaries, Joint KWS and KFS Programme supported by the UNEP, Vol 1 July 2007.

106 *Supra* (n 127).

the Endorois around Lake Baringo.[107] Several court cases have been filed, and courts, both local and regional have held these communities have a right to dwell within the forests.[108] This must be reconciled with the changes in their lifestyles over time, which pose a challenge for forest conservation as they include grazing and crop production which compromise the integrity of the forest ecosystem. The Report of the Taskforce on the Implementation of the African Court Decision on the Ogiek claim should have provided a muchneeded way forward on the issue of forest dwellers rights when eventually it is released to the general public.

G. Devolution of forest governance

The introduction of county governments in the 2010 Constitution opened a new chapter in forest management with expectation and confusion. A number of questions were raised: Was forest among the resources set for devolution? Would devolution improve management?; and How will the county crosscutting nature of forests be addressed? While forest resources remain important for local livelihood in terms of grazing, fuelwood and water sources, among others, forests are equally important at the national level as they provide critical ecosystem services and products. Forest management functions are yet to be fully devolved, but some functions have been devolved. Gazette Supplement No. 116 of August 9, 2014 on Devolution of Forestry Functions to Counties specified forestry functions to be devolved as follows: 'forestry including farm forestry extension services, forests formerly managed by Local Authorities, excluding forests managed by Kenya Forest Service, National Water Towers Agency and private forests.' The process of devolution through Transition Implementation Plans (TIPs) has been ongoing, but less than half of the counties have signed TIPs. Taita Taveta County was the first one to sign a TIP in 2016, and several others followed, but the uptake is still low. Counties lack the capacity to undertake forestry work, and this could be partly the reason for the low signing of TIPs. Those that have signed the TIPs still leave KFS to manage forests due to low internal capacity. This is reminiscent of the experience with the defunct County Councils, which had low forests management capacity and invested very little of their budgets and capacity in forestry.[138] To ease pressure on forest resources, especially gazetted forest resources, investment in farm forestry including extension, is important. This is, however, unlikely to be achieved under the current scenario where counties have such low forestry undertaking capacity.

The main focus of the forest management budget is dedicated to gazetted forests with minimal focus on farm forestry and extension, meaning that farmers and landowners are left on their own. While the 2005 and 2016 Acts provided for registration of private forests, this is unlikely to materialise with small scale farming and communal land providing for new frontiers for increased forest cover. In this regard also, Kenya has not had a committed forest programme focusing on dryland areas, which makes up more than 75 per cent of the country139, which could be the focus under the devolved system with counties getting assistance to make forestry a major activity under forestry extension service. The dryland areas are a major source of charcoal, which is consumed by 80% of urban dwellers and 30 per cent of rural folks.140 Charcoal remains a critical source of domestic energy, and as highlighted in the Kenya National

107 *Ibid.*

108 Banjul, Gambia, African Commission on Human and Peoples Rights 276/03 *Centre for Minority Rights Dev (Kenya) on Behalf of Endorois Welfare CouncilvKenya*; ELC Civil Suit No. 821 of 2012 OS *Joseph Letuya and othersvAG*; Application No.006 of 2012 *African Commission on Human and Peoples RightsvKenya Ogiek Community of Mau Forest*.

Appropriate Mitigation Action (NAMA) for charcoal, development of the charcoal sector provides the best opportunity for managing dryland deforestation. Charcoal production is a devolved function and KFS in 2012 developed Charcoal Rules141 (under revision), which counties are adopting and domesticating. The aim of developing a NAMA on Kenya's Charcoal Value Chain (CVC) is to trigger low-carbon development, to minimise the impact of the current CVC while acting on causes of deforestation and improving the energy independence of the country.142 The NAMA has three interventions that if implemented, will also address climate change. These include sustainable biomass supply, thus reducing emissions from deforestation linked to charcoal by 75 per cent (3.9 $MtCO_2eq$) per year by 2030,[143] implement efficient charcoal production technologies and establish a charcoal certification and labelling scheme.[144]

H. The utility of forest ecosystem management

Kenya has diverse forest ecosystems covering approximately 6.9 per cent of the land area. These include coastal forests in Arabuko-Sokoke, Dakacha, Tana and Boni, Southern hills forest which are dry and are found in Taita, Kasigau, Shimba, Chyulu and Nguruman: Riverine forest: Northern mountains like Leroghi, Ndotos, Mathews, Kulal and Marsabit; Western plateau/ GuineaCongolian rain forests in Karbarnet, Kakamega, Nandi and Trans Mara; and High mountainous/ Afro-montane forests in Mount Elgon, Mount Kenya, Aberdares, Cherangany and Mau.[109] These make a total of 4.1m hectares of which the gazetted area of natural forest is 1.2 million hectares, a situation that has changed very little since the 1990s. Most of the forestland in Kenya (77%) is under community and private ownership with the rest being public.

KFS core program focuses on management and conservation of the natural forests. The objective is to intensify conservation and sustainable management of natural resources for environmental protection and socio-economic growth. These forests are rich in plant and wildlife biodiversity, in addition to having numerous attractive features including panoramic views, lakes, craters, waterfalls, caves and hills.[110]Investments in biodiversity management as part of the forest programme have great potential. However, this has not been realised as KFS has only one biodiversity officer for the whole country and in addition, CFAs see more potential in PELIS than in natural forests. There is a need for investments in natural forest science and personnel, coupled with shifts towards building community capacity to appreciate this potential. For instance, the value of the three water towers ecosystem is estimated to be Ksh339 billion.[111]

Plantation forests cover about 186,716 hectares with 53 per cent being in public land and 47 per cent in private forest plantations. In total, plantation forests barely make up 5 per cent of the total forest cover in the country.[149] Just before independence, the then Forest Department prepared a guide to long-term industrial plantations investment and forest-based industries, particularly pulp and paper.[112] The target was 136,000 hectares of sawn timber plantations and 24,000 hectares of pulpwood plantations to be established by 1980.[113]There is a potentially

109 Ministry of environment and natural resources, *National forest Programme of Kenya*, (MENR, Nairobi, Kenya) (2016). 146 *Ibid.*
110 *Ibid.*
111 *Ibid.* 149 *Ibid.*
112 David Mbugua, 'Forest Outlook Studies in Africa (FOSA)' Food and Agriculture Organization of the United Nation <http://www.fao.org/3/a-ab569e.pdf> accessed 25 November 2019.
113 *Ibid.*

high demand for plantation products. Indeed, investments in plantations in terms of personnel, data gathering by KFS and CFA involvement is very high. The annual contribution of the plantations to the economy is estimated to be about 10.7 billion, which is part of 3.5 per cent forest contribution to GDP.[114] While plantations are seen as a threat to the country's ecological stability, Kenya has yet to reach the target for plantations, and the demand for timber and pulp is rising, posing a big threat to natural forests.[115]According to the latest forest planning[154], 70 per cent of the wood supply will be generated from trees on a farm, yet forest extension is in need greater investments and is not among the areas CFAs investment in. At the moment demand for wood products including firewood, charcoal, timber and poles stands at approximately 45 million cubic metres against a supply of 35 million cubic metres.[116]Conversion of natural forests to plantations stopped in the 1970s, but there has been limited and sustained development of on-farm forestry with necessary support from government agencies. Investment in facilitated extension market and scientific guidance and incentives on planting and management of both exotic and indigenous forests without undue condemnation of species such as eucalyptus will help in achieving the 10 per cent forest cover. Controversies, including forced uprooting of some exotic trees, will not help in improving the forest sector. For example, it is claimed that the presence of eucalyptus on the landscape causes the drying up of water sources, rivers and springs. Scientific studies have, however, established that *Eucalyptus spp* exhibits high efficiency in water use for biomass accumulation.[156]*Eucalyptus spp* requires 785 litres of water to produce one kilogramme of biomass compared to cotton/coffee/bananas, which require 3,200 litres, sunflower 2,400 litres, and maize, potato and sorghum 1,000 litres.[157]

I. Assessing forest governance against constitutional standards

With the establishment of the community-based institutions discussed above coupled with devolution of forest resources' management, the stage was indeed set for community involvement in forest management. But the reality on the ground remains grim. The results are yet to be realised, the community remains detached, and KFS continues to run the show. This begs the question: why are the changes not as effective as they should be? To understand the root cause of the problem, it is important to look briefly at the historical background against which the 2010 constitution and the forest laws were premised.

Sessional Paper No. 9 of 2005 on Forest Policy had a broad objective to guide the development of the forestry sector. The paper noted that since 1968 there had been no comprehensive forest policy and there had also been a major decrease in forest cover, which had resulted in reduced water catchment, biodiversity, the supply of forest products and habitats for wildlife. At the same time, it noted that the forest sector was riddled with conflicts between forest managers and adjacent communities over access to forest resources, which should not be the case. It addressed and recognised the role of communities and other stakeholders in forest management and noted the framework in existence did not allow for this participation and additionally, the law did not allow the Forest Department to manage resources outside gazetted forests. It proposed reforms to allow for stakeholder participation and enactment of legislation to regulate the forest sector on a sustainable basis.

114 *Supra* (n 147).
115 *Ibid.* 154 *Ibid.*
116 Ministry of Environment, Water and Natural Resources, *Water and Natural Resources, Analysis of Demand and Supply of Wood*

Vision 2030: A Globally Competitive and Prosperous Kenya, 2007's First Medium Term Plan in 2008 highlighted the national development plans including intensified conservation of strategic natural resources such as forests, water towers, wildlife sanctuaries, and marine ecosystems in a sustainable manner without compromising economic growth. Vision 2030 provides that in order to achieve environmental integrity and sustainable resource management, reforms will have to be undertaken, which include the revision of the Forest Policy and relevant legislation.

Sessional Paper No. 3 of 2009 on National Land Policy was the first clearly defined land policy. Considering that all natural resources find their primary base on land, the complex land management system in operation before the Policy had led to a lot of environmental, social and economic problems largely associated with natural resource degradation as the pursuit was economic productivity at the expense of other equally important values. With respect to conservation of forests, the policy stated that

> To achieve an integrated and comprehensive approach to the management of the land-based natural resource, all policies, regulations, and laws dealing with these resources shall be harmonised with the framework established by the Environmental Management and Coordination Act (EMCA) 1999.

Unfortunately, the Physical Planning Act 1996 focused more on urban planning and not on other land uses like forestry and environmental planning in Kenya. With the enactment of the Physical and Land Use Planning Act heralds a new beginning for a more holistic approach in physical planning incorporating land use.[117]

KFS is the lead agency that coordinates with NEMA, a body established under EMCA to prescribe measures necessary to ensure the conservation of biodiversity in Kenya in consultation with lead agencies. In the case of forests, KFS is expected to integrate policies, plans and programs addressing forestry issues into national conservation plans and policies. It KFS needs to develop internal capacity to contribute to SFM, promote environmental education and public awareness on forest conservation. It is also expected to supervise the conduct of Environmental Impact Assessments for projects affecting forests and has, in line with this, develop a strategic plan[118] with the key objective being the protection of the five water towers that happen to be forests (Mount Kenya, Aberdares, Mount Elgon, Cherangany and Mau). Part of its plan is also to increase forest cover by 4 per cent over the plan period and to enhance the sustainable supply of forest goods and services not forgetting Kenya's commitment to global agreements on forests.[119] There have been complaints that NEMA has encroached on the sectoral mandate of KFS. The Environmental Management and Coordination Act gives NEMA the overall responsibility for the management of the environment, forests included. There is a need for synergy in the entire environment sector and the alignment of all the legislation for the benefit of sustainable management.

As pointed out earlier, the Draft National Forest Policy of 2014 was developed after the promulgation of the 2010 Constitution, which was the first document to emphasise the role of the communities in forest protection and management. Its 12 guiding principles for the

117 Physical and Land Use Planning Act, No. 13 of 2019.
118 Forest Conservation and Management Act, No. 34 of 2016, Section 5 and Section 63.
119 The Constitution of Kenya, 2010 Article 2.

ministry and KFS in implementing PFMPs and guiding PFMP included: people-centredness; good governance; sustainability; transparency; equity; benefits; capacity building; culture; partnerships; dynamic approach; and holistic approach.

The proposition that SFM and conservation should be entrenched in the Constitution is based on the significance of a healthy environment for human existence.[120] The inclusion of a right to a healthy en-vironment in the Constitution signals an integrated approach to tackling environmental problems. Article 42 on the right to a clean and healthy environment, the Constitution provides that in the utilisation of the environment the state shall among other things respect the integrity of natural processes and ecological communities including the conservation of habitat and species and work to achieve and maintain a tree cover of at least 10% of the land are in Kenya. With respect to forests, Article 69 of the Constitution provides amongst other things that the state shall not only ensure sustainable exploitation, utilisation, management and conservation of resources but also ensure the equitable sharing of the accruing benefits whilst also encouraging public participation in the management, protection and conservation of the environment.

The Constitution also provides for a devolved government system and states that County Governments shall ensure implementation of specific national government policies on natural resources and environmental conservation, including soil and water and forestry conservation. Some of the devolved functions include extension services that include the establishment of on-farm trees and management of community forests like Maasai Mau among others. This is operationalised through the signing of TIPs, as discussed above. While it was expected that counties would immediately sign the TIPs, this has not been the case and as noted above, even those that have signed the TIPs, still leave KFS to manage forests in the counties.

The Constitution 2010 also addresses land ownership and classifies land into public, communal and private. Land carrying forest resources is specifically recognised at article 62 (1)(g), 62 (2) and 63(1)(d) NLC is tasked with the management of public land on behalf of national and county governments. Its responsibility extends to the sustainable management of forest resources since public land includes forests, game reserves, national parks, water catchment areas, specially protected areas and animal sanctuaries. In a nutshell, the introduction of the NLC and creation of counties calls for harmonisation of functions under the respective legislations.

Article 2 of the Constitution provides that a treaty or convention ratified by Kenya forms part of Kenyan law. The Convention on Biological Diversity read together with the Nagoya Protocol to the Convention on Biological Diversity is the international legal instrument dealing with conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of benefits arising out of the utilisation of genetic resources. Going forward, therefore, emphasis should be placed on aligning the role of NLC in land policy development and management and the proper domestication of international treaties within the framework laws being EMCA and FCMA. FCMA focuses on sustainable use and management leaving out issues of equity, social justice, inclusivity, human rights, good governance, integrity, sustainable development, which

120 C Juma, 'Private Property, Environment and Constitutional Change' in C Juma and JB Ojwang (eds.) *In Land We Trust: Environment, Private Property and Constitutional Change* 363 (1994).

issues are emphasised in the Constitution and are the cornerstone of community involvement in forest conservation.

While embracing community participation at Part V, FCMA fails to provide clear mechanisms for achieving the social and economic imperatives raised by the Constitution. This leaves communities with more questions than answers. The NLC has also not aligned itself to its key role on managing land that forests sit on and this has meant communities cannot, therefore, access benefits provided for by law beyond the traditional benefits such as grazing, fruits, firewood and honey. Not all is lost the 2020 draft policy goes a long way to provide for harmonisation of the act aligning it with the policy which as earlier stated provides for solutions to most of the issued raised herein above albeit in writing. Implementation is a different story.

J. Working towards community participation some legal insights

The key to community participation is the formation of representative institutions, which are sustainable financially and can stand the test of time and not dependent on donor funding. Forest governance structures ought to not only guarantee communities autonomy in forest management but also access to forest resources and legitimate benefit sharing. CFAs are a creature of the Forest Act 2005 and carried into the FCMA 2016 with KFS as the legal leg upon which they stand. KFS has however restricted them to user rights such as grazing, firewood and related rights. Friends of Karura, who actualise benefit sharing, are the exception. It is important that the communities are enlightened that when they establish CBOs and register small scale enterprises, they ought to register them as societies under the Societies Act Chapter 108 of the Laws of Kenya, which is basically an association of ten or more persons, whatever its nature or object, established in Kenya or having its headquarters or chief place of business in Kenya. They should also know that they are required to deposit with the Registrar of Societies a constitution which provides for membership, office bearers, elections, meetings, funding and accounts all governed by the Act,

Where several CBOs form a CFA, these ought to be registered as trusts under the Trustees Perpetual Succession Act Chapter 164 Laws of Kenya. Section 3 of the Act provides that Trustees can be appointed by anybody or association of persons established for any religious, educational, literary, scientific, social, athletic or charitable purpose who will apply to the minister in the manner provided in the act for a certificate of incorporation of the trustees as a body corporate. The Trust has the power to sue, be sued, own property, and receive gifts and donations in movable or immovable property. This will begin to create a sense of belonging and begin the conversation of forest ownership.

The National Association of Community Forest Associations (NACOFA) needs demonstrate to be representative of CFAs across the board and each CFA ought to have an elected representative being a member of the NACOFA and its Constitution ought to reflect as much. This will give it autonomy to negotiate better for its membership, to have its own capacity-building mechanism for members, aid members with drafting and legal representation when negotiating with KFS, NEMA and investors.

KFS does both the conservation and commercial operations in forestry raising the need to restructure it to separate these roles. There is also need to revisit the Forest (Participation in

sustainable forest management) Rules (2009) which are recognised by sections 77 e of the FMCA and cover various ways communities and private sector can be engaged in SFM and improve on the same to ensure stakeholders are brought on board. Counties should also be recognised in the revision of the said rules as well private sector involvement as set out in the call for the preservation of African Forests in UNEA 4 Conference in Nairobi Kenya in March 2019.

K. Conclusion

The 2010 Constitution ideals relating to forest conservation and management are set out as follows; sound conservation and protection of ecologically sensitive areas at Article 60(e), sustainable exploitation, utilisation, management and conservation of the environment and natural resources and ensure equitable sharing of the accruing benefits at Article 69.(1)(a), work.

to achieve and maintain a tree cover of at least 10 per cent of the land area of Kenya at Article 69(1)(b), protect and enhance IP in and indigenous knowledge of, biodiversity and genetic resources of the communities at Article 69(1)(c), encourage public participation in the management, protection of conservation of the environment at Article 69(1)(d), protect genetic resources and biological diversity at Article 69(1)(e) and every person has a duty to cooperate with state organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources at Article 69(2). To realise these ideals and tackle the several challenges discussed above the paper proposes the following measures.

There is need to re-evaluate the laws, practice and institutions including finances relating to CFAs which will ensure they have an economic, legal capacity unlike the social one it enjoys under the societies act, adequate capacity to negotiate agreements and access to adequate, legal representation.

There is also need for KFS to be restructured to reflect and apply the principles of good governance, transparency, integrity and full application of Chapter 6 on leadership and integrity while dealing with CFA or other stakeholders.

Land ownership disputes involving forests need to be adequately dealt with, especially concerning communities laying claim on public forests like the Sengwer, and Ogiek. This will improve the relationship between the government, government agencies like NEMA and Kenya Forests Service, and the communities. It will also contribute to meaningful engagement and participation by communities in sustainable forest management.

Illegal forest excisions must also be firmly dealt with, and where evictions are undertaken, afforestation and reforestation must follow immediately. Private landowners must be engaged to embrace private forestry and the commercialisation of forest resources through concessions and joint ownership agreements, as this will encourage private sector actors to get involved, which will contribute to growth in the sector.

On Devolution County governments' engagement must continue. TIPs do not appear to be popular amongst the Counties and as such a new engagement style involving a multi-sectoral team appointed by both the national and county governments ought to be set up to establish a structured engagement style for forest governance at the county level. A bottom-up approach would be preferable.

It is evident that attempts are being made and the same have been discussed in this chapter. Institutional and legal challenges have been identified, and proposals made; indeed, the constitutional ideals still remain far from complete realisation. There is growing goodwill and efforts are being made by all stakeholders to work together, and this is the reason why sustainable conservation and management of forests ought to continue.

CHAPTER 21

Environmental Governance of the Extractives Sector in Kenya: A Review of the Legal Framework Relating to Water and Air Pollution in the Extractive Industry

Muriuki Muriungi & Purity Wangigi

A. Introduction

Kenya boasts of over a hundred types of mineral resources that constitute its extractive sector, though their full exploitation is yet to be attained. In recent years, the country has discovered oil in the northern part of Turkana, large deposits of titanium in the coastal region in Kwale, coal in Mui Basin in Kitui in the eastern part of the country, among other resources.[121] It is thereby unsurprising that the country recognized the mining sector as a key sector for driving economic growth and enabling the transition to a middle income economy in the next decade according to Vision 2030.[122] In particular, the policy document cites the oil and gas mineral extraction as the seventh priority sector that holds promise for economic growth.

The exploitation of mineral resources within the extractive industry raises particular environmental concerns, since they have the potential of degrading the environment. This is particularly the case for extractive minerals since they involve interference with the topography of the land surface, use of water and drilling machines, release of waste, fumes and other effluent into land, water or air resulting in water and air pollution, among other environmental effects. As a result, any governing regime needs to have in place a robust environmental governance framework that not only promotes the exploitation of minerals but also counterbalances it with proper environmental management. These governance measures will likely include: mitigation of negative environmental impacts, proper waste management, decommissioning of extractive plants and incurring resultant liability, internalizing the costs of the externalities, recycling of water and other essential resources, treatment of water that is polluted as a result of the extractive activities, among other measures. Such an approach accords with the human rights approach. It serves to avert conflicts among communities in which extractive activities occur thereby affording the necessary social licence to operate,[123] and ensures long term sustainability of the extractive activities.

This Chapter assesses the environmental governance framework relating to the extractive sector in Kenya, focusing in particular on water and air pollution in areas in which extractive activities are being undertaken. In this regard, we explore the exploitation of various minerals in Kenya such as gypsum mining in Kajiado County and oil mining in Turkana among others. Our assessment reveals that in these areas, there is water and air pollution caused by extractive

1 Moses Michira, 'The billions buried under Kenyan soil' (Financial Standard, 2nd May 2017) <https://www.standardmedia.co.ke/business/article/2001238312/the-billions-buried-under-kenyan-soil >accessed 20 October 2018.

2 Republic of Kenya, *Vision 2030* (Government Printer: Nairobi, 2007). <https://theredddesk.org/sites/default/files/vision_2030_brochure__july_2007.pdf > accessed 20 October 2018.

3 A social licence to operate in this context means the acceptance and approval by the local community and other stakeholders of mining companies and their operations. For an historical evolution of the phrase, see Sara Bice & Kieren Moffat, 'Social licence to operate and impact assessment' (2014) 32(4) Journal of Impact Assessment and Project Appraisal 257.

activities. We attribute the associated water and air pollution firstly, to a gap in a specific policy and legal framework relating to effluent discharge into the air and water.

Secondly, the absence of comprehensive and uniform standards to deal with air and water pollution, decommissioning, apportionment of liability and on water recycling and treatment. This conclusion is drawn from our review of the legal and regulatory framework relating to environmental governance generally and with respect to the extractive sector specifically. We then make recommendations to fill in the gaps in law and policy.

The paper is divided into four parts. Part A is the introduction while part B examines the various impacts of extractive activities and the link to water and air pollution in extractive areas. Part C reviews the legal and institutional framework with a view to conducting a gap analysis that could account for the resultant water and air pollution in areas where extraction of minerals occurs. Part D concludes and makes recommendations.

B. Impact of Extractive Activities on Water and Air

Activities within the extractive industry have the potential for releasing water and air contaminants, with consequent negative health effects on the inhabitants of extractive areas.[1] Consequently, it is imperative to inquire into and understand the character, magnitude and extent of water and air pollution and effects on the quality of these essential resources as a result of extractive activities, if measures to ensure proper environmental governance in this regard are to be adopted. This section of the paper is devoted to investigating these particular issues with a focus on gypsum mining in Kajiado County, and oil exploration in Turkana County.

Impacts of Gypsum Mining on Water and Air Quality in Kajiado County

Water pollution or contamination making it unsuitable for human consumption and use occurs principally due to the alteration of the physical, biological, and chemical properties of water through extractive activities.[2] There are studies linking extractive activities to water and air pollution.[3] This could be because extraction affects the hydrology of water sources or water catchment areas. In addition, there may be seepage from waste rock that may come into contact with water bodies after extraction thus polluting them.[4] In the same breadth, the waste emanating from the mining activities causes fumes which if released into the atmosphere leads to air pollution. Other studies have also demonstrated how some extractive activities may introduce tailings, waste rock, and effluent discharge into water bodies thereby causing harm to humans.[5] Besides water pollution, extractive activities also result in the reduction and wastage of water. Put differently, mining activities not only impact on the quality of water but also on

4 PL Kinney, MG Gichuru, & NV Close, *et al,* 'Traffic impacts of Pm 2.5 air quality in Nairobi' (2012) 14(4) Journal of Environmental Science and Policy 369.

5 C Magombedze, *Geochemical processes controlling the generation and environmental impacts of acid mine drainage in semi-arid conditions. A case study of sulphide metal mines in Zimbabwe* (PhD dissertation: Norwegian University of Science and Technology, 2006).

3 I Aigibedion & SE Iyayi, 'Environmental effects of mineral exploitation in Nigeria' (2007) 2(2) International Journal of Physical Sciences 33.

4 S Siegel, 'The ethics of mining' (2013) 27(1) Ethics and International Affairs 3.

5 For e.g. OS Odira, MC Mboya & OJ Ochieng, 'Assessment of anthropogenic activities and climate change activities and climate change effects on the sustainability of the Tudor creek ecosystem' (2012) Journal of Environmental Science 231.

its availability.[6] This is attributable to the physical impacts that extraction has on various river channels, which may render them unstable.[7]

According to a fieldwork study that examined the impact of extraction of gypsum on water quality in Kajiado East Sub-county, there were high concentrations of nitrate in the water sample in areas where extractive activities took place.[8] This finding is consistent with other studies that have associated gypsum mining with nitrate concentrations.[9] In addition, the study found bacterial contamination in the water samples collected, principally infected by the bacterial organism, *Escherichia Coli*.[10] This finding is also consistent with other published literature that has demonstrated a correlation between water samples collected from mine pits and bacterial contamination. [11] Such contaminated water likely leads to waterborne diseases including dysentery, typhoid fever, intestinal worms and diarrhoea. It is worth mentioning, however, that the bacterial contamination of water samples in areas adjacent to gypsum mining sites is indirect rather than direct, since it occurs as a result of human occupation in those areas where sewage treatment is minimal or non-existent

Oil exploration in Turkana County

Considerable exploration activity has taken place in the East African Rift since 1985. From the time that the British oil company, Tullow, made a first discovery of crude oil in the South Lokichar Basin at Ngamia-1 well in 2012, an estimated resource potential of over 750 million recoverable barrels of crude oil has been reported. Crude oil potential of up to 1.5 billion barrels has been identified in Mandera and gas discoveries reported in Offshore Lamu and onshore Anza, Graben area.[12] Kenya's offshore potential has attracted significant investment from companies looking to survey and explore the Lamu Basin for oil and gas. [13] All the investment companies are at the exploration stage. This stage involves the search for rock formations associated with oil or natural gas deposit, geophysical prospecting and exploratory drilling. These activities have adverse environmental impact because clearing of vegetation interferes with the flora and fauna specific to that location. Abandonment of wells if no hydrocarbons are found and un-enforced treatment systems to preserve the environment also have the potential to pollute the soil, biodiversity and human beings for decades.

Other Impacts of Extractive Activities on the Environment

Water is largely used within the extractive industry as a critical input in the mining processes such as dust suppression, transport of waste, product separation and crushing as well as further

6 JJ Kitetu, 'Ecological assessment of potential impacts of riverbed sand harvesting to riparian ecosystems in Kenya' (2014) Paper presented during the Kabarak University 4th International Conference on addressing the challenges facing humanity through research and innovation, Kabarak University repository.

7 D Padmalal & K Maya, 'Impacts of river sand mining' (2014) Environmental science and engineering Springer, Netherlands 31.

8 Omoti, Kitetu & Keriko (n 2) 96.

9 R Margutti, 'The gypsum mining area in the Vena del Gesso biodiversity landscapes (Monte tondo quarry, Emilia Romagna region): Quarrying and old mine tunnels environmental impacts on natural karst systems and ground water quality' (2009) 3(2) Scientific acta 31.

10 Omoti, Kitetu & Keriko (n 2) 100.

11 See e.g. E Amankwah, 'Impact of illegal mining on water resources on water resources for domestic and irrigation purposes' (2013) 2(3) Journal of Earth Sciences 117.

12 <https://nationaloil.co.ke/upstream/ > accessed 21 February 2019.

13 Ibid.

processing.[14] With most countries particularly in Africa including Kenya experiencing severe effects of climate change, it has been predicted that the country as well as other East African countries will continue to experience water scarcity, which may worsen to nearly 65 percent in the next decade.[15] This scarcity will likely lead to limited water availability for the operations of extractive industry operatives. Climate change will also negatively affect the supply chain of the whole mining industry given that flooding and storms that accompany changes in climate will hamper or interrupt the effective transportation and port facilities for storing and conveying minerals.[16]

The enormity and seriousness of the environmental degradation concerns within the extractive industry must not be downplayed. As noted by Auty when he expounded on his resource curse thesis, there continues to be an association of less economic benefits from extractive activities within low and middle income countries, unlike in developed economies.[17] Further evidence demonstrates that this is largely attributable to the negative effects of environmental degradation caused by extractive activities.[18] In particular, the extraction of coal and oil as is happening in Kitui and Turkana counties in Kenya respectively, normally necessitate the clearing of trees and forests if any, to make mining possible. This large-scale deforestation certainly has implications for climate change, which may then lead to negative environmental effects, including water and air pollution. More specifically, there is empirical scientific evidence indicating that deforestation contributes to the release of carbon into the atmosphere thereby contributing to global warming.[19] And these concerns are not idle as they are backed by studies, which indicate large-scale deforestation practices accompanying extractive activities and processes particularly in sub-Saharan Africa.[20]

Further, while considering the impact of extractive activities on environmental degradation and particularly water and air pollution, there is need to take a holistic view to better understand and plan for all negative environmental effects. The successful extraction of oil requires the establishment of transportation infrastructure such as roads, railways, pipelines and the consequent displacement and resettlement of workers, which in turn may also involve the clearing of vegetation and forests.[21] Were this to occur, then there would be indirect effects of extractive activities on climate change, which in turn would have a significant effect on both water availability and water quality. As evidence of this latter point, King illustrates that oil exploration and extraction in South Africa has led to deforestation as forests give way to extractive activities and also release emissions into the atmosphere.

14 ICMM, *Water management in mining: a selection of case studies* (ICMM: London, 2017) 7.

15 I Niang *et al*, 'Africa' in VR Barros et al (eds)., *Impacts, adaptation, and vulnerability: Regional aspects.* Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (Cambridge University Press: Cambridge, 2014) 1199-1265.

16 ICMM (n 23) 17.

17 RM Auty, *Sustaining development in mineral economies* (Routledge: London, 2002).

18 F Van der Ploeg, 'Natural resources: curse or blessing?' (2011) 49 Journal of Economic Literature 366.

19 RW Gorte & PA Sheikh, *Deforestation and climate change* (CRS Report for Congress, USA, 2010).

20 M Hironsa, 'Trees for development? Articulating the ambiguities of power, authority and legitimacy in governing Ghana's mineral rich forests' (2015) 2 The Extractive Industries and Society 491, 492; L Cotula, 'The international political economy of the global land rush: A critical appraisal of trends, scale, geography and drivers' (2012) 39 Journal of Peasant Studies 649.

21 See e.g. AO Jegede, *The climate change regulatory framework and indigenous peoples' lands in Africa: Human rights implications* (Pretoria University Law Press: Pretoria, 2016) 13, 25.

C. Legal and Regulatory Framework

The Constitution of Kenya 2010

All mineral and mineral oils in Kenya are defined and classified by the Constitution as public land.[22] This means that irrespective of who holds rights to the land above, the government owns the minerals and mineral oils in the sub-surface. The minerals and mineral oils vest in and are held by the national government in trust for the people of Kenya[23] and thus the institutions established under the respective statutes are placed in a position of trust to execute the functions and exercise powers as trustees of the people of Kenya. Effectively, public officers[24] are under a duty to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources; work to maintain a tree cover of at least ten per cent of the land area of Kenya; protect and enhance biodiversity and the genetic resources of the communities; encourage public participation in the management, protection and conservation of the environment; establish systems of environmental impact assessment, environmental audit and monitoring of the environment; and utilize the environment and natural resources for the benefit of the people of Kenya.[25]

The national values and principles of governance[26] apply to and 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. An important national value spelt out under the constitution and which is relevant for our purposes is sustainable development. Public officers charged with making or implementing public policy decisions in extractives must ensure that laws are complied with and that all activities promote sustainable development.

Agreements executed between government and investors in respect of minerals and mineral oils inevitably disrupt land owners and communities adjacent to the projects through resettlement and subsequent processes of compulsory acquisition. However, the most critical impact of extractives projects is environmental degradation generated by pollution through oil spillage, gas flaring, and discharge of effluents and wastes. More so, there is usually depletion of water from water aquifers in the extractives communities particularly in marginal and arid areas.

The Constitution of Kenya is the supreme law and it has binding force on all authorities and persons in the Republic of Kenya. It provides for a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations through legislative measures. It further states that every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.[27]

Besides the Constitution, there are other legislative instruments and policies in Kenya that seek to achieve the object of environment conservation and protection to which we now turn.

22 Constitution of Kenya 2010, art. 62.
23 Ibid, art. 62(1)f.
24 Public officers are deemed to exercise their power and functions in public trust.
25 Ibid.
26 Constitution of Kenya 2010, Article 10.
27 Ibid, art. 70.

Environmental Management and Coordination Act 1999 (as amended)

The Environmental Management and Coordination Act (EMCA)[28] is the overarching legal framework for the regulation and protection of elements of the environment such as air, land, water, sea, biological diversity, genetic resources among others. It includes regulations[29] on different aspects of the environment to govern the interaction between humans and the natural environment and standards of apportioning liability in the event of default. It establishes the National Environment and Management Authority (NEMA), which has the function of enforcing all laws and policies relating to the environment.[30] Fundamentally, the statutory body is vested with powers of requiring and approving environmental audits and environmental impact assessments before an exploration activity or project may be commenced.[31] On occasion, or as a condition set forth in an environmental licence issued for a project, NEMA may require continued observance of particular conditions or protection of water catchment areas or rehabilitation of an area as the case may be.[32] A breach of any of such conditions as set forth in the licence vitiates any such licence which may then be revoked, withdrawn or attract disciplinary sanctions.[33] This tool is critical especially when considering the extractive activities because failure to adhere to the terms of the licence may potentially result in environmental degradation.

The Petroleum Act No. 2 of 2019

The current legislation in the Petroleum sector is the Petroleum Act, No. 2 of 2019.[34] It governs all matters relating to the exploration, development, production and transportation of, petroleum and for connected purposes. This law has had enormous impact on oil and gas exploration and production. Section 10 of the Act grants the Minister[35] authority, upon the advice or recommendation of the National Upstream Petroleum Advisory Committee, to review applications for licences and permits, negotiate, enter into, approve, terminate, or revoke petroleum agreements. The Minister also exercises supervisory powers over operations under petroleum agreements. The statute further provides that the Minister may approve budgets submitted by a contractor; oversee upstream petroleum operations carried out under the terms and conditions of a petroleum agreement; develop, publish and review national policies and strategic plans in relation to upstream petroleum operations; approve the transfer or assignment of any interest in a petroleum agreement in accordance with the Act; and take any action or decision, or give any permission or consent or exercise any other control as may be necessary or desirable in accordance with the Act and a petroleum agreement.[36] It is important to note a distinction between the extant law and the Petroleum Act 2019 where provisions on environmental protection in oil and gas activities are statutory in their own right. It is hoped that by virtue of inclusion of environment protection provisions in the substantive legal framework, the Petroleum Act 2019 will accord more attention and therefore better protection of the environment in the oil and gas sector.

28 Environmental Management and Coordination Act, No. 8 of 1999.
29 Ibid, sec 147.
30 Ibid, sec 7.
31 Ibid, Part VI.
32 Ibid, sec 63.
33 Ibid, sec 67.
34 <https://kplc.co.ke/img/full/WiUDxtboLpSw_Petroleum%20Act%202019.pdf> accessed 19 November 2020.
35 Minister refers to the Cabinet Secretary for Petroleum and Mining under the current governance architecture.
36 Petroleum Act No 2 of 2019, sec 10.

A Model Production Sharing Contract (PSC) in the Schedule of the Petroleum Act 2019,[37] provides a framework for the agreement between the International Oil Company (IOC) and the Minister. The exact terms of the agreement however depend on the negotiations between the Minister and the IOC. Parts III and VI of the Model PSC stipulate that a contractor shall cause the development and production program to be implemented in accordance with good international petroleum industry practice. In the absence of a tailor-made sectoral legal regime for environmental protection and conservation, the investor is under no legal obligation to adhere to a higher standard or level of care at all stages of the oil and gas activities.

The PSC under section 32 of the Schedule to the Petroleum Act 2019 addresses treatment of natural gas when it is commercially viable for processing and utilization. However, the contractor has the option to flare associated gases in accordance with good international practice after giving notice and reasons to the Minister as to why the natural gas cannot be economically used, sold or returned to the subsurface structure. Flaring is defined as the burning of natural gas present in petroleum in production and processing facilities where there are no gas production facilities to make use of the gas.[38] Specifically, 'flaring is the controlled burning of natural gas and is a common practice in oil and gas exploration'.[39] It is used as a safety measure to prevent injury to personnel or damage to equipment or any other safety requirement.[40] Flaring is a large contributor to air pollution and release of green-house gas emissions which contribute to global warming. The practice has dangerous health consequences such as asthma, bronchitis, hearing loss, skin problems and serious childbirth problems.[41] It also kills surrounding vegetation; is a noise nuisance; and injects soot, toxic chemicals and smoke into the atmosphere.[42] Inadequate regulatory measures to curb and monitor gas flaring will leave these environmental and health risks unmitigated. Additionally, gas flaring is a waste of energy, which could be harnessed for use in the country. In the absence of gas flaring regulations, dangerous levels of flaring will be inevitable because producers find the burning of natural gas to be a more economical alternative to disposing or utilizing it.[43]

To overlook enactment of gas flaring regulations in oil and gas production is not only a breach of mandatory duty to safeguard the environment and provide a healthy and clean environment, but also a failure to learn from precedents in other oil producing countries. The Petroleum Act 2019 has provided wide flaring exemption provisions. In particular, the Model PSC as provided for under clause 32(2)c of the Schedule to the Petroleum Act 2019 provides that a contractor may return associated natural gas, not required for use in petroleum operations or sold, to the subsurface structure, but if such natural gas cannot be economically used or sold or returned

37 Petroleum Act 2019 Schedule, 257..

38 Eman A Emam, 'Gas Flaring in Industry: An Overview' (2015) 57(5) Petroleum & Coal 532.

39 Erica Beacom, 'Gas, Roads, and Glory: North Dakota and MHA Nation's Struggle Over Flaring Regulation' (2015) 40(1) Wm. & Mary Envtl. L. & Pol'y Rev. 235, 237.

40 Directorate General of Hydrocarbons- Ministry of Petroleum & Natural Gas Government of India, *Good International Petroleum Industry Practices* (Delhi: Ministry of Petroleum & Natural Gas, 2016).

41 DS Olawuyi, *The Principles of Nigerian Environmental Law* (Business Perspectives Publishing, 2013).

42 Amy Sinden, 'An Emerging Human Right to Security from Climate Change: The Case Against Gas Flaring in Nigeria' in William CG Burns & Hari M Osofksy eds., *Adjudicating Climate Change: State, National, And International Approaches* (Cambridge University Press: Cambridge, 2009) 173, 176.

43 Erin Thomas, 'Capping the Flame: Solving North Dakota's Natural Gas Flaring Problem Through Cap and Trade' (2017) 8(2) George Washington Journal of Energy & Environmental Law 137, 138.

to the subsurface structure, and the costs of such re-injection shall be recoverable to the extent that such reinjection is included in the development plan.

In the absence of this exemption, the investor would be incentivized to innovate means of capturing and utilizing the gas. Under the current legal framework, the Minister is vested with the power to supervise petroleum operations carried out under a petroleum agreement and take any necessary legal action.[44] This blanket provision is problematic in supervision and enforcement of flaring levels in the absence of regulations.

Section 62 of the Petroleum Act 2019 prohibits a contractor from venting or flaring natural gas in the course of conduct of upstream petroleum operations except with the authorization of the relevant Authority and NEMA, and even then, such venting or flaring must be carried out in accordance with terms and conditions of the consent, existing laws and best petroleum practices. We note however, that good international petroleum industry practice is open ended and subject to multiple interpretations hence difficult to enforce. It is hoped that the relevant agency, the responsible Cabinet Secretary will provide guidance on protection of the environment in this sector.

Sessional Paper No.1 of 2021 on National Water Policy

Pursuant to the constitutional obligations, and international resolutions,[45] the Government should ensure that acceptable standards are adhered to in the whole process of providing and use of water as well as wastewater disposal through the development of properly organized and efficient systems of sanitation. The National Water Policy 2021 has laid a strong foundation upon which aspirations of the Constitution are anchored into the water sector actions, with respect to human right to water, sanitation services, and a clean environment. It has proposed strategies relevant and applicable to all stakeholders in the entire water sector.

Immediately after independence, the Government of Kenya committed itself to provision of water to all within a reasonable distance to ensure that water availability did not become a constraint to the country's development. In spite of policy interventions through the years, several challenges have afflicted the water sector including Kenya being a water a scarce country with low annual renewable freshwater availability and depletion and degradation of water resources.[46] In 2018, access to safe sources of water was at 55 percent and only 16 percent to sewerage coverage.[47] The fact that extractive activities are known to occur in marginalized communities, which are known to have less access to water than the national average, necessitates strict governance.

The policy has prescribed that allocation of water abstraction rights observes equity, giving priority to domestic uses, and the ecological reserve in order to stay within the sustainable limits so as to actualize key policy objectives to preserve and protect available water resources and to realize water security in the country. The Policy also recommends a framework for pricing of water resources that integrates critical costs such as catchment management, rehabilitation, restoration, and ring-fencing of revenue for relevant water resource management

44 Petroleum Act 2019, sec 10.

45 Mar del Plata Conference of 1977; 1992 Rio de Janeiro Earth Summit which provided for Agenda 21.

46 Sessional Paper No. 1 of 2021 on National Water Policy, Pg. 4

47 Water Services Regulatory Board Annual Report, 2016-2017 https://wasreb.go.ke/downloads/Financial%20Statements%20for%20the%20year%20ended%2030th%20June%202017> accessed 23 February 2019

and conservation activities.[48]In line with the polluter pays principle, the policy suggests the use of regulatory tools such as restoration bonds as a licensing condition.[49]

The Water Act, 2016 and the Water Resources Regulations, 2021

The Water Act 2016 provides for the regulation, management and development of water resources, water and sewerage services and other connected purposes in line with the Constitution. It has established the Water Resources Authority (Authority) which among other functions, regulates the management and use of water resources, receives applications and issues water permits for water abstraction, water use and enforces conditions for those permits. The Authority also advises the Cabinet Secretary generally on the management and use of water resources.[50]

The Act requires issuance of a permit and payment of charges to the Authority, for use of water from a water resource and the discharge of a pollutant into any water resource.[51] The Authority considers several factors, in determining conditions to be imposed on the permit including the likely effect of the proposed water use on the water resource and on other water users, the objectives of the water resource, the investments already made and to be made by the water user in respect of the water use, among others. The Authority can prohibit any activities in relation to groundwater conservation area as may be necessary for conservation of the ground water. The Regulations elaborate on application processes required before abstraction of ground water using boreholes, management requirements, charges and mandatory water quality monitoring and waste disposal control plan. The regulations lay out the related offences and penalties for breach of regulations.[52] The regulations stipulate that a permit holder is not exempt from any other applicable laws.

It is interesting to note that the Model Production Sharing Contract (PSC) under the Petroleum Act, describes in mandatory terms that the Cabinet Secretary must obtain on behalf of the contractor, any permit necessary to enable the contractor to use the water in the contract area for petroleum operations.[53] This clause consequently renders inept the Water Act objectives in petroleum activities and gives a *carte blanche* to the contractor on water use and disposal.

Given the extensive use of water in the extractives industry, it is necessary to ensure that PSCs and legislation are rationalized to promote responsible utilization of water by extractives companies. For instance, when a proponent cannot comprehensively propose a reliable source of large amounts of water for use in a processing plant, interference with the accessibility of potable water is inevitable. This exacerbates the existing inequalities and denies communities in extractive areas the right to accessible and clean water. Kenya would benefit from non-exempt permit system with charges for use of water. For instance, under Qatar Model PSC, a permit is required for use of water from a resource and the discharge of effluents into any water

48 Sessional Paper No. 1 of 2021 on National Water Policy, Pg.18
49 Ibid, 8.
50 Water Act 2016 (No. 43 of 2016) Section 12.
51 Ibid, Section 36.
52 The Water Resources Regulations, 2021
53 Model Production Sharing Contract, Schedule of the Petroleum Act 2019.

resource.[54] Similarly, a contractor purchases cooling sea water and electrical power from the government for petroleum operations. [55]

It is notable that clauses 16 and 17 of the model PSC in the Petroleum Act 2019 provide stringent rules on water abstraction in relation to sinking of boreholes and extraction of water from wells and compliance with environmental laws and principles including plugging, abandonment and decommissioning operations. Directions by the Ministry of Water to carry out inspection of water abstractions points and monitor effluent discharges are necessary to ensure access to clean water for domestic purposes and curb pollution of water sources.

The Mining Act[56]

The Mining Act 2015 contains articulate safeguards for health, safety and environment. First, the Mining Act stipulates that no exemptions are to be granted to any law in Kenya concerning protection of the environment.[57] This clause expands the scope of environmental matters for consideration before the person or a mining company makes an application for a licence or permit. While the decision to grant a permit or licence rests with the Cabinet Secretary, an independent body, the Mineral Rights Board (MRB) is established in the Act[58] to advise and give recommendations to the CS on the grant, rejection, retention, renewal, suspension, revocation, variation, assignment, trading, tendering or transfer of Mineral Rights Agreements.[59] The MRB has an important role in environmental governance in the mining industry because prior to recommending to the CS the grant of a mineral right, MRB requires the applicant to seek approval from the appropriate CS responsible for matters relating to wildlife conservation and management, where the land is situated within a marine park, a national park or a sanctuary under the Wildlife (Conservation and Management) Act[60] or the CS responsible for matters relating to the environment, where the land is situated within a protected area or a protected coastal zone under the EMCA or the Director of the Kenya Forest Service, where the land is situated within a forest area or operations on, under or over an area that has been declared a forest area under the Forest Act.[61]

The High Court decision in *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others*[62] is instructive on the foregoing provisions. In this case, the CS revoked the Applicants Special (Mining) Licence and appointed a task force to undertake a review of the Applicant's licence. The Applicants sought the court's order of *certiorari* to remove and quash the decision revoking the Special (mining) Licence and an order of prohibition against the respondents' from taking any further action to revoke the Applicant's (mining) License. The Applicant had applied for a special Mining licence over an area of 614.3 square kilometres for a term of 21 years. The court held that the licence was invalid for reasons that the holder of the licence had not complied with the law relating to the requirement of obtaining consent from the relevant state agencies mandated to give such approval for carrying out prospecting or mining activities in areas falling

54 https://www.resourcecontracts.org/contract/ocds-591adf-6349675951
55 Ibid.
56 Mining Act (Act No. 12 of 2016).
57 Ibid, sec 176.
58 Ibid, sec 30, 31.
59 Ibid, sec 31(1)(a).
60 Act No.47 of the Laws of Kenya
61 Ibid, sec 36.
62 Environment and Land Case No. 195 of 2014.

within their jurisdiction. The court held that the Commissioner of Mines, who was mandated to issue such licenses (under the repealed mining Act) acted in breach of the law which directed him to issue licenses subject to the specific conditions being fulfilled. An Environmental Impact Assessment Licence is a pre-requisite to issuing a mining licence. Similarly, in cases where the mining is to take place within a protected area such as a Gazetted Forest or National Museum or Monument, respective consents from the Kenya Forest Service and the National Museum of Kenya must be obtained.

The Mining Act invokes the Water Act 2016[63] concerning the right to the use of water from the water source distinct from the Petroleum Act, 2019[64] which guarantees the rights to use water through the Cabinet Secretary of Petroleum and Mining. The Act obligates the Licence holder to ensure restoration of mines and quarries, to ensure that seepage of toxic wastes into streams, rivers, lakes and wetlands is avoided and disposal of toxic wastes is done in the approved areas only.[65]

The Director of Mines has the role of advising on development of policy to ensure compliance with international conventions and national policies relating to the sustainable development of the mineral resources and to ensure that mining operations reflect local and community values. The implications on the environment as indicated above are demonstrated at the various stages of the extractives lifecycle or value chain, from exploration stage, development and production phase. The exploration stage portends varied environmental impacts on the environment, in the form of clearance of vegetation to allow movement of seismic trucks and machines for prospecting minerals and mineral oils and digging of test wells in the petroleum sector.

The last stage of extractives lifecycle is the decommissioning stage. It is expected that investors have made profits at this stage and minimized funds available for further operations in the project. Typically, there is little motivation for further investment before decommissioning because resources have diminished and there is little or no returns on any investment. The Petroleum Act of 2019 has provided for a decommissioning fund to facilitate activities at this stage.[66] This means that periods of low oil prices, during the production phase do not result in reduced investments in environmental safeguards and the knock-on effect of this does not affect the investor's commitment to environmental safety. Best practice shows that a sinking fund for the decommissioning process ought to begin as soon as production phase commences. The Petroleum Act of 2019 has extensively discussed how decommissioning in the Oil and Gas Industry will be governed. [67]

An analysis conducted by the United Nations Development Program on the governance framework of the mining sector in Kenya in 2016-17 found that various environmental obligations were found absent or non-integrated within the environmental governance framework. These include the absence of monitoring of water abstraction and rain water harvesting which leads to depletion of water resources and water shortage; lack of control measures against water pollution leading to continued pollution of water sources; lack of proper mechanisms for

63 The Water Act, No. 43 of 2016.
64 Petroleum Act No. 2 of 2019 .
65 Mining Act (Act No. 12 of 2016), section 179.
66 Petroleum Act 2019, sec 40.
67 Ibid Clause 17.

effluent water treatment and recycling and lack of protection of wetlands and floodplains; lack of regulations relating to reduction of mining emissions and toxic emissions leading to increased air pollution; and absence of regulations to help monitor water quality, among others.[68]

D. Conclusion and Recommendations

This Chapter has assessed the negative environmental impacts of extractive activities in Kenya with respect to air and water pollution. It has demonstrated the deleterious effects on the environment particularly on water and air, which are critical elements for sustenance of human being and other living animals. The Chapter has further reviewed the legal and institutional arrangements relating to the extractive industry with a view to highlighting any gaps that could account for the continued and unchecked water and air pollution and water depletion. The assessment has attributed the continued degradation to the absence of specific comprehensive and uniform standards relating to water and air pollution for players and investors in the extractive sector. While the review has noted the presence of laws, regulations and institutions charged with ensuring environmental protection, it has found that these laws are more of a generic nature. In the mining legal regime, there are no provisions requiring continuous monitoring of water and air quality, water abstraction and rainwater harvesting and there are also no laid down mechanisms for treatment of effluent discharge. In addition, much reliance is placed on Production Sharing Contracts signed between the government and investors for provisions relating to environmental protection. However, as we have indicated, there is usually little motivation on the part of investors to insist on stringent requirements on environmental protection given that these are usually added costs to businesses with little or no direct return on investment.

Unlike the Republic of Uganda where all extractive operations were stopped to pave way for enactment of regulations, Kenya has been keen to secure concessions in the mining sector and agreements in the Petroleum Sector notwithstanding the existing weak regulatory regime. As a result, contractual obligations and rights of investors under the PSCs are skewed to the benefit of investors; and lack in environmental exactitude on the part of the investor. This situation is little helped by the fact that most of the agreements are not usually disclosed to the public for scrutiny at least until after signing, thereby creating room for mischief. This Chapter has therefore argued that more needs to be done with respect to the legal and regulatory environment by creating and adopting comprehensive and uniform standards on water and air pollution in the extractive sector to provide a legal basis for action by relevant agencies. While the Mining Act 2016 on the one hand has robust provisions on environmental protection, questions arise as to whether this law can be enforced retrospectively in respect of the mining companies in Kwale and Taita Taveta where mining activities have already affected the quality of water. In recognizing that water is a finite resource, compensation for use of water ought to be addressed and an opportunity to the community provided to lay a charge for volumes of water extracted from their communities to facilitate extractive activities.

68 Habitat Planners, *UNDP Strategic Environmental Assessment (SEA) for the Mining Sector in Kenya Draft Report* (Habitat Planners, May 2017) 89, 90. <https://www.nema.go.ke/images/Docs/SEA%20Reports/UNDP%20DRAFT%20SEA%20REPORT%20FOR%20THE%20MINING%20SECTOR%20IN%20KENYA.pdf

In light of the foregoing, this Chapter thereby proffers the following recommendations: It recommends bringing under the control of the Cabinet Secretary responsible for petroleum and mining, issues relating to air and water pollution in the extractive industry. Under this framework and approach, the investor or oil marketing company would be required to submit to the Minister, a feasibility study, programme or proposal for utilization of natural gas, associated to oil or not, which is discovered in an area. It is not enough that the Minister only predicates the grant of a prospecting licence on provision of an environmental rehabilitation and restoration plan as currently provided in law. It is important that over and above having a rehabilitation plan, preventive measures or mechanisms be part of requirements for grant of licences in so far as possible. These requirements need not be enshrined in production sharing agreements but rather in legally binding standards that must be met by all investors working in the sector. To this end, there is also the need for comprehensive and universally accepted pollution control standards on water recycling, air pollution and treatment of effluent discharge for all mining sites in the country which must be observed by all investors.

CHAPTER 22

Conflict Management Mechanisms for Environmental Governance

Kariuki Muigua

A. Introduction

Effective management of environmental conflicts is also considered to be part of the sustainable development agenda. This is because the Sustainable Development Goals (SDGs) provide that sustainable development cannot be realized without peace and security; and peace and security will be at risk without sustainable development.[1] The Constitution of Kenya, 2010, recognises this connection and effectively provides that sustainable development is one of the national values and principles of governance, which 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.[2] The other relevant values and principles that are geared towards creating a peaceful and environmentally sound society include: equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised.[3]

In addition to the foregoing values and principles, the Constitution also dedicates a whole chapter to land and environment matters.[4] It guarantees every person's right to a clean and healthy environment, which includes the right: to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and to have obligations relating to the environment fulfilled under Article 70. The Constitution also provides that land in Kenya should be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles: equitable access to land; security of land rights; sustainable and productive management of land resources; transparent and cost effective administration of land; sound conservation and protection of ecologically sensitive areas; elimination of gender discrimination in law, customs and practices related to land and property in land; and encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution.[5] The Constitution thus, not only envisages sound management of environmental resources but also contemplates emergence of environmental conflicts and disputes, and consequently makes provision for their management.[6]

It is against this background that this chapter entails a critical examination and analysis of conflict management mechanisms in environmental matters for effective environmental governance. The chapter has several parts that address the following: the first part defines

1 United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, para. 35.
2 Constitution of Kenya 2010, arts 10 and 69(c).
3 *Ibid*, Art 10(2)(b)&(c).
4 *Ibid*, Arts 60-72.
5 Constitution of Kenya, 2010, Art60(1).
6 Constitution of Kenya, 2010, Arts 21, 43, 60, 67, 69, 70&159.

and discusses the nature of environmental and natural resource-related conflicts; the second part offers an overview of the various conflict management mechanisms and their applicability or suitability in the management of environmental conflicts; the third part offers a critique of Kenya's framework on management of environmental and natural resource-related conflicts; and the last part discusses the way forward on environmental conflicts management for effective environmental governance and sustainable development in Kenya.

B. Nature of environmental and natural resource-related conflicts

The role of natural resources in society has been discussed by various authors as including sources of income, industry, and identity, with developing countries being more dependent on natural resources as their primary source of income because many individuals depend on these resources for their livelihoods, with agriculture, fisheries, minerals, and timber as their main sources of income.[7] In addition, natural resources also play a prominent cultural role for many local communities and may even be a point of pride for the nation as a whole, a part of the country's patrimony, where resources such as land, water, and timber (forests) usually have historical and cultural significance, serving as the home of ancient civilizations, historical artifacts, and cultural practices.[8] This is well reflected in the Constitution, which recognises the environment in the Preamble as the heritage of the people of Kenya, worthy of respect and sustenance for the benefit of future generations.[9]

Away from the communities, natural resources, both renewable and nonrenewable, are mostly controlled by the State (which is considered the case in most developing countries) and are used as exports by the government to attain profit and power.[10] It has been observed that environmental scarcities have had great adverse effects on populations, including violent conflicts in many parts of the developing world.[11] These conflicts are especially expected to be more devastating in poor societies since they are less able to buffer themselves from environmental scarcities and the social crises they cause.[12] The many groups whose interests in and actions concerning a region's natural resources can lead to or exacerbate conflict may include local communities, governments, rebel groups, and outside actors.[13]

Natural resource conflicts are defined as social conflicts (violent or non-violent) that primarily revolve around how individuals, households, communities and States control or gain access to resources within specific economic and political frameworks.[14] They are the contests that exist as a result of the various competing interests over access to and use of natural resources

7 United States Institute of Peace (USIP), *Natural Resources, Conflict, and Conflict Resolution, A Study Guide Series on Peace and Conflict For Independent Learners and Classroom Instructors,* (Washington, DC) (2007), p.6 <www.usip.org/sites/default/files/file/08sg.pdf> 13 August 2018.

8 *Ibid*, p 7.

9 Constitution of Kenya,2010, Preamble.

10 United States Institute of Peace (USIP), *Natural Resources, Conflict, and Conflict Resolution, A Study Guide Series on Peace and Conflict For Independent Learners and Classroom Instructors,* (Washington, DC) (2007), p. 8 <www.usip.org/sites/default/files/file/08sg.pdf> 13 August 2018. See also Constitution of Kenya2010, art 62.

11 Thomas F. Homer-Dixon, 'Environmental Scarcities and Violent Conflict: Evidence from Cases' [1994], 19 *International Security*, 5 at 6.

12 *Ibid*.

13 United States Institute of Peace, 'Natural Resources, Conflict, and Conflict Resolution, A Study Guide Series on Peace and Conflict For Independent Learners and Classroom Instructors' [2007], p. 7.

14 Mikkel Funder & Others, 'Addressing Climate Change and Conflict in Development Cooperation Experiences from Natural Resource Management' [2012], DIIS<https://www.ciaonet.org/attachments/20068/uploads> 12 August 2018, p.17.

such as land, water, minerals and forests. Natural resource conflicts mainly have to do with the interaction between the use of and access to natural resources and factors of human development such as population growth and socio-economic advancement.[15]

The role of natural resources in conflict has also been a focus of many authors. The two approaches that have been proposed to explain the role of natural resources in conflict include scarcity (sometimes called the neo-Malthusian view) and abundance.[16]

Under the scarcity theory, it is argued that rapid population growth, environmental degradation, resource depletion, and unequal resource access combine to exacerbate poverty and income inequality in many of the world's least developed countries, and such deprivations are easily translated into grievances, increasing the risks of rebellion and societal conflict.[17] An example of areas experiencing scarcity problems in Kenya is Turkana County, which has been documented as one of the counties with the highest level of poverty in Kenya, and with the distrust between local communities around the region against each other, leading to constant conflicts as well as cross-border skirmishes.[18] The conflict is largely attributed to livestock rustling, harsh climate and boundary dispute. A degraded environment leads to a scramble for scarce resources and may culminate in poverty and even conflict.[19]

Those who view abundance as a problem argue that it is resource abundance, rather than scarcity, that is the bigger threat likely to cause conflict, often referred to as the 'resource curse' —corruption, economic stagnation, and violent conflict over access to revenues.[20] For instance, it has been pointed out that for many resource-rich developing countries, there have been cases of low economic growth, environmental degradation, deepening poverty and, in some instances, violent conflict.[21] For instance, extractive industries, particularly in sub-Saharan Africa, have been marked with increasing levels of political, social, technical and environmental risk.[22] This has been the case in countries like Sudan, Democratic Republic of Congo,[23] and Nigeria, where internal armed conflict has erupted as a result of their rich natural resources. Conflict also often produces significant environmental degradation.[24]

15 Klaus Toepfer, 'Foreword', in Daniel Schwartz & Ashbindu Singh, *Environmental Conditions, Resources and Conflicts: An Introductory Overview and Data Collection* (UNEP, New York) (1999) p.4.

16 United States Institute of Peace (USIP), *Natural Resources, Conflict, and Conflict Resolution, A Study Guide Series on Peace and Conflict for Independent Learners and Classroom Instructors,* (Washington, DC) (2007), p.8. <www.usip.org/sites/default/files/file/08sg.pdf> 13 August 2018.

17 *Ibid*.

18 Eliza Johannes, Leo Zulu and Ezekiel Kalipeni, 'Oil discovery in Turkana County, Kenya: A Source of Conflict or Development?' [2015], *African Geographical Review*, at 142.

19 'Wangari Maathai, An Excerpt from the Nobel Peace Prize winner's Acceptance Speech' [2005] *Earth Island Journal*<http://www.earthisland.org/journal/index.php/eij/article/wangari_maathai_an_excerpt_from_the_nobel_peace_prize_winners_acceptance_sp/> 12th August 2018.

20 United States Institute of Peace (USIP), *Natural Resources, Conflict, and Conflict Resolution, A Study Guide Series on Peace and Conflict For Independent Learners and Classroom Instructors, (*Washington, DC) (2007), p.8.

21 James Van Alstine and others, 'Resource Governance Dynamics: The Challenge Of "New Oil" In Uganda' [2014], 40 Resources Policy 44 at 48.

22 *Ibid*.See also Liane Lohde, 'The Art and Science of Benefit Sharing in the Natural Resource Sector' (International Finance Corporation, 2015)<https://info.undp.org/docs/pdc/Documents/KEN/ProDoc%20Turkana-UN%20Joint%20Programme%20final%205th%20%20March%202015-binder%20%282%29.pdf> 12 August 2018.

23 See Raymond Samndong and Isilda Nhantumbo; *Natural Resources Governance in the Democratic Republic of Congo: Breaking Sector Walls for Sustainable Land Use Investments*(International Institute for Environment and Development) (2015), p. 11<http://pubs.iied.org/pdfs/13578IIED.pdf>12 August 2018.

24 Jérôme Ballet, Nicolas Sirven, Mélanie Requiers-Desjardins, 'Social Capital and Natural Resource Management: A Critical Perspective' [2007], 16 *The Journal of Environment & Development,* 355 at 367.

Apart from the adverse effects of the conflict on the environment, the illegal trade inminerals bars communities from benefiting from their resources.[25] Communities expect that availability of environmental goods and services in their region will improve their livelihoods by 'real' development, which may not always be the case.[26] Poor and low economic development,[27] and consequently, failed economies result in conflicts[28]as do environmental and natural resources, bad governance or mismanagement.[29] Skewed distribution of benefits from natural resources and other environmental goods may fuel social exclusion and conflict, thus threatening sustainability.[30]

As far as the abundance theory is concerned, it has been argued that rent-seeking models assume that resource rents can be easily appropriated hence encouraging bribes, distorted public policies and diversion of public towards favour rent-seeking and corruption,[31] which is a threat to protected human security.[32] Mismanagement of resources is thus associated with corruption, undermining inclusive economic growth, inciting armed conflict and damaging the environment.[33]

Public policy can also lead to natural resource conflicts. It is argued that specific policies, government programmes, and their implementation have, in some areas, generated or aggravated conflicts, even when the intention was to reduce the conflict.[34] A good example of such policies would be those touching on property ownership, especially land, and where there is a need to balance conservation and access to the resources by communities. A government policy to relocate people forcibly may degenerate into conflicts as witnessed during the Mau Forest eviction in Rift Valley Kenya.[35]

25 Wilson Sigismond, 'Diamond exploitation in Sierra Leone 1930 to 2010: a resource curse?' [2013], *Geo Journal*<https://www.academia.edu/27634323/Diamond_exploitation_in_Sierra_Leone_1930_to_2010_a_resource_curse> 12 August 2018; Colin Kinniburgh, 'Beyond "Conflict Minerals: The Congo's Resource Curse Lives On' [2014], Dissent Magazine <https://www.dissentmagazine.org/article/beyond-conflict-minerals-the-congos-resource-curse-lives-on> 12 August 2018; Free the Slaves, 'Congo's Mining Slaves: Enslavement at South Kivu Mining Sites' [2013], Investigative Field Report <https://www.freetheslaves.net/wp-content/uploads/2015/03/Congos-Mining-Slaves-web-130622.pdf> 12 August 2018.

26 ClaudineSigam,& Leornado Garcia;*Extractive Industries: Optimizing Value Retention in Host Countries*(UNCTAD) (2012) <http://unctadxiii.org/en/SessionDocument/suc2012d1_en.pdf>12 August 2018.

27 Philippe Le Billon; *Wars of Plunder: Conflicts, Profits and Politics* (New York, Columbia University Press) (2012).

28 Sylvester Maphosa,*Natural Resources and Conflict: Unlocking the Economic dimension of peace-building in Africa*(AISA Policy brief Number 74, 2012).

29 *infra*, note 30. See also Manfred Wiebelt and others, 'Managing Future Oil Revenues in Uganda for Agricultural Development and Poverty Reduction: A CGE Analysis of Challenges and Options' (2011) Kiel Working Paper 1696/2011 <https://www.ifw-members.ifw-kiel.de/publications/managing-future-oil-revenues-in-uganda-for-agricultural-development-and-poverty-reduction-a-cge-analysis-of-challenges-and-options/kap-1696.pdf> 12 August 2018.

30 Torpey Saboe and others, 'Benefit Sharing among Local Resource Users: The Role of Property Rights' [2015], 72 *World Development*, p. 408.

31 Stella Tsani, 'Natural resources, governance and institutional quality: The role of resource funds' [2013], 38 *Resources Policy*, 181 at 184.

32 Abiodun Alao, 'Natural Resource Management and Human Security in Africa', in Ademola Abass (Ed.); *Protecting Human Security in Africa* (Oxford University Press) (2010). See also Lawson-Remer Terra and Greenstein Joshua, 'Beating the Resource Curse in Africa: A Global Effort.' *Africa in Fact*[2012] <http://www.cfr.org/africa-sub-saharan/beating-resource-curse-africa-global-effort/p28780> 12 August 2018.

33 Ivar Kolstad, Tina Søreide, and Aled Williams, *Corruption in Natural Resource Management: An Introduction* (Bergen: Michelsen Institute) (2008) <http://www.cmi.no/publications/file/2936-corruption-in-natural-resource-management-an.pdf> 12 August 2018.

34 Stephen Tyler, 'Policy Implications of Natural Resource Conflict Management' [1999] <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan022237.pdf>12 August 2018.

35 Amnesty International and others, *Nowhere to go: Forced Evictions in Mau Forest, Kenya* (Briefing Paper, April 2007). See also Joseph Sang, "Case study 3-Kenya: The Ogiek in Mau Forest" [2001].

Based on the foregoing possibilities, some scholars have rightly maintained that regardless of which approach describes the bigger threat; both scarcity and abundance can create environments that are ripe for violent conflict.[36]

C. Overview of conflict management mechanisms and their applicability in the management of environmental conflicts

Natural resource conflicts can, arguably, involve three broad themes: actors (or stakeholders, groups of people, government structures and private entities), resources (land, forests. rights, access, use and ownership) and stakes (economic, political, environmental and socio-cultural).[37] As a result, it is contended that conflicts can be addressed with the actor-oriented approach, resource-oriented approach, stake-oriented approach or a combination of the three.[38] Despite this, there are key principles such as, inter alia, participatory approaches,[39] equitable representation, capacity building, context of the conflict and increased access and dissemination of information, that must always be considered.[40]

Conflict is a process of adjustment, which can be subject to procedures to contain and regularize conflict behaviour and assure a fair outcome,[41] and the same can be managed, transformed, resolved or settled depending on the approach adopted.

Conflict management has been defined as the practice of identifying and handling conflicts in a sensible, fair and efficient manner that prevents them from escalating out of control and becoming violent.[42] It involves action that addresses how people can make better decisions collaboratively to address the roots of conflict by building upon shared interests and finding points of agreement.[43]

Conflict transformation, on the other hand, aims to overcome revealed forms of direct, cultural and structural violence by transforming unjust social relationships and promoting conditions that can help to create cooperative relationships, by focusing on long-term efforts oriented towards producing outcomes, processes and structural changes.[44]

Conflict settlement deals with all the strategies that are oriented towards producing an outcome in the form of an agreement among the parties that might enable them to end an armed conflict,

36 United States Institute of Peace (USIP), *Natural Resources, Conflict, and Conflict Resolution, A Study Guide Series on Peace and Conflict For Independent Learners and Classroom Instructors, (*Washington, DC) (2007), p.8.

37 Jon Anderson, & others, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage', (January 1996) (Paper prepared for Session 1: 'Setting the Stage', of the e-conference on Addressing Natural Resource Conflicts through Community Forestry, Rome, January - May 1996. Community Forestry Unit) <http://www.fao.org/docrep/005/ac697e/ac697e13.htm#TopOfPage> 12 August 2018.

38 *Ibid.*

39 See Sybille van den Hove, 'Between Consensus and Compromise: Acknowledging the Negotiation Dimension in Participatory Approaches' [2006], 23 *Land Use Policy* 10.

40 Jon Anderson, & others, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage', (January 1996) (Paper prepared for Session 1: 'Setting the Stage', of the e-conference on Addressing Natural Resource Conflicts through Community Forestry, Rome, January - May 1996. Community Forestry Unit).

41 Rudolph Rummel; *Understanding Conflict and War* (Sage Publications) (1981).

42 Antonia Engel and Benedikt Korf (Eds.); *Negotiation and Mediation Techniques for Natural Resource Management* (Food and Agriculture Organization of the United Nations (FAO) (2005) <http://peacemaker.un.org/sites/peacemaker.un.org/files/NegotiationandMediationTechniquesforNaturalResourceManagement_FAO2005.pdf> 12/ August 2018.

43 *infra,* note 43.

44 *infra,* note 45.

without necessarily addressing the underlying conflict causes.[45] Settlement is an agreement over the issues(s) of the conflict, which often involves a compromise.[46] Parties have to come to accommodations that they are forced to live with due to the anarchical nature of society and the role of power in the relationship. Basically, power is the defining factor for both the process and the outcome.[47]

Settlement may be an effective immediate solution to a violent situation but will not address the factors that instigated the conflict. The unaddressed underlying issues can later flare up when new issues or renewed dissatisfaction over old issues or the third party's guarantee runs out.[48] Settlement mechanisms may not be very effective in facilitating satisfactory access to justice (which relies more on people's perceptions, personal satisfaction and emotions). Litigation and arbitration are coercive and thus lead to a settlement. They are formal and inflexible in nature and outcome.[49]

Conflict resolution deals with process-oriented activities that aim to address and resolve the deep-rooted and underlying causes of a conflict.[50] Conflict resolution mechanisms include negotiation, mediation and problem solving facilitation.[51] It has rightly been observed that whereas concerns for justice are universal, views of what is just and unjust are not universally shared, and as such, divergent views of justice often cause social conflicts.[52] This is attributed to the fact that frequently, the parties involved in conflicts are convinced that their view is the sole valid one.[53] It is, thus, suggested that since there is no access to an objective truth about justice, conflicts may be reconciled by the judgment of an authority accepted by all parties or by a negotiated agreement between the parties: agreements are just when the parties are equally free in their decision and equally informed about all relevant facts and possible outcomes.[54]

Article 33 of the Charter of the United Nations outlines the various conflict management mechanisms that parties to a conflict or dispute may resort to, including, *negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of parties' own choice* (Emphasis added).[55] These are captured in the Figure 21.1.

45 *Ibid.*

46 David Bloomfield, 'Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland' [1995], 32 *Journal of Peace Research*, P. 152.

47 Claire Baylis and Robyn Carroll, 'Power Issues in Mediation' [2005], 1 *ADR Bulletin*, p.135.

48 David Bloomfield, 'Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland' [1995], 32 *Journal of Peace Research*, P. 153. See also Makumi Mwagiru; *Conflict in Africa; Theory, Processes and Institutions of Management* (Centre for Conflict Research, Nairobi) (2006), p. 42.

49 Makumi Mwagiru; *Conflict in Africa; Theory, Processes and Institutions of Management* (Centre for Conflict Research, Nairobi) (2006).

50 Antonia Engel and Benedikt Korf (Eds.); *Negotiation and Mediation Techniques for Natural Resource Management* (Food and Agriculture Organization of the United Nations (FAO) (2005).

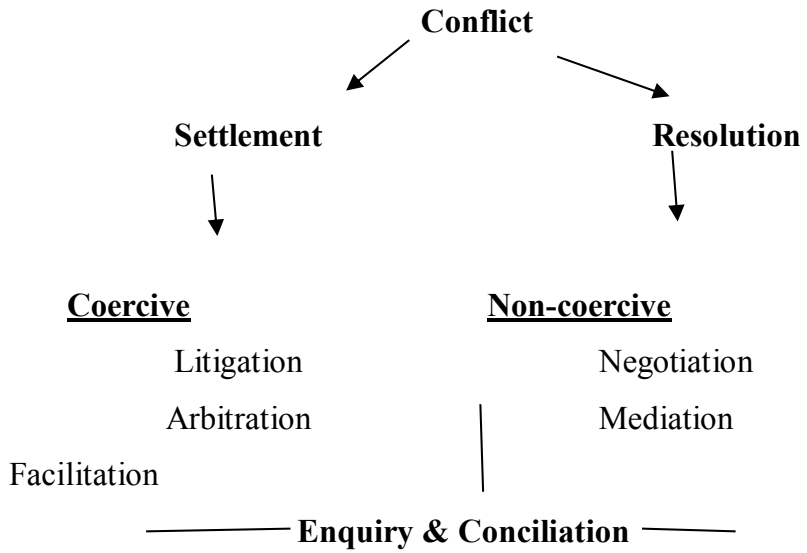
51 Kenneth Cloke, 'The Culture of Mediation: Settlement vs. Resolution' [2005] <https://www.beyondintractability.org/essay/culture_of_mediation> 12 August 2018.

52 Leo Montada, 'Justice, Conflicts, and the Justice of Conflict Resolution' [2015], *International Encyclopedia of the Social & Behavioral Sciences,* 937 at 942.

53 *Ibid.*

54 *Ibid.*

55 United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.



***Source: The author**

Figure 21. 1: Methods of conflict management

From the foregoing figure, it is clear that there is a wide range of mechanisms for the avoidance of conflicts, resolution of conflicts, dispute settlement and conflict transformation. Conflict avoidance involves the application of a variety of techniques, some used consciously and some unconsciously, to avoid the escalation from normal conflict into a dispute.[56] Some require communication between the parties while others involve the intervention of third parties. The appropriate mechanisms depend on the particular stage of the conflict. For instance, where the conflict involves complex underlying issues and relationships have been totally destroyed, dispute settlement processes may not be the appropriate mechanisms to resolve the conflict.[57]

Generally, interest-based or non-coercive processes are timely, cost-efficient, provide more satisfaction to the disputing parties, and are less destructive to the relationships of the parties than processes like litigation, and often result in more durable solutions to which disputants stay committed, therefore, lessening the possibility of appeal, future conflict or dishonouring of the agreement.[58]

Both power-based and rights-based processes lead to results in which one side loses and the other wins. These processes can lead to the issues in disagreement flaring up again. They can lead to resistance, violence and revolt, as they are merely settlement mechanisms that do not address the underlying causes of the conflict. Although rights-based dispute resolution feels fairer and less arbitrary than power-based processes, the outcome is zero-sum since one side must win and the other loses. On the other hand, interest-based processes can lead to win-win

56 Peter Fenn, 'Introduction to Civil and Commercial Mediation' in Chartered Institute of Arbitrators, *Workbook on Mediation* (CIArb, London) (2002) 50-52.

57 Kariuki Muigua, *Resolving Conflicts through Mediation in Kenya*, 2nd Ed., (Glenwood Pub., Nairobi) (2017) p. 55.

58 William Ury, Jeanne Brett and Stephen Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (Harvard Program on Negotiation) (1993) <www.williamury.com> accessed 16 August 2018.

outcomes, in that they explore the real interests, goals and motivations of disputants and aim to develop a solution thatmutually satisfies those needs. Interest-based processes are also more efficient at bringing about participant satisfaction, process fairness, effectiveness, efficiency, fostering of relationships and addressing power-based issues, all of which are important considerations in conflict resolution. [59]

Environmental conflicts are perceived as a symptomatic of a global model of economic development based on the exploitation of natural resources, disregard for people's rights and absenceof social justice.[60] Furthermore, it is believed that there are about four key factors that contribute tothe creation of environmental conflict: poverty, vulnerable livelihoods, migration and weak State institutions – all problems that present at the local level.[61]

Some authors also argue that environmental factors often interact with the visible drivers of ethnic tensions, political marginalisation and poor governance to create a causal framework that allows degradation to affect livelihoods, interests and capital – which, in turn, lead to conflict.[62] For instance, conflicts have been associated with changing norms, values, and worldviews about property rights within formerly subsistence-based (or pastoralist) communities.[63] There has been witnessed violence in areas around Kajiado town with the Maasai community seeking to 'evict foreigners' from the area.[64] The alleged foreigners arepeople who have bought land for residential homes and commercial purposes through real estate land developers. The Maasai pastoralists felt that their land was being taken away. Such incidents require collaborative conflict management techniques, considering that there are deep-rooted issues and harboured feelings of alienation and discrimination that need to be adequately addressed. There is a need to strike a balance between community and national interests on development. Otherwise, without such a balance, erupting conflicts subsequently affect the course of development in the country.

Environmental conflicts thus need to be managed through interactive, participatory and inclusive approaches to balance interests and power while adjusting parties' expectations in order to avoid the potentially negative effects of conflict in society. There is need to strike a balance among the three component parts of a conflict, namely, goal incompatibility, attitudes and behaviour, in order to ensure a peaceful society where groups do not unduly use their power to suppress the perceivably weak groups or individuals.[65]

59 Loode Serge and others, 'Conflict Management Processes for Land-related Conflict' (Pacific Islands Forum Secretariat) (2009). *S*ee also Kenneth Cloke, 'The Culture of Mediation: Settlement vs. Resolution' [2005].

60 *Ibid.*

61 Jon Barnett, W. Neil Adger, 'Climate Change, Human Security and Violent Conflict' [2007], 26 *Political Geography*, 639 at 643. As cited in Ed Akins, 'Environmental Conflict: A Misnomer?' In Sosa-Nunez Gustavo, & Ed Atkins (Eds.), *Environment, Climate Change & International Relations E-International Relations* (E-International Relations) (2016) <http://www.e-ir.info/2016/05/12/environmental-conflict-a-misnomer/>20 August 2018.

62 Sosa-Nunez Gustavo, & Ed Atkins (Eds.), *Environment, Climate Change & International Relations E-International Relations* (E-International Relations) (2016) <http://www.e-ir.info/2016/05/12/environmental-conflict-a-misnomer/> 20 August 2018.

63 Derek Armitage, 'Adaptive Capacity and Community-Based Natural Resource Management' [2005], 35 Environmental Management, 703 at 710.

64 *George* Sayagie, 'Tension as different clans from Narok, Kajiado both claim Nguruman', *Sunday Nation,* (Sunday, November 9, 2014) <*http://www.nation.co.ke/counties/Narok-Kajiado-clans-Nguruman/-/1107872/2516170/-/c6b4t5/-/index.html*>12 August 2018. See also 'Clashes in Kitengela as Traders Fight over Market', *Nation Media Group*, (Friday, September 8, 2015) <*http://www.nation.co.ke/photo/-/1951220/2865112/-/faabnp/-/index.html*> 12 August 2018.

65 Jacob Bercovitch,'Conflict and conflict management in organizations: A framework for analysis' [1983], 5 *Hong Kong Journal of Public Administration,* 104-123.

Some of the current conflict management mechanisms in Kenya, while they may have helped to tackle some environmental disputes, have not done enough to ensure amicable resolution of environmental conflicts since some of them are not affordable, while others such as the court, have too many and complex procedural requirements. The Kenyan framework forconflict management has long leaned towards litigation as a mechanism for conflict resolution yet courts of law are often inaccessible to the poor, marginalized groups and communities living in remote areas. Access to justice through litigation is, however, considered a powerfulremedy when access to environmental information or public participation has been wrongly denied or is incomplete. It guarantees citizens the right to seek judicial review to remedy such denial and/or deprivation.[66]

The Fair Administrative Action Act,[67] which was enacted to give effect to Article 47 of the Constitution, provides under Section 6(1) that 'every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review in accordance with Section 5'. Section 5(1) of the law provides that in any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall issue a public notice of the proposed administrative action inviting public views in that regard; consider all views submitted in relation to the matter before taking the administrative action; consider all relevant and materials facts; and where the administrator proceeds to take the administrative action proposed in the notice, [he should] (i) give reasons for the decision of administrative action as taken; (ii) issue a public notice specifying the internal mechanism available to the persons directly or indirectly affected by his or her action to appeal; and (iii) specify the manner and period within which such appeal shall be lodged.

In relation to access to information, Article 35(1) (b) of the Constitution guarantees every person's right of access to information held by another person and required for the exercise or protection of any right or fundamental freedom. In addition to the foregoing, the Access to Information Act was enacted to give effect to Article 35 of the Constitution; and to confer on the Commission on Administrative Justice the oversight and enforcement functions and powers. Notably, the law defines 'private body' to mean any private entity or non-state actor that, inter alia, is in possession of information which is of significant public interest due to its relation to the protection of human rights, the environment or public health and safety, or to the exposure of corruption or illegal actions or where the release of the information may assist in exercising or protecting any right.[68]

Alternative Dispute Resolution (ADR) and Traditional Dispute Resolution Mechanisms (TDRMs), especially negotiation and mediation, have been effective in managing conflicts where they have been used. ADR mechanisms include mediation, conciliation, negotiation and traditional/community-based dispute management mechanisms. ADR methods have the advantages of being cost-effective, expeditious, informal and participatory. Parties retain a degree of control (as illustrated in Figure 21.2) and relationships can be preserved. Conflict management

66 Migai Akech, 'Land, the Environment and the Courts in Kenya' [2006], A background paper for The Environment and Land Law Reports <http//:www.kenyalaw.org> 20 August 2018.

67 Fair Administrative Action Act, 2015.

68 Access to Information Act 2016, s 2.

mechanisms such as mediation encourage 'win-win' situations, where parties find their own solutions, pursue interests rather than strict legal rights, are informal, flexible and attempt to bring all parties on board.[69]

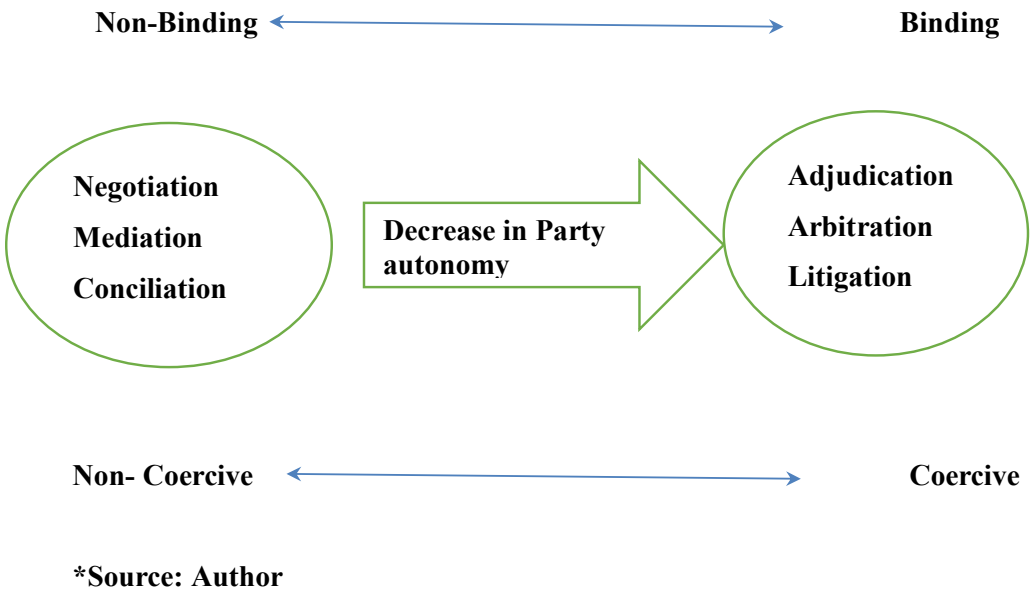


Figure 21.2 Degree of party autonomy

Arguably, negotiation and mediation have more value forthe local communities than just being means of conflict management as they present means of sharing information and participating in decision-making. They have unique and positive attributes, which include their participatory nature that can be used to manage environmental and natural resource conflicts for meaningful participation in decision making processes by enabling communities to present proof and reasoned arguments in their favour as tools for obtaining socio-economic justice.[70]

Community-based approaches to conflict resolution are also deemed to be useful, particularly to promote locally-based, indigenous management strategies.[71] Since indigenous mechanisms of conflict management are based on the very values and tenets of the people, they maintain and protect the customs and traditions of the society. Thus, they are able to resolve longstanding disputes and promote durable peace.[72]

69 Peter Fenn, 'Introduction to Civil and Commercial Mediation' in Chartered Institute of Arbitrators, *Workbook on Mediation* (CIArb, London) (2002) p. 10.

70 A Ristanić 'Alternative Dispute Resolution and Indigenous Peoples: Intellectual Property Disputes in the Context of Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources', (Lund University) (2015)<*https://www.law.lu.se/webuk.nsf/%28MenuItemById%29/JAMR32exam/$FILE/Alternative%20Dispute%20Resolution%20and%20Indigenous%20Peoples.%20Intellectual%20Property%20Disputes%20in%20the%20Context%20of%20Traditional%20Knowledg.pdf*> 14 August 2018.

71 *Ibid.*

72 Abu Azebre, 'Indigenous Mechanisms of Dispute Resolution among the People of Adaboya Traditional Area' [2012] <https://www.modernghana.com/news/534448/1/indigenous-mechanisms-of-dispute-resolution-among-.html> 14 August 2018.

D. Kenya's framework on management of environmental and natural resource-related conflicts: Prospects and challenges

Most of the sectoral laws governing environmental matters in Kenya mainly provide for conflict management through the national court system, based on legislation and policy statements that are administered through regulatory and judicial institutions. Litigation, which is a State-sponsored approach to conflict management, does not afford the affected parties a reasonable and fair opportunity to participate in finding a lasting solution. This is because, apart from the coercive nature of the process, litigation is also subject to other procedural technicalities thatmay affect its effectiveness.[73] The Constitution provides for active involvement of communities in sustainable environmental and natural resources matters through seeking the court's intervention. Citizens have a role to ensure that their rights in relation to the environment are not violated by way of litigation.[74] This is also captured in various statutes, such as the Forest Conservation and Management Act, which provides that persons can sue for enforcement of environmental rights,[75] and the Environmental Management and Coordination Act,[76] which is the framework law on environmental management and conservation, and provides that a court of competent jurisdiction may, in proceedings brought by any person, issue an environmental restoration order against a person who has harmed, is harming, or is reasonably likely to harm the environment,[77] among others.

The role of courts in environmental governance has also been reaffirmed by jurisprudence fromaround the world, including the Kenyan courts in various cases. In the Kenyan case of *Peter K. Waweru v Republic,*[78] the High Court held that sustainable development has a cost element, which must be met by the developers.[79] The court went on to state as follows:

> …As regards the township itself, this court is concerned on whether or not in the circumstances described the development is ecologically sustainable…. We are also concerned that the situation described to us could be the position in many other towns in Kenya especially as regards uncoordinated approval of development and the absence of sewage treatment works. As a Court, we cannot, therefore, escape from touching on the law of sustainable development although counsel from both sides chose not to touch on it although it goes to the heart of the matter before us…. Section 3 of EMCA demands that courts take into account certain universal principles when determining environmental cases. Apart from the EMCA, it is our view that the principles set out in Section 3 do constitute part of international customary law and the courts ought to take cognizance of them in all the relevant situations.[80]

73 Jackton Ojwang, 'The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development' [2007], 15 *Kenya Law Review Journal,* 19 at 29.
74 See Constitution of Kenya, 2010, Arts 22(1) & 70. See also Environmental Management and Co-ordination Act ,1999, s 3(3).
75 Forest Conservation and Management Act, 2016, s 70.
76 Environmental Management and Co-ordination Act, 1999.
77 *Ibid*, s 111(1).
78 *Peter K. Waweru v Republic* [2006] eKLR.
79 *Ibid*, para 4.
80 *Ibid*, para 7.

Thus, courts can step in and protect the environment without necessarily looking for immediate proof of likely violation of the environment. The Constitution gives courts the power to make any order, or give any directions, it considers appropriate – to prevent, stop or discontinue any act on omission that is harmful to the environment, or to any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment, or to provide compensation for any victim of a violation of the right to a clean and healthy environment.[81] An applicant seeking such orders from courts does not have to demonstrate that any person has incurred loss or suffered injury. The Constitution provides that an applicant does not have to demonstrate that any person has incurred loss or suffered injury.[82] However, to succeed in their plea,theymust demonstrate that their right under Article 42 has been or is likely to be denied, violated, infringed or threatened.[83]

The *suo moto* powers of the court in environmental matters are also envisaged under provisions of the Environment and Land Act.*[84]* It is also important to point out that the courts are under a constitutional obligation, under Article 10, to uphold the principles of sustainable development. This includes protecting the environment for the sake of future generations.

In addition to the foregoing provisions on the use of litigation, the promulgation of the 2010 Constitution created an opportunity to explore the use of ADR mechanisms and Traditional Dispute Resolution Mechanisms (TDRMs) in managing natural resource conflicts.[85]One of the principles of the land policy as envisaged in the Constitution is the encouragement tocommunities to settle land disputes through recognised local community initiatives consistent with the Constitution.[86] In addition, one of the functions of the National Land Commission is to encourage the application of traditional dispute resolution mechanisms in land conflicts.[87] TDRMs include informal mediation, negotiation, problem-solving workshops, council of elders, and consensus approaches, among others. It has been observed that where traditional community leadership was strong and legitimate, it had positive impacts in promoting local people's priorities in natural resource management.[88]

In the case of *Joseph Letuya & 21 others v Attorney General & 5 Others*,[89] the court observed:

> [Q]uite apart from the special consideration that needs to be given to the Ogiek community as a minority and indigenous group when allocating forest land that this court has enunciated on in the foregoing, this court also recognizes the unique and central role of indigenous forest dwellers in the management of forests. Various international and national laws recognize this role. The Convention on Biological Diversity, which Kenya has ratified and which is now part of Kenyan law by virtue of Article 2(6) of the Constitution, recognizes the importance of traditional knowledge,

81 Constitution of Kenya,2010, Art 70(2).
82 *Ibid*, Art 70(3). See also Environment Management and Conservation Act, 1999, s3(1).
83 *Joseph Owino Muchesia & Another v Joseph Owino Muchesia & Another* [2014] eKLR.
84 See Environment and Land Act, 2011, s 20.
85 Constitution of Kenya, 2010, Art 159 (2)(c).
86 *Ibid*, Art 60 (1)(g).
87 *Ibid*, Art 67 (2)(f).
88 Sheona Shackleton, and others, 'Devolution and Community-based Natural Resource Management: Creating Space for Local People to Participate and Benefit?' [2002], 76 *Overseas Development Institute Natural Resource Perspectives,* p.4.
89 *Joseph Letuya & 21 Others v Attorney General & 5 Others [2014] eKLR.*

innovations and practices of indigenous and local communities for the conservation and sustainable use of biodiversity and that such traditional knowledge should be respected, preserved and promoted.

The traditional and customary systems for managing conflict are associated with a number of strengths, which include: they encourage participation by community members and respect local values and customs; are more accessible because of their low cost, their flexibility in scheduling and procedures, and their use of the local language; they encourage decision-making based on collaboration, with consensus emerging from wide-ranging discussions, often fostering local reconciliation; they contribute to processes of community empowerment; are informal and even formal leaders may serve as conciliators, mediators, negotiators or arbitrators; and finally, long-held public legitimacy provides a sense of local ownership of the process and its outcomes.[90]

E. Way forward

Public participation and community empowerment

Article 69(2) of the Constitution places a duty on every person to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. Agenda 21[91] under Chapter 23 calls for full public participation by all social groups, including women, youth, indigenous people and local communities in policy-making and decision-making.

Meaningful public participation can preempt conflicts in environmental matters since all the important stakeholders get to own the decisions made. Various sectoral laws and policies should be designed in ways that protect the environment from degradation, and also ensures meaningful participation of communities in such measures first, through decision-making, and then by encouraging active participation, whether through incentives or otherwise.

A bottom-upapproach to natural resource management, including conflict management, creates an opportunity to involve the local people, who may have insiders' grasp of the issues at hand and thus positively contribute to addressing them satisfactorily.

There is need for communities to be empowered in order to help people gain control over their lives, through fostering power (that is, the capacity to implement) in people, for use in their lives, their communities, and in their society, by acting on issues that they define as important.[92] Empowerment promotes participation of people, organizations, and communities towards the goals of increased individual and community control, political efficacy, improved quality of community life, and social justice.[93] Thus, through empowerment, poor people get the assets and capabilities to participate in, negotiate with, influence, control, and hold accountable institutions that affect their lives.[94]

90 Antonia Engel and Benedikt Korf (Eds.); *Negotiation and Mediation Techniques for Natural Resource Management* (Food and Agriculture Organization of the United Nations (FAO) (2005).

91 United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3 to 14 June 1992.

92 Nanette Page and Cheryl Czuba, 'Empowerment: What Is It?' [1999] 37 *Journal of Extension*.

93 Nina Wallerstein, 'Powerlessness, Empowerment and Health: Implications for Health Promotion Programs' [1992], *American Journal of Health Promotion*,197-205. As quoted in John Lord, and Peggy Hutchison, 'The Process of Empowerment: Implications for Theory and Practice' [1993], *Canadian Journal of Community Mental Health*, p. 5.

94 World Bank, *What Is Empowerment?,* p.11 <http://siteresources.worldbank.org/INTEMPOWERMENT Resources/486312-1095094954594/draft2.pdf> 19 August 2018.

The basic aspects of empowerment that are considered important, especially in the context of this discussion, include: *participation, control and critical awareness,* where participation is the individual's actions that contribute to community contexts and processes; control is the effective or the perception of ability to influence decisions; and critical awareness is the ability to analyze and understand the social and political environment.[95]

Kenyan local communities should, therefore, be empowered to participate more productively in social, political and economic decision-making processes, especially in the areas of natural resources and environmental management, conflict management and participation in general governance matters. These have a direct impact on the quality of their social, economic and cultural life as local people and it is, therefore, important to involve them.

Concerted peacebuilding efforts

Promotion and implementation of peacebuilding efforts in environmental governance matters cannot meaningfully be achieved as an element of sustainable development without concerted efforts from all stakeholders. The SDGs recognise this connection and provide that sustainable development cannot be realized without peace and security; and peace and security will be at risk without sustainable development.[96]

The non-governmental organisations, academia, government institutions and community leaders directly concerned in peacebuilding efforts can collaborate in creating awareness and coming up with creative ways to manage environmental conflicts for peace and sustainable development. Religious organisations can also facilitate the actual processes of conflict management and foster awareness creation. In Kenya, where these conflicts are clan or community-based, courts offer little help in terms of achieving lasting peace due to the settlement nature of the outcome.[97] Courts are thus under an obligation to take the lead in promoting the use of traditional and community justice systems in environmental conflict management. They should offer support and uphold the relevant provisions where they are faced with such situations. Their dualrole in litigation as well as ADR and other alternative justice systems is recognised under the Environment and Land Court Act.[98]

The need to involve everyone is affirmed in the Constitution, which provides that every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.[99]

Enhanced legal and institutional framework on environmental conflicts management

Natural resources and environmental conflicts negatively affect Kenyans owing to the many weaknesses of the present legal and institutional framework. Despite the fact that the existing

95 Mark Zimmerman, 'Empowerment Theory: Psychological, Organizational and Community Levels of Analysis' in Julian Rappaportand Edwards Seidman (Eds.), *Handbook on Community Psychology* (New York: Plenum Press) (2000) p. 52.
96 United Nations, *Transforming Our World: The 2030 Agenda for Sustainable Development*, A/RES/70/1, para. 35.
97 Makumi Mwagiru, *Conflict in Africa: Theory, Processes and Institutions of Management* (Centre for Conflict Research, Nairobi) (2006).
98 Environment and Land Court Act,2011, s 20.
99 Constitution of Kenya, 2010, Art69(2).

legal and institutional framework in the country is meant to deal with natural resource conflicts, it has not offered much in stemming them, due to inadequacies within thestructure. It is clear that most of the sectoral laws mainly provide for conflict management through the national court system, and specifically litigation. However, the recognition of ADR and TDR mechanisms in the Constitution heralds a new dawn on the use of the latterand other alternative justice systems in managing environmental conflicts. ADR and TDR mechanisms allow public participation in enhancing access to justice as they bring in an element of efficiency, effectiveness, flexibility, cost-effectiveness, autonomy, speed and voluntariness in conflict management.

F. Conclusion

The political and strategic impact of surging populations, spreading disease, deforestation and soil erosion, water depletion, air pollution, and possibly, rising sea levels developments that will prompt mass migration and, in turn, incite group conflicts – are considered some of the most serious problems of the 21stCentury.[100] It is important, therefore, to deal with environmental conflicts if peace and stability is to be maintained. Natural resource-based conflicts are unique, and if left to escalate, can bring suffering and death as the undesirable result. The ADR conflict management mechanisms are considered suitable for use in the resolution of natural resource-based conflicts. However, litigation also has its advantages. As such, there is need for synergy in the application of coercive and non-coercive mechanisms, depending on the nature of dispute.

This chapter has discussed the nature and methods of conflict management in environmental and natural resources governance, and suggested some of the approaches that may be employed to enhance the same for sustainable development.

The chapter has not only defined and discussed the nature of environmental and natural resource-related conflicts, but has also offered an overview of the various conflict management mechanisms. The chapter has also compared the different mechanisms in terms of their merits and demerits, and outlined the kind of conflicts or disputes that each applies to. Finally, there are some recommendations on how these conflict management mechanisms can contribute to effective environmental governance for the realisation of sustainable development agenda in Kenya.

The discussion in this chapter demonstrates that while environmental conflicts may be inevitable, they can be efficaciously managed to promote effective environmental governance as an important aspect of sustainable development. As already pointed out, peace and security are key elements of the sustainable development agenda and achieving them requires having in place working conflict management mechanisms to address environmental and natural conflicts.

100 Robert Kaplan, 'The Coming Anarchy' [1994], *Atlantic Monthly*.

PART V

CROSS-CUTTING ELEMENTS OF ENVIRONMENTAL GOVERNANCE

CHAPTER 23

Climate Change Governance Through the Kenyan Constitution: Bastion of Hope or Boulevard of Broken Dreams?

Clarice Wambua

A. Introduction

Climate change is defined by the Intergovernmental Panel on Climate Change (IPCC), which publishes peer-reviewed scientific research on climate change, as 'a change in the state of the climate that can be identified by changes in the mean and/or the variability of its properties, and that persists for an extended period, typically decades or longer …'[1] It may be directly or indirectly attributable to human activity or to natural climate variability.[2] Though there has been contestation and disinformation on the extent of human contribution to climate change,[3] scientists agree with 95 to100 per cent confidence level, that human activities caused more than half of the observed increase in global average surface temperature from 1951 to 2010.[4] Human activity that drives a rise in the greenhouse gases (GHGs) responsible for climate change includes the burning of fossil fuels, which is an activity that accounts for the largest driver of emissions globally. In Sub-Saharan Africa however, Agriculture, Forestry and Other Land Use (AFOLU) are the main drivers of GHG emissions.[5] Despite being one of the world's lowest GHG emitters, climate change disproportionately affects economies, infrastructure investments, water and food systems, public health, agriculture, and livelihoods of Sub-Saharan African countries including Kenya, threatening to undo modest development gains and heightening poverty levels.[6]

On March 18, 2020, a Kenyan newspaper reported the news of a likely case of the 'first Kenyan to die of a heat wave sweeping through the country'.[7] Heatwave death reports are rare in the country, however indications are that they are a possible silent killer in Africa and are likely to increase in frequency and scale given the global crisis of climate change.[8] Together with

1 Intergovernmental Panel on Climate Change (IPCC), 'Glossary of Terms', in Field, C.B et al (eds) *Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation. A Special Report of Working Groups I and II of the Intergovernmental Panel on Climate Change (IPCC)*. (Cambridge University Press, 2012).

2 Article 1, UN General Assembly, United Nations Framework Convention on Climate Change, 20 January 1994, A/RES/48/189.

3 John Cook et al, *America Misled: How the Fossil Fuel Industry Deliberately Misled Americans about Climate Change*. (George Mason University Centre for Climate Change Communication, 2019).

4 Thomas F. Stocker et al, 'Technical Summary', in Stocker T.F et al (eds) *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*. (Cambridge University Press, 2013).

5 Balgis Osman-Elasha and Diego Fernández de Velasco, *Drivers of Greenhouse Gas Emissions in Africa: Focus on Agriculture, Forestry and other Land Use*. African Development Bank Blog Post, 29 July 2020. Available at https://blogs.afdb.org/climate-change-africa/ drivers-greenhouse-gas-emissions-africa-focus-agriculture-forestry-and-other. Accessed 4 November 2020.

6 African Development Bank (AfDB), Climate Change in Africa. At https://www.afdb.org/en/cop25/climate-change-africa. Accessed 22 June 2020.

7 James Kahongeh et al, 'Kenyans to Battle Severe Climate Change Effects', *Daily Nation*, March 18, 2020. Available at https:// www.nation. co.ke/dailynation/news/kenyans-to-battle-severe-climate-change-effects-17452. Accessed 09 June 2020.

8 Suzanne Carter, *Heatwaves Could Become a Silent Killer in African Cities*, Climate Home News, November 29, 2018. Available at https:// www.climatechangenews.com/2018/11/29/heatwaves-silent-killer-african-cities/. Accessed 09 June 2020.

droughts and floods, which are a more common and catastrophic occurrence in Kenya,[9] heatwaves are an example of the extreme weather events exacerbated by climate change. Africa is one of the continents expected to suffer most from the effects of these extreme weather events, due to the continent's social, economic and ecological nature that make it more vulnerable.[10] As a Sub-Saharan African country, climate change and related disasters in Kenya have the potential to adversely impact the majority of Kenyans given that about 75 per cent of the population depends directly on land and natural resources for their livelihood.[11] The economic cost of floods and droughts in Kenya is severe, estimated by the National Climate Change Action Plan (NCCAP) 2018-2022 to create a long-term fiscal liability equivalent to 2 to -2.8 per cent of GDP each year.[12]

Further, according to the NCCAP, floods have led to the highest loss of lives in the country with records showing that in 2018, floods claimed over 183 lives, displaced more than 225,000 people including over 145,000 children, and closed over 700 schools thus affecting education.[13] Roads and infrastructure were also damaged, seasonal crops across an estimated 8,500 hectares of land were destroyed and over 20,000 livestock drowned. Like floods, the NCCAP highlights that droughts affect lives and destroy livelihoods. They also trigger local conflicts over scarce resources and erode the ability of communities to cope.[14] Kenya's water towers are also affected due to glacier melting on Mount Kenya, with forecasts being that the glaciers are likely to disappear in the next 30 years. At Kenya's coast, sea level rise is impacting coastal towns and communities with coastal flooding from sea-level rise projected to affect up to 86,000 people a year, leading to coastal erosion and wetland loss at an annual cost of about Ksh 6 billion by 2030.[15]

There is, therefore, need to put in place and implement a governance structure that builds resilience and enhances adaptive capacity to these impacts, as well as enables a transition to a low-carbon society, which emits a minimal quantity of GHGs, while registering high growth and sustainable development. The governance of climate change has traditionally been conceived as an issue for the international stage, but there is now awareness of the increasingly wide range of actors at different levels of governance involved in addressing the challenge.[16] At the national level, States have enacted constitutional protections on the environment, which provide an opportunity to tackle climate change backed by their highest law, the Constitution. In 2010, Kenya promulgated a new Constitution. Described as "green in respects unknown previously in the country's laws", the new Constitution introduced aspects of environmental protection and environmental processes.[17] Among their advantages, green constitutions such as Kenya's

9 For example, as at 13 May, 2020, 237 people had lost their lives to floods in various parts of Kenya and 161,000 households had been affected or displaced. At https://www.capitalfm.co.ke/news/2020/05/237-dead-800000-displaced-in-kenya-floods/. Accessed 19 June 2020. See also Trocaire, *Feeling the Heat: How Climate Change is Driving Extreme Weather in the Developing World*, (Trocaire, 2014) at 17-22.

10 Gufu Oba, *Climate Change Adaptation in Africa: An Historical Ecology*, (Routledge, 2014).

11 Government of Kenya (GoK) and UNDP, *Climate Change and Human Development: Harnessing Emerging opportunities*. Kenya National Human Development Report (UNDP, 2013).

12 Government of Kenya (GoK), *National Climate Change Action Plan* (2018-2022), (GOK, 2018) at 2.

13 Ibid.

14 Government of Kenya (GoK), *National Climate Change Action Plan* (2018-2022), (GOK, 2018) at 2.

15 Ibid.

16 Chukwumerije Okereke, 'Conceptualizing Climate Governance Beyond the International Regime', 9 *Global Environmental Politics* 1 (2009).

17 Donald Kaniaru, 'Launching a New Environment Court: Challenges and Opportunities', 29 *Pace Envtl. L. Rev*. 626 (2012).

guarantee environmental rights, making them less susceptible to political whims[18] and offer one of the most important governance tools employable to combat climate change, whose governance relates broadly to not only environment but also social and economic activities. However, good environmental governance is central to building resilience and GHG reduction and, therefore, in addition to guaranteeing environmental rights,[19] Kenya's Constitution is important for its emphasis on sustainable development, among other goals and principles of governance provided under Article 10. This focus enhances effective climate change governance, as development cannot be sustainable without an alignment of economic growth with social and environmental goals. Further, Article 69 of the Constitution is also critical as it provides that the State has certain clear-cut obligations in respect of the environment,[20] and clarifies that every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.[21] This is recognition of the responsibility of all persons to take climate action, linking this action to ecologically sustainable development. Buoyed by the new Constitution and the relevance of its provisions, multiple changes in the regulatory (legal, policy and institutional) structure for climate governance have occurred in Kenya.

a. This chapter assesses the climate change governance structure under the old and new constitutional dispensations, and highlights the myriad changes brought about by the 2010 Constitution. The chapter begins by assessing why the need for climate change governance, and then turns to analysing the state of play on climate change governance prior to 2010, that is, before the Constitution was promulgated. It then proceeds to analyse the changes in effect in climate governance following the promulgation of the new Constitution, and examines how transformative these changes have been in tackling climate change in the country. The chapter argues that Kenya's 2010 Constitution was ground-breaking for climate action, guaranteeing the right to a clean and healthy environment, setting out key values and principles such as equity, participation and sustainable development, which have a significant bearing on climate change, and introducing a devolved system of governance that allows climate action at both the national and sub-national level, among other far-reaching provisions. On promulgation of the 2010 Constitution, these provisions offered hope that climate change concerns in the country would be adequately addressed. While there has been reasonable progress in meeting this goal, there are broken dreams. The constitutional values and principles are not wholly embraced and the mainstreaming approach to governing climate change is hampered by challenges, 10 years after the promulgation of the new Constitution. As such, this chapter calls for a rethink in how climate change governance in Kenya can better embrace not just the letter, but also the spirit of the Constitution.

18 James R. May, 'Constituting Fundamental Environmental Rights Worldwide', 23 *Pace Envtl. L. Rev.* 113 (2006).
19 Article 42, Constitution of Kenya, 2010.
20 Article 69 (1), Constitution of Kenya, 2010.
21 Article 69 (2), Constitution of Kenya, 2010.

B. National climate change governance

The question of who responds to climate change and how is a pressing 21st century challenge requiring urgent action internationally and nationally. It squarely relates to 'governance' and more specifically, 'climate change governance', which entails the set-up of relevant mechanisms and measures to prevent, mitigate or adapt to any risks and threats caused by climate change.[22] These relevant mechanisms and measures are founded on the four main pillars of climate governance, namely, policies, strategies, activities and actors.[23] The establishment of effective and efficient governance structures clearly reflecting these pillars is critical to responding to the threat posed by climate change.

Climate change governance at the national level is especially important, as States are one of the most powerful agencies for mobilizing collective resources for dealing with acute societal problems.[24] In addition to concluding agreements at the international level, States are enforcers of domestic law, chief holders of financial resources, adjudicators of disputes, redistributors of resources, and compellers of obedience with all important facets of effective climate action.[25]

The State cannot however, act alone. Climate change responses and interventions require integrated action at different levels of governance, across sectors, and a diverse range of stakeholders, with new institutional arrangements and new forms of cooperation arising at both national and sub-national levels.[26] Cities, county governments, industry, civil society organizations (CSOs), and community-based organizations (CBOs) are emerging as important actors in undertaking climate action. One of the common approaches for the integrated management of climate change is through mainstreaming. This entails the integration of climate change vulnerabilities or adaptation into all aspects of related government policy.[27] Demonstrating the multilevelnature and complexity of climate change governance, mainstreaming can be operationalized horizontally (by different policy sectors or departments), vertically (at different hierarchical administrative levels) and internationally (through multilateral cooperation).[28] Based on the multiplicity of action and actors, and the need for an integrated approach to action taken, effective national climate change policies, legislation and institutions are vital. As a nation's principal law, the Constitution is instrumental in actualizing effective climate change governance. The premium placed on Kenya's new Constitution is so high that it has been asserted that 'Kenya's future is inexorably tied to the implementation of the 2010 Constitution.'[29] With climate change being one of the defining issues of this century, combating the challenge is similarly inexorably linked to the Constitution and how well it is implemented. As will be shown in the rest of this chapter, climate change as a constitutional issue has grown in significance over time, starting off as a non-constitutional issue prior to 2010 to its concerns being reflected in various ways in the Constitution, with however, varying levels of success.

22 Sveker C. Jagers and Johanne Stripple, 'Climate Governance beyond the State' *Global Governance* (2003)-pp. 385-399
23 Grace Ngaruiya et al, 'Developing Climate Change Governance in Kwale County, Kenya' (ILEG,2018).
24 Ibid.
25 James Meadowcraft, *Climate Change Governance*, Policy Research Working Paper 4941 (World Bank, 2009).
26 Johara Bellali et al. *Multi-Level Climate Governance in Kenya. Activating Mechanisms for Climate Action*. (adelphi/ILEG, 2018).
27 Ibid.
28 Martin Oulu, 'Climate Change Governance: Emerging Legal and Institutional Frameworks for Developing Countries'. In W. Leal Filho (ed) *Handbook of Climate Change Adaptation*. (Springer, 2015).
29 Kempe Ronald Hope, 'Bringing in the Future in Kenya: Beyond the 2010 Constitution': *Insight on Africa*. 2015; 7(2): 91-107.

C. Climate change governance prior to the Constitution, 2010

The Kenya Meteorological Department (KMD) has recorded an increase in both daytime and nighttime temperature in Kenya, a trend that is noted to have begun since the early 1960s.[30] In addition, changing rainfall patterns have been observed over time in both the long rain season (March-May) and the short rain season (October-December) with an effect on the socio-economic wellbeing of the country.[31] Despite these early observations on ongoing climatic changes, the challenge was not in the public consciousness and studies carried out at the beginning of the new millennium show that respondents did not perceive climate change as being a significant problem compared to the societal challenges of poverty, unemployment, crime and corruption that were being faced.[31] This was partially reflected in the priorities of the Kenyan government at the time, which focused on poverty alleviation, the fight against crime and graft, improved access to education, and on addressing health problems, as opposed to direct focus on climate change.[32] As such, from independence in 1963 to the year 2010, Kenya lacked a dedicated climate change policy and regulatory framework. This is however unsurprising as climate change also evolved progressively in importance on the global agenda, with the clamour for global action towards mitigating the effects of climate change reaching a crescendo in the 1990s.

Thus, in the pre-2010 period, climate was indirectly protected by the diverse sectoral laws on environment and natural resource management, beginning in the pre-colonial period when the use of environmental resources was regulated through customary laws and rules. In the colonial era (1895-1963), the law focused on the regulation of the use of natural resources such as forests and wetlands, with marginalization, discrimination, and exclusion a key feature of the colonial regime. For example, forests which are important for carbon sequestration had one of the earliest pieces of legislation enacted with the Ukamba Woods and Forest Regulation of 1897. These regulations were significant insofar as they vested a natural resource and its management with the structures of the colonial administration. This was the first in a series of laws on the management of natural resources, which included the Forest Act of 1942 and the first Forest Policy of 1957. Notably, the policies and regulations of the colonial era granted unchecked discretion to government agencies in the management of forests,[33] and resulted, whether deliberately or otherwise, in the disenfranchisement and displacement of indigenous communities.[34]

Upon independence in 1963, Kenya's basic aim was to attain a high and growing per capita income and to have the same equitably distributed to all Kenyans.[35] This entailed the use of its natural resource base. However, natural resource inputs such as land and forests were unsustainably exploited, and inequities were exacerbated.[36] The independence constitution

30 Government of Kenya, *National Climate Change Response Strategy* (GoK, 2010). Available http://www.environment.go.ke/wpcontent/documents/complete%20nccrs%20executive%20brief.pdf. Accessed 15 June 2020.

31 CA Shisanya and M Khayesi 'How is Climate Perceived in Relation to other Socioeconomic and Environmental Threats in Nairobi, Kenya?' (2007) *Climate Change* 85, 271-284.

32 Ibid.

33 Peter Wass, *Kenya's Indigenous Forests: Status, Management and Conservation*, (International Union for Conservation of Nature and Natural Resources, 1995).

34 J Wouters, A Ninio, T Doherty and H Cisse (eds), *The World Bank Legal Review. Improving Delivery in Development: The Role of Voice, Social Contract and Accountability,'* (World Bank, 2015).

35 Shadrack Wanjala Nasong'o, 'Environmental Policy and Practice in Kenya: Between Cornucopians and Neo-Malthusians' (2017), *The International Journal on Green Growth and Development*. 3:1 1—19.

36 Friedrich-Ebert-Stiftung, *Regional Disparities and Marginalisation in Kenya*, (FES, 2012).

contained provisions for the conservation of soil and other natural resources, and heralded an opportunity to redress the weaknesses inherent in colonial era laws. However, in practice, the colonial-era exploitative approach to resource management continued, and the constitution neither recognized the right to a clean and healthy environment as a fundamental right nor bestowed legal standing on citizens to seek protection for the environment. This omission would set the tone for judicial pronouncements limiting the ability to institute public interest litigation on environmental matters. For example, in *Wangari Maathai v Kenya Times Media Trust Ltd*,[37] the plaintiff was declared as not having a right of action against the defendant company whom she sought to restrain from constructing a proposed complex in a recreational park in central Nairobi. The court asserted that only the Attorney General could sue on behalf of the public, limiting attempts by members of the public to seek protection for the environment.

In additional to the narrow judicial interpretations of prevailing law, constitutional amendments in the post-independence period revolved around political change, from transforming Kenya into a republic, to a one-party state and later into a multi-party system.[38] Arguably, this was the priority of the time as opposed to considerations of environmental change and sustainability. As from the late 1960s, modern institutions of environmental governance came into being across the developed world, spreading later to developing countries.[39] In Kenya, none were however, specifically geared to climate change. Similarly, despite the enactment of a plethora of laws touching on the management of natural resources, the interplay between the management of these resources and climate change mitigation and adaptation strategies was not emphasized.

Events on the global stage influenced the advent of domestic climate change governance, though the path to a fully-fledged focus on climate in Kenya was long and painstaking.[40] At the United Nations Conference on Environment and Development held in Rio de Janeiro in 1992, countries, following increased attention to and awareness of the science of climate change, signed the United Nations Framework Convention on Climate Change (UNFCCC).[41] This marked the first international environmental treaty addressing climate change. Kenya ratified the UNFCCC on August 30, 1994. However, as a dualist state at the time, bilateral and multilateral treaties ratified by Kenya had to be incorporated into domestic law (domesticated), so that the rights and duties contained in the treaties became applicable and enforceable domestically.[42] It is likely that in part due to the lack of definitive obligations for reductions of greenhouse gas emissions by developing countries such as Kenya in the UNFCCC and its Kyoto Protocol adopted thereafter in 2005, climate change was not prioritized and domestication of the Convention was not immediately forthcoming.

37 *Wangari Maathai v Kenya Times Media Trust Ltd* (1989) eKLR.

38 Angela Mwenda and James Njuguna Kibutu, 'Implications of the New Constitution on Environmental Management in Kenya'. (2012) 8 *Law, Environment and Development Journal* 76.

39 James Meadowcraft, *Climate Change Governance*, Policy Research Working Paper 4941 (World Bank, 2009).

40 Clarice Wambua. 'The Kenya Climate Change Act, 2016: Emerging Lessons from a Pioneer Law'. (2019) *Carbon and Climate Law Review* Vol 13 Issue 4, pp.257-269.CCLR 4.

41 UN General Assembly, *United Nations Framework Convention on Climate Change*. Resolution adopted by the General Assembly, 20 January 1994, A/RES/48/189. Available at: https://www.refworld.org/docid/3b00f2770.html. Accessed 23 November 2020.

42 Adronico O Adede, 'Domestication of International Obligations' [2001] *KECKRC* 14.

Nonetheless, Kenya participated in all Conferences of the Parties and reported to the Convention through its first National Communication submitted in 2002.[43] At an institutional level, a National Climate Change Activities Coordinating Committee (NCCACC) was established in 1992 as a requirement under the UNFCCC, and in 2009 the then Ministry of Environment and Mineral Resources (MEMR) established a National Climate Change Coordinating Office, which acted as the NCCACC's secretariat.[44] Under the oversight of the MEMR, the KMD, and the National Environment Management Authority (NEMA) took on responsibility for climate change affairs. A Climate Change Coordination Unit (CCCU) at the Office of the Prime Minister was set up to provide high-level political support to climate change activities in Kenya, and the Ministry of Foreign Affairs was also involved in climate change diplomacy.[45] It was a significant step to have institutions specifically geared to climate change, but their multiplicity and overlapping mandates did not yield a streamlined approach to combating the challenge.

While control of pollution and environmental degradation was enshrined in a national environment policy adopted under Sessional Paper No. 6 of 1999,[46] and in the first overarching framework law for the management of the environment with the Environmental Management and Coordination Act (EMCA) enacted the same year,[47] neither contained specific provisions on climate change. However, the EMCA reflected a gradual shift in environmental consciousness, with Section 3 of the law entitling every person in Kenya to a clean and healthy environment and granting all persons the right to sue to safeguard and protect the environment thus enhancing public interest.[48] Further, the courts in cases such as *Peter K Waweru*[49] and *Charles Lekuyen Nabori,*[50] demonstrated this enhanced consciousness about the impact of human activities on nature, which is a close corollary to actions that result in higher GHGs.

In the *Peter K. Waweru* case, for example, the court was tasked with determining a constitutional reference from the Magistrates Court (the subordinate court) to the High Court by the applicant who alleged that his fundamental rights and freedom had been violated by his discriminatory and improper prosecution for discharging raw sewage into a public water source and failure to comply with a statutory notice from the public health authority. The court considered the right to life as guaranteed under Article 71 of the then Constitution; the right to a clean and healthy environment as provided for in Section 3 of the EMCA; the need for application of various principles in international law, such as the principle of sustainable development, the precautionary principle, the principle of intergenerational equity, polluter-pays principle, and the principle of public trust. Based on this analysis, the court determined that the government was under a statutory duty to establish treatment works, which it had as yet not done, and held that no further development in the township should be undertaken without satisfying all environmental requirements. In the C*harles Lekuyen Nabori* case, the government was accused

43 See Government of Kenya, *First National Communication of Kenya to the Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC)*. Available at https://unfccc.int/resource/docs/natc/kennc1.pdf. Accessed 23 November 2020.

44 Government of Kenya, *National Climate Change Response Strategy*. (GOK, 2010) at 89.

45 Ibid.

46 Government of Kenya, Sessional Paper No. 6 of 1999 on Environment and Development, (GoK, 1999).

47 Act No. 12 of 1999.

48 Section 3, Environmental Management and Co-ordination Act (EMCA), Act No 12 of 1999.

49 Misc. Civil Application No. 118 of 2004; Peter K. Waweru v Republic [2006] eKLR.

50 Petition 466 of 2006; Charles Lekuyen Nabori & 9 others v Attorney General & 3 others [2008] eKLR.

of introducing a noxious weed known as *Prosopis juliflora* in Marigat, Rift Valley Province, in the 1980s**,** which affected life, health, property and livelihoods in the area. Though the respondents argued that the petitioners failed to show that their rights had been violated or breached and, therefore, the petitioners had no remedies available to them, the court held that the petitioners had standing to sue and declared that their rights had been infringed when they were deprived of sustainable development. In upholding the polluter-pays principle, the court also determined that the government be held accountable for its actions. A departure from the *Wangari Maathai Kenya Times Media Trust Ltd* era*,* these cases evinced the wind of change that was blowing over Kenya as far as addressing environmental rights was concerned.

Eventually, the broad focus on environment narrowed down to specific cross-cutting challenges in the sector, such as climate change. In April 2010, following a year-long countrywide stakeholder engagement process, the MEMR published a National Climate Change Response Strategy (NCCRS).[51] This was Kenya's first official document dedicated to addressing climate change. The NCCRS set out recommendations to inform policy going forward, noting that prior to its publication, climate information was not easily understandable or factored into government development policies and plans, including the development blueprint, Vision 2030.[52] Chapter 8 of the NCCRS centred on climate change governance and highlighted the fact that a suitable governance framework should stem from both the realities of the negative impacts of climate change in Kenya and from obligations placed on the country by the UNFCCC and Kyoto Protocol.[53] It set out proposals for creating an enabling climate change policy, legal, and institutional/ organisational framework to support implementation of the NCCRS comprehensively and effectively. Importantly, it highlighted the need for Kenya to develop a comprehensive policy on climate change, an appropriate climate change legal framework that provides legitimacy for all climate change activities including necessary actions intended to mitigate against climate change, and an appropriate institutional framework comprising a dedicated climate change institution serving as a coordination instrument, which ensures that all cross-sectoral activities match the overall vision of the NCCRS – a prosperous and climate change resilient Kenya.[54] These proposals had an impact on the next step, which was the development of the 2013-2017 NCCAP, setting out an action plan to take adaptation and mitigation efforts in Kenya to the next level of implementation.[55] The year 2010 was thus a watershed moment for climate change, because a few months after the publication of the NCCRS, a new Constitution was promulgated with far-reaching effects on climate governance in the country.[56]

D. Climate change governance after promulgation of the Constitution, 2010

The 2010 Constitution bolstered emerging efforts in the country to develop a governance structure to adapt to climate change and mitigate its impacts. In 2008, a Member of Parliament with the support of civil society organizations, had set in motion the process of enacting a national climate change law. Parliament passed the Climate Change Authority Bill, which had

51 Government of Kenya, *National Climate Change Response Strategy*. (GOK, 2010).
52 Government of Kenya, *Kenya Vision 2030: A Globally Competitive and Prosperous Kenya*, (GoK, 2007).
53 Government of Kenya, *National Climate Change Response Strategy*. (GOK, 2010) at 88.
54 Government of Kenya, *National Climate Change Response Strategy*. (GOK, 2010).
55 Government of Kenya, *National Climate Change Action Plan* (NCCAP) (2013-2017), (GoK, 2013).
56 The new Constitution was promulgated on the 27th of August 2010.

been drafted by this team in 2013.[57] However the then president, Mwai Kibaki, declined to assent to the Bill citing the need for more robust public participation.[58] He relied on the 2010 Constitution's high standard for public participation.[59] This application of the new Constitution marked its foray into the domain of climate change. Following the Bill's shelving, widespread consultations were held on a substantially revised draft, and in 2014, the Climate Change Bill was introduced in Parliament. The revised Bill was subsequently enacted and entered into force on May 27, 2016 as the Climate Change Act, 2016, with supporting policy following thereafter.

Salient provisions of Kenya's climate change policy framework

Ordinarily, policy precedes law. This is ideal as a means of giving the law justiciable basis and an implementation framework.[60] In the case of climate change, however, the policy was approved after the Climate Change Act had been enacted. The challenge with such an approach includes implementation difficulties for the just-enacted law and demands for immediate amendments to rectify anomalies that could have been forestalled or foreseen if the ideal process of law following policy had been adhered to.[61] Nonetheless, the National Climate Change Framework Policy,[62] though approved after the Climate Change Act, was a welcome addition to Kenya's climate change governance structure, especially as the two documents were developed together with the policy only approved by Parliament after the law, but essentially in the same year- 2016.

The policy aims to provide a clear and concise articulation of overall response priorities to climate variability and change in the country and acknowledges that the Constitution has set out a legal commitment to attain ecologically sustainable development, hence providing a firm basis to address the challenge of climate change while striving to attain the development goals set out in Kenya's Vision 2030.[63] It adopts an overarching mainstreaming approach to ensure the integration of climate change considerations into development planning, budgeting and implementation in all sectors and at all levels of government.[64] It also contains policy statements on different actions to be taken by government to realize low carbon climate resilient development, among other goals, but fails to delineate specific actions to be taken by county governments, *vis-à-vis* the national government.

Kenya also has a National Policy on Climate Finance,[65] which provides a guiding framework to enhance national financial systems and institutional capacity to effectively access, disburse, absorb, manage, monitor and report on climate finance in a transparent and accountable manner. The policy elaborates on the climate finance aspects of the Climate Change Act and is also

57 Clarice Wambua. 'The Kenya Climate Change Act 2016: Emerging Lessons from a Pioneer Law'. (2019) *Carbon and Climate Law Review* Vol 13 Issue 4, pp.257-269.CCLR 4.

58 Felix Kiprono, *At last, Kenya Signs Bill into Climate Change Law*. May 20 2016. Climate Change Information Portal. Available at http://meas.nema.go.ke/unfccc/174-2/. Accessed 24 November 2020.

59 Enshrined, for example, in Article 10 (2) (a); 69 (1) (d) and 118 (1) (b).

60 Kenya Law Reform Commission (KLRC), *A Guide to the Legislative Process in Kenya*, (KLRC, 2015).

61 Ibid with far-reaching effects on climate governance in the country .

62 Government of Kenya, Sessional Paper No. 5 of 2016.

63 Government of Kenya, National Climate Change Framework Policy, Sessional Paper No. 5 of 2016 at 4.

64 Mainstreaming moves climate change from marginal discourse and puts it in the centre of a discussion, to re-design and re- plan actions under the lens of climate change. See Sandra Guzman, *What Is Mainstreaming Climate Change in Theory?* Berlin Conference on Global Environmental Change. 2016. Available at https://refubium.fu-berlin.de/handle/fub188/19025. Accessed 24 November 2020.

65 Government of Kenya, Sessional Paper No. 3 of 2017.

informed by the 2010 Constitution, which introduced a new system of public administration that vests governance authority in the national government, and 47 county governments with the aim of decentralising State organs, their functions and services, as well as ensuring equitable benefit sharing and dealing with the marginalization experienced in the pre-2010 Constitution era.

Salient provisions of Kenya's climate change institutional framework

The Climate Change Act establishes an institutional framework comprising a National Climate Change Council (NCCC) at the apex, chaired by the President, who is deputized by the Deputy President and with the function of providing an overarching national climate change coordination mechanism.[66] The NCCC's high-level convening power is geared towards enhancing intersectoral and inter-governmental responses to climate change and is symbolic of the high priority given to climate change in the country. Its membership comprises a mix of representatives from Cabinet Secretaries of key ministries (environment, energy, economic planning and national treasury), the chairperson of the Council of Governors, and one representative each drawn from academia, civil society, private sector, and marginalized communities.[67] While this mix ensures different views and interests are considered from a cross-section of the Kenyan public, council members may not always be able to apply their expertise independently due to pressure from their respective institutions to conform to the institutional position and push the institutional agenda.[68] In addition to this, placing the President and his Deputy as the chairperson and vice-chairperson, respectively, relies on the political commitment of the government to combat climate change and this will be reflected in how committed this leadership will be to the council.

The Cabinet Secretary responsible for climate change affairs serves as secretary to the NCCC and is responsible for overall implementation of the Climate Change Act, including the development of regulations for incentives to promote climate initiatives,[69] regulations to guide the reporting and verification of climate change actions,[70] and development of a strategy and regulations for climate finance within one year of the law coming into force.[71] It is critical to note that both the time-bound and non-time bound regulations have not yet been enacted, despite the law's commencement on the May 27, 2016. In addition to the regulation-making function, the Cabinet Secretary leads formulation of policy and the National Climate Change Action Plan (NCCAP), which is a five-year plan that prescribes measures and mechanisms for climate action.[72] A Climate Change Directorate is also established under the law as the secretariat to the NCCC, and as a lead agency of the government on national climate change plans and actions for operational coordination.[73] Other entities include the National Environmental Management Authority, established under the EMCA, which enforces compliance with the climate change duties under

66 Section 5, Climate Change Act, 2016.

67 Section 7 (2) Climate Change Act, 2016.

68 In a study on climate change advisory councils, for example, it was found that the councils consisting entirely of academic representation felt they had most independence, likely due to less pressure from their respective institutions to focus on certain issues. See Sally Weaver, Sanna Lötjönen and Markku Ollikainen, *Overview of National Climate Change Advisory Councils*, The Finnish Climate Change Panel Report 3/2019.

69 Section 26 (2), Climate Change Act, 2016.

70 Section 22, Climate Change Act, 2016.

71 Section 25 (9), Climate Change Act, 2016.

72 See Part III, Climate Change Act, 2016. The Government of Kenya, *National Climate Change Framework Policy*, Sessional Paper No. 5 of 2016 and the Government of Kenya, *National Climate Change Action Plan* 2018-2022, have been developed pursuant to this requirement under the Climate Change Act.

73 Section 9, Climate Change Act, 2016.

the Climate Change Act,[74] and Parliament, which receives, reviews and makes recommendations on evaluation reports prepared by the NCCC on the performance of climate change duties by public entities.[75] Parliament also approves presidential nominees to the NCCC.[76]

The 2010 Constitution has influenced the composition of the NCCC in its appointments, since the Climate Change Act prescribes that the President must ensure that not more than two thirds of the NCCC membership is of one gender.[77] This requirement follows the Constitutional principle that not more than two thirds of the members of all elective or appointive bodies shall be of the same gender.[78] However in making appointments to the first membership of the NCCC, the President did not adhere to the two-thirds gender principle. The Climate Change Act lays out the procedure for the appointment of council members. According to the law, all the nominees to the Council with the exception of the Cabinet Secretaries and the chairperson of the Council of Governors are required to be vetted by Parliament, which then submits the approved names to the President as the appointing authority.[79] In appointing the first council members, the names were gazetted before parliamentary approval, contrary to the law.[80] Further, the selection process for CSOs, academia and marginalized community representatives was subject to objection by the representative bodies. In the case of CSOs, for example, they had selected a representative but the one gazetted was not the choice they had made.[81] In light of these issues, Transparency International Kenya, the Green Belt Movement, and the Pan-African Climate Justice Alliance, in close collaboration with other CSOs working on climate change, challenged the appointment process in court.[82] Despite the court finding that the procedure for nomination, approval and appointment of members of the NCCC had been violated, the NCCC was never reconstituted and is yet to be operationalized. The failure to have the NCCC up and running, despite being a pivotal institution with critical obligations and functions, is illustrative of the failure to follow through with not just the Climate Change Act requirements, but also the constitutional imperatives for good governance as well as equality and inclusiveness, which are all national values and principles of governance. After developing the 2018-2022, the NCCAP and the Ministry of Environment and Forestry announced that the President had approved the Plan.[83]However, the NCCC is the entity granted the power to approve and oversee implementation of the NCCAP under the law.[84] By the President giving approval outside the NCCC, he disenfranchised the constituency represented by the membership of the council and disregarded the rule of law as well as tenets of public participation guaranteed by the Constitution.[85]

74 Section 17, Climate Change Act, 2016.
75 Section 15 (9) and (10), Climate Change Act, 2016.
76 Section 7 (4), Climate Change Act, 2016.
77 Section 7 (6), Climate Change Act, 2016.
78 Article 27 (8), Constitution of Kenya, 2010.
79 Section 7 (4), Climate Change Act, 2016.
80 Robert Kibugi, 'Governing Climate Change for Sustainable Development: Legal and Institutional and Policy Perspectives in Kenya". In Patricia Kameri-Mbote and Collins Odote, *Blazing the Trail: Professor Charles Okidi's Enduring Legacy in The Development of Environmental Law*. (University of Nairobi, School of Law, 2019). 194-215 at 201.
81 Caroline Othim, *Independent Reporting Mechanism (IRM): Kenya Progress Report 2016–2018*, (Open Government Partnership, 2018).
82 See *Republic v National Assembly & 5 Others Ex-parte Greenbelt Movement & 2 Others [2018] eKLR; Judicial Review 11 of 2017*.
83 See https://twitter.com/environment_ke/status/1267790850010071041?lang=en. Accessed 1 December 2020.
84 Section 6 (b), Climate Change Act, 2016.
85 Article 10 (2), Constitution of Kenya, 2010.

The Climate Change Act also recognizes the devolved system of government introduced by the Constitution,[86] and sets out in detail the roles of the national and county governments. These provisions buttress the delineation of roles under the Fourth Schedule of the Constitution, which provides that the national government is tasked with protection of the environment and natural resources with a view to establishing a durable and sustainable system of development, while county governments implement national government policies on natural resources and environmental conservation.[87] Specifically with regards to climate change, the law highlights climate change duties for the public sector, including State departments and national government public entities, which are to be imposed by the NCCC.[88] The Climate Change Act expressly requires the national and county governments to integrate climate change in their exercise of powers and performance of functions.[89] County governments are also required to ensure that their County Integrated Development Plans (CIDPs) and County Sectoral Plans mainstream the National Climate Change Action Plan.[90] These plans form the basis of budgetary allocation and spending in a county,[91] and it is critical that they reflect climate concerns. Each County Governor is further required to designate a member of the County Executive Committee as responsible for coordinating climate change affairs,[92] and to submit through this designated County Executive Committee Member, an annual report of the county's progress in mainstreaming climate action to the County Assembly, with a copy to the CCD for information purposes.[93]

A review of different CIDPs shows that mainstreaming is still a work in progress and counties are at different stages of actualizing this goal. For example, the Elgeyo Marakwet CIDP is elaborate.[94] It sets out the CIDP's linkage with the National Adaptation Plan (NAP 2015-2030), and NCCRS. It highlights the impact of climate change in the county, noting the increased vulnerability of mostat-risk groups, such as women, youth, children, and persons with disabilities, and then sets out adaptation and mitigation measures and mainstreaming strategies. The CIDP also sets out in detail, a variety of climate change management proposed projects with information on objectives. Activities, targets, cost, source of funding, time frame, implementing agency, and sub-location and ward where activity will be carried are also provided. Among the mainstreaming activities highlighted is the development of a county climate change policy. Laikipia's CIDP mentions that it has integrated the NCAAP into its CIDP, but it does not elaborate on the linkages.[95] It sets out the impacts of climate change in different sectors where applicable, and proposed action for adaptation and mitigation, including adoption of climate smart technology, improved access to climate information, capacity building and advocacy and disaster risk reduction policies. Like Elgeyo Marakwet, Laikipia's CIDP sets out a goal to formulate and implement a county

86 Article 10(2), Constitution of Kenya, 2010.
87 Fourth Schedule, Constitution of Kenya, 2010.
88 Section 15, Climate Change Act 2016.
89 Section 3(2), Climate Change Act, 2016.
90 Section 19(2), Climate Change Act, 2016.
91 Section 107(2), County Governments Act, 2012.
92 Section 19 (3), Climate Change Act, 2016.
93 Section 19 (5), Climate Change Act, 2016.
94 County Government of Elgeyo Marakwet, *County Integrated Development Plan (CIDP) 2018-2022*, (County Government of Elgeyo Marakwet, 2018).
95 County Government of Laikipia, *Second County Integrated Development Plan* 2018-2022, (County Government of Laikipia, 2018).

climate change policy. It also highlights that the source of funding for certain activities such as integrated rangeland restoration and monitoring will be derived from the county government or climate change adaptation fund. This county fund is not yet established.

County Governments may enact legislation that aids the implementation of the county's functions under the Climate Change Act.[96] Whereas it may appear to be a duplication of efforts where County Assemblies legislate on matters already legislated upon at the national level, county laws are important for bringing issues down to the local level and highlighting local concerns. In line with this, counties have begun to develop local climate laws, with Kisumu being an example of a county that has a Climate Change Act that sets out local level institutions for climate change, generally, as well as mechanisms and modalities for adaptation, mitigation and financing with provisions that mimic the national Climate Change Act.[97] Other counties have taken positive action geared towards the financing of climate change action by enacting specific climate fund legislations and regulations. For instance, the county governments of Makueni, Wajir, Kitui, Tharaka Nithi, Garissa and Isiolo have in place detailed Climate Change Funds that aim to facilitate access and proper use of climate finance flows to the county.[98] However, not all of Kenya's 47 counties have taken steps to enact climate change-related regulations. This is however not surprising, as studies have shown that most members of County Assemblies lack understanding of climate change action and what it entails,[99] and this highlights the need for capacity building at the county level to empower more local level action. To this end, initiatives such as the Financing Locally-Led Climate Action Program (FLLOCA) funded by the World Bank and spear headed by the National Treasury have been launched to build county level capacity for planning, budgeting, reporting and implementation of local climate actions in partnership with communities, under the coordination of national government.[100]

There are currently no enacted regulations to operationalize the national Climate Change Fund established under the Climate Change Act as a national financing mechanism for priority climate change actions and interventions approved by the NCCC.[101] This delay is partly due to a lack of cohesion at the institutional level. Though the fund is to be vested in the National Treasury, administered by the council and managed by the principal secretary for climate change affairs, it is a creature of the Climate Change Act.[102] However, the National Treasury does not recognize this and developed the Draft Public Finance Management (Climate Change Fund) Regulations,

96 Section 19(4), Climate Change Act, 2016.

97 The Kisumu County Climate Change Act 2020. Available at: http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/2020/KisumuCountyClimateChangeAct2020.pdf. Accessed 24 October 2022. Additional counties with climate legislation include Nakuru, Turkana and Taita Taveta, among others.

98 Public Financial Management (Makueni County Climate Change Fund) Regulations, 2015; The Wajir County Climate Change Fund Act, 2016; The Public Finance Management Act (Kitui County Climate Change Fund) Regulations, 2018; The Tharaka Nithi County Climate Change Fund Act, 2019; The Garissa County Climate Change Fund Act, 2018; and the Isiolo County Climate Change Fund Regulations, 2018.

99 Development Initiatives, *Tracking subnational government investments in climate change mitigation and adaptation in Kenya*, (Development Initiatives, 2019).

100 Council of Governors, *Financing Climate Action*. 4 Oct 2020. Available at https://cog.go.ke/component/k2/item/210-financing-climate-action. Accessed 25 October 2022

101 Section 25 (1) Climate Change Act, 2016.

102 Section 25 (2) and (4), Climate Change Act, 2016.

2018,[103] pursuant to the Public Finance Management Act (PFMA)[104] as opposed to Section 25 of the Climate Change Act. This creates confusion and conflict between the provisions of the Climate Change Act and the PFMA.[105] The regulations have not been enacted to date. Whereas the national Treasury has proceeded to develop further guidelines on climate finance, such as the published circulars to both non-state actors and government entities on tracking and reporting climate finance,[106] failure to streamline climate finance mobilisation at the national level and link funds to the sectoral and county levels through the envisioned Climate Change Fund withholds the benefits of this critical mechanism from the people, and runs contrary to the national values and governing principles of good governance, transparency and accountability espoused in the 2010 Constitution.[107]

Salient provisions of Kenya's climate change legislative framework

The Climate Change Act is the first domestic climate change law in an Africa country, and the push for a national climate change law and its eventual enactment in Kenya was a momentous occasion for climate change governance in Kenya and precedent-setting on the continent. In its preamble, the Act sets out an aim to provide for a regulatory framework for enhanced responses to climate change, to provide for mechanisms and measures to achieve low carbon development and for connected purposes. It adopts a mainstreaming approach with the National Climate Change Action Plan (NCCAP), which is as a critical tool for mainstreaming climate change responses into all sectors of the economy, to achieve its objectives.[108] The Climate Change Act highlights the importance of mainstreaming climate change action into different strategic areas. This includes, through the identification of priority strategies and actions for disaster risk reduction related to climate change and incorporating them into the functions and budgets of each national government and county government entity, and the development and incorporation of a public safety component to prevent climate change-induced disasters and manage emergency responses by all levels of government.[109] This recognizes the adverse effects of climate change in Kenya and the need to ensure protection of all persons from the loss of life, injury, destruction of property, loss of livelihoods, interruptions to education and health services and lack of access to adequate food and water.

Climate integration is further explicitly required in the Climate Change Act, specifically in all forms of assessments and in education. NEMA is required to integrate climate risk and vulnerability assessments into all forms of assessment, liaising with relevant lead agencies for technical advice.[110] While the Environmental Impact Assessments (EIAs) in Kenya have generally failed

103 Government of Kenya, The Draft Public Finance Management (Climate Change Fund) Regulations, 2018. Available at https://www.treasury.go.ke/draft-public-finance-mangement-climate-change-fund-regulations-2018.html#:~:text=The%20Draft%20Public%20Finance%20Management%20(Climate%20Change%20Fund)%20Regulations%2C%202018&text=The%20Climate%20Change%20Fund%20(CCF,climate%20change%20actions%20and%20interventions. Accessed 23 August 2020.

104 Government of Kenya, Public Finance Management Act No.18 of 2012.

105 Robert Kibugi, 'Governing Climate Change for Sustainable Development: Legal and Institutional and Policy Perspectives in Kenya', in Patricia Kameri-Mbote and Collins Odote, *Blazing the Trail: Professor Charles Okidi's Enduring Legacy in The Development of Environmental Law*. (University of Nairobi, School of Law, 2019). 194-215 at 213.

106 Government of Kenya, *National Treasury Circular No.13 /2020 on Tracking and Reporting of Climate Finance Flows and Climate Change Related Expenditure in Kenya*. Available at https://www.treasury.go.ke/publications/circulars.html. Accessed 25 July 2020.

107 Article 10 (2) (c), Constitution of Kenya, 2010.

108 Section 13 (3) and (4), Climate Change Act, 2016.

109 Section 18, Climate Change Act, 2016.

110 Section 20, Climate Change Act, 2016.

to effectively integrate climate change mitigation and adaptation measures, [111] the draft EIA Regulations require project proponents to integrate climate change vulnerability assessments, and relevant adaptation and mitigation actions.[112] As environmental assessments are key tools for ensuring sustainable development, once enacted these regulations would advance the goal of sustainable development, which is a national value and principle of governance under the 2010 Constitution. The incorporation of climate change in all forms of assessment would also ensure the State meets its obligations under the Constitution to establish systems of environmental impact assessment, environmental audit and monitoring of the environment, ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources and eliminate processes and activities that are likely to endanger the environment, among others.[113]

With regards to education, the Climate Change Act requires the Kenya Institute of Curriculum Development to mainstream climate change through integration in the national education curricula, in various disciplines and subjects and at all levels.[114] This is to be done on the advice of the NCCC, which is also expected to advise public agencies responsible for regulating universities and tertiary institutions' curricula on integration of climate change into their curricula. However, as the NCCC is currently non-operational, this specific provision is yet to be actualized. The government has instead developed an education policy aimed at promoting sustainable development, and this policy takes note of the importance of providing climate change related education in a bid to ensure rationality between education and other key sectors of sustainable development. The policy further outlines strategies that the county government in collaboration with the Ministry of Education should implement to achieve sustainable development with such as creating public awareness and promoting research and innovation at the community level.[115] Additionally, there are draft guidelines by the Ministry of Environment and Forestry that provide information on how climate change can be integrated in education.[116] The guidelines acknowledge that appropriate knowledge and skills to respond to climate change have not been mainstreamed in the education curriculum and call on curriculum developers to design curricula that integrates climate change education for community resilience, climate proofing and empowering learners to respond to climate change. While these initiatives to integrate climate in the curricula are a step in the right direction, they are inadequate as currently framed. For example, the draft guidelines do not segregate the needs of learners at all levels of the national curricula. This failure to take the system-wide mandatory mainstreaming approach throughout basic education, from early childhood onwards, as well as the failure to

111 Julius Kamau and Francis Mwaura, 'Climate Change Adaptation and EIA Studies in Kenya', (2013) *International Journal of Climate Change Strategies and Management*, 2013.

112 See, The Draft Environmental Management and Coordination (Strategic Assessment, Integrated Impact Assessment And Environmental Audit) Regulations, 2018. Available at https://www.nema.go.ke/images/featured/Draft_Regulation_22.5.18.pdf. Accessed 25 November 2020.

113 Article 69 (1), Constitution of Kenya, 2010.

114 Section 21 (1), Climate Change Act, 2016.

115 Government of Kenya, *Education for Sustainable Development Policy for the Education Sector*, (GoK, 2017). Available at: https://www.education.go.ke/index.php/downloads/file/308-unesco-policy-for-education-sector-web-fa. Accessed 20 October 2020.

116 Government of Kenya, *Draft Guidelines for Mainstreaming Climate Change in Curricula at all Levels of Education and Training*, (GoK, 2020). Available at: http://www.environment.go.ke/wp-content/uploads/2020/06/Climate-change-curriculum-guidelines31st-May-2020.pdf Accessed 20 October 2020.

involve the NCCC, as envisioned in the law, means that the appropriate broad-based outlook to climate change integration in the education sector is missing.

Part IV of the Climate Change Act deals with duties relating to climate change. These are statutory obligations conferred on public and private entities to implement climate change actions consistent with the national goal of low carbon climate resilient development, and the duties are, therefore, a means to incorporate climate action into day-to day life. According to the law, the NCCC may on the recommendation of the Cabinet Secretary of the ministry for the time being responsible for climate change matters and in consultant with relevant Cabinet Secretaries and county government impose duties relating to climate change on any public entity at all levels of government.[117] The imposition of these duties is to be preceded by public awareness and consultations, and the duties are to be imposed, varied or revoked through regulations made by the Council. The NCCC may also, in consultation with the Cabinet Secretary and relevant State Departments, impose climate change obligations through regulations, on private entities, including entities constituted under the Public Benefit Organizations Act, 2013. The regulations will govern the nature and procedure for reporting on performance by private entities, including the authority to monitor and evaluate compliance.[118]

NEMA is mandated to monitor compliance of entities, and the law sets out offences such as failure or refusal to give NEMA access to any land, hindering NEMA's execution of its duties, failure or refusal to give NEMA information that is lawfully required, and giving false or misleading information to NEMA. A person found convicted of these offences can be fined up to Ksh1 million or imprisoned for no more than five years, or both.[119] The imposition of these duties relating to climate change will be critical to enable Kenya to meet its Nationally Determined Contribution (NDC) under the Paris Agreement.[120] The updated NDC, which was submitted to the UNFCCC in December 2020, set out Kenya's goal to abate its GHG emissions by 32 per cent by 2030 relative to the Business As Usual (BAU) scenario of 143 MtCO2eq, with the focus on mitigation across six sectors: energy, transportation, industrial processes, Agriculture, Forestry and Other Land Use (AFOLU) and the waste sector.[121] The imposition of climate duties aligned to the NDC is necessary, ensuring that this is done with a clear understanding on the economy-wide effects of the imposed duties and the ideal incentives to stimulate action.

Inadequate monitoring in the different sectors hampers mainstreaming that would provide critical baseline information that can be used for proper planning. For example, in the forest sector, which is important in the context of climate change for its carbon sequestration potential, the Constitution sets out a goal to 'work to achieve and maintain a tree cover of at least 10 per cent of the land area of Kenya.'[122] However, the term "tree cover" is undefined, and the Kenya

117 Section 15 (1), Climate Change Act, 2016.
118 Section 16 (2), Climate Change Act, 2016.
119 Section 17, Climate Change Act, 2016.
120 Nationally Determined Contributions are long-term goals that embody efforts by each country to reduce national emissions and adapt to the impacts of climate change. Article 4 (2) of the Paris Agreement requires each Party to prepare, communicate and maintain successive NDCs.
121 Government of Kenya, Kenya's Updated Nationally Determined Contribution, 2020. Available at https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Kenya%20First/Kenya's%20First%20%20NDC%20(updated%20version).pdf. Accessed 24 October 2022.
122 Article 69 (1)(b) of Kenya's Constitution.

Forest Service assesses forest cover and not tree cover.[123] There is, therefore, no systemic data collection to assess the tree cover in the country and monitor performance towards achieving the target set by the Constitution.[124] Mainstreaming also suffers from the lack of a cohesive approach within government on the place of ecologically sustainable development. Recent development programmes such as the Big Four Agenda, which advocate for affordable housing, food security, access to health and robust manufacturing industry, do not enumerate the place of climate change or make reference to environmental sustainability.[125]

The government's Third Medium Term Plan (MTP III), which actualizes the long-term development plan of Vision 2030 and also incorporates the Big Four Agenda, more deeply incorporates climate change. It highlights the fact that during the previous MTP period (MTP II) (2013-2017), climate change adaptation and mitigation actions were to some extent mainstreamed across the sectors, and one of the lessons was that climate change financial resources into the country are skewed in favour of mitigation actions.[126] MTP III, therefore, calls for a balance in allocation of resources between adaptation and mitigation, but does not go further to elaborate steps in the medium term period to achieve this balance. Kenya's NDC is, however, clear that adaptation is the country's priority,[127] and as such development planning needs to similarly highlight this. A more recent initiative, the Building Bridges Initiative, seeking consensus to amend the 2010 Constitution, also makes no mention of any environmental or climate-related interventions.[128] This failure to sufficiently take cognisance of climate change in development agenda is likely to affect the very realization of developmental goals.[129]

In addition to mainstreaming, a key focus of the climate change legislative framework is its protection of procedural rights, including access to information, public participation, and access to justice. The NCCC and the CCD are required to publish and publicize all-important information within their mandate, and the Climate Change Act refers to the constitutionally guaranteed right of access to information.[130] A request for information under the Climate Change Act may be subject to the payment of a prescribed fee where the NCCC or the CCD incurs expenses in providing the information.[131] The Constitution guarantees the right to access to information without tying this right to payment, and it is paramount that information on climate matters is provided freely. The discretion to levy payment for information under the law may lead to the denial of this right for those who cannot afford to pay.

123 Government of Kenya, *Taskforce Report on Forest Resources Management and Logging Activities in Kenya* (GoK, 2018), at 30.
124 Ibid.
125 Government of Kenya, *The Big Four Agenda*. Available at https://www.president.go.ke/. Accessed 20 October 2020.
126 Government of Kenya, Third Medium Term Plan, 2018 – 2022, (GoK, 2018). At 10. Available at http://vision2030.go.ke/inc/uploads/2019/01/THIRD-MEDIUM-TERM-PLAN-2018-2022.pdf. Accessed 4 December 2020.
127 Government of Kenya, *Kenya's Intended Nationally Determined Contribution* (INDC) (GoK, 2015).
128 Government of Kenya, *Report of the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report, Building Bridges to a United Kenya: From a Nation of Blood Ties to a Nation of Ideals*, (GoK, 2020). Available at: https://e4abc214-6079-4128-bc62-d6e0d196f772.filesusr.com/ugd/00daf8_bedbb584077f4a9586a25c60e4ebd68a.pdf. Accessed 2 December 2020.
129 National Climate Change Action Plan, 2018-2022.
130 Article 35, Constitution of Kenya, 2010.
131 Section 24 (5) (c), Climate Change Act, 2016.

Participation of the people is a national value and principle of governance under the Constitution,[132] and the State is obliged to encourage public participation in the management, protection and conservation of the environment,[133] while Parliament is required to facilitate public participation in all law-making.[134] The Climate Change Act expounds on these constitutional requirements, specifically providing that public entities should undertake public awareness and conduct public consultations when developing strategies, laws and policies relating to climate change,[135] and requiring that public consultation are undertaken in a manner that ensures the public's contribution 'makes an impact on the threshold of decision-making'.[136] To make such an impact, the public needs to provide substantial input in the decision-making process, and this is only achievable where the public is given full and accurate information and granted an opportunity to be heard and their views taken into consideration. It also means that public entities not only consider the public contribution, but also provide feedback to the consulted public, demonstrating clearly how that contribution was taken into account when making the climate-related decision in question.[137]

The Climate Change Act also contains a Schedule detailing the procedure for public consultations in matters relating to climate change policy, strategy, programme, plan or action,[138] and also requires the development of regulations published by the NCCC upon the recommendation of the Cabinet Secretary, to ensure public participation in decision making is actualized at all levels of government.[139] Meaningful participation is yet to be embedded in all climate action as witnessed in GHG intensive projects such as in the *Lamu Coal* case, where the project proponent aiming to develop Kenya's first coalfired power plant had their EIA licence revoked for lack of effective participation.[140] This case is also significant as the Tribunal emphasized the importance of climate considerations in such projects, stating that the project proponent's failure to consider and comply with the provisions of the Climate Change Act was significant even though its eventual effect would be unknown.

According to the Tribunal,

> …in applying the precautionary principle, where there is lack of clarity on the consequences of certain aspects of the project, it behoves the Tribunal to reject it. On climate change issues this is of greater importance and made the provisions on climate change within the report incomplete and inadequate.

The right of access to justice is enshrined in the Constitution,[141] and buttressed in the Climate Change Act. Section 23 of the Act sets out the measure for enforcement of rights relating to climate change and highlights that a person may, pursuant to Article 70 of the Constitution, apply to the

132 Article 10, Constitution of Kenya, 2010.
133 Article 69 (1) (d), Constitution of Kenya, 2010.
134 Article 118 (1) (b), Constitution of Kenya, 2010.
135 Section 24 (1), Climate Change Act, 2016.
136 Section 24 (2), Climate Change Act, 2016.
137 Robert Kibugi, *Policy Brief on Political Economy of Climate Change Interventions in Kenya: Who Benefits and Who Loses?* (Friedrich Ebert Stiftung, 2018) at 16.
138 Schedule on Provisions on Public Consultation, Climate Change Act, 2016.
139 Section 24 (3) Climate Change Act, 2016.
140 *Save Lamu & 5 Others v National Environmental Management Authority (NEMA) & Another* [2019] eKLR; Tribunal Appeal No. NET 196 of 2016.
141 Article 48, Constitution of Kenya, 2010.

Environment and Land Court alleging that a person has acted in a manner that has or is likely to adversely affect efforts towards mitigation and adaptation to the effects of climate change. Such an applicant does not need to demonstrate that they have incurred loss or suffered injury. As such, the Climate Change Act facilitates public interest litigation on climate change matters, and also opens the gate for rights-based climate litigation, buoyed by the constitutional obligation placed on the judiciary to purposively interpret the Constitution and protect the rights enshrined in it.[142] The remedies available to an applicant include a court order or direction compelling prevention, stoppage or discontinuation of the harmful act or omission, compelling a public officer to take measures to prevent or discontinue the harmful act or omission or providing compensation to a victim of a violation relating to climate change duties.[143]

The potential impact of this is that a wide variety of climate-related suits are possible in Kenya. As has been witnessed in other parts of the world, there may be suits instituted by specific groups such as children, women or the elderly, with claims against public entities such as the national government, county government or State agencies, or private entities such as carbon majors operating in the country. The claims may point at inaction or action that adversely affects efforts towards mitigation and adaptation, which could include the State's failure to pass the requisite laws as envisioned in the Climate Change Act, failure to establish the relevant mechanisms such as the Climate Change Fund, imposition of inadequate climate duties on public or private sector, or the failure of the entities to observe the duties imposed on them. The complexity of demonstrating claims of this nature has been reduced as the science on climate change grows, and climate cases rise globally, presenting rich precedent.[144]

The climate change legislative framework is also emphatic on substantive rights pegged on the Constitution's Bill of Rights, which guarantees the right to life, property, family, language and culture, a clean and healthy environment, as well as socio-economic rights including the right to the highest attainable standard of health, accessible and adequate housing and to reasonable standards of sanitation; freedom from hunger, the right to have adequate food of acceptable quality, the right to clean and safe water in adequate quantities; and the right to education.[145] As climate change impacts affect the realization of these rights,[146] it is imperative that human rights are integrated in all climate action.[147] Save for a mention on environmental rights,[148] the Climate Change Act does not specifically refer to the other substantive rights. However, its focus on building adaptive capacity,[149] allowing the NCCC to impose climate change duties on public and private entities,[150] and focused provisions on groups in vulnerable situations such as women[151] and indigenous peoples[152] signifies an intention to have human rights and

142 Articles 20 and 23, Constitution of Kenya, 2010.
143 Section 23 (2), Climate Change Act, 2016.
144 For examples of different cases, see climate change litigation databases at: http://climatecasechart.com/; and https://climate-laws.org/. Accessed 6 December 2020.
145 Chapter Four –The Bill of Rights, Constitution of Kenya, 2010.
146 UNEP, *Climate Change and Human Rights* (UNEP, 2015).
147 Ibid.
148 Section 23, Climate Change Act, 2016.
149 See for example, Section 3 (2) (b) of the Climate Change Act, 2016 which sets out the objects of the Act to include to build resilience and enhance adaptive capacity. To further this, Section 13 (3) (c) highlights that the NCCAP shall prescribe measures and mechanism for adaptation to climate change.
150 Section 15 and 16, Climate Change Act, 2016.
151 See for example, Section 3 (2)(e); Section 9 (8) (f); and Section 25 (5) (e).
152 See for example Section 7 (2) (h); and Section 13 (5) (g).

corresponding obligations reflected in any climate action. More explicitly, the Climate Change Act sets out that in any action, the NCCC, Cabinet Secretary, county government, and any State organ are to be guided by the imperative to ensure equity and social inclusion in allocation of effort, costs, and benefits to cater for special needs, vulnerabilities, capabilities, disparities and responsibilities.[153] Also, in formulating the NCCAP, the Cabinet Secretary shall be informed by fiscal circumstances, in particular the likely impact of the action plans, strategies and policies on marginalized and disadvantaged communities.[154] Whilst the Climate Change Act sets out a goal to formulate a gender and intergenerational responsive public education and awareness strategy,[155] there is need to go further in the implementation of the law to reflect how all groups in vulnerable situations, including the elderly, persons with disabilities, children, the youth, and indigenous people, who tend to be most affected by impacts of climate change, can be protected as well as be agents of change.

E. Conclusion

Constitutionalism and constitutional law have unavoidable impacts on the fields of environmental law, and these fields in turn shape constitutional law.[156] As has been set out in this chapter, national climate change governance in Kenya is largely founded on the 2010 Constitution and its emphasis on sustainable development, which is one of the values and principles of national governance.[157] Other constitutional values and principles such as sharing and devolution of power, the rule of law, democracy and participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability are also key components of effective climate change governance.

As set out in Article 10 of the Constitution, these values and principles are mandatory and binding, and should be considered whenever any climate-related decisions are made, or action is taken. In addition to being hinged on these national values and governing principles, the climate change governance framework is tied to Article 69 (2) of the Constitution, which requires every person to cooperate with State organs and other persons in working to protect and conserve the environment and ensure ecologically sustainable development. These constitutional provisions inform the proposal for climate duties to be imposed on both public and private entities under the Climate Change Act, as well as the provisions on financing, education and awareness and offences and penalties, among others, to enable wide and varied climate action.

As such, the Constitution promulgated in 2010 has been transformative in ushering in a climate governance framework that provides the much-needed low carbon climate resilient development necessary for sustainable development. At promulgation, the Constitution offered hope that climate change concerns in the country would be adequately addressed, and there has been reasonable progress in meeting this goal. For example, with the establishment of an

153 Section 4 (2) (d), Climate Change Act, 2016.
154 Section 13 (5)(d).
155 Section 8 (2) (c), Climate Change Act, 2016.
156 James R May, 'New and Emerging Constitutional Theories and the Future of Environmental Protection' (2010) 40 *Envtl L Rep News & Analysis* 10989.
157 Article 10, Constitution of Kenya, 2010.

overarching national climate law and policy, the establishment of climate-focused institutions and the action at the ground-level through the robust activities carried out by counties in climate legislation and planning, and the efforts to ensure access to information, public participation and access to remedies for climate wrongs. This has been actualized through the adoption of mainstreaming as the methodology for implementing climate action in Kenya, and laying emphasis on a rightsbased approach to decision-making and action.

However, there are also broken dreams. The constitutional values and principles on gender equality, inclusivity, transparency, rule of law and good governance are not wholly embraced as has been witnessed in the appointments of the CCC members, the establishment of the Climate Change Fund, and the failure to enact the requisite regulations under the Climate Change Act within the timelines stipulated in law. Further, the mainstreaming approach to governing climate change is hampered by challenges, including the lack of baseline data that would aid in proper planning, and the insufficient capacity at county level, meaning that counties are at widely differing levels in mainstreaming climate change in local action. While the climate change governance framework gives flexibility to counties to take appropriate action that fits their local contexts, thus envisioning community-led climate change actions that link with official actions, this requires political will at the county level to empower communities to take action. There are counties such as Makueni, which have benefitted from the immense political will of the governor to take action, and have been early movers in setting up county climate funds that enable community-level decision making on climate priorities for funding.[158] Counties that do not enjoy similar political support face challenges prioritizing community level action and, in most cases, are yet to develop enabling policy and legislation.

In addition to this, the mainstreaming approach requires enhancement through facilitating climate financing for adaptation, to ensure that resilience and the building of adaptive capacity receive adequate financial support and do not trail the support for mitigation. This is important, as sustainable development in Kenya will be unattainable, without prioritizing adaptation, which is Kenya's priority concern. For mitigation, an understanding of Kenya's NDC and the market and non- market mechanisms for financing these NDCs' as envisioned under the Paris Agreement, is key across all levels of government as well as the private sector. There is for example need for clarity on Kenya's carbon markets strategy and the issuance of relevant authorizations and approvals that enable participation in markets established under Article 6 of the Paris Agreement, as well as the Voluntary Carbon Markets, whilst ensuring Kenya meets her NDC target.

As has been highlighted in this chapter, the current climate governance framework has been influenced by the experiences of the pre-colonial, colonial and post-colonial era, with the need for localized action through devolution seen as paramount to redress the historical incidences of marginalization, as well as a focus on a less exploitative form of development that is aligned to the current global needs.

158 Moushumi Chaudhury, Tonya Summerlin, and Namrata Ginoya, *Mainstreaming Climate Change Adaptation in Kenya: Lessons From Makueni and Wajir Counties* (World Resources Institute, 2020) at 13.

Through mainstreaming and a rights focus, the climate change governance framework has made attempts to meet these goals. However, to be effective, the response to climate change in Kenya should fully adhere to the constitutional underpinnings permeating the entire document that reflect a commitment to sustainable development, good governance, equity, equality, among others. This calls for Kenya to embrace not just the letter, but also the spirit of the Constitution, and the starting point is a focus on sustainable development, which requires balancing social, economic, environmental, cultural and political considerations during decision making, with a favourable focus on actions that result in, or permit ecological balance.[159]

159 Robert Kibugi, *Policy Brief on Political Economy of Climate Change Interventions in Kenya: Who Benefits and Who Loses?* (Friedrich Ebert Stiftung, 2018) at 10.

CHAPTER 24

Assessing the Utility of Human Rights, Environmental Assessments and Devolved Functions as Constitutional Tools to Enhance the Mainstreaming of Biodiversity in Kenya

Robert Kibugi

A. Introduction

Biological diversity, commonly referred to as biodiversity, is defined as the variability among living organisms from all sources, including terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; and this includes diversity within species, between species and of ecosystems.[1] The governance of this biodiversity globally, is guided by the Convention on Biological Diversity (CBD), which has three objectives: conservation of biological diversity; the sustainable use of its components; and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources. The CBD invites State parties to 'integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies'.[2] This is affirmed by Article 10(a), which calls on the State parties to 'integrate consideration of the conservation and sustainable use of biological resources into national decision-making'. The call for biodiversity integration is about the mainstreaming approach.

Mainstreaming means the integration of conservation and sustainable use of biodiversity in cross-sectoral and sectoral plans such as sustainable development or human rights.[3] It also applies to sector-specific plans such as agriculture, fisheries, forestry, mining, energy, tourism and transport, among others.[4] In all cases, mainstreaming biodiversity implies changes in development models, strategies and paradigms such that conscious assessments are made to determine the impacts of the cross-sectoral, sectoral and sector-specific actions on biodiversity, and how its conservation and biodiversity use can be enhanced into those activities.[5] It is, therefore, about integrating biodiversity considerations and actions into all these existing or new structures and processes, and avoids creating parallel and artificial processes in those same systems.[6] Mainstreaming is, therefore, about embedding biodiversity considerations into policies, strategies and practices of key public and private actors that impact or rely on biodiversity, so that biodiversity is conserved, and sustainably used, both locally and globally.[7]

The application of the term 'mainstreaming' to conservation and development has stemmed from the need to influence dominant institutions with the values and practices of those with less

1 Convention on Biological Diversity, Article 2.
2 Ibid, Article 6(b).
3 IUCN, 'What Does Success Look Like? Mainstreaming Biodiversity', *IUCN & Birdlife International,* 1 <https://www.iucn.org sites/dev/files/import/downloads/factsheet0_ideas_introduction_.pdf> (accessed 26 November 2020).
4 Ibid.
5 Ibid.
6 Ibid.
7 BJ Huntley and KH Redford, *Mainstreaming Biodiversity in Practice: A STAP Advisory Document,* Global Environment Facility, Washington, DC (2014) 14.

political influence.[8] If successfully undertaken, biodiversity mainstreaming has the potential to ensure that development activities minimize or stop being drivers of biodiversity loss and instead promote sustainable outcomes that balance ecological considerations with socio-economic priorities.

Kenya is a party to the CBD, having ratified the Convention on July 26, 1994.[9] As a treaty, the CBD forms part of Kenyan law under the Constitution, and it is implemented through various sectoral laws enacted by Parliament, which govern aspects of biodiversity, including those on forestry, wildlife, and environment.[10] Notably, the forestry law explicitly requires its provisions to be implemented in accordance with any treaties, conventions or international agreements concerning forests, provided they are ratified under the Constitution.[11] Additionally, the Cabinet Secretary is empowered to make regulations to ensure compliance with such treaties.[12] The wildlife law also empowers the Cabinet Secretary to make regulations to implement treaties concerning wildlife, which have been ratified under the Treaty Making and Ratification Act, 2012.[13] The scope of biodiversity surpasses these two legal frameworks, which are given here for illustrative purposes. The Constitution of Kenya, as the supreme law of the land, contains various critical provisions that can play a strategic role in enhancing achievement of the CBD objectives through the mainstreaming of biodiversity concerns. These include a strong and robust human rights framework, which guarantees socio-economic rights whose implementation could adversely impact ecological integrity, such as the right to food that is realized through agriculture land use. To support ecological integrity and biodiversity protection, the Constitution guarantees a human right to a clean and healthy environment. In this respect, the chapter examines how the interdependence between these two rights, and the right to life provide a unique constitutional tool to reinforce biodiversity mainstreaming. Human rights are binding and mandatory, spelling out obligations on the Kenyan State and, therefore, provide a valuable tool to protect nature while providing for human livelihoods. As one of the mechanisms for fulfilling this environmental right, the Constitution sets out various tools, which include environmental assessments and audits. This chapter also analyses the utility of environmental assessments and audits as a constitutional tool for enhancing biodiversity protection. The evolving role of county governments as subnational levels of administration specifically identified by the CBD for biodiversity actions is also examined.

The first section of the chapter is the introduction, while second is an appraisal of biodiversity in Kenya within the context of social and economic activities. The third section is a discussion of the approach to biodiversity mainstreaming under the CBD, while fourth evaluates human rights, environmental assessments and devolved government functions as critical constitutional tools available for enhancing biodiversity mainstreaming in Kenya.

8 Ibid, 12.
9 Kenya Law <http://kenyalaw.org/treaties/treaties/87/Convention-on-Biological-Diversity> (accessed 26 November 2020).
10 Constitution of Kenya (2010), Art 2(6), 94(5).
11 Forest Conservation and Management Act, No. 34 of 2016, s 71(1).
12 Ibid, s 71(2).
13 Ibid, s 109 (1) and (2).

B. Biodiversity, social and economic activities in Kenya

Kenya ranks highly as one of the biodiversity rich countries in the world.[14] This is derived from a diversity of environments and ecosystems, fashioned by topography and episodic changes in climate and habitat.[15] Culture is identified as part of the ecosystems as it incorporates knowledge gained through teaching and experiences bearing on local environmental systems and their resources and cannot be thought of as separate from the environment.[16] The country has a broad range of natural ecosystems that manifest the biological diversity: forests; woodlands; shrublands; grasslands; deserts; lakes and rivers; montane ecosystems; afro-alpine; and marine.[17] As it is dynamic, culture is both traditional and contemporary. The number of species in the country was recorded in 2015 by the National Biodiversity Atlas to stand at 7,004 plants and 5,245 animals.[18] The (Advanced) Draft 2019-2030 National Biodiversity Strategy and Action Plan (NBSAP) records a higher number of fauna species as 25,000 invertebrates (21,575 of which are insects), 1,133 birds, 315 mammals, 191 reptiles, 180 freshwater fish, 692 marine and brackish fish, 88 amphibians and about 2,000 species of fungi and bacteria.[19]

Kenya has witnessed unprecedented socio-economic transformation since independence, such as population growth, expansion of agriculture, shrinking of productive land, and expansion of extractive activities, among others, which continue to impact the state of biodiversity nationally.[20] Thus, biodiversity in the country is under threat from a variety of sources.[21] These threats to biodiversity and ecosystems are identified by Kenya's Biodiversity Atlas and Draft 2019-2030 NBSAP as follows:[22]

a) Population growth: Kenya's population grew from about 8 million people in 1960 to 38.6 million in 2009 and 47.6 million in 2019. The rapid human population growth in the country is driving the need to exploit the ecosystems and biodiversity for sustenance and socio-economic development.

b) High poverty levels: Pressure on biodiversity from population growth is exacerbated by high poverty levels, which worsen inequality in access to and consumption of resources. This increases pressure on the scarce biodiversity resources accessible to Kenyans living below the poverty line.

c) Expansion of agriculture and settlement as crop production and pastoralism are key sources of livelihood nationwide. Population growth and expansion of agriculture has reduced available land per capita to less than one-fifth of a hectare. This puts pressure on the land, resulting in overexploitation, higher erosion rates, declining soil fertility and illegal forest use.

14 Ministry of Tourism and Wildlife (2018) National Wildlife Strategy, 2030, 4.
15 Kenya (2015) *Kenya's Natural Capital: A Biodiversity Atlas*, 14.
16 Ibid, 34.
17 Ibid, 24-33.
18 Ibid, 65.
19 Kenya (2019) Draft National Biodiversity Strategy and Action Plan 2019-2030, <http://meas.nema.go.ke/cbdchm/download/Meas/Biodiversity/Plans-and-Strategies/KENYA-NBSAPFINAL-DRAFT.pdf > (accessed on 24 September 2020)
20 Kenya (2012) National Environment Policy, p. 4.
21 Ibid, 27.
22 Ibid (n 15), 38-43; Ibid (n 19), 69–73.

d) Resource over-exploitation through unsustainable production and consumption patterns including generation and poor handling of solid waste and effluent.
e) Institutional and policy obstacles with responsibility for elements of biodiversity governed by different laws, policies, mandates and priorities that often result in duplication and deleterious outcomes.
f) Climate change impacts resulting from risk in global greenhouse gas (GHG) emissions will continue to adversely impact biodiversity and species will struggle to adapt to changing conditions.
g) Habitat loss and fragmentation, the largest threats to ecosystems and species, are driven largely by expanding human activity. Loss occurs from the spread and intensification of agriculture, settlement, infrastructure and industry.
h) Degradation of land and aquatic resources due to overutilization through human activities, including in marginal areas.
i) Overharvesting of species, which is a major cause of biodiversity loss.
j) Invasive species, which have become a serious threat to native plants, animals and pastures.
k) Changing cultural attitudes and practices that prioritize short-term economic gain without regard for ecosystem health, equitable use, or the needs of future generations.

Kenya's economic development plan, Vision 2030, acknowledges that the country has a wide range of ecosystems that are important sources of livelihood.[23] The Vision further affirms that these ecosystems 'have a big contribution to make in the economic development processes that it sets out.[24] This means that biodiversity exploitation has been framed as a key economic driver for Kenya, and, without adequate ecological protections this may increase the impacts of the drivers of biodiversity loss. The 2018-2022 (Third) Medium Term Plan to implement Vision 2030 acknowledges, as an emerging threat, that there are 'changes in biodiversity and emergence of invasive plants and weeds affecting productivity'. Vision 2030 embodies a social pillar and economic pillar for achievement of its goal to transform Kenya into an industrialized upper middle-income economy offering a high quality of life to all its citizens by 2030. The social pillar 'involves the building of a just and cohesive society that enjoys equitable social development in a clean and secure environment'.[25] It affirms that there will be changes that will exert pressure on the already declining natural resources base, and fragile environment and for this reason, a strong policy on the environment will be required in order to sustain economic growth while mitigating the impacts of rapid industrialization.[26] Thus these drivers of biodiversity loss will continue having a negative impact unless concerted legal, policy and practical action is taken to ensure ecological concerns are taken into account, and impact the nature and extent of socio-economic decisions.

23 Kenya, Sessional Paper No. 10 of 2012 on Kenya Vision 2030, 124.
24 Ibid.
25 Ibid, 93.
26 Ibid.

C. Justification for the mainstreaming approach under the Convention on Biological Diversity

The need for biodiversity mainstreaming, reflected in Article 6 of the CBD, has been revisited and affirmed by the parties through various decisions of the Conferences of Parties (CoPs). These include CBD Decision X/2, which adopted the Strategic Plan for Biodiversity 2011-2020, and the Aichi Biodiversity Targets.[27] This decision recognized that there was a major shortcoming in global implementation of the CBD objectives. The Strategic Plan noted that the 2010 biodiversity targets, while inspiring action at many levels, have not resulted in sufficient integration of biodiversity concerns into broader policies, strategies, programmes and actions. Consequently, according to the Strategic Plan, the underlying drivers of biodiversity loss had not been significantly reduced. In this context, and despite the Aichi Targets, CBD Decision X/2 noted that the value of biodiversity was still not reflected in broader policies and incentive structures. This is the challenge that the Strategic Goals and the Aichi Biodiversity Targets had aimed to address, by setting out measures through which States can enhance the mainstreaming of biodiversity within a broader policy and governance context. Strategic Goal A is indicative of this, for instance, as it requires parties to 'address the underlying causes of biodiversity loss by mainstreaming biodiversity across government and society'.

CBD Decision XIII/1 focused on a review of the implementation The need for biodiversity mainstreaming, reflected in Article 6 of the CBD, has been revisited and affirmeof the Convention and the Strategic Plan for Biodiversity 2011-2020 and towards the achievement of the Aichi Biodiversity Targets.[28] The Decision expressed concern with the status of biodiversity mainstreaming, noting that while most of the national biodiversity strategies and action plans developed or revised since 2010 contain targets related to the Aichi Biodiversity Targets, only a minority of parties have established targets with a level of ambition and scope commensurate with the Aichi Biodiversity Targets.[29] Kenya's Sixth National Report to the CBD, published in 2020, concurs with this 2013 CoP assessment, reporting that while the country has not established national targets, various measures are in place to support the implementation of the CBD Strategic Plan including Vision 2030, Medium Term Plans to Vision 2030, and the Constitution of Kenya.[30]

The 2016 Cancun Declaration, which focused on mainstreaming the conservation and sustainable use of biodiversity, observed that States were most concerned by the negative impacts on biodiversity caused by degradation and fragmentation of ecosystems, unsustainable land use changes, overexploitation of natural resources, illegal harvesting and trade of species, introduction of invasive alien species, pollution of air, soil, inland waters and oceans, climate change and desertification."[31] The Declaration, adopted by CoP 13, reiterated that biodiversity is valuable as it offers solutions to the pressing development and societal challenges that the

27 CBD CoP Decision X/2, The Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets.

28 CBD Decision XIII/1, Progress in the implementation of the Convention and the Strategic Plan for Biodiversity, 2011-2020 and towards the achievement of the Aichi Biodiversity Targets, 2013.

29 Ibid (n, 27); Ibid, 2013, para. 6.

30 Government of the Republic of Kenya, 2020: Kenya Sixth National Report to the Convention on Biological Diversity, Ministry of Environment and Forestry, 17.

31 UNEP/CBD/COP/XIII/24 - 6, December 2016. The Cancun Declaration on Mainstreaming the Conservation and Sustainable Use of Biodiversity for Well-Being (December 2016), Preamble, page 2, para 3.

world community is currently facing."[32] In this context, the Declaration made a commitment that State parties to the CBD, including Kenya, would work at all levels of government and across all sectors to mainstream biodiversity through:[33]

(i) establishing effective institutional, legislative and regulatory frameworks.
(ii) incorporating an inclusive economic, social, and cultural approach with full respect for nature and human rights.
(iii) tailoring the actions to national needs and circumstances and in line with other relevant international agreements, through various actions.

These commitments include taking actions to ensure that State parties integrate, in a structured and coherent manner, actions for the conservation, sustainable use, management, and restoration of biological diversity and ecosystems. Specifically, through CBD Decision XIII/3, State Parties agreed to take action to reduce and reverse biodiversity loss through implementation of nationally appropriate sectoral and cross-sectoral strategies. [34] These would foster sustainable practices; contribute to health and resilience of ecosystems; and promote conservation and restoration of areas of particular importance for biodiversity and ecosystem services and functions, habitats of threatened species, and recovery of endangered species.[35] This set of CBD CoP decisions define the scope of guidance available to State parties, such as Kenya, in implementing the mainstreaming of biodiversity. As the Constitution is the supreme national law, it is important that these approaches are adequately anchored in it and supported by its provisions.

D. Reviewing the utility of constitutional mechanisms in enhancing biodiversity conservation, sustainable use and utilization

The Constitution of Kenya contains various provisions and mechanisms that can be applied to achieve the three objectives of the CBD and enhance the mainstreaming of biodiversity considerations when socio-economic choices and decisions are made. It binds every person and state organ, and any law (including customary law) that is inconsistent with its provisions, is void to the extent of that inconsistency.[36] In this section, the chapter discusses the human rights framework, and environmental assessments as two key tools and mechanisms under the Constitution that can enhance biodiversity conservation, sustainable use and utilization.

First, it is important to reiterate that in order to assure ecological integrity results from social and economic activities, a balancing of these contesting considerations is important. This balancing of interests is a requirement of sustainable development and, ideally, where there are strong environmental rights, the conservation of nature should receive higher consideration. The Constitution has set out sustainable development as one of the national values and principles of governance that bind all State organs, State officers, public officers and all persons whenever any of them implements its provisions, makes or implements any law, or makes any public policy

32 Ibid, Preamble, page 2, para 2.
33 Ibid, last paragraph, page 2.
34 CBD Decision XIII/3. Strategic Actions to Enhance the Implementation of the Strategic Plan for Biodiversity 2011-2020 and the Achievement of the Aichi Biodiversity Targets, including with Respect to Mainstreaming and the Integration of Biodiversity within and across Sectors, para 17.
35 Ibid, para 17.
36 Constitution of Kenya (2010), Art 2.

decisions.[37] These values and principles, specified in Article 10(2), are extensive and include public participation, good governance, accountability, rule of law, and sustainable development. This, further, reinforces the argument that Kenya's Constitution contains robust provisions to secure ecological integrity. Jurisprudence on the legal import of Article 10 national values and sustainable development has affirmed this view.

In a 2014 decision, the Supreme Court of Kenya in *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others*[38] held that 'sustainable development has found stable constitutional and legal frameworks in what we have come to call transformative constitutions', such as that of Kenya.[39] The court further affirmed that 'the Kenyan Constitution, under Article 10, provides that sustainable development is a national value and principle to be taken into account when the Constitution is interpreted as well as a guide to governance'.[40] The Court of Appeal, delivering judgment in *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others*,[41] decided that 'Article 10(2) of the Constitution is justiciable and enforceable immediately', and that the values espoused in Article 10 are 'neither aspirational nor progressive, but are immediate, enforceable and justiciable'. Therefore, according to the court, a violation of Article 10 can found a cause of action either on its own, or in conjunction with other constitutional Articles or statutes as appropriate.[42] This means that Kenya's Constitution has cemented sustainable development, and based on the foregoing court decisions, failing to integrate sustainable development considerations could result in nullification of a law, or public policy decision. This is an important dimension as management of biodiversity requires application of sustainable development considerations through balancing the competing social, economic and environmental considerations.

The role of human rights in enhancing the mainstreaming of biodiversity

The Constitution guarantees various human rights, stipulated in the Bill of Rights, which applies to all law and binds all State organs and all persons.[43] It places a fundamental duty or obligation on the State to observe, respect, protect, promote and fulfil these human rights and fundamental freedoms.[44] The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights.[45] It prohibits State actions that may undermine the enjoyment of rights.[46] The obligation to protect requires States to protect individuals and groups against human rights abuses, including by ensuring access to impartial legal remedies when human rights violations are alleged.[47] The obligation to fulfill is a positive duty for the State to take action to facilitate the enjoyment of basic human rights. The obligation to promote requires the State to put in place the legal, institutional and procedural conditions that rights holders need in order to realize and enjoy their rights in full.[48] The human rights guaranteed

37 Constitution of Kenya (2010), Art 10(1).
38 *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others* [2014] eKLR.
39 Ibid, para 380.
40 Ibid, para 381.
41 *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others*, [2017] eKLR.
42 Ibid, Para 80-81.
43 Constitution of Kenya (2010), Art 20(1).
44 Ibid, Art 21(1).
45 *Human Rights Handbook for Parliamentarians No. 26,* Inter-Parliamentary Union & United Nations Office of the High Commissioner for Human Rights, 2016, 33.
46 Ibid.
47 Ibid, 33.
48 Ibid.

under the Constitution, which Kenya is obligated to implement, are extensive, and include both procedural and substantive rights and have a bearing on biodiversity management.

Substantive human rights

The scope of substantive human rights under the Constitution is wide. For this chapter, we focus on those that have a direct correlation with biodiversity, which include the right to life, clean and healthy environment, and socio-economic rights. In *Peter K Waweru v Republic,* the High Court drew a direct link between the right to life and that of a clean and healthy environment, holding that 'the right of life is not just a matter of keeping body and soul together because in this modern age, that right could be threatened by many things including the environment. The right to a clean environment is primary to all creatures including man.'[49] The Constitution guarantees every person the right to life;[50] and the right to a clean and healthy environment.[51] It also guarantees every person several socio-economic rights, which[52] include the highest attainable standard of health; accessible and adequate housing; reasonable standards of sanitation; freedom from hunger and adequate food of acceptable quality; and clean and safe water in adequate quantities. These socio-economic rights, when fulfilled, provide the means for people to fulfil the right to life. Further, the realization of these socio-economic rights depends on a clean and healthy environment, including biodiversity. The human right to a clean and healthy environment; and the right to life, and the socio-economic rights are, therefore, interdependent.

This interdependence is demonstrable, for instance, through examination of resolutions of the UN General Assembly and the Human Rights Council. The UN General Assembly resolution on the human right to water and sanitation, adopted in 2010, recognized the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights. In a 2018 report to the UN Human Rights Council, the Special Rapporteur on Environment and Human Rights affirmed that a safe, clean, healthy and sustainable environment is necessary for the full enjoyment of a vast range of human rights, including the rights to life, health, food, water and development. The Special Rapporteur also affirmed that, at the same time, the exercise of human rights, including the rights to information, participation and remedies, is vital to the protection of the environment. This interdependence is further affirmed by General Comment No.15 on the Right to Water, which recognized the importance of ensuring sustainable access to water resources for agriculture to realize the right to adequate food.[53] Focusing on the socio-economic right to health, General Comment No. 14 acknowledges that the right to health extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water, and adequate sanitation, safe and healthy working conditions, and a healthy environment.[54]

49 *Peter K. Waweru v Republic,* (2006) eKLR, p.5.
50 Constitution of Kenya (2010), Art 26(1).
51 Ibid, Art 42.
52 Ibid, Art 43.
53 General Comment No. 15 Substantive Issues arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, Economic and Social Council, E/C.12/2002/11 20 January 2003, para 7.
54 General Comment No. 14 The Right to the Highest Attainable Standard of Health (Art. 12), E/C.12/2000/4, 2000, para 4.

The Framework Principles on the Human Right to a clean and healthy environment also affirm this interdependence of human rights.[55] Thus, Framework Principle 1, on the one hand, calls on States to ensure a safe, clean, healthy and sustainable environment in order to respect, protect and fulfil human rights. Framework Principle 2, on the other hand, calls on States to respect, protect and fulfil human rights in order to ensure a safe, clean, healthy and sustainable environment. The commentary to the Framework Principles affirms that human rights and environmental protection are, therefore, interdependent.[56]

A clean and healthy environment, on which the right depends, requires that nature maintains the competence to perform regulating, supporting, provisioning and cultural ecosystem services. Regulating services are the benefits obtained from the regulation of ecosystem processes such as greenhouse gas (GHG) regulation, natural hazard regulation, and water purification, pollination and pest control.[57] Provisioning services refer to goods and physical products obtained from ecosystems such as food, fresh water, fibre, genetic resources and medicines.[58] Supporting services support the delivery of other services, such as soil formation and supplying habitat for species, and in turn enable ecosystems to continue supplying, regulating and provisioning services.[59] Cultural or aesthetic services include non-material benefits that people obtain from ecosystems, such as spiritual enrichment, intellectual development, recreation and aesthetic values.[60] Biodiversity loss will lead to a deterioration of these ecosystem services, increasing the likelihood of ecological changes that bring negative impacts on human well-being.[61] These ecological changes include runaway climate change, desertification, fisheries collapse, floods, landslides, wildfires, eutrophication and diseases.[62] Regulating services such as pest control requires a focus on designing and promoting ecosystem systems in which pests do not become problems. An example of this is the push-pull system of maize production, which considers the value of placing different crops (including maize, forage grasses and forage legumes) in proximity to each other to 'push' pests out of crops and 'pull' natural enemies out.[63] According to ICIPE, the push-pull strategy involves:[64]

> … intercropping cereals with a repellent plant, such as desmodium, which repels or deters stem borers from the target food crop. An attractant trap plant, for instance Napier grass, is planted around the border of this intercrop, with the purpose of attracting and trapping the pests. As a result, the food crop is left protected from the pests. In addition, desmodium stimulates the germination of striges (witch weed) and then inhibits its growth. The push-pull technology also has significant benefits

55 A/HRC/37/59. Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Annex.

56 Ibid, para 4.

57 FAO, Mainstreaming ecosystem services and biodiversity into agricultural production and management in East Africa: Techincal Guidance Document, FAO and CBD, 4.

58 Ibid.

59 Ibid.

60 Ibid.

61 Millennium Ecosystem Assessment (2005) Ecosystems and Human Well-being: Biodiversity Synthesis, World Resources Institute, 64.

62 Ibid.

63 FAO, Mainstreaming ecosystem services and biodiversity into agricultural production and management in East Africa: Techincal Guidance Document, FAO and CBD, 15.

64 International Centre of Insect Physiology and Ecology (ICIPE),<http://www.icipe.org/impacts/demonstration-research-impacts-communities/push-pull-technology> (accessed 18 November 2020).

> for dairy farming, since desmodium and Napier grass are both high quality animal fodder plants. Moreover, because both plants are perennial, push–pull conserves the soil's moisture and improves its health.

The 2005 Millennium Ecosystem Assessment (MEA) indicated that due to biodiversity loss, security and social relations would be vulnerable for instance as shortages in provisioning ecosystem services (e.g., food, water or pasture) result in human conflict. Human relations could also be harmed by reduced ecosystem cultural services such as loss of iconic species or changes to culturally valued landscapes.[65] In concurrence, the UN Human Rights Council in March 2020 adopted a report of the Special Rapporteur on Human Rights and Environment, which recognized maintenance of healthy ecosystems and biodiversity as a good practice observed by States in implementing the human right to a clean and healthy environment.[66] These good practices are those laws, policies, jurisprudence, strategies, programmes, projects and other measures that contribute to reducing adverse impacts on the environment, improving environmental quality and fulfilling human rights.[67] The report of the Special Rapport argued that healthy ecosystems and biodiversity are critical to the environmental right as humanity depends on nature for a vast range of products and ecological services, from food, fibre and medicine to pollination, clean air, water and soil.[68] Human rights may be jeopardized by lack of access to nature's bounty or by actions taken to protect nature that fail to take rights into consideration.[69]

In a recent decision concerning lead pollution from a battery recycling plant in an informal settlement called Owino Uhuru, the High Court addressed the interconnectivity of rights, with the human right to a clean and healthy environment at the heart of a constitutional petition. The matter, in *KM & 9 Others v Attorney General & 7 Others[2020] eKLR* concerned a human rights petition by residents of Owino Uhuru Village in Mombasa, who alleged that Metal Refinery (EPZ) Ltd had set up a lead acid batteries recycling factory, which activity produced toxic waste; and that the waste seeped into the village causing the petitioners and area residents various illnesses and ailments as a direct consequence of lead poisoning, with more than 20 deaths attributed to it.[70] The court had opportunity to see the minor petitioner, KM, and observed the unsightly rashes/wounds that were spread out on his limbs (legs and hands) discharging fluids.[71] The minor was said to have been born normal within the settlement but started developing problems at the age of two years.[72] In its determination, the court held that the Constitution gives Kenyans access to court even where there are only threats of violation, and:[73]

> In the instant petition, I am satisfied that the Petitioners did not just demonstrate that their rights under the stated Articles were likely to or were threatened to be violated. They proved the actual violation, which was to their personal life, the environment

65 Millennium Ecosystem Assessment (2005) Ecosystems and Human Well-being: Biodiversity Synthesis. World Resources Institute, 64.
66 A/HRC/43/53, Right to a healthy environment: good practices. Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Human Rights Council.
67 Ibid, para 2.
68 Ibid, para 103.
69 Ibid, para 103.
70 *KM & 9 Others v Attorney General & 7 Others [2020],* eKLR, para 1.
71 Ibid, para 126.
72 Ibid, para 126.
73 Ibid, para 134.

> (soil and dust) where they stayed and the water (sanitation), which they consumed. None of the Respondents who participated in these proceedings gave any reports to contradict the scientific reports produced on record.

This holding, and the reasoning of the court above demonstrates consciousness that damage to the environment also harms quality of life, jeopardizes life itself, and diminishes access to socio-economic rights. In its extensive provisions relating to the right to a clean and healthy environment, the Constitution shows recognition that maintaining the competence of the environment to perform ecosystem services is integral to fulfilling the right to a clean and healthy environment. Article 42, which frames the right, specifies the entitlement to include having the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69, and include obligations on the Kenyan State to take certain actions, such as:

a) Ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits.
b) Work to achieve and maintain a tree cover of at least 10 per cent of the land area of Kenya.
c) Protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities.
d) Encourage public participation in the management, protection and conservation of the environment.
e) Protect genetic resources and biological diversity.
f) Establish systems of environmental impact assessment, environmental audit and monitoring of the environment.
g) Eliminate processes and activities that are likely to endanger the environment
h) Utilise the environment and natural resources for the benefit of the people of Kenya.

These obligations on the Kenyan State are broad, but they encompass the objectives of the CBD and also identify legal tools with utility in protecting the environment and biodiversity. The obligations are also part of measures prescribed by the Constitution for the State to implement in order to meet its obligations on the human right to a clean environment. The realization of socio-economic rights, such as to water or food, depends on success in implementing these measures to maintain a wholesome environment and biodiversity that adequately supports ecosystem services, which in turn cater for those socio-economic rights.

Procedural rights

Procedural rights are mainly those anchored on public participation, itself an Article 10 national value and principles of governance. These procedural rights include access to court, access to information, and consultation during decision making processes. Article 22 of the Constitution guarantees the right of every person to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. This provision also eased the rules of standing by permitting proceedings to be instituted directly by the affected person, or a person acting on behalf of another person who cannot act in their own name; or a person acting as a member of, or in the interest of, a group

or class of persons; those acting in the public interest. In this instance, no requirement is made for a person to demonstrate that they have sufficient interest.

The Constitution provides a right, restricted to citizens, for access to information that is held by the State.[74] This right includes a duty on the State to publish and publicize any important information affecting the nation. In order to implement the right of access to information, the Access to Information Act requires each public agency to designate its Chief Executive Officer as the information access officer.[75] Information held by a private person can only be accessed if it is required for the exercise or protection of any right or fundamental freedom.[76] The latter part, information held by any other person, broadens statutory law beyond the Constitution, which only permits access to information held by any other person (besides public entities) only if that information is required for the exercise or protection of any right or fundamental freedom.[77] The Environmental Management and Coordination Act (EMCA),[78] in 2015 amendments, introduced access to information provisions, reiterating the right of any person to access information relating to implementation of the law that is held by public agencies, or any other person. The National Environment Management Authority (NEMA), for instance, on its website has a public database of Strategic Environment Assessments (SEA) and Environmental Impact Assessment (EIA) reports submitted by proponents for its approval.[79] This database does not, however, provide other useful information such as the analysis and final decision on those reports, issued EIA licences and Environmental Management Plans (EMP). Further, there is no public database for environmental audit reports, which monitor compliance with EIA licence conditions.

Public consultations during environmental decision making are an important component of the procedural rights guaranteed by the Constitution. Judicial decisions have played a major role in developing principles for undertaking public consultations. These principles complement current statutory provisions such as those stipulated by the EMCA for observance during conduct of EIA studies by a project proponent, and by NEMA itself during review of EIA reports prior to approval.[80]

In *Mohammed Baadi v Attorney General and Others*, the High Court ruled on the utility of public participation, holding that it is imperative because the utilization of the public views in governmental decision-making on environmental issues results in better implementation due to an expanded knowledge base on the nature of environmental problems that are to be met by the decision.[81] The court argued that public consultation helps to identify and address environmental problems at an early stage, thus saving reaction time, energy and scarce financial resources and, further, helps to improve the credibility, effectiveness and accountability of governmental decision-making processes.[82] In *Save Lamu & Others v NEMA & Amu Power,* the National Environmental Tribunal (NET) affirmed that access to information is a vital condition

74 Constitution of Kenya (2010), Art 35.
75 Access to Information Act, No. 31 of 2016, s 7.
76 Constitution of Kenya (2010), Art 35(1) (b).
77 Constitution of Kenya (2010), Art 35(1) (b).
78 Environmental Management and Coordination Act, 2015.
79 The National Environment Management Authority of Kenya <https://www.nema.go.ke/index.php?option=com_content&view=article&id=131&Itemid=290> (accessed 24 November 2020).
80 Environmental (Impact Assessment and Audit) Regulations, 2003, Section 17 and 21.
81 *Mohamed Ali Baadi and Others v Attorney General & 11 Others*[2018] eKLR, para 277.
82 Ibid, para 288, 289.

to public participation and demonstrated how insufficient consultation could deny the public a chance to question environmental impacts of a project.[83] The NET found that the information contained in the EIA study report had not been made available in good time to members of the public, or at all.[84] In this context, since the EIA report lacked public input, the Tribunal wondered whether members of the public would have accepted the project if certain information in the possession of the Amu Power project had been provided to them.[85] Specifically, the Tribunal singled out observations on pages 1693 and 1694 of the EIA report (volume II), which included identification of potential harm to the biodiversity flora and fauna, air quality, which was stated to be potentially hazardous and may cause difficulty in breathing, and the climate change effect leading to adverse consequences on human health. The report raises concern on 'increased risk of asthma, lung damage and premature death'.[86] Other sensitive information the Tribunal indicated ought to have been brought to the attention of the public concerned the adverse impacts of the proposed power plant on fish, forests, soil and vegetation.[87]

In terms of the proper legal threshold for public consultation, the court in *Baadi* declared the proper standard for ascertaining whether there is adequate public participation in environmental matters to be the reasonableness standard, which must include compliance with prescribed statutory provisions as to public participation.[88] This would imply there is need to have statutory provisions on public consultations that enhance, rather than minimize, value of public contributions during decision-making on environmental matters.

Ordinarily, provisions on consultations include standard obligations to publish notices on the issue at hand in the newspapers, and the holding of consultation meetings. The Climate Change Act contains an additional requirement for public consultations to be undertaken 'in a manner that ensures the public contribution makes an impact on the threshold of decision making'.[89] An interpretation of the meaning and impact of this provision of the Climate Change Act can be drawn from the judgment in *Mui Coal Basin Local Community & 15 Others v Permanent Secretary, Ministry of Energy & 17 Others*.[90] The court held that the right to public participation is a right to represent one's views but there is no duty on the public agency to accept the view given as dispositive.[91] However, the court also held that there is a duty for the government agency or public official involved to take into consideration, in good faith, all the views received as part of the public participation programme. The government agency or public official cannot merely be going through the motions or engaging in democratic theatre so as to tick the constitutional box.[92] This approach, which involved a good faith consideration of the public views and providing an opportunity for the public to give this view, provides scope for the views to impact the final decision that is made concerning environment and biodiversity.

83 *Save Lamu and Others v NEMA and Amu Power Tribunal*, Appeal No. NET 196 of 2016.
84 Ibid, para 69.
85 Ibid, para 69.
86 Ibid, para 69.
87 Ibid, para 69.
88 Ibid (n 81), p.50.
89 Climate Change Act No.11 of 2016, s 24(2).
90 *Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others* [2015] eKLR.
91 Ibid, para 97.
92 Ibid.

In the section that follows, the chapter examines the utility of environmental assessments and audits in enhancing biodiversity mainstreaming, which is important since those systems identify risks to the environment from socio-economic activities and prescribe measures to enhance ecological integrity. Environmental assessments and audits, a constitutional mechanism to implement the human right to a clean and healthy environment and also integrate procedural rights as discussed in this section.

The utility of environmental assessments in enhancing mainstreaming of biodiversity during social and economic activities

As explained earlier, environmental assessments and audits have a constitutional foundation as one of the obligations on the Kenyan State required for implementation of the human right to a clean and healthy environment. The EMCA, the framework environmental law, makes provision for implementation of environmental assessments and audits. The scope of environmental assessments is two-fold: strategic environmental assessments (SEA) and project-level EIA.

Strategic Environmental Assessments

The EMCA defines a strategic environmental assessment to mean a formal and systematic process to analyse and address the environmental effects of policies, plans, programmes and other strategic initiatives.[93] It requires that all plans, programmes or policies for implementation should undergo a strategic environmental assessment.[94] These plans, programmes or policies are defined as those that are under preparation or are ready for adoption by a public authority at national, regional, county or local level, or which are prepared by a public authority for adoption through a legislative procedure by Parliament, government, as through inter-governmental agreement.[95] The scope of these types of plans, programmes or policies is, therefore, very broad. It can be argued that economic development plans like Vision 2030, or the Medium-Term Plans (MTPs) for Vision 2030 implementation, or physical and land use development plans (discussed below), all of which are for implementation by public authorities, tend to promote economic and social activities but are drivers of biodiversity loss and should be subjected to SEA. This is important because, as stipulated in the national guidelines, a SEA process systematically integrates environmental considerations into policy, planning and decision-making processes, such that environmental information derived from the examination of proposed policies, plans, programmes or projects are used to support decision making.[96] During a SEA, therefore, the effects, impacts, trade-offs, and options or alternatives are assessed in terms of significance in order to determine optimum choices and eliminate unacceptable ones.[97] A mitigation hierarchy, which is also optimal for biodiversity, should be followed for identified negative impacts: first, avoid; second, reduce; and third, offset adverse impacts using appropriate measures.[98] The precautionary principle should be applied if the analysis indicates a potential for major, irreversible, negative impacts on the environment.[99]

93 Environmental Management and Coordination Act, s 2.
94 Ibid, s 57A.
95 Ibid, s 57A (2).
96 Kenya, National Strategic Environmental Assessment Guidelines, 2011, 1.
97 Ibid, 21.
98 Ibid, 12.
99 Ibid, 23.

Kenya has undertaken SEA sometimes known as Strategic Environmental and Social Assessment (SESA) analysis for various sensitive economic undertakings which are suitable for discussion here. In 2016, a Strategic Environmental and Social Assessment (SESA) was undertaken for the petroleum sector in Kenya to 'systematically address environmental and socio-economic management issues pertaining to oil and gas activities in the context of sustainable development.'[100] Biodiversity was one of the specific concerns addressed by the SESA in order to 'consider biodiversity and the policies, plans and programmes necessary to sustainably manage and mitigate impacts on biodiversity and ecosystem services throughout the petroleum development lifecycle.'[101] This was deemed important because ecosystem services valued by humans are often underpinned by biodiversity and the petroleum impacts on biodiversity can often adversely affect the delivery of ecosystem services.[102] The SESA found that negative impacts on biodiversity, resulting from oil and gas development, may result in habitat conversion, degradation and fragmentation; air, water and soil pollution; deforestation; soil erosion and sedimentation of waterways; soil compaction; contamination from improper waste disposal or oil spills; and loss of productive capacity and degradation of ecosystem functions.[103] With this context, the SESA recommended that for future oil and gas projects, biodiversity should be integrated into the EIA process, based on an appropriate risk assessment and by expanding the scope of EIA analysis to include biodiversity characteristics.[104] The integration, as recommended in the SESA, should evaluate these impacts holistically using a wider ecosystem approach as recommended in the CBD, and considering long-term and cumulative secondary impacts in addition to more immediate, primary impacts.[105] The SESA further recommended that the integration of biodiversity should occur in all key stages of the EIA process in upstream oil and gas operation lifecycles from pre-bid/ contracting to decommissioning, i.e. through identification of alternatives, screening, scoping, baseline establishment, evaluation (impact analysis), development of mitigation options and implementation, and during monitoring and adaptation.[106] Finally, the SEA recommended that the ministry responsible for petroleum should ensure that oil and gas companies address biodiversity concerns at end point divestiture in their operational plans, especially when contracts are terminated by either party or divesting by transferring legal business interest to another operator.[107]

A SESA undertaken for Kenya's proposed nuclear power plant in March 2020[108] reported that in siting a specific nuclear power plant (NPP), areas with likely presence of threatened or endangered biodiversity species will be avoided, with special attention given to the presence of important species habitats, such as marine grasses and commercial shellfish beds.[109] The

100 Kenya, Strategic Environment and Social Assessment for the Petroleum Sector (Annex), Ministry of Energy and Petroleum 2016, p.4.
101 Kenya, Strategic Environment and Social Assessment for the Petroleum Sector (Annex), Ministry of Energy and Petroleum 2016, 12.
102 Ibid, 12.
103 Kenya, Strategic Environment and Social Assessment for the Petroleum Sector, (Final Report), Ministry of Energy and Petroleum 2016, 82.
104 Ibid, 220.
105 Ibid, 221
106 Ibid, 221
107 Ibid, 221
108 Kenya, Strategic Environment and Social Assessment for Kenya's Power Programme, Nuclear Power and Energy Agency, March 2020.
109 Ibid, 159.

SESA recommended that investigations of alternative sites should be undertaken, relative to the primary candidate sites, taking into account that a potential site where no potential impact on biodiversity is expected will be much favourable than those sites where a potential severe impact is expected.[110] Thus, the SESA recommends that in selecting most preferred specific sites, those candidate sites identified will be re-evaluated and updated with on-site specific information when undertaking the specific ESIA studies.[111] Specific actions recommended include avoiding clearing indigenous vegetation, and putting measures in place to control the spillage of hazardous substances and wastewater into the soil.[112] It is important to note that both SESA reports have recommended specific actions relating to biodiversity, that should be taken up and integrated into the analysis at the EIA stage for each biodiversity sensitive petroleum or nuclear power plant project.

Environmental impact assessments

The Environment Management and Coordination Act requires that an Environmental Impact Assessment should be undertaken for each project or activity which falls within the scope of those listed in the Second Schedule.[113] An EIA is undertaken by a project proponent, through an expert licensed by NEMA.[114] An EIA report should address certain matters specified in the regulations, which include the following:[115]

a) the proposed location of the project;
b) a concise description of the national environmental legislative and regulatory framework, baseline information;
c) the technology, procedures and processes to be used, in the implementation of the project;
d) the materials to be used in the construction and implementation of the project;
e) the products, by-products and waste generated project;
f) a description of the potentially affected environment;
g) the environmental effects of the project, including the social and cultural effects and the direct, indirect, cumulative, irreversible, short-term and long-term effects anticipated;
h) an environmental management plan proposing the measures for eliminating, minimizing or mitigating adverse impacts on the environment, including the cost, timeframe and responsibility to implement the measures.

From this list, it is clear that while a description of the potentially affected environment and the environmental effects of the project are mandatory for analysis, the regulations do not specifically require a focus on biodiversity. This is, for instance, in contrast with the findings of the two SESA reports reviewed earlier, which showed significant risks to biodiversity. Arguably, it may be assumed that based on the nature of the project, the intensity of biodiversity analysis required can be dynamic. However, the impact of these legal lacunae can be seen through an EIA report submitted to NEMA in August 2020 (for regulatory approval), undertaken for a proposed iron ore mine in West Pokot county.[116] The proposed mine is located in Mbaru area, which lies

110 Ibid, 159.
111 Ibid, 159.
112 Ibid, 208.
113 Environmental Management and Coordination Act, Section 58(1).
114 Environmental (Impact Assessment and Audit) Regulations 2003, Section14.
115 Ibid, Section 18.
116 Shaneebal Limited, 'Environmental and Social Impact Assessment Report (ESIA) Study Report for Proposed Iron Ore Extraction

in a semi-arid zone.[117] The EIA report identifies the impacts of the proposed mining project to include 'impact on biodiversity'. It also states that dust produced from mining activities has physical effects which impact their physiological activities; and this can be reduced by retaining vegetation cover where possible and rehabilitating mined areas by planting indigenous or exotic trees.[118] It is important to note that the EIA report does not make reference to a 2017 SESA undertaken on the mining sector, which identified degradation or loss of critical ecosystems and species from mining activities as high risks, and recommended that to protect life on land during mining, these should be included in EIAs and audits.[119]

Where a proposed activity undergoing an SEA or an EIA is biodiversity-intensive, scientific practice recommends application of a biodiversity mitigation hierarchy and offsets to prevent harm. Mitigation hierarchy is the sequence of actions undertaken to anticipate and avoid impacts on biodiversity and ecosystem services; and where avoidance is not possible, minimize; and, when impacts occur, rehabilitate or restore; and where significant residual impacts remain, offset.[120] It is a decision-making framework involving a sequence of steps, starting with the avoidance of impacts, followed by the minimization of inevitable impacts, on-site restoration and finally, where feasible and necessary, biodiversity offsets.[121] Due to its step-by-step nature, the mitigation hierarchy analysis is compatible with an EIA study as the technical team can examine the project impacts, including alternative site/location through the four steps.

The four steps of the hierarchy are: (i) avoid, (ii) minimize (both preventive), (iii) restore and (iv) offset, which are restorative steps. Avoidance requires steps to eliminate impacts, for instance, during site selection or infrastructure design; and minimization involves actions such as abatement to reduce the intensity or extent of unavoidable impacts.[122] Restoration involves steps to rehabilitate ecosystems from impacts that could not be avoided, such as re-establishing ecosystem services, biodiversity values and habitat types.[123] Biodiversity offsets, the final step of the mitigation hierarchy, are conservation actions intended to compensate for the residual, unavoidable impact on biodiversity caused by projects to ensure at least a no net loss of biodiversity and, where possible, a net gain.[124] Mitigation offsets, whether to restore or avert loss, require that a full set of alternatives to the proposed project should have been considered, with priority given to avoiding any damage to biodiversity.[125] It is important that offsets should integrate additionality, such that they secure additional biodiversity conservation outcomes that would not have happened otherwise; and the offset gain should last at least as long as

Plant in Tokechir, Mbaru Area of West Pokot County', August 2020. <https://www.nema.go.ke/images/Docs/EIA_17501759/ESIA_1753%20IRON%20ORE_MBARU_WEST%20POKOT-min.pdf > (accessed 18 November 2020).

117 Shaneebal Limited, 'Environmental and Social Impact Assessment Report (ESIA) Study Report for Proposed Iron Ore Extraction Plant in Tokechir, Mbaru Area of West Pokot County', August 2020, p.15.

118 Ibid, 9.

119 Kenya, 'Strategic Environmental and Social Assessment (SESA) of the Mining Sector', 2017, p. 12, 91.

120 Rhett Bennett, 'No Net Loss of Biodiversity and Ecosystem Services: Applying the Mitigation Hierarchy and Biodiversity Offsets as Tools to Achieve Sustainable Development in the WIO', Presentation to Nairobi Convention Science to Policy Meeting 10 July 2018, Durban, South Africa, <https://wedocs.unep.org/bitstream/handle/20.500.11822/25931/Mitigation_offsets_WCS.pdf?sequence=1&isAllowed=y> (accessed 14 November 2020).

121 IUCN, 'Biodiversity Offsets', *Issues Brief*, September 2016, 1.

122 Ibid (n 120), 6.

123 Ibid.

124 Ibid (n 121), 1.

125 Ibid, 2.

the impact being addressed, which often means in perpetuity.[126] IUCN recommends that since biodiversity losses, even with the best application of the mitigation hierarchy are unavoidable, as no two areas of biodiversity are identical, offsets should only be considered as a last resort after all other steps in the preventive and restorative stages have been considered.[127]

If the iron-ore mining EIA discussed earlier had applied a mitigation hierarchy, it would likely have identified the effects beyond just stating that there would be 'impacts on biodiversity'. An EIA analysis that has applied the mitigation hierarchy would enhance the utility of the Environmental Management Plan (EMP), which is issued with the EIA licence. An EIA study undertaken for the Early Oil Production Scheme Phase II in Turkana County applied the mitigation hierarchy, with various measures specified, including the following:[128]

a) avoidance, including reuse of existing access road to avoid clearing new areas.
b) minimization of habitat loss by limiting areas of surface disturbance and mandatory environmental training of all new employees on species specific sensitivities.
c) Prompt and effective rehabilitation and revegetation (with desirable plant species) of disturbed areas.
d) No offsetting measures recommended as the EIA took the view that the mitigation hierarchy had identified sufficient measures.

The EIA for the Early Oil Production Scheme has been analysed to demonstrate that the mitigation hierarchy and offset system can be applied at project level assessment to enhance the nature of biodiversity protections. The chapter does not, however, analyse the efficacy of the proposed measures. The EIA report for the Early Oil Production Scheme Phase also proposes a biodiversity management plan as part of the EMP to ensure there are specific and practical actions, operational methods and conservation programme management through protocols and training on conserving the biodiversity of the project area.[129]

This approach would also enhance the value of self and control Environmental Audits (EA) required by the EMCA to be undertaken annually on every project holding an EIA licence in order to examine compliance with the EMP conditions.[130] A self-audit is undertaken by the holder of an EIA licence annually. NEMA is authorized to undertake a control audit when deemed necessary to confirm that there is compliance with the EMP; and verify its adequacy in mitigating the negative impacts of the project.[131] In practice, this is also done where there are public complaints about pollution or environmental non-compliance. Therefore, with insufficient analysis of biodiversity impacts, a project will have an EMP that is inadequate, which in turn vitiates the utility of both the EIA study and the EA process.

In the next section, the discussion focuses on how county governments, in exercise of their mandates, can enhance biodiversity mainstreaming. This is important because counties have functions that, without mainstreaming, can play a major role as threats to biodiversity and ecosystems.

126 IUCN, 'Biodiversity Offsets', *Issues Brief*, September 2016, p.2.
127 Ibid, 2.
128 Tullow Kenya B.V., *Early Oil Pilot Scheme Phase II - Environmental and Social Impact Assessment: Volume 1* (2018), 5-46.
129 Ibid, 7-13.
130 Environmental (Impact Assessment and Audit) Regulations, 2003, s 34.
131 Environmental Management (Water Quality) Regulations, 2006, s 33.

Biodiversity mainstreaming through devolved government functions

County governments, as a subnational level of administration, stands to play a key role in peforming biodiversity functions and enhancing the success of mainstreaming. Kenya's 47 county governments have functions that are set out in the Fourth Schedule to the Constitution. Part 1 of that schedule requires the national government to protect the environment and natural resources with a view to establishing a durable and sustainable system of development, including in particular, fishing, hunting and gathering, protection of animals and wildlife; water protection, securing sufficient residual water, hydraulic engineering and the safety of dams; and energy policy.[132] This broad function of the national government correlates protecting the environment and natural resources with establishing durable and sustainable systems of development. County governments, on the other hand, are assigned various functions relevant to environment and biodiversity in Part 2 of the Fourth Schedule. These include agriculture, whose scope includes crop and animal husbandry, livestock, plant and animal disease control, and fisheries.[133] The mandate also includes county planning and development permitting. More specifically, counties are required to implement specific national government policies on natural resources and environmental conservation, including soil and water conservation and forestry.

The role of subnational-level governments, such as counties, has been identified as critical by the CBD. In Decision X/22, State parties at CoP 10 set out and endorsed the 2011-2020 Plan of Action on Subnational Governments, Cities and Other Local Authorities for Biodiversity.[134] Among other things, the Action Plan urged State parties to engage with their subnational governments and local authorities in the revision and implementation of national biodiversity strategies and action plans (NBSAPs); and to integrate biodiversity considerations into public procurement policies and urban infrastructure investments.[135] State parties are also urged by the Action Plan to encourage development and implementation of subnational and local biodiversity strategies and action plans in support of national biodiversity strategies and action plans.[136]

County Integrated Development Plans (CIDP) under the County Governments Act, 2012, are an example of such plans as they are mandatory for counties to prepare in each five-year period and should include a spatial plan.[137] The CIDP should, among other things, set out any development initiatives in the county, including infrastructure, physical, social, economic and institutional development.[138] The Laikipia County CIDP, for instance, identifies degraded water catchment areas, rangeland degradation and low county tree cover as key challenges. As priority actions, the CIDP sets out rehabilitation of catchment areas through afforestation and riparian areas reclamation as well as the reseeding of rangelands together with eradication of alien invasive species.[139] The CIDP is an important tool for biodiversity mainstreaming since, under the law, it informs the county's budget on the basis of annual development priorities and performance targets.[140]

132 Constitution of Kenya (2010), Fourth Schedule, Part 2, s 22.
133 Ibid, Part 1, Section 1.
134 UNEP/CBD/CoP.x/22. Plan of Action on Subnational Governments, Cities and Other Local Authorities for Biodiversity.
135 Ibid, Part D.
136 Ibid, Part D.
137 County Governments Act, No. 17 of 2012, s 108.
138 Ibid, s 108(2) (b).
139 Laikipia County, 2018-2022 County Integrated Development Plan (CIDP), 101.
140 Ibid (n 137), s 113(1).

Another example is the Lamu County 2018-2022 CIDP, which clearly maps out Lamu's rich biodiversity, with a unique ecosystem that combines both marine and terrestrial wildlife.[141] The Lamu archipelago is a significant world ecological and cultural heritage with 75 per cent of Kenya's mangrove forests located in the county, together with endemic marine biodiversity of diverse coral reefs, sea-grass beds, sand bars, lagoons and creeks.[142] The CIDP is clear that these ecosystems are under enormous pressure from increasing human population that is extracting and using resources at an accelerated rate from a resource base that is vulnerable and finite.[143] The pressure on the natural resources is manifested in vegetation removal; land and water resources degradation and pollution; overfishing and degradation of fish habitats; development initiatives under the Lamu Port South Sudan Ethiopia Transportation (LAPSSET) corridor such as a port, and an oil refinery.[144] While the CIDP prioritizes social and economic activities, such as farming, it contains an innovation where 'green economy considerations' are identified for the various actions. These considerations include preservation of riparian land, green parks, open spaces, protection of water catchment area and ecologically sensitive areas.[145] The county has also prepared a Spatial Plan, which includes an Action Plan that sets out a zonation plan. Zone 6 focuses on conservation areas that include the sand dune strip on the lower end of Shella, and the Mangrove ring surrounding the island on the shoreline that will be promoted as fragile ecosystems and strict guidelines towards conserving them proposed.[146] Under this zoning plan, these areas will be separated by compatible land uses that enhances their conservation. The lower end of the island, which has the sand dunes that are vital sources of fresh water for the island, will be separated by a buffer zone of 50 metres from the lowest point of the sand dune.[147] While this is only at the level of a development plan and a spatial plan, it demonstrates there is consciousness by counties on the value of biodiversity, which can be harnessed, especially in economic activities that often drive biodiversity loss.[148]

E. Conclusion

The integration approach is an important tool for implementing the three CBD objectives, and they bring biodiversity to the mainstream at par with or more importance than the ordinarily dominant social and economic activities. The adoption of the mainstreaming approach has been identified as a pathway to ensuring that development activities minimize or stop being drivers of biodiversity loss and instead promote sustainable outcomes that balance ecological considerations with the socio-economic priorities. The Constitution is unique as it is equipped with legal tools and mechanisms that are mandatory in nature, and are by their nature structured to prioritize biodiversity and ecological integrity.

Human rights, including socio-economic entitlements and the right to life, by nature need an environment whose ecosystem services are functional and wholesome. This ecological integrity is now recognized as a good practice for fulfilling State obligations to implement the human right to a clean and healthy environment. Environmental assessment tools, such as SEA, EIA and

141 Lamu County, 2018-2022 County Integrated Development Plan (CIDP), 1.
142 Ibid, 1.
143 Ibid, 31.
144 Ibid 31.
145 Ibid, 210.
146 Lamu County Spatial Plan 2016-2026: Action Plans, Volume III, March 2017.
147 Ibid, 12.
148 Ibid, 12.

EA, framed by the Constitution as mechanisms to implement the environmental right, can play an important role in requiring explicit assessment and consideration of biodiversity impacts prior to approval of social and economic activities. In this context, the chapter has examined the application of biodiversity mitigation hierarchy and offsets, and recommends the integration of this valuable scientific tool into the statutory methodology for undertaking EIAs. Modification to the EIA regulations should be sufficient to implement this important reform, which has the potential to mainstream biodiversity protection in approval of social and economic activities that impact the environment.

County governments perform important functions that, as drivers of degradation, can adversely impact biodiversity. Counties also have constitutional mandates that require protection of the environment and biodiversity, as previously highlighted. Whether through enactment and implementation of county-level legislation, or through the CIDP and spatial plans reviewed in this chapter, counties can lead the charge in actively mainstreaming biodiversity. A case in point is in agriculture where, as highlighted in the chapter, ecosystems when sustainably functional can support natural pest control methods through the 'push-pull' system, which provides regulating ecosystem services (pest control, soil regeneration) and make available provisioning ecosystem services such as food crops and animal fodder.

CHAPTER 25

Environmental Pollution and Waste Management in Kenya

Anne Nyatichi Omambia, Selelah Atieno Okoth, and David Walunya Ong'are

A. Introduction

The quality of our air, water, soils and biological resources is changing, in turn affecting not only human health but also ecosystem health, thereby reducing their resilience and adaptive capacity, disrupting biogeochemical processes, and affecting the climate.[1] Human population increase and even faster consumer growth of human aspirations have collectively magnified the scope of the human footprint on the planet.[2] Economic activities have thus resulted in environmental consequences in both large and small scale, key among these being pollution. However, most often the benefits of these economic decisions, though immediate and gratifying, lead to high negative costs on the environment and the impacts are borne by others sometimes in far flung areas who have no way to express their displeasure.[3] Environmental pollution problems are, therefore, not easily solved by decree or regulation and some challenges cannot be completely ameliorated but steps must be taken by nations. Indeed, the global community has taken policy, regulatory and institutional measures to provide a powerful new set of incentives and disincentives to nations, institutions and individuals whose behaviour negatively affects the environment.[4] Thus, the need and role of environmental governance to manage our global commons is indispensable.

In Kenya, the Constitution has enshrined the right to a clean and healthy environment in the Bill of Rights.[5] Further, Articles 42, 69 and 70 elucidate measures and actions on the management of the environment to ensure that the country thrives along a sustainable development pathway.[6] With regard to control of environmental pollution and waste management, including access to sanitation, Article 69(1) (g) of the Constitution indicates that the State shall eliminate processes and activities that are likely to endanger the environment.[7] The Constitution has spelt out various roles and functions, including devolved duties to county governments.[8] These include refuse removal, provision of water and sanitation, noise pollution control, community forest management, and urban renewal.[9] Further, counties have power to make laws and regulations for the control of environmental nuisance and environmental management.[10] In addition, the government at both levels has established policy, legislative, institutional and regulatory measures for the sustainable management of the environment. Kenya is also signatory to various regional and Multilateral Environmental Agreements with the key objective of cooperative action for the conservation and management of the global commons.

1 Arild Vatn; *Environmental Governance: Institutions, Policies and Actions* (Edward Elgar Publishing Limited, 2015) 213-224.
2 James Gustave Speth and Has M. Peter, *Global Environmental Governance* (Island Press, Washington DC, 2006) 98.
3 Ibid.
4 Sheila Aggarwal-Khan, *The Policy Process in International Environmental Governance* (Palgrave Macmillan UK, 2011) 44-75.
5 Republic of Kenya, *The Kenya Constitution* (Government Printer Nairobi, 2010) Chapter 4.
6 Ibid, Chapter 5.
7 Ibid.
8 Republic of Kenya (n 8), Fourth Schedule, Part 2(3) and (11).
9 Ibid. 10 Ibid.

In spite of all these actions, environmental pollution and poor waste management persist in the country. This chapter provides a situational analysis of environmental pollution in Kenya, the policy and regulatory measures in place and the actions, challenges and opportunities that exist in environmental pollution and waste management. The chapter assesses whether, in law and policy, the management of pollution and waste is rising to the standard required by implementing the Constitution of Kenya.

B. Context of environmental pollution

Environmental pollution is a global problem but its prevalence and impacts are higher in developing countries like Kenya[10]due to governance challenges. These developing countries are not only challenged from policy, regulatory and institutional perspectives but also from a technical perspective mainly due to the lack of infrastructural capacity that largely undermines sustainable management of pollution from various sources.[11]

The upsurge in environmental pollution has a strong connection with civilization.[12] In the past, prior to the industrial revolution and increase in human population, nature could selfregenerate but currently, the capacity of natural cleansing has been outweighed.[13] The poor people, whether from developed or developing countries are also more vulnerable to impacts of pollution due to high risk of exposure than the rich.[14]

Kenya has been grappling with various environmental pollution challenges as it continues to develop industrially. Key among these is solid waste challenges, including domestic and electronic wastes, air pollution mainly in the major cities with Nairobi being the worst affected with water pollution.[15] Remarkably, pollution from various sources presents a myriad challenges to the country and no source has been curtailed from contributing to any pollution that undermines human health and degradation of the ecosystem.

The United Nations Sustainable Development Goals (SDGs) have put great focus on the reducing environmental pollution.[16] Specifically, SDG 3.9 targets substantial reduction of deaths and illnesses from hazardous chemicals and air, water, and soil pollution and contamination by 2030.[18] Other SDGs that relate to pollution include Goal 2.4 on improving the quality of soil; Goal 7 focusing on clean energy; Goal 9.4 focusing on clean energy and industrial processes; Goal 11 on sustainable cities and communities, Goal 12 on responsible consumption and production, and Goals 14 and 15 on water and land, respectively.[17] Goal 9.4 would largely be met through industrial ecology, which is currently picking up in Kenya through projects under the Kenya

10 Pierre Failler, Patrick Karani and Wondwosen Seide, *Assessment of the Environment Pollution and Its Impact on Economic Cooperation and Integration Initiatives of the IGAD Region* (IGAD, National Environment Pollution Report, Kenya 2016).
11 Ibid.
12 Jean-Yves Heurtebise, 'Sustainability and Ecological Civilization in the Age of Anthropocene: An Epistemological Analysis of the Psychosocial and "Culturalist" Interpretations of Global Environmental Risks' [2017], *Sustainability*, 9 at 1331.
13 Ibid.
14 Anjum Hajat, Charlene Hsia and Marie S. O'Neil, 'Socioeconomic Disparities and Air Pollution Exposure: A Global Review' [2015], *Springer International Publishing,* 2 at 440-450.
15 Failler, Karani and Seide (n 14).
16 The 2030 Agenda for Sustainable Development (UN Doc A/RES/70/1) (Signed 1 January 2016). 18 Ibid.
17 Ibid.

National Cleaner Production Centre (KNCPC).[18] A number of initiatives within manufacturing and processing industries such as the sugar milling companies have embarked on efforts to prevent pollution and where reduction is unavoidable, reuse and recycling is applied while minimizing resource exhaustion.[21] Through the reuse and recycling strategies, over exploitation of natural resource base is being avoided.

Article 69 of the Constitution contains provisions that support efforts towards reduction in environmental pollution.[19] There is promotion of sustainable exploitation and utilization of natural resources, which include water, air and land. Other provisions advocate environmental impact assessment that would help identify possible pollution sources and ensure corrective/ mitigation measures are in place to minimise any negative impacts associated with any development.[20] Environmental audit would support monitoring of the performance of any facility that supports degradation of any environmental media.[21] The other key provision is the call of duty for all citizens to support government agencies in protecting and conserving the environment.[22]

Sustainable consumption and production (SCP), though referred to using different terminologies including green growth and green economy famously used in Kenya, have the same principles all geared towards sustainable development. The concept of SCP principally promotes quality life without compromising environmental conservation for future generations.[23]Additionally, SCP envisages the life cycle thinking during all production and consumption processes.

The 20th Century has witnessed a great deal of transformation in human lifestyles and industrial growth, which largely impacted negatively on resources such water and air, and saw more wastes being generated. A study by UNEP in 2011 noted that there had been a dramatic increase in the use of natural resources (biomass, minerals, water and fossil fuels) from 10 billion tonnes in 1950 to over 70 billion tonnes in 2010.[24] The SCP concept appreciates that while human beings must grow, such growth whether economic or social must strive to support the achievement of sustainable development for future generations.

Circular economy, which views the world as waste-free, was popularized through the cradle-tocradle concept. The circular system focuses on redesigning the production cycle of products to an industrial system beneficial for the wellbeing of people and ecological systems.[25] The Kenyan government banned use of carrier and flat, single-use plastic bags[26] popular for commercial and household packaging and is applying the concept of circular economy by providing a framework that promotes recycling of plastic materials that have not been banned such as PET, LPDE, HPDE, among others. Circular economy is applicable in SDG 12 on responsible consumption and production through its principles of reduce, reuse and recycle. The Kenyan government,

18 Ministry of Devolution and Planning, Implementation of the Agenda 2030 for Sustainable Development Goals (Kenya, 2017). 21 Ibid.
19 Republic of Kenya (n 8), Article 69(1).
20 Ibid.
21 Ibid.
22 Republic of Kenya (n 8), Article 69(2).
23 United Nations Environment Programme, *Sustainable Consumption and Production*: *A Handbook for Policymakers* (2015).
24 Ibid.
25 Lieder and Rashid, 'Towards circular economy implementation: a comprehensive review in context of manufacturing industry' [2015], *Journal of Cleaner Production*, 115 at 36.
26 Republic of Kenya, Gazette Notice No.2356 (2017).

through the National Environment Management Authority is spearheading the recycling aspect through constructive engagement with manufacturers and recyclers in the entire chain of plastic materials.

Causes, types and effects of environmental pollution

One of the greatest challenges the world faces today is environmental pollution, mainly due to the industrial revolution that is causing irreparable damage to the earth and its humanity. The broad types of pollution are air, water, soil, land, light and noise. All these types endanger public health, the fauna and flora as well as ecosystem functions.

Air pollution

Air pollution is a common occurrence in urban areas. The main causes are excessive combustion to provide energy for cooking, transportation and industrial activities . Burning of wastes though prohibited under the Environmental Management and Coordination (Waste Management) Regulations, 2006 in Kenya, is still practiced. One of the common practices is the material recovery for scrap metal business through burning of waste tyres. This practice releases dioxins, contributing to air pollution and risk to public health.[27]

Carbon monoxide (CO) is a poisonous gas formed during the combustion of fossil fuels and primarily emitted from cars and trucks. When inhaled, the gas can block oxygen from vital organs such as the brain and the heart. Carbon dioxide gas, though naturally occurring, has increased in quantities over the years due to unrefined power plants and emissions from automobiles. The volumes of CO_2 have further been exacerbated by massive logging of trees. Nitrogen oxides (NO_x) contribute to the formation of particulate matter and ozone at the lower level. High levels of exposure to the NO_x suppress the immune system against respiratory infections and lead to lung irritation. Sulphur dioxide (SO_2) gas, emitted from power plants dependent on diesel during combustion, can react with other chemicals in the atmosphere and form fine particles. It poses very high risks to asthmatic people and children.[28]

Hazardous (toxic) air pollutants can cause birth deformities and cancer, and have negative ecological and environmental effects. Benzene, found in gasoline and methylene chloride used as a solvent, is a common example of these pollutants.[29] Greenhouse gases from transportation by vehicles, aeroplanes and freight emit gases such as carbon dioxide, which contribute to climate change globally. Fossil fuel emissions from power plants that use coal fuel together with vehicles, which run on fossil fuels, combined with heat and sunlight result in smog.[30]

Particulate matter (PM) is usually fine particles from soot with murky colour. The particulate matter is harmful to human health as they can penetrate the lungs. Vehicles dependent on diesel are the main emitters of the particulate matter. Hydrocarbons (HC) react with nitrogen oxides

27 Maria Triassi, Rossella Alfano, Maddalena Illario, Antonio Nardone, Oreste Caporale, and Paolo Montuori, 'Environmental Pollution from Illegal Waste Disposal and Health Effects: A Review on the "Triangle of Death"'[2015], Int J *Environ Res Public Health,* 12](2) at 1216.

28 Shao-Kun Liu, Shan Cai, Yan Chen, Bing Xiao, Ping Chen and Xu-Dong Xiang, 'The Effect of Pollutional Haze on Pulmonary Function' [2016], *J Thorac Dis.,* 8(1) at E41.

29 United States Environmental Protection Agency <https://www3.epa.gov/airtoxics/pollsour.html> (accessed 14 November 2020).

30 H Mohammadi,* D Cohen, M Babazadeh, and L Rokni, 'The Effects of Atmospheric Processes on Tehran Smog Forming' [2012], *Iran J Public Health,* 41(5) at 1.

when there is sunlight and are harmful in the lower atmosphere as it causes irritation of the respiratory system, causing choking and coughing.[31]

Emission of greenhouse gases has increased temperatures, unpredictable droughts and rains globally. All these have increased cases of bronchitis, lung cancer and asthma.[32]

Water pollution

Living organisms depend on water, and its pollution affects almost all forms of life. Water pollution emanates from domestic and industrial effluents, poor disposal of hazardous and nonhazardous wastes, deforestation leading to soil erosion, chemicals such as fertilizers, pesticides and oil spills whether onshore (through run-offs) or offshore—all of which impact on water quality.[33] Eutrophication of the water bodies, common in lakes due to washing of clothes and utensils using detergents with high phosphorus and nitrogen levels, also pollute water.[34] Any form of water pollution causes harm to aquatic life and contaminates the entire food chain, which affects people dependent on them.[38] Cholera and diarrhoea are common waterborne diseases associated with water pollution.

Soil pollution

Land pollution normally occurs when unwanted chemicals are fed into the soil through various human activities.[35] Industrial activities such as petroleum refining, mining, manufacturing of pesticides and the production of other chemicals categorized as hazardous contribute to soil pollution.[40] Some industries and institutions practice illegal dumping to evade taxes for waste management services. Excessive use of chemical fertilizers, pesticides and insecticides make the soil unfit for plant survival. Illegal practices can include burying toxic waste in non-designated sites such as buildings, cultivable areas, and roads.[36] Other practices include deforestation that deprives the soil of its nutrients and undermines the quality of soil.[37]

Radiation pollution

Apart from the sunshine, electromagnetic radiation is a major polluter. Information communication technology equipment such as mobile phones, computers, tablets and other wireless devices emit electromagnetic radiation.[38] Any uncontrolled upset in nuclear plants, and poor disposal of nuclear wastes contribute to radiation.[39] Effects of radiation on human health and plants are irreversible as they can cause mutation of species, skin and blood cancer, infertility, blindness and birth defects. Radiation can also permanently change air, water and soil.

31 Shyam Bihari Sharma, Suman Jain, Praveen Khirwadkar, and Sunisha Kulkarni, 'The Effects of Air Pollution on the Environment and Human Health' [2013], *Indian Journal of Research in Pharmacy and Biotechnology*, 1(3) at 391.

32 Sarvjeet Yadav, 'Environmental Pollution Effects on Living Beings' [2018], *International Journal of Scientific Research in Science and Technology,* 4 (7) at 143.

33 Ibid.

34 Ibid. 38 Ibid.

35 Amrik Bhattacharya and S K Khare, 'Sustainable options for mitigation of major toxicants originating from electronic waste' [2016], *Current Science Association*, 12 at 1946. 40 Ibid.

36 Ibid.

37 Hikmet Günal, Tayfun Korucu, Marta Birkas, Engin Özgöz, and Rares Halbac-Cotoara-Zamfir, 'Threats to Sustainability of Soil Functions in Central and Southeast Europe' [2015], *Sustainability*, 7 at 2161.

38 Rehab O. Abdel Rahman, Matthew W. Kozak and Yung-Tse Hung, 'Radioactive Pollution and Control', in Nazih K. Shammas, Yung-Tse Hung, Lawrence K. Wang (Eds.,) *Handbook of Environmental and Waste Management* (World Scientific) (2014) 9491027.

39 Ibid. 45 Ibid.

Noise pollution

Exposure to noise levels beyond 85 decibels can be harmful to human health. Normally, excessive noise and vibration contribute to stress and hypertension, and can permanently impair hearing.[45] Heavy machinery with compressors, pumps and even noise from churches as well as entertainment joints contribute to noise pollution. In Kenya, another major cause of pollution is noise from public service vehicles playing loud music and using modified hooting systems.[40]

In view of these documented facts on global pollution, it would be important to utilize existing opportunities such as structures like the United Nations Environment Programme, World Health Organization, research institutions, technological advancement and intergovernmental cooperation to work towards reduction of pollution sources. Additionally, the existence of relevant treaties such as those relating to water management, air quality and waste management, to which many countries are parties, provide avenues to combine efforts to reduce pollution. The Sustainable Development Goals are only achievable if environmental issues are holistically addressed using existing structures.

C. Contextual assessment of environmental pollution in Kenya

Environmental pollution has been worsening over the years as economic growth largely depends on exploitation of natural resources or is the recipient of various by-products from various industrial processes such as wastewater, emissions from factories and disposal of waste. Kenya is experiencing key challenge around creating a balance between sustainable development on one hand and environmental management and utilization on the other.[41] The country lacks effective systems for waste collection and disposal, with the waste management situation in urban areas being highly defective. The National Environment Management Authority (NEMA) has been implementing the Environmental Management and Coordination (Waste Management) Regulations, 2006, which should ensure that all county governments have functional collection systems for municipal waste and proper landfills. However, no single county has to date developed a landfill due to financial constraints.[42] The development of the National Solid Waste Management Strategy of 2015, sets out basic minimum and temporary requirements on management of existing dumpsites in the country.[43] These requirements are short-term responses to poor disposal practices as the county governments plan to develop and operationalise proper landfills. Not much progress can be reported towards this measure to date, however, except in the County Government of Kisumu, which has relocated its dumpsite

40 Enock Abe Wawa and Galcano Canny Mulaku, 'Noise Pollution Mapping Using GIS in Nairobi, Kenya' [2015], *Journal of Geographic Information Systems,* 7(05) at 486.

41 Pierre Failler, Patrick Karani and Wondwosen Seide, 'Assessment of the Environment Pollution and its Impact on Economic Cooperation and Integration Initiatives of the IGAD Region', National Environment Pollution Report-Kenya (2016). <https://www.researchgate.net/profile/Pierre_Failler/publication/299442468_Assessment_of_the_Environment_Pollution_and_its_impact_on_Economic_Cooperation_and_Integration_Initiatives_of_the_IGAD_Region_National_Environment_Pollution_Report_-_Kenya/links/56f7be9f08ae81582bf38a09/Assessment-of-the-Environment-Pollution-and-its-impact-on-Economic-Cooperation-andIntegration-Initiatives-of-the-IGAD-Region-National-Environment-Pollution-Report-Kenya.pdf?origin=publication_detail > (accessed 16 November 2020).

42 Leah Oyake-Ombis, 'Awareness on Environmentally Sound Solid Waste Management by Communities and Municipalities in Kenya', Ministry of Environment and Natural Resources. <https://www.ke.undp.org/content/dam/kenya/docs/energy_and_environment/Awareness%20on%20environmentally%20Sound%20Solid%20Waste%20Management_.pdf > (accessed 16 November 2020).

43 National Environment Management Authority, *The National Solid Waste Management Strategy* (2015).

and restored the Kachok dumpsite.[44] Private garbage collectors licensed by NEMA and their respective county government but without proper disposal facilities are currently undertaking waste collection within urban settings. There are still instances of open burning of wastes in both rural and urban settings. A good example is the burning of waste tyres by street children, which has not been regulated despite the potential risk the practice poses to the public health. Traders dump waste from their facilities in the evening after operations due to absence of tracking.

Domestic and industrial effluent

Domestic and industrial effluents are not well managed in most parts of the country. Sewerage facilities are few, and where they exist, they are largely inefficient. Only 20 per cent of households have access to sewerage facilities yet the country is experiencing 4.3 per cent annual urban growth.[45] Only 5 per cent of sewage is well treated as most of the sewerage systems are faulty and wastewater treatment processes are inadequate.[46] Poor solid waste management is contributing to blocked sewer lines that overflow into fresh water bodies such rivers and lakes, thereby compounding the pollution levels in these waters. Some industrial effluents are directly discharged into rivers without treatment. Within the coastal towns of Kenya, uncontrolled and rapid urbanization with especially slum settlement with is largely contributing to marine pollution as all the wastes are directed into the ocean due to lack of appropriate waste collection and disposal systems.

NEMA is mandated to regulate effluent discharges that end up in any environment media through the Environmental Management and Coordination (Water Quality) Regulations, 2006. The Water Resources Authority (WRA) monitors the quality of water bodies through various compliance and enforcement approaches under the Water Act, 2016. The two agencies have harmonized standards on effluent that guide their operations. While water quality has been observed as getting degraded, the main problem could be attributed to non-point sources of pollution. These non-point sources include mainly release of effluent from informal settlements, surface run-offs and dumping of hazardous and non-hazardous waste into the water bodies.[47]

Air pollution

Air pollution is becoming a huge public health threat due to industrial growth, vehicle emissions, huge traffic jams and old cars with high emission levels of SO_2 and CO_2. Air pollution was a localized problem in the past but rapid urbanization has made it attract reasonable attention. Rapid urbanization and industrialization have contributed to increasing fumes, dust and smoke from the open burning of wastes as well as particulates from construction site, vehicular emissions and manufacturing industries in most Kenyan cities.[48] Over the past two decades, Kenya has

44 Frankline Otiende Awuor, Belinda Nyakinya, John Oloo, Michael Oloko, Stephen Gaya Agong.' 'How Did Kachok Dumpsite in Kisumu City Develop into a Crisis?'<https://www.mistraurbanfutures.org/en/publication/how-did-kachok-dumpsite-kisumu-citydevelop-crisis > (accessed 16 November 2020).

45 Goufrane Mansour, Charles Oyaya & Michael Owor, 'Situation Analysis of the Urban Sanitation Sector in Kenya' (2017). < Https://Www.Wsup.Com/Content/Uploads/2017/09/Situation-Analysis-Of-The-Urban-Sanitation-Sector-in-Kenya.pdf > (accessed 16 November 2020).

46 Ibid.

47 Ministry of Lands, Housing and Urban Development, 'The Kenya Informal Settlements Improvement Project –Environmental and Social Management Framework' (2014). <http://documents.vsemirnyjbank.org/curated/ru/276491468253780772/E48150AFR0ESMF00Box391429B00PUBLIC0.doc> (accessed 16 November 2020).

48 Ibid. 55 Ibid.

experienced rapid urbanization, with many households and institutions owning vehicles that largely contribute to air pollution. The situation has been worsened by clearance of forests that exacerbate the release of greenhouse gases. Environmental Management and Coordination (Air Quality) Regulations, 2014, to regulate ambient air quality from both mobile and stationary sources have been in place. Regulation of stationary sources has since commenced with all the regulated facilities submitting initial emission assessment reports to NEMA and their emission licences issued.

Monitoring of air pollution from mobile sources has, however, not picked up so far. The Authority requires huge financial support to procure appropriate monitoring equipment and proper coordination with lead agencies such as the National Transport and Safety Authority to ensure the regulation of the mobile sources of pollutionMajor towns such as Nairobi and Mombasa experience huge traffic jams causing idling of the vehicles are major air and climate pollutants. Kenya has not fully transitioned to clean energy in the transport sector and majority of the vehicles depend on processed petroleum products (petrol and diesel) as fuel. Indoor air pollution due to use of firewood (mainly rural) and charcoal for households is a key challenge for the country.[55] The prevalent charcoal burning emits methane and $CO_{2,}$ sending tiny particulates into the air that threaten public health. A study conducted on air pollution in Kenya pointed that air pollution is the eighth leading risk factor for premature death, accounting for nearly 19,000 deaths (5,000 due to ambient air pollution and the remaining due to indoor pollution) in 2017[49].

Proper enforcement has not been realized and it is assumed that people have accepted to live with such pollutants (smoke, fumes, dust and particulates) in major towns around the country.

Electronic waste

The rapid growth and advancement in Information and Communications Technology (ICT) has been aggravated with the explosion of mobile devices and computers to address the rising demand in Kenya. The ICT industry is growing remarkably rapidly in Kenya more than in other East African countries. The government's initiative of mainstreaming e-learning in schools and waiver of tax levies on computers as well as the e-government strategy have been pivotal to increasing volumes of computers and related accessories in the country. The rapid growth of the telecommunications industry has also aggravated the proliferation of mobile gadgets in the country. By 2014, Kenya had 32 million mobile phone subscribers and the number of Internet users was 22 million;[50] and these numbers have since increased. Otieno and Omwenga state that 'some of these equipment are old and have almost reached their End-of-Life (EoL) and are usually imported illegally under the pretext of bridging the "digital divide".' Additionally, the computational capacities of ICT products and dynamism in the ICT industry due to major improvement have decreased the lifespan of these products hence quick obsolescence. Most of the resultant e-wastes from the ICT products are in offices, homes and storage facilities as the country lacks appropriate infrastructure, policy and legal framework to support e-waste management.

49 deSouza, Priyanka et al. 'Air pollution in Kenya: a review." Air Quality, Atmosphere & Health' [2020], Springer Nature B.V.13 1487–1495

50 Ibrahim Otieno and Elijah Omwenga, 'E-Waste Management in Kenya: Challenges and Opportunities' [2015], *Journal of Emerging Trends in Computing and Information Sciences,* 6 at 661. 57 Ibid. 58 Ibid.

The growth in the sector has generated challenges, including e-waste management and subsequently negative impacts to public health and environment due to pollution. Most of the e-wastes produced in Kenya is managed informally through re-use of the product (including resale of the parts), crude recycling, disposal in dumpsites and open burning. E-wastes contain highly toxic materials and when not disposed of appropriately, they can threaten human life and the environment. The waste management strategies employed by the informal sector are undertaken without safety standards for the people involved and the damage to the environment. A study by UNEP in 2010 reported that 11,400 tonnes of refrigerators, 2,500 tonnes of personal computers, 2800 tonnes of television sets, 150 tonnes of mobile phones and 500 tonnes of printers had resulted into e-waste.[51] Producers and suppliers such as Safaricom, Nokia, and Computer for Schools Kenya, among others that would support collection, recycling and refurbishment, attempted take-back schemes. They flopped due to lack of awareness and incentives for end users. Consumers hold onto these e-waste gadgets since mechanisms for proper disposal do not exist.

Hazardous waste

Kenya has domesticated the Basel Convention on control of transboundary movement of hazardous wastes and their disposal, as well as the Bamako Convention on the ban of imports into Africa and control of transboundary movement of hazardous wastes into Africa through the Waste Management Regulations of 2006. Kenya is also a signatory to the Nairobi Convention, which provides a platform for regional cooperation, coordination and collaborative actions geared towards solving pollution of the coastal and marine environment. Other relevant treaties that Kenya is a signatory to include the Stockholm Convention on Persistent Organic Pollutants and the Rotterdam Convention on Prior Informed Consent that provides procedures for disposing of certain hazardous chemicals and pesticides. NEMA has since begun developing regulations on chemical management to domesticate the latter treaty.

Kenya has no policy or legislative framework on e-waste management but developed guidelines on e-waste management in 2010. The guidelines sought to support all consumers of ICT products to effectively manage the e-wastes generated once the devices reach their End-of-Life and promote environmental conservation. The ICT Policy of 2006[52] stipulates that all electronic and electrical equipment (EEE) dealers must prove their commitment to reduce harm to the environment by ensuring that their infrastructure would cause less harm to the environment prior to renewal of their licences.

Despite the adverse impacts of e-waste, including release of heavy metals such as lead and mercury, on human health and the environment, Kenya has not been able to effectively provide a proper strategy for the management of e-wastes. The problem is further compounded by low levels of awareness on the impacts on e-wastes among consumers, ability to afford second-hand EEE that have a short life span, therefore, adding to existing volumes of e-wastes, and lack of proper coordination among the relevant agencies.

51 Ibid.

52 Ministry of Information Communications and Technology, 'Draft National Information Communications and Technology' (2016). < http://icta.go.ke/national-ict-policy/ > (accessed 16 November 2020).

The problem of environmental pollution in Kenya had been compounded by the introduction of plastic bags for packaging over the past three decades. The plastic that Kenya has dealt with in the past was not biodegradable, with some purposed for single-use only, thereby increasing the volumes ending up in different environment media. It is not uncommon to find plastic materials floating in water bodies that host aquatic life, blocked drainage and sewerage systems due to plastics, as well as blockage of the rumen of animals. Open burning of plastics has been practised and the process releases dioxins and furans, which are highly toxic to human health. The poor disposal of plastics is largely to blame for flooding within most cities during rainy seasons.

The ban on plastics, covering carrier bags and flat bags used for commercial and household packaging, took effect on August 28, 2017[53] after a lot of failed attempts by the environmental Authority. The focus of the ban is on manufacturers, importers and end-users. Most of these categories of consumers have since complied with the order. The ban witnessed court battles between the regulator and the regulated community in attempts to overturn it but the Environment and Land Court ruled that the ban was timely and appropriate for the good of the country.

Proper enforcement of the ban presents a big challenge to NEMA. Plastic bags have been passing through the border points such as Busia. The small-scale traders within open-air markets and hawkers continue to use the banned plastic bags for packaging. It would be imperative to have a proper multiagency approach towards enforcement of the ban, specifically, involvement of the Customs Services Department to undertake physical verification within the porous border points.

D. Environmental pollution control: Challenges and opportunities

Control of environmental pollution calls for concerted efforts within the country and outside it, especially with the neighbouring countries. While this presents a number of challenges, there are opportunities that can be bought into to address the unbecoming situation of pollution. These have been outlined in the section that follows.

Challenges of environmental pollution management

Industrial expansion and rapid urbanization

Kenya has in the past decades witnessed rapid urbanization and industrial growth, especially in her major cities. This kind of growth has presented a number of pollution challenges affecting public health and all forms of environment media. In most of the cities, the capacities of sewerage systems, which were built many years ago and have never been expanded to accommodate the rising population leading to frequent overflows of effluents. In addition, illegal settlements have impacted on pollution control as most of the slum dwellers lack basic sanitation facilities and, therefore, direct their wastes into sensitive environment media like rivers. The problem becomes complicated as the government, despite developing physical plans for each and every city, is unable to undertake proper enforcement and support for the slum dwellers in a way that promotes sustainable development. Likewise, industries have grown and the capacity to regulate emissions and effluents from these facilities remains inadequate. The existing workforce is unable to cope with the needs for controlling pollution from industries. Industries

53 Government of Kenya, *The Kenya Gazette:* Gazette Notice No. 2334' (2017).

are also the major emitters of greenhouse gases that are currently threatening the existence of humanity due to unpredictable weather patterns in the country and the globe at large.

Rapid population growth

Rapid human population growth has brought forth scarcity. Every living being is scrambling for scarce resources to provide for the much-needed basics. This has contributed to overexploitation of the natural resource base and does not allow for the self-regeneration process. The current population, which is above 47 million people, depends on water, air and land for survival and due to the fact that most of these resources are dwindling, their capacity is getting over-stretched.

Climate change

Climate change is the most threatening, complex and controversial major global change issue of this age. The effects of climate change on the environment and human life are getting more conspicuous. Kenya is a climate-vulnerable country and already experiencing sector-wide impacts with varying effects on the economy, livelihood support system and jeopardizing achievement of developmental milestones envisioned in the national economic blue print, Vision 2030.[54] Projected observable changes in climate in Kenya include increase in temperatures, changes in rainfall distribution and intensity, sea level rise, increase in frequency and severity of extreme events, among others.[55]

Methane gas, a major greenhouse gas, is increasing in the atmosphere mainly from poor waste management, livestock rearing and the resultant manure management practices and the combustion of fossil fuels. As Kenya gets warmer, wetter and drier, poorly disposed waste becomes a more public health hazard by increasing the geographic range of vector borne human and animal diseases. A changing climate thus necessitates the application of climatesmart methods and technologies for environmental pollution and waste management. These approaches need to be appropriate to the climate predictions in each region. Further, climate change-induced extreme events such as floods have and will lead to damage to the waste management infrastructure and increase the costs for pollution and public health management. In addition, during flooding, water bodies will became more polluted due to heavy surface runoff and the resultant ecosystem and public health impacts cannot be underestimated. On the other hand, extreme prolonged droughts contribute to inadequate water resources, which jeopardize the effectiveness of water-assisted waste management technologies and systems. The Climate Change Act, 2016 provides for State, private and individual citizen action towards addressing climate change. The law has spelled out adaptation and mitigation actions by actors, which are further elaborated in the National Climate Change Action Plan 2013-2017, and the subsequent sector-based action plans. Further, some county governments have established policy and financial measures for addressing climate change. These include Makueni, Garissa, Wajir and Isiolo counties[56], inter alia.

54 Republic of Kenya, *National Adaptation Plan 2015-2030: Enhanced climate resilience towards the attainment of vision 2030 and beyond (*Government of Kenya: 2016).

55 Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, 'Climate Change: Impacts, Adaptation and Vulnerability' https://www.ipcc.ch/site/assets/uploads/2018/03/ar4_wg2_full_report.pdf (accessed 17 November 2020).

56 Orindi, V., H. K. Wendo, T. Landesman, P. Adriázola and L. Strauch 2020: The County Climate Change Funds in Kenya. Real Practice in Collaborative Climate Action. Berlin: adelphi.

Financial capacity

Inadequate financial capacity has over the years impeded regulatory agencies' response to environmental pollution control. The budgets allocated remain insufficient for procurement of the appropriate equipment such as monitoring of air pollution and inadequate personnel.

The industry players are also affected by their inability to meet the financial needs that can support pollution abatement equipment and instead end up contributing to environmental pollution.

Opportunities in environmental pollution management

Regional cooperation

The existence of African Union, East African Community and Intergovernmental Authority for Development (IGAD) are good platforms for Kenya to utilize in controlling pollution. These organ if well utilized and clear mechanisms developed would be critical in controlling transboundary illegal movement of hazardous wastes and banned chemicals and materials such as plastics. Appropriate enforcement strategies including networks among relevant institutions, harmonized policy and legislative frameworks within the region would be essential in supporting efforts towards pollution control. The strong networks would involve well-defined regional team undertaking enforcement with harmonized enforcement procedures and manuals.

Treaties related to control of environmental pollution

Kenya has signed and ratified a number of relevant Multilateral Environmental Agreements (MEAs) that can support pollution control measures if well domesticated and enforced. The MEAs related to hazardous waste management, control of ozone depletion, climate change mitigation, and water pollution control, among others, are key to ensuring that the unbecoming situation of environmental pollution is brought under control.

In 2010, 2011 and 2012, the National Environment Management Authority confiscated illegal shipments of refrigerants. The consignees, though licensed by the regulator, brought in mislabelled and adulterated refrigerants.[57] The consignments were reshipped to the countries of origin as the Authority applied the principles provided for under the Montreal Protocol and further domesticated through the Environmental Management and Coordination (Controlled Substances) Regulations, 2007.

Constitution of Kenya

The Constitution provides a great opportunity for Kenya to tackle environmental pollution. Article 42, which gives each citizen a right and a duty to a clean environment, is a strong provision in controlling pollution. The provision on duty makes everyone accountable for his actions that are detrimental to the environment. In addition, Article 69(2) calls for cooperation between every citizen and relevant State organs in protecting and conserving the environment. These constitutional provisions did not exist before and are good opportunities that should well implemented. The existence of the Environment and Land Court is a step in the right direction where environmental offences can be handled with the competency and accorded the deserving weight.

57 ACR News, 'Kenyan Customs Intercept Illegal R12 Consignment.' (2012) <https://www.acr-news.com/kenyan-customs-interceptillegal-r12-consignment> (accessed 17 November 2020).

Strategic partnerships

Partnerships provide a good basis for knowledge, technology transfer and funding, which if well explored can bridge gaps in the country's technological, policy and legislative needs in controlling environmental pollution. Key partners include UNEP, development agencies that are keen to support developing countries in addressing environmental challenges. The Danish government supported the Ministry of Environment and Forestry and NEMA through the Green Growth and Employment Programme. The programme supported a number of initiatives, including the development of an Environmental Performance Index and the integration of the circular economy in several industries in Kenya.

> The government is now developing a Green Economy Strategy and Implementation Plan (GESIP) to support development efforts towards addressing key challenges such as poverty, unemployment, inequality, environmental degradation, climate change and variability, infrastructure gaps and food insecurity.[58]

The civil society and community approaches are essential in supporting various programmes, such as awareness creation, and public mobilization to support efforts towards pollution control.

E. Policy, regulatory and institutional framework for environmental pollution management in Kenya

Kenya has a number of policy and legal and institutional regimes that make provisions and give mandates for the management of environmental pollution. A clean environment is one of the fundamental rights envisaged in Article 42 of the Constitution, and it makes it an obligation for all Kenyans to safeguard the environment. The Constitution, in Chapter 5 with Part 2, stipulates duties of the State and the citizens in protecting and conserving the environment, while recognising that any development must be assessed and adequate mitigation measures put in place to manage any potential adverse impacts related it.

National Environment Policy

Sessional Paper No. 10 of 2014 on National Environment Policy[59] notes the lack of coherent policies and poor management of the environment as major contributors to pollution. The policy recognizes water and air pollution, poor waste management, and other sources of pollution such as toxic chemicals and radiation as adversely impacting on human health and environment. The policy envisions putting up various measures to curtail further pollution of the environment. Positive developments can be reported even though not much has been achieved since 2014. There have been developments in promotion of the use of motorcycles, which have a smaller carbon footprint compared to vehicles. Not much effort has been noted in efforts to reduce the volume of vehicles being imported into the country and the vehicle numbers are growing yearly thus contributing to air pollution due to low fuel efficiency traffic jams in the major cities. The development of a national waste management strategy sought to ensure that, among other things, county governments construct appropriate landfills for waste disposal. Unfortunately, there are minimal achievements in that respect, with the counties only

58 Kenya Climate Innovation Centre, Kenya Leading in the Green Growth Agenda, (2016). <https://www.kenyacic.org/content/kenyaleading-green-growth-agenda> (accessed 17 November 2020).

59 Republic of Kenya, *Sessional Paper No. 10 of 204 on The National Environmental Policy* (Government Printer: 2014).

committing to the minimum requirements for better management of dumpsites, whose results are yet to be felt. Further, the policy envisioned the development of a national strategy on noise pollution, which has not been completed despite the high pollution levels emanating from public service vehicles and social places. Prior to the promulgation of the Constitution, control of noise pollution was the mandate of NEMA but it has since become a devolved function. Due to inadequate capacity, the county governments have been unable to effectively control noise pollution making it a public nuisance.

Environmental management under the Environmental Management and Coordination Act, 1999

The EMCA[60] has a number of provisions on environmental pollution control. These entail the establishment of NEMA to coordinate and supervise environmental management and conservation activities in the country; formulation of regulations on water quality, waste management, climate change, ozone depletion and other relevant mechanisms to abate environmental pollution. In addition, the framework law establishes institutions such as the National Environment Tribunal (NET) and the National Environment Complaints Committee (NECC). NET and NECC, which are independent institutions that handle environmental grievances or complaints against NEMA from individuals or organized groups for the betterment of environmental management.

Since 2006, NEMA has been implementing the Waste Management Regulations. The scope of these regulations[61] entails waste collection and transportation, disposal facilities and various types of licences required by various categories of waste handlers. The Fourth Schedule to the Constitution devolved certain waste management functions to the county governments. Part 2 (g) of the Fourth Schedule stipulates that 'refuse removal, refuse dumps and solid waste disposal'[62] is a function of the county government. As such, the county governments should put in place mechanisms and strategies, including legislation, to ensure that the devolved function is performed. The Nairobi City County's Solid Waste Management Act, 2015, provides for licensing of waste transporters, and waste disposal facilities, among others. This clearly brings out the overlaps in the legal frameworks on waste management between NEMA and Nairobi City's county government. In addition, the processing of licences entails double taxation for the licensees. It would be prudent for the two institutions, guided by the Fourth Schedule of Constitution, to harmonize these legal provisions to avoid potential sources of conflict.

The EMCA and its related regulations have established environment and social safeguards for the management of the environment and prevention of environmental pollution. Further, NEMA has also developed manuals and guidelines for the management of various types of wastes. The EMCA's 1999 regulations include Environmental Impact Assessment and Audit Regulations, 2003; Air Quality Regulations, 2014; Water Quality Regulations, 2007; and Controlled Substances and Waste Management, 2006.

60 The Environmental Management and Coordination Act, 2015.

61 Government of Kenya, *The Environmental Management and Coordination (Waste Management) Regulations* (The Government Printer: 2006).

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

The National Sustainable Waste Management Policy, Feb 2021[63]

In the recent past, Kenya has made significant steps in establishing a regulatory and institutional structure for the management of waste at both the national and county level. Spurred by the global and national call to end plastic pollution[64], embrace circularity in waste management and wise resource use, the National Sustainable Waste Management Policy adopts a circular economy approach to waste management where waste is regarded as a resource whose maximum value is fully extracted before disposal. The policy therefore embraces the 7R approach of Reducing, Re-thinking, Refusing, Recycling, Re-using, Reparing and Refilling. Further, the policy provides for the development and implementation of regulations, standards, guidelines and strategies at national and county level. Implementation of the policy and its related instruments calls for citizen action in waste management including households, business community, industry and government if the right to a clean and healthy environment is to be achieved as a significant component and enabler of the Vision 2030.

The Sustainable Waste Management Act 2022[65]

The Sustainable Waste Management Act 2022 was assented to on 6th July 2022 putting in place an institutional structure and obligations for various entities for sustainable waste management in Kenya. The Act provides the policy, coordination and oversight framework for waste management which establishes for the first time in Kenya the Waste Management Council whose mandate includes "a) enhance inclusive inter-governmental coordination for sustainable waste management; (b) review progress in implementation of the national sustainable waste management strategy; (c) recommend to the Cabinet Secretary the national waste management recycling and recovery targets; (d) synchronise the development of waste management infrastructure; (e) mobilise resources for financing of the waste management sector; (f) promote inter county waste management partnerships in consultation with counties recommend to the Cabinet Secretary incentives to promote sustainable waste management."(Ibid, Section 7). Further, the Act defines the roles of NEMA as the regulator, Counties, Public Entities, Private Sector, Waste Service Provides, Citizens, National Public Complaints Committee and the National Environment Tribunal. The Act also provides for public participation and information access in waste management and monitoring and compliance. Finally, the Act provides for formulation of subsidiary legislations for its implementation including the Extended Producer Responsibility Regulations and related guidelines including those that relate to material recovery facilities.

Devolution

The creation of devolved government under the Constitution meant that certain environmental functions designed to support better environmental management and conservation have been devolved to the county governments. The key functions here include control of noise pollution and waste management. However, these functions have suffered setbacks due to inadequate technical capacity in most county governments. In addition, environmental management is not a priority for county governments as their main focus is revenue generation from other

63 Kenya, Republic of., February 2021. National Sustainable Waste Management Policy, 2021. Ministry of Environment and Forestry. Government Printers.

64 https://www.unep.org/plastic-pollution

65 The Sustainable Waste Management Act 2022 No. 31 of 2022.

sectors of the economy. Taking the specific case of noise, while control of this type of pollution has been devolved to the county governments, vibrations that are associated with noise have not. This points to challenges in implementing such a function. As such, it would be important to review the provisions in the Constitution relating to functions within the two levels of the government and weigh them against other factors, such as technical and financial capacity to make sure that efforts towards control of environmental pollution are finally realized through better coordination mechanisms.

Cross-cutting areas of governance

Kenya has a robust policy and legislative framework for the management of the environment, including for the control of environmental pollution and the containment of emerging challenges. Issues across all key policy documents include the Environmental Management and Coordination Act of 1999, the Water Act of 2016, the National Climate Change Framework Policy of 2016, the Climate Change Act of 2016, the Energy Act 2019, and the Agriculture, Fisheries and Food Authority Act, 2013, among others. All these pieces of legislation have defined measures for the control of environmental pollution and have apportioned clear mandates for institutions established under them to champion activities that enhance control of environmental pollution. NEMA is mandated to regulate effluent discharges that end up in any environment media through the Environmental Management and Coordination (Water Quality) Regulations, 2006. The Water Resources Authority monitors the quality of water bodies through the Water Act, 2016. The two agencies have harmonized standards on effluent management that guide their operations.

F. Approaches and innovations in mitigating and ending pollution

Circularity in the manufacturing sector in Kenya

According to Khisa,[66] Kenya's industrial model is historically and currently based on a wasteful and unsustainable linear development economic model of extracting raw materials, converting them into consumable products, and discarding the resultant unwanted wastes into regulated and unregulated dumpsites, that is, cradle to grave. However, in the recent past, there has been increased interest in greening the industrial sector; and small but incremental steps are being witnessed within some industries which are adopting a circular economy development model, the so- called 'cradle- to- cradle' paradigm.

The circular economy (CE) model is characterized by resource use efficiency, adopting the 5-D production and waste management philosophy of 'Rethink – Redesign – Reduce – Reuse – Recycle'. A critical component of this approach is that circularity is embedded prior to production, i.e. in the design[67] stage in addition to eliminating use of toxic chemicals, which impair re-use. The CE model incorporates components of industrial symbiosis where one industry's wastes become the raw material for another industry,[68] akin to the symbiotic relations in nature where waste from one organism becomes food for another thus both mutually benefit and thrive. 'A circular economy has moved beyond the normal, *'take, make, and dispose'* mentality and instead

66 Kelvin Khisa, 'Industrial Symbiosis in the Manufacturing Sector' in *Joto Afrika: Low Emission and Climate Change Adaption Actions* (May Issue 23 2018). <<file:///C:/Users/USER/Downloads/30518070Joto%20Afrika_Issue_23.pdf> (accessed 17 November, 2020).

67 Ellen McArthur Foundation, *Rethinking the Future; Towards the Circular Economy; Economic and Business Rationale for An Accelerated Transition (2013).*

68 Kelvin Khisa (n, 76).

relies on system-wide innovation, redefining products and services to design waste out, while minimizing impacts[69]to keep the mined resources flowing for as long as possible. The adoption of this 'cradle-to-cradle' economic approach has the potential to facilitate Kenya's implementation of Sustainable Development Goal 12[70] on responsible consumption and production; control of environmental pollution; reduced pressure on the limited virgin raw materials on which Kenya's economic growth depends; improved human and ecosystem health; and reduced carbon footprint of the industrial sector through closed-loop manufacturing value-addition cycles.[71]

A case study on circularity: The Ruaraka Industrial Park

The Danish Ministry of Environment, as part of its environmental diplomacy, has entered into partnership with Kenyan enterprises to promote the principles of the circular economy targeting the manufacturing sector especially through resource efficiency, and pollution chain management in the Ruaraka industrial zone. The partnership shall serve as a pilot scheme and a 'living lab' for strengthening environmental enforcement and compliance systems by environmental regulators of industries to support Kenya's National Solid Waste Management Strategy,[72] and to manage waste water as a resource. The participating institutions are 38 manufacturing companies under the Ruaraka Business Community (RUBICOM) within the Ruaraka industrial zone; the Ministry of Environment and Forestry (MEF); the Ministry of Industrialization and Enterprise Development (MOIED); the National Environment Management Authority (NEMA); the Nairobi City County Government (NCCG); the Nairobi City Water and Sewerage Company (NCWSC); the Kenya Association of Manufacturers (KAM); the Water Resources Authority (WRA); the Kenya Industrial Research and Development Institute (KIRDI), the Danish Environmental Protection Agency (DEPA); and Denmark Technical University(DTU).

The partnership is focused on integrated water use and water use efficiency. This is informed by a number of factors, including the general scarcity of water in Kenya, water losses and inefficiency in transmission and production, leading to high overheads for industry, and the role of waste water in environmental pollution. Another key focus area is synergy among regulatory agencies concerned with water issues in Nairobi. Based on circular economy principles, the water is meant to be efficiently transmitted from treatment plants and kept circulating in a closed loop for as long as possible within the production systems and ultimately used for purposes such as maintenance of lawns and seedlings. The partner institutions are expected to leverage their mandates, in addition to participating in joint monitoring and lesson-learning fora.

Key within this model is promotion of collaboration through strategic communication, learning, and transitioning.

> Strategic communication serves information exchange, establishing consensus among divergent opinions and interests, and facilitates the building of know-how, decision-making and action capacities at the heart of the delicate cooperation between government, civil society groups and the private sector.[73]

69 Ellen McArthur Foundation (n 77).

70 United Nations, *Sustainable Development Goals* (2015) <https://sustaianbledevelopment.un.org/sdgs > (accessed 17 November 2020).

71 Ibid.

72 National Environment Management Authority, 'The National Solid Waste Management Strategy' (2015).

73 GTZ, *Strategic Communication for Sustainable Development: A Conceptual Overview* (2006) < https://www.cbd.int/cepa/toolkit/2008/doc/Strategic%20Communication%20for%20Sustainable%20development.pdf> (accessed 17 November 2020). 79 Kalundborg Symbiosis< www.symbiosis.dk>.

A number of initial results have been realized from the Ruaraka model, including the signing and formal launch of the partnership; baseline studies on the environmental profile for the Ruaraka industrial zone undertaken with regard to water use/ water use efficiency; a capacitybuilding workshop on circular economy principles for participating institutions; a readiness assessment of the Ruaraka industries done with regard to the green and circular economy. At the regulatory level, joint inspections have been carried out with the Nairobi City Water and Sewerage Company, NEMA, and the Danish Environment Protection Agency. From the latter, efforts are currently under way to refine and improve the environmental audit templates so that they capture relevant and cross-cutting information that can be shared between agencies. Once the templates are operational, it is expected that the regulatory burden on industries will reduce since a single audit will capture sufficient information for sharing among different government agencies. Industries have also mainstreamed the maintenance of accurate and up to date data on water use with a view of monitoring the benefits from retro-fitting their operations. One major review meeting has been held to discuss the progress of this partnership. This is an experiment that is at its formative stages. Compared to other models, there is opportunity to learn lessons and also get some inspiration from other more mature models. There are similar models in the world such as the Kalundborg Park in Denmark, which has been operational for several decades and from which we see opportunities to strengthen the cooperative model of collaborations. In the Kalundborg example, private utility companies are working together with the municipality in constructive partnerships. The Kalundborg Symbiosis is a private association run by a board with the Kalundborg Municipality providing secretariat services. It operates on a Life Cycle Assessment (LCA) to offer both financial and environmental benefits for partner institutions, with a grand vision to attain full resource utilization.

It also covers the whole production cycle including carbon offsets, unlike the Kenyan example, which is currently only focused on water. Contrasting this scenario with the Ruaraka model, we see a flat governance model where the private and public sector institutions share equal power. The Kenyan partnership is developing in an environment where previously, there has been a climate of mistrust between government and the regulated community. The governance structure for this partnership will be reviewed and enhanced based on the lessons that emerge during implementation, in addition to borrowing best practice from other successful case studies globally.

One way to manage the Ruaraka cooperation could be through the networked governance approach,[74] where issues such as uniformity in substantive and procedural normative standards are addressed. In the long run, this could influence Kenyan legislation and policy, especially the scope and interpretation of the Public Private Partnership Act of 2013.

Perceptions, attitudes, knowledge and behaviour: The role of environmental consciousness in environmental management

The role that people as a collective play in pollution and waste management is, to a very large extent, shaped by their perception, which in itself is the product of a mesh of issues. It has been documented that 'the mere presentation of scientific facts will not motivate people to change their

74 Mark Fenwick, 'Regulatory Networks, Population Level Effects and Threshold Models of Collective Action' in Fenwick Mark, Van Uytsel, Steven, Wrbka, Stefan (Eds.) M, *Networked Governance, Transnational Business and the Law* (Springer) (2014) 83-89.

attitudes and behaviour; reality is shaped by culture, education, peers, and personal experience with perception is the only reality'.[75] Matters pollution control involve many stakeholders from different spheres, including manufacturing, county and national government, the hospitality sector, the transport sector, households and others. An issue with such a complex array of players is equally difficult to address as perceptions vary from different standpoints. Therefore, there is need for 'understanding from totally new perspectives and the questioning, challenging and changing of old assumptions, paradigms and values.

Pollution and waste matters in Kenya have generally been viewed as a nuisance, and almost all counties are grappling with these twin challenges and how to re-engineer mindsets to better manage these problems. 'People have conceptual maps in their minds or frames that help them make sense of the world; different strategies are needed to communicate in ways that either resonate with the values and pre-dispositions of different audiences or that address fundamental misconceptions.[76] Responsible waste management has not been part of the DNA for most citizens of Kenya. Various cross-country initiatives are currently in place to shape perspectives with regard to waste management and pollution control. There are a number of questions to be addressed in order to shift the debate, including what waste represents in society, and the general duty of care with respect to waste.

A number of examples come to mind. Initially it was common for Kenyans to buy and thereafter discard newspapers after use, but with recycling companies coming up, informal collectors who buy the old papers at a small fee frequently visit many estates. Many people nowadays store these old newspapers carefully as they now represent a different, albeit small, source of income. In the same vein, a number of used items such as bottles are regularly re-used or sold in urban centres. Additionally, used cans are finding new applications as sugar bowls; or old bottles as flower vases; driven by a variety of factors including waste accumulation in homes and pressing economic times. With the rising middle class in Kenya and increased environmental awareness through mass and social media, we are increasingly seeing more individuals and corporate entities driven either by environmental consciousness and/ or the need to promote their brands and image in society rising up to profile their interventions in the general sphere of waste management in the name of being 'green'. So it has recently dawned on institutions that the 'green label' can be used to gain a competitive market advantage.

To incentivize government institutions to be good environmental stewards and practice what they preach to the private sector, the government of Kenya did introduce environmental targets as part of the performance contracting targets for ministries, departments and agencies. This provided an impetus for institutions to start paying greater attention to environmental matters by, for instance, developing internal environment policies; developing environmental management systems; and establishing tools for monitoring their respective environment performance. The key emphasis was for respective agencies to engage in interventions based on their mandates; the latter implied, for instance, that an entity like the Kenya Film Corporation did not need to venture out to undertake tree planning but rather needed to invest efforts in developing and creating public awareness through film. Despite the government drawing the environmental

75 Frits Hesselink, Wendy Goldstein, Peter Paul van Kempen, Tommy Garnett and Jinie Dela, *Communication, Education and Public Awareness (CEPA) A Toolkit for National Focal Points and NBSAP Coordinators* (2007) 24- 34. 82 Ibid.

76 Ibid.

performance targets a few years ago, most agencies have continued implementing them on their own volition, having found them to be a useful contribution to the country's overall wellbeing. It goes without saying that part of this mindset shift has cascaded from government agencies to the homes of public servants. A similar project was initiated in 2019 by the National Environment Management Authority to rank counties by their overall environmental performance. The initiative has caught the attention of many county governments and it is expected to generate pressure from citizens depending on how their respective counties are deemed to be performing.

It is, therefore, apparent that the continuum of perceptions, attitudes, knowledge and behaviour is influenced by many factors ranging from regulations, societal pressure, corporate brand management, global developments and environmental disasters, among other factors.

> Therefore to bring about meaningful change, learning and innovation will therefore take place at the individual level and at the organizational level to establish new priorities, new procedures and to reposition. At the societal level transformative change through new agendas, new partnerships, networks and new ways of interaction can be fostered.[77]

The role of non- state actors in pollution control and management

In February 2017, the Cabinet Secretary of Environment and Natural Resources, through Gazette Notice No. 2334, banned the use, manufacture and importation of plastic carrier bags and flat bags. This was due to the negative impact of the pollution load by plastics on various sectors of the economy, including livestock, fisheries and tourism, to name but a few. This catalysed an urgent conversation around plastic (Polyethylene Terephthalate, PET) bottles, which, though not banned, were in real danger of going the same way as the carrier bags. To forestall any challenges, the Ministry of Environment and Forestry, the National Environment Management Authority (NEMA) and the Kenya Association of Manufacturers (KAM)[78] set up a collaborative mechanism to manage pollution from plastic bottles. A memorandum of understanding was signed in early 2018.

Polyethylene Terephthalate (PET) is popularly used for packaging food and beverages, pharmaceuticals and personal care products due to its inert and shatter proof nature. Due to its widespread usage, it is a major component of solid waste on both land and the aquatic environment. There was, therefore, need for those responsible for production of these bottles to shoulder the aspect of its management post-use in line with the 'polluter pays' principle. The latter has been hinged on the concept of Extended Producer Responsibility.[79] The key elements of the agreement are to effect the sustainable disposal of plastic bottles, to apportion responsibilities to parties, and to set up a monitoring mechanism. Additional support interventions in the scheme include clean-up activities for bottles already in the environment, awareness campaigns to the public and manufacturers, and research on the effectiveness of the take- back model.

This is designed as one of the model PPP arrangements meant to inform environmental policy

77 Ibid.

78 The Kenya Association of Manufacturers (KAM) is a business membership organization established in 1959 to serve the manufacturing value-add industry and associated service industry. The organization has an extensive and countrywide network in Kenya with its core mandate being advocating to Government to advance the interests of its members and the entire business community by fostering a business friendly environment with a view to grow the manufacturing sector in Kenya. The Association is organized for purposes of its work into 14 manufacturing sectors. < http://kam.co.ke/about-kam/ >

79 Leila Monroe, 'Tailoring Product Stewardship and Extended Producer Responsibility to Prevent Marine Plastic Pollution' [2014], *Tulane Environmental Law Journal*, 7(2) at 219.

and legislation in this field going forward. It is a voluntary, self-financed scheme. At its core is a management team made up of representatives from KAM, Ministry of Environment, NEMA, the Council of Governors and the Ministry of Industrialization. There has been a number of dialogue sessions organized by KAM (dubbed sundowners) to share experiences with regard to plastic waste in general and the bottles in particular. This attempt at self-regulation within a formal organized setting such as this one gives optimism as it offers a win-win scenario with minimal enforcement actions. One result of this nascent network has been to break down communication barriers, leading to a better understanding of what each of the stakeholders requires of the other. This has led NEMA to embark on a re-design of the environmental audit template that is more concise and easier to use by KAM members. NEMA has in turn received feedback on how to enhance access to information and data that KAM members require in their day- to- day operations including abilities to remotely track the status of permit applications. One major result from this endeavour has been the setting up of the Kenya PET recycling company, PETCO, with a fairly well organized collection system that incorporates street families who are paid a small fee for the bottles they collect.

Learning to live sustainably: 'Adopt-a-River' initiative

Urban wetlands are among the most threatened ecosystems in Kenya. This is due to their direct conversion into built up areas (either planned or unplanned) and their being used as disposal areas for both liquid and solid waste streams. This has led to acute pollution-related problems, including uncontrolled domestic and industrial discharges; and irresponsible dumping of commercial, municipal and institutional wastes. There have also been drainage concerns; direct biodiversity habitat loss; overexploitation of wetland plant and animal species; and increased prevalence of invasive alien species.

In response to these challenges, the following institutions came together to formulate a project dubbed the 'Adopt-a-River' Initiative. The National Environment Management Authority (NEMA), the World Student Community for Sustainable Development in Kenya (WSCSD-Kenya), the University of Nairobi, the National Museums of Kenya, the Wildlife Clubs of Kenya and the African Fund for Endangered Wildlife (AFEW-K);

This project is a 'people-driven' wetlands monitoring and restoration project being piloted within the Nairobi River Basin before up scaling to other parts of the country. The project entails adoption of a section of a nearby river by university/college student groups, community youth groups and other interested institutions. The groups are expected to subsequently monitor the adopted section of the river over time, identify sources of its pollution and take local action towards its restoration and conservation.

The Adopt-a-River initiative is modelled along the Mini Stream Assessment Scoring System (miniSASS),[80] which has been developed and widely applied in southern Africa. It is a simple, user-friendly river health monitoring tool. The tool uses composition of macro-invertebrates in the river and is based on their sensitivity to varying water quality levels. It is, therefore, handson, fun, and can offer a hands-on experiential learning for several subjects, including Biology, Geography and ICT. 'The data produced is sufficiently accurate to be of value to all

80 Mark Graham, Chris Dickens and Jim Taylor, 'MiniSASS:A Novel Technique for Community Participation in River Health Monitoring and Management' [2010], *African Journal of Aquatic Science,* 29(1) at 25. 88 Ibid. 89 Ibid

stakeholders with an interest in river health; it has an Internet-web based mapping programme'. A simple colour code chart denotes how polluted a river is and can lead to several actions, including identifying the polluters; naming-and-shaming of polluters; or joint community efforts to rehabilitate their ecosystems. 'The increased opportunity for communities to become involved, use a scientifically valid tool, and undertake real bio-monitoring of their river systems is probably the most important aspect of the development of this resource.

The aim of the project is to strengthen the link between the curricula and addressing real sustainability challenges in Kenya. This is by mobilizing students in universities, colleges and secondary schools to collaborate with community youth groups to champion for clean and healthy river ecosystems and other wetlands. This objective will be achieved through regular monitoring of the health of the rivers, coupled with various conservation and restoration efforts. Currently, there are 25 learning institutions in this initiative with 'adopted' sections of rivers having been identified adjacent to the said institutions. Capacity building sessions have been undertaken, followed by distribution of water-quality monitoring equipment. Currently, active monitoring of the rivers is under way. A number of awareness materials have been generated and disseminated to various target stakeholders and learning institutions. Though met with a lot of enthusiasm by school children, the main challenge that is being addressed at the moment is the real-time uploading of data to a secure website to enable tracking of changes in the health of rivers in the city so as to replicate the successes this approach has had in the southern Africa region.

Mobilizing community action: The Kenya Alliance of Residents Associations

The Kenya Alliance of Residents Associations (KARA)[81] has been active in advocacy on environmental matters since the year 2000. It delivers monthly lectures through its chapters on a range of topical issues, including air quality, water, waste management, and sustainable cities. Through this mandate, KARA was instrumental in mobilizing public participation in mainstreaming citizen viewpoints during the formulation and enactment of Nairobi City County Solid Waste Management Act, 2015, which provides a legislative framework for sustainable management of solid waste in the city. KARA, in close collaboration with Nairobi City County Government's Department of Water, Energy, Forestry, Environment and Natural Resources, is currently leading the process of developing regulations for Nairobi City County under the said Solid Waste Management Act, 2015. The regulations will enable effective implementation of the law. KARA has also partnered with the Kenya Association of Manufacturers (KAM) to support development of legal and policy frameworks on solid waste management for 11 counties, namely: Mombasa, Nakuru, Kisumu, Uasin-Gishu, Nyeri, Kisii, Meru, Kitui, Kajiado, Machakos and Kiambu.

KARA partnered with Practical Action, NEMA, UNDP and UNEP to carry out a pilot project on separation of waste at source, which was dubbed 'Tenga Taka Tuimarike' (A Kiswahili phrase loosely translated to mean 'waste segregation for development'). This was out of the realization that solid waste would be better managed if households pooled their efforts and resources together towards waste separation at the point of generation. The pilot was carried out in Plainsview Estate, South B (in Nairobi), comprising of a representative sample of 160 housing units in an enclosed area with a population of about 1,000 individuals. Joint monitoring and evaluation is currently under way to understand whatever hurdles hamper waste segregation

81 KARA is registered under the Societies Act, Cap. 108. It represents Resident Associations across the country. Its main focus is democratic governance, sustainable environmental management, safety and disaster management.

at the household level and what other structures can be integrated to facilitate uptake before up scaling to other parts of the country.

KARA also led the formulation of the first ever Citizens Report Card on urban water, sanitation, and solid waste services in Kenya. KARA coordinated the initiative on behalf of a wider, multi stakeholder forum called the 'Nairobi City Consortium'. The consortium, which was created as a platform to nurture dialogue around water service delivery, included service providers' representatives from the Athi Water Services Board, the Nairobi City Water and Sewerage Company, the Nairobi County's environment department, resident association representatives and civil society groups. The survey sought to examine citizen satisfaction and experiences in four main sectors, namely water, sanitation, solid waste management and communication. The findings are expected to generate requisite actions, especially within the different sub-counties in Nairobi, and to shape the county planning processes.

In 2015, KARA in partnership with the Centre for Sustainable Urban Development (CSUD), successfully held a Policy Dialogue Forum on the state of air quality in Nairobi. Findings from the study on Traffic Impacts on $PM_{2.5}$ air quality in Nairobi were released, and data from the survey showed that many Nairobi residents are exposed to elevated concentrations of fine particle air pollution on a regular basis, with potentially serious long-term implications for health. The findings from this study have assisted with implementation of air quality regulations, in addition to other policy briefs that will target relevant ministries including those of health and transport as well as the next generation County Integrated Development Plan for Nairobi.

In conclusion, the foregoing actions of public-private partnerships and strategic bilateral partners point in a sense to the notion that perceptions and actions on pollution and waste management will be best anchored on features of local Agenda 21. The new consciousness is re-shaping governance away from the top-down ('command and control') approaches to collaboration, networks, and leveraging the expertise resident in different sectors of the economy.

G. Conclusion

There is a need to re-look at pollution management not in isolation but as part of other environmental challenges, including conservation of resources, environmental pollution and the welfare of the society as a whole. Further, it is imperative that we employ optimal and effective utilization of raw materials so as to result in waste minimization. In essence, relooking the entire cradle to cradle or the current cradle to grave chain of production in waste management, that is, Rethink >> Redesign >> Reduce >> Reuse >> >> Recycle >> Dispose only that which cannot be reused or recycled. This calls for concerted synergistic actions by all actors – national, county, private sector, civil society and indeed individual citizens of Kenya. For waste management to work, research has shown that small-scale decisions and actions combine to have larger consequences in terms of public health and the broader health of the global environment, on which human societies and their economies depend and thus a multidisciplinary and synergistic approach to pollution management is indispensable.[82] Although Kenya is still at infancy in the management of environmental pollution and waste, commendable and progressive efforts have been made at all levels to ensure a clean and healthy environment for all.

82 James Gustave Speth and Has M. Peter (n 5).

CHAPTER 26

Gender and Climate-Resilient Planning: Lessons from Kenya

Fatema Rajabali, Elvin Nyukuri & Lass Otto Naess

A. Introduction

There is an increasing acknowledgement of the need to consider gender as an integral part of interventions to support adaptation or resilience building in the face of climate change. There is a growing literature demonstrating how gender is a key driver of vulnerability to climate change and variability,[1] as well as the central role of gender in justice and equity concerns related to climate change.[2] At the international level, the inclusion of gender justice in the Paris Agreement[3] under the United Nations Climate Change Convention (UNFCCC)[4] is recognition of the importance of gender-climate change links, echoing the broader gender equality goal under the UN Sustainable Development Goals (SDGs). Gender-climate change linkages have also begun to be reflected in national level government climate change policy frameworks.[5]

At the same time, there are concerns over how gender is conceptualised in climate change discussions, and the implications of this for adaptation policies, planning and implementation at different scales.[6] Particular concerns have been raised over a tendency to understand gender narrowly as being about women only, rather than the social relations between women and men,[7] as well as concerns over essentialist framing of women as 'weak and vulnerable' and without capacity or agency in the face of climate-related shocks and stressors.[8] To date, there is little evidence on how this plays out in policy processes. Some gender analyses are starting to emerge in country-level climate change policy, we still know little about whether and how this

1 Yianna Lambrou, Sibyl Nelson, 'Gender Issues in Climate Change Adaptation: Farmers' Food Security in Andhra Pradesh', in Margaret Alston, Whittenbury Kerri (Eds.,) *Research, Action and Policy: Addressing the Gendered Impacts of Climate Change* (Springer Netherlands) (2013) (189-206); Alyson Brody, Justina Demetriades and Emily Esplen, 'Gender and Climate Change: Mapping the Linkages: A Scoping Study on Knowledge and Gaps' [2008], BRIDGE, Institute of Development Studies, University of Sussex; John Agard *et al, Annex II: Glossary to Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part B: Regional Aspects* (Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC) (2014).

2 Seema Arora-Jonsson, 'Virtue and Vulnerability: Discourses on Women, Gender And Climate Change' [2009], 21(2) Global Environmental Change 744. See also Geraldine Terry, 'No Climate Justice without Gender Justice: An Overview of the Issues' [2009], 17(1) *Gender & Development,* 5-18.

3 Paris Agreement to the United Nations Framework Convention on Climate Change (U.N. Doc FCCC/CP/2015/L.9/Rev/1) (Adopted 12 December 2015).

4 United Nations Framework Convention on Climate Change (UN Doc A/AC.237/18/add. 1, reprinted in 31 ILM(Signed in June 1992).

5 Emily Wilkinson, Virginie Le Masson and Andrew Norton, 'Gender and Resilience' [2015], Working Paper, BRACED Knowledge Manager.

6 Petra Tschakert, Mario Machado, 'Gender Justice and Rights in Climate Change Adaptation: Opportunities and Pitfalls' [2012] 6(3) *Ethics and Social Welfare* 275; Lisa Schipper & Lara Langston, *Gender Equality and Climate Compatible Development* (Climate and Development Knowledge Network) (2014); Edward R. Carr & Mary C. Thompson, 'Gender and Climate Change in Agrarian Settings. Current Thinking, New Directions, and Research Frontiers' [2014], 8(3) *Geography Compass*, 182-197.

7 Edward R. Carr & Mary C. Thompson, 'Gender and Climate Change in Agrarian Settings. Current Thinking, New Directions, and Research Frontiers' [2014], 8(3) *Geography Compass,* 182-197.

8 Seema Arora-Jonsson, 'Virtue and Vulnerability: Discourses on Women, Gender and Climate Change' [2009], 21(2) *Global Environmental Change* 744; Petra Tschakert, Mario Machado, 'Gender Justice and Rights in Climate Change Adaptation: Opportunities and Pitfalls' [2012] 6(3) *Ethics and Social Welfare* 275; Sherilyn MacGregor, 'Gender and Climate Change: from Impacts to Discourses' [2010], 6(2) *Journal of the Indian Ocean Region*, 223-238.

recognition of the importance of gender is followed through in implementation of government policy.[9] There is a particular paucity of studies at sub-national levels of governance.

Against this background, this chapter examines the framing and implementation of gender in sub-national level policy processes in Laikipia and Machakos counties in Kenya, focusing particularly on the water, energy and food security sectors. Kenya is an interesting case for several reasons: First, it was one of the first African countries to have a comprehensive national climate change strategy,[10] followed recently by a national legal framework.[11] Second, Kenya is undergoing a process of devolution of key government functions to county levels, which has important implications for the governance of climate change-related funding and interventions. Third, gender is featuring prominently as part of both development and adaptation policy and strategy documents at the national level,[12] but at the same time with severe contestations around the so-called 'two-thirds gender rule' laws amendment Bill.[13] Taken together, an examination of how the attention to gender plays out in practice could, therefore, give useful insights to feed into broader debates on the use of climate funds at sub-national and national levels. While the discussion focuses primarily on Kenya, lessons from here could give insights of use for other countries as well.

The chapter will draw on literature on gender, climate change and development, as well as insights from political economy. Our starting point is that gender must be understood not as something to adjust to fit a goal of making planning procedures climate resilient, but that gender and associated rights must form a core aim of resilience building, with sectoral, county level planning processes as enabling factors to achieve these. This follows what Ziervogel in a study of urban resilience building and social equity, calls an 'inversion' of relationships normally assumed for resilience building.[14] To examine this in the Kenyan context, we look at three factors that operationalise the above questions and concerns. First, we look at *how* gender is framed, and by *whom*, determining the scope of gender as well as the range of possible courses of action. We find that a narrow view of gender and perception of women as 'weak and vulnerable' still persists and poses challenges to climate adaptation, but views on gender are broader among county level staff working on climate change and related areas of water, energy and food security.

Second, we look at whether and how policy processes consider voices and concerns of women and men. This draws attention to the ability of women and men not only to be nominally represented, but also influence processes. Here, we find that while attention to gender is embedded in policy documents, the way policy processes are set up and run tends in practice often to exclude gender concerns. Third, we consider emerging evidence of outcomes in implementation processes on gender and climate change at the county level. The chapter finds

9 Reetu Sogani, *Gender Approaches in Climate Compatible Development: Lessons from India* (CDKN/Practical Action Consulting) (2010); See also Elvin Nyukuri, *Gender Approaches in Climate Compatible Development: Lessons from Kenya* (CDKN/Practical Action Consulting) (2016).

10 Government of Kenya, *National Climate Change Strategy,* (Nairobi: Government Printer) (2010).

11 Climate Change Act, 2016.

12 Elvin Nyukuri, *Gender Approaches in Climate Compatible Development: Lessons from Kenya* (CDKN/Practical Action Consulting) (2016); Government of Kenya, *Kenya National Climate Change Action Plan 2013-2017,* (Nairobi; Government Printer) (2013); Government of Kenya, *National Climate Change Strategy,* (Nairobi: Government Printer) (2010).

13 Constitution of Kenya, 2010.

14 Gina Ziervogel et al, 'Inserting Rights and Justice into Urban Resilience: A Focus on Everyday Risk' [2017], 29(9) *Environment and Urbanization*

that while there are instruments of support and monitoring nominally in place, there is a lack of mechanisms to monitor progress, as well as a lack of spaces for adjusting policy processes on the basis of lessons learnt.

Taken together, the chapter concludes that the way gender is considered in county-level planning and implementation processes in Kenya risks undermining the effectiveness of adapting to climate change as well as the possibility of achieving gender equity goals. Current processes do little to promote gender equity in outcomes, and they fail to address in any way deeply embedded social and cultural norms biased against women. Beyond Kenya, it reinforces the need to understand the socio-political context in which gender integration is carried out, and where the implementation of gender-sensitive approaches to adaptation may be socially and politically contested.

B. Theory and methods

There is little or no disagreement at a global level over the need to consider gender in responses to climate change. This is evident through the UNFCCC, Paris Agreement, gender in adaptation and mitigation responses, gender in climate justice movements. The motivation for this comes first and foremost from the recognition that impacts of climate change are likely to differ whether you are a man or woman, young or old, girl or boy. A huge amount of literature, going back many decades, demonstrates how gender relations drive vulnerability to climate stressors. To analyse the integration of gender at county levels, and what this means, we draw on three strands of literature, in particular theories on the politics of policy processes, which emphasises narratives, actors and networks, and power relations.[15]

Narratives on gender and climate change have focused on the link between poverty and differentiated access to resources. Poor and marginalized segments of society are especially vulnerable to the adverse effects of climate change since they tend to have limited resources, and hence capacity to adapt, and their livelihoods tend to be highly dependent on natural resources, which are sensitive to climatic vulnerability.[16] As women constitute the largest percentage of the world's poorest people, they are most affected by these changes because they lack access to critical resources such as land, crops, livestock, tools and financial resources.[17] Given women's focus on household food production and preparation, they tend to emphasize climate change impacts on the availability of resources for the household, such as drinking water, while men emphasize impacts on crops given their greater involvement in market-oriented production. This means that men tend to pursue adaptation measures that stabilize income, such as migration in search of work, while women seek to smooth consumption. Adaptation initiatives that do not take gender perspectives and social inclusion into account may unintentionally reinforce existing gender inequalities. However, a fully gendered approach could be used to identify differences in adaptive capacity among different groups between men and women, and

15 James Keeley, and Ian Scoones, *Understanding Environmental Policy Processes* (Earthscan, London) (2003). See also Emily Wilkinson, Virginie Le Masson and Andrew Norton, 'Gender and Resilience' [2015], Working Paper, BRACED Knowledge Manager.

16 Irene Dankelman; *Gender and Climate Change: An Introduction* (Earthscan, London) (2010).

17 Camilla Toulmin; *Climate Change in Africa* (Zed Books) (2009).

ensure that adaptation strategies work towards ensuring that vulnerable people have equal access to resources, rights and opportunities.[18]

The vulnerabilities of men to climate change have been invisible in literature. Men are virtually invisible from much of this discourse, and if at all mentioned, their absence from the locality is only seen as enhancing women's vulnerability to risks and stresses.[19] The whole narrative that they are in control of resources, heads of households, and decision makers puts them on a different pedestal and a different yardstick is used to determine their vulnerability. According to Ifejika, gender expectations put men under social pressure to provide for their households.[20] Also, worth noting is that livelihood activities can be gendered and, therefore, there are also instances in which men will be more affected than women by climate change. For example, the inability of male fishermen to support households – a traditional masculine role is creating social problems and tensions.[21]

A resilience perspective highlights the need to understand social norms and social factors that maintain gendered power inequalities, and reduce the ability of women, men and other groups' ability to reduce their vulnerability to climate shocks and stresses. Eriksen, Brown, and Kelly in their 2005 study of smallholder responses to climate stress in Kenya and Tanzania note that married women are excluded from profitable activities due to local taboos as well as domestic responsibilities. They get confined to activities such as rearing chicken at home. Gender norms often exclude women from participating in decision-making and rule setting at various levels for example, household, group, and community.[22] Men and women's priorities for adaptation will be shaped by the existing norms, roles, and responsibilities and how adaptation strategies build on, ameliorate, or distort these.

Alston notes that a systematic awareness of the social systems, power differentials, and inequitable resource allocation is necessary if we are to avoid assuming that adaptation is possible for all people in all circumstances with effort, funding, and careful planning.[23] Culturally specific gender norms define the roles that men and women play in farm and natural resource management.[24] Indeed, integrating gender analysis in research and policy on environmental change is at the core of the concept of resilience.[25] By placing less emphasis on the crucial role of socio-cultural dimensions from the very beginning can result into simplified context with undesirable results. Developing gender-transformative solutions as to how boys and men can acknowledge and challenge these changing, harmful gender norms is proposed.

18 Christine Jost, Nafisa Ferdous & Taylor Spicer, *Gender and Inclusion Toolbox: Participatory Research in Climate Change and Agriculture*, (CGIAR Research Program on Climate Change Agriculture and Food Security, CARE International, World Agroforestry Centre) (Copenhagen, Denmark) (2009).

19 Nitya Rao, et al, 'Gendered Vulnerabilities to Climate Change: Insights from the Semi-Arid Regions of Africa and Asia' [2019], 11(1) *Climate and Development.*

20 Ifejika Chinwe Speranza & Edward Bikketi, 'Engaging with Gender in Water Governance and Practice in Kenya', in Christiane Fröhlich et al, (Eds.), *Water Security across the Gender Divide* (Springer International Publishing) (2008) (125–150).

21 Elvin Nyukuri, *Gender Approaches in Climate Compatible Development: Lessons from Kenya* (CDKN/Practical Action Consulting) (2016).

22 Emma L.Tompkins and Neil Adger, 'Does Adaptive Management of Natural Resources Enhance Resilience to Climate Change?' [2004], 9(2) *Ecology and Society*, 1-14.

23 Margaret Alston, 'Gender Mainstreaming and Climate Change' [2014], 47 *Women's Studies International Forum*, 287–294.

24 Ruth Meinzen-Dick et. al, 'Engendering Agricultural Research' [2010], 973 International Food Policy Research Institute discussion papers.

25 Emily Polack, Isilda Nhantumbo and Janna Tenzing, 'Building Resilience to Environmental Change by Transforming Gender Relations' [2014], 17237 International Institute of Environment and Development.

Babagura explores how gender roles are constantly changing. Based on their distinct roles, women and men have different sets of knowledge and skills.[26] Women have knowledge on which seeds to plant during a dry spell or knowing how to dig a well and will, therefore, be exposed to different risks.[27] Women's perceptions of risk, however, tend to be given less attention than those of their male counterparts.[28]

The importance of unpacking the political implications of adaptation processes is increasingly acknowledged. A focus on sub-national levels is important not only because of devolution processes, but because of other significant policy changes at national and county levels, such as the national gender Bill, the Climate Change Act, and advances in integrated planning at county levels.[29] Particular focus is on actors and processes related to the water-energy-food nexus, hereafter abbreviated as the 'WEF nexus'.

We examine the politics and policy processes and implications of gender responses by delving more deeply into the following three factors: framing (linked to contextual justice, ideas and ideologies), processes (linked to procedural justice, relating to power and interests), and outcomes (related to distributive justice, capacity not only to be part of processes, but also in receiving benefits).

First, we question whether but also how gender is framed and tackled, and by whom (their relative power). Framing refers to how the issue of gender and climate change is formulated as a problem by actors, with particular reference to the water-energy-food nexus and in relation to the social, political and cultural context. Actors come together around particular narratives of gender and climate change. Much recent writing on gender and climate change has equated gender with a focus on women and girls as particularly vulnerable to climate risks, and hence needing particular attention and support.[30] While recognising that some women and girls are more vulnerable due to their lack of coping strategies to shocks or lack of access to assets or resources to enable them to adapt or be resilient,[31] this essentialist 'weak and vulnerable' narrative[32] has been criticized for ignoring the agency and capacities of women as well as men, and also for a too simplistic, binary perspective of gender.[33] Such narratives in turn provide

26 Agnes Babugura, *Gender and Climate Change: South Africa Case Study,* (Southern Africa: Heinrich Böll Stiftung) (2010).

27 Marther W. Ngigi, Ulrike Mueller, Regina Birner, 'Gender Differences in Climate Change Adaptation Strategies and Participation in Group-based Approaches: An Intra Household Analysis from Rural Kenya' [2017], 138 *Ecological Economics,* 99-108.

28 Michel Boko, *Climate change 2007: Impacts, Adaptation and Vulnerability* (Contribution of working group 11 to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change) (2007).

29 Goga, S., Schreiner, B., and Laing, K., *Integrated WEF Planning in Kenya in the Context of Devolution: Lessons from Three Counties* (Pegasys, Pretoria) (Forthcoming).

30 Seema Arora-Jonsson, 'Virtue and Vulnerability: Discourses on Women, Gender and Climate Change' [2009], 21(2) *Global Environmental Change* 744. See also Christine Okali & Lass Otto Naess, 'Making Sense of Gender, Climate Change and Agriculture in sub-Saharan Africa: Creating Gender-responsive Climate Adaptation Policy' [2013], 57/2013 Future Agricultures Consortium Working Paper.

31 Emmeline Skinner, 'Gender and Climate Change: Overview Report' (Institute of Development Studies, Brighton) (2011). See also Caroline Moser and David Satterthwaite, 'Toward Pro-poor Adaptation to Climate Change in the Urban Centers of Low-and Middle-income Countries' in Robin Mearns and Andrew Norton, (Eds.,) *Social Dimensions of Climate Change: Equity and Vulnerability in a Warming World*, (The International Bank for Reconstruction and Development /The World Bank) (2010) 231-258.

32 Seema Arora-Jonsson, 'Virtue and Vulnerability: Discourses on Women, Gender and Climate Change' [2009], 21(2) Global Environmental Change 744. See also Christine Okali, 'Achieving Transformative Change for Rural Women's Empowerment' [2011], IDS, Brighton.

33 Edward R. Carr & Mary C. Thompson, 'Gender and Climate Change in Agrarian Settings. Current Thinking, New Directions, and Research Frontiers' [2014], 8(3) *Geography Compass,* 182-197.

poor guides for adaptation policy.[34] This discussion shares many characteristics of the debates on women in development (WID), leading to gender and development (GAD) perspectives.[35] Women, girls, men and boys require different types of social engagement, skills, capacities and structures to engage with and respond to WEF activities.

Second, we examine how and to what extent policy processes integrate voices and concerns of both men and women. Drawing on theories of policy spaces,[36] our starting point is that to be meaningful, gender integration requires initiatives to acknowledge the different roles of women and men, and support their voices and engagement in policy and decision making processes. This includes creating and encouraging formal and informal spaces for this level of engagement and interaction.[37] The situation on climate change in many countries and contexts is currently characterised by a multitude of actors and groups vying for influence and support.

Third, we look at evidence on the role of gender in outcomes from policy processes. We here draw on the lessons from the integration of gender, and the evidence of integration with the existing social, political and cultural barriers to gender and social inclusion, including a focus on gendered rights and justice. Barriers and challenges need to be viewed with the intention of bridging policy prescriptions with the situation on the ground, and the contribution to reducing drivers of vulnerability. Much of the adaptation literature has tended to focus on the technical barriers and assets, and practical gender needs, paying inadequate attention to underlying strategic gender needs.[38]

Gender sits within a complex policy landscape in Kenya. The importance of gender has been recognised across a number of policy areas, and we so far know little about how gender concerns move from national to county levels. Kenya has made significant steps forward over recent years on the integration of gender in policies. Examples here are the inclusion of gender considerations in the Constitution,[39] the strong attention to gender in the national Climate Change Act,[40] the Water Act, 2016,[41] the ongoing parliamentary debate around elections to meet the two-thirds gender rule, and the 2013-2017 Climate Change Action Plan, as well as in sectoral water, energy and food security policies.[42] These developments have put Kenya ahead of many other countries in the integration of gender in development policy and practice. Gender aspects of the Constitution focus on representation, in particular the so-called 'two-thirds' rule.

34 Christine Okali, 'Achieving Transformative Change for Rural Women's Empowerment' [2011], IDS, Brighton.

35 Seema Arora-Jonsson, 'Virtue and Vulnerability: Discourses on Women, Gender and Climate Change' [2009], 21(2) *Global Environmental Change* 744.

36 John Gaventa, 'Reflections on the Uses of the "Power Cube": Approach for Analysing the Spaces, Places and Dynamics of Civil Society Participation and Engagement' [2006], (Institute of Development Studies, University of Sussex) 4 CFP evaluation series 2003-2006.

37 Emily Wilkinson, Virginie Le Masson and Andrew Norton, 'Gender and Resilience' [2015], Working Paper, BRACED Knowledge Manager; Petra Tschakert, Mario Machado, 'Gender Justice and Rights in Climate Change Adaptation: Opportunities and Pitfalls' [2012] 6(3) *Ethics and Social Welfare* 275; Alyson Brody, Justina Demetriades and Emily Esplen, 'Gender and Climate Change: Mapping the Linkages with A Scoping Study on Knowledge and Gaps' [2008], BRIDGE, Institute of Development Studies, University of Sussex.

38 Edward R. Carr & Mary C. Thompson, 'Gender and Climate Change in Agrarian Settings. Current Thinking, New Directions, and Research Frontiers' [2014], 8(3) *Geography Compass*, 182-197; Petra Tschakert, Mario Machado, 'Gender Justice and Rights in Climate Change Adaptation: Opportunities and Pitfalls' [2012] 6(3) *Ethics and Social Welfare* 275.

39 Constitution of Kenya, 2010.

40 Climate Change Act, 2016.

41 Water Act, 2016.

42 Government of Kenya, *Kenya National Climate Change Action Plan 2013-2017,* (Nairobi; Government Printer) (2013).

Article 214(c) states that '.. . no more than two thirds of the members of representative bodies in each devolved government shall be of the same gender'. Similarly, Article 222(1)b states that '[t] he county assembly membership should be such that no more than two-thirds are of the same gender'. Kenya also has a strategy for mainstreaming gender into climate change.[43]

The chapter is based on interviews and focus group discussions in Laikipia, Machakos and Nairobi from May 2015 up to July 2016. A literature review was carried out using both peer reviewed and 'grey' literature, building on other recent work in Kenya.[44] Word searches were carried out in publicly available documents on gender and climate change linkages. We examined the extent of gender integration in two counties in terms of inclusion and coverage in formal as well as informal processes, with a particular focus on perceptions of key actors involved with the policy processes at county levels. Data collection included semi-structured interviews with 42 individuals in government, non-government and research bodies during August and September 2015, as well as in July 2016.[45] Four group discussions were carried out during the same period, comprising two policy dialogue events with 30 per cent of women and 60 per cent of the men attending the dialogues and two focus group discussions comprising four women and seven men in one focus group; and three women and five men attending the second focus group. Participants in the policy dialogues and focus groups included senior management, advisory and programme staff in water, energy, food, climate change and gender from national and county government bodies, parastatals, non-governmental organisations and community-based organisations. Interviews focused on whether and how gender is considered in their work, and how gender is being integrated across formal or informal policy processes. From the document review, interviews and group discussions, we identified central threads and themes in relation to the three components of the analytical framework.

C. Case study: Laikipia and Machakos counties

The chapter's geographic focus is the counties of Laikipia and Machakos. Both counties sit within important river basins. Machakos falls within the drainage basins of River Tana and Athi.[46] Laikipia County, among several permanent rivers and a number of seasonal streams; Ewaso Nyiro River is the largest of them and most of the county's drainage is dominated by North Ewaso Nyiro basin.[47] Machakos is classified as semi-arid, with annual rainfall ranging between 400mm and 800mm. The county is highly agricultural-based but frequently characterized by frequent crop loss due to droughts and reliance on food relief.

Like other Kenyan counties, Laikipia and Machakos are tasked with the role of implementing national government policies, including natural resources, environmental conservation and forestry. The core priorities and investment strategies for the next five years are laid out in

43 Government of Kenya, *Strategy for mainstreaming gender in Climate Change. Engendering the climate change responses in Kenya*, (Nairobi; Ministry of Environment and Natural Resources) (2012).

44 Elvin Nyukuri, *Gender Approaches in Climate Compatible Development: Lessons from Kenya* (CDKN/Practical Action Consulting) (2016).

45 Interviewees have been anonymised in this chapter.

46 Machakos County Government, *County Integrated Development Plan*, (2015).

47 Laikipia County Government, *County Integrated Development Plan*, (2013).

the County Integrated Development Plans (CIDPs), with the first ones published in 2013.[48] Beyond the policy statements in these, it is unclear, on the one hand, how and to what extent the intentions in national policy frameworks are carried through at county levels, and on the other, how county level actors – government or non-government – are mobilising resources to support or oppose these, in the context of their own devolved powers.

The framing of gender

In Laikipia, gender is listed as one of five cross-cutting themes and Machakos' CIDP focus on implementation of Millennium Development Goals (MDGs) at the county level includes a goal to 'promote gender equality and empower women'.[49] One of the key instruments to promote gender goals is the county-level 'Women Enterprise Fund', which aims 'to provide easy access to credit facilities in an effort to promote gender equity'.[50] Another similarity is that both CIDPs refer to women among other groups (people with disabilities, people with HIV) as 'socially marginalised groups' under the County Government Act.[51] They also have in common the fact that neither of them formulates a link between gender and climate change.

The perception of gender and its linkages to climate change show a wide variation across the interviewees, many of who worked on climate or climate adaptation. In Laikipia, the following quotes typifies responses: 'Gender is more [than] the numbers representation, it is about quality of knowledge and skills',[52] and 'Socially marginalised [is] not just about women, it is about men and women and people with disabilities (PWDs), people with HIV …'[53] In Machakos, key themes from the interviews were that gender was about the roles played by men and women; equality between sexes; platforms that empower men and women; a place to meet and engage between men and women; and inclusion. Youth was also seen as part of the concept of 'gender'. Equity concerns and the need to consider social inclusion were also highlighted by several respondents, stressing the need to create a 'good level playing field', and that attention to gender helped them to do so.

Interview responses across the two counties also suggest that there is a more narrow understanding of gender and, therefore, referenced more on the activities done by men and women. The following quote illustrates this: 'Gender is important especially in rearing chicken, it is considered a woman's job'.[54] Other examples were references from interviewees about traditional farming roles, highlighting the difference in ownership and management of livestock: 'Cows are owned by men and milk from the cow, although milked by women…' The interviewee goes on to add that when even training the local community on livestock management: '… we are only training men [for] example … about how to better manage livestock and milking processes.

48 Laikipia County Government, *County Integrated Development Plan*, (2013); Machakos County Government, *County Integrated Development Plan*, (2015).
49 *Ibid*.
50 Laikipia County Government, *County Integrated Development Plan*, (2013) 17.
51 County Government Act, 2012.
52 Focus Group Discussion (Laikipia, July 2016).
53 Policy Dialogue (Laikipia, October 2015).
54 Focus Group Discussions (Laikipia, June 2016).

In terms of key actors and entry points for addressing gender in policy processes, the local Water Resource User Associations (WRUAs) were very instrumental in Laikipia and Machakos. This is because the leadership of the WRUAs had a well representative of both men and women. In addition, they had put in place well-organised community structures in water governance as defined in the Water Act.[55] The law also sets a two-thirds gender rule for membership of various boards and committees in the water sector. The two-thirds gender rule expresses that 'not more than two-thirds of the members of elective or appointive bodies shall be of the same gender', according to Article 27(8) of the Constitution. A number of other organisations were also noted by interviewees in both counties, including: Inades Formation International Kenya Office, WRUAs, Kenya Agricultural and Livestock Research Organisation (KALRO), and the Water Resource Management Authority (WRMA). Inades' Kenya office is headquartered in Machakos. One interviewee described Inades' role as '[focusing] on women through promotion of household farming methodologies which are all-inclusive, hence addressing the gender perspective'.[56] The focus of Kenya Agricultural and Livestock Research Organisation (KALRO) was described as '[working with] those who are "marginalised" but [they] are mostly involved in logistics (…) KARLO does a 50-50 per cent recruitment of both genders'.[57]

Several patterns emerge on the way gender is framed among county level organisations. First, while a perception of women as 'weak and vulnerable' undoubtedly still exists, formulations on gender are much broader among county level staff working on climate change and related areas of water, energy and carbon. Views seem to be grouped broadly in two ways: either rights and equity, or alternatively, gender integration as a condition to be efficient in programming and planning. Some respondents noted that a widely held view of gender as being about 'promoting women's rights' had prompted a backlash against gender.[58] Persistent cultural attitudes such as 'men are better decision makers' were also raised by interviewees.

How do processes include women and men?

Both Laikipia and Machakos have proactive efforts to address gender and resource management. In Laikipia, the Ministry of Agriculture engages with women and men formally through workshops, field days, focus groups discussions, individual farm visits, farm tours and exchange visits. Using extension services, they have taken into account the time of the meetings and events to make it possible for women to attend.[59] In Machakos, examples of formal engagement highlighted the use of training workshops, self-help groups, publications, participatory methods, and barazas (meeting places). Informal activities include conversations with families to encourage men and women to work together.[60] During these interactions, farmers are provided with information on improved farming practices, food production techniques, use of fuel wood and effects of charcoal production. On most occasions, the Kenya Wildlife Service officials in Laikipia took advantage of the farmer forums convened by agricultural extension officers to address issues of wildlife conflict, which is often a result of competition over water points and pasture. The use of established mechanisms by the agriculture sector in reaching out to different genders at the farm level was noted as a cost-

55 Water Act, 2016.
56 Interview (Laikipia, July 2015).
57 *Ibid*.
58 Policy Dialogues, Laikipia & Machakos, October 2015).
59 Interview (Laikipia, July 2016).
60 Policy Dialogue (Machakos, October 2015).

cutting measure on outreach budgets by the different ministries in the county. One key approach used by the agricultural extension services is utilising the male and female calendars to optimise on their outreach programmes. On most occasions, Kenya Wildlife Service officials accompany agricultural extension staff to create awareness on human-wildlife conflicts in Laikipia, which are related to access to water points and wildlife encroaching on farms.

Interviewees add nuances to the impacts of these activities. Considerations of inclusion are highlighted by several individuals in Machakos. Despite engaging women and men formally and making efforts to integrate views of both women and men, responses suggest considerable challenges in fulfilling this, and that there is often a gap between the intentions and practice. When asked to describe it, the following trends stood out. First, responses show confusion over what the 'two-thirds rule' actually means. The Constitution provides that not more than two-thirds of elective or appointive bodies shall be of the same gender in public sectors. However, the confusion arises from the fact that public bodies are not confined to the National Assembly, Senate or county government, but include all public bodies that hold some form of election or election. Furthermore, the cost of implementing the two-thirds rule will increase because if the requisite number of women are not elected in Parliament, the only option is to nominate women into these positions, which has cost implications. The other response was that women need to be appointed on merit and not given public positions for the sake of fulfilling the two-thirds gender rule as stipulated in the Constitution.

Given that the Kenyan government has yet to put in place a systematic framework or guidance notes of how the two-thirds rule should be implemented, the counties are working in ad hoc ways. The implementation of the Constitution is seen as key in both counties, but the attention to gender is facing a number of challenges in the implementation phase. One notable challenge is the lack of capacity and awareness, illustrated by the following quote: 'Most decision makers don't understand gender',[61] women are underrepresented in executive, management and technical positions but are more represented in middle management and general service positions in the ministries at the county level. More often women are appointed on the basis of vocal ability … as noted: "Better get two or three women who can raise motions in the assembly than many who cannot even speak one word in the whole session'. Others point to political or cultural opposition to gender equity, and that gender planning and budgeting is as a result simply not a priority'.[62] These findings concur with Kiura, who observed that despite many efforts being made to promote gender equality, inequalities still exist.

Gender is important in public tendering processes at the county level because it ensures equitable access as well as an opportunity to engage in diversified incomes among men and women. This is well articulated in the Constitution, which accords protection for groups or persons previously disadvantaged by unfair competition.[63] It provides that public procurement of goods and services should be just and equitable. In addition, the Public Procurement and Asset Disposal Regulations require the inclusion of disadvantaged groups, enterprises owned by women, youth and persons with disability in public tender processes.[64] Tendering process

61 Interview (Machakos, July 2015).
62 Interview (Laikipia, July 2016).
63 Constitution of Kenya 2010, art 227.
64 Public Procurement and Asset Disposal Regulations, 2020.

was most talked about with regard to differentiated gender access to resources and services in the county. The tendering process in Laikipia was observed as very highly complicated, non-transparent, and biased against women. Some of the most noted concerns included: '[lack of] equality in terms of access and application – targets more privileged business persons'[65] and that 'tendering is still dominated by men, and the budget percentage is still below. All [of] this blamed on [lack] of capacity' and 'not equal opportunities and gender biases, for example, accessing small tenders'[66] Access to such tenders usually boosts the financial capabilities of those involved in the process and in turn use such resources to cope and diversify livelihoods that can support them in times of climate stresses.

The two-thirds rule for gender inclusion also directs attention to the number of women, rather than the depth or quality of engagement. Fifty per cent of Laikipia county government ministerial posts are held by women (four women, four men). However, responses suggest there is little regard for the ability to use these positions to challenge entrenched power relations between men and women, including whether or not women are enabled in position to take part in decision-making.[67] Women have jobs in high positions, including public administration posts such as the Minister of Tourism and Infrastructure. But there are still insufficient capacity support structures in place to encourage women to apply for other leadership and management positions across the county governance structure, illustrated by an interviewee stating that 'women representation does not mean they are enabled to take part'.[68]

WRUAs play a key intermediary role, which is important given the view among many that the government is 'not very supportive' in promoting gender in policy processes. In Laikipia, they include business communities such as banks and water companies, which are considered critical. The challenge here is the lack of structures, frameworks and platforms to support intermediaries' work. Existing programmes include, in particular the LAICONAR and Water Resource User Associations (WRUAs). The key organisations for promoting gender noted by interviewees included YAAKU Laikipia Trust, IMPACT, and LAICONAR. Centre for Training and Integrated Research in ASAL Development (CETRAD) has an interest in these issues but from a research agenda. YAAKU Laikipia Trust was said to 'engage in advocacy and capacity building of women-led organisations'.[69] The County Government works mainly with LAICONAR to engage civil society and community groups in development activities. 'LAICONAR constitutes community members from different parts of Laikipia, representing all Laikipians indiscriminately. LAICONAR has people on "ground", e.g. in Nanyuki, Doldol, who help identify groups that are marginalised in their communities. LAICONAR is a platform for communities to contact government officials, and it is very effective in advocacy work'.[70] CETRAD, which focuses on research, shares indigenous practices, highlighting the efforts and successes by local communities including by local women to adapt to changing climate conditions.

In Machakos, women are mentioned as being actively involved in WRUAs as managers of water and climate related initiatives, and managing resources at domestic (household) levels. 'WRUAs provide the main mechanism for women engagement [along with] women organisations (…)'.

65 Policy dialogue (Laikipia, October 2015).
66 Interview (Laikipia, July 2016).
67 Policy Dialogue (Laikipia, October 2015).
68 *Ibid*.
69 Interview (Laikipia, July 2015).
70 *Ibid*.

Overall, energy as a resource continues to be a preserve mostly for women at household levels, especially cooking and lighting, while the energy sector is highly formalised, and most of the decisions are made at the national level. This is with the exception of the support provided by NGOs who take part in energy-saving *Jikos* awareness campaigns at the household level. While the M-Kopa initiative targets the poor and most vulnerable in the rural areas, the uptake of solar energy is not affordable to all and electricity still remains costly and unreliable. The majority of women in the rural areas lack access to credit, which further limits their ability to pay the upfront costs for M-Kopa or the connection to the energy grid. In addition, the lack of information, noted as a challenge in the energy sector, limits the women's ability to become energy entrepreneurs and earn an income.

Another point emerging from the interviews was that women have less engagement as you move up in the power hierarchy. There are more women at the grassroots, and progressively fewer at higher levels, where decisions are made. Women in Laikipia are considered to have very high participation in WRUAs, and the two-thirds rule is seen as significantly important. At more senior levels of employment, especially within the county government, the 'two-thirds' rule is being strived for. However, what is not explicit is how much of a difference this had made in getting poorer and ethnically diverse women, as well as other marginalised groups, get their voices heard in Laikipia. GROOTs Kenya, an active NGO focusing on women leadership, stated that while they had been successful in engaging with Kikuyu women in more accessible areas of Laikipia, enticing Maasai and Turkana women who live in conservative and patriarchal communities has been a real challenge: 'If you want champions to front and support candidates, you end up getting Kikuyus ... [we] aim to build capacity for political mobility in Laikipia North interior. It is a huge investment and big logistical task.'[71]

The findings can be connected to the fact that the processes privilege dominant actors and issues, and arguably give little real space for 'new' voices (i.e. women brought in through the two-thirds rule) to be heard, which paradoxically was precisely the intended effect. Some progress has been made, but only to a point. For example, although there is a drive to get women into management and leadership positions in both Machakos and Laikipia, among women it tends to be the best educated who apply for these positions,[72] in practice excluding women from poorer and more politically marginalised social groups. Moreover, the majority of the women could not apply because of lack of work experience in years required for the advertised job. Neither county has a coherent capacity development programme to enable less privileged women to take up these opportunities. This shows that while processes in principle are becoming more open, less attention has been paid to how participation works in practice; in other words, whether it achieves more equal representation, and ultimately whether the assumption that more women in male-dominated spheres actually results in more gender-sensitive and socially inclusive policies and practices.

This thus points to a gap between rhetoric and reality, and a clear sense that women lack real participation in processes, and that women's participation is seen superficially as a 'numbers' game' rather than a deep commitment to addressing structural gender concerns. Despite gender being acknowledged in policy documents and among actors, as noted above, it tends

71 Interview (Nairobi, July 2016).
72 Policy dialogues (Machakos and Laikipia, 2015); Interview (Nairobi, July 2016).

to remain at the rhetorical level: operational integration is typically proving challenging, and without undertaking a thorough gender analysis to understand critical barriers and gaps.[73] Gender integration often tends to revert to balance in representation figures, as well as echoing other work emphasising a tendency to focus on functional, rather than strategic gender needs.[74] At the same time, interviewees did identify a number of entry points – potential or current – for integrating gender in their work. These included elements both of numerical/functional integration, but also more strategic needs.

Challenges to gender integration can be seen more broadly as a lack of both formal and informal 'spaces' for actors to engage, following from dominant actors being able to 'close down' discussions around particular narratives, excluding others.[75] Such processes of closing down may be informal (lack of formal opportunities, processes) or formal (e.g. rules and regulations promoting gender, but for various reasons not happening in practice). In the case of gender, there could be many reasons why county level actors may seek to avoid opening up gender-related discussions, or to channel them in particular ways, for example, that such discussions challenge their economic interests, positions of power, as well as social and cultural norms and values.

To what extent are goals of gender equality and justice central to implemented activities?

Both counties have formal initiatives and mechanisms to support implementation of gender-related programmes and to help monitor policy commitments. The Machakos CIDP highlights, for example, that the county will take a human development approach in its economic development planning. This includes taking account of a Gender Related Development Index (GRDI).[76] However, the GRDI is taken into account in actual programming and is not articulated. As part of meeting the Sustainable Development Goals, the goal of promoting gender equality is considered through use of boards within the county where their purpose is 'to ensure that gender equality is upheld and women are empowered financially and otherwise'.[77] However, frameworks and processes to establish and convene these boards are not clear.

One participant from Laikipia assumed that the available Constituency Development Fund was the county's gender-budgeting response.[78] Other participants noted funding mechanisms such as the Women Enterprise Funds, UWEZO, as alternative mechanisms. NGOs such as GROOTs Kenya are supporting awareness campaigns and training for women to empower them to track gender budgetary planning. One noted example includes:

> The community had been funded to access the proposed budgets so they could be prepared for the public participatory forums. They stopped the budgetary reading [in Laikipia] because ... when the Member of the County Assembly came, they came with a different budget. So the meeting went haywire and the community GROOTs

73 Interview (Nairobi, July 2016).
74 Emmeline Skinner, 'Gender And Climate Change: Overview Report' (Institute of Development Studies, Brighton) (2011).
75 Melissa Leach, Ian Scoones, Andy Stirling (eds); *Dynamic Sustainabilities: Technology, Environment, Social Justice* (Routledge) (2010).
76 Gender Development Index (GDI) <http://hdr.undp.org/en/content/gender-development-index-gdi>
77 Machakos County, *Agricultural Sector Development Support Programme* (2014) http://www.asdsp.co.ke/index.php/machakos-county.
78 Interview (Nairobi, July 2016).

> representative demanded they should be given the right data and two weeks to prepare for the meeting.

Beyond WRUAs, Laikipia County has other well-established forums like LAICONAR, which facilitates dialogue with communities, working closely with WRUAs and local county governments.[79] The lack of accessible data makes it difficult to understand what additional impact they have on generating participation of women and other minority and marginalised groups. This is also as a result of lack of clarity on the impact of cost sharing activities such as the Household Economic Empowerment Programme's water tanks initiative that support women and other stakeholder groups.

In Laikipia, a critical area of concern and inequity is the insufficient levels of water for downstream users. There is a difference in how the land is being used across the basin (pasture and arable land, privately owned land) and the potential threat of conflict that may emerge as a result of this dispute. This quote illustrates this point:

> 'The County Government and other agencies . . . aspire to equitably distribute resources to all groups. Nevertheless, the pastoralist groups in the Lower Ewaso Nyiro areas such as Doldol sometimes felt marginalised when the water did not reach them downstream. Most of the time, this is simply due to drought, but there are also cases of illegal abstraction upstream'.[80]

Conflict in accessing other resources such as pasture is only an issue as downstream communities, who are mostly pastoralists, travel upstream in search of pasture, encroaching on now privately owned land.[81] 'The indigenous perception by pastoralists is that grass is a 'communal good' – that can be utilised wherever it is found'.[82] WRUA members who live along the banks are also impacted by this conflict.

In Machakos, sectoral 'silos' are creating barriers in facilitating cross-sectoral and cross-organisational responses. As far as water resources are concerned, the Water Services Trust Fund (WSTF) did not think there is a gender gap in the sector given their programmes, although 'some water projects are implemented without women's involvement in the design'. This, as presented by a participant, 'causes a problem later in accessing water and sanitation facilities for women'.[83] As discussed in the Machakos policy dialogue, there are 'many agencies dealing with women, people with disability and youth issues in Machakos … [with] limited benefits being felt even though the support is present.[84] One interviewee identified the lack of policy direction, which does not currently encourage and facilitate structured interaction within county departments and between county departments and CSOs. By establishing a stronger legislative angle, a more enabling environment could be created.[85]

79 Policy dialogue (Laikipia, October 2015).
80 Interview (Machakos, July 2015).
81 Focus group discussions (Laikipia, June 2016).
82 Interview (Machakos, July 2015).
83 Policy dialogues (Machakos, October 2015).
84 *Ibid.*
85 *Ibid.*

Group discussions and interviews in Laikipia, Machakos and Nairobi identified a number of other gender responsive gaps, including: disparities in access to formal literacy and capacity building programmes; insufficient access to relevant information for women to help them make strategic decisions as well as supporting them in feeling confident in applying this information.[86] Another area of weakness is the lack of county-level evidence. For example public service performance contracts to track their performance and impacts[87] and data of process, successes and failures including capturing disaggregated data. As one interviewee put it, there is a need for 'a more nuanced response and understanding of underlying openness and tolerance of county institutional structures and knowledge, tools, skills needed by women to be able to engage more effectively'.[88]

The above also reflect how power is played out through the dominant framing of gender as about women, and the structures that support this. The gender Bill was rejected, which was celebrated as a victory by some, and a sense that 'gender has been promoted at the expense of men'. For both counties, there is thus formal consideration, but responses suggest that there is some way to go to achieve effects in practice. There has been progress in both counties on formal integration and recognition of women in key planning posts, but indicators insufficiently show progress in practice. There is a sense that this has now become a 'numbers game', where gender issues are 'solved' if the minimum 30 per cent rule applied, but little or no attention is being paid to the ability of women to get their voices heard. The data show that while in principle, policy changes have created many new spaces, in practice there are still important challenges, hindered by a number of outlined cultural, social, and political constraints.

In Machakos, through our policy dialogue session in August 2015 and the interviews carried out with county government representatives and NGOs, participants highlighted the fact that different ministries were facilitating a number of gender and social inclusion programmes (Ministry of Devolution; Water and Irrigation; Agriculture (Agriculture Support Development Programme).

The system of allocating resources is only just being defined, with the national and county governments still in discussion over budget allocations and funds. However, as the scenario discussed above shows, this has implications for women's rights and access to resources. Women and men have legitimate claim to the Kenya government as the primary duty bearer to protect, promote and uphold their rights to access basic services in water, energy and food. As discussed earlier, there are still barriers to effective representation, participation and engagement within the county and at the national level in the water, energy and food sectors. Women face difficulties in benefitting fully from these sectors because of the inequitable access to resources. For example, lack of control over land and property limits their ability to fully engage, participate and benefit equally from water, energy and agricultural facilities with men. Everywhere, men's energy needs and interests are given higher priority over women and girls' needs.[89] Lack of women's involvement within energy planning hinders their access to modern

86 Policy dialogues (Laikipia, October 2015).
87 Policy dialogues (Machakos, October 2015).
88 Policy dialogues (Laikipia, October 2015).
89 Practical Action, *Poor People's Energy Outlook* (Rugby, UK) (2010).

and efficient energy services as a right, which they have a legitimate claim to as per the 2010 Constitution. Women participation in water related activities such as WRUAs and farming is within their rights and it is the duty of the government as a duty bearer to create more avenues within its structure to promote their involvement. Next, we conclude on the findings and discuss their implications for policy.

D. Discussion

This chapter has examined gender integration in Laikipia and Machakos counties in view of planning for climate resilience, with a particular focus on actors and processes around the so-called water-energy-food (WEF) nexus. The chapter aims to help fill a gap in our understanding of what 'integration' of gender means (challenging the assumption that it is already 'mainstreamed) and adding empirically to our understanding of sub-national level planning processes. The question asked is whether and how gender was considered, by whom, and with what consequences. Some of the key themes that have emerged include the role of champions, overcoming cultural bias, making use of emerging 'best practice', as well as strengthening resources and capacity.

It seems clear from the preceding sections that the devolution processes in Laikipia and Machakos have opened up a number of potential policy spaces. With the governing structures still settling, national government structures are trying to keep their influence while county structures are trying to carve out a new, independent place for themselves.[90] Such processes create openings, but also leave considerable space for powerful individuals and coalitions of actors, whose views on gender will be crucial in determining strategies and outcomes.

Cultural biases continue to undermine progress being made to address the gender gap in planning processes. For example, women in both counties are often prohibited to discuss matters related to land with their husbands, including cash proceeds from the farm. More often, water permits are registered in their husband's name, yet women are the custodians of the water points.[91] One way of addressing this challenge may be by encouraging participation of the two genders in planning activities. Identifying gender biases at all levels of engagement and documenting this information would enable reflective learning and provide useful case studies for other communities within and across counties. In Laikipia, a group of men have been involved in an awareness raising campaign and training programme to encourage their support for women in accessing land, property and inheritances.[92]

The literature points to the role of policy champions, coalitions and particular 'policy windows' in times of significant changes.[93] In this way, gender champions can play a significant role in sensitizing the county government on the need for additional resources to address gender, even though there are those who perceive gender mainstreaming as an automatic process that does not need to be a focus any more. However, where there was significant presence of

90 Goga, S., Schreiner, B., and Laing, K., *Integrated WEF Planning in Kenya in the context of devolution: lessons from three counties* (Pegasys, Pretoria) (Forthcoming).

91 Interview (Nairobi, July 2016).

92 *Ibid.*

93 Sarah Stachowiak & Organizational Research Services, *Pathways for Change: 6 Theories about How Policy Change Happen*s (Organizational Research Services (ORS) (2009).

these champions either as Members of Parliament, patrons or members of staff, gender-related discussions had always been factored in the policy discussions at county and national levels. Encouraging local women to become role models to support and inspire young girls and women is also critical.[94] At the village level, engaging the customary elders and actively opening dialogue with husbands and fathers to champion the gender discussion was often widely supported during field work discussions: 'We need to tell men that we want to make you champions, to be supporting women leadership'.[95]

E. Conclusion

The chapter concludes that the attention to gender in county-level planning and implementation processes risks undermining the effectiveness of adapting to climate change as well as the possibility of achieving gender equity goals in the two counties. Findings suggest, first, that despite the rhetoric of gender integration in Kenya, and the steps made at national level to ensure gender sensitivity, men's interests dominate, and women's voices, roles and needs are neglected. We connect this to the way gender is introduced and framed, both in policy documents and the debate discourses.

Second, there is a clear sense that women lack real participation in processes, and that women's participation is seen superficially as a 'numbers' game' rather than a deep commitment to gender. We argue that this can be connected to the fact that the processes privilege dominant actors and give little real space for women to speak or make their voices heard. The '30 per cent rule' is a case in point. Finally, aims of gender equality or justice aspects are all but missing in policy implementation. For example, despite there being systems for monitoring of implementation, little or no follow up could be identified.

Beyond Kenya, the findings highlight the need to understand the socio-political context in which climate resilient planning is carried out, and where the implementation of gender-sensitive approaches to adaptation may be socially and politically contested. Findings highlight the need for efforts to broaden the way gender is understood, to design strategies to improve spaces for participation, and to better identify and monitor outcomes with regard to gender responsiveness. This is particularly relevant in the context of ongoing discussions about allocation and use of climate funds at national and sub-national levels.

94 Interview (Laikipia, July 2016).
95 Interview (Nairobi, July 2016).

PART VI

REGIONAL AND INTERNATIONAL PERSPECTIVES ON ENVIRONMENTAL GOVERNANCE

CHAPTER 27

Environmental Law in Uganda: Constitutional Approaches, Human Rights and Biodiversity Management

Emmanuel Kasimbazi

A. Introduction

Uganda is a landlocked country located in Eastern Africa, west of Kenya, south of South Sudan, east of the Democratic Republic of the Congo, and north of Rwanda and Tanzania. The country's climate is tropical and generally rainy with two dry and wet seasons. Uganda has a population of 39,198,424 people and a total area of 241,550.7 square kilometres.[1] The major environmental problems in Uganda are soil degradation, deforestation, and loss of wildlife, loss of biodiversity, wetland degradation, and pollution. These problems result from poor agricultural practices, environmental pollution, improper land use planning and development, population growth, and poor implementation of environmental policies. Environmental law in Uganda is premised on some environmental constitutional principles such as sustainable development, public trust doctrine, right to a clean and healthy environment, and the polluter-and-user-pays principle. The relationship between human rights and environmental law lies in the fact that the environment is a pre-requisite for the enjoyment of human rights. Access to environmental information, public participation in decision-making, access to environmental justice and freedom of association are essential to the promotion of a clean and healthy environment. Biodiversity offsets are used predominantly by planning authorities and developers to fully compensate for biodiversity impacts associated with economic development through the planning process. Access and Benefit Sharing (ABS) ensures that local communities benefit from the commercialization and use of natural resources.

This chapter contains the following six main sections. The first section provides the introductory elements of the chapter. The second analyses the environmental problems in Uganda, their causes and implications. The third section reviews the constitutional environmental principles, while the fourth analyses the linkage between human rights and environmental law. The fifth section assesses how biodiversity management is incorporated in environmental law, while the final section is the conclusion.

B. Causes and implications of environmental problems in Uganda:

Major environmental problems in Uganda Soil degradation

Although Uganda has a large percentage of arable land, soil degradation is a significant problem in the country. It is estimated that between 4 and 12 per cent of Gross National Product is lost from environmental degradation, 85 per cent of this from soil erosion, nutrient loss and changes in crops. The land affected by soil degradation ranges from 90 per cent in Kabale to 20 per cent in Masindi.[2] Soil degradation results from poor farming methods and practices, land

1 Uganda Bureau of Statistics (2018) <https://www.ubos.org/> accessed 12 August 2018.

2 Jennifer Olson, *Land Degradation In Uganda: Its Extent and Impact* (2002)<https://docsbay.net/Land-Degradation-in-Uganda> accessed 15 August 2018.

fragmentation, deforestation, overstocking and overgrazing, uncontrolled bush burning and improper use of agro-chemicals.

Deforestation

Deforestation is the elimination of forest and woodland areas on a large scale. Uganda's annual deforestation rate has climbed 21 per cent since the end of the 1990s. The country lost an average of 86,400 hectares of forest or 2.1 per cent of its forest cover each year between 2000 and 2005. Uganda lost 26.3 per cent of its forest cover (1.3 million hectares) between 1990 and 2005. NEMA has warned that if deforestation continues in Uganda at its current rate, there will be no forests left in 40 years.[3] This forest loss threatens biodiversity in Uganda, which is home to more than 5,000 plant species, 345 species of mammals, and 1,015 types of birds. Deforestation has been attributed to a number of reasons ranging from the population explosion to the energy needs of the population. The loss of forest cover has become a critical issue in the conservation of biodiversity.[4] The rapid loss of Uganda's forest cover is as a result of high demand for wood fuel, encroachment on forests for agriculture, and uncontrolled pit-sawing.

Loss of Wildlife

Uganda harbours a great variety of mammals and birds, which are simply not found elsewhere in east or southern Africa. Major tracts of forest are easily accessible, providing unmatched opportunities to see primates such as the chimpanzee, golden monkey or the famous mountain gorilla.[5]

Wildlife species live in communities that depend on each other. The survival of these species can depend on soil conditions, local climate, altitude, and other features of the local environment. Environmental degradation causes direct and indirect damage to wildlife. The impacts stem primarily from disturbing, removing, and redistributing the land surface. Some impacts are short-term while others may have far-reaching, long-term effects. Wildlife loss may be due to human activities such as mining. In Western Uganda, Hima Cement (U) Ltd operates the Dura Quarry in Queen Elizabeth National Park. The large disturbances caused by mining in the Dura Quarry have disrupted the environment around it, adversely affecting the aquatic habitats (streams and rivers), terrestrial habitats (grasslands, forests), and riverine wetlands that many organisms rely on for survival.[6] The other causes of wildlife loss include poaching animals for hides, skins, ivory and meat, and encroachment into the protected areas for ranching, crop production and settlement.

Loss of biodiversity

Biodiversity is the variety and variability of all living things, which can be measured at the genetic, species and ecosystem level. Uganda, though small on size, has a very rich and varied biodiversity resulting from its bio geographical setting, varied altitudinal range (600-5100m)

3 Annie Kelly, 'Uganda at Risk of Losing All Its Forests' The Guardian (Thursday, 25 June, 2009)<https://www.theguardian.com/society/katineblog/2009/jun/25/uganda-deforestation> accessed 16 August 2018.

4 Deforestation and Uganda (27 March 2012) <https://www.studymode.com/essays/Deforestation-And-Uganda-951718.html> accessed 17 August 2018.

5 Wildlife Worldwide, 'Uganda Trips'<http://www.wildlifeworldwide.com/discover/uganda> accessed 17 August 2018.

6 National Association of Professional Environmentalists, *Environmental Costs Related to Limestone Mining At the Dura Quarry Site in Queen Elizabeth National Park, Kamwenge,* (18 August 2015)<http://www.nape.or.ug/blogs/environmental-costs-related-tolimestome-mining-at-the-dura-quary-site-in-queen-elizabeth-national-park-kawenge> accessed 18 August 2018.

creating diverse physical features. With an estimated 90 vegetational communities, Uganda has more than 18,000 species of fauna and flora although the actual figure is unknown because some species are poorly known with especially those in lower life forms.7 There are very few endemic species despite Uganda's unique biogeographic position. Uganda is, therefore, increasingly undergoing genetic erosion and loss of species (such as the white rhino). This loss of diversity occurs with the loss of forests and other wildlife as explained earlier in this chapter. It is important to note, however, that loss of biodiversity has also occurred because of the introduction of exotic animal and plant types, which have tended to replace native species.

Wetland degradation

Wetlands are commonly known as swamps in Uganda. Otherwise, they are ecosystems where the vegetation has adapted to temporary or permanent flooding. According to the Uganda Wetlands Atlas, wetland destruction costs Uganda nearly Ush2 billion annually, and contamination of water resources, which is partly caused by reduced buffering capacity of wetlands near open water bodies, costs the country a further Ush38 billion annually.8 Wetland ecosystems in Uganda have been degraded by extensive drainage for dairy farming, extensive burning, especially to renew pasture and for hunting, brick-laying, excessive harvesting of vegetation (Papyrus, trees), hunting of wild animals, rice growing especially in eastern Uganda, pollution from sewage, industries and garbage dumping, as well as conversion for industrial developments.

Pollution

Pollution is said to be the biggest killer in developing countries. Contaminated air, water and soil claim millions of lives every year. And with rapid urbanisation and economic growth come fears that these numbers will only rise in years to come. In Uganda, the effects of pollution on people are becoming more visible. The World Health Organisation estimates that more than 8 million people die around the world each year as a result of living in a polluted environment. The effects of air pollution are becoming more and more noticeable, especially in urban areas. The main cause of air pollution is transport, especially rapid motorisation that is being experienced in urban areas.[9] Pollution of land, air and water is widespread in the country due to soil erosion, discharge of industrial effluent, improper sewage and other waste disposal, mismanagement of agro-chemicals, gaseous emissions and dust from industries, bush burning and exhaust fumes from motor vehicles.

Causes of environmental degradation

Poor agricultural practices

Intensive agricultural practices have led to a decline in the quality of most natural environments. Majority of the farmers resort to converting forests and grasslands to croplands, which reduce the quality of natural forests and vegetation cover. The pressure to convert lands into resource

7 NBU, 1992, *Uganda Country Study on Costs, Benefits and Unmet Needs of Biological Diversity Conservation*, Department of Environment Protection, Kampala.

8 Gillian Nantume, 'Poverty, the Driving Force Behind Wetland Degradation' (22November 2017) <http://www.monitor.co.ug/SpecialReports/Poverty-wetland-degradation-Lubigi-NEMA-rosebud/688342-4195062-gjkju9/index.html> accessed 23 August 2018.

9 Serginho Roosblad, 'Pollution Is Silent Killer in Uganda' (18 February 2015) <https://www.voanews.com/a/pollution-is-silentkiller-in-uganda/2648372.html> accessed 25 August 2018.

areas for producing priced foods, crops, and livestock rearing has increasingly led to the depreciation of natural environments such as forests, wildlife habitats and fertile lands.

Intensive agricultural practices destroy fertile lands and nearby vegetation cover due to the accumulation of toxic substances like bad minerals and heavy metals, which destroy the soil's biological and chemical activities. Runoffs from agricultural wastes, chemical fertilisers and pesticides into marine and freshwater environments have also deteriorated the quality of wildlife habitats, natural water resources, wetlands and aquatic life.

Environmental pollution

Most of Uganda's natural environment has been destroyed and a large portion is under threat due to the toxic substances and chemicals emitted from fossil fuel combustions, industrial wastes, and homemade utilities, among other industry-processed materials, such as plastics. Land, air, and water pollution pose long-term cumulative impacts on the quality of the natural environments in which they occur.

A severely polluted environment has become insignificant in value because pollution makes it harsh for the sustainability of biotic and abiotic components. Pollution impacts the chemical compositions of lands, soil, ocean water, underground water and rocks, and other natural processes. Air pollution from automobiles and industries, which results in the formation of acid rain, is a good example of how the environment is degraded by pollution.

Improper land use planning and development

The unplanned conversion of lands into urban settings, mining areas, housing development projects, office spaces, shopping malls, industrial sites, parking areas, road networks, and so on leads to environmental pollution and degradation of natural habitats and ecosystems. Mining and oil exploration, for instance, renders land unusable for habitation and causes other forms of environmental degradation by releasing toxic materials into the environment. Improper land use has led to the loss and destruction of the natural environment across Uganda.

Population growth

Uganda's population is one of the fastest growing in the world.[10] In 1911, Uganda had a population of 2,463,900 million people, which rose by 576.7 per cent to 16,671,700 million people in 1991 and then to 25 million people in 2002. As of January 1, 2018, the population of Uganda was estimated to be 42,288,962 people. This is an increase of 3.26 per cent (1,335,493 people) compared to a population of 40,953,469 the previous year. In 2017, the natural increase was positive, as the number of births exceeded the number of deaths by 1,369,484. Since 2018, the population of Uganda has been increasing by 3,778 persons daily. During 2018, Uganda's population was projected to increase by 1,379,043 people and reach 43,668,005 at the beginning of 2019. The natural increase is expected to be positive, as the number of births will exceed the number of deaths by 1,414,143.[11]

10 USAID, 'Global Health' (04 June 2018)<https://www.usaid.gov/uganda/global-health> accessed 23 August 2018.

11 United Nations Department of Economic and Social Affairs: Population Division, 'Quick Facts about the Population of Uganda' (01 January 2018) <http://countrymeters.info/en/Uganda/> accessed 25 August 2018.

This population surge causes a sudden increase in the demand for basic needs of food, fuel and land for cultivation as well as settlement in the country. This high level of demand has led to high pressure on the natural resources base, due to the direct reliance on natural resources.

Poor implementation of environmental policies

Although some of the existing environmental policies on natural resource management are out-dated, even the current policies are poorly implemented. The implementation is sectoral and this leads to misuse of resources that are deemed not to be under the management of the given policy host institution. The situation has been worse for resources that are not under the jurisdiction of any specific institution and, therefore, lack a management policy, such as wetlands. Poor implementation of environmental law and policies has many negative effects, such as the environmental, economic and social costs, unequal playing field for economic operators, and the loss of faith in national institutions.

Implications of environment degradation

The degradation of the environment, as demonstrated earlier, has direct deleterious effects on the well-being of the people of Uganda. The following will suffice to illustrate the potential dangers of environmental degradation:

i. Reduction in agricultural production, leading to food shortages, and in extreme cases, famine, and loss of income. This eventually results in poverty, which leads to further environment degradation. It is through such factors that environmental refugees have been created;

ii. Shortage of building poles and firewood. Parts of Uganda, especially in the north and northeast, are reported to be facing acute shortage of firewood and building poles. In these areas, there is congestion in houses, fewer meals are cooked, more meals are eaten raw and women walk longer distances to search for firewood;

iii. Poor health, arising out of drinking polluted water and living in a polluted environment, and failure to meet basic nutritional requirements;

iv. Loss of foreign exchange earnings due to reduced tourist attraction with the loss of wildlife and other natural resources;

v. Reduced availability of water with the accompanying impacts of poor hygiene;

vi. Loss of water resources associated with the disappearance of fish resources, which are a major source of protein; and

vii. Floods and associated impacts, leading to displacement of settlements, loss of property and life, and poor health.

C. Constitutional approach to environmental protection

The Ugandan Constitution has provisions that contain principles for protecting the environment. The major principles are outlined in the sections that follow:

Sustainable development

Sustainable development is development that meets the needs of the present, without compromising the ability of future generations to meet their own needs.[12] Principle XXVII of the Constitution requires the Government of Uganda to promote sustainable development and public awareness of the need to manage land, air, and water resources in a balanced and sustainable manner for the present and future generations.[13] It further requires that the utilization of the natural resources of Uganda shall be managed in such a way as to meet the development and environmental needs of present and future generations of Ugandans, and in particular, the State shall take all possible measures to prevent or minimize damage and destruction to land, air and water resources resulting from pollution or other causes.[14]

Public trust doctrine

The Public Trust Doctrine is incorporated in the Constitution and in other statutes. The Constitution under the National Objectives Directive Principles of State Policy requires the State to protect natural resources including land, water, wetlands, minerals, oil, fauna and flora on behalf of Ugandans.[13] The Government of Uganda, including local governments, is required to create and develop parks, reserves and recreational areas and ensures the conservation of natural resources and to promote the rational use of natural resources so as to safeguard and protect the bio-diversity of Uganda.[14] In the substantive article, the Constitution provides that:

> The Government or a Local Government as determined by Parliament by law, shall hold in trust for the people, and protect natural lakes, rivers, wetlands, forest reserves, game reserves, national parks and any land to be reserved for ecological and touristic purposes for the common good of all citizens.[15]

The implication of this article is that the government is a trustee and as such its powers to deal with such natural resources are not absolute; rather they are subject to the interests and wishes of the people of Uganda. The Article represents a social contract between the people of Uganda and the State to protect the resources mentioned and guarantees their permanent availability for public uses. Any derogation from that position without changing the provisions of this contract amounts to the abuse of the trust vested in the State by the people of Uganda. As required by Article 245 of the Constitution,[16] Parliament has enacted several laws for the protection of the environment. These laws have, in their endeavour to protect the environment, incorporated the public trust doctrine as one of the management tools. The Land Act[17] reechoes obligations of the State in similar terms as the Constitution. The Land Act goes a step further, however, by providing that the government or a local government is not to lease out or otherwise alienate any natural resource referred to in the law.[18] However, the government, or a local government, may grant concessions or licences or permits in respect of these natural resources but subject to the law.[19]

12 The World Commission on Environment and Development, 'Our Common Future, From One Earth to One World' (20 March 1987) <http://www.un-documents.net/our-common-future.pdf> accessed 20 August 2018. 13 The Constitution of the Republic of Uganda 1995, Principle XXVII (i) 14 Ibid (ii).

13 Ibid Principle XIII.

14 Ibid XXVII (iv).

15 The Constitution of the Republic of Uganda 1995, Article 237(2) (b). 18 *Ibid.*

16 The Constitution, Article 245 *supra,* note 17.

17 The Land Act Cap 227, Laws of Uganda, 2000, Section 44 (1).

18 *Ibid,* Section 44 (4).

19 *Ibid,* Section 44 (5).

The Public Trust Doctrine is also incorporated in other statutes. Section 3(1) of the Wildlife Act No 5, 2019 provides that the ownership of every wild animal and wild plant existing in its wild habitat in Uganda is vested in the government on behalf of, and for the benefit of, the people of Uganda. Section 5 of the National Forestry and Tree Planting Act, 2003, requires the Government of Uganda, or a local government, to hold in trust for the people and protect forest reserves for ecological, forestry and tourism purposes for the common good of the citizens of Uganda. Further, Section 5 of the Water Act, Cap 152, and vests all rights to investigate, control, protect and manage water in Uganda for any use in the government, which shall be exercised by the Minister and the Director of Water Resources Development.

The doctrine rests on the principle that the ownership and use of essential natural resources is vested in a given authority in trust for citizens. In the case of *Advocates Coalition for Development and Environment v Attorney General,*[20] the applicant brought an action to court seeking a determination on whether there was a breach of the Doctrine of Public Trust when Kakira Sugar Works was allocated land in a forest reserve to plant sugar cane. The court held that Butamira Forest Reserve is land the government holds in trust for the people of Uganda to be protected for the common good of the citizens. It further held that since there was evidence that a permit had been granted to Kakira Sugar Works amid protests from local communities, which led to the rising up of a pressure group of over 1,500 members who depended on the reserve for their livelihood through agro-forestry, and as a source of water, fuel and other forms of sustenance, this amounted to breach of the public trust doctrine.

It is important to note that the public trust doctrine imposes a number of obligations on the central and local government as the trustees. However, as noted in the foregoing case, there has been a number occasions when the government has breached its obligations.

Right to a clean and healthy environment

The Constitution expressly provides that every Ugandan has a right to a clean and healthy environment.[24] The scope of the right includes the improvement of all aspects of the environment,[21] preventive measures in respect of occupational accidents and diseases, the requirement to ensure an adequate supply of safe and potable water and basic sanitation, the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental effects. Principle XXI requires the Government of Uganda to take all practical measures to promote a good water management system at all levels.[22]

Other laws also include the right to a clean and healthy environment. One of the key principles of environmental management under the National Environment Act No 5, 2019 (NEA), ensuring optimum sustainable yield in the use of renewable natural resources.[23] The law also has a specific provision on the right to a decent environment. Section 3 guarantees every person's right to a

20 *Advocates Coalition for Development and Environment v Attorney General* [2004] Miscellaneous Cause No. 0100. 24 The Constitution of the Republic of Uganda, 1995, Article 39.

21 William Onzivu, 'International Environmental Law, the Public Health, and Domestic Environmental Governance in Developing Countries' [2006], 21 *Am. U. Int'l L. Rev* 597 <https://pdfs.semanticscholar.org/aed0/1266ec77c6abd43b7f1d5b512b51ebfd6096.pdf> accessed 20 December 2018.

22 The Constitution of the Republic of Uganda, 1995, Principle XXI.

23 National Environment Act, 2019, Section 5 (2) (d).

healthy environment.[24] It also imposes a duty on every person to maintain and enhance the environment, including the duty to inform the authority or the local environment committee of all activities and phenomena that may affect the environment significantly. In furtherance of the right to a healthy environment and enforcement of the duty to maintain and enhance the environment, NEMA or the local environment committee, is entitled to bring an action against any person whose activities or omissions have or are likely to have a significant impact on the environment to prevent, stop or discontinue any act or omission deleterious to the environment; or compel any public officer to take measures to prevent or to discontinue any act or omission deleterious to the environment; or require that any ongoing activity be subjected to an environmental audit; or require that any ongoing activity be subjected to environmental monitoring or request a court order for the taking of other measures that would ensure that the environment does not suffer any significant damage.

The National Forestry and Tree Planting Act, 2003, provides that in furtherance of the right to a clean and healthy environment, any person or responsible body may bring an action against a person whose actions or omissions have had or are likely to have a significant impact on a forest or for the protection of a forest.

Section 11 of the Tobacco Control Act, 2015, guarantees the right of every person to a smokefree environment.[25] It requires every person consuming a tobacco product to ensure that he or she does not expose another person to tobacco smoke.[26] The purpose of this provision is to ensure protection of people against exposure to the hazards of tobacco smoke; and to promote and protect people's right to health, life, safe and healthy environment.

Ugandan courts have provided a better understanding of the right to a clean and healthy environment. In the case of *Uganda Electricity Transmission Co Ltd v De Samaline Incorporation Ltd,*[27] the applicants sought a declaration that the discharge of unpleasant, noxious and choking dust from the respondent's premises constituted a violation of the applicant's employees' right to a clean and healthy environment under Article 39 of the Constitution. The court held that the right to a clean and healthy environment must not only be regarded as a purely medical matter but rather as a holistic social cultural phenomenon. In another case of *British American Tobacco v The Environmental Action Network* (TEAN),[28] where TEAN asked the court for a declaration that the respondent had not fully informed the actual and potential consumers of the dangers associated with cigarette smoking. The court held that any person or organisation could bring an action to protect the right to a clean and healthy environment on behalf of any person who is unable to bring the action by him or herself. This court decision led to the enactment of the National Environment (Control of Smoking in Public Places) Regulations, 2004.[29] The Regulations re-affirmed a right in the Ugandan Constitution and the National Environment Act in the context of tobacco**.** Regulation 3 provides for every person's right to a clean and healthy environment, and the right to be protected from exposure to second-hand smoke. It imposes

24 *Ibid*.
25 The Tobacco Control Act, No. 22 of 2015.
26 I bid, Section 11.
27 *Uganda Electricity Transmission Co Ltd v De Samaline Incorporation Ltd* [2004] Misc. Cause No. 181 of (High Court of Uganda).
28 *British American Tobacco v The Environmental Action Network (TEAN)* [2003] Appl. no. 27/2003, High Court of Uganda at Kampala.
29 The National Environment (Control of Smoking in Public Places) Regulations, 2004, Statutory Instrument No. 12.

on every person a duty to observe measures to safeguard the health of non-smokers. It further requires every head of family to be responsible for creating a climate for children to be free from second-hand smoke**.**

The right to a clean and healthy environment entails the obligations to respect, protect and fulfil. The government and all persons[30] have an obligation to refrain from interfering with the enjoyment of the right, to prevent any person from interfering with the enjoyment of the right, and to adopt and use necessary legislative, administrative and judicial measures to achieve realisation of the right. The National Environment Management Authority (NEMA) was established under the National Environment Act as the principal government instrument for implementing all policies relating to the environment. NEMA regulates the activities of private actors to ensure that they do not infringe on the enjoyment of the right to a clean and healthy environment. All persons (natural and artificial) are also required to respect, protect and fulfil the right to a clean and healthy environment.

D. Human rights and environmental law

Environment as a pre-requisite for the enjoyment of human rights

Human rights obligations should include the duty to ensure the level of environmental protection necessary to allow the full exercise of protected rights. Enforcement of environmental law is an essential instrument in the effort to secure the effective enjoyment of human rights.

In the case, *Advocates Coalition for Development and Environment v Attorney General,*[31] the court emphasised that:

> There is no doubt that environmental law must be seen within the entire political, social, cultural and economic setting of the country and must be geared towards the development vision. In other words, it must act as an aid to socioeconomic development rather than a hindrance. The law must be in harmony with the prevailing government efforts and need to attract more foreign and local investment and channel national energies into more production endeavours in industry and sustainable exploitation of natural resources. Lastly it must be seen in the constitutional and administrative set up of the country.

In Uganda, the basis for the enforcement of human rights is provided under Article 50 of the Constitution, which entitles any person who claims that a fundamental or other rights or freedom guaranteed under the Constitution has been infringed or threatened to apply to a competent court for redress which may include compensation.[32] It further adds that any person or organization may bring an action against the violation of another person's or group's human rights, and any person aggrieved by any decision of the court may appeal to the appropriate court.[33] This Article not only grants *locus standi* to any person whose fundamental or other right, which includes a right to a healthy and clean environment, has been violated or threatened. The Article acts both as a shield and a sword. One does not have to prove injury or damage were proof of threatened injury or damage is enough, not only to bring an action but also get a remedy.

30 The Constitution of the Republic of Uganda, 1995, Article 20 (2).
31 *Advocates Coalition for Development and Environment v Attorney General* [2004] Miscellaneous Cause No. 0100.
32 Article 50, supra note 34.
33 *Ibid*.

It is important to note that human beings are ecologically dependent, and this lays the basis for the relationship between the environment and human rights. The right to a clean and healthy environment is dependent upon the realization of other human rights, as contained in the Constitution including the rights to life, human dignity, non-discrimination, equality, the prohibition of torture, privacy, access to information, and the freedoms of association, assembly and movement. For example, the right to life cannot be enjoyed independent of the right to a clean and healthy environment, since environmental deterioration or pollution puts the life of present and future generations at risk. *In British American Tobacco Ltd v the Environmental Action Network Ltd (TEAN),*[34] the court attempted to establish a link between environmental quality and the right to life. In determining whether the failure to warn consumers of the risks associated with cigarette smoking amounted to a violation of the right to life, the court held that failure to disclose the dangers of cigarette smoking to the consumers was too remote to constitute taking away the life of such a consumer. The court did not consider the fact that there are numerous disadvantages of environmental or passive smoking, and even if their real impact on life takes long to manifest, finally the affected consumers may die as a result of lung cancer and other related diseases. What is important to note is that the right to life requires that people live in an environment that is conducive for their survival and free from contamination and pollution? The devastation of the environment is a violation of all human rights. To the extreme, other human rights cannot be enjoyed at all if the environment is destroyed beyond a certain grave plane. The poorer the environment, the more impaired human rights will be, and vice versa.

Access to environmental information

Access to environmental information in Uganda is very important because people rely heavily on natural resources. They need to access relevant environmental information in order to know environmental threats and the origins of those threats, and to effectively advocate for environmental protection.

The genesis of the right of access to environmental information can be traced from the Stockholm Declaration on the Human Environment of 1972, which first pronounced itself on the interrelationship between the enjoyment of human rights and the quality of the environment and since then, it has been reiterated in various international soft law instruments, including the Rio Declaration and its sister instrument, Agenda 21. Principle 10 of the 1992 Rio Declaration states that 'at the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes'.

The environmental information to be accessed is defined by the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998 to mean any information in written, visual, aural, electronic form or any other material form on the following:

34 *British American Tobacco v The Environmental Action Network (TEAN)* [2003] Appl. no. 27/2003, High Court of Uganda at Kampala.

(a) the state of elements of the environment such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interactions among these elements;

(b) factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;

(c) the state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above.[35]

(d) Freedom of access to environmental information is a mechanism by which the public is equipped to advocate for accountable institutions, equitable distribution of resources, and transparency in public decision-making. The existence of a strong freedom of information legislation is essential to maintaining and restoring public confidence in public institutions by subjecting the activities of those institutions to intense public scrutiny.

The right of access to information has the following key ingredients;

i. The right to be informed of the existence of the information;

ii. the right to know with a high degree of certainty the procedures for obtaining the information;

iii. the right to receive the information or notification of refusal within a reasonable time; and

iv. the right to have grounds for refusal expressly stated devoid of any ambiguities and evasiveness.

In Uganda, there is increasing recognition of the right of access to information as the basis upon which transparent and accountable governance must be founded. Article 41 of the Constitution guarantees the right of every citizen to access information in the possession of the State or any other organ or agency of the State except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to the privacy of any other person. The constitutional right is further elaborated in the Access to Information Act of 2005. Section 5 of the law provides that every citizen has a right of access to information and records in the possession of the State, or any public body, except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to the privacy of any other person. The law further provides that such information and records, to which a person is entitled to access, shall be accurate and up to date so far as is practicable.

35 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 2161 UNTS 447, 38 ILM 517 (1999); Article 2, Para 3 9.

Specific freedom of access to environmental information is provided under the National Environment Act, which provides that: 'Every person shall have freedom of access to any information relating to the implementation of this Act submitted to the authority or to a lead agency.[36] Thus, a person desiring the information shall apply to the authority or a lead agency and may be granted access on payment of a prescribed fee.[37] However, freedom to access environmental information does not extend to proprietary information, which the authority and any lead agency shall be treated as confidential.[38]

Further, Section 146 of the NEA requires NEMA to gather information on the environment and natural resources from existing data; subject to any other law, have access to any data collection on the environment and natural resources; analyse information; disseminate information to public and private users; carry out public information and education campaigns in the field of environment, exchange information with other Ugandan, foreign, international and non-governmental agencies; coordinate the management of environmental information in the lead agencies; advise the government on existing information gaps and needs; in consultation with the lead agencies, establish guidelines and principles for the gathering, processing and dissemination of environmental information and liaise with the district environment committees and district environment officers regarding environmental information.[39]

NEMA is also required to publish a State of the Environment report every two years.[40] This report, in addition to other matters, may specify the main activities of the Authority and the lead agencies regarding the protection of the environment.

The Access to Genetic Resources (Benefit Sharing) Regulations, 2005, provide that any person wishing to access information or exercise the right of access to documents relating to genetic resources, monitoring information of the use of and the benefits accruing from access to genetic resources shall be granted such access by the competent authority.[41] Any information or document requested under the regulations shall be made available to the applicant within 60 days of application.[46]

Although the foregoing statutes set the stage for a broad-based agenda for an information policy and law in Uganda, the exemptions are not clearly defined. The laws exempt access to information that is likely to prejudice the security or sovereignty of the State, or to interfere with the privacy rights of any other person. These exemptions are not clearly defined and may be used as excuses to withhold information. In Uganda's context, a freedom of access to information legislation should provide clear guidance on what constitutes information prejudicial to the security or sovereignty of the State.

The right of access to information has also been the subject of several court decisions. In *Paul K. Ssemwogerere and Zachary Olum v Attorney General,*[42] the Supreme Court of Uganda reversed the decision of the constitutional court , which had denied the appellants access to the Hansard

36 National Environment Act 2019, Section 85 (1).
37 Ibid,(2).
38 Ibid (3).
39 Ibid.
40 Ibid, Section 86 (2).
41 The National Environment (Access to Genetic Resources and Benefit Sharing) Regulations, SI 2005/30. Reg. 29 (1). 46 Ibid, (2).
42 *Paul K. Ssemwogerere and Zachary Olum v Attorney General* [2000] Constitutional Appeal No. 1 of 2000.

to use as evidence in court. The matter of access to information was again dealt with in the case of *Green Watch v Uganda Electricity Transmission Company and Attorney General.*[43] In this case, the application, brought under Articles 50 and 41 of the Constitution, sought to obtain a Power Purchase Agreement (PPA) from the respondents in respect of a proposed hydroelectric power plant in Bujagali on the River Nile. The applicant, an non-governmental organisation and a company limited by guarantee, requested from the government a copy of PPA, which declined the request, hence the application. At the trial, Uganda Electricity Transmission Company, the successor to Uganda Electricity Board, was added to the suit as 2nd Respondent. The court held that Article 41 refers to information in possession of the State and further held the State does not have to be a party to the agreement in question, for the agreement to be in possession of the State. That what is important is the possession in whatever capacity occurring. Government was in possession of the Power Purchase Agreement. That once this is established, it is enough to trigger an application of Article 41 of the Constitution as against the Government of Uganda.

Participation in decision-making

Participation in decision-making processes means a possibility for the citizens, civil society organizations (CSOs) and other interested parties to influence the development of policies and laws that affect them. The importance of engaging the public in these processes is increasingly recognised in Uganda. Participation in decision-making is enshrined in the Constitution. The National Objective and Directive Principle of State Policy X provides that the State shall involve the people in the formulation and implementation of development plans and programmes, which affect them. The Constitution also provides that the State shall be based on democratic principles, which empower and encourage the active participation of all citizens at all levels in their own governance.[44]

There are several benefits of participatory processes. Specifically, participation can contribute to:

- Creating fair policies/laws reflective of real needs enriched with additional experience and expertise;
- Facilitating cross-sector dialogue and reaching consensus;
- Adopting more forward and outward-looking solutions;
- Ensuring legitimacy of proposed regulation and compliance;
- Decreasing costs, as parties can contribute with own resources;
- Increasing partnership, ownership and responsibility in implementation;
- Strengthening democracy with preventing conflict among different groups and between the public and the government while increasing confidence in public institutions.

Public participation in decision-making is crucial to realising a rights-based approach to a clean and healthy environment. Participation increases the sense of ownership and responsibility by all stakeholders. It also improves the relationship between institutions charged with managing the environment and the general public as beneficiaries of a clean and healthy environment. Through participation, the public gets informed about environmental issues, including their

43 *Green Watch v Uganda Electricity Transmission Company and Attorney General* [2001] High Court Misc. Applic. No. 0139 of 2001.

44 National Objectives and Directives Principles of State Policy [2004] Miscellaneous Cause No. 0100, Policy II.

environmental rights and duties. This helps the public to be better equipped to hold government institutions to account, and to play its role in promoting a clean and healthy environment. Participation must be genuine, active and meaningful, taking into account the views, concerns and voices of all stakeholders.

One of the key management tools for public participation is environmental impact assessments (ESIA) for projects likely to have a negative effect on the environment. Schedule 5 of the NEA 2019 sets out projects that require the Environmental Social Impact Assessment:

(a) may have an impact on the environment;

(b) is likely to have a significant impact on the environment, or

(c) will have a significant impact on the environment.

National Environment (Environmental and Social Assessment) Regulations SI. No. 143 of 2020 specify the rules and procedures for public participation when carrying out an environmental impact study. The Regulations provide that '[t]he developer shall take all measures necessary to seek the views of the people in the communities, which may be affected by the project'. For this purpose, the Regulations prescribe a minimum standard of activities to proactively facilitate access to information about the proposed development.

The Environmental Impact Assessment Public Hearings Guidelines developed by the NEMA in 1999 provide further guidance on how to conduct the public hearing. They allow for the arrangement of 'pre-public hearing meetings' between public officials, the developer and other interested parties to identify issues, participants, possible witnesses or experts, and to finalize the meeting schedule. At the conclusion of the public hearing, the presiding officer shall summarise the proceedings and discussions without making conclusions. S/he then draws up a report, including recommendations on which basis a final decision is taken. Following the final decision NEMA makes, the report is then made public. The Guidelines permit anyone to request copies of reports, submissions and other materials in the files. In return, the authorities can require the payment of reasonable costs incurred in connection with photocopying or duplicating

E. Biodiversity management

The Convention on Biological Diversity and the National Environment Act define biological diversity to mean the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems.[45] Uganda's rich biodiversity is distributed across both terrestrial and aquatic habitats.[46] Most of the biodiversity can be found in natural forests, but a considerable number is also found in other natural ecosystems such as mountains, savannahs, wetlands, lakes and rivers.[47] This implies that sustainable management of biodiversity in Uganda is critical.

45 Convention on Biological Diversity 1999, Article 2.

46 The Republic of Uganda, National Biodiversity Strategy and Action Plan II (2015-2025) ch 1.

47 Ibid.

There are several priorities that are important for biodiversity management in Uganda. The key ones to be considered for this chapter are access to genetic resources and benefit sharing as well as biodiversity offsets.

Access to genetic resources and benefit sharing

Genetic resources are defined as the genetic material of actual or potential use or value, and include their derivative products and intangible components while, 'benefit sharing' or 'sharing of benefits' is defined as the sharing of benefits that accrue from the utilisation of genetic resources, and includes technology, technology transfer, innovations, practices, results of research, capacity building, community knowledge, awareness and education.[48] In short, access and benefit-sharing (ABS) refer to the way genetic resources may be accessed, and how the benefits that result from their use are shared between the people or countries using the resources (users) and the people or country that provide them (providers).

There are significant potential benefits to be gained by accessing genetic resources and making use of them. They provide a crucial source of information to better understand the natural world and can be used to develop a wide range of products and services for human benefit. This includes products such as medicines and cosmetics, as well as agricultural and environmental practices and techniques.[49]

One of the objectives of the Convention on Biological Diversity (CBD) is to ensure the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources. Uganda ratified the Convention on Biological Diversity (CBD) on September 8, 1993. She is also a party to the Protocols made under the CBD, namely the Cartagena Protocol on Biosafety, the Nagoya Protocol on Access to Genetic Resources and Benefit Sharing (ABS) and the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety. Section 59 of the NEA, 2019, requires the National Environmental Management Authority (NEMA) in collaboration with the relevant lead agency to issue guidelines and prescribe measures for the conservation of biological diversity. And that the authority may, in issuing such guidelines specify national strategies, plans and programmes for the conservation and the sustainable use of biological diversity.

Section 62 of the NEA of the National Environment Act provides for access to genetic resources and benefit sharing. Under the Section, NEMA is required to issue guidelines and prescribe measures for the sustainable management and utilization of the genetic resources of Uganda for the benefit of the people of Uganda. The guidelines and measures issued should specify appropriate arrangements for access to the genetic resources and the sharing of benefits derived from genetic resources originating from Uganda. The Guidelines for Accessing Genetic Resources and Benefit Sharing in Uganda were developed by NEMA in 2007[50] to provide for simple arrangements and procedures, including measures for accessing biological and genetic resources of Uganda, their products and derivatives for scientific research, commercial and any

48 Access to Genetic Resources and Benefit Sharing Regulations, SI of 2005/ 30, Section 2.

49 The Secretariat of the Convention on Biological Diversity, 'Introduction to Access and Benefit-sharing' <https://www.cbd.int/abs/ infokit/brochure-en.pdf> accessed 19 December 2018. 55 The Convention on Biological Diversity, 1992, Art. 1.

50 National Environment Management Authority, Ministry of Water and Environment, *Guidelines for Accessing Genetic Resources and Benefit Sharing in Uganda* 1st Edition (June 2007).

other purposes connected with them, and to ensure equitable sharing of the benefits accruing from them. The guidelines provide the benefits to be shared. Under the guidelines, the persons acquiring access to genetic resources are required to share fairly and equitably with the country of origin and other stakeholders, the benefits arising from the use of the genetic resources and their derivatives, including non-monetary, and, in the case of commercialisation, also monetary benefits.[51] The fees charged to anyone seeking to access Uganda's genetic resources are considered part of the benefits.[52]

In the same spirit, Uganda developed its first National Biodiversity Strategy and Action Plan (NBSAPI) in 2002 and later developed the National Biodiversity Strategy and Action Plan II (2015-2025).[53] Strategic Objective 4 of NBSAPII covers the promotion of sustainable use and equitable sharing of costs and benefits of biodiversity. Access and Benefit Sharing (ABS) is considered a key instrument in ensuring that local communities, women and men benefit from the commercialization and use of natural resources. Increased funding and mechanisms for research and development, institutional structures and increased awareness are all necessary so that the potential of ABS can be harnessed.

Biodiversity offsets

Biodiversity offsets are regarded as conservation activities intended to compensate for the residual, unavoidable harm to biodiversity caused by development projects. They are mitigation measures taken to compensate for any residual significant, adverse impacts that cannot be avoided, minimized and/or rehabilitated or restored, in order to achieve no net loss or a net gain of biodiversity. They can take the form of positive management interventions, such as restoration of degraded habitat, arrested degradation or averted risk, protecting areas where there is imminent or projected loss of biodiversity. Developers of large infrastructure projects such as hydroelectric power projects, mines, oil and gas projects and large agricultural production projects are encouraged to use biodiversity offsets as part of the review of the Environmental and social Impact Statement (EIS). Results of cost-effectiveness, cost-benefit analyses and other economic instruments are used to demonstrate the benefits of biodiversity offsets over alternative biodiversity loss mitigation measures. The main stakeholders, beneficiaries or losers use available incentives of acknowledgement in publications, international media, websites and use of environmental compliance audit reports and sector reporting to encourage project developers establish biodiversity offsets.

The biodiversity offsets implementation legal framework is specifically provided in the NEA, 2019. Section 2 defines the biodiversity offsets as the measurable conservation outcomes resulting from actions designed to compensate for significant residual adverse biodiversity impacts arising from project development and persisting after appropriate prevention and mitigation measures have been implemented. Section 115 (3) of the NEA provides that the biodiversity offsets may be applied to address residual impacts. Where a biodiversity offset, other offset or compensation mechanism is considered, the developer is required to design, fund and implement it to address residual impacts and to achieve measurable conservation

51 Ibid ch. 5.1.

52 Ibid. ch.5.2.

53 National Environment Management Authority (NEMA) October 2016, *National Biodiversity Strategy and Action Plan ii (20152025*) ,https://www.cbd.int/doc/world/ug/ug-nbsap-v2-en.pdf accessed 19 December 2018. 60 Ibid.

outcomes that can reasonably be expected to result in no net loss and preferably a net gain of biodiversity or other benefits.[54] Such design of the biodiversity offset is required to adhere to the "like-for-like or better" principle[55] and is to be undertaken in accordance with best available information and in the manner prescribed by regulations and guidelines developed NEMA.[56]

It is important to note that NEMA can only permit the application of biodiversity offsets after reviewing an environmental and social impact study and evaluating the application of the mitigation principles in the proposal submitted.[57]

In Uganda, the biodiversity-offset approach was applied in the Kalagala Offset Indemnity Agreement between the Government of Uganda and IDA implemented through the Kalagala Offset Sustainable Management Plan (2010-2019). This SMP provides an overall development planning framework for addressing obligations of Kalagala Offset while promoting sustainable development in the Mabira ecosystem. The Government of Uganda (GoU) entered the Indemnity Agreement with IDA/World Bank in July 2007 whereby IDA committed to be a Guarantor to Uganda under the 'IDA Guarantee Facility Agreement' between Bujagali Energy Limited and financing institutions ('IDA Guarantee lenders') and ABSA Bank Limited as the Agent for the IDA Guarantee Lenders amounting to US$115,000,000 to support a portion of the financing of the Bujagali project. The Indemnity Agreement is an integral component of the approved Bujagali Hydro Power Project by the IDA/World Bank. The Indemnity Agreement provides for preparation and implementation of a Sustainable Management Plan (SMP) for the Kalagala Offset, which includes the Mabira Central Forest Reserve. The Indemnity Agreement committed the Government of Uganda to:

a) Set aside the Kalagala Falls site exclusively to protect its natural habitat and environmental and spiritual values in conformity with sound social and environmental standards.

b) Carry out tourism development activities at the Kalagala Falls site in conformity with sound social and environmental standards.

c) Not to develop power generation that could adversely affect the ability to maintain the Kalagala Falls.

d) Conserve through a sustainable management programme and budget, the present ecosystem of Mabira Central Forest Reserve, Kalagala Central Forest Reserve and Nile Bank Central Forest Reserve.

While the Indemnity agreement recognizes that the Bujagali Hydro Power Project (HPP) would lead to negative environmental impacts, the Kalagala Offset was designed among other mitigation measures, to address these negative environmental impacts whilst promoting sustainable development principles and objectives. Hence, the Kalagala Offset is one among other programmes and initiatives implemented tom address environmental management in the Mabira Ecosystem. Therefore, its implementation requires integration with ongoing programmes and activities.

54 The National Environment Act, 2019, Section 115 (4).
55 Ibid, (7).
56 Ibid, (8).
57 Ibid, (2)

F. Conclusion

Uganda is currently experiencing a number of environmental problems, which include soil degradation, deforestation, and loss of wildlife, loss of biodiversity, wetland degradation and pollution. The causes of environmental degradation are poor agricultural practices, environmental pollution, improper land use planning and development, population growth and poor implementation of environmental laws and policies. The Ugandan government has formulated a number of policies and enacted laws to regulate land use and impacts on the environment. However, as reflected by the alarming rate at which natural resources are being depleted, it is evident that these laws and policies are not enforced effectively. Thus, there is need to develop strategies of the effectiveness implementation of environmental laws and policies on restoration and conservation of the environment. This include strategies such as introduction of incentives for communities and local governments that excel in enacting, implementing, and monitoring of laws and policies at the national, local government and community levels.

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This is an extremely important addition to the literature pertaining to the intersection of Constitutional Law and Environmental Law, and one of its kind in combining the two important legal domains in the context of a modern constitution of an African Country. The book's rich content, covering a waterfront of issues from foundational elements of environmental governance in Kenya to regional and international perspectives, is an indispensable resource for established and emerging scholars, practitioners, and students in East Africa and beyond.

Dr. Elifuraha Laltaika, Senior Lecturer Tumaini University Makumira, Arusha-Tanzania, and a former Harvard Law School Visiting Scholar

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Environmental Governance in Kenya: Implementing the Constitutional Framework is an irrefutable piece of evidence demonstrating the innovative growth of environmental law scholarship in Kenya and Africa. Written by eminent environmental law lecturers and practitioners and largely from the Kenyan perspective, this unique book is useful in many respects. It introduces the reader to foundational aspects of land and environmental governance, compliance, and enforcement as well as other cross cutting environmental governance aspects such as climate change, human rights and environmental pollution. Importantly, the book incorporates regional and international perspectives, rendering it an extremely useful resource for both environmental law lecturers and practitioners in many jurisdictions.

Using the laudable Kenyan constitutional framework as a basis for analysis, the authors traverse a wide range of environmental governance issues that are topical at national, regional and global levels. This approach to environmental governance markets Constitutions as important determinants of environmental governance.

Dr Pamela Towela-Sambo, Senior Lecturer in Law, University of Zambia

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This ground-breaking book offers thorough and compelling analyses of the latest development of environmental governance in Kenya. The editors have brought together a group of leading energy, environment and natural resources law scholars that illuminate the challenges, opportunities, legal innovations and strategies for advancing environmental rule of law in the context of sustainable development. Extensive in its coverage, the book includes regional and country-specific case studies that explore the historical context, theoretical foundations, and contemporary application of constitutional tools to promote good environmental governance. The book is not only an authoritative resource for environmental law students, researchers and practitioners in Kenya, the rest of Africa and the world will draw inspiration from it for many years to come.

Damilola S. Olawuyi, SAN, Professor of Energy and Environmental Law, Independent Expert, African Union's Working Group on Extractive Industries, Environment and Human Rights Violations in Africa.

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