

**ENVIRONMENTAL JUSTICE IN KENYA: A CRITICAL
ANALYSIS**

by

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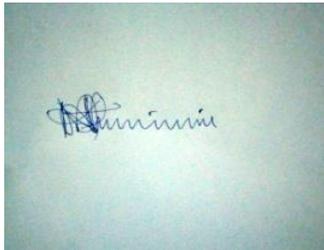
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FEBRUARY 2018

DECLARATION

Student Number: 3508-052-3

I, MAUREEN K NDETHIU, declare that 'ENVIRONMENTAL JUSTICE IN KENYA: A CRITICAL ANALYSIS' is my own work and that all the sources I have used or quoted have been indicated and acknowledged by means of complete references.

A square image showing a handwritten signature in blue ink on a light-colored background. The signature appears to be 'Maureen K Ndethiu'.

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ABSTRACT

Title of Dissertation: ENVIRONMENTAL JUSTICE IN KENYA: A CRITICAL ANALYSIS

Environmental justice, a new but rapidly developing concept in international environmental law, arose in the United States of America during the Environmental Justice Movement of the late 1970s and 1980s. It starkly highlighted injustices faced by people of colour and low-income communities as regards racially skewed environmental legal protection and allocation of environmental risks. The movement radically changed the meaning of 'environment' from its conventional green overtones to include issues of social justice at the core of environmental thinking. I critically examine the concept of environmental justice in the Kenyan context by highlighting the injustices, and the formulation and application of laws and policies that significantly impact on environmental regulation and equitable distribution of social services.

KEY TERMS

Modern environmentalism; international environmental law; environmental principles; anthropocentrism; sustainable development; environmental justice; United States of America (USA); vulnerable and marginalised persons; human rights.

DEDICATION

To Leon and Lynn, may the achievement in this work give you a headlight to see a world of possibilities in everything you set your hearts and minds to do

and

to the reformists, who place their lives and families on the line so that those on the margins of society can live in dignity, justice, and hope for brighter days.

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...And to God, the Almighty, who makes everything possible.

LIST OF ABBREVIATIONS AND ACRONYMS

ACTS	African Centre for Technological Studies
AFREPREN	African Energy Policy Research Network
AMCOW	African Ministers' Council on Water
ADRC	Asian Disaster Reduction Center
CBD	Central Business District
CBD	Convention on Biological Diversity
CEPL	Centre for Environmental Policy and Law
CISDL	Centre for International Sustainable Development Law
CIPEV	Commission of Inquiry on Post-Election Violence
COHRE	Centre on Housing Rights and Evictions
COP	Conference of Parties
EJIL	European Journal of International Law
EPA	Environmental Protection Agency
EDMCN	Drought Monitoring Centre Nairobi
DPMF	Development Policy Management Forum
ECHR	European Courts of Human Rights
FAO	Food Agricultural Organisation
FIAN	Food First Information and Action Network
FIDA	Federation of Women Lawyers in Kenya
GDP	Gross Domestic Product
GYIL	German Year Book of International Law
HSRC	Human Sciences Research Council
ICC	International Criminal Court
IDG	International Data Group
IELRC	International Environmental Law Research Centre
ILEG	Institute for Law and Environmental Governance
ILR	Iowa Law Review

IMF	International Monetary Fund
IPCC	Intergovernmental Panel on Climate Change
IPCS	International Programme on Chemical Safety
IREC	Independent Review Committee
ISOCARP	International Society of City and Regional Planners
ITJEMAST	International Transaction Journal of Engineering Management and Applied Sciences and Technologies
IWA	International Water Association
JAP	Journal of Applied Philosophy
JRS	Jesuit Refugee Service
KIFCON	Kenya Indigenous Forest Conservation Programme
KLA	Kenya National Land Alliance
KLR	Kenya Law Reports
LLR	Law Africa Law Reports
MIT	Massachusetts Institute of Technology
NACCP	National Association for the Advancement of Coloured People
NBER	National Bureau of Economic Research
MDG	Millennium Development Goals
OECD	Organisation for Economic Corporation and Development
PAC	Practical Action Consulting
PISCES	Policy Innovation Systems for Clean Energy Security
PREMUA	Poverty Reduction and Economic Management Unit Africa
RECIEL	Review of European Community and International Environmental Law
SID	Society for International Development
SDG	Sustainable Development Goals
UNEP	United Nations Environmental Programme
UN-HABITAT	United Nations Human Settlements Programme
UNICEF	United Nations Children’s Fund
UNISDR	United Nations International Strategy for Disaster Reduction

UNESCO	United Nations Educational Scientific and Cultural Organisation
UNPF	United Nations Population Fund
UNYB	United Nations Year Book
WCED	World Commission on Environment and Development
WMO	World Metrological Organisation
YJIA	Yale Journal of International Affairs

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CHAPTER 1

INTRODUCTION AND PROBLEM STATEMENT

1.0 The 'environmental justice' principle

'Environmental justice' is an emerging principle of international environmental law.¹ It is a relatively new principle in the field which originated in the United States of America (USA) during the late 1970s and early 1980s.² The Ecology Society of America defines 'environmental justice' as:

Environmental justice is the unbiased treatment and significant involvement of people of all races, incomes, and cultures with respect to the development, execution, and enforcement of environmental laws, regulations and policies. The term environmental justice is often used interchangeably with the term environmental equity which refers to the equal distribution of environmental effects, such as pollution and contamination, across all groups, as well as equitable policies and processes to reduce differences in those who endure environmental problems. Such unbiased treatment implies that no group should shoulder a disproportionate share of negative environmental impacts.³

Generally, environmental justice affirms the equitable distribution of environmental benefits and burdens. Adverse environmental impacts, such as pollution, should not be

¹Issues of aligning governance to meet the challenges of sustainable development have been ranked top among emerging issues of the 21st Century. Sustainable development was defined by the Brundtland Commission as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs", see Report of the World Commission on Environment and Development "Our common future" (Brundtland Report) 1987 at 43. Sustainable development and environmental justice have been considered mutually supportive principles in improving quality of life and standards of living. "Any model for sustainable development that fails to incorporate equity concerns is simply not a sustainable model. Similarly, environmental justice advocacy that disregards principles of sustainable development will never be able to achieve its objectives on a large scale" Fisher (2003) 26/2 *Environ* 206. (See Chapter 3 of this dissertation for a further discussion of the interrelationship between sustainable development and environmental justice principles.) There is a growing and ever more pressing need to implement norms dealing with sustainable development and concern for marginalised groups and future generations. An 'emerging environmental issue', according to the UNEP "21 Issues for the 21st Century: Report of the UNEP Foresight Process on Emerging Environmental Issues" (2012) (Foresight Report) 1, 6-7 available at http://www.unep.org/pdf/Foresight_Report-21_Issues_for_the_21st_Century.pdf (date of use: 4 January 2017), is "emerging" due to its 'newness' and has a positive or negative global environmental impact recognised by the scientific community as very important to human wellbeing, but has not yet received adequate attention from the policy community". The Foresight Report is a compilation and ranking of the most important emerging issues that require global attention and to be prioritised. Environmental justice is an emerging theme in 21st Century and involves policy issues not recognised in traditional environmental thought which concerns strict ecology, see Rhodes *Environmental Justice* 43.

²Rhodes *ibid*; Goodwin & Jasper *Social Movements Reader* 391; Montrie *Making a Living* 113.

³Available at http://www.esa.org/education_diversity/pdfDocs/EnvironmentalJustice.pdf (date of use: 16 July 2015).

unfairly and discriminatorily apportioned to the less advantaged (disadvantaged) and vulnerable persons in society, such as the poor and minorities.⁴

1.1 The concept of ‘vulnerable, disadvantaged and marginalised’ persons/groups in environmental justice

‘Vulnerable or disadvantaged groups’ may be defined as certain groups of the population who ‘often encounter discriminatory treatment, or need some kind of special attention for state protection from exploitation or harmful environment’.⁵ ‘Vulnerability’ can be defined as the ‘diminished capacity of an individual or group to anticipate, cope with, resist and recover from the impact of a natural or man-made hazard’.⁶ These persons/groups may include: groups that experience a higher risk of poverty and social exclusion than the general population; ethnic minorities; the homeless; the elderly; and women and children.⁷ ‘Marginalisation’ – sometimes also called ‘social exclusion’ or ‘discrimination’ – refers to the relegation of a vulnerable group, which results in, amongst others, the denial of rights and exclusion from access to resources and opportunities.⁸ ‘Marginalisation’ is a social injustice that denies vulnerable and disadvantaged persons their inherent human dignity and is, therefore, arguably the most dangerous form of human oppression.⁹

⁴Bullard & Johnson (1998) 4 *Journal for Public Management and Social Policy* 137-48, leading proponents of environmental justice in the United States of America, argue that an environmental justice framework raises the ethical and political question of who gets what, why, and how much. Environmental justice raises public awareness of the need for social transformation and the overhaul of governance in addressing disproportionate programs, policies and activities that have adverse impacts on minorities and the lower income class – Sandler & Pezzulo *Environmental Justice* 28. Environmental equity takes the concept of environmental justice a notch higher and calls for equal protection against environmental harms, regardless of factors such as race, ethnicity, and class – Harding *Access to Environmental Justice* 319.

⁵Sastry *Vulnerable and Disadvantaged Groups* 11.

⁶Fothergill, Maestas & Darlington (1999) 23/2/June *Disasters* 156-73.

⁷European Foundation for the Improvement of Living Working Conditions quoted in Sastry *Vulnerable and Disadvantaged Groups* 11.

⁸Jenson “Thinking about Marginalisation: What, Who and Why” available at http://cprn3.library.carleton.ca/documents/15746_en.pdf (date of use: 5 January 2017).

⁹Ibid.

Historically, factors such as race and ethnicity, economic classification, and at times, regional differences and sexism, have had a strong impact on how environmental resources and risks are distributed within communities.¹⁰ The essence of the concept 'environmental justice' relates to integrating social equity questions, such as human rights and government accountability, into the mainstream of environmental protection.¹¹ The concept 'environmental justice', therefore, represents a broad reflection of what is considered as 'environmental'. Such a view demands a radical shift from what has traditionally been an ecological approach to the environment, to a more homo-centric understanding.¹² The 1991 summit of the First National People of Color Environmental Leadership in the United States, adopted the '17 Principles of Environmental Justice' which extended the scope of what is understood under the term 'the environment'. In addition to aspects of the natural environment, the summit shone light on a public-centred, holistic, and socially just approach to 'environment'. Environmental justice, therefore, integrates the natural environment and wider issues of public health, worker

¹⁰Although vulnerability is intimately linked to economic status and ethnicity, it is a broad and multifaceted concept with a variable range of injustice factors. In order to appreciate how vulnerability relates to environmental justice, it is necessary to examine diverse social injustices involved in a vulnerable state. This requires adopting a progressive view of 'vulnerability' through critical evaluative aspects and processes including: risk perception; preparedness behaviour; warning communication response; physical impact; psychological impact; emergency response; recovery; and reconstruction. By evaluating these components of vulnerability in categories, patterns begin to emerge that clearly show the variable constructions of adverse environmental impacts on the vulnerable. These patterns include: socio-economic vulnerability such as poverty levels; population growth and settlement patterns; and political vulnerability. For instance, the poor are most vulnerable to adverse environmental impacts because they are often pushed to settle on the most marginal lands and have least access to environmental disaster prevention, preparedness, and early warning. In addition, the poorest are the least resilient in recovering from adverse environmental effects due to lack of support networks and alternative livelihood options. Fothergill, Maestas & Darlington (1999) 23/2/June *Disasters* 14; UNEP "Environment and Vulnerability: Emerging Perspectives" available at http://www.preventionweb.net/globalplatform/2007/firstsession/docs/Workshops/4_2_3_Ecosystems_Environment/Environment_and_Vulnerability.pdf (date of use: 11 July 2017); Asian Disaster Reduction Centre(ASDR), United Nations International Strategy for Disaster Reduction(UNISDR) and World Meteorological Organisation (WMO) "Emerging trends in disaster impact, hazards and vulnerability patterns" available at http://www.adrc.asia/publications/LWR/LWR_abridged/preface3.pdf (date of use: 11 July 2017).

¹¹Bowen & Haynes (2000) 8 *Social Science Quarterly* 3.

¹² The 'ecological approach to environment' connotes interrelationships between natural ecosystems and organisms. Barry "Ecology is the meaning of life" available at http://www.theecologist.org/blogs_and_comments/commentators/other_comments/2132074/ecology_is_the_meaning_of_life.html (date of use: 25 September 2017).

safety, land use, housing, resource allocation, policies, and community empowerment, among other social issues, into the concept of 'environment'.¹³

1.2 Broad reflection on the term 'environment': Environmental justice and 'anthropocentrism': Positioning the human being at the centre¹⁴

Environmental justice is closely related to the principle of sustainable development which is, in the main, concerned with placing humans at the centre of development.¹⁵ Putting the lives of people at the centre of development includes addressing human problems such as social injustice and environmental degradation to provide a decent standard of living to all people (regardless of their economic, social, ethnic, or political background). Human development is a meaningful concept and tool developed to facilitate a multidimensional approach.¹⁶

Environmental justice is strongly linked to anthropocentric thinking on the term 'environment'. A broad approach to 'environment' places humans at the forefront of all environmental reflection, management, and concern, and forms the basis for judging the ethical concern of environmental wrong or right action.¹⁷ It seeks to meet the wellbeing and needs of humans such as, inter alia: aesthetic; physical; psychological; spiritual;

¹³McDonald *Environmental Justice* 27. First National People of Color Environmental Leadership Summit "Principles of Environmental Justice" available at <http://www.ejnet.org/ej/principles.html> (date of use: 3 March 2015).

¹⁴Anthropocentrism is the environmental regard of humankind as the central or most important element of existence, especially as opposed to animals. See <https://www.bing.com/search?q=anthropocentrismorm=PRUSML&mkt=en-us&httpsmsn=1&refig=3babd0bbce4842d0a663ddeb604d49ab&pq=anthropocentrism&sc=8-16&sp=-1&qsn=n&sk=> (date of use: 14 February 2018).

¹⁵International Development Law Organisation "Connecting the Dots across the Sustainable Development Goals: Environment, Justice and People" available at <https://www.idlo.int/sites/default/files/pdfs/events/Framing%20paper%20IDLO%20Event%2010%20June.pdf> (date of use: 12 July 2017). Sustainable Development Goals (SDGs) are discussed in Chapter 3 of this dissertation.

¹⁶This tool encapsulates that economic, environmental, and social development is about people, and should persuade public institutions to put people at the centre in defending rights, shaping public policy, and in promoting communities' participation in the decision making process. UNDP "Human development is about placing people at the centre" available at <http://hdr.undp.org/en/content/human-development-about-putting-people-centre> (date of use: 12 July 2017).

¹⁷That is, environmental right or wrong action depends on the consequences for and effects on humans as the primary environmental subjects. Desjardin *Environmental Ethics* 98.

developmental; cultural; and social needs.¹⁸ The essential feature of placing humans at the centre of environmental thinking is founded on the notion of ‘anthropocentrism’. This, in turn, is based on the precept that human beings are ‘superior’ to nature and are responsible for its sustainable management for the benefit of mankind.¹⁹ The notion is anchored in the Christian ideology which has underpinned western civilisation for the past 1500 years.^{20 21} An anthropocentric approach is implicit in many legal systems, particularly those that underpin emerging environmental law norms.²² This dissertation adopts an holistic and inter-disciplinary approach in which the ecological, economic, social, cultural, and political aspects are integral to anthropocentric thought on the ‘environment’.

1.3 Environmental justice: A spreading concept

Although largely a concept originating in the United States of America (USA), environmental justice has, and is still, spreading to many regions such as Europe, Latin-America, Asia and Africa and numerous countries of the world.²³ However, elements

¹⁸An anthropocentric and human wellbeing approach is animated in the key international environmental law instruments, for instance, principle 1 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) UN Doc A/Conf.48/14/Rev.1(1973); (1972) 11/ILM 1416, states: “Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. In the long and tortuous evolution of the human race on this planet a stage has been reached when, through the rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale. Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights the right to life itself”.

¹⁹Teng & Yifan *Environment and Development* 251.

²⁰Perry *Western Civilisation* 104-12.

²¹‘Anthropocentrism’ is criticised for being a problematic concept by showing ‘prejudice’ against the non-human, natural world. However, anthropocentric thinkers argue that what anthropocentrism disputes, is not the saving/conservation of nature, but the disregard of humans and human well-being as a legitimate part of the biosphere. In response, anthropocentrists rather feel that the real contention should focus on what includes ‘human wellbeing’. Beckmann et al (1997) 3 *Consumption Environment & Culture* 3; Buell *Environmental Criticism* 137-8.

²²The emerging system of international environmental norms is anthropocentric in the sense that it emphasises principles concerned with the treatment of human stakeholders with regard to the environmental impacts of actions, and are strongly motivated by the desire to enhance social welfare and common good, see Young *Governing Complex Systems* 172.

²³For instance, Harding *Access to Environmental Justice* for a discussion on environmental justice in USA, India, Indonesia, Malaysia, China, Thailand and Ghana.

reflecting injustice are contextual and differ from country to country.²⁴ The environmental justice concept is spreading to various parts of the globe in dealing with conflicts in ecological distribution such as waste disposal, land grabbing, and climate injustices.²⁵ These are evidenced by press reports and court judgments, environmental campaigns, strikes and protests, and other forms of ecological action.²⁶ Environmental justice is pivotal in the realisation of sustainable development in countries and, consequently, is included in national environmental, legal, and political agendas.²⁷

In Africa, South Africa provides a good example of country that has suffered environmental injustice as a result of struggle against racial inequality during the apartheid regime under which environmental policy was used as a tool for racial oppression and discrimination.²⁸ For example, the location of toxic-waste sites and mines and industries guilty of polluting the environment in many black and coloured communities is one of apartheid's historical legacies.²⁹ In response to the inequitable position of certain people (in the case of South Africa the black majority), the Environmental Justice Networking Forum of South Africa points out that:

²⁴Studies of environmental justice considerations in national laws are provided by Bosselman & Richardson *Environmental Justice*. Defining 'justice' and 'equity' with regard to environmental risks and benefits is contextual—as factors of injustice vary. Borak & Peak (2012-2013)8/1 *Sustainable Development Law & Policy* available at http://www.ejnet.org/ej/SDLP_Ewall_Article.pdf (date of use: 28 September 2016).

²⁵'Climate injustice' refers to the uneven contribution to and effects of climate change. Poor people in developing countries will experience the impacts of climate change first and more severely than in developed countries, because of their vulnerable geography and lesser economic ability to cope with the effects. Climate injustice is as a result of the emission of greenhouse gases such as carbon dioxide which result from the burning of fossil fuels (such as coal) by industrialised countries. Effects of climate change include rising sea levels, drought, and loss of agricultural land. Marcotullio "Climate injustice and cities" available at <https://ugecviewpoints.wordpress.com/2015/04/28/climate-injustice-and-cities/> (date of use: 9 February 2018). See Chapter 4 of this dissertation for a discussion of the interrelation between climate change and injustice in understanding international environmental injustices.

²⁶Martinez-Alier et al "Is there a global environmental justice movement?" Colloquium paper no 16 Global governance, politics, climate justice & agrarian social justice linkages and challenges: An international Colloquium 4-5 February 2016 at 2-3.

²⁷*The Ecologist* "Degrowth and the Global Movement for Environmental Justice" (2016) available at http://www.theecologist.org/News/news_analysis/2988035/degrowth_and_the_global_movement_for_environmental_justice.html (date of use: 11 July 2017).

²⁸McDonald *Environmental Justice* 1.

²⁹Interpress News Agency "Environment: South Africa-Environmental Racism: A Lingering Legacy of Apartheid" available at <http://www.ipsnews.net/2001/04/environment-south-africa-environmental-racism-a-lingering-legacy-of-apartheid/> (date of use: 18 July 2017).

Environmental justice is about social transformation directed towards meeting basic human needs and enhancing our quality of life – economic quality, health care, housing, human rights, environmental protection, and democracy. In linking environmental and social justice issues the environmental justice approach seeks to challenge the abuse of power which results in poor people having to suffer the effects of environmental damage caused by the greed of others.³⁰

In Sierra Leone, environmental justice is generally centred on the disproportionate application of environmental laws and policies, especially development-related laws which, amongst others, exploit poor mining communities and exclude local communities from the environmental decision-making process.³¹ Sierra Leone gained prominence in the international arena following the protracted war that engulfed the country between 1991 and 2002. The role of so-called ‘blood diamonds’ in fuelling the conflict has received significant attention.³² In Nigeria, the promotion of the environmental justice principles has been intrinsically related to issues of farmland deprivation, environmental degradation, threats to health, exclusion from resource benefits, and lack of environmental rehabilitation by oil mining companies. Environmental justice is a prominent concern of environmental and social movements in Nigeria in demanding equitable and sustainable development policies.³³

In Kenya, current environmental injustices have their roots in colonial laws and policies which imposed inequitable environmental burdens and marginalised certain communities from enjoying access to and a fair share of the country’s natural resources such as land, water, and a clean and safe environment. Environmental justice in the country, therefore, centres mainly on the formulation and implementation of environmental regulations, decisions, and public policy that promotes equitable

³⁰McDonald *Environmental Justice* 4.

³¹Schwartz “Corporative activities” 429.

³²Diamond revenues (the so-called ‘blood diamonds’) were used to buy weapons and ammunition which were used by rebels to exploit civilians and control diamond mines. Marchuk (2009) *YJIA* 88 available at <http://yalejournal.org/wp-content/uploads/2011/01/094207marchuk.pdf> (date of use: 28 September 2016).

³³Sobomate “Environmental Justice in Nigeria: Reflections on the Shell-Ogoni Uprising, Twenty Years Afterwards” a paper delivered at 14th EADI General Conference 23-26 June 2014 Bonn; Ebiri “Nigeria: Flicker of Hope for Environmental Justice in Ogoniland” available at <http://allafrica.com/stories/201508242278.html> (date of use: 5 January 2017).

development and proportionate distribution of natural resources and social amenities such as education, health services, sanitation, and proper housing.³⁴

On a broader international scale, environmental justice is a point of concern in the widening inequalities in North-South international relations.³⁵ The shipment of hazardous waste to African countries and the devastating impact of climate change are issues of economics and power-imbalance which confront the ideal of global environmental justice.³⁶

1.4 Problem statement

The African traditional society in Kenya enjoyed a strong communal bond. The environment and its resources were used to secure collective satisfaction which was integral to the cultural life-view of the time. Colonisation and its related injustices caused a major rupture which left an unfortunate legacy in Kenya.³⁷ British authoritarian and indirect rule kept governance at a distance from the people. Law and order served the British minority and oppressed the African communities. Land was alienated to the white settlers without consultation and involvement of the Kenyan people. Moreover, more often than not the protection of wildlife was seen as more important than the dignity of the Kenyan people.³⁸

³⁴Muigua & Kariuki "Towards Environmental Justice in Kenya" available at <http://www.kmco.co.ke/attachments/article/140/Towards%20Environmental%20Justice%20in%20Kenya-January%202015.pdf> (date of use: 21 July 2017); Government of Kenya *Kenya Vision 2030*.

³⁵In international environmental law there is considerable discussion about North-South conflicts, or conflicts between wealthier, economically developed nations and poorer, economically developing countries. Global Change Instruction Programme "North- South Conflicts over Environmental Protection and Resource Management" available at <https://www.ucar.edu/communications/gcip/m3elaw/m3pdfc3.pdf> (date of use: 22 July 2017).

³⁶Inequality and inequity remain inherent and almost foundational characteristics of the North-South divide. Gutta "Interrogating the Relevance of the Global North-South Divide: Focus on the Global South" (2016) available at http://www.cetri.be/IMG/pdf/shalmali_guttal_23000_eng_3-2.pdf (date of use: 5 January 2016).

³⁷Ndege "Colonization and its legacies in Kenya" paper presented during Fulbright-Hays Group Project abroad Program 5 July-6 August 2009, Moi University at 2.

³⁸In settler-dominated colonies such as Kenya, Zimbabwe, and South Africa, settler conservationists advocated the promotion of wildlife protection. Game laws introduced were inequitable. They had a disproportionate impact on human interests. Colonel Sir James Hayes Sadler (21 May 1827 – 9 January 1910) was a British diplomat and civil servant who held a number of senior government positions in East Africa. He observed that native populations and their farm produce suffered severely from attacks by wild animals protected by game laws, and set the balance between people and nature at the wrong place. In

After independence Kenya was left with a disproportionate, racially-biased economy in which four ethnic groups – European, Asian, Arab and African – took part and competed. Today, nearly half (which accounts to 43,4%) of Kenya’s population lives in abject poverty without even the most basic services.³⁹ Inequitable development has been a major factor in generating civil instability and post-election unrest in Kenya in 1992, 1997, 2002, and most recently 2007. Key factors that have contributed to the cycle of violence include unequal opportunities for economic development, unemployment, poverty, and inequitable land allocation.⁴⁰

In the global arena, Kenya, as a third-world country, is faced with challenges arising from the injustices wrought by developed nations such as toxic waste dumping,⁴¹ as well as the impact of climate change and its overall resulting evils such as food insecurity and water scarcity. Added to Kenya’s vulnerability is the fact that the country – as is the case with many developing countries – lacks the resources to adapt to or cope with the devastating effects of climate change.⁴²

The Nobel laureate, Professor Wangari Maathai, was the leading environmental activist in Kenya. She transformed Kenya’s environmental space to extend beyond green conservationism by challenging human rights abuses in society, and agitated for

noting the problem, Colonel Sir James stated: “Whilst preserving the elephant, we also have to think about the people.” See Adams *Against Extinction* 73-4.

³⁹*World Fact Book* as at 9 July 2017 available at <https://www.cia.gov/library/publications/the-world-factbook/fields/2046.html> (date of use: 31 July 2017). There is a wide social and economic disparity whereby access to basic quality services such as health care, education, clean water and sanitation are a challenge for many poor people. Large segments of the population, which includes the urban poor and rural settlements, bear the heaviest brunt of environmental, economic and social inequalities. See Unicef Report 2009 available at <http://www.unicef.org/kenya/overview4616.html> (date of use: 14 July 2017).

⁴⁰Atanda & Marklyi (2011) 4/2 *Journal of Politics and Law* 175.

⁴¹Africa and less industrialised countries are targets for toxic-waste dumping by developed countries. The recipient countries are nations gripped by poverty and unable to bear with the environmental and health effects from these wastes. The illegal dumping of toxic waste and environmental injustice have been labeled with terms such as ‘toxic colonialism’, ‘toxic racism’ and ‘toxic terrorism’. See Clapp J *Toxic Exports* 31-2; Adujie “Africa: Dumping Europe’s Toxic Waste on Africa” available at <http://allafrica.com/stories/200910130454.html> (date of use: 3 August 2017); Kabukuru “East Africa: An Investigation on Toxic Dumping in East Africa” 17 March 2011 available at <http://www.shout-africa.com/news/east-africa-toxic-dumping-in-east-africa/> (date of use: 3 August 2017).

⁴²Roberts & Parks *Climate of Injustice* 10.

democratic reform in the country. The new Constitution, promulgated on 27 August 2010, heralded a wide spectrum of changes in political governance in Kenya. These include, the decentralisation of government,⁴³ a more comprehensive Bill of Rights which includes the right to a healthy environment,⁴⁴ protection of marginalised and vulnerable persons,⁴⁵ and economic and social rights.⁴⁶ A Land and Environmental Court with superior court status has also been established.⁴⁷

The purpose of this dissertation – and problem statement – is, therefore: to examine the historical origin, nature and scope of environmental justice; to expose the environmental injustices in Kenya and how they evolved within a social and historical context; and finally, to offer possible solutions by proposing mechanisms to solve and/or ameliorate injustices existing in the promotion of sustainable development and human wellbeing in the country.

1.5 Demarcation of chapters

Chapter 1 serves as an introduction to the dissertation and sets out of the problem to be addressed.

In Chapter 2 I discuss the genesis of the concept ‘environmental justice’ in the United States of America (USA). I examine the historical factors that led to the Environmental Justice Movement of the late 1970s and early 1980s. In doing so, I point to the movement’s wide approach to ‘environment’ and how it integrated social justice and ecological concerns. The chapter looks at the meaning of environmental justice in the context of its place of origin, its overall significant recognition, acceptance and active integration by USA Presidents Clinton and Obama’s policy frameworks. The application of environmental justice in the USA, and its significant impact in safeguarding environmental rights and improving quality of life for minorities and vulnerable groups,

⁴³Chapter 11.

⁴⁴Article 42.

⁴⁵Article 56.

⁴⁶Article 43.

⁴⁷Article 162(2)(b).

makes it a fundamental area of study in international environmental law from which other countries can learn. The chapter further addresses the legal position of the concept of environmental justice and, its current nature and scope in international environmental law.

Chapter 3 discusses the inseparable link between the principle of sustainable development and the concept of environmental justice. Sustainable development is the principle that generally underpins international environmental law in improving human quality of life, with key emphasis on poor and vulnerable persons. The concern of marginalised and vulnerable persons is also a primary precept of environmental justice. The reinforcement of the principle of sustainable development in the 2010 Kenyan Constitution, in the preamble to the Constitution, and in the spirit of the Constitution, provides fertile ground for greater legal and policy appreciation of environmental justice aims in Kenya.

Chapter 4 sets out the historical background to environmental justice in Kenya. It covers the pre-colonial, colonial, and post-colonial periods leading up to 2010. The chapter also looks at global environmental injustices against Kenya as a developing country.

In the pre-colonial period, it depicts the African traditional society's '*Ubuntu*' values of communalism, human rights, equity, and human dignity which exemplified environmental justice precepts secured and practised in the traditional African world view.

The colonial period, by contrast, ushered in a degeneration of environmental protection anchored in an 'African value-based' system. Colonisation brought with it misplaced capitalist notions of development which were instrumental in, inter alia, human rights violations, exploitation of environmental resources, and the consequent problems of poverty, poor governance, and economic prosperity benefiting only a minority of the population.

The post-colonial period allowed considerable scope for the perpetuation of colonial institutions which had been intricately legitimised in key public policies, laws, and socio-political structures. This posed as a major setback to the efforts of post-independence governments to redress issues of inequitable economic development and poverty – the lot of the majority of people in Kenya.

The ‘new’ constitutional dispensation of 2010 is characterised by a determined policy and legal reform aimed at a just, cohesive, and equitable society. It is marked by the exigency for overhaul in governance, democracy, and human rights protection in Kenya.

This chapter also focuses on environmental injustice in the country on a broader international scale. As a developing country, Kenya is prey to environmental injustices committed by politically more sophisticated and industrialised countries. Case studies of environmental injustice form part of this chapter.

Chapter 5 discusses the immense opportunity for the development of the concept of environmental justice in Kenya under the sustainable development principle, which is firmly entrenched in the 2010 Constitution as a principle for the interpretation of the Constitution and any law, legislation negotiation and drafting processes, and public policy-making. The Constitution also provides a rich and progressive Bill of Rights with a wide array of substantive and procedural environmental rights that can bolster environmental justice objectives in Kenya.

Also considered is Kenya’s policy blueprint dubbed ‘Vision 2030’, as a road map for achieving environmental justice in Kenya. Vision 2030 aspires to improve the lives of Kenyans and, in particular, the poor and marginalised in society. The policy emphasises the role of sustainable development objectives and environmental justice ideals in creating a high quality of life, reducing poverty, and advancing good governance, social justice, and equity.

This is also the final chapter of this dissertation and so provides a conclusion, a prognosis, and recommendations arising from this study.

CHAPTER 2

THE GENESIS OF ENVIRONMENTAL JUSTICE AND ITS PLACE IN INTERNATIONAL ENVIRONMENTAL LAW

2.1 Introduction

The origin of the environmental justice debate and subsequent emergence of the Environmental Justice Movement (EJM) which advocated the acceptance of the concept, can be traced to the USA. The debate was triggered by the injustices faced by people of colour and low-income communities in particular, and forms the background to the establishment of the EJM in the late 1970s and early 1980s which shaped the concept of environmental justice. This chapter discusses the movement's integration of social justice concerns and traditional environmental thought (ecology or green conservation) and its extension of the meaning of 'environment' to include more than natural factors by drawing in the human environment. It also looks at the contemporary application and integration of the concept of environmental justice in Presidents Clinton and Obama's policy initiatives in the USA. Lessons that can be drawn from the EJM to reaffirm the international environmental law discourse by addressing inequalities – a critical issue captured within the sustainable development principle – are also highlighted. The chapter considers the legal status, nature, and scope of the concept of environmental justice in international environmental law.

2.2 The impetus leading to the Environmental Justice Movement in the USA

The EJM originated from the racial struggles and inequalities that have shaped the history of the USA. Racial inequality in USA society denies people of colour and minorities equal protection of the law and access to social benefits.⁴⁸

⁴⁸Norton "Racial inequality" available at <http://www.ssc.wisc.edu/~wright/ContemporaryAmericanSociety/Chapter%2014%20--%20Racial%20inequality--Norton%20August.pdf> (date of use: 13 October 2016).

'Racism' is a belief that one race is superior to another.⁴⁹ In the USA racism is a hierarchical system of injustice that routinely advantages and provides opportunities and privileges to the racial majority of the population, at the expense of minority groups including African Americans, Latinos, Asians, Pacific Islanders, Arabs, and others.⁵⁰ The EJM was an outcry against the upsurge in racial intolerance – an intolerance that also manifested in the environmental sphere through minorities living under unhealthy conditions and, taking a broader perspective, social spheres which excluded them from education and employment.

The environmental justice concept had its genesis in the USA in the late 1970s and early 1980s⁵¹ as a reaction to the discriminatory and biased distribution of unwanted land usually regarded as Locally Undesirable Land Uses (LuLus)⁵² – such as the sites for hazardous waste, landfills, incinerators, and zoning of polluting industries – that were skewed towards neighbourhoods where people of colour lived. This extended further to the exclusion of, or limited participation by people of colour and minorities when environmental policy and laws were made.⁵³ In 1978, highly toxic polychlorinated biphenyl (PCB)⁵⁴ waste was dumped alongside roads in North Carolina. The PCBs

⁴⁹Walsh & Dominican "Addressing racism: What will it take?" available at <http://www.op.org/sites/www.op.org/files/public/documents/fichier/addressingracism.pdf> (date of use: 4 February 2017).

⁵⁰Lawrence & Keleher "Chronic disparity: Strong and pervasive evidence of racial inequalities: poverty outcome: structural racism" paper delivered at the Race and Public Policy Conference 2004 University of California available at <http://www.intergroupresources.com/rc/Definitions%20of%20Racism.pdf> (date of use: 13 October 2016).

⁵¹McGurty (1997) 2 *Environmental History* 301-02; Montrie *Making a Living* 113.

⁵²Bullard (1996) 77/3 *Social Science Quarterly* 493-9; Hill *Environmental Justice* 80.

⁵³Kaswan (1997) 47/221 *American University Law Review* 223-4. The Environmental Justice Movement succeeded in challenging environmentalism to include the concerns of the poor and people of colour. Redefining participation and inclusion was at the core of the movement's goals. McGurty *Transforming Environmentalism* 155.

⁵⁴The perilous effect of PCB-waste on the environment is proven by its strict regulation in the USA. PCBs are regulated by Chapters 173 to 303 of the Dangerous Waste Regulations available at <https://fortress.wa.gov/ecy/publications/documents/9291.pdf> (date of use: 10 October 2016). The waste is also regulated by the USA Environmental Protection Agency (EPA) under 40 CFR (Code of Federal Regulations) Part 761 available at <https://www.law.cornell.edu/cfr/text/40/part-761> (date of use: 10 October 2016). While the Dangerous Waste Regulations govern the management of waste materials in general, the Code of Federal Regulations is more specific and broader as it controls the manufacturing, processing, distribution, and use of PCBs. The requirements of both set of laws must be met for any PCBs waste produced. Some of PCBs' lethal effects on humans include: skin, digestive and liver tumours; blood and respiratory disorders; and reproductive effects such as hair loss, skin defects and low

originated from the Raleigh-based Ward Transfer Company. In the following year, 1979, the state of North Carolina selected Warren County, a poor and predominantly African-American county, as the site for dumping PCB-contaminated soil collected from the roadsides. This culminated in an intense civil outcry for social and environmental policy reform, with over 500 arrests taking place. And in this process the widely-heralded EJM came to the fore.⁵⁵ The incident played an important role in propelling the racial inequality debate for social and political transformation which had its early influences in the Civil Rights Movement of the 1950s, 1960s and 1970s, led by renowned civil-rights activists such as the Reverend Martin Luther King.⁵⁶ ⁵⁷ In general terms, the EJM can be seen to have arisen from various and diverse protests opposing disparity. The movement played a significant role in advancing the Civil Rights Movement's agenda by demanding neutral decisions in the apportionment of environmental risks and burdens.⁵⁸

birth weight, and bone abnormalities in the offspring of exposed mothers. UNEP and Secretariat of the Basel Convention *Training Manual* 6.

⁵⁵McGurty *Transforming Environmentalism* 1-4; Sandler & Pezullo *Environmental Justice and Environmentalism* 88.

⁵⁶The Environmental Justice Movement was a tributary of the Civil Rights Movement in challenging social and racial injustices, Sandler & Pezullo *Environmental Justice and Environmentalism* 108, 122.

⁵⁷The Civil Rights Movement contributed to the recognition of the right to non-discrimination and equal treatment in the USA and its subsequent protection under the Civil Rights Act of 1964. This law banned segregation in schools, work, and public places. Moreover, the movement led to the adoption of the Voting Rights Act, 1965, which guaranteed American citizens of all races and ethnic backgrounds the right to vote available at

http://www.dikseo.teimes.gr/spoudastirio/E-NOTES/T/The_Civil_Rights_Movement_Viewpoints.pdf (date of use: 21 November 2016).

⁵⁸Finger & Zorzi 2013 *UNEP Model United Nations Journal* 223 available at <https://www.ufrgs.br/ufrgsmun/2013/wp-content/uploads/2013/10/Environmental-Justice.pdf>. See too http://www.dikseo.teimes.gr/spoudastirio/E-NOTES/T/The_Civil_Rights (date of use: 21 November 2016). The Environmental Protection Agency in the USA established in 1970, is mandated to enforce regulations for the protection and management of the environment. In compliance with regulations for advancing environmental justice, it is obliged to comply with the Civil Rights Act, 1964, in promoting non-discriminatory policies against race, color, or national origin such as equitable federal financial assistance. This is one of the EJM's legacies that directly promotes the Civil Rights Movement's aims. Moreover, environmental justice has been recognised as an important 'civil right' in the USA. See Statutory Report of the United States Commission on Civil Rights "Environmental Justice: Examining the Environmental Protection Agency's Compliance and Enforcement of Title VI and Executive Order 12,898" September 2016 available at http://www.usccr.gov/pubs/Statutory_Enforcement_Report2016.pdf (date of use: 25 November 2016).

2.3 Environmental racism and the roots of injustice as historical justification for the genesis of environmental justice

'Environmental racism' or 'environmental discrimination' has been used by American authors to portray the disproportionate apportioning of environmental risks to coloured communities.⁵⁹ Environmental racism unfairly positions racially defined sectors of the population at the receiving end of environmental burdens. It is these sectors, rather than the population at large, who end up paying dearly for damage caused to the environment.⁶⁰ Environmental justice advocates in the USA contend that it is no coincidence that people of colour and poor communities are forced to 'live, work and play' in the most polluted environments.⁶¹

Robert Bullard, often regarded as the 'father of environmental justice'⁶² defines environmental racism as

...any policy, practice, or directive that differentially affects or disadvantages intentionally or unintentionally, differentially impacts or disadvantages individuals, groups, or communities based on race or colour [it] ... also refers to the exclusionary and restrictive practices that limit participation by people of colour in decision making boards, commissions and staffs.⁶³

People of colour in the USA have been subjected to greater health and environmental risks than the rest of the society. Civil activism following the Warren-County dispute sparked keen interest in studies to establish whether racial discrimination indeed played a role in, amongst others, the locating of landfills and waste disposal facilities – that is, environmental issues. The first study was carried out by the USA's General Accounting Office (GAO) and revealed that people of colour and the poor made up the majority of

⁵⁹Collins et al (1995) 25 *Journal of Black Studies* 25.

⁶⁰Bullard (1993) 8/1 *Forum for Applied Research and Policy* 29-35.

⁶¹Natural Resources Defense Council (17 March 2016) "The Environmental Justice Movement" available at <https://www.nrdc.org/stories/environmental-justice-movement> (date of use: 25 November 2016).

⁶²Bullard "Dr Robert Bullard: Father of Environmental Justice" available at <http://drrobertbullard.com> (date of use: 15 October 2016). Dicum accredits Bullard with being widely regarded as the first to fully articulate the concept of environmental justice in his work *Dumping in Dixie*. See Dicum "Meet Robert Bullard, the Father of Environmental Justice" available at <http://grist.org/article/dicum/> (date of use: 15 October 2016).

⁶³Bullard (1993) 6 *Land Use Forum: A Journal of Law, Policy, and Practice* 6.

the population living in the vicinity of landfills.⁶⁴ Research conducted by the Commission for Racial Justice also identified race as the most prominent factor influencing the zoning of hazardous waste facilities. For instance, three in five black and Hispanic Americans lived in communities with uncontrolled toxic waste.⁶⁵ Studies by the Environmental Protection Agency (EPA)⁶⁶ reaffirmed the disproportionate location of environmental pollutants in areas housing racial minorities.⁶⁷ Lead poisoning in children is an example of environmental health problems that disproportionately affected people of colour.⁶⁸ Environmental racism in the USA further includes discriminatory practices or policies that limit or exclude minorities from enjoyment of the right to a healthy environment such as uneven negative impacts of environmental laws, disproportionate access to environmental services such as garbage removal, or inadequate maintenance of environmental amenities such as parks and recreation areas.⁶⁹

2.4 Ecology ‘meets’ civil liberties and human justice

Charges of racism and exclusionary treatment have been levelled against traditional environmental thought which focuses, in the main, on green conservation.⁷⁰ This was

⁶⁴USA General Accounting Office “Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities” (1983).

⁶⁵Penn (2012) 3 *Springer Science Business and Media* 624-6.

⁶⁶Environmental Equity Workgroup Report (1992) “*Environmental Equity: Risks for All Communities: United States*” available at <https://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=40000JLA.TXT> (date of use: 15 February 2018).

⁶⁷Other arguments, however, deny that race was a significant element taking into account the various factors which could have influenced the siting of the environmental hazards. Canter & Kriesel “Toxic exposure and race: Establishing A case of discrimination under American legal institutions” paper delivered at a conference on environmental justice and Market Mechanisms (1998) Auckland available at www.caes.uga.edu/.../documents/cvs/KrieselVita2017.pdf (date of use: 18 February 2018); Anderton et al (1994) 18 *Evaluation Review* 123.

⁶⁸Wernette & Nieves (1992) 18 *EPA Journal* 16-17.

⁶⁹Bullard (1993) 6 *Land Use Forum: A Journal of Law, Policy, and Practice* 6.

⁷⁰Traditional environmental thought is often associated with the term ‘green conservatism’. ‘Green conservation’, ‘green philosophy’ or ‘deep ecology’ are, in the main, concerned with the efforts to protect nature. In traditional environmental thought, human beings and human problems are perceived from how they impact nature in totality as an integral component. ‘Green conservatism’ is associated with the ideology that promotes the protection of natural resources and judges human environmental problems strictly from an ecological perspective. Steiguer *Modern Environmental Thought* 189-90. See also Chapter 1 (para 1.2) of this dissertation on anthropocentric versus biocentric environmental thought. Radical environmental groups are, however, unavoidably moving from this limited ecological view towards a more pragmatic, socio-ecological approach with concerns of human rights seen as paramount in achieving ‘green’ objectives. See Steiguer *ibid*191-3.

perceived by civil activists as yet another example of the perpetuation of social injustices having a negative impact on certain people, especially the poor and minorities. For example, in the mid-1980s, in trying to prevent a solid-waste incinerator from being located in South Central, Los Angeles, a low-income community of colour, 'the issue was not deemed adequately environmental' by local environmental groups.⁷¹ Activists were particularly vocal in criticising mainstream environmental groups for being reluctant to address issues of equity and social justice within the context of the environment.⁷² The events in Warren County transformed environmental thinking by creating a focal point around which to consider the environment, not only as an ecological subject, but also a central issue in human justice.

2.5 'Environmental justice' as human dignity for everyone

Historically, human dignity is a critical theme running through the organisation of USA anti-racism activist groups in addressing inequalities in the political, economic, and social spheres, and in aiming for full enjoyment of inherent, inalienable, and universal rights by all.⁷³ The EJM, like its forerunner the Civil Rights Movement, championed the recognition of human dignity as that which accrues to every human being at birth – irrespective of colour, birth, or origin. Every person is, therefore, entitled to a life free of discrimination, and deserves respect and to live in humane conditions.⁷⁴

In the USA, environmental justice imposes a duty on the government to make conscious decisions to eliminate programs and policies that either degrade the dignity of or impact severely on vulnerable communities.⁷⁵ Environmental justice in the USA is the converse of environmental racism;⁷⁶ it calls for 'fair play', impartiality and egalitarian decision-

⁷¹Di Chiro "Nature as Community" 299.

⁷²Alston *We Speak for Ourselves* 3.

⁷³McCrudden (2008)19/4 *European Journal of International Law* 663.

⁷⁴Klug & Wildbore "Equality, Dignity and Discrimination under Human Rights Law: selected cases". available at http://www.lse.ac.uk/humanRights/aboutUs/articlesAndTranscripts/Runnymede_article.pdf (date of use: 4 February 2017).

⁷⁵American Civil Liberties Union "Promoting Opportunity and Racial Equality in America: A Guide for Federal, State and Local Governments" available at <https://www.aclu.org/other/promoting-opportunity-and-racial-equality-america> (date of use: 4 February 2017).

⁷⁶Lazarus (1992) 87 *Northwestern University LR* 790.

making procedures that promote an ‘all-inclusive and healthy community’.⁷⁷ It entails the enjoyment of the highest attainable standard of life and social development for every human being without distinction as to race, religion, political belief, and economic or social condition.⁷⁸

2.6 Underpinning human wellbeing: ‘Principles of environmental justice’

Probably one of the most significant expositions of the meaning of environmental justice was produced by the First National People of Environmental Leadership Summit convened in Washington DC in 1991. The summit delegates adopted seventeen ‘Principles of Environmental Justice’.⁷⁹

These principles added a further dimension to the environmental justice discourse by highlighting a number of key issues which had, till then, not received much attention save for the disproportionate distribution of environmental risks. The principles brought into clearer focus the inviolability and interconnection of fundamental human rights which emphasise the right of all human beings to enjoy a viable, quality, and dignified life.⁸⁰

From the principles, environmental scholars have attempted to distil definitions of the concept of environmental justice. For example, Kidd bases his definition on the ‘principles of environmental justice’ and notes that:

Environmental justice is about social transformation directed toward meeting human need and enhancing the quality of life – economic equality, health care, shelter, human rights, species preservation, and democracy – using resources sustainably. A central principle of environmental justice stresses equal access to natural resources and the right to clean air and water, adequate

⁷⁷Maiese “Justice versus Fairness” available at <https://www.scribd.com/document/147723182/Principles-of-Justice-and-Fairness> (date of use: 4 February 2017).

⁷⁸Gabr “Health Ethics, Equity and Human Dignity” available at <http://humiliationstudies.org/documents/GabrHealthEthics.pdf> (date of use: 4 February 2016).

⁷⁹Held on 24-27 October available at <http://www.ejnet.org/ej/principles.pdf> (date of use: 14 October 2016).

⁸⁰Principle 10 states: “Environmental Justice considers governmental acts of environmental injustice a violation of international law, the Universal Declaration on Human Rights, and the United Nations Convention on Genocide”. See Universal Declaration of Human Rights GA res 217A (III) UN Doc.A/810 (1948) at 71; Convention on the Prevention and Punishment of the Crime of Genocide GA res 260A (III) UN Doc.A/810 (1948) 78 UNTS 277 (1951).

health care, affordable shelter, and a safe workplace ... Environmental problems therefore remain inseparable from other social injustices such as poverty, racism, sexism, unemployment, urban deterioration⁸¹

Kidd observes that this definition ‘corresponds with [sic] the essence of the ‘Principles of Environmental Justice’ adopted by the First National People of Colour Environmental Leadership Summit’.⁸²

Apart from articulating the meaning of environmental justice, the summit highlighted the inter-relationship between these Principles of Environmental Justice and sustainable development and human rights. This shows a broad approach to the term ‘environment’ which integrates people and their day-to-day social problems such as inequality and discrimination, poor housing and governance, in their lived environment.⁸³ For example, one of the contributions to the summit identified:

For us, the issues of the environment do not stand alone by themselves. They are not narrowly defined. Our vision of the environment is woven into an overall framework of social, racial and economic justice...The environment for us, is where we live, work, and where we play...The environment affords us the platform to address the critical issues of our time; questions of ...sustainable development, the futures of our cities, housing, land and sovereignty rights, self-determination, and employment.⁸⁴

2.7 The new environmental justice roadmap: The initiatives of Presidents Clinton and Obama

Environmental justice is taken seriously in the USA. In response to the escalating evidence of and serious concern over the disparate distribution of environmental consequences, in 1994 President Clinton issued an Executive Order⁸⁵ requiring the redress of the disproportionate adverse environmental impacts on minority and low-

⁸¹Kidd *Environmental Law* (2011) 302 quoting Hofrichter ‘Introduction’ in Hofrichter (ed) *Toxic struggles: The theory and practice of environmental justice* (1993) 4.

⁸²Kidd *Environmental Law* 302 n 64.

⁸³SooHoo, Albisa & Davis *Bringing Human Rights Home* 266.

⁸⁴Ibid.

⁸⁵Executive Order 12898 “Federal Actions to Address Environmental Justice in Minority Populations and Low-income Populations” 59 Fed Reg 7629 (1994) available at <http://www.ejrc.cau.edu/execordr.html> (date of use: 20 August 2015).

income populations within existing federal programs, activities, laws, and policies.⁸⁶ The Order charges the US EPA with the task of developing guidelines and criteria for identifying disparate and adverse environmental effects on vulnerable populations. It is also mandated to coordinate federal agencies in the development of environmental-justice strategies for effective and consistent implementation of the Order. The Executive Order also encourages participation by the impacted populations in the various phases of assessing environmental impact, including: data gathering concerning and analysis of the problem; determining alternative measures to address the environmental impact; mitigation, where necessary, of the adverse environmental effect; and monitoring.⁸⁷

In advancing the federal responsibilities and commitments outlined in the 1994 Executive Order, seventeen federal agencies⁸⁸ signed a memorandum of understanding on 4 August 2011 – the Environmental Justice Memorandum of Understanding⁸⁹ – to control and address environmental harm affecting indigenous, low-income and minority communities, and to encourage vulnerable communities to participate in public processes designed to improve environmental health and wellbeing.⁹⁰ The

⁸⁶Environmental Protection Agency “Summary of Executive Order 12,898 – Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations” available at <https://www.epa.gov/laws-regulations/summary-executiveorder-12898-federal-actions-address-environmental-justice> (date of use: 25 November 2016).

⁸⁷US Commission on Civil Rights “Not in My Backyard: Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice” available at <http://www.usccr.gov/pubs/envjust/ej0104.pdf>.(date of use: 29 November 2016).

⁸⁸These are: (1) The Environmental Protection Agency (EPA); (2) White House Council on Environmental Quality; (3) Department of Health and Human Services; (4) Department of Justice; (5) Department of Agriculture; (6) Department of Commerce; (7) Department of Defence; (8) Department of Education; (9) Department of Energy; (10) Department of Homeland Security; (11) Department of Housing and Urban Development;(12) Department of the Interior; (13) Department of Labour; (14) Department of Transportation; (15) Department of Veterans Affairs; (16) General Services Administration; and (17) Small Business Administration Centre for Effective Government. “Obama Administration Issues Environmental Justice MOU” available at <http://www.foreffectivegov.org/node/11826> (date of use: 10 August 2017).

⁸⁹Memorandum of Understanding on Environmental Justice available at https://www.doi.gov/sites/doi.gov/files/migrated/pmb/oepec/upload/EJ_MOU.pdf (date of use: 14 October 2016).

⁹⁰US Department of the Interior: Office of Environmental Policy and Compliance “Environmental justice strategic plan 2016-2020” available at https://www.doi.gov/sites/doi.gov/files/uploads/Draft%20EJ%20Strategic%20Plan%202016_2020_Public%20document.pdf (date of use: 29 November 2016). US Department of Energy “Environmental Justice Annual Implementation Report” available at http://energy.gov/sites/prod/files/2013/10/f3/FINAL_EJ%20IWG_Report.pdf (date of use: 29 November 2016).

Environmental Justice Memorandum of Understanding was one of the steps taken by President Obama's administration to advance environmental justice concerns.

Environmental justice in the USA incorporates a three-strand protection model. *Distributive justice* provides that all groups are given just consideration in the allocation of benefits and burdens. *Participatory justice* ensures that those who are affected by the outcome of a decision-making process are given an equal opportunity to be involved at every level in the process of arriving at a conclusion. *Corrective justice* entails that those who are unfavourably impacted are accorded reparation and redress – including the government seriously applying pro-active measures to rectify the problem.⁹¹

2.8 After the Environmental Justice Movement: Lessons and relevance in the international environmental law discourse

The EJM played a significant role in highlighting the plight of vulnerable persons in the apportionment of environmental burdens and their disenfranchisement in development and participation in the decision-making process. It propelled their struggles for recognition, dignity, and equality to a critical level. Important lessons can be learnt from the Movement, especially from the 'Principles of Environmental Justice'⁹² which call for action not only at the local, but also the global/international level in affirming equity and human rights of the poor and minorities to enjoy a life of opportunity, significance, and health.⁹³ The Movement was successful in its call for the recognition that "environmental discrimination is unfair, unethical and immoral".⁹⁴ This form of 'classism' and abuse detracts from the tenets of sustainable development, an international principle that has today come to be appreciated as a foundational principle of environmental justice in its

⁹¹Environmental justice in the USA encompasses procedural, distributive, corrective, and social justice discourse and measures to provide reparations for historical and environmental harms suffered by people of colour. Redclift & Springett *Routledge International Handbook of Sustainable Development* 213-19.

⁹²Principle 10 of the Environmental Justice Principles articulates that: "Environmental justice considers governmental acts of environmental injustice a violation of international law, the Universal Declaration on Human Rights, and the United Nations Convention on Genocide". Universal Declaration of Human Rights GA res 217A (III) UNDoc.A/810 (1948) at 71; Convention on the Prevention and Punishment of the Crime of Genocide GA res 60A (III) UNDoc.A/810 (1948), (1951) 78 UNTS 277.

⁹³West *Environmental Justice and International Climate Change Legislation* (2011) Dissertation for Masters in Law and Environmental Science (MSc) University of Nottigham (unpublished) at 4.

⁹⁴Bullard *Quest for Environmental Justice* 1.

concern for equity and meeting the needs of, in particular, the poor and minority groups.⁹⁵

A major strength of the EJM was its focus on communities which exceeds the ambit of most international instruments where the emphasis generally falls on the role of states.⁹⁶ The Movement was key in radically shifting the attention from the natural environment to people – specifically communities at grass-root level.⁹⁷ The Movement also sought to show that environmental protection and planning should happen by actively taking into account the social, political, and economic realities of communities.⁹⁸ Conversation on environmental justice today takes place on both the national and international levels. In relation to developing countries, Falk categorically states that the “character of environmental justice should be understood in relation to distributive inequities associated with race and class, as well as with respect to injustices visited on non-Western societies as a result of colonial and post-colonial practices”.⁹⁹ Within the context of the principle of sustainable development, people’s social wellbeing and economic development are recognised as an integral, as opposed to an isolated, part of the process of environmental management, and is taking shape as an essential feature in the international environmental law debate.¹⁰⁰ Moreover, the concept of environmental justice is gradually gaining momentum as a fundamental principle that incorporates a global discourse through the framework of international human rights instruments.¹⁰¹

2.9 International environmental law and the development of relevant principles and concepts: Finding the place of environmental justice

⁹⁵Oukta (2012) 19/1 *Journal of Environmental and Sustainability Law* 64.

⁹⁶Kameri-Mbote & Cullet “Environmental Justice and sustainable development” International Environmental Law Research Centre Working Paper (1996) 1 available at www.ielrc.org/content/w9601.pdf (date of use: 14 February 2018).

⁹⁷*Ibid* at 2.

⁹⁸*Ibid*.

⁹⁹Falk “The second cycle of ecological urgency” 43.

¹⁰⁰Centre for International Environmental Law (CIEL) “One species, one planet: Environmental Justice and Sustainable Development” available at http://www.ciel.org/Publications/OneSpecies_OnePlanet.pdf (date of use: 4 February 2017).

¹⁰¹Soohoo, Albisa & Davis *Bringing Human Rights Home* 266.

International environmental law (IEL) exists to guide and promote the protection of the environment by regulating the behaviour of states and other actors through setting rules and standards.¹⁰² Over and above setting environmental standards, IEL has to deal with the complexities of setting priorities and providing viable solutions to global environmental problems within the context of competing state interests.¹⁰³ It is possible to identify distinctive fundamental principles and concepts of IEL that have emerged during the four decades¹⁰⁴ of its development. These include:¹⁰⁵

- sustainable development;
- integration of environment and development;
- inter-generational and intra-generational equity;
- common heritage and common concern of humankind;
- good neighbourliness;
- cooperation;
- polluter-pays principle;
- precaution;
- prevention;
- common but differentiated responsibilities;
- good governance;
- the public trust doctrine;
- human right to a decent environment;
- environmental justice;
- equitable utilisation and apportionment;
- access and benefit-sharing regarding natural resources;
- public participation and access to information and remedies;
- transparency, and
- prior information, consultation, and early warning.

¹⁰²Dixon *Textbook on International Law* 1-2.

¹⁰³Sancin & Dine *International Environmental Law* 115.

¹⁰⁴Fitzmaurice, Ong & Merkouris *Research Handbook* 305; Falk, Rajagopal & Stevens *International Law and the Third World*; Weiss (2011) 54/1-27 *Japanese Yearbook of International Law* 1.

¹⁰⁵UNEP *Training Manual* 23.

The principles of IEL have developed piecemeal as *ad hoc* responses to environmental problems.¹⁰⁶ In addition, certain norms have emerged from certain of the principles and certain unifying themes or concepts can be identified.¹⁰⁷ The principles reflect the growth of IEL and its potential to influence present and future environmental concerns. Moreover, the principles assist in understanding specific approaches to and goals in environmental management, such as sustainable development. Sustainable development is regarded as the overarching goal and core objective of IEL in terms of which the principles can be interpreted.¹⁰⁸

Some writers attempt to classify these principles in two broad categories:¹⁰⁹

- 1) International environmental principles and concepts of substance. These include: sustainable development; a human right to a decent environment; responsibility for environmental damage; and the polluter-pays principle.
- 2) International environmental principles and concepts of procedure. These include: access to information; public participation; and access to judicial proceedings.

The substantive principles give content to sustainable development by defining the rights and obligations it implies. These principles are also referred to as material principles.¹¹⁰ Procedural IEL principles, on the other hand, are the machinery through

¹⁰⁶UNEP *Training Manual* 23.

¹⁰⁷For example, the concept of 'environmental justice' encapsulates themes of the human right to a decent environment; common concern for humankind; inter-generational and intra-generational equity; access and benefit sharing regarding natural resources; good governance; transparency; public participation and access to information. See Ebesson & Okowa *Environmental Law* 12 for a discussion of the concepts espoused in 'environmental justice'.

¹⁰⁸UNEP *Training Manual* 25. A consultation on sustainable development held at Windsor Castle in 1993 in attempting to cast more light on the notion of environmental principles, referred to the principles as being the 'legal and philosophical basis' for the move towards sustainable development, see "Report of a consultation on Sustainable Development: The Challenge to Law" (1993) 2 *Review of European, Comparative & International Law*. Lang notes "...environmental principles have become principles with a new focus: sustainable development". Lang (1999) 3 *United Nations Year Book* 164.

¹⁰⁹Wolfrum (1990) 33 *German Year Book of International Law* 308; Koivurova *International Environmental Law* 126-8; Atapattu *Emerging Principles* 97-8.

¹¹⁰Koivurova *International Environmental Law* 126-8.

which the substantive principles can be achieved. The IEL principles of substance are, therefore, meaningless without the infrastructure or means by which they can be achieved.¹¹¹

There is perceptible growth in the development of IEL which is shifting the focus from the normative substantive principles to the procedural principles.¹¹² The emerging IEL principles (see below) are the most recent in the field and constitute a significant body of procedural rights.¹¹³ This suggests a deliberate effort within IEL to place environmental norms at the cutting edge in increasing more effective implementation and enforcement.¹¹⁴ Koivuvora acknowledges the challenges in classifying the principles in substantive and procedural categories. Some of the principles cannot fall into only one category. For example, sustainable development and environmental justice, although material principles, also involve procedural elements if the principles are to be achievable. In addition, he explains that some principles cannot readily be classified as material or procedural, for example, the precautionary principle.¹¹⁵

2.10 The emerging principles of international environmental law and environmental justice

¹¹¹Koivurova *ibid*, classifies the principles into: (1) material principles; and (2) procedural principles. He describes material principles as those norms that establish the goal of an environmental quality to be attained, for example sustainable development and the human right to a decent environment. He also adds that material principles are important in interpreting and filling gaps in environmental regulations. He then identifies procedural principles as those concepts that aim to guarantee that material principles are implemented; and prescribe the processes whereby environmental targets can be achieved. Examples include: access to information; public participation; and access to courts. Atapattu *Emerging Principles* 97-8 attempts to cluster the principles into broad classifications: (a) principles of environment and development which includes: right to development; right to a healthy environment; and state responsibility not to cause environmental harm to other states; and (b) principles of participation, decision-making and transparency as principles that promote compliance, procedure and monitoring in the implementation of international environmental norms.

¹¹²Future international environmental law appears to be influenced by rules having legal force away from mere political doctrines. Lang (1999) 3 *United Nations Year Book* 162; Sands (1994) 1/2 *Indiana Journal of Global Legal Studies* 323.

¹¹³Atapattu *Emerging Principles* 97-8.

¹¹⁴The emerging procedural principles of international environmental law illustrate some of the concerns and considerations of the international community in devising new regulatory responses to national, regional, and global environmental challenges and have potential to eventually impact upon attitudes, policy and law reform. Sands (1994)1/2 *Indiana Journal of Global Legal Studies* 323.

¹¹⁵Koivurova *International Environmental Law* 126-8.

Some principles of IEL are considered long-standing and renowned in the field. These include the principles of good neighbourliness, state responsibility or liability for environmental damage, and the common heritage of humankind.¹¹⁶ International environmental law has, however, also witnessed the emergence of several other relatively new principles or concepts which are increasingly influential in shaping the development of IEL.

There appears to be general consensus among authors¹¹⁷ that certain principles are firmly rooted and accepted through their constant and repeated use in IEL and incorporation in international legal instruments, judgments in courts and tribunals, and their predominance in customary international law over the last 25 years. For instance, the principle of responsibility or liability for environmental damage has been reiterated many times¹¹⁸ since the *Trail Smelter* decision¹¹⁹ in 1941.¹²⁰

¹¹⁶Atapattu *Emerging Principles* xxv.

¹¹⁷Sands (1994) 1/2 *Indiana Journal of Global Legal Studies* 323; UNEP *Training Manual* 23; Atapattu *ibid* xxiv.

¹¹⁸Lang (1999) 3 *United Nations Year Book* 171.

¹¹⁹The *Trail Smelter* dispute was a trans-boundary air pollution case involving the federal governments of Canada and the United States, which eventually contributed to the establishment of the 'no harm' principle in the environmental law of transboundary pollution. The facts of the case were that a Canadian smelting company was operating in Trail (along the Columbia River which flows from Canada across the border into Washington State in the USA). Between 1925 and 1936, the Canadian company that smelted zinc and lead, emitted sulphur dioxide that caused injury to plant life, forest trees, soil, and crop yields in Washington State. The affected rural community of farmers claimed damages from the smelting company. The USA charged Canada for these injuries, and the case was referred to an International Joint Commission. The issue confronting the Commission was whether countries have a responsibility to protect other countries against harmful acts by private individuals within their jurisdiction. The arbitration held that no state has the right to use, or to permit the use of its territory, in a manner which causes environmental injury to the territory of another. See *Trail Smelter: United Nations Reports of International Arbitration Awards (United States v Canada)* 16 April 1938 and 11 March 1941 at 1908, 1963.

¹²⁰The *Trail Smelter* case is premised on the established international law principle of sovereignty which affirms that although states have an exclusive right to be in control of the activities in their own territory, such as the right to exploit their natural resources for economic development, they have a duty to prevent transboundary harm to other states. The *Trail Smelter* case is a landmark case in international law as it limited the strict sovereignty principle by prohibiting transboundary environmental damage to another country arising from activities within a state's jurisdiction. The case involved balancing delicate sovereignty rights in relation to a state's right to self-determination and autonomy in economic development on one hand, and the duty not to cause transboundary environmental damage to another state, on the other hand. The decision is particularly notable as it not only holds a state liable for transboundary harm, but also subjects the state to environmental liability even at the individual (private/domestic) level, such as companies causing damage at grassroots level (such as the property of a rural community). See further Prunella (2014) 335 *E-journal Geography International Pollution Issues* available at <http://intlpollution.commons.gc.cuny.edu/an-international-environmental-law-case-study-the-trail-smelter-arbitration/> (date of use: 18 August 2016).

Other IEL principles, however, have developed only recently and are in the process of gaining momentum and international acceptance.¹²¹ A good example is the principle of sustainable development recognised by the international community in 1992 which seeks to address damage done to the human and natural environments as a result of states' developmental activities.¹²² Other recognised emerging principles include: the precautionary principle; the polluter-pays principle; the common heritage of mankind; common but differentiated responsibilities; global partnership; and intergenerational equity.¹²³

Environmental justice has been classified as an emerging principle of international environmental law in dealing with sustainable development challenges. It encapsulates concepts such as, inter alia: non-discrimination; the right to participation in environmental decision-making; the right of access to information; and the right of access to justice.¹²⁴ Ebbesson and Okowa note that environmental justice is in varying degrees derived from various concepts and principles of IEL that seek to address sustainable development concerns within and between countries in the creation of formal legal redress mechanisms to ensure equitable sharing of benefits, participation, state responsibility, and accountability.¹²⁵

2.11 Legal nature of international law principles in general and environmental law principles in particular

¹²¹Atapattu *Emerging Principles* xxv.

¹²²In 1987 the World Commission on Environment and Development (WCED) (the Brundtland Commission) popularised the term 'sustainable development' but it was at the first United Nations Conference on Environment and Development in 1992 (Rio Declaration) that sustainable development was 'recognised' as an international law principle for adoption by states in their development plans. Centre for International Sustainable Development Law "What is sustainable development" (2005) 1 available at <http://cisdl.org/public/docs/What%20is%20Sustainable%20Development.pdf> (date of use: 18 August 2016); Atapattu *Emerging Principles* xxv; UNEP *Manual on International Environmental Law* 24; Sands (1994)1/2 *Indiana Journal of Global Legal Studies* 323.

¹²³Atapattu *Emerging Principles* xxv.

¹²⁴Silva & Wates (2012) 7 UNEP 1.

¹²⁵Ebbesson & Okowa *Environmental Law* 433.

The legal status (ie, their binding or non-binding effect on states) of international-law principles is an enduring and thorny issue among scholars and negotiators (usually state representatives in the international-law sphere). The way a principle is to apply in a given country, is fundamentally dependent on the facts and circumstances of the case in question, taking into account various factors such as the source or origin of the principle or concept, and its textual context including geographical region (as juridical effect changes from one jurisdiction to another).¹²⁶ Based on these factors, international law is confronted with the challenge of determining whether or not a particular principle or concept in fact constitutes binding and enforceable international law.¹²⁷ The degree of application of IEL principles is thus dependent on which of its concepts and principles is amenable to a concrete definition, and able to generate precise legal obligations capable of being included in legally binding instruments. If not, most international environmental principles and concepts are destined to remain in the realm of general guidelines or aspirational statements.¹²⁸ International environmental law has been accused of excessive generality as regards the content of its principles and concepts, even those espoused in its major instruments.¹²⁹ ¹³⁰ Some scholars argue for the development of a single, comprehensive treaty of environmental norms to provide clarity on the legal status of its various principles and concepts.¹³¹ A comprehensive environmental law instrument, it is anticipated, will help to consolidate the fragmented concepts of sustainable development in non-binding texts, for the more effective enforcement of international environmental law.¹³² The codified concepts and principles

¹²⁶UNEP *Manual on International Environmental Law* 23.

¹²⁷*Ibid.*

¹²⁸Adede *International Environmental Law* 4.

¹²⁹The United Nations Conference on the Human Environment (Stockholm Declaration) UN Doc .A/Conf.48/14/Rev.1(1973), (1972) 11 *ILM* 1416; Rio Declaration on Environment and Development UN Doc A/CONF 151/26 (vol1), (1992) 31 *ILM* 874.

¹³⁰Most of the principles are more in the nature of guidelines or policy directives which do not necessarily give rise to specific legal rights and obligations. UNEP *Manual on International Environmental Law* 23; Buffard, Crawford & Pellet *International Law* 13.

¹³¹UNEP *Manual on International Environmental Law* 23; Buffard, Crawford & Pellet *International Law* 789-94. Lang (1995) 9 *International Geneva Yearbook* 159 affirms that the enforcement of international environmental law principles and concepts can be operationalised by means of more tangible norms or obligations which can be pursued in international courts. Teclaff "The Impact of Environmental Concerns" 229; Rauschnig (1972) 27 *EA* 567-9 notes with dissatisfaction that the principles enunciated in the *Trail Smelter* arbitration require further development and anchoring to produce concrete legal duties.

¹³²The Draft International Covenant on Environment and Development endeavours to provide a more comprehensive legal document dealing with environmental issues and fill the gaps in the Stockholm and

can then be taken into account in judicial decisions, the negotiation of new instruments, and even in national law-making.¹³³ To date, the European Union (EU) Convention known as the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters,¹³⁴ is a good example of a comprehensive codification of environmental procedural principles.¹³⁵ Its limited jurisdictional application notwithstanding, various non-EU countries have relied on its model of environmental procedural rights and applied these in their national Constitutions.¹³⁶

There is need for a comprehensive definition and formulation of international environmental-law principles and concepts and a strengthening of their legal status. Such a global formulation is critical for environmental justice in particular. West identifies with this urgency and reckons that:

Important lessons are to be learnt from the Environmental Justice Movement: it has matured and internationalised the recognition that “environmental discrimination is unfair, unethical and immoral”¹³⁷... a formulation of environmental justice can be manifested on a global scale, it can help to deal with problems of both environmental protection and social justice, but only if this formulation is clear, appropriate and amenable...If overarching values and institutions capable of enforcement at the international level are then needed in order to produce just distributions, then environmental justice must play a role here. However, to make any real sense of environmental justice, identification... beyond the state is needed.¹³⁸

Rio Declarations for their better application. IUCN Environmental Policy Paper No 31 Rev 2 (2004) available at <https://portals.iucn.org/library/sites/library/files/documents/EPLP-031-rev3.pdf> (date of use: 9 January 2016). Arguments against a comprehensive legal document in international environmental law, however, are premised on the extensive scope of the environmental field and the existing widespread regulation of different aspects of the environment to enable a compact unification. See Buffard, Crawford & Pellet *International Law* 10. The Draft Covenant also admits to the difficulties in addressing environmental problems in an ‘holistic’ manner. So far, there has been no success in the consolidation of substantive norms of international environmental law. See IUCN Environmental Policy Paper *ibid* at xi, xiii and xiv.

¹³³This creates fundamental principles that can guide states, international organisations, and individuals by providing a legal framework for reinforcing consensus on basic international norms. UNEP *Manual on International Environmental Law* 23.

¹³⁴Aarhus Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (1999) 38 *ILM* 517.

¹³⁵Atapattu *Emerging Principles* 136.

¹³⁶Examples include: Ethiopia, Kenya, Albania, Thailand and Colombia. Daly (2012)17/2 *International Journal of Peace Studies* 72.

¹³⁷Bullard *Quest for Environmental Justice* 14.

¹³⁸West *Environmental Justice and International Climate Change Legislation* (2011) dissertation submitted for the degree Masters in Law and Environmental Science (MSC) (Nottingham) (unpublished) 7, 15.

2.12 Conclusion

In its emphasis on the wellbeing of the individual or groups of people, environmental justice in the USA clearly mirrors the prevailing human inequality intrinsic to society. Environmental justice as a concept is aimed at rectifying racism, classism, and other forms of intolerance and abuse which limit the enjoyment of social benefits to a sector of the population, and skew the unwanted burden of the negative effects of such benefits to the detriment of a defined 'inferior' (generally minority) group. This is a form of human exploitation which unjustly labels human worth as a 'commodity value', manifests in decisions as to who in society deserve to receive more humane treatment than others. Environmental justice offers a solution to this illegitimate and intolerable situation by providing that all persons are equally human and should (ideally) share proportionally in both the privileges and the risks in a broad communal life that promotes sustainable human development. The 'justice' embedded in environmental justice is the fair, moral, dignified, and impartial treatment of all persons regardless of colour, origin, economic status, and background.

Environmental justice in the USA, therefore, defies a narrow interpretation of the term environment. It embraces the most comprehensive understanding of the concept 'environment' and places 'people' centre stage. This broad view of the environment is intended to provide a pragmatic approach towards the day-to-day dealings and interactions of a modern society with the environment. Within such a context environmental justice reins in injustices.

Important lessons can be drawn from the EJM in the USA in advocating the dignity and wellbeing of vulnerable persons. The movement has transformed environmental protection into part of a larger social justice movement that does not aim only at protecting nature, but also strives to achieve a more reasonable balance of environmental protection across human society around the world by taking the needs of the poor and marginalised sectors of society or community into account. The precise

scope and legal status of environmental justice as a binding international environmental law principle is subject to considerable uncertainty and dissent. This notwithstanding, the inextricable link between environmental degradation and deeper structural ills such as poverty, racism, and social injustice, is one identifiable thread in the global human rights discourse, which reinforces government accountability in fulfilling fundamental rights, and furthers an environmental justice debate within and between countries. The nature of environmental justice entails both material and procedural environmental principles. This includes, most notably, sustainable development as the overarching principle, but also encompasses a mix of other emerging environmental procedural norms.

The following chapter considers the vital relationship between sustainable development and environmental justice. Sustainable development is the goal, agreed upon internationally, by which to improve human well-being and environmental management. Kenya has embraced the sustainable development principle in its new Constitution which creates a framework for environmental justice concerns, debate, policies, and legislation with greater articulation of human rights and equitable integration into environmental protection.

CHAPTER 3

THE LINK BETWEEN SUSTAINABLE DEVELOPMENT AND ENVIRONMENTAL JUSTICE

3.1 Introduction

There is a clear link between sustainable development and environmental justice. Both share in the advancement of fundamental (human) rights such as human dignity, equity, social justice, and (human) development, with the defined goal of achieving a better quality of life for present and future generations. Underlying the two notions is the overriding need and urgency to meet the needs of poor and vulnerable persons. At the core of both sustainable development and environmental justice is the demand for a healthy environment, equitable economic growth, accessible and equal opportunities, and a decent standard of living.

3.2 The sustainable development principle and its application in international environmental law

Sustainable development is the international norm that generally guides international environmental law.¹³⁹ Although sustainable development is also a relatively new principle, it has become commonplace in today's global understanding of environmental law. The World Commission on Environment and Development (the Brundtland Commission) convened by the United Nations General Assembly in 1983,¹⁴⁰ described sustainable development as 'development that meets the needs of the present without

¹³⁹Glazewski *Environmental Law* 12.

¹⁴⁰The mission and purpose of the World Commission on Environment and Development (WCED) – also known as the Brundtland Commission after the chairperson Gro Harlem Brundtland, appointed by the United Nations Secretary-General in December 1983 – was to unite countries to pursue sustainable development as a common goal. At the time, the UNGA became aware of the massive degradation of the human environment and natural resources. The UN established the Brundtland Commission to rally countries to pursue sustainable development together. The Brundtland Commission officially dissolved in December 1987 after releasing "Our Common Future" (also known as the Brundtland Report), a document which coined and defined the term 'sustainable development'. Roseland *Towards Sustainable Communities* 6.

compromising the ability of future generations to meet their own needs'.¹⁴¹ Whereas development was earlier widely perceived solely as economic development, the award-winning Brundtland Report¹⁴² brought value to the concerns for environmental protection, human development, equity, and social justice.¹⁴³ In the late 1970s for example, it became a critical concern that benefits of development such as education, nutrition, health, sanitation, and employment did not necessarily 'trickle down' to those who needed them most.¹⁴⁴ Moreover, within the wealthier countries of Europe, North America, and Japan, economic development had connotations of modernisation and industrialisation, but with relatively little (if any) concern for issues of environmental protection, human wellbeing, and equity. The Report introduced the concept of a 'rights-based approach' to development, geared more towards meeting people's basic needs in a healthy and sustainable environment.¹⁴⁵ The Brundtland Report explains that sustainable development and human wellbeing are achieved when the 'three pillars of sustainable development are incorporated together; economic development, social equity and environmental protection'.¹⁴⁶ In re-affirming this interconnection, paragraph 6 of the Copenhagen Declaration on Social Development, states:

¹⁴¹World Commission on Environment and Development "Our Common Future" 43.

¹⁴²"Our Common Future" won the University of Louisville Grawemeyer Award in 1991 for "ideas improving world order". It is available at <https://louisville.edu/sustainability/home/sustainability-council> (date of use: 24 August 2017).

¹⁴³The challenge posed was the need to harmonise economic prosperity with ecology, and to address human needs by explicitly interjecting the norms of social justice by redefining the doctrine of economic development as the new doctrine of 'sustainable development' and a 'global ethic' christened in the Brundtland Report available at <http://worldsustainability.pbworks.com/w/page/15443575/PreludeToBrundtland> (date of use: 24 August 2017); Borowy *Defining Sustainable Development* 17, 116, 166.

¹⁴⁴Harris "Basic principles of sustainable development" Global Development and Environment Institute Working paper 00-04 (2000) at 1 available at http://www.ase.tufts.edu/gdae/publications/working_papers/Sustainable%20Development.PDF (date of use: 15 February 2017).

¹⁴⁵Ibid. Moreover, during the colonisation era there was an over-exploitation of natural resources resulting in environmental degradation. Injustices were committed through forced labour, evictions, and land deprivation. There was also racially-based distribution of social amenities such as water and housing. Ndege "Colonization and its legacies in Kenya" paper presented during Fulbright-Hays Group Project abroad Program 5 July - 6 August 2009 at Moi University available at <http://africanphilanthropy.issuelab.org/resources/19699/19699.pdf> (date of use: 15 February 2018) at 2. The colonial injustices in Kenya are elaborated upon in Chapter 4 of this dissertation.

¹⁴⁶World Commission on Environment and Development "Our Common Future" available at www.un-documents.net/our-common-future.pdf (date of use: 15 February 2018).

We are deeply convinced that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development, which is the framework for our efforts to achieve a higher quality of life for all people...¹⁴⁷

The meaning of sustainable development was also highlighted in the proceedings of the Seminar of the Organisation for Economic Co-operation and Development (OECD)¹⁴⁸ on Social and Environmental Interfaces. The report stresses:

If the primary goals of environmentally sustainable development are freedom from poverty, secure livelihoods, good health and quality of life, then socially responsible development has to deal with such needs as food, basic housing, access to good water, health care (especially for children and older members of society), sanitation, education...¹⁴⁹

Mainstream definitions of sustainable development reveal certain shared core characteristics. These include: integration of policies related to social justice, environmental protection, and economic development; the interests of future generations; and the involvement of the public through participation and transparency at all levels of decision-making.¹⁵⁰

Sustainable development encompasses a reading of human development which involves the notion of human evolution and progression towards a specific ‘ceiling’ through the improvement of human living conditions to the highest quality of life possible. ‘Development’ represents a growing trend towards meeting human needs and impacts on the selection of the most viable and effective strategy in realising

¹⁴⁷Copenhagen Declaration, World Summit on Social Development 1995 Copenhagen, Denmark UN Doc A/CONF.166/7/Annex (1995) available at <http://www.un.org/esa/socdev/wssd/> (date of use: 15 February 2017).

¹⁴⁸The Organisation for Economic Co-operation and Development (OECD) is an international economic organisation with 35 member countries, founded in 1960 to stimulate economic progress and world trade. The organisation provides a forum and platform for countries to compare policy experiences, seek answers to common problems, identify good practices, and coordinate the domestic and international policies of its members. Most OECD member states are high-income countries with high Human Development Indices (HDI) and are regarded as developed countries. The OECD is also an official UN observer. See further <http://www.oecd.org/about/> (date of use: 24 August 2017); <http://www.oecd.org/about/membersandpartners/> (date of use: 24 August 2017); <https://www.un.org/en/sections/member-states/intergovernmental-organizations/index.html> (date of use: 24 August 2017).

¹⁴⁹The OECD Seminar on Social and Environmental Interface Proceedings ENV/EPOC/GEP (99) 13 (22-24 September 1999) available at [http://www.olis.oecd.org/olis/1999doc.nsf/LinkTo/env-epoc-gep\(99\)13](http://www.olis.oecd.org/olis/1999doc.nsf/LinkTo/env-epoc-gep(99)13) (date of use: 15 February 2017).

¹⁵⁰Centre for International Environmental Law (CIEL) “One species, one planet: Environmental Justice and Sustainable Development” available at http://www.ciel.org/Publications/OneSpecies_OnePlanet.pdf (date of use: 4 February 2017).

sustainable and human development.¹⁵¹ Progressive ‘development’ involves a consistent monitoring and protection of fundamental rights.¹⁵² Human development raises questions as to whether countries’ policies, laws, and economic life-styles are viable as regards the protection of the environment and favourable to human quality of life, and whether there is any reason to pass them on to the next generation.¹⁵³

3.3 A common global agenda towards sustainable development

There can be little doubt that the world is on an unsustainable path.¹⁵⁴ There is a growing global challenge to meeting human needs, especially those of the world’s poor, minority, and vulnerable persons. This is attributable to a number of factors including: exploitation and degradation of natural resources which leads to environmental problems, inter alia, increased resource consumption and depletion, carbon emission, and climate change, pollution, and natural disasters;¹⁵⁵ inequalities within and between countries; and a wide range of global economic challenges, such as recession, all of which are problems that diminish the quality of human life.¹⁵⁶ All these universal challenges place poor and vulnerable communities at risk of becoming more and more underprivileged. In recognition of this reality, at the beginning of 2012, Jacob Zuma and Tarja Halonen, the presidents of South Africa and Finland respectively, were tasked by the United Nations with the responsibility of working with a panel of a number of the world’s prominent leaders, to bring issues relating to ‘sustainable development’ into the

¹⁵¹United Nations Development Programme (1990-2002) “Human Development Report” available at <https://www.du.edu/korbel/hrhw/researchdigest/development/undp.pdf> (date of use: 15 February 2018).

¹⁵²Harris JM “Sustainability and Sustainable Development” paper commissioned by the International Society for Ecological Economics (2003) at 6 available at <http://www.isecoeco.org/pdf/susdev.pdf> (date of use: 16 February 2017).

¹⁵³*ibid.*

¹⁵⁴“Resilient People, Resilient Planet: A future worth choosing” a report submitted by the United Nations Secretary General’s High-level Panel on Global Sustainability at the African Union Summit in the Ethiopian capital of Addis Ababa 30 January 2012 available at http://en.unesco.org/system/files/GSP_Report_web_final.pdf (date of use: 24 August 2017).

¹⁵⁵Borowy *Defining Sustainable Development* x.

¹⁵⁶United Nations World Economic and Social Survey “Sustainable Development Challenges” (2013) E(2013)50/Rev.1 at 2; Sakmar SL et al “Sustainable Development and Environmental Challenges: Accounting for the Environment in the 21st Century” Economic Research Forum Working Paper 592 (2011) at 3.

economic discourse of countries.¹⁵⁷ In their response, ‘Seizing sustainable development’, the panel’s report articulates the integration of economic, social justice and environmental concerns. The report argues for the eradication of poverty, reduction in inequality, and making economic growth all-inclusive so as to benefit vulnerable communities in particular. It also points to the urgency of action to combat climate change and preserve earth’s life-support systems for future generations. The report also affirms that economic development, environmental protection, and social equity should be addressed simultaneously.¹⁵⁸ This is exactly what the Brundtland Commission which popularised the concept of sustainable development more than 30 years ago, recommended for enduring economic growth without endangering the environment by over-utilisation of natural resources and jeopardising people’s survival in the process.

International environmental law is steeped in rules and provisions for promoting sustainable development. For instance, international instruments addressing natural environmental degradation highlight the social, political, and economic concerns encapsulated in sustainable development.¹⁵⁹ The use of the principle of ‘sustainable development’ in international environmental law instruments enriches legal and policy dialogue, inter alia, by impressing upon states the need to modify their conduct and advance their accountability towards their people by improving quality of life in general.¹⁶⁰ This transformation in environmental thinking, which incorporates the sustainable development principle, is also being entrenched in countries’ national agendas/policies. Sustainable development is an important tool in tackling issues such as poverty and marginalisation, unsustainable exploitation of natural resources, environmental degradation, poor governance, and socio-political instability. The

¹⁵⁷UN Secretary-General Ban Ki-moon established the High-level Panel on Global Sustainability in August 2010 and invited President Zuma to co-chair the Panel with President Halonen. In addition to the co-chairs, the Panel comprises twenty appointed members. See <http://www.projectsyndicate.org/commentary/seizing-sustainable-development> (date of use: 15 July 2015).

¹⁵⁸Ibid at 1-6.

¹⁵⁹For instance, the Rio Declaration on Environment and Development UN Doc A/CONF.151/26 (vol1) (1992) 31 *ILM* 874; Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) UN Doc A/Conf.48/14/Rev1(1973);(1972) 11 *ILM* 1416; and United Nations Convention on Biological Diversity 5 June 1992, 1760 UNTS 79, 143; (1992) 31 *ILM* 818.

¹⁶⁰Centre for International Environmental Law (CIEL) “One species, one planet: Environmental Justice and Sustainable Development” available at http://www.ciel.org/Publications/OneSpecies_OnePlanet.pdf (date of use: 4 February 2017).

principle of sustainable development integrates the promotion of social equity, uplifts the quality of life by improving access to social services such as basic health care and education, and promotes respect for human rights and grass-root participation.¹⁶¹

Sustainable development is also an overarching norm expressed in various key global policy frameworks, goals, and action plans.¹⁶² Among these is the Millennium Declaration of the United Nations which encapsulated the Millennium Development Goals (MDGs).^{163 164}

The Millennium Declaration refers to the principle of sustainable development and emphasises the value of equity and responsibility for vulnerable persons with the aim of halving the world's poor population by 2015.¹⁶⁵ Goal 7 of the Declaration articulates the

¹⁶¹United Nations “Developing National Sustainable Development Strategies in Post- Conflict Countries” available at <https://sustainabledevelopment.un.org/content/documents/guidancenotes.pdf> (date of use: 6 September 2017); UNESCO “Sustainable Development in the Least Developed Countries: Towards 2030” available at <http://unesdoc.unesco.org/images/0024/002448/244835E.pdf> (date of use: 6 September 2017); OECD “Organisation for Good Practices in the National Sustainable Development Strategies of OECD Countries” available at <https://www.oecd.org/greengrowth/36655769.pdf> (date of use: 6 September 2017).

¹⁶²The focus of environmental principles and developmental paradigms is geared towards the principle of sustainable development, see Lang 1999) 3 *UNYB* 164; Government of Kenya “Kenya Vision 2030 Globally competitive and prosperous Kenya” (2007) available at <http://www.vision2030.go.ke/> (date of use: 17 February 2017).

¹⁶³The Millennium Development Goals (MDGS) were adopted by the largest gathering of world leaders in history at the Millennium Summit in September 2000. They committed their nations to a partnership to reduce extreme poverty and global inequalities. The Goals constituted the world's time-bound and quantified targets for addressing extreme poverty, hunger, disease, lack of adequate shelter, and exclusion-while promoting equality, education, and environmental sustainability. The Goals primarily constitute basic human rights such as the right to health, education, shelter, and clean environment. See <http://www.unmillenniumproject.org/goals/> (date of use: 24 August 2017).

¹⁶⁴UNGA res 55/2, United Nations Millennium Declaration A/55/ I.2 18 September 2000. The eight Millennium Development Goals were signed by 189 countries during the United Nations Millennium Summit at the United Nations headquarters, New York. The goals were a formulation by thematic task teams of experts from around the world including; researchers and scientists; policymakers; representatives of NGOs; UN agencies; the World Bank and IMF; and the private sector. The Millennium Development Goals were mainly intended to facilitate development between developing countries. The goals were subject to deadlines set to improve the lives of people in the developing countries where unfortunately, the poorest people live. See <http://www.unmillenniumproject.org/goals/> (date of use: 24 August 2017).

¹⁶⁵Goal 1 available at <http://www.unmillenniumproject.org/goals/gti.htm#goal1> (date of use: 24 August 2017).

integration of the ‘three pillars’ of sustainable development into country policies and programs.¹⁶⁶

The Millennium Development Goals 2015 Report¹⁶⁷ (the Report) revealed that the achievement of global human wellbeing still lies far in the future. The Report indicates, for instance, that although there has been a remarkable decline in global poverty by more than half over recent years – from 1,9 billion in 1990 to 836 million in 2015 – some 800 million people are still living in abject poverty. The Report also shows that children from the poorest sectors of society are more than twice as likely to be stunted in their growth than those from the wealthiest countries, and also four times more likely not to be school-going. The Report further discloses, with reference to the environment, that environmental degradation and carbon-dioxide emissions have increased by over 50 per cent since 1990, and that the water scarcity problem is projected to escalate. The findings in the Report present a grim picture, especially for the poorest and most vulnerable communities in the world.

The abject failure to achieve the MDGs has been described as ‘serious, regrettable and deeply painful for people with low income’,¹⁶⁸ and implicates players and stakeholders at both the global and local levels. The reasons for this failure include inadequate/poor conditions from the outset, weak governance institutions, as well as unfulfilled promises of development assistance to poorer nations by richer countries.¹⁶⁹ Despite the deficit generally perceived in the achievement of the MDGs, there is nevertheless a widespread view among policy-makers that the MDGs have made significant inroads in improving human development through fighting poverty by directing a major global focus on the goals when it comes to policy debates and the planning of national

¹⁶⁶Goal 7 available at <http://www.unmillenniumproject.org/goals/gti.htm#goal7> (date of use: 24 August 2017).

¹⁶⁷“The Millennium Development Goals Report 2015” 6 July 2015 available at http://www.un.org/millenniumgoals/2015_MDG_Report/pdf/MDG%202015%20PR%20Global.pdf (date of use: 25 August 2017).

¹⁶⁸Sachs JD “From Millennium Development Goals to Sustainable Development Goals” available at <http://jeffsachs.org/wp-content/uploads/2012/06/From-MDGs-to-SDGs-Lancet-June-2012.pdf> (date of use: 17 February 2017).

¹⁶⁹Ibid.

legislation.¹⁷⁰ The United Nations hailed the MDGs as ‘the most successful anti-poverty movement in history’.¹⁷¹ ¹⁷² The level of success of the MDGs has motivated countries (examples include Sweden, Australia, France, Malaysia, Japan, Gabon, Angola, and Nigeria) to continue with concerted international efforts to secure human wellbeing through working towards globally agreed action plans for realising sustainable development.¹⁷³

In response to the expiry of the MDGs (whose deadline came and went in 2015), world leaders called for a further set of goals with specific targets to succeed the MDGs as a new agenda for sustainable development by the year 2030. These goals are referred to as the ‘Sustainable Development Goals’ (SDGs).¹⁷⁴ The seventeen goals have 169 specifically defined targets, and call for a collaborative partnership forum of countries, aid agencies, both private and public, to unite in their implementation. The goals include: ending poverty and hunger;¹⁷⁵ improving health and wellbeing;¹⁷⁶ reducing

¹⁷⁰Ibid. See too Kassaye “Millennium Development Goals: Progress and Challenges” available at http://aigaforum.com/articles/Millennium_Development_Goals.pdf (date of use: 15 February 2017).

¹⁷¹United Nations “Were the Millennium Development Goals a Success?” available at <http://www.wvi.org/united-nations-and-global-engagement/article/were-mdgs-success> (date of use: 18 February 2017).

¹⁷²There have been pockets of success attributable to the Millennium Development Goals. Ghana and Ethiopia, among other countries, are good success stories. Although still off-track in the achievement of the other goals, significant progress has been observed with, for example, MDG 3—ensuring gender equality and empowering women – and MDG 5 – improving maternal health. See <http://www.et.undp.org/content/ethiopia/en/home/library/mdg/EthiopiaMDG2014.html> (date of use: 29 August 2017); <http://www.gh.undp.org/content/ghana/en/home/library/poverty/2015-ghana-millennium-development-goals-report.htm> (date of use: 27 August 2017) in improving human conditions of life. Ghana made commendable progress towards halving its poverty level, and Ethiopia’s school enrolment has increased at the considerable rate of 500 per cent since 1994. Common to both examples has been the sustained commitment of each government to reform the respective sectors. For example, Ghana has revamped its agriculture sector and economy; while Ethiopia worked towards devolving government to districts to eliminate regional inequalities and ensure greater access to education as a major weapon in attacking poverty. The success stories of these countries is fundamental in assisting other developing countries to develop policies and build structures in support of sustainable development. See <http://www.irinnews.org/report/90498/ethiopia-ghana-mdg-success-stories> (date of use 18 February 2017).

¹⁷³Available at <https://www.weforum.org/agenda/2017/03/countries-achieving-un-sustainable-development-goals-fastest> (date of use: 21 November 2017).

¹⁷⁴Officially known as “Transforming our world: The 2030 Agenda for Sustainable Development”. The goals are contained in para 54 of the UN res A/RES/70/1 of 25 September 2015 available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (date of use: 17 February 2017).

¹⁷⁵Ibid goal 1 and 2 respectively.

inequalities within and among countries;¹⁷⁷ and promoting peace, justice, and stronger institutions which can ensure equal opportunities, reduce inequality, eliminate discriminatory laws, policies and practices; and promote equitable legislation and policies.¹⁷⁸ As successors to and a consequence of the MDGs, the SDGs also embody a considerable number of targets relevant to environmental protection and aimed at promoting the sustainable management of: water resources and sanitation;¹⁷⁹ combating climate change and its impacts;¹⁸⁰ and conservation and sustainable use of ecosystems.¹⁸¹ The SDGs are the new global agenda ‘plan of action’ which articulates that poverty (especially in its extreme forms) and denial of a life of dignity are currently the greatest global challenges. The SDGs emphasise that eradicating poverty in all its facets is indispensable to the achievement of sustainable development.¹⁸² The goals affirm the need to remove constraints (such as inequalities within and between countries, environmental degradation including devastating impacts of climate change and resource depletion, poverty and hunger, disease, lack of education and inhuman living conditions) faced by vulnerable people in accessing a humane quality of life.¹⁸³ The SDGs seek to build on the MDGs and complete their unfinished business.¹⁸⁴ In so doing they are more comprehensive, far-reaching, and transformative goals and targets to advance sustainable development in its ‘three dimensions’ – economic, social, and environmental – in a balanced and integrated manner.¹⁸⁵

In the promotion of sustainable development and human wellbeing, the SDGs are dedicated to a ‘human-rights based approach’ in the realisation of the sustainable development goals by countries. The document is particularly emphatic about the integration of human rights as a requirement for achieving sustainable development, and also recognises that human rights are ‘integrated and indivisible’ and balance the

¹⁷⁶ Ibid goal 3.

¹⁷⁷ Ibid goal 10.

¹⁷⁸ Ibid goal 16.

¹⁷⁹ Ibid goal 6.

¹⁸⁰ Ibid goal 13.

¹⁸¹ Ibid goals 14 and 15.

¹⁸² Ibid Preamble.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

three dimensions of sustainable development.¹⁸⁶ The SDGs, in elaborating on the MDGs, embrace a bottom-up approach to human wellbeing and reaffirm the paradigm of sustainability as a basis from which the world can achieve the competing goals of economic growth, environmental sustainability and protection, as well as human development simultaneously.¹⁸⁷

3.4 The relationship between sustainable development and the concept of environmental justice

Environmental justice and sustainable development are interrelated concepts.¹⁸⁸ Environmental justice is a concept that, in general, advocates equity, social justice, human dignity, fair treatment, and meaningful involvement for all people regardless of race, colour, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. To achieve environmental justice, states must include measures in their national laws, policies, and practices that give due regard to the following principles:¹⁸⁹

- A disproportionate burden to protect the environment should not be borne by any particular group, and specifically not by vulnerable populations.
- The benefits of both the natural (such as clean air) and social (such as services and amenities) environment should be equally accessible to all.
- There should be transparency and the opportunity for meaningful public participation in decision-making for all.

¹⁸⁶Ibid para 3 of the Preamble. Moreover, the resolution states: “We reaffirm the importance of the Universal Declaration of Human Rights, as well as other international instruments relating to human rights and international law. We emphasise the responsibilities of all States, in conformity with the Charter of the United Nations, to respect, protect and promote human rights and fundamental freedoms for all, without distinction of any kind as to race, colour, and sex”.

¹⁸⁷Sachs “From Millennium Development Goals to Sustainable Development Goals” available at <http://jeffsachs.org/wp-content/uploads/2012/06/From-MDGs-to-SDGs-Lancet-June-2012.pdf> (date of use: 17 February 2017).

¹⁸⁸Kameri-Mbote & Cullet “Environmental Justice and sustainable development” International Environmental Law Research Centre Working Paper 1 (1996) at 1; Centre for International Environmental Law (CIEL) “One species, one planet: Environmental Justice and Sustainable Development” available at http://www.ciel.org/Publications/OneSpecies_OnePlanet.pdf (date of use: 4 February 2017).

¹⁸⁹Centre for International Environmental Law (CIEL) “One species, one planet: Environmental Justice and Sustainable Development” at 4 available at http://www.ciel.org/Publications/OneSpecies_OnePlanet.pdf (date of use: 4 February 2017).

- Everyone should have access to effective remedies for violations of environmental rights, irrespective of political or economic background.
- Environmental protection to sustain human health and well-being and ecosystem equilibrium should be achieved and maintained.

The sustainable development principle involves maintaining a delicate balance between the duty/obligation of states to improve human wellbeing through the advancement of economic development, on the one hand, whilst maintaining peoples' right to a safe environment by preserving natural resources and ecosystems for both present and future generations, on the other hand. At the core of sustainable development is the urgency to meet human needs – the needs of poor and vulnerable populations must receive specific attention.

Sustainable development, like environmental justice, involves focusing on real-life conditions faced by individuals and communities both at present and potentially in the future. It involves addressing negative impacts of policy decisions by states.¹⁹⁰ As with environmental justice concerns, sustainable development ensures that policy choices not only achieve equitable results in the short term, but also do not cause or perpetuate injustice in the long term.¹⁹¹ Again, achieving sustainable development requires a transparent decision-making processes and meaningful public participation, as does environmental justice.¹⁹²

Both environmental justice and sustainable development confront and rein in injustices such as sexism, racism, classism, and poor governance which may also trigger the inequitable distribution of environmental benefits. Extension of the benefits of development to all people, especially the most vulnerable, is a deep-seated and entrenched aim in both sustainable development and environmental justice.¹⁹³ Also in both, human rights protection lies at the core of environmental protection in which

¹⁹⁰Ibid at 5.

¹⁹¹Ibid.

¹⁹²Ibid.

¹⁹³Kameri-Mbote & Cullet ibid at 1.

'environment' is given more than a purely ecological interpretation.¹⁹⁴ Sustainable development and environmental justice are compatible precepts. While sustainable development is the overarching framework for improving the quality of life, environmental justice can be seen as an integral component of sustainable development. The achievement of environmental justice is thus a fundamental prerequisite for the full realisation of sustainable development.¹⁹⁵ The close relationship between sustainable development and environmental justice is further reinforced by the 'universality, indivisibility and interdependency' of all human rights,¹⁹⁶ which re-affirm 'the dignity and worth of the human person'.¹⁹⁷ Developing rights-based approaches to environmental protection has been recognised as the 'first steps' in promoting sustainable development and human wellbeing.¹⁹⁸ The human rights link between sustainable development and environmental justice is gaining recognition in international environmental law. For instance, the United Nations' 2030 Agenda for Sustainable Development¹⁹⁹ affirms:

We envisage a world of universal respect for human rights and human dignity, the rule of law, justice, equality and non-discrimination; of respect for race, ethnicity and cultural diversity; and of equal opportunity permitting the full realization of human potential and contributing to shared prosperity...A just, equitable, tolerant, open and socially inclusive world in which the needs of the most vulnerable are met...A world in which use of all natural resources -from air to land, from rivers, lakes and aquifers to oceans and seas -

¹⁹⁴Hofrichter *Toxic Struggles* 4.

¹⁹⁵Centre for International Environmental Law (CIEL) "One species, one planet: Environmental Justice and Sustainable Development" at 4 available at http://www.ciel.org/Publications/OneSpecies_OnePlanet.pdf (date of use: 4 February 2017).

¹⁹⁶The 1993 United Nations World Conference on Human Rights in Vienna declared that "all human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms". World Conference on Human Rights, Vienna 14-25 June 1993 "Vienna Declaration and Programme of Action" para 5 UN Doc A/CONF.157/23 (1993) available at <http://www.un-documents.net/ac157-23.htm> (date of use: 15 February 2018).

¹⁹⁷The Preamble to the Charter of the United Nations states: "We the Peoples of the United Nations [are] determined...to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small". See Charter of the United Nations, 26 June 1945, pmbl 59 Stat 1031 available at <http://www1.umn.edu/humanrts/instrree/aunchart.htm> (date of use: 15 February 2017).

¹⁹⁸Meeting of Experts on Human Rights and the Environment 14-15 January 2002 section 18 Final Text (2002) available at <http://www.unhchr.ch/environment/conclusions.html> (date of use: 15 February 2017).

¹⁹⁹United Nations res A/RES/70/1 *ibid* at 4.

are sustainable. One in which democracy, good governance and the rule of law as well as an enabling environment at national and international levels, are essential for sustainable development, including... social development, environmental protection and the eradication of poverty and hunger...

The universality of human rights also reinforces the conclusion that environmental justice needs to be a universal concept. The link between human rights and the environment has been gaining international support over the last decade, and is contributing to the global recognition of the equally significant emerging international relationship between sustainable development and environmental justice.²⁰⁰

3.5 Conclusion

There appears to be a movement in international environmental law (IEL) towards an appreciation and understanding of the innate relationship between sustainable development and environmental justice. Both sustainable development and environmental justice intersect at the point of human rights protection. They both underscore that inherent human dignity requires the full enjoyment of all rights.

The realisation of full human potential includes removing constraints such as inequalities that inhibit human development which also envisages the enjoyment of the right to a healthy environment. The universality and indivisibility of human rights demands that environmental justice defies a mere narrow geographical application or relevance. Environmental justice is essential in the realisation of actual sustainable development at the local, national and international levels in promoting human wellbeing.

²⁰⁰Recognition of the links between sustainable development and environmental justice is gaining momentum in international and national laws see Centre for International Environmental Law (CIEL) “One species, one planet: Environmental Justice and Sustainable Development” at 9 available at http://www.ciel.org/Publications/OneSpecies_OnePlanet.pdf (date of use: 4 February 2017).

The following chapter examines the historical background to environmental injustices in Kenya. The chapter is presented in three main parts: the pre-colonial period; the colonial period; and post-colonial.

The pre-colonial period addresses African traditional society in pre-colonial Kenya. It shows how the pre-colonial values promoted a cohesive and equitable society. Colonisation brought with it inequalities that led to environmental injustice through environmental degradation, human rights exploitation, and inequitable economic development that benefited only the minority population. Environmentally unjust policies, laws, and practices persisted after independence in 1963. These continued through the post-colonial period and resulted in indiscriminate impact on the protection of the right to a clean environment, access to decent living conditions such as proper housing, and social amenities such as education. The post-colonial period also addresses international environmental injustices committed by rich and powerful countries against Kenya as a developing country.

The post-colonial period pre-2010 is characterised by an important phase of in-depth political and legal reform geared towards human rights protection, environmental sustainability activism, and human development concerns that triggered the birth of the new Constitution of Kenya which firmly entrenches the principle of sustainable development and creates a fundamental legal basis for the application of environmental justice.

CHAPTER 4

ENVIRONMENTAL INJUSTICES IN KENYA DURING THE COLONIAL AND POST-COLONIAL ERAS AS BACKGROUND TO AN UNDERSTANDING OF 'ENVIRONMENTAL JUSTICE' IN KENYA

4.0 Introduction

This chapter examines the origin, nature and scope of environmental injustice in Kenya and how it evolved within the social, political and legal contexts during the colonial and post-colonial periods. (I classify the 'post-colonial period' as the phase pre-dating the 2010 Constitution.) I submit that a proper understanding of the injustices Kenyans suffered during the colonial and post-colonial periods, in particular, will contribute greatly to both the need and urgency of understanding and recognising 'environmental justice' in the country. A consideration of environmental injustices also provides the background against which the dynamics of the relationship between cause and effect in the overall evolution of the injustices in the country can be closely analysed to provide viable solutions for promoting sustainable development – an element of 'environmental justice' as explained above.²⁰¹

The section dealing with the post-colonial era includes a discussion of environmental injustices in Kenya as a vulnerable and developing country, from an international perspective. This discussion arises as a result of the inequitable global relationship between powerful (industrialised) countries, and Third World (developing) countries.

This chapter further addresses what I term 'The pre-colonial era' as an example of 'broad-based and ideal environmental justice', in contradistinction to the subsequent colonial and post-colonial eras. The latter two eras illustrate the environmental injustices Kenya suffered and which make the recognition of environmental justice a necessity for

²⁰¹Nasson "The Meaning and Role of History in Human Development" available at <http://www.eolss.net/Sample-Chapters/C04/E6-22-00-00.pdf> (date of use: 10 March 2017). See Chapter 3 for a discussion of the 'sustainable development' principle.

the country on various levels – from the protection of the environment as such, to proper adherence to human rights.

4.1 A brief outline of Kenya's geography and ethnography

Before embarking on a discussion of the various phases during which environmental injustices manifested, and a discussion of the pre-colonial era as an illustration of true, if perhaps idealistic, environmental justice, it is apposite briefly to outline Kenya's geography and ethnography. Kenya is a country in East Africa that lies on the Equator. It is bordered by the Indian Ocean to the south-east, and five other East African countries: Tanzania, Uganda, Ethiopia, Somalia, and South Sudan.²⁰²

The country has a diverse population comprising 43 ethnic groups. Bantu-speaking people who form the largest ethnic group belong to the various Bantu sub-groups. Some of the prominent Bantu groups in Kenya include: the Kikuyu (who form the largest ethnic population in Kenya); the Kamba; the Luhya; the Kisii; the Meru; the Embu; the Mijikenda; and the Swahili (the Swahili people and their language stem from the Mijikenda peoples intermarrying with Arab and Persian immigrants in East Africa). The Swahili Bantu language and English are Kenya's official languages. Most Bantu-speaking ethnic groups are farmers. It is trite that Bantu-speaking groups exist across Africa. Some of the main examples of Bantu in Africa include: the Zulu; the Fang; the Shona; the Tswana; the Herero; the Congolese; et cetera. Linguistic similarities exist between Bantu languages with certain shared characteristics in structure, grammar and key words.

The Nilotic are the second-most populous of Kenya's peoples. The most prominent of these groups include the Luo, Maasai, the Samburu, the Turkana, and the Kalenjin. Most Nilotic people in Kenya are herdsmen.²⁰³

²⁰²Geographical position of Kenya available at <http://www.worldatlas.com/webimage/countrys/africa/ke.htm> (date of use: 10 March 2017).

²⁰³Falola & Fleming "World Civilisations and History of Human Development – African Civilisations: From The Pre-Colonial to the Modern Day" available at <http://www.eolss.net/Sample-Chapters/C04/E6-97->

Cushitic peoples form the smallest ethnic population in Kenya. They speak Afro-Asiatic languages, and originally came from neighbouring Ethiopia and Somalia. The Cushites are concentrated in the North-Eastern Province of Kenya which borders on Somalia.²⁰⁴ Indians, Arabs and Europeans also form part of the racial groupings in Kenya.²⁰⁵

4.2 The pre-colonial era as an example of broad-based and ideal 'environmental justice'

Here I explore traditional African civilisation which is an integral part of Kenya's heritage. It depicts a mastery of early Kenyan traditional society in protecting nature within an holistic conceptualisation of sustainable development and its ability to ensure survival for future generations.²⁰⁶ It also demonstrates African traditional society's 'Ubuntu' values of equity which exemplified environmental justice precepts protected in traditional African civilisation.

4.2.1 The Ubuntu African philosophy and its environmental justice notions

Traditional African civilisation was reinforced by a human-centric ethic oriented towards human wellbeing.²⁰⁷ The philosophy of *Ubuntu* is deeply entrenched in traditional

09.pdf (date of use: 10 March 2017); Okoth & Ndaloh *Social Studies* 60-1; Mwakikagile *Identity of a Nation* 99-102; and Wandibba et al *Social Studies* 45-7.

²⁰⁴Okoth & Ndaloh *ibid*.

²⁰⁵ Indians are primarily descendants of migrants who arrived in Kenya between 1896 and 1901 when indentured labourers were recruited from India to build the Kenya-Uganda Railway. Aiyar *Indians in Kenya* 11. Arabs form a small but historically important minority ethnic group in Kenya. They are principally concentrated along the coast in cities such as Mombasa, see Mwakikagile *Identity of a Nation* 99-102. Europeans in Kenya consist primarily of descendants of British colonials, see Population Division of the Department of Economic and Social Affairs of the United Nations Secretariat "World Population Prospects" The 2010 revision is available at https://issuu.com/iomdrd/docs/wmr_2010_english (date of use 10 March 2017).

²⁰⁶Eyong & Foy (2006) 1/ 2 *International Journal of Sustainable Development* 133-5.

²⁰⁷Creff "Exploring *Ubuntu* and the African Renaissance: A Conceptual Study of Servant Leadership from an African Perspective" paper commissioned by School of Leadership Studies Regent University (August 2004) at 2 available at http://www.regent.edu/acad/sls/publications/conference_proceedings/servant_leadership_roundtable/2004pdf/cerff_exploring_ubuntu.pdf (date of use: 11 March 2017); Awuah-Nyamekye "Religion and Development: African Traditional Religion's Perspective" available at https://www.researchgate.net/profile/Samuel_AwuahNyamekye/publication/234093093_Religion_AndDevelopment_African_Traditional_Religion%27s_Perspective/links/0fcfd5134f371a41f300000.pdf (date of use: 10 March 2017).

African civilisation.²⁰⁸ *Ubuntu* conceptualises common humanity, the interconnection of humankind, and the responsibility of one to another which flows from that connection.²⁰⁹ Battle notes that *Ubuntu* reflects the strong interdependence and equality of human beings:

We say a person is a person through other persons. We don't come fully formed into the world...We need other human beings in order to be human. We are made for togetherness, we are made for family, for fellowship, (for community) to exist in a tender network of interdependence.²¹⁰

Ubuntu manifests in various forms within different African cultures and languages always, however, retaining its core meaning.²¹¹ Environmental justice objectives emerge strongly in the underpinning principles of *Ubuntu* which, as Malunga observes, include:²¹²

- sharing and collective ownership of opportunities, responsibilities and challenges;
- the importance of people and relationships over things;
- participatory decision making; and
- accountable leadership.

Traditional African society functioned on the ethic of open and fair distribution where everyone had access to the resources and goods of the community.²¹³ This conceptualisation was the foundation of environmental justice values in equitable

²⁰⁸Manda "Ubuntu Philosophy as an African Philosophy for Peace" available at <http://www.africafiles.org/article.asp?ID=20359> (date of use: 5 March 2017).

²⁰⁹Barbara affirms: "Ubuntu calls on us to believe and feel that: Your pain is my pain, my wealth is your wealth, and your salvation is my salvation". Nussbaum (2003) 4/4 *Reflections* 1.

²¹⁰Battle *Reconciliation* 65. Mbiti *African Religions and Philosophies* 141 adds: "[T]he African view of the person can be summed up in the statement: 'I am because we are, and since we are, therefore I am'".

²¹¹For instance, '*Ubuntu*' in the Zulu language in South Africa; 'Hunhu' in the Shona language in Zimbabwe; '*Ajobi*' in Yoruba of West Africa (Nigeria, Benin and Togo); '*Abantu*' in Buganda of Uganda; '*Ubuntu*' in Kinyarwanda of Rwanda; '*Utu*' in Swahili of Kenya and Tanzania; '*Obuntu*' in Luhya of Kenya, among others. Muzvidziwa (2012) 37/1/Jan-March *Dharmaram Journals* 27-42; Ntamushobora "The Philosophical Presuppositions of *Ubuntu* and its Theological Implications for Reconciliation" Daystar University Centre for Research Publications and Consultancy Working Paper Series (2012) DU/2012/007at 3 available at www.daystar.ac.ke/downloads/working-papers/Working Paper 007.pdf (date of use: 18 February 2018).

²¹²Malunga "Learning Leadership Development from African Cultures" International NGO Training and Research Centre Working Paper 25 (2006) at 2.

²¹³Awoniyi (2015) 17/1 *Journal of Sustainable Development in Africa* 9.

apportionment of a community's social and economic goods as well as its burdens. Decisions in the community were made either by the chief and his or her council of elders, or directly by the community itself in the form of a general assembly to ensure greater consensus.²¹⁴ In describing the profound democratic decision-making process that fortified environmental justice attributes in the traditional African setting, Mandela notes:

Everyone who wanted to speak could do so. It was democracy in its purest sense. There may have been a hierarchy of importance amongst the speakers, but everyone was heard ... Only at the end of the meeting as the sun was setting would the regent speak. His purpose was to sum up what had been said and form some consensus among the diverse opinions. But no conclusion was forced on those who disagreed.²¹⁵

4.2.2 Sustainable environmental protection in traditional African society

Traditional African society enjoyed an intimate bond with nature and bestowed on it honorary titles such as 'mother', 'provider' and 'sustainer of human life'.²¹⁶ Humans had a stewardship function in the universe and were accountable to their ancestors for its proper management.²¹⁷ This ensured that the environment was protected and maintained for future generations – a principle exemplified in modern-day sustainable development.²¹⁸ Environmental justice is well illustrated in the ownership and management of land by the pre-colonial communities.²¹⁹ In describing the situation of environmental justice in land ownership and fair distribution in traditional African societies, Emegara notes:

Everyone's dignity was respected and ensured. The farmlands were fairly distributed and no one person or selected individuals could own more than their entitled portion. Thus oppression of the downtrodden was checked. In fact there were no downtrodden. Is it any wonder, then, that hunger

²¹⁴Falola & Fleming "World Civilisations and History of Human Development – African Civilisations: From The Pre-Colonial to the Modern Day" available at <http://www.eolss.net/Sample-Chapters/C04/E6-97-09.pdf> (date of use: 10 March 2017).

²¹⁵Mandela *Long Walk to Freedom* 20; El-Obaid & Appiagyeyi-Atua "Human Rights in Africa - A New Perspective on Linking the Past to the Present" available at <http://lawjournal.mcgill.ca/userfiles/other/2190101-41.EIObaid.pdf> (date of use: 10 March 2017).

²¹⁶Elias *African Customary Law* 4.

²¹⁷*Ibid.*

²¹⁸Chapter 3 of this dissertation discusses the meaning of the principle of sustainable development.

²¹⁹Mapira & Mazambara (2013) 15/5 *Journal of Sustainable Development in Africa* 95.

was not a known issue before colonisation and the modern age of capitalism and unjust economic systems?²²⁰

Tools developed for farming were those that could cause the least harm to the environment. They were incapable of cutting down big trees, clearing large tracts of land, or heavy turning of the soil.²²¹ Farming methods practised were aimed at allowing rejuvenation and regeneration of the land.²²² All these mechanisms were intended to keep land in good condition for present and future generations; an important element recognised in the sustainable development principle.²²³ Farming only took place on the edges of forests with the indiscriminate felling of trees and other vegetation forbidden and transgressors fined.²²⁴ This allowed longstanding conservation and sustainable use of the environment based on minimal interference from human activity.²²⁵ Certain trees and plant species were regarded as sacred, or as totems, or were associated with bad omens.²²⁶ They were for this reason protected.²²⁷ Certain birds were honoured as

²²⁰ibid. Land was perceived as a community property in which everyone was entitled to its sustainable use and its benefits. Communal ownership gave every member an equitable share in the natural resource and its use which ensured that no individual could be landless, homeless, a peasant or squatter.

²²¹An example is the *rapur* or *kwenyagot*, a hand hoe from the Luo community who live in the areas surrounding Lake Victoria in Western Kenya. The *rapur* was a V-shaped wooden stick with a thin metal piece attached to its shorter end. Mwaura “Indigenous knowledge in disaster management in Africa” paper commissioned by United Nations Environmental Programme (2008) 35 available at www.irdrinternational.org/.../Appendix-9-Indigenous-Booklet-UNEP.pdf (date of use:18 February 2018).

²²²Agricultural Bantu sub-groups such as the Agikuyu, Ameru, and Aembu found in the Mount Kenya region in the Eastern and Central parts of Kenya, practised shifting cultivation, mixed cropping, intercropping, and agro-forestry methods for growing crops. Moreover, transhumance pastoralism (which allows the renewal of vegetation), is a culture that has been practised by the Maasai for hundreds of years. Ruthenberg *Farming Systems in the Tropics* 49; Narimatsu “Environmental Justice Case Study: Maasai Land Rights in Kenya and Tanzania” available at <http://www.umich.edu/~snre492/Jones/maasai.htm> (date of use: 10 March 2017).

²²³See the discussion in Chapter 3 of this dissertation on the sustainable development principle.

²²⁴For example, the Mijikenda community in the coastal region of Kenya, had rules regulating the maintenance of forests. If a green tree was cut down, the offender had to pay a fine of a sheep. Githitho “The Sacred Mijikenda Kaya Forests of Coastal Kenya and Biodiversity Conservation” available at http://sacredland.org/PDFs/Mijikenda_Kaya.pdf (date of use: 21 August 2016).The Kaya forests of the Mijikenda people have been in existence for the last 500 years, see Spear *Kaya Complex* 89. The forests are also listed as a world heritage site. See <http://www.africanworldheritagesites.org/cultural-places/traditional-cultural-landscapes/kaya-forests.html> (date of use: 21 August 2016).

²²⁵Spear *Kaya Complex* 21

²²⁶Mapira & Mazambara (2013) 15/5 *Journal of Sustainable Development in Africa* 99.

²²⁷For instance, *Ficus thonningii*, known locally in Western Kenya as *pcho*, is hallowed by many traditional Kenyan communities including the Embu, Kikuyu, Kipsigis, Luhya, Luo, Maasai and Meru. Moreover, certain birds were honoured as symbols representing certain clans. Mwaura “Indigenous knowledge in disaster management in Africa” paper commissioned by United Nations Environmental Programme (2008) 51 available at www.irdrinternational.org/.../Appendix-9-Indigenous-Booklet-UNEP.pdf (date of use: 18 February 2018).

symbols representing certain clans. They were therefore not hunted for food – for example, the pigeon which is considered a clan symbol for some Banyala clans in Western Kenya.²²⁸

Against the backdrop of these examples of ‘environmental justice’ as they manifested in pre-colonial times, what follows is a discussion of some of the laws and policies introduced by the colonial powers which undermined the ideal of environmental justice. Not only did they result in the disintegration of the African traditional institutions, they also promoted environmental exploitation, human rights abuses, and environmental injustices. These had a devastating and lasting impact on sustainable development in Kenya.

4.2.3 Conclusion: The antithesis of environmental injustice – environmental justice in pre-colonial times

Traditional human societies and their environment were symbiotic and interdependent. The indigenous law systems reflected a traditional philosophy grounded on principles of reverence for and the protection of nature, human dignity, and responsibility for future generations. These promoted the values of sanctity of life, the common good, and equity which are firmly entrenched in the modern-day principle of environmental justice and the overarching goal of sustainable development. Human dignity was exemplified by a ‘humanity of conscience’ which created the foundation for the equitable distribution of natural and social goods to all. The interplay between a diversified legal structure of traditions, beliefs, and norms, and a dynamic value-based system, fortified equilibrium with nature, social justice, and economic development within the civilisations.

4.3 Environmental injustices in Kenya during the colonial era

4.3.1 General remarks

²²⁸ Ibid.

The introduction of colonialism in Kenya plunged traditional African institutions, customs, and traditions into crisis. Colonisation had a significant environmental, economic, political, and social impact on the indigenous societies of Africa.²²⁹ Among the negative legacies colonialism brought to Kenya are: inequitable policies and laws governing land distribution; inequality in occupational opportunities, housing, and settlement (as demonstrated in regionally and racially-split development as regards living conditions, social services, and human development); unequal regional development and disproportionality which resulted in environmental degradation and mismanagement – disproportionate in the lack of regard shown for local populations in enacting nature conservation rules for national parks and forest reserves. These legacies resulted in deep-rooted misaligned social structures which post-independence governments have struggled to realign.²³⁰

4.3.2 *Examples of environmental degradation and inequitable land-distribution policies*

Deforestation and over-exploitation of natural resources for economic benefit have been documented to have accelerated acutely during the colonial era and continued as a critical challenge even after independence.²³¹ Colonialism introduced widespread ecological imbalances due to the exploitation of land for cash-crop agriculture and of

²²⁹Hrituleac *The Effects of Colonialism on African Economic Development* (2011) thesis submitted for the degree Masters in International Economic Consulting (Business and Social Sciences) Aarhus University Business at 1 available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.454.1977&rep=rep1&type=pdf> (date of use: 18 February 2018); Eyong & Foy (2006) 1/2 *International Journal of Sustainable Development* 133; the cultural reason for colonisation was deeply rooted in the ethnocentrism by the settlers who perceived the indigenous people as culturally inferior. In the case of the Africans, because they were not technologically advanced, the colonists intended to 'civilise' and 'uplift' the African people but while overlooking that they had a civilisation and cultural identity. Khapoya *Colonialism* 104.

²³⁰Howard *Management Education Challenge* 6.

²³¹Palo & Mery *Sustainable Forestry* 294. Globally, deforestation is highest in sub-Saharan Africa. World Bank "Global Monitoring Report 2007: Millenium Development Goals: Confronting Challenges of Gender Equality and Fragile States" at 60 available at <http://documents.worldbank.org/curated/en/309311468324011934/Global-Monitoring-Report-2007-Millennium-Development-Goals--confronting-the-challenges-of-gender-equality-and-fragile-states> (date of use: 18 February 2018); Spray & Land Moran *Tropical Deforestation* 43. Deforestation in post-colonial times in Africa is associated with the culmination of the effect of the use and abuse of natural resources. For example, through logging and cutting trees for implementing development projects such as the construction of large dams, roads etc. The environmental degradation also translates into economic and social challenges. See Voinnet & Schneider *Conflict Management in Africa* 34.

raw materials such as timber.²³² Environmental degradation in those times resulted in the negative effects of desertification, soil infertility, drought, and the disappearance of important water resources which continue to impact negatively to this day.²³³

Land segregation in Kenya was introduced by the Native Lands Trust Ordinance of 1930 which designated specific areas for Africans, but with the British government retaining power to appropriate such land for the benefit of and use by non-Africans. The highland areas – commonly referred to as the ‘White Highlands’ – which allow both tropical and temperate agriculture, were allocated to the British settlers.²³⁴ Indigenous communities were relocated to reserve ‘compressions’ with risks to human survival such as arid and marginal land.²³⁵ The reserves struggled to sustain the burgeoning populations under increasing threat of disease, malnutrition, poverty and even resource-based conflict.^{236 237}

At the time of independence in 1963 a total of 7.5 million acres (3 million hectares), equivalent to half of the agricultural land in Kenya, had been appropriated.²³⁸ Individual farmers such as Lord Delamere²³⁹ are reported to have acquired as much as one million acres (400 000 hectares).²⁴⁰ Lord Delamere is renowned for fighting for British supremacy in Kenya and particularly notorious for proclaiming that Kenya was a ‘White

²³²Kwashirai *Green Colonialism* 10-11.

²³³ibid 11.

²³⁴Ochieng’ “Structural and political changes” 119, 126.

²³⁵They consisted of large parts of land in Central Kenya, areas around Mount Kenya, and tracts of land in the Rift Valley region of Kenya, Western Kenya and others. Anderson *Histories of the Hanged* 21; Engermann & Sokoloff (2005) 11057 *NBER* 5.

²³⁶Hrituleac *The Effects of Colonialism on African Economic Development* (2011) thesis submitted for the degree Masters in International Economic Consulting (Business and Social Sciences) Aarhus University Business at 11 <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.454.1977&rep=rep1&type=pdf> available at (date of use: 18 February 2018).

²³⁷Syagga “Public land, historical injustices and the new constitution” Society for international Development Constitutional Working Paper Series 9 (2012) 6-7 available at https://www.researchgate.net/publication/279749857_Public_land_historical_land_injustices_and_the_new_Kenya_Constitution (date of use: 18 February 2018).

²³⁸Okoth- Ogendo “Governance and Sustainable development in Africa” in Ginther, Denters & Waart 15.

²³⁹Lord Delamere was one of the first and most influential of the British settlers who moved to Kenya in 1901 and acquired vast land holdings from the British Crown. He entertained high-ranking official visitors to Kenya, including then Under-Secretary for the Colonies, Winston Churchill. Lord Delamere was also the first president of the East African Turf Club. Over the years, he became the unofficial ‘leader’ of the colony’s European community who fiercely fought to maintain British supremacy in Kenya. He was also personally fond of many Africans, and particularly enjoyed the company of the Maasai. See Bartle *Safari* 188; Herne *White Hunters* 99.

²⁴⁰Sheppard, Porter & Fraust *A World of Difference* 371.

man's country'.²⁴¹ The legacy of inequitable land distribution remains a thorny and emotive issue in Kenya.²⁴² At independence, Kenya already had one of the most skewed patterns of land distribution in the world, comparable only to Brazil, South Africa, Zimbabwe and Namibia where the crisis of legitimacy of the land titling system and security of tenure would be appropriate to address.²⁴³

4.3.3 Regionally and racially split development: Opportunities, living conditions, social services, and human development

The construction of the Kenya-Uganda Railway resulted in the growth of Nairobi as the commercial and business hub of the then British East Africa Protectorate, later renamed Kenya. In 1907, Nairobi, which was already developing into an urban, racially-segregated town with a predominantly European and Indian (Asian) population, the latter being mainly labourers employed on the construction of the railway line. There was virtually no African settlement in Nairobi city.²⁴⁴

Racial segregation was a colonial practice that persisted as late as the early 1960s and dictated settlement patterns which still exist today.²⁴⁵ Affluent areas within Nairobi, such as Muthaiga, Upper Parklands, Westlands, Loresho, Kileleshwa and Kilimani, began as exclusive (and exclusively) European enclaves. The Indians (Asians), unemployed after

²⁴¹Huxley *White Man's Country* 176-202; Dilley *British Policy in Kenya Colony* 64.

²⁴²While the majority of Kenyans own lands ranging from only half an acre to five acres, an elite few, especially in arable areas such as the Rift Valley and Western Kenya, own extensive lands. Most Kenyans in highly populous areas have squatter status. This is a direct legacy of the colonial inequitable land distribution. Land redistribution has proved to be a thorn in the flesh of the post-independence governments and a highly emotive issue in Kenya. Wangalachi (2011) 2/1 *International Journal of Afro-Asian Studies* 45.

²⁴³Kenya National Land Alliance "The national land policy in Kenya: Addressing historical injustices" (2004) issues paper 2KLA at 3 available at http://www.caledonia.org.uk/land/documents/kla_issues_paper.pdf (date of use: 18 February 2018); Falola *The Dark Webs* 343.

²⁴⁴The capital city was first established by the British colonialists in 1899 as a railway depot. Mosha *A Reappraisal* 45.

²⁴⁵Adebayo "A tale of two African cities: hyper growth, sprawl and compact city Development: Towards the Development of a Sustainable Future City" paper delivered at the 48th ISOCARP Congress 2012 at 1 available at www.isocarp.net/Data/case_studies/2172.pdf (date of use: 18 February 2018). From its earliest times, emerging spatial patterns in Nairobi showed segregation between the Central Business District and the European, Asian, and African residential areas, see Mitullah "The case of Nairobi, Kenya" available at <http://erepository.uonbi.ac.ke/handle/11295/42473> (date of use: 15 April 2017).

completion of the railway, also established their own residential areas which consisted mainly of shops which also served as living quarters, near the railway line. These areas later came to be termed the 'Indian Bazaar'. While Europeans and Asians lived in the western suburbs of Nairobi with access to better social services, the few Africans employed by the Kenya-Uganda Railways, had inferior housing or lived in 'shantytowns' in the eastern part of Nairobi.²⁴⁶

The inequitable colonial settlement pattern is still reflected today with a partly racial and income classification. For instance, those – including Africans, Europeans and Asians – who live in the western suburbs of Nairobi are generally the more affluent. The settlement is generally typified by large houses, gardens, and paddocks.²⁴⁷ An overwhelming number of lower and middle-income people settle, in the main, in eastern Nairobi with its dense spatial housing.²⁴⁸ The access to services is significantly disparate in the two settlements.²⁴⁹

At the time of colonisation, social amenities such as education, health facilities, water supply and sanitation were also unequal for the different racial groups and regions in Kenya. Colonial rulers used social services as an important instrument of discrimination and exclusion. For instance, in the education sub-sector, greater focus was placed to

²⁴⁶Mitullah *ibid.*

²⁴⁷Olima "The Dynamics and Implication of Sustaining Urban Spatial Segregation in Kenya: Experiences from Nairobi Metropolis" paper delivered at the Lincoln Institution of Land Policy 26-28 July 2001 Cambridge at 6-8 available at <http://erepository.uonbi.ac.ke/handle/11295/55213> (date of use: 18 February 2018); Mitullah *ibid.*

²⁴⁸Upper Nairobi, lying to the west and north of the CBD, is an area of low density with a high-income population (2-25 people per hectare in 1980) and comprises many of the former well-known expatriate residential areas such as Woodley, Kileleshwa, Kilimani, Lavington, Bernard, Thomson and Muthaiga. Parklands, Eastleigh and Nairobi South, are areas of medium-income with a medium density population (30-40 people per hectare in 1980) and consists of mainly owner-occupier housing (mainly owned by Asians). Karen and Langata, to the south and south-east of Nairobi city are also high income, low-density residential areas. The Eastlands of Nairobi is a low-income densely populated area reaching densities of 200-300 people per hectare in 1980. Mathare Valley to the east of the city and Kibera to the west form the most famous, largest uncontrolled urban settlements in the city, reaching staggering densities of 1 250 people per hectare in 1980. Mitullah *ibid.*

²⁴⁹Mitullah *ibid.*

Europeans than on the indigenous people in terms of government expenditure, infrastructure, equipment, and personnel.²⁵⁰

Current regional inequalities and marginalisation in Kenya have been strongly linked to the unequal development policies of the colonial administration which largely favoured the agriculturally productive areas. Cooksey, Court and Makau, attribute current problems of regional inequality in Kenya to the unbalanced economic patterns of colonial development.²⁵¹

Colonial segregation created a racially divided society in which Europeans and other colonial administrators, were at the top of the pyramid, Asians and Arabs occupied the second tier, while Africans lay on the bottom level.²⁵² This resulted in the development for Europeans, Asians and Arabs in the higher sub-structures, and a concomitant lack of development for the native population on the bottom level. This was particularly important as regards limited political and employment opportunities.²⁵³

4.3.4 Nature conservation rules without concern for local people: National parks and forest reserves

'Nature conservation', as such, was unknown in pre-colonial African societies. African societies lived with nature in a symbiotic relationship.²⁵⁴ Nature conservation where nature is protected by being separated from local people is a foreign concept introduced

²⁵⁰Friedrich Ebert Stiftung "Regional Disparities and Marginalisation in Kenya" <http://library.fes.de/pdf-files/bueros/kenia/09859.pdf> (date of use: 15 April 2017).

²⁵¹Cooksey, Court & Makau "Education for Self-Reliance and Harambee" in Barkan (ed) *Beyond Capitalism* 201.

²⁵²Fried *ibid*.

²⁵³For example in 1965 after Kenya gained independence in relation to government occupational opportunities: of the 25 trained surveyors only two were Africans; of the 22 hydraulics engineers there was only one African; there were 50 Africans of the of the 811 doctors in Kenya, and 364 Africans of the of 1 569 secondary school teachers. Government of Kenya *African Socialism and Its Application to Planning In Kenya: Sessional Paper No 10* (1965) Government Printer at 21.

²⁵⁴Kameri-Mbote & Cullet "Law, Colonialism and Environmental Management in Africa" International Environmental Law Research Working Paper 6:1 (1997) at 24 available at www.ielrc.org/content/a9701.pdf (date of use: 18 February 2018). Also above on the pre-colonial environmental history of Kenya.

via Kenyan colonial laws as early as the 1900s.²⁵⁵ The colonisers laboured under the false perception that the indigenous communities exploited natural resources and had no regard for their conservation.²⁵⁶

The establishment of national parks and game reserves by the colonial government through formally proclaiming certain areas as state-protected zones, was a colonial strategy to divorce native Africans from nature.²⁵⁷ These establishments had a devastating impact on African communities which depended on nature for survival. The Maasai people, for example, feel this impact to this day.

Before the arrival of the British colonists, the pastoral Maasai could wander freely across the country with their cattle, sheep, and goats.²⁵⁸ However, with the advent of colonisation in the early 1900s, the 1930s and 1950s the Maasai were driven from their native lands and lost large tracts of land to the colonial government's measures to conserve natural resources through the creation of wildlife sanctuaries. These include, most notably, the Masai Mara Game Reserve, the Amboseli Game Reserve, and the Nairobi National Park.²⁵⁹ This was done without the involvement and consideration of the Maasai people.²⁶⁰ The Maasai, in all these dealings, not only lost the best rangeland, but were also confined to dry areas where the threat of drought was (and still is) always imminent.²⁶¹

Upon gaining independence from the British in 1963, the post-independent governments continued to maintain pro-colonial measures through tourism development

²⁵⁵An example includes the 1900 Convention for the Preservation of Wild Animals, Birds and Fish in Africa (the 1900 London Convention) cited in Kameri-Mbote & Cullet *ibid*.

²⁵⁶*Ibid*.

²⁵⁷*Ibid*.

²⁵⁸Hughes "Land Alienation and Contestation in Kenyan Maasailand" available at https://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/8915/HUGHES_0880.pdf?sequence=1 (date of use: 15 April 2017).

²⁵⁹Manundu "Class Based Conflicts: The case of Agriculture and Livestock Production in Kenya" (1997) available at <https://issuu.com/nothingfancy/docs/masterthesis/168> (date of use: 18 February 2018).

²⁶⁰Cheeseman "Conservation and the Maasai in Kenya: Trade off or Lost Mutualism?" available at http://www.environmentalaction.net/aa_kenya_policy.htm (date of use: 20 August 2016).

²⁶¹Ndaskoi "The roots of Maasai Predicament" available at http://www.galdu.org/govat/doc/maasai_fi.pdf (date of use: 20 August 2016).

and even applied wildlife conservation policies more stringently and severely. In 1989, for example, a 'shoot to kill' order was introduced against game poachers which culminated in the killing of over 100 poachers in the first two years. The policy was heavily criticised and condemned by human rights activists. Moreover, the world ban on trading in ivory instituted by the Convention on International Trade in Endangered Species of wild fauna and flora (CITES) which robbed poachers of their economic incentive to kill elephants led to the reversal of the policy by the Kenyan government in 1993.²⁶²

Today, the Maasai are faced with the problems of limited land on the one hand, and having to compete with wildlife for natural resources on the other. To date the Maasai are still waiting for the fulfilment of the many failed promises of compensation. The Maasai have consistently aired their grievances; notably before the Kenya Land Commission in 1932, at the second Kenya constitutional conference at Lancaster House, London in 1962, and at the Kenyan constitutional review discussions in 2004.²⁶³ On 4 August 2004 – marking the hundredth anniversary of the first agreement signed in 1904 with the British for land transfer– Maasai activists threatened to sue Britain for land injustices claiming that the agreement had expired and demanding restitution of their lands.²⁶⁴

4.3.4.1 Forest conservation: The Ogiek people 'riddle'

The colonial government introduced policies to declare certain forests protected zones. Colonial conservationism was, and remains, controversial in that it was aimed at securing natural resources with long-term capitalist interests in mind, such as timber extraction and agricultural expansion. This has resulted in denying rural people a basic

²⁶²Rootes *Environmental Movements* 231.

²⁶³Cheeseman "Conservation and the Maasai in Kenya: Trade-off or Lost Mutualism?" available at http://www.environmentalaction.net/aa_kenya_policy.htm (date of use: 15 August 2016); Ndaskoi "The roots of Maasai Predicament" available at http://www.galavavailabledu.org/govat/doc/maasai_fi.pdf (date of use: 15 August 2016).

²⁶⁴Syagga "Land ownership and land use in Kenya, policy prescriptions from an inequality perspective" at 7 available at https://learning.uonbi.ac.ke/courses/GPR203_001/document/Property_Law_GPR216-September,_2014/Articles/Syagga_Chapter8.pdf (date of use: 16 August 2016).

livelihood.²⁶⁵ In particular, the Ogiek, as a forest-dwelling community, were the most severely victimised by the protection process.

The Mau forest is the largest tropical forest in Kenya covering an area of 273,300 hectares.²⁶⁶ The forest is also Kenya's largest fresh water source. It serves as a water catchment area for several streams and twelve rivers west of the Rift Valley, making it a life support resource for millions of people in both Kenya and Tanzania. The rivers have the capacity to produce 518MW of hydro-electricity which contributes some half of Kenya's total electricity production and generates huge revenue returns.²⁶⁷ The Mau is also home to a rich biodiversity of both flora and fauna. These include acacia, bamboo, the giant forest hog, buffalo, the Columbus monkey, yellow backed duiker, leopard, elephant, spotted-necked otter, and striped hyena.²⁶⁸ The forest is also the richest *montane arifauna* in Eastern Africa with 173 bird species.²⁶⁹ The colonial government gazetted the forest as a state protected area in 1932.²⁷⁰ In its protection efforts the colonial government failed to recognise the significance of the forest as the ancestral home to humans (the Ogiek people) who should have been afforded the necessary human dignity to live in their native environment.

The Ogiek are a minority tribe in Kenya with a population of between only 10 000 and 20 000 people.²⁷¹ It is believed that the Ogiek community is among the earliest

²⁶⁵The motives for the colonisation of the African continent included increased access to natural resources for capitalist gain and industrial development in Europe. Colonial environmental laws and policies were thus chiefly concerned with facilitating the extraction of raw materials from the colonies. Kameri-Mbote & Cullet "Law, Colonialism and Environmental Management in Africa" International Environmental Law Research Working Paper 6:1 (1997) at 23 available at www.ielrc.org/content/a9701.pdf (date of use: 18 February 2018).

²⁶⁶Kenya Forest Service http://www.kenyaforestservice.org/index.php?option=com_content&view=category&layout=blog&id=223&Itemid=98&limitstart=108 (date of use: 20 August 2016).

²⁶⁷Nabutola "The Mau Forest in the Rift Valley: Kenya's Largest Water Tower: A Perfect Model for the Challenges and Opportunities of a Sustainable Development Project?" available at http://www.fig.net/pub/fig2010/papers/ts02e%5Cts02e_nabutola_4755.pdf (date of use: 3 August 2016).

²⁶⁸Obare & Wangwe "Underlying Causes of Deforestation and Forest Degradation in Kenya" available at www.Ogiek.org (date of use: 22 August 2016).

²⁶⁹Ibid.

²⁷⁰Ibid.

²⁷¹Kimaiyo (2004) 1 *Egerton Nakuru* 7.

immigrants to settle in Kenya.²⁷² They live symbiotically with the forest and are commonly referred to as the 'caretakers' of the forest.²⁷³ They are the one of the few remaining hunter-gatherer peoples of East Africa.²⁷⁴ Their main economic activity is bee-keeping with the honey collected from the tall trees of the forest. The forest is the Ogiek's livelihood and they have depended on it for wood, for fuel from the bamboo (*tegat*), for medicine from trees such as the bark of the *sakawaita* (*Fagara macrophylla*) and *seet* (*Albizia gummifera*) trees. *Teget* grass (*Arundniaria alpina*) hosts a fungus which is used to treat malaria. The forest also provides food in the form of nuts, roots and fruit.²⁷⁵

In 1933, the Carter Land Commission undertook an enquiry into resolving the problem of inequitable land distribution and landlessness in Kenya.²⁷⁶ Despite the Ogiek's efforts to retain their ancestral land, their efforts were rendered futile by the claim by the British that the Ogiek were not a distinct ethnic entity but mere 'forest wanderers'.²⁷⁷ The Carter Commission's recommendation was for the expulsion of the Ogiek from the forest. In endorsing the Mau forest protective measures the colonial government converted the forest into state property which foreshadowed the eviction of the forest dwellers and the complete dispossession of their lands. Between 1946 and 1956, the colonial authorities drove out the Ogiek from the Mau forest through Gazette Notice 117 of 1960 barring unauthorised persons from entering the forest reserve.²⁷⁸

The colonial legacy of controversial forest conservation continued in post-independence Kenya. An estimated 60 per cent of the forest cover has been destroyed

²⁷²Archaeological evidence suggests their settlement dates back more than five millennia, see Jackson & McCarter 1994 *KIFCON* 48.

²⁷³Sang "The Ogiek Land Question" paper delivered at the Indigenous Rights in the Commonwealth Project Africa Regional Expert Meeting 16 October 2002 Cape Town, South Africa at 3 available at ogiek.org/indepth/forest-guardians.htm (date of use: 18 February 2018).

²⁷⁴Kameri-Mbote & Odor "Following God's Constitution" 1.

²⁷⁵Lubanga 1991 *KIFCON* 17.

²⁷⁶Also known as the Kenya Land Commission established by the colonial parliament see Dilley *British Policy in Kenya* 178.

²⁷⁷Jansen "Background to the Ogiek case" available at <http://www.ogiek.org/indepth/back-ogiek-case.htm> (date of use: 15 April 2017).

²⁷⁸*Ibid.*

over the past two decades,²⁷⁹ raising a major socio-political question over the Mau forest.

The Mau forest conservation is a critical issue that has attracted heated legal and political debate in Kenya. One of the prominent legal arguments surrounding the government's protection efforts of the Mau forest, is the contravention of the fundamental rights of the Ogiek community – their right to life, to human dignity, and to social-economic rights – occasioned by their forcible eviction from the forest.²⁸⁰ The lack of regard for and participation of the Ogiek, and injustices they suffered, stemmed from a colonial conservation policy which was often geared towards ecological conservation but neglected human needs in the process.²⁸¹ Today the Ogiek minority group fights for justice in claiming compensation and the right to equal treatment and recognition as a minority group.²⁸²

4.3.5 Conclusion: The colonial era

The colonial legacy includes regional disparities; economic inequalities; inequitable human development; and unequal living conditions. Colonialism also introduced inequitable environmental policies that did not pay due regard to human needs thereby exacerbating poverty, human rights abuses, and unsustainable development.

In the next section I discuss post-colonial environmental injustices pre the 2010 Constitution. I identify the perpetuation of inequitable policies and laws against a colonial backdrop which generated social injustice, environmental injustice, ecological disintegration, and the flouting of inalienable fundamental rights.

4.4 Post-colonial environmental injustices perpetrated before the 2010 Constitution

²⁷⁹Kimaiyo (2004) 1 *Egerton Nakuru* 7.

²⁸⁰*Ibid.*

²⁸¹*Ibid.*

²⁸²*Ibid.*

4.4.1 General remarks

Colonial institutions found their way into the Kenyan independence Constitution and the legal structures of the state.²⁸³ Environmental decisions were often divorced from human justice.²⁸⁴

Environmental injustices manifest in the post-colonial regime pre-2010 through the inequitable distribution of social amenities and through political oppression. The late Professor Wangari Maathai, an icon in the struggle for environmental justice and sustainable development in post-independence Kenya, challenged vices such as: poor governance; abuse of human rights as evidenced by the inequitable distribution of social benefits and burdens in Kenya; and exclusion from ecological decision-making. The cycle of civil instability in Kenya has been linked to marginalisation and social exclusion. The post-colonial period pre the 2010 Constitution is, nonetheless, also marked by an intensified struggle against issues such as environmental degradation and poor governance that prevent access to a life of dignity and human wellbeing for all Kenyans.

In the paragraphs that follow I elaborate on a number of these inequalities and exactly how they manifest themselves. The discussion, therefore, provides an assessment of inequitable development and access to social amenities, as well as the disproportionate distribution of environmental burdens pre the 2010 Constitution, as a fundamental part of the environmental injustice discourse in Kenya.

²⁸³This made the new post-independent regime in Kenya look like a continuation of the colonial regime. One such example is the law on forest conservation and land laws. Soi *Politics and Conservation of Mau Forest in Kenya* (2015) Thesis Submitted in Partial Fulfilment of the Requirements for the Degree of Masters of Arts in Political Science and Public Administration University of Nairobi at 29 available at http://erepository.uonbi.ac.ke/bitstream/handle/11295/93927/Soi_Politics%20and%20conservation%20of%20the%20Mau%20forest%20in%20Kenya.pdf?sequence=3 (date of use: 18 February 2018).

²⁸⁴Boon "An Overview of Sustainable Development in Africa" available at <http://www.eolss.net/Sample-Chapters/C16/E1-48.pdf> (date of use: 10 March 2017).

My discussion includes an evaluation of just how significant Wangari Maathai's contribution to the realisation of environmental justice in Kenya has been through her rallying cry to unite against environmental injustice.

4.4.2 Inequitable distribution of social benefits and burdens in Kenya

Kenya currently has a population of 48 million people.²⁸⁵ Non-African groups (Asian, European, and Arab) make up only one per cent of the overall population.²⁸⁶ Since independence, Kenyan society has been characterised by gross inequality. Research findings in 2004 presented an alarmingly disproportionate income distribution in the form of a pyramid. Only one per cent of working Kenyans earned a salary exceeding 100 000 Kenyan Shillings (approx 1 000 USD) and were, in the main, the economic, social and political elite. A small nine per cent fell within the middle class who earned an income of up to 100 000 Kenyan shillings; while an astounding 90 per cent earned between 0 and 15 000 Kenyan shillings (approx 150 USD). The latter group are largely workers and peasants in the poor urban and rural areas.²⁸⁷ This clearly bears out the claim that the majority of Kenyans were at that point living below the poverty line and, therefore, subject to social inequalities and injustices.

Studies in 2008 revealed that half of the Kenyan population were living in abject poverty²⁸⁸ – the situation where a person earns low wages or is unemployed, has dilapidated (if any) housing, does not own property (such as land), and generally works on other household's farms to earn some sort of living. These individuals clearly cannot afford basic services.²⁸⁹

²⁸⁵ See <http://www.worldometers.info/world-population/kenya-population/> (date of use: 26 April 2017).

²⁸⁶ See <https://www.cia.gov/library/publications/the-world-factbook> (date of use: 26 April 2017).

²⁸⁷ Development Policy Management Forum (DPMF) available at http://www.dpmf.org/dpmf/index.php?option=com_content&view=article&id=97:a-brief-general-profile-on-inequality-in-kenya&catid=43:social-policy-development-and-governance-in-kenya&Itemid=94 (date of use: 17 August 2016).

²⁸⁸ 45,9 per cent of the population in Kenya lives below the poverty line. World Bank available at <http://data.worldbank.org/country/kenya> (date of use: 10 August 2016).

²⁸⁹ World Bank "Poverty and Inequality Assessment" (2008) 44190-KE Poverty Reduction and Economic Management Unit Africa Region (PREMUA) at 19.

4.4.2.1 Education

Education is key to a nation's socio-economic development in that it provides a fundamental base for human development and progress.²⁹⁰ Education also helps in preventing the inter-generational transmission of the poverty cycle by raising standards of living in society.²⁹¹

In Kenya, a study conducted in 2008 and 2009 revealed that although a majority of Kenyans had some basic education, only seventeen per cent of the population had received an education beyond the secondary level. This percentage comprised, in the main, people in townships and urban areas. On the other hand, a basic primary education was still not a reality for many Kenyans. For instance, 78 per cent of women, and nearly half of the men in the North Eastern Province of Kenya (one of the poorest and least developed regions) were illiterate.²⁹² Moreover, children with special education needs had never enjoyed full or equal enjoyment of the right to education when compared to other children.²⁹³

Inequitable education in Kenya is a critical environmental-injustice issue that needs to be addressed in that it is a fundamental element in sustainable development. Acute disparities in quality of education can generate vast disparities in standards of living among people.

4.4.2.2 Healthcare

²⁹⁰United Nations Educational, Scientific and Cultural Organisation (UNESCO) "Sustainable Development Begins with Education" available at <http://unesdoc.unesco.org/images/0023/002305/230508e.pdf> (date of use: 21 April 2017).

²⁹¹Ibid.

²⁹²Kenya "Demographic and Health Survey 2008-2009" available at <http://www.scribd.com/doc/48314515/Key-Findings-Kenya-2008-09-DHS> (date of use: 15 April 2017).

²⁹³Kairu & Oduor "Shame of the Rot Choking Learners in Public Schools" *Saturday Nation* 2017.02.04 at 1, 12-13 available at <https://www.nation.co.ke/news/Teachers-AND-LEARNING-IN-SCHOOLS/1056-3798962-1171mvz/> (date of use: 18 February 2018).

The right to healthcare services is inextricably linked to human wellbeing. A healthy population is a requirement for the achievement of sustainable development.²⁹⁴ Quality healthcare is a catalyst for a productive country.²⁹⁵ Healthcare services have generally not been accessible to the poorest in Kenya. For instance, studies show that the North Eastern Province of Kenya has registered the least number of health facilities while having the highest population per healthcare unit. In 2009, for example, there were some 14 000 persons per health facility in the North Eastern Province, compared to Nairobi which had about 5 000 persons per healthcare facility.²⁹⁶ Inequitable development in healthcare can be seen in the disproportional concentration of medical staff in some regions compared to others. For instance, whereas the Central Province had a total of 190 doctors and a doctor-patient ratio of 1:20, the North Eastern Province had only nine doctors with a ratio of 1:120.²⁹⁷

A study conducted in 2009 revealed that one in every nineteen child born in Kenya died before its first birthday, while one in every fourteen did not survive to the age of five.²⁹⁸ Among the contributing factors to child mortality are poverty, low quality of health services, and poor access to healthcare facilities.²⁹⁹

4.4.2.3 Water and sanitation

Water access has been far from realised in urban slums and rural areas so revealing a scenario of environmental injustice. For instance, in 2004 the proportion of households with piped water in houses in urban areas was some five times that in

²⁹⁴Thematic Group on Health for All of the Sustainable Development Solutions Network “Health is the Framework for Sustainable Development” Technical Report for the Post 2015 Development Agenda. Available at <http://unsdsn.org/wp-content/uploads/2014/02/Health-For-All-Report.pdf> (date of use: 21 April 2017).

²⁹⁵Ibid.

²⁹⁶Muhula (2009) 1 *Kenya Studies Review* 95.

²⁹⁷Ibid.

²⁹⁸Kenya Demographic and Health Survey 2008-2009 at 8 available at <http://www.scribd.com/doc/48314515/Key-Findings-Kenya-2008-09-DHS> (date of use: 15 April 2017).

²⁹⁹Ibid.

rural areas – 19,2 per cent and 3,8 per cent respectively.³⁰⁰ In Nairobi, the capital city, where the water could be expected to be more equitably distributed than other regions in the country, it is the rich who have benefited most. For instance, in 2006, high-income settlements which represent barely more than ten per cent of Nairobi's population, consumed 30 per cent of water for domestic purposes. By contrast, among low-income groups which represent 64 per cent of the city's population, only 35 per cent was consumed.³⁰¹

Since the enactment of the Water Act of 2002 there has been the need for constant policy revisions and restructuring of administrative and institutional roles to improve quality service provision and enable access of clean water and sanitation for many poor Kenyans who suffer social exclusion.³⁰²

4.4.2.4 Settlement and housing

Settlement and housing patterns in Kenya have to a great extent also defined how social benefits and environmental risks are allocated within the society. An 'apartheid' policy governed housing and settlement during colonisation.³⁰³ This colonial characteristic has had an impact on planning, settlement, and the development of urban areas in post-independence Kenya. For example, in Nairobi a good number of Europeans and few affluent Africans live in the former well-known, expatriate, low-density residential areas such as Woodely, Sclaters, Kileleshwa, Kilimani, Lavington, Bernard, and Thomson. The averagely populated areas such as Parklands and Nairobi South are inhabited by a good number of the Asian community. Most Africans, on the

³⁰⁰Syagga "Public land, historical injustices and the new constitution" Society for International Development Constitutional Working Paper Series 9 (2012) 25
available at

https://www.researchgate.net/publication/279749857_Public_land_historical_land_injustices_and_the_new_Kenya_Constitution (date of use: 18 February 2018).

³⁰¹Cruz, Sommer & Tempra "Nairobi Sector Profile" paper commissioned by *UN-HABITAT* (2006) at 4 available at mirror.unhabitat.org/pmss/getElectronicVersion.aspx?nr=2791&alt=1 (date of use: 18 February 2018).

³⁰²African Ministers' Council on Water (AMCOW) Report "Water Supply and Sanitation in Kenya: Turning Finances into Services for 2015 and beyond" (2011) available at <https://wsp.org/sites/wsp.org/files/publications/CSO-Kenya.pdf> (date of use: 21 April 2017).

³⁰³See this chapter on colonial environmental injustices in Kenya.

other hand, live in the densely populated areas of Nairobi. These include Shauri Moyo, Kariobangi, Bahati, Dandora, Mathare Valley and are generally known as the 'Eastlands'.³⁰⁴ Over 60 per cent of the population of Nairobi is made up of Africans living in informal dwellings which occupy only five per cent of the city's residential land. There are virtually no Europeans or Asian communities in these settlements.³⁰⁵ The distribution and quality of basic social services and infrastructure has also been grossly inequitable between all these residential areas, exposing a critical issue for environmental justice.³⁰⁶

4.4.2.4.1 Crisis of informal settlements in Kenya

Since independence, Kenya has been facing an increasing growth in informal settlements in her urban centres. Kenya's annual informal settlements growth rate of five per cent is the highest in the world.³⁰⁷ And unlike cities in developed countries, Nairobi's growth is not accompanied by equal socio-economic or environmental development such as an improvement in sanitation.³⁰⁸ Informal settlements have a long history in Nairobi dating from the colonial period when most Africans were barred from the city's designated residential areas which were exclusively for Europeans and Asians. Africans who came to the city in search of work had to create informal residential settlements outside of the central business district.³⁰⁹

³⁰⁴Olima "The Dynamics and Implications of Sustaining Urban Spatial Segregation in Kenya: experiences from Nairobi metropolis" paper delivered at the Lincoln Institute of Land Policy 26-28 July Cambridge 2001 at 6-7 available at citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.501.5693 (date of use: 18 February 2018).

³⁰⁵Oxfam "Urban Poverty and Vulnerability in Kenya" (2009) at 1 available at https://urbanhealthupdates.files.wordpress.com/2009/09/urban_poverty_and_vulnerability_in_kenya1.pdf (date of use: 18 February 2018).

³⁰⁶Urban development is influenced by residential areas and the community living in them. By looking at a residential area, one is able to discern the city's dynamics. See Bousquet *Water and the Poor* vi.

³⁰⁷Yarime & Mutisya "Understanding the Grassroots Dynamics of Slums in Nairobi: The Dilemma of Kibera Informal Settlements" (2011) available at <http://www.tuengr.com/V02/197-213.pdf> (date of use: 18 February 2018).

³⁰⁸Ibid.

³⁰⁹Amnesty International "The Unseen Majority: Nairobi's two million slum-dwellers" (2009) available at <http://www.africafiles.org/article.asp?ID=21043> (date of use: 18 February 2018); see also the discussion of colonial history and the development of informal settlements in Kenya in this chapter.

Informal settlements in Kenya are characterised by high densities of up to 1 300 inhabitants per hectare.³¹⁰ For instance, the Kibera informal settlement – which first sprang up in 1912 – has in recent years had an estimated population of 950 000. The Mathare slum (started in 1963) has a population of more than 500 000 people, while the Korogocho slum (started in 1980s) is inhabited by an estimated 150 000 people. Mukuru Kwa Njenga (begun in 1958) has had an estimated population of 100 000 people in the recent years.³¹¹ The residents of these informal settlement areas have experienced the most inhumane and deplorable living conditions.

4.4.2.4.2 The Kibera slum: Poverty and exclusion

The Kibera slum is the oldest in Kenya, and the second and third largest in Africa and the world respectively.³¹² With some one million inhabitants, the slum is situated on only 2,5 square kilometres.³¹³ More than 30 000 structures are found in the Kibera slum. They are mud-walled and thatched while others are made of corrugated iron sheets.³¹⁴ Studies conducted in 2009 revealed that, on average, a household in the Kibera slum had seven members and occupied an area of only 12ft by 12ft.³¹⁵ Due to the inaccessibility of clean water, some residents reuse sewerage water for bathing and washing.³¹⁶ Poor sanitation and waste disposal has forced residents to dispose of waste, including human waste, in the Nairobi River which flows through the slum. The slum dwellers have to pay for each use of the already over-stretched latrines, whereas

³¹⁰Diang'a "Community based upgrading of informal settlement for rental housing: the case of Mathare IVa, Nairobi Kenya" paper delivered at the Sustainable Futures: Architecture and Urbanism in the Global South Conference 25-30 June 2012 Kampala, Uganda at 2 available at <http://sfc2012.org/dianga.pdf> (date of use: 18 February 2018).

³¹¹Umande Trust "The right to water and sanitation in Kibera in Nairobi, Kenya" An Action Research Report 2007 at 5-6 available at www.kounkuey.org/.../141006%20WATSAN%20Portal%20Kibera.pdf (date of use: 18 February 2018); Mutisya & Yarime (2011) 2 *ITJEMAST* 201.

³¹²Deutsche Welle "The Challenges of Urban Development" available at <http://www.dw.com/en/kibera-the-challenges-of-urban-development/a-18581615> (date of use: 29 April 2017).

³¹³Mutisya & Yarime (2011) 2 *ITJEMAST* 209.

³¹⁴Oxfam "Urban Poverty and Vulnerability in Kenya" (2009) at 1 available at https://urbanhealthupdates.files.wordpress.com/2009/09/urban_poverty_and_vulnerability_in_kenya1.pdf (date of use: 18 February 2018).

³¹⁵Ibid 209.

³¹⁶Ibid 207.

the majority resort to the 'flying toilet' which involves defecating in a plastic bag and throwing the waste away after nightfall.³¹⁷

4.4.2.5 Dandora dumpsite site: Adverse environmental impacts on the poor

The Dandora dumpsite is perhaps the clearest Kenyan case study of environmental injustices where the poor carry an unfair burden of harmful environmental impact. The Dandora dumpsite is also a prime example of Nairobi city's waste management problem which over time has grown into an humanitarian problem unfairly falling on the socio-economically underprivileged.³¹⁸

The dumpsite has been rated one of Africa's largest.³¹⁹ What makes Dandora dumpsite particularly unique and distinguishes it from other dumpsites around the world, is that over one million people live in and around the site and bear the brunt of its harmful effects.³²⁰ The Dandora municipal landfill site has over time attracted international environmental attention and concern and serves as a warning to industrialising countries of the need for safe and viable waste management laws, equitable urban settlement policies, and human-centred environmental governance.³²¹

The dumpsite was established by the City Council of Nairobi in the mid-1970s over a disused quarry in the then sparsely populated outskirts of Nairobi.³²² It is situated eight kilometres from Nairobi's Central Business District in the urban, low-income settlement

³¹⁷In Kenya the term 'flying toilet' is inextricably associated with the Kibera slum. Oxfam *ibid*.

³¹⁸Ogola & Moschetti "Dandora Dumpsite: Struggling for health, security and dignity" available at www.ref-sg.ch/news/datei/d1169.doc (date of use: 27 April 2017).

³¹⁹Albert "At the Dandora Dump" available at <https://www.worldpressphoto.org/collection/photo/2013/contemporary-issues/micah-albert> (date of use: 27 April 2017).

³²⁰Conrad "Dandora: Conflicting Views and Multiple Struggles" available at <http://pulitzercenter.org/reporting/dandora-conflicting-views-and-multiple-struggles> (date of use: 27 April 2017); Ogola & Moschetti "Dandora Dumpsite: Struggling for health, security and dignity" available at www.ref-sg.ch/news/datei/d1169.doc (date of use: 27 April 2017).

³²¹Conrad *ibid*.

³²²Ogola & Moschetti "Dandora Dumpsite: Struggling for health, security and dignity" available at www.ref-sg.ch/news/datei/d1169.doc (date of use: 27 April 2017).

in the city's Eastlands. These include areas such as Korogocho, Kariobangi, Dandora, Gitare Mariguini, Kinyago, Kibagare and Muoroto and other slums.³²³

The Dandora dumpsite is estimated to cover an area of 30 acres and receives over 2 000 tonnes of domestic, industrial, chemical, medical, and electronic waste daily from various locations in Nairobi and environs.³²⁴

The dumpsite has grown into a multimillion legally unregulated industry operated by affluent individuals and private cartels.³²⁵ The cartels hire youth and women to sort through and recycle the waste, for which they earn an average of between 50 and 150 Kenyan Shillings (USD 0,75 – 2,3) a day. They work under harsh conditions and without protective clothing.³²⁶

Although the Dandora dumpsite has offered a source of living for a good number of people scavenging for food, recyclables, and other valuables for economic benefit, its downside is that the people have in the process been exposed to serious respiratory, gastrointestinal, and dermatological health risks emanating from the chemicals and refuse.³²⁷ Domestic animals such as pigs, cows, and goats also forage through the

³²³ *Environmental Justice Atlas* available at <https://ejatlas.org/conflict/dandora-landfill-in-nairobi-kenya> (date of use: 27 April 2017).

³²⁴ The United Nations Environmental Programme (UNEP) Report released in 2007 established that industrial waste such as fall-offs, used chemicals, raw materials, expired products, and substandard goods were offloaded at the dumpsite. The report further reveals that agricultural waste such as fungicides and herbicides and hospital waste, including packaging materials and containers, used syringes, biological waste, and pharmaceuticals are all dumped at the site. See Kimani "Environmental Pollution and Impact to Public Health: Implications of the Dandora Municipal Dumping Site in Nairobi, Kenya" A Pilot Study UNEP Report 2007 at 10 available at http://staging.unep.org/urban_environment/PDFs/DandoraWasteDump-ReportSummary.pdf (date of use: 18 February 2018).

³²⁵ Ogola & Moschetti "Dandora Dumpsite: Struggling for health, security and dignity" available at www.ref-sg.ch/news/datei/d1169.doc (date of use: 27 April 2017): "They (dumpsite workers) exist on the lowest rung of the economy, an informal chain of middlemen and women working in horrific conditions, doing the dirty work for recycling companies." See Albert "Kenya Poor Cling to Dumpsite" available at <http://pulitzercenter.org/reporting/kenya-poor-cling-dump-site> (date of use: 27 April 2017).

³²⁶ *Ibid.*

³²⁷ Kimani "Environmental Pollution and Impact to Public Health: Implications of the Dandora Municipal Dumping Site in Nairobi, Kenya" A Pilot Study UNEP Report 2007 at 9 available at http://staging.unep.org/urban_environment/PDFs/DandoraWasteDump-ReportSummary.pdf (date of use: 18 February 2018).

waste for their feed.³²⁸ Women take along their children who are left to play with the garbage as their mothers scavenge through the waste.³²⁹ The pungent, and sometimes poisonous fumes have also been a major interruption to learning in neighbouring slum schools.³³⁰

A study³³¹ commissioned by the United Nations Environmental Program in 2007, established critical levels of heavy metals, in particular cadmium, copper, zinc, and lead.³³² Five of the twelve samples analysed, contained lead levels ranging from 417-547ppm which is four times above the World Health Organisation standard.³³³ The research also showed that half of the children tested had high concentrations of lead in their blood which exceeded internationally accepted toxic levels.³³⁴ According to records obtained from a health facility located in Dandora, approximately 9 121 people had been treated for respiratory tract related problems between 2003 and 2006.³³⁵ A further study of the health records between the years 2004 and 2009 revealed that there had been a rapid 440 per cent increase in the monthly average of patients treated for respiratory problems – from 795 to 3 356 patients – which is indicative of the growing extent of the impact of the dumpsite.³³⁶ The Stockholm Convention on Persistent Organic Pollutants (POPS) dealing with hazardous pollution, which Kenya has ratified, requires action aimed at eliminating dangerous pollutants such as heavy metals.³³⁷ Apart from pollution

³²⁸ Apart from the community around the dumpsite being exposed to dangerous environmental pollutants in the environment and consumption of contaminated foodstuff, people far off are also at risk of exposure by consumption of meat or poultry products as well as vegetables cultivated using compost from the site. Kimani *ibid* at 13.

³²⁹ Kamala (2011) 5 *Kutoka Network Newsletter* 5.

³³⁰ *Ibid*.

³³¹ Kimani “Environmental Pollution and Impact to Public Health: Implications of the Dandora Municipal Dumping Site in Nairobi, Kenya” A Pilot Study UNEP Report 2007 at 9 available at http://staging.unep.org/urban_environment/PDFs/DandoraWasteDump-ReportSummary.pdf (date of use: 18 February 2018).

³³² Even at minimal exposure to heavy metals is known to be highly toxic. Kimani *ibid*.

³³³ *Ibid*.

³³⁴ Health effects in children sometimes may not show until adulthood. Kimani *ibid* at 8.

³³⁵ Medical records at the Catholic Church Dispensary at Kariobangi North 2003-2006. See Kimani *ibid* at 13-14.

³³⁶ *Ibid* at 15.

³³⁷ The Stockholm Convention on Persistent Organic Pollutants (POPS) 2256 UNTS 119; (2001) 40 *ILM* 532, is a global treaty to protect human health and the environment from chemicals that remain in the environment for long periods and accumulate in the fatty tissue of humans and wildlife. Exposure to POPS can lead to serious health effects including cancer, birth defects, and dysfunctional immune and

and its danger to public health, the dumpsite also harbours other social ills. It is a haven for law offenders and a breeding ground for criminal activities such as murder and abortion.³³⁸

The Dandora dumpsite problem has been described as a real human rights issue and an environmental justice question for the urban poor. The environmental burdening of the poor in Kenya, marked by the appalling conditions experienced by low-income people in urban areas, has been labelled as ‘social-economic apartheid’ in which the poor live in the rubbish pit, literally, while those in wealthier suburbs enjoy clean air and environment at the expense of the socially weak.³³⁹

4.4.2.6 Environmental injustices through forced evictions for ‘environmental conservation’

The post-colonial government continued the colonial legacy of ‘environmental conservation through eviction’ in an ostensibly virtuous endeavour to create national parks and forest reserves. However, in this endeavour little or no attention was paid to the needs of local communities. The colonial approach to conservation has involved evicting the very communities who have sustained the environment for centuries.³⁴⁰

A recent landmark ruling in favour of the Endorois community issued against the Kenyan government, exemplifies environmental injustice perpetrated against local communities by making critical environmental decisions while ignoring the interests of

reproductive systems. See <http://chm.pops.int/TheConvention/Overview/tabid/3351/> (date of use: 27 April 2017). Many POPs are currently, or have in the past been used as pesticides, solvents, pharmaceuticals, and industrial chemicals. Ritter *et al* “*Persistent organic pollutants*” *International Programme on Chemical Safety (IPCS) Report available at* <http://www.pops.int/documents/background/assessreport/en/ritteren.pdf> (date of use: 29 April 2017).

³³⁸Kimani “Environmental Pollution and Impact to Public Health: Implications of the Dandora Municipal Dumping Site in Nairobi, Kenya” A Pilot Study UNEP Report 2007 at 13 available at http://staging.unep.org/urban_environment/PDFs/DandoraWasteDump-ReportSummary.pdf (date of use: 18 February 2018).

³³⁹Ogola & Moschetti “Dandora Dumpsite: Struggling for health, security and dignity” available at www.ref-sg.ch/news/datei/d1169.doc (date of use: 27 April 2017)

³⁴⁰*The Guardian* “Kenya’s Ogiek people forced from homes amid ‘colonial approach to conservation’”. Available at <https://www.theguardian.com/global-development/2016/aug/18/kenyas-ogiek-people-are-seeing-their-land-rights-brutalised> (date of use: 29 April 2017).

those who are likely to be most harmed by the decisions. The African Commission on Human and People's Rights issued a ground-breaking ruling against the Kenyan government on the eviction of the Endorois people to promote the development of tourism in Kenya. It is the first judgment of its kind in international law and upholds the customary land rights of indigenous communities.³⁴¹

The Endorois people are a pastoralist community belonging to the Kalenjin tribe³⁴² who live in the Lake Bogoria area in the Rift Valley Province of Kenya. Lake Bogoria is considered to have great tourism potential due to its hot springs and abundant wildlife, including one of Africa's largest populations of flamingos.³⁴³ In the 1970s the Kenyan government evicted the Endorois people to make way for a national reserve and tourist facility. The case was brought before the African Commission in 2003 after Kenyan courts had refused to entertain the dispute.³⁴⁴ The community alleged that since 1978 they had been refused access to their land.³⁴⁵

The Commission found that their eviction by the Kenyan government which was carried out with minimal compensation, violated the Endorois' right to property, health, culture, religion, and natural resources.³⁴⁶ It ordered Kenya to compensate the Endorois community for the injustices and losses suffered and to restore them to their ancestral land.³⁴⁷

³⁴¹Decision 276/03 The African Commission on Human and People's Rights available at http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46_276_03_eng.pdf paras 4, 5 (date of use: 18 February 2018).

³⁴²See the introduction to Chapter 4 of this dissertation for a discussion of the different ethnic groups in Kenya.

³⁴³Decision 276/03 The African Commission on Human and People's Rights available at http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46_276_03_eng.pdf paras 3, 19 (date of use: 18 February 2018).

³⁴⁴On 19 April 2002 the High Court of Kenya dismissed the application by stating that the Endorois had effectively lost any legal claim due to the government's designation of the land as a game reserve in 1973 and 1974. The court also concluded that compensation had been paid to 170 families of the Endorois people in 1986. Okoth "How the State Rendered the Endorois Homeless" available at <https://www.standardmedia.co.ke/article/2000037407/how-the-state-rendered-the-endorois-homeless> (date of use: 25 April 2017).

³⁴⁵Okoth *ibid*.

³⁴⁶Decision 276/03The African Commission on Human and People's Rights available at http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46_276_03_eng.pdf paras 1, 16 (date of use: 18 February 2018).

³⁴⁷*Ibid* at para 237;

The African Commission accepted the Endorois' evidence that they had lived on the land involved since 'time immemorial' and that the lake was the centre of their religion and culture.³⁴⁸ It was also submitted to the Commission that the community had lived sustainably within their natural environment.³⁴⁹ The community further established that they had suffered loss from being evicted from the fertile land around the lake which provides green pasture and medicinal salt lakes which help raise healthy cattle. The community submitted that after the eviction they had been forced to congregate on arid land, where many of their cattle died.³⁵⁰

The *Endorois* case provides the green light to address historical land injustices against the Maasai, the Ogiek, and other communities in Kenya who have suffered environmental injustices committed by state institutions in the name of upholding environmental policies that do not integrate human considerations and fundamental rights.³⁵¹ The ruling also aids protection against denying pastoral communities access to grazing lands which ultimately consign them to lives of vulnerability, poverty, and deprivation.³⁵²

4.4.2.7 (In)justice and the judiciary

A country's justice system is also a fundamental indicator of the level of the country's democracy, rule of law, and respect for human rights which are key concerns of environmental justice.³⁵³ The poor and vulnerable in Kenya face various barriers when

³⁴⁸See para 4.2.1 of this Chapter for a discussion of indigenous Africa's civilisation, traditional ideologies, and environmental philosophy.

³⁴⁹Decision 276/03 The African Commission on Human and People's Rights para 3 available at http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46_276_03_eng.pdf (date of use: 18 February 2018).

³⁵⁰Ibid para 6.

³⁵¹See paras 4.3.2 and further above, for my discussion of colonial environmental injustices.

³⁵²Minority Voices Newsroom Kenya "Justice for Indigenous Peoples - The Endorois Case" available at <http://minorityvoices.org/news.php/en/841/kenya-justice-for-indigenous-peoples-the-endorois-case> (date of use: 29 April).

³⁵³See Chapters 1, 2 and 3 above for a discussion of the core concerns in sustainable development and environmental justice; Lenaola "Public Participation in Judicial Process" available at <http://kenyalaw.org/kl/index.php?id=1934> (date of use: 27 April 2017).

attempting to access justice. These include: prohibitive High Court fees; lack of basic legal information on and knowledge of laws; complexity of court rules and procedure; and a backlog of cases which delays justice. Many people are also experiencing social exclusion in their lack of access to courts since they have to travel long distances to access the courts. This has resulted either in delays in the dispensing of justice, or even the lack of access to justice at all. The issue is exacerbated by litigants and witnesses in marginalised areas having to walk long distances to attend court proceedings.³⁵⁴

4.4.2.8 Historical land injustices, inequitable development and political violence in Kenya

Kenya's economy is primarily agrarian. Therefore, land has a high social, cultural and economic value. Land is a primary source of livelihood and an important sign of well-being and freedom from poverty.³⁵⁵ Unfortunately, the distribution and ownership of this important resource has been, at best, iniquitous.³⁵⁶

The overly complex colonial land regulation system resulted in a proliferation of over 50 statutes (some conflicting) governing ownership and land use in Kenya, raised challenges for the management of land in Kenya.³⁵⁷ Moreover, the colonial powers

³⁵⁴Muigua "Improving Access to Justice: Legislative and Administrative Reforms under the Constitution" available at

<http://www.kmco.co.ke/attachments/article/110/A%20Paper%20on%20Improving%20Access%20to%20Justice%202.pdf> (date of use: 27 April 2017).

³⁵⁵Apiyo "Land Grabbing and Evictions in Kenya" (1998) available at

http://www.google.com/url?url=http://www.hicmena.org/img/documents/Land%2520Grabbing%2520in%2520KenyaLawrence%2520Apiyobackground%2520info.doc&rct=j&frm=1&q=&esrc=s&sa=U&ved=0ahUK Ewi58eXvws_TAhXrAMAKHR6LAZwQFggfMAA&usq=AFQjCNGVsd_yYQCc5_tcArF2RdgvGN1bQ

(date of use: 27 April 2017); Kanyinga "Struggles of Access to Land: The Squatter Question in Coastal Kenya" Centre for Development and Research Working Paper 98:7 (1998) available at http://erepository.uonbi.ac.ke/bitstream/handle/11295/89181/Kanyinga_Struggles%20of%20Access%20to%20land.%20The%20%27Squatter%20Question%27%20in%20Coastal%20Kenya.pdf?sequence=1&isAl lowed=y (date of use: 18 February 2018).

³⁵⁶Narh et al "Land Sector Reforms in Ghana, Kenya and Vietnam: A comparative analysis on their effectiveness" (2016) 5: 8 Multidisciplinary Digital Publishing Institute at 6 available at <http://www.mdpi.com/2073-445X/5/2/8> (date of use: 18 February 2018).

³⁵⁷Kamau "The Ogiek an In-depth Report" available at www.ogiek.org/report/ogiek-app1.htm (date of use: 29 April 2017); McLaren "Formulating a Sectoral Approach to Urban Land Policy: The Case of Kenya" available at

divided land into various categories termed 'government land', 'trust land', and 'private land' which complicated land administration and hampered redistribution to the original rightful African owners.³⁵⁸

The fundamentals of the colonial land administration system were not significantly adjusted by the post-colonial (independence) governments. Colonial land laws were outdated and inefficient in dealing with the problems of the newly independent state in that their primary objective was the consolidation of land with a definite bias in favour of a capitalist aim rather than equitable distribution/ownership and fair administration of land on behalf of the local people.³⁵⁹

Regrettably, unjust colonial land alienation systems which encouraged arbitrary land deprivation continued after independence.³⁶⁰ For example, the most abused colonial land laws in Kenya have been the Government Land Act (GLA) Cap 280 (repealed in 2012),³⁶¹ and the Trust Land Act Cap 288, both colonial enactments which continued in force after independence. The abuse occurred in regard to the allocation of government land and the setting apart of lands under the trusteeship of the government. The GLA and Trust Land Acts have been abused in the irregular allocation of land in Kenya to the

<http://www.google.com/url?url=http://siteresources.worldbank.org/INTIE/>

Resources/R_McLaren.doc&rct=j&frm=1&q=&esrc=s&sa=U&ved=0ahUKEwjApOW25OXTAhUMC8AKHfomC48QFggkMAM&usg=AFQjCNH6GJjLOPXMOsXO217jIA11CnWfw (date of use: 29 April 2017).

³⁵⁸Njuguna "Land Reforms in Kenya: Institute of Surveyors Initiative" available at https://www.fig.net/resources/proceedings/fig_proceedings/korea/full-papers/pdf/session7/njuguna-baya.pdf (date of use: 28 April 2017).

³⁵⁹Kimaiyo *Ogiek Land Cases* 32.

³⁶⁰Veit "History of Land Conflicts in Kenya" available at <http://www.focusonland.com/foia/en/countries/brief-history-of-land-conflicts-in-kenya/> (date of use: 28 April 2017). The ruling class that inherited the state apparatus at independence continued the same patterns that had flourished under colonial capitalism for their benefit and privileged former politically powerful British colonialists who remained at independence. Rowley (2000) 16/1 *European Journal of Political Economy* 138 states that: "Independence merely 'Africanised the colonial class structure'".

³⁶¹The Government Land Act Cap 280 was repealed with other colonial land legislation by the Land Registration Act 3 of 2012 as part of comprehensive land reform laws initiated by the 2010 Constitution (some of the fundamental provisions brought by the new Constitution are discussed in Chapter 5 of this dissertation). The Land Registration Act revises, consolidates and rationalises the registration of titles to land, gives effect to the principles and objects of devolved government in land registration and related purposes. It replaces the previous registration provisions contained in several colonial statutes and creates a uniform system of land registration in the country. See Anjarwalla Khana "Summary of the Land Laws" available at <http://estates.uonbi.ac.ke/sites/default/files/centraladmin/estates/Summary-of-the-Land-Laws-Anjarwalla-Khanna-October-2012.pdf> (date of use: 29 April 2017).

politically powerful. There have also been instances of double or multiple allocations of the same piece of land.³⁶² The 1980s and 1990s were marked by gross irregularities in the acquisition, registration, and administration of land. These included illegitimate allocations of public land and land-grabbing which underlined the pressing need for land reform and curbing environmental injustices in post-independent Kenya.³⁶³

Political patronage also played a critical role in land acquisition and led to ethnic tensions. This, in turn, exacerbated inequitable distributions by benefiting communities as regards access to land in various provinces such as the Coast Province, the Rift Valley Province, and other locations across the country, while other communities remained landless and living under squatter conditions.³⁶⁴

After the attainment of independence there were no fundamental changes impacting on the elimination of inherent injustices as regards the form and function of governance, the environment, the economy, or state political or legal structures.³⁶⁵ The land injustices can, to a large extent, be laid at the door of the ruling class and politically powerful.³⁶⁶

³⁶²Njuguna “Land Reforms in Kenya: Institute of Surveyors Initiative” available at https://www.fig.net/resources/proceedings/fig_proceedings/korea/full-papers/pdf/session7/njuguna-baya.pdf (date of use: 28 April 2017).

³⁶³Konrad Adenauer Foundation “Kriegler and Waki Reports on 2007 Kenya Elections” (2009) at 50 available at http://www.kas.de/wf/doc/kas_16094-1522-2-30.pdf (date of use: 18 February 2018); Otiso “Forced Evictions in Kenyan Cities” available at http://isites.harvard.edu/fs/docs/icb.topic845003.files/Session%2014%20%20Mar%2010/Otiso_2002_Kenyan%20Forced%20Evictions.pdf (date of use: 28 April 2017); Kanyinga “Struggles of Access to Land: The Squatter Question in Coastal Kenya” Centre for Development and Research Working Paper 98: 7 (1998) available at http://erepository.uonbi.ac.ke/bitstream/handle/11295/89181/Kanyinga_Struggles%20of%20Access%20to%20land.%20The%20%27Squatter%20Question%27%20in%20Coastal%20Kenya.pdf?sequence=1&isAllowed=y (date of use: 18 February 2018).

³⁶⁴Veit “History of Land Conflicts in Kenya” available at <http://www.focusonland.com/fola/en/countries/brief-history-of-land-conflicts-in-kenya/> (date of use: 28 April 2017).

³⁶⁵Kanyinga “Struggles of Access to Land: The Squatter Question in Coastal Kenya” Centre for Development and Research Working Paper 98:7 (1998) at 5 available at http://erepository.uonbi.ac.ke/bitstream/handle/11295/89181/Kanyinga_Struggles%20of%20Access%20to%20land.%20The%20%27Squatter%20Question%27%20in%20Coastal%20Kenya.pdf?sequence=1&isAllowed=y (date of use: 18 February 2018); Rowley (2000)16/1 *European Journal of Political Economy* 139.

³⁶⁶Otiso “Forced Evictions in Kenyan Cities” available at http://isites.harvard.edu/fs/docs/icb.topic845003.files/Session%2014%20%20Mar%2010/Otiso_2002_Kenyan%20Forced%20Evictions.pdf (date of use: 28 April 2017).

Historical land injustices and the correlatives of socio-economic inequalities and regional inequitable development, have been the principal underlying causes of civil strife in Kenya.³⁶⁷ Kenya transitioned from a single- to a multi-party system in 1992 accompanied by conflict that left over 300 000 Kenyans internally displaced.³⁶⁸ During the 1997 and 2001 presidential elections there were also skirmishes in the Rift Valley Province which displaced thousands. Kenya attracted international attention during the 2007 presidential election when widespread violence broke out resulting in the death of 1 300 people and the displacement of 600 000.³⁶⁹ The announcement of the disputed 2007 presidential election results in Kenya on 27 December 2007 led to what could be described as the worst political crisis in Kenya's post-colonial history.³⁷⁰

At the beginning of 2008, during mediation for the resolution of the Kenyan political crisis of 2007-2008 by African Union head, Kofi Annan (former UN Secretary- General), poverty and perceived discrimination, injustice and inequality in the allocation of resources, and the exclusion of segments of Kenyan society were recognised as the underlying causes of the violence and the cycle of conflict.³⁷¹ In order to address the civil instability witnessed in Kenya, a national accord was concluded. Among the

³⁶⁷Konrad Adenauer Foundation "Kriegler and Waki Reports on 2007 Kenya Elections" (2009) available at http://www.kas.de/wf/doc/kas_16094-1522-2-30.pdf (date of use: 18 February 2018).

³⁶⁸Kamungi "The current situation of internally displaced persons in Kenya" paper commissioned by Jesuit Refugee Service (2001) at 3 available at <https://www.jrs.net/assets/Publications/File/ken-idp.pdf> (date of use: 18 February 2018).

³⁶⁹Human Rights Watch World Report 2013 at 128 available at https://www.hrw.org/sites/default/files/wr2013_web.pdf (date of use: 29 April 2017); Internal Displacement Monitoring Centre "Kenya: Speedy Reforms Needed to Deal with Past Injustices: Profiles of the Internal Displacement Situation (2010) available at <http://www.internal-displacement.org/assets/library/Africa/Kenya/pdf/Kenya-June-2010.pdf> (date of use: 29 April 2017); Veit "History of Land Conflicts in Kenya" at 1 available at <http://www.focusonland.com/fola/en/countries/brief-history-of-land-conflicts-in-kenya/> (date of use: 28 April 2017).

³⁷⁰Commission of Inquiry into Post Election Violence (CIPEV) Report (2008) at vii available at http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf (date of use: 28 April 2017); Ngamau "The Kenya 2007-2008 Post Election Violence" available at <http://www.worldmediation.org/paper-1.pdf> (date of use: 29 April 2017).

³⁷¹Kenyan National Dialogue and Reconciliation through the Mediation of HE Kofi A Annan and the Panel of Eminent African Personalities on the Resolution of the Political Crisis: Statement of Principles on long-term Issues and solutions February 2008 available at <http://katibainstitute.org/Archives/images/3-Review%20Report%20Agenda%204%20Long-standing%20issues%20and%20solutions-2009.pdf> (date of use: 10 December 2017).

mediation principles included in the accord were the completion of the constitutional and legal reform process, land reform, poverty reduction, and equitable development.³⁷²

The mediation agreement also saw the establishment of two important quasi-judicial bodies to further investigate the circumstances surrounding the 2007-2008 violence, and to submit reports to guide what constitutional and legal reforms would be implemented to curb a recurrence of the violence.³⁷³ The reports of both bodies recognised fundamental notions of environmental justice³⁷⁴ as measures to be undertaken to prevent the social conflict witnessed in Kenya.

The Independent Review Committee (IREC)³⁷⁵ – also known as the Kriegler Commission³⁷⁶ – reported on the position of vulnerable persons such as ethnic minorities, and recommended affirmative action and the introduction of reserved seats, among other significant constitutional reforms to advance democracy and equitable representation.³⁷⁷

The Commission of Inquiry into the Post-election Violence (CIPEV)³⁷⁸ – also known as the Waki Commission³⁷⁹ – identified inequality in the distribution of benefits and governance as being primarily linked to the violence. The Report noted:

Given the power of the President and the political class, the perception on the part of the public is that everything flows not from laws but from the president power... This also has

³⁷²Ibid.

³⁷³Konrad Adenauer Foundation “Kriegler and Waki Reports on 2007 Kenya Elections” (2009) available at http://www.kas.de/wf/doc/kas_16094-1522-2-30.pdf (date of use: 18 February 2018).

³⁷⁴See Chapters 1, 2 and 3 of this dissertation for a detailed discussion of the meaning of environmental justice.

³⁷⁵IREC was appointed by retired president Mwai Kibaki under the Commissions of Inquiry Act (Cap 102 Laws of Kenya). Its formation was formally gazetted in Gazette Notice 1983, *Kenya Gazette* 14 March 2008.

³⁷⁶Headed by the retired judge of the Constitutional Court of South Africa and former Chairperson of the Independent Electoral Commission of South Africa (the IEC), Justice Johann Kriegler.

³⁷⁷Konrad Adenauer Foundation “Kriegler and Waki Reports on 2007 Kenya Elections” (2009) available at http://www.kas.de/wf/doc/kas_16094-1522-2-30.pdf.

³⁷⁸Established in the *Kenya Gazette* Notice 4473 vol cx-no.4.

³⁷⁹Headed by Justice Philip Waki, judge of Kenya’s Court of Appeal.

led the public to believe a person from their own tribe must be in power, both to secure from them benefits...and jobs, land and entitlements.³⁸⁰

The report further noted that a number of Kenyans, but especially those living in urban slums and afflicted by poverty, engaged in the violence more readily as a result of feelings of marginalisation, resentment, and powerlessness.³⁸¹ Social classism, poverty, and the under-development of some communities more than others, as well as a significantly growing number of the underclass (the urban poor in particular) who are not landowners, were also ready contributors to the violence.³⁸²

Yet another outcome of Kenya's 2007-2008 conflict was the referral of the matter to the International Criminal Court (ICC) for resolution on the basis of crimes against humanity.³⁸³ Due to the hesitancy shown by the Kenyan government to either convene a local tribunal or to refer the matter to the ICC, this was the first example of the ICC prosecutor taking up a case of his own volition; all earlier cases had been referred to the court either by a national government, or by the United Nations Security Council.³⁸⁴ ³⁸⁵ Due to criticism and resentment among Kenyan leaders and the African Union (AU), of the way in which the administration of justice was handled by the ICC, the Kenyan case was derailed.³⁸⁶ The perception among African states is that the ICC is discriminatory

³⁸⁰Konrad Adenauer Foundation "Kriegler and Waki Reports on 2007 Kenya Elections" (2009) available at http://www.kas.de/wf/doc/kas_16094-1522-2-30.pdf.

³⁸¹*Ibid.*

³⁸²*Ibid.*

³⁸³*The Guardian* "Annan Hands List of Perpetrators of Post-election Violence in Kenya" available at <https://www.theguardian.com/world/2009/jul/09/international-criminal-court-kofi-annan> (date of use: 29 April 2017).

³⁸⁴Article 15 of the UNGA Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998 provides that the International Criminal Court's prosecutor may open a formal investigation in one of three circumstances: (a) when a situation is referred by the government of a state; (b) when the situation is referred by the UN Security Council; or (c) under his own volition with authorisation from a Pre-Trial Chamber. On 6 November 2009 the ICC Presidency assigned the situation in Kenya to Pre-Trial Chamber II and the Prosecutor applied to that chamber for authorisation to open a formal investigation on 26 November 2009 which was granted by the judges of the chamber.

³⁸⁵Human Rights Watch "ICC: Judges Approve Kenyan Investigation" available at <https://www.hrw.org/news/2010/03/31/icc-judges-approve-kenyan-investigation> (date of use: 29 April 2017).

³⁸⁶Following the announcement of the decision of the ICC to investigate and prosecute the perpetrators of the violence of its own volition, the Kenyan National Assembly sought to remove Kenya from the jurisdiction of the ICC by passing a motion seeking to withdraw Kenya as a state party to the Rome Statute, the treaty which established the International Criminal Court. The motion was dismissed by the National Assembly on the basis that it was unconstitutional. The motion was then amended and debated

and targets Africa unfairly. This view is premised on the claim that virtually all of the formal investigations undertaken by the ICC have involved African countries, and only African defendants have been indicted.³⁸⁷ The ICC Deputy Prosecutor, Fatou Bensouda, in refuting the allegation and affirming justice for victims of international crimes reckons:

Anytime I hear this about ICC targeting Africa, ICC doing double justice, it saddens me, especially as an African woman, also knowing that these conflicts, most of these conflicts are happening on the continent of Africa...We say that ICC is targeting Africans, but all of the victims in our cases in Africa are African victims. They are not from another continent. They are African victims and they are the ones who are suffering these crimes.³⁸⁸

4.4.3 Wangari Maathai: Unveiling the relationship between environment, democracy, and human rights as integral to environmental justice

Professor Wangari Muta Maathai (1 April 1940 – 25 September 2011) was awarded the Nobel Peace Prize in 2004 for her ‘contribution to sustainable development, democracy and peace’.³⁸⁹ She became the first environmentalist and first African woman to receive this prestigious award. In her acceptance speech, she stressed the interrelation between environment, democracy and peace. These are the three elements which formed the bedrock of her ‘Green Belt Movement’ (GBM) in Kenya and its three

on the basis of seeking to repeal Kenya's International Crimes Act which domesticated the Rome Statute. The National Assembly's action which was based on saving face for the sake of the sovereignty of the country and the integrity of her judicial processes, was criticised for ignoring the voices of victims who would benefit from the ICC process. *Daily Nation* “Kenyan Parliament Pulls Kenya from ICC Treaty” available at <http://www.nation.co.ke/News/politics/Parliament%20pulls%20Kenya%20from%20ICC%20treaty/-/1064/1077336/-/v0uyxsz/-/index.html> (date of use: 29 April 2017); *Daily Nation* “MPs Vote Sets Kenya to Cut ties with ICC” available at <http://www.nation.co.ke/News/politics/MPs+vote+sets+stage+for+Kenya+to+cut+ties/-/1064/1077788/-/qdv1xo/-/index.html> (date of use: 29 April 2017).

³⁸⁷Voice of America “African Union Says ICC Prosecutors are Discriminatory” available at <http://www.voanews.com/a/article--african-union-says-icc-prosecutions-are-discriminatory-125012734/158424.html> (date of use: 29 April 2017).

³⁸⁸*ibid.*

³⁸⁹Nobel Prize.org. 2005 (date of use: 29 April 2017); “Maathai stood up courageously against the former oppressive regime in Kenya” the Norwegian Nobel Committee said in a statement announcing her as the 2004 Nobel Peace Prize winner. “Her unique forms of action have contributed to drawing attention to political oppression - nationally and internationally. She has served as inspiration for many in the fight for democratic rights...” See African Success “Biography of Wangari Maathai” available at <http://www.africansuccess.org/visuFiche.php?id=407> (date of use: 29 April 2017).

decades of work.³⁹⁰ Maathai was an elected Member of Parliament in Kenya and served as Assistant Minister for Environment and Natural Resources between January 2003 and November 2005.³⁹¹

On her return to post-colonial Kenya in 1966 after furthering her education abroad, Maathai was devastated by the sight of what had been a land abounding in trees and flowing rivers while she was growing up, but which had been turned into a land of tea and coffee plantations during her absence. The rivers were drying up, filled with silt from massive soil erosion. The legacies of colonialism manifested in, amongst others, a cash-crop economy in timber, coffee, and tea which posed widespread environmental challenges for Kenya, most notably devastating deforestation.³⁹² By the early 1970s, Maathai had witnessed a myriad of negative effects of the Kenyan government's deforestation programme and its laxity in environmental protection.³⁹³ In 1977, in response to the massive deforestation that had taken place in post-colonial Kenya, Maathai began the GBM. It sought to mobilise women to tackle the challenges of deforestation, soil erosion, water scarcity, malnutrition, and poverty by surrounding each village with a 'green belt' of at least one thousand trees.³⁹⁴ What started as a simple tree-planting and income-generating activity for poor rural women, was set to establish a network of intricate links of the environment with social, economic, and political issues, drawing the largest nationwide grass-root effort to safeguard the environment and challenge unsustainable development issues such as poor governance and human rights abuses in post-colonial Kenya. In her own words: 'Women who start to plant trees on their farms influence their neighbours. Their neighbours eventually become involved. Now, we see the government reacting'.³⁹⁵ She also noted:

³⁹⁰ Wangari Maathai Nobel Price Acceptance Speech available at http://www.nobelprize.org/nobel_prizes/peace/laureates/2004/maathai-lecture-text.html (date of use: 29 April 2017).

³⁹¹ African Feminist Forum "Wangari Muta Maathai" available at <http://www.africanfeministforum.com/wangari-muta-maathai-kenya/> (date of use: 29 April 2017).

³⁹² Maathai *Unbowed: A memoir* 173.

³⁹³ Tavaana "Wangari Maathai: The Tree Mother of Africa" available at https://tavaana.org/nu_upload/Wangari_Maathai_En_PDF.pdf (date of use: 25 April 2017).

³⁹⁴ Mellor *Feminism and Ecology* 20.

³⁹⁵ Kennedy "Speak Truth to Power: Human Rights Defenders Who Are Changing Our World" available at <http://blogs.nysut.org/sttp/defenders/wangari-maathai/> (date of use: 29 April 2017).

Once you start making these linkages, you can no longer do just tree planting. When you start working with the environment seriously, the whole arena comes: human rights, women's rights, environmental rights, children's rights...everybody's rights.³⁹⁶

She continued, '...we are called [upon] to assist the earth to heal her wounds, and in the process heal our own'.³⁹⁷

Maathai was a force to reckon with in the democratic revolution and struggle for Kenya which gained momentum in the early 1990s and sought to oppose political oppression. Political activism was often confronted by police brutality, repressive voting laws, and a lack of freedom of association and expression.³⁹⁸ In dealing with political offenders the government often invoked colonial-era anti-democracy laws used by the colonialists to suppress political activism in African communities fighting for independence.³⁹⁹

The GBM became involved in various protests in Kenya which drew attention to the inseparable relationship between environment and human justice. These range from the battle against vices such as the privatisation of public lands and the illegal 'grabbing' of gazetted forests, to the fight for the freedom of political prisoners, multi-party democracy, the right to vote in free and fair elections, the right to freedom of expression, and the right to freedom of association. The Movement also pushed for constitutional reform in Kenya to address issues such as good governance, historical injustices, legal reform, protection of human rights, environmental protection, and sustainable development – all aimed at improving the quality of life of Kenyans and ending political oppression and the denial of a life of dignity and wellbeing.⁴⁰⁰

³⁹⁶Film by Merton & Dater (Directors/Producers) *Taking root: The Vision of Wangari Maathai* (Marlboro Productions United States 2008); Griffin & Bone *National Geographic* 234; *The Washington Post* "The Woman Mother Earth" available at <https://www.washingtonpost.com/archive/lifestyle/1992/06/02/the-woman-mother-earth/c5296e28-e542-4e1e-897a-36fc8228887a/> (date of use: 29 April 2017).

³⁹⁷Nadrakarni *Between Earth and Sky* 254.

³⁹⁸Maathai *Unbowed: A memoir* 173; Tolerance "Teaching Tolerance, Diversity, Equity and Justice: Wangari Maathai" available at <http://www.tolerance.org/activity/wangari-maathai> (date of use: 29 April 2017).

³⁹⁹For example, The Vagrancy Ordinance of 1925 (repealed in 1997) which restricted the movement of Africans during colonial times. The Conversation "Kenyans are Still Oppressed by Archaic Colonial Laws" available at <http://theconversation.com/kenyans-are-still-oppressed-by-archaic-colonial-laws-73880> (date of use: 29 April 2017).

⁴⁰⁰Maathai *Unbowed: A memoir* 173.

In 1989 the GBM staged a public protest against the privatisation of Uhuru Park – a major public-use area or public park in the centre of Nairobi. The park was to be converted into a 62-floor commercial skyscraper. The complex would include luxury housing units, a new headquarters for the country’s ruling party, and a statue of the then incumbent president.⁴⁰¹

In protest, letters were written to the *Kenya Times*, the government, including the Nairobi City Commission and the Minister for Environment and Natural Resources, and to the United Nations. A letter of protest was also submitted to the British High Commissioner in Nairobi, urging Her Majesty’s government to intervene and equating the construction of the skyscraper with the construction of a similar building in Hyde Park, London, or Central Park, New York and maintaining that it could not be tolerated. Following the public outcry, funders of and investors in the project pulled out. In 1991 a similar protest was successful in saving Jeevanjee Gardens, also a public park, from being allocated to private developers.⁴⁰²

In 1992, mothers of detained political activists led by Maathai gathered at Uhuru Park in a protest for the release of children. The mothers kept up the protest under harsh conditions and severe police brutality.⁴⁰³ Fifty-two political prisoners were released in 1993.⁴⁰⁴ ‘Freedom corner’, the name given to the place where the mothers had camped, has become a recognised symbol of democracy in Kenya.⁴⁰⁵ Having challenged the ruling class on the demolition of Uhuru Park, Maathai was repeatedly imprisoned and

⁴⁰¹Maathai *The Green Belt Movement* 50; Nayar *Post-colonial Studies* 530.

⁴⁰²UNDP “Kenya: The Green Belt Movement” available at http://ssc.undp.org/content/dam/ssc/documents/Expo/solutions/2008_to_2012/2012431128430.KENYA%20-THE%20GREEN%20BELT%20MOVEMENT-2008.pdf (date of use: 29 April 2017).

⁴⁰³The mothers camped at Uhuru Park and embarked on a hunger strike. Concerned Kenyans joined them with food, blankets, and tents. In retaliation to police brutality, the protesting women stripped naked leading the police to disperse (in African traditional belief it is a curse for someone’s mother or an old woman to strip naked in anger). See *The Nairobiian* “Six defiant Mothers who stripped Naked at Uhuru Park” available at <https://www.sde.co.ke/thenairobiian/article/2000203068/6-defiant-mothers-who-stripped-naked-in-uhuru-park> (date of use: 12 December 2017).

⁴⁰⁴Maathai *The Green Belt Movement* 30; UNESCO Wangari Maathai and the Green Belt Movement at 54 available at unesdoc.unesco.org/images/0023/002301/230122e.pdf(date of use: 18 February 2018).

⁴⁰⁵Ammons & Roy *Sharing the Earth* 321.

targeted in assassination attempts.⁴⁰⁶ Facing a hostile climate, she received international attention and support that pushed for her release.⁴⁰⁷

In 1998, the GBM led a winning cause against the illegal allocation of parts of the 2000 acre (8 km²) Karura Forest to private companies. The private developers aimed to develop a luxury housing estate in the centre of the forest.⁴⁰⁸ Karura forest is a vital water catchment area situated at the edge of Nairobi and also serves as an ‘oxygen lung’ for the metropolis. Gazetted in 1932, the forest is the largest gazetted forest in Nairobi. Recognisable features of the forest include a waterfall, a bamboo forest, and marshland. It also contains historical features such as *Mau Mau* caves and an old church. Ecologically, wildlife in the forest includes bush baby, bushbuck, bush pig, duiker, genet, dikdik, African civet, and the epauletted bat.⁴⁰⁹ Both the United Nations Nairobi Office and world UNEP headquarters border on the forest.⁴¹⁰ In 2007 the GBM endorsed the ‘Forests Now Declaration’ calling for new market-based mechanisms to protect tropical forests.⁴¹¹

During its initial phase in the late 1970s, the GBM played a critical role in realising the objective of reforestation and environmental training. It started out as a community activist forum to inform the public of the dangers of deforestation and desertification. It had not, at that stage, entered the traditional political arena but rather sought to plant trees and to educate on the cause and effect of ecological destruction.⁴¹² As the Movement grew, its emphasis slowly expanded as it came face to face with the realities of environmental protection which were directly linked to the human problems of

⁴⁰⁶Tavaana “Wangari Maathai: The Tree Mother of Africa” available at https://tavaana.org/nu_upload/Wangari_Maathai_En_PDF.pdf (date of use: 25 April 2017).

⁴⁰⁷ An Amnesty International letter writing campaign helped secure Maathai’s release from prison. Members of the international political community, such as Mikhail Gorbachev (General-Secretary of the Communist Party of the Soviet Union (1985–91) and President of the Soviet Union (1990–91)) pressured for her release. Tavaana *ibid*.

⁴⁰⁸Global Non-Violent Action Database “The Green Belt Movement Defends the Karura Forest in Nairobi, Kenya, 1998-1999” available at <http://nvdatabase.swarthmore.edu/content/green-belt-movement-defends-karura-forest-nairobi-kenya-1998-1999> (date of use: 29 April 2017).

⁴⁰⁹Kenya Forest Service “Karura Forest” available at <http://www.kenyaforestservice.org/index.php/2016-04-25-20-16-21/2014-11-26-08-43-45/2014-11-26-08-56-51/karura-forest> (date of use: 29 April 2017).

⁴¹⁰Mwangi (2003) 22/1 *Ecoforum: Journal of the Environment Liaison Centre*103.

⁴¹¹Stange, Oyster & Sloan *Encyclopedia of Women* 646.

⁴¹²Michaelson (1994) 41/4 *Social Problems* 545-6.

poverty, social inequality, human rights abuse, political repression, and poor governance. During its second phase, the Movement entered the political arena by joining the pro-democracy political drive and used environmental issues as a catalyst for social and political reform.⁴¹³ In time, the tree has come to be recognised as a symbol of peace and the epicentre of the struggle for democracy and justice in Kenya.⁴¹⁴ The GBM has used peace trees to reconcile disputing communities in ethnic conflicts through its 'Peace Tent Initiative'.⁴¹⁵ During the pro-democracy campaigns of the late 1980s, trees were planted in Nairobi's Uhuru Park, at Freedom Corner, and in many parts of the country to demand the release of political prisoners. Trees were also planted during the drafting of the new Constitution to signify a peaceful transition to democracy.⁴¹⁶ With the spreading of its green-belts agenda around the world, it is now engaging issues of climate change and food security in its agenda.⁴¹⁷

The GBM has been involved in an 'holistic approach' in contributing to environmental protection, sustainable development, environmental justice, human rights, democracy, and peace.⁴¹⁸ The GBM has become one of the most recognisable non-governmental organisations in Africa. It also serves as a 'case study' for environmental justice, not only in Kenya but in the Global South as a whole.⁴¹⁹ It has set up GBM 'satellites' in 30 African countries including Tanzania, Malawi, Lesotho, and Zimbabwe through the Pan-African Green Belt Network.⁴²⁰ It has also spread 'belts' across the world including in

⁴¹³Ibid 552.

⁴¹⁴Tal *Speaking of Earth* (2006) 257; African Renewal "Wangari Maathai the Woman of Trees Dies" available at <http://www.un.org/africarenewal/web-features/wangari-maathai-woman-trees-dies> (date of use: 30 April 2017).

⁴¹⁵Tavaana "Wangari Maathai: The Tree Mother of Africa" available at https://tavaana.org/nu_upload/Wangari_Maathai_En_PDF.pdf (date of use: 25 April 2017).

⁴¹⁶Nobel Prizes and Laureates "Nobel Peace Prize 2004: Wangari Maathai" available at http://www.nobelprize.org/nobel_prizes/peace/laureates/2004/maathai-lecture-text.html (date of use: 29 April 2017).

⁴¹⁷Green Belt Movement "Mainstream Advocacy" available at <http://www.greenbeltmovement.org/what-we-do/advocacy> (date of use: 28 August 2016).

⁴¹⁸Her holistic approach eventually led her to link environmental responsibility to political struggles for governance, human rights, and peace. UNESCO "Wangari Maathai and the Green Belt Movement" at 60 available at unesdoc.unesco.org/images/0023/002301/230122e.pdf (date of use: 18 February 2018).

⁴¹⁹*Sowards Across Borders and Environments* 81.

⁴²⁰Website for Pan-African Green Belt Network available at <https://www.britannica.com/topic/Pan-African-Green-Belt-Network> (date of use: 29 April 2017).

the United States, the United Kingdom, West India, Japan, and South America.⁴²¹ GBM has planted over 40 million trees in Kenya since 1977.⁴²²

Wangari Maathai died from ovarian cancer in September 2011. The dignity of the symbolic meanings of the tree that have come to be critical in the democratic struggle for Kenya, were exemplified by her wish to be laid to rest in a hyacinth rather than a conventional wooden casket.⁴²³

4.4.4 Environment, environmental claims and environmental justice under the old (pre-2010) Constitution

Under the 'old' Constitution,⁴²⁴ environmental protection 'claims' were minimal.⁴²⁵ This was without doubt due to the absence of explicit environmental protection provisions in the constitutional dispensation. The Constitution also did not recognise an environmental right;⁴²⁶ although the right to life entrenched in the old Constitution was a pre-condition to the enjoyment of the right to a clean and healthy environment, its interpretation as an instrument by which to protect other rights – including the environmental right – received only limited attention.⁴²⁷

⁴²¹Tavaana "Wangari Maathai: The Tree Mother of Africa" available at https://tavaana.org/nu_upload/Wangari_Maathai_En_PDF.pdf (date of use: 25 April 2017).

⁴²²Nagel (2005) 2 *Wagadu: A Journal of Transnational Women's and Gender Studies* 1-9.

⁴²³*Daily Nation* "How Groups Made Maathai's Wish Come True" available at <http://www.nation.co.ke/news/How-groups-made-Maathais-wish-come-true-/1056-1253314-p03fwa/index.html> (date of use: 29 April 2017).

⁴²⁴The Constitution of the Republic of Kenya Act 5 of 1969.

⁴²⁵Kameri-Mbote "Towards greater access to justice in environmental disputes in Kenya: opportunities for intervention" International Environmental Law Research Working Paper 1 (2005) at 2 available at www.ielrc.org/content/w0501.pdf (date of use: 18 February 2018).

⁴²⁶The right to a clean and healthy environment was recognised as a statutory right and not a constitutional (fundamental) right. The right to a clean and healthy environment is protected under s 3(1) the Environmental Management and Coordination Act 8 of 1999 which was the main framework legislation for environmental protection in Kenya under the 'old' Constitution.

⁴²⁷Article 71(1) of the Constitution of the Republic of Kenya Act 5 of 1969; Kenya National Commission on Human Rights (KNCHR) Position Paper "Enhancing and Operationalising Economic, Social and Cultural Rights in the Constitution of Kenya" (2006) 3, 10 available at <http://www.knchr.org/Portals/0/EcosocReports/PP%20on%20socio-economic%20rights%20-%20final.pdf> (date of use: 18 February 2018).

Lack of precise demarcation of environmental legislation also impeded effective environmental litigation. Kenya inherited a highly uncoordinated and fragmented environmental regulatory framework from the colonial government. Moreover, colonial environmental management laws were aimed largely at nature conservation rather than human protection. Environmental regulation was, in the main, conceived of in the narrow sense of the conservation, improvement, and protection of natural resources and sanctuaries – generally from human activity.⁴²⁸ Such a legal framework made addressing post-independence environmental challenges and the implementation of an environmental right virtually impossible.⁴²⁹

As part of the colonial legacy the environmental legal framework was fragmented with over 70 sectoral laws covering matters such as forest conservation, wildlife conservation, geology and mining, agriculture, livestock husbandry, land, water, et cetera.⁴³⁰ The laws were enforced by various sectoral institutions and administrative agencies established by the colonial government. These laws and their prescribed agencies often found themselves in competition as regards environmental regulation.⁴³¹

⁴²⁸The main aim of environmental regulation as part of the colonial legacy was primarily aimed at reservation/conservation, restriction, and prohibition. The sectoral rules were highly regulatory with setting penalties but without providing for governing standards or principles to deal with either socio-economic conflicts resulting from environmental concerns flowing from issues such as poverty, population growth, and landlessness, or making provision for the equitable distribution of resources and environmental justice which are sustainable development concerns. Mwangi “Colonialism, Self-governance and Forestry in Kenya: Policy, Practices and Outcomes” (1998) available at

<http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/5706/Colonialism%20self%20governance%20and%20forestry%20in%20Kenya.pdf?sequence=1> (date of use: 28 April 2017).

⁴²⁹The country’s post-colonial regime was to be understood against the background of fragmented, sector laws that purported to deal with environmental conservation, improvement and protection. The laws were not structured to deal with the environmental concerns that faced post-independent Kenya such as responsiveness to community needs, participatory approaches in natural resource management, recognition of local communities’ rights, and traditional knowledge systems integral to sustainable development. See Okidi “Kenya’s Framework Environmental Law” 6-13; Angwenyi “An overview of the Environmental Management Act” 143; Kameri-Mbote & Ouedraogo “Partnership for the Development of Environmental Law and Institutions in Africa (PADELIA): Evaluation Report” (2006) 21 available at www.ahrlj.up.ac.za/images/ahrlj/2014/ahrlj_vol14_no2_2014_chapter9.pdf (date of use: 18 February 2018).

⁴³⁰For example: The Forest Act Cap 385 Laws of Kenya; The Wildlife Act Cap 376 Laws of Kenya; The Mining Act Cap 306 Laws of Kenya; The Agricultural Act Cap 318 Laws of Kenya. Okidi “Background to Kenya’s Framework Environmental Law” 126.

⁴³¹For example, in forest regulation in Kenya, since colonisation forests have been designated to different authorities such as local government, the Forestry Department, forest guards, forest advisory committees, the Minister and the President. There have been no definite demarcation of the roles of the various

The innate challenges raised by environmental governance called for the consolidation of existing environment laws with a view to generating a comprehensive legal framework for environmental regulation and governance.

It was only in the late 1990s that Kenya joined many other African countries⁴³² in an attempt to harmonise environmental laws through the enactment of the Environmental Management and Coordination Act (EMCA).⁴³³ This process involved a review of the sectoral laws and the formulation of a general (framework) Act to synchronise those laws and remove legal and institutional differences. The review further entailed amending archaic colonial regulations to fit present-day environmental challenges, needs, and realities.⁴³⁴ However, the review process has been slow and on-going with many sectoral laws yet to be reviewed. This explains the need for an overarching and principal law dealing with environmental governance.⁴³⁵ The ECMA, enacted under the old Constitution, was the answer to this call.⁴³⁶

There was huge expectation that the enactment of the framework EMCA would better serve the promotion and protection of environmental rights in the country than had been

functionaries and they have found themselves in a regulatory conflict. Moreover, besides a sectoral law on a given area of regulation, there are also numerous other laws and policies relevant to the sectoral law including subsidiary legislation, policy papers and other environmental applicable legislation which land laws (including The Trust Land Act Cap 288 Laws of Kenya, Registered Land Act Cap 300 Laws of Kenya and so on), Water Act Cap 372 Laws of Kenya, Fisheries Act Cap 378 Laws of Kenya and so on. Mwangi “Colonialism, Self-governance and Forestry in Kenya: Policy, Practices and Outcomes” (1998) available at

<http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/5706/Colonialism%20self%20governance%20and%20forestry%20in%20Kenya.pdf?sequence=1> (date of use: 28 April 2017).

⁴³²In East Africa, while Tanzania and Kenya have had no provisions for environmental protection in their Constitutions, Uganda took the lead with comprehensive provisions on the environment, including a constitutional environmental right. Uganda was the first country in East Africa to also have a coordinated environmental framework law, the National Environment Act 5 of 1995. Kameri-Mbote & Odote “Courts as Champions of Sustainable Development: Lessons from East Africa” paper commissioned by International Environmental Law Research Centre (2009) at 32 available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article> (date of use: 18 February 2018).

⁴³³Act 8 of 1999.

⁴³⁴Mwangi “Colonialism, Self-governance and Forestry in Kenya: Policy, Practices and Outcomes” (1998) available at <http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/5706/Colonialism%20self%20governance%20and%20forestry%20in%20Kenya.pdf?sequence=1> (date of use: 28 April 2017).

⁴³⁵Okidi, Kameri-Mbote & Akech *Environmental Governance in Kenya* xix.

⁴³⁶Ibid.

the case under the sectoral laws.⁴³⁷ The EMCA even attempted to incorporate progressive international environmental principles such as sustainable development.⁴³⁸ Unfortunately, the Act proved too weak for such an expectation to materialise. In principle, the effectiveness of the EMCA was curtailed by the old Constitution's failure to give clear expression to environmental rights and their implementation.⁴³⁹ Moreover, environmental litigation in Kenyan courts has generally been impeded by a strict and limited approach to the right to standing (*locus standi*) – the ability to approach a court of law as a litigant. Access to justice in environmental matters has been suppressed and frustrated by this rigidity. Before the adoption of the new Constitution, only a person whose right had been infringed or threatened enjoyed *locus standi*.⁴⁴⁰ Interestingly, by far the most litigated matter in environmental claims in Kenya has been the question of *locus standi*.⁴⁴¹

In many crucial environmental claims in Kenya the courts refused to hear the case on the basis of lack of standing. An example is the case of *Wangari Maathai v The Kenya Times Media Trust*.⁴⁴² The plaintiff, a resident in Nairobi and the coordinator of GBM, a non-governmental organisation, filed suit against the defendant based on the proposed construction of a complex in a recreational park in Nairobi. The court upheld the

⁴³⁷First, EMCA consolidated the government responsibilities on environmental management. Previously, such power and responsibilities were delegated to various government departments, making it difficult to co-ordinate the promotion and protection of environmental rights. Secondly, unlike the sectoral laws, EMCA provided a focal point from which the policies and activities of the various environmental bodies dealing with the environment would be regulated and coordinated for harmonised protection of environmental rights. Bosek (2014) 14/2 *African Human Rights Law Journal* 493.

⁴³⁸Section 5 of the Act provides that sustainable development shall be a guiding principle in environmental enforcement and regulation. The section further sets out the principles of sustainable development that should be observed by the court, for example, the principle of public participation in the development of policies plans and processes for the management of the environment (s 5(a)); the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources insofar as they are relevant, are not repugnant to justice and morality, or inconsistent with any written law (s 5(b)), and intra- and inter-generational equity (s 5(d)), among others.

⁴³⁹Bosek (2014) 14/2 *African Human Rights Law Journal* 493.

⁴⁴⁰The courts have been relying on *locus standi* common-law principles established in the English case of *Gouriet v The National Union of Post Office Workers* (1977) 3 All ER 71-2 which states: "It was a fundamental principle of English law that public rights could only be asserted in a civil action by the Attorney General as an officer of the Crown representing the public. Except where statute otherwise provided, a private person could only bring an action to restrain a threatened breach would only constitute an infringement of his private rights or would inflict special damage on him". Bosek (2014) 14/2 *African Human Rights Law Journal* 491.

⁴⁴¹Migai 2006 *KLR* 23.

⁴⁴²1989 *KLR* 267.

defendant's objection that the plaintiff lacked *locus standi* to bring the suit. The court ruled that the applicant had no standing because she had not alleged that the defendant company had breached any rights in relation to her, nor had the company caused any damage to her. The judge also noted: 'It is well established that only the Attorney General can sue on behalf of the public'.⁴⁴³

Under the old constitutional regime, public interest litigation had, therefore, generally been operated through government machinery (ie the Attorney-General suing on behalf of the public).⁴⁴⁴ Therefore, perhaps the greatest shortcoming of environmental protection in Kenya under the old constitutional regime has been the incapacity effectively to deal with the modern-day public law environmental problems such as sustainable development and environmental justice challenges that are inextricably linked to governance, human rights protection, and democracy. This has only exacerbated the challenges.⁴⁴⁵

4.4.5 Conclusion

Post-colonial, pre-2010 environmental injustices were indicative of inequalities and social inequities within a neo-colonial paradigm where similar political approaches and ideologies that had operated before independence were retained but in the hands of a new administrative authority. However, the operation of environmental injustices in the post-independence period were even significantly heightened in some respects. For example, whereas colonial environmental conservation was essentially managed by

⁴⁴³At 4. Case law available at <http://kenyalaw.org/caselaw/cases/view/53011/> (date of use: 27 April 2017).

⁴⁴⁴Legally speaking, other than being the principal legal advisor to the government, the Attorney-General also acts as its advocate and defender. This separated the government from being the accuser and accused. Bosek (2014) 14/2 *African Human Rights Law Journal* 493; s 26(2) of the Constitution of the Republic of Kenya Act 5 of 1969, provided that: "The Attorney-General shall be the principal legal adviser to the Government of Kenya".

⁴⁴⁵Environmental litigation in Kenya (prior to the Environmental Management and Coordination Act 8 of 1999) has generally been a private law affair (with less concern for the main branches of public law such as human rights protection). Litigants generally resorted to private environmental breaches that have mostly revolved around issues such as nuisance and trespass in the law of torts (delict). It was after the enactment of the Environmental Management and Coordination Act, with its inclusion of the right to a clean and healthy environment that the meaning of the environmental right and its protection began gradually to take shape. Still, without the inclusion of the environmental right in the old Constitution and an expansion of the interpretation of *locus standi* and development of public interest litigation, the right was not fully imbued with public law significance under the old Constitution. Ogolla (1992) 22 *Environmental Policy and Law* 176; Bosek (2014) 14/2 *African Human Rights Law Journal* 490.

setting aside forests for so-called ‘protection’ by regulation through the publication of such information in *gazette* form while ignoring human needs, post-colonial environmental injustices were distinguished by the ‘deregulation’ of forests and public utilities (such as parks) through removing such information from a particular *Gazette* in order to make way for irregular and unlawful allocations for infrastructural development that, in the main, benefited the socially dominant group. Moreover, the post-colonial era (pre the new 2010 Constitution) was fundamentally characterised by the critical need for constitutional and legal reform of archaic colonial legacies in governance, land, and environmental management to address contemporary challenges, needs, and aspirations of the Kenyan people.

The final section of this chapter is a discourse on post-colonial global environmental injustices resulting from the North-South divide and the unequal relationship between North and South. Less developed countries are vulnerable to pollution, environmental burdening, and impoverishment from disproportionate adverse ecological impacts generated by affluent and politically powerful countries. I look critically at key examples and case studies of environmental injustices and ecologically-biased actions towards Kenya emanating from these North-South relations.

4.5 Global inequalities and environmental injustices: The impact on Kenya

4.5.1 General remarks

In the 1980s, the Brandt Line was advanced as a means by which to illustrate that the world was geographically split into relatively richer and poorer nations.⁴⁴⁶ According to this model, richer countries are almost all located in the Northern Hemisphere, with the exception of Australia and New Zealand. Poorer countries are mostly located in tropical regions and in the Southern Hemisphere. However, over time it was realised that this

⁴⁴⁶Royal Geographical Society “The Global North/South Divide” available at <https://www.rgs.org/NR/...9141.../60sGlobalNorthSouthDivide.pdf> (date of use: 1 May 2017).

view was overly simplistic.⁴⁴⁷ For example, countries such as Argentina, Malaysia, and Botswana all have above global average GDP per capita, yet still appear as part of the 'Global South'.⁴⁴⁸ Today, although the world is much more complex than the Brandt Line would suggest, and many poorer countries have continued to experience significant economic and social development, commentators refer to the term the 'Global North' and the 'Global South' to depict inequalities between countries.⁴⁴⁹ The causes of these inequalities include: the availability of natural resources; levels of health and education; a country's economy and its industrial sector; how a country is governed; conflict within and between countries; and a country's vulnerability to natural hazards and climate change.⁴⁵⁰

The Stockholm Declaration provides clearly in principle 21,⁴⁵¹ that states have the responsibility to ensure that activities within their jurisdiction do not harm the environment of other states. Environmental injustice within an international context involves environmental inequalities committed by powerful and industrial countries against poor, Third World countries. Distribution of environmental risk and burdens and environmental decision-making are generally off-kilter, skewed against the weaker South, and favour and promote the interests of the North.

This discourse consists of case studies as evidence of environmental injustices 'committed' by the North against Kenya as part of the South.

4.5.2 Developed countries and the waste problem

⁴⁴⁷ *Ibid.*

⁴⁴⁸ *Ibid.*

⁴⁴⁹ *Ibid.*

⁴⁵⁰ *Ibid.*

⁴⁵¹ "States have in accordance with the Charter of the United Nations and the principles of international law...the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction". See Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) UN Doc.A/Conf.48/14/Rev1(1973); (1972) 11 *ILM* 1416.

The dumping of toxic waste in Africa by the North (the West) has become a social, political, and legal issue that has precipitated conflict over the years.⁴⁵² While the West is the hub of industrialisation, it is also the ‘mastermind’ of environmental injustices in disposing of toxic waste in Africa. This practice has been encapsulated in various terms such as ‘environmental colonialism’, ‘environmental apartheid’, and ‘environmental racism’.⁴⁵³

Toxic waste is a massive problem in the West. During the past 30 years, the Western world has been faced by a waste dilemma which has posed acute challenges regarding waste disposal and clean-up.⁴⁵⁴ In studies conducted more than twenty years ago in 1994, it was estimated that there were more than 50 000 sites covering between 47 000 and 95 000 square kilometres already contaminated by hazardous waste in Europe, where many countries have spent mammoth amounts of money to address the problem.⁴⁵⁵ A country such as the Netherlands has spent over a billion dollars in an attempt to minimise her toxic waste, but still has to contend with hazardous emissions and disposal of toxic ash.⁴⁵⁶ On an annual basis Europe generates some three billion tonnes of hazardous waste.⁴⁵⁷

Public pressure against toxic waste generation and the adoption of strict regulation of toxic waste have made toxic waste disposal and clean-up in Europe a costly exercise. As a consequence, it is more economical for companies to transport and dump the

⁴⁵²Greenpeace “The Toxic Ships” available at <http://www.greenpeace.it/Report-The-toxic-ship.pdf> (date of use: 15 August 2016).

⁴⁵³Lipmann “Trade in Hazardous Waste: Environmental Justice vs Economic Growth” paper delivered at the Conference on Environmental Justice, Melbourne 1998 page unnumbered available at www.archive.ban.org/library/lipman.html (date of use: 18 February 2018).

⁴⁵⁴Redfern “US Dumping Toxic Waste in Africa; Radioactive Materials Dumped on Somalia Coast, Nigerian and Haitian” available at <http://www.afroarticles.com/article-dashboard/Article/EU--US-Dumping-Toxic-Waste-in-Africa--Radioactive-Materials-Dumped-on-Somalia-Coast--Nigerian-and-Haitian-Beaches/210994EU> (date of use: 16 July 2016).

⁴⁵⁵European Environment Agency “Europe’s Environment: The Debris Assessment” (1994) 36 available at <http://www.unidadlatinanj.org/e/e/europes-environment-the-dobris-assessment.pdf> (date of use: 18 February 2018).

⁴⁵⁶Ibid.

⁴⁵⁷In 2008, the total generation of waste in the European Union amounted to 2,62 billion tonnes. In the years 2004 and 2006 respectively, the EU total waste generation amounted to 2,68 billion tonnes and 2,73 billion tonnes. Eurostat “Statistics Explained” available at http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Waste_statistics (date of use: 30 July 2016).

waste in another less-regulated country than to pay for waste removal in Europe.⁴⁵⁸ The average cost of waste disposal in Europe is US\$ 1000 a tonne while in Africa it costs as little as US\$ 2,50 a tonne⁴⁵⁹ in that few, if any, treatment processes apply in many so-called 'Third World' countries.

Third World countries have become the dumping grounds for the toxic waste generated by developed countries and, as a result, have been turned into the most vulnerable countries in the world today. Canada alone, for example, reported shipping 20 581 metric tonnes of non-ferrous metal scrap and residue, and 11 691 tonnes of plastic waste to Asian countries in 1992. The United States exported over 17 000 tonnes of lead and plastic scrap to Asia between January and July 1993 alone.⁴⁶⁰ Through a lack of technical awareness, proper watchdog mechanisms, and political will, the recipient states give little or no consideration to the problem.

African countries – especially war-torn and poverty-stricken states – have become the main victims of environmental injustices and the waste trade. The levels to which their environmental integrity has been compromised is exemplified by the fact that they are even willing to sell their territories for dumping in exchange for corrupt financial gains which at times may not even correspond to the actual value of the land. Africa is replete with cases of illicit waste trading. One example, in particular, is Guinea-Bissau, one of Africa's poorest nations, whose government agreed in 1988 to accept over fifteen million tonnes of toxic waste from European tanneries and pharmaceutical companies in exchange for US\$ 600 million, four times its Gross Domestic Product (GDP).⁴⁶¹ Although such deals appear lucrative in the short term, especially for countries

⁴⁵⁸It costs £1,70 a tonne to transport waste to Somalia, whereas waste disposal costs in Europe is about £670 a tonne. See Green Planet Ethics available at <http://greenplanetethics.com/wordpress/toxic-waste-what-is-toxic-waste-do-we-clean-it-up-or-illegally-dump-it-overseas/> (date of use: 23 August 2016).

⁴⁵⁹Abdulahi "Toxic Waste' behind Somali Piracy" available at <http://www.aljazeera.com/news/africa/2008/10/2008109174223218644.html> (date of use: 25 July 2016).

⁴⁶⁰Greenpeace International "The Basel Opportunity: Closing the Last Global Waste Dump" available at <http://www.skeptictank.org/treasure/GP3/LOBASEL.TXT> (date of use: 1 May 2017).

⁴⁶¹Ibid; Brooke "West Dumpers Turning to West Africa" available at <http://www.nytimes.com/1988/07/17/world/waste-dumpers-turning-to-west-africa.html?pagewanted=all> (Date of use: 1 May 2017).

struggling with their budgets (swapping debt for waste which amounts to substituting poverty for poison),⁴⁶² the long-term effects are profound.⁴⁶³ In 1999, Southern Somalia was paid US\$ 80 million to accept ten million tonnes of toxic waste⁴⁶⁴ which illustrates how fragmented war-torn countries engage in murky deals with developed economies in situations when 'receiving' countries experience budget restraints and upheaval.

In Africa, waste is often deposited on land, buried, or dumped in rivers or large bodies of water. Such disposal has disastrous consequences particularly for the area's flora and fauna.

Responsibility for the problem of waste handling and disposal remains a somewhat theatrical blame-shifting game. Who is responsible and who should remove the waste? Rather than handling the problem, the 'blame-game' continues.⁴⁶⁵ Waste dumping in developing countries can be laid at the door of environmental mismanagement; the negligence of government agencies (in both the recipient country and the country of origin); a lack of rigorous environmental management; the absence of environmental ethics; laxity in the application of regulations; and fraudulent practices by private waste companies.⁴⁶⁶

⁴⁶²Greenpeace International "The Basel Opportunity: Closing the Last Global Waste Dump" available at <http://www.skeptictank.org/treasure/GP3/LOBASEL.TXT> (date of use: 1 May 2017).

⁴⁶³Wayman "Toxic Waste Sites May Cause Health Problems for Millions" available at <https://www.sciencenews.org/article/toxic-waste-sites-may-cause-health-problems-millions> (date of use: 1 May 2017). Long exposure to toxic waste can lead to three outcomes: disease, disability, and death. Diseases include cancer, anaemia, and cardiovascular disease. Disability includes mental retardation and birth deformities.

⁴⁶⁴The deal was made between a Swiss Company, an Italian waste broker, and Somali nationals. Transparency Solutions "Evaluating Claims of Nuclear Waste Dumping in Somalia/Somaliland available at <http://transparencysolutions.co.uk/assets/nuclear-waste-dumping-claims.pdf> (date of use: 1 May 2017).

⁴⁶⁵A prominent example of Northern countries shipping waste to Southern countries is the case of Philadelphia, USA (North) and Haiti (South). The USA had ash from the incineration of toxic waste which they had nowhere to dump. Philadelphia decided to contract a private company to take care of the disposal of the ash. The company duly shipped the ash out of the USA and proceeded to dump it in various parts of the world, including Haiti. After debating for over ten years who was responsible for the waste and, therefore, should remove the waste dumped in Haiti, it was removed and taken back to a site just outside of Philadelphia, USA to be properly disposed of. Ridgeway "How Thousands of Tons of Philadelphia's Toxic Waste Ended Up on a Haitian Beach and What the City of New York Is Doing About It" available at http://www.ban.org/ban_news/dumping_on_Haiti.html (date of use: 20 August 2016).

⁴⁶⁶At least ten people died and thousands fell ill after chemical waste pumped from a tanker chartered by Trafigura, a huge petroleum trading company based in the Netherlands, was dumped across Abidjan, the

Some of the waste includes pharmaceuticals, explosives, used oil, mercury, lead, radioactive material, electronic waste, and sewage.⁴⁶⁷ International cartels handling European industrial waste have devised sophisticated mechanisms to disguise their merchandise. For example, the waste could be transported in containers with fake labels such as ‘fertilizer’ so as to mislead customs officials.⁴⁶⁸ Global North-South inequalities and inadequate regulation of waste movement and disposal by countries in the North, have resulted in the environmental burden falling predominantly to developing countries.⁴⁶⁹

Countries in which waste is dumped face increased health risks and the potential of ecological disaster. Agriculture – the lifeblood of the African continent – faces a bleak future as land, rivers and other open spaces are increasingly transformed into waste ‘burial sites’.⁴⁷⁰ Although comprehensive studies on the overall effect of the waste are yet to be undertaken, prevailing knowledge indicates that people who encounter these hazards can suffer severe burns, internal bleeding, birth defects, and endocrine disruption such as kidney failure; all potentially fatal.⁴⁷¹ While some of the more dangerous long-term effects have been established – including an increased risk of various forms of cancer⁴⁷² – in Africa, where waste dumping is usually clandestine, the full scale of the impact has yet to be established. The greatest danger, however, is that most local communities living in the vicinity of the dumpsites are completely oblivious to

capital of the Ivory Coast, in the main landfill and near poor neighbourhoods in 2006. Polgreen “Neglect and Fraud Blamed for Toxic Dumping in Ivory Coast”

available at <http://www.nytimes.com/2006/11/24/world/africa/24ivory.html> (date of use: 1 May 2017).

⁴⁶⁷Rutter “A Growing Concern: Hazardous Waste in Fertilizer” available at <http://newfarm.rodaleinstitute.org/depts/gleanings/0803/rutter.html> (date of use: 30 August 2016).

⁴⁶⁸Ibid.

⁴⁶⁹Peter “Race, Class, and the Global Politics of Environmental Inequality: Global Environmental Politics” available at <http://www.mitpressjournals.org/doi/abs/10.1162/1526380054794835> (date of use: 13 December 2017).

⁴⁷⁰Illegal dumping has environmental, social, and economic impact. Land which could have been used for economic purposes such as agriculture, is instead filled with toxic waste. See Government of South Africa “Quick Facts on Waste Management” available at https://www.environment.gov.za/sites/default/files/docs/waste_management_facts.pdf (date of use: 1 May 2017).

⁴⁷¹Jaishankar et al “Toxicity, Mechanism and Health Effects of some Heavy Metals” available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4427717/> (date of use: 1 May 2017).

⁴⁷²Jaishankar *ibid*.

the looming dangers.⁴⁷³ While certain toxins may exhibit discernible symptoms, a lack of proper understanding by communities of their poisoned environment and the possible connection between the environment and their health issues, make diagnosis difficult and treatment prolonged. Although dumping generally targets countries with weak governance, it nonetheless also occurs in the most marginalised localities where the poor live.⁴⁷⁴

Ultimately, poor and underprivileged countries pay the ecological debt of powerful states, which leads to a disproportionate sharing of the problem. Against the background of the magnitude and complexity of the problem, the poor experience the greatest threat and are, at the same time, the most ill-equipped to deal with the toxic burden.⁴⁷⁵

What follows is a discussion of what I term 'case studies' or practical examples of the impact of waste dumping on Kenya.

Kenya case 1: Toxic waste dumping along the East African coast

The Indian Ocean coastline is shared by several countries in the Eastern African region including Kenya and Somalia. In December 2005, an Asian tsunami washed containers containing hazardous waste believed to have emanated from Europe, ashore in Southern Somalia.⁴⁷⁶ According to a report from Common Community Care, a local non-governmental organisation, radioactive materials and hydrogen peroxide toxic wastes were found in different locations across Southern and Central Somalia.⁴⁷⁷ Swept ashore was a cocktail of tonnes of toxic waste which drifted onto the Somali beach from

⁴⁷³Environmental Justice Atlas "Somalia Toxic Waste Dumping" available at <https://ejatlas.org/conflict/somalia-toxic-waste-dumping-somalia> (date of use: 2 May 2017).

⁴⁷⁴Ibid.

⁴⁷⁵Ibid.

Ibid; Clayton "Somali's Secret Dumps of Toxic Waste Washed Ashore by Tsunami" available at <https://www.thetimes.co.uk/article/somalias-secret-dumps-of-toxic-waste-washed-ashore-by-tsunami-hk36dwtnp8j>. (date of use: 2 May 2017).

⁴⁷⁷Environmental Justice Atlas available at <https://ejatlas.org/conflict/somalia-toxic-waste-dumping-somalia> (date of use: 2 May 2017).

the Somali seabed. These included radioactive, chemical, and medical waste; lead; and heavy metals such as cadmium and mercury. This toxic concoction was found barely 200km from villages on the Kenyan side of the Kenya-Somali border. A United Nations' report indicated that a wide range of medical problems, including mouth bleeds, abdominal bleeding, unusual skin disorders, and breathing difficulties manifested in the neighbouring communities after this event.⁴⁷⁸

Kenya case 2: E-waste dumping in Kenya

Kenya has become the dumping ground for used electrical and electronic appliances originating in the developed world. These are often disguised as 'donations' or 'second hand goods',⁴⁷⁹ but have also simply been dumped openly in landfills. The Basel Network estimates that 80 per cent of the electronic waste in the United States is not recycled in that country but shipped to developing countries in Asia and Africa. This may be ascribed to the United States' refusal to ratify the Basel Convention on Movement of Transboundary Waste,⁴⁸⁰ and that it has no domestic legislation prohibiting the export of waste.⁴⁸¹

Most of this waste ends up in thriving informal repair markets, which have no capacity to deal safely with electronic waste. Crude methods are used to separate electrical waste – for example, simply tossing the equipment onto open fires to burn away unwanted materials such as plastic casings and unusable metals. This releases dangerous fumes such as carcinogens and neurotoxins high in toxic heavy metals such as cadmium and mercury, into the air. These fumes are usually associated with long-term health issues. Valuable minerals such as copper, iron, silicon, nickel, and gold can be extracted and

⁴⁷⁸UNEP "After the Tsunami: Rapid Environmental Assessment" 134 available at http://www.unep.org/tsunami/reports/TSUNAMI_report_complete.pdf (date of use: 16 April 2016).

⁴⁷⁹Asimwe "E-waste Management in East African Community" available at http://www.spidercenter.org/sites/default/files/master_theses_sponsored/Edgar_Napoleon.pdf (date of use: 15 August 2016).

⁴⁸⁰Basel Convention on the Control of Transboundary Movements of Wastes and Their Disposal (1989) 28 *ILM* 657, 1673 UNTS 125.

⁴⁸¹The United States is the only industrialised country in the world that has not ratified the treaty. See Greenpeace International "Where Does E-waste End up?" available at <http://www.greenpeace.org/international/en/campaigns/detox/electronics/the-e-waste-problem/where-does-e-waste-end-up/> (date of use: 2 May 2017); Campbell "Where Does America's E-waste End up?" available at <http://www.pbs.org/newshour/updates/america-e-waste-gps-tracker-tells-all-earthfix/> (date of use: 3 May 2017).

so fuel a soaring local market for obsolete electronics. Poor people (particularly the youth and children) are engaged in the recycling market oblivious of the deadly effects posed by the waste.⁴⁸²

Due to the magnitude of the E-waste problem and the local interest in its market, East Africa's first E-waste management plant was established at Embakasi, Kenya in 2008. The plant is, however, still in its infancy.⁴⁸³ The purpose of the plant is to dismantle and separate the contents of obsolete electronic appliances. The workers are also equipped and educated on how to handle and separate metals such as aluminium and copper, which can be recycled locally, while motherboards, for example, are shipped to Asia and Europe for disposal. The workers are also provided with proper waste-handling equipment, including heavy duty protection.⁴⁸⁴ This is positive evidence of a pro-active role led by African countries in addressing the waste problem. However, such a move is a mere reactive 'solution' based on the results of waste dumping without addressing the root problem of environmental injustice.

In March 2012, the Pan-African Forum on E-waste was held in Nairobi under the auspices of the Secretariat of the Basel Convention, to address the problem of the movement of E-waste to Africa. The Forum brought together relevant stakeholders from the governments of Africa, international organisations, academia, and the private sector. It sought to identify sustainable solutions to E-waste in Africa, and considered the need for regulatory frameworks for establishing international collaboration. Although the forum acknowledged sustainable management of E-waste as a tool in generating green jobs and combating poverty in Africa, it was also categorical in finding that environmental safeguards should be promoted on the continent in the recycling, collection, and processing of E-waste. The forum further came up with action plans to improve sound environmental management of E-waste in Africa – for example, the need

⁴⁸²*The Guardian* "Trading in Trash: Nairobi's E-waste Entrepreneurs" available at <https://www.theguardian.com/sustainable-business/gallery/2017/feb/01/nairobi-kenya-electricals-e-waste-recycling-safaricom-ibm-samsung-in-pictures> (date of use: 2 May 2016).

⁴⁸³Wanjiku "Kenya Opens First E-waste Management Plant" available at <http://www.networkworld.com/article/2274615/data-center/kenya-opens-first-e-waste-management-plant.html> (date of use: 2 May 2017).

⁴⁸⁴Ibid.

to develop national systems to improve safe collection, recycling, transport, storage, and disposal of E-waste.⁴⁸⁵

Kenya case 3: Dumping of blacklisted pesticides in Kenya

Agriculture is the backbone of the Kenyan economy. Pesticide dumping by foreign companies is a serious problem affecting the agricultural sector. The pesticides are past their 'sell-by' dates, illicit, and most significantly, have dangerous side effects for the ecology and human health.⁴⁸⁶ These products are available at a cheap retail price or at no cost to farmers. The irony, however, is that Kenya is the world's leading producer and exporter of pyrethrin.⁴⁸⁷

Kenya is one of the African countries heavily contaminated by obsolete pesticides.⁴⁸⁸ The process of disposing of obsolete pesticides is slow and expensive and Kenya lacks the appropriate technology for such an exercise which requires high-temperature incinerators.⁴⁸⁹ Most at risk of pesticide poisoning are poor and vulnerable small-scale farmers. A good number of the outdated pesticides are reported to be amongst the dreaded persistent organic pollutants (POPs) – the 'dirty dozen' pesticides which have been banned worldwide.⁴⁹⁰

⁴⁸⁵Pan-African Forum on E-waste 14-16 March 2012 UNEP Headquarters, Nairobi, Kenya Report of the meeting at 96, 98 available at https://www.basel.org/ng/index.php/conference-abstracts/doc_download/1_28-draft-report-of-pan-african-forum-on-e-waste-14-16-march-2012-unesp-headquarters-nairobi-kenya (date of use: 2 May 2017).

⁴⁸⁶Kabukuru "An investigation on toxic dumping in East Africa" *Shout-Africa News East Africa* 20-03-2011 available at <http://www.shout-africa.com/news/east-africa-toxic-dumping-in-east-africa> (date of use: 3 May 2017).

⁴⁸⁷Pyrethrum is one of the cash crops that was introduced into Kenya by European farmers who settled in the highland regions of the country. It is grown for its white flowers. The flowers contain a substance called pyrethrine which is used in the manufacture of insecticides. Kenya produces 70 per cent of the world consumption. Epza Kenya "Kenya's Pyrethrum Industry; Export Processing Zones Authority" available at <http://www.epzakenya.com/UserFiles/files/KenyaPyrethrum.pdf> (date of use: 3 May 2017); Za Kenya "Uses of Pyrethrum in Kenya" available at <http://www.zakenya.com/tag/uses-of-pyrethrum-in-kenya.html> (date of use: 3 May 2017).

⁴⁸⁸Diplomat East Africa "Merchants of peril – deadly pesticides pose death, pollution for EA" available at <http://www.diplomateastafrica.com> (date of use: 23 August 2016).

⁴⁸⁹Kabukuru "An investigation on toxic dumping in East Africa" *Shout-Africa News East Africa*. 2011-03-2011 available at <http://www.shout-africa.com/news/east-africa-toxic-dumping-in-east-africa> (date of use: 3 May 2017).

⁴⁹⁰Ibid.

In 2009, Kenya banned the use of *Furadan* which was retailing at only US\$ 1,25 per container after reports from conservationists revealed a decline in wild-life.⁴⁹¹ Another example is *Carbofuran*, a deadly insect-killing pesticide which was phased out in the USA in 1991 but traded to Kenya despite its dangerous effects on the environment.⁴⁹²

4.5.2.1 The Basel Convention on Trans-boundary Waste and the betrayal of Africa

The Basel Convention on the Control of Trans-boundary Movements of Hazardous Waste and Their Disposal⁴⁹³ is an international treaty that was designed to reduce the movement of hazardous waste between states, and specifically to prevent the transfer of hazardous waste from developed to less-developed countries. It does not, however, address the movement of radioactive waste. The Convention is also intended to minimise the amount and toxicity of waste generated, to ensure its environmentally sound management as closely as possible to the source of generation, and to assist less-developed countries in environmentally sound management of the hazardous and other waste they generate.⁴⁹⁴

In 1988, some 134 states adopted the Basel Convention, drawn up in the Swiss city, which set out to control the export of most forms of hazardous waste from industrialised states to developing countries. The Convention was opened for signature on 22 March 1989, and entered into force on 5 May 1992. The treaty is not legally binding on a country unless that country has adopted it. Four countries that have not adopted the Basel Convention are: the USA, Australia, New Zealand, and Canada.⁴⁹⁵ The laxity in the ratification and implementation of the Convention by key developed nations that are

⁴⁹¹Ibid.

⁴⁹²Mynott "Insecticide 'killing Kenya lions" BBC News, Kenya available at <http://news.bbc.co.uk/2/hi/7460008.stm> (date of use: 30 April 2016).

⁴⁹³(1989) 28 *ILM* 657, 1673 UNTS 125.

⁴⁹⁴Preamble.

⁴⁹⁵Status of ratification of the Convention available at <http://www.basel.int/Countries/StatusofRatifications/PartiesSignatories/tabid/4499/Default.aspx> (date of use: 3 May 2017).

also leading producers of toxic wastes, could mean that the battle against the transport of the environmental burden to poor, vulnerable states is far from won.⁴⁹⁶

Moreover, the effectiveness of the Convention in protecting developing countries from the transportation of hazardous waste is debatable, as it does not expressly outlaw the export of hazardous wastes or their actual transportation thus making its provisions not overly demanding in their enforcement.⁴⁹⁷ For instance, the Convention merely states that illegal traffic in hazardous wastes is criminal without providing an enforcement mechanism/strategy or penalties.⁴⁹⁸ The dumping of toxic waste in Africa has been going on for years and continues despite its being illegal since 1992.⁴⁹⁹

4.5.2.2 Bamako Convention: Africa's prohibition on the import of waste

The Bamako Convention,⁵⁰⁰ to which Kenya is a signatory, is a treaty of African nations prohibiting the import of any hazardous (including radioactive) waste by member states. The Convention was negotiated by twelve states of the Organisation of African Unity (OAU – now the African Union (AU)) at Bamako, Mali in January 1991, and came into force in 1998.⁵⁰¹

The Convention arose from the failure of the Basel Convention effectively to prohibit the movement of hazardous waste to less-developed countries and from the realisation that many developed nations were exporting toxic waste to Africa. An important event that provided the impetus for concluding the Convention occurred in 1987. This was the

⁴⁹⁶Global economic inequity must be remedied before there can be any effective controls on hazardous waste. Cusack (1990) 5/2 *American University Law Review* 393, 423.

⁴⁹⁷Opponents of the Convention believe that the document should outlaw the transboundary movement of hazardous waste instead of merely regulating it. There is also the argument that the Convention's definition of hazardous wastes is not broad enough for its effective protection. Kirby (1994) 24/2 *Georgia Journal of International and Comparative Law* 291, 297.

⁴⁹⁸Article 3.

⁴⁹⁹Ekine "Toxic Waste" available at [//newint.org/blog/majority/2009/07/01/toxic-waste/](http://newint.org/blog/majority/2009/07/01/toxic-waste/) (date of use: 3 May 2017).

⁵⁰⁰Bamako Convention on the Ban on the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, Bamako, Mali, 30 January 1991.

⁵⁰¹UNEP "Bamako Convention" available at <http://staging.unep.org/delc/BamakoConvention/tabid/106390/Default.aspx> (date of use: 3 May 2017).

importation into Nigeria of 18 000 barrels (2 900 m³) of hazardous waste from a number of Italian companies which had agreed to pay a local Nigerian farmer US\$ 100 per month for storage. The barrels, found in storage in the port of Lagos, contained toxic waste including polychlorinated biphenyls (PCBs).⁵⁰²

The Bamako Convention uses a format and language similar to that of the Basel Convention, but is much stronger in prohibiting all imports of hazardous waste. In addition, it does not allow for exceptions as regards certain hazardous waste – as, for example, the exception for radioactive materials in the Basel Convention.⁵⁰³

4.5.3 *Climate change and injustice towards the developing world*

‘Climate change’ is one of the global problems today that is hitting the poorest and vulnerable first and the hardest.⁵⁰⁴ Africa, despite its being least responsible for the developing calamity, is bearing the risk and heavy costs of climate change.⁵⁰⁵ While developed countries which have the resources, technology, and political power are in a position to cope and adapt, Africa is least able to deal with its consequences and meet the costs of adaptation.⁵⁰⁶ The potential effects are so far-reaching and severe that it is

⁵⁰²Bamako Conference of Parties (COP) 1 available at <http://sdg.iisd.org/news/bamako-cop-1-decides-unep-to-host-secretariat/> (date of use: 3 May 2017). PCBs are highly toxic waste associated with the origin of the concept of environmental justice. PCBs were dumped along the roadsides in Warren County, Northern Carolina (USA), a low-income area. This created a social outcry for an equitable environmental policy. See Chapter 2 of this dissertation for the origin of the Environmental Justice Movement.

⁵⁰³Bamako COP1 *ibid*; the Bamako Convention has more stringent standards than the Basel Convention, but it lacks the funding and monitoring procedures of the Basel Convention. Kirby (1994) 24/2 *Georgia Journal of International and Comparative Law* 299.

⁵⁰⁴World Bank “Climate Change Complicates Efforts to End Poverty” available at <http://www.worldbank.org/en/news/feature/2015/02/06/climate-change-complicates-efforts-end-poverty> (date of use: 3 May 2017).

⁵⁰⁵BBC Policy Briefing “Least Responsible, Most Affected, Least Informed: Public Understanding of Climate Change in Africa” available at http://downloads.bbc.co.uk/worldservice/pdf/wstrust/PB_climatechange_web.pdf (date of use: 3 May 2017).

⁵⁰⁶United Nations “Sustainable Development Goals: Goal 13- Take Urgent Action to Combat Climate Change and Its Impact” available at <http://www.un.org/sustainabledevelopment/climate-change-2/> (date of use: 3 May 2017); Fanelli (2014) 25 *Alternative Routes: A Journal of Critical Social Research* 1; Skole “The Greatest Challenges of Our Time” available at <https://api.globalchallenges.org/static/files/the-greatest-challenges-of-our-time.pdf> (date of use: 3 May 2017).

believed by some to be the most significant environmental challenge ever faced by the planet.⁵⁰⁷

Climate change is caused by the emission of greenhouse gases which result from the burning of fossil fuels (such as coal) by industrialised countries. For example the USA and the EU, with only ten per cent of the world's population, are responsible for producing 45 per cent of all carbon dioxide (CO₂) emissions, the principal greenhouse gas which accounts for 80 per cent of global warming.⁵⁰⁸

The Intergovernmental Panel for Climate Change (IPCC) has indicated that natural systems across the planet are being affected by extreme temperatures. The report also points out that weather patterns have become more unpredictable.⁵⁰⁹ The main environmental changes taking place across the world include rising temperatures, decreasing rainfall at sub-tropical latitudes, reduced water supplies, desertification, and wildfires. On the other hand, rising sea levels, rising precipitation at high altitudes, floods, changes in river run-off patterns, among others, are also experienced.⁵¹⁰ Projections suggest that the number of weather-related disasters is set to triple by 2030.⁵¹¹ Human activity such as agriculture has become less sustainable leading to a reduction in food production and security. The UN's Food and Agriculture Organisation

⁵⁰⁷Some of the effects of climate change include: rises in sea level due to increased ocean temperatures which cause expansion of the oceans; floods; strong winds and tropical cyclones (including hurricanes and typhoons); ocean acidification resulting to serious harm to marine organisms; biodiversity loss and extinction; heat waves; droughts; water scarcity and food shortages. Technological adaptation range from construction of sea defences and flood-proof houses which are not readily affordable in poor countries. United Nations Framework Convention on Climate Change (UNFCCC) "Climate Change: Impacts, Vulnerabilities and Adaptation in Developing Countries" available at <https://unfccc.int/resource/docs/publications/impacts.pdf> (date of use: 3 May 2017); United Nations Sustainable Development Goals available at <http://www.un.org/sustainabledevelopment/climate-change-2/> (date of use: 3 May 2017).

⁵⁰⁸Bachram "Climate Fraud and Carbon Colonialism: The new trade in greenhouse gasses" available at <http://www.carbontradewatch.org/pubs/cns.pdf> (date of use: 2 May 2017).

⁵⁰⁹Intergovernmental Panel on Climate Change (IPCC) "Summary for Policymakers in Climate Change 2007: Impacts, Adaptation and Vulnerability, Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change" (2007) at 415 available at <https://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-spm.pdf> (date of use: 18 February 2018).

⁵¹⁰United Nations Framework Convention on Climate Change (UNFCCC) "Climate Change: Impacts, Vulnerabilities and Adaptation in Developing Countries" available at <https://unfccc.int/resource/docs/publications/impacts.pdf> (date of use: 3 May 2017).

⁵¹¹Global Humanitarian Forum "The Anatomy of a Silent Crisis – Human Impact Report: Climate Change" (2009) at 13 available at www.ghf-ge.org/human-impact-report.pdf (date of use: 10 February 2018).

(FAO) reported that over one billion people are suffering from hunger worldwide, and most of these are in developing countries.⁵¹²

Kenya's case 4: Unsustainable agriculture and food insecurity

In Kenya the effect of climate change is characterised by persistent drought, less penetrating rain, and an increase in torrential rainstorms and floods. The days are getting hotter in Kenya, with 'hot days' up by 57 every year, equal to a rise of fifteen per cent between 1960 and 2003.⁵¹³ Kenya has experienced both prolonged drought and intense flooding annually since 2000.⁵¹⁴

Dwindling agricultural production has had a severe impact on food security in the country. In 2011, for example, President Mwai Kibaki declared drought a national disaster.⁵¹⁵ A decrease in food production has resulted in increased prices, further heightening the hunger tragedy. The recurrent droughts have contributed to depriving already vulnerable people of their livelihoods and created yet more poverty.

Kenya case 5: The melting glaciers of Mount Kenya⁵¹⁶

Mount Kenya is a two-peaked volcanic mountain dominating the landscape of the Kenyan highlands. It is the second highest mountain in Africa, and an historic mountain

⁵¹²FAO "The State of Food Insecurity in the World: Economic Crises –Impacts and Lessons Learned" (2009) page unnumbered available at http://www.fao.org/fileadmin/templates/CFS_2009/SOFI09_flyer_En.pdf

(date of use: 18 February 2018).

⁵¹³UNICEF "Climate change in Kenya: focus on the children" (2010) at 3 available at <https://www.unicef.org.uk/publications/Climate-Change-in-Kenya-Focus-on-Children/> (date of use: 18 February 2018).

⁵¹⁴Organisation for Economic Corporation and Development (OECD) "Climate Change Financing and Aid Effectiveness: Kenya Case Study" (2011) at 13 available at www.oecd.org/dac/environment-development/48458443.pdf (date of use: 18 February 2018).

⁵¹⁵Osano (2012) 33/July *Africa Portal* 3.

⁵¹⁶Glaciers are an important source of water and seasonally replenish rivers and ground water. Reduction in glaciers affects the ecosystem, agriculture and hydro-electricity supply. Glaciers in Africa are found in East Africa near the equator. They are located at Mt Kenya in Kenya; Mt Kilimanjaro in Tanzania; and the Ruwenzori Range in Uganda and the Democratic Republic of Congo. UNEP "Africa without Glaciers" available at https://na.unep.net/geas/getUNEPPageWithArticleIDScript.php?article_id=90 (date of use: 3 May 2016).

famous in Kenya for the hoisting of the Kenyan national flag on its Lenana Peak in 1963 when Kenya gained independence.⁵¹⁷ The melting glacier on the snow-capped Mount Kenya is a striking example of the impact of changing climatic conditions. The ice and snow covering the mountain which can be seen for hundreds of kilometres rising above the surrounding savannah, are vanishing as a result of climate change.⁵¹⁸

The mountain once had a 200 km² surface area covered in ice and snow. However, climate change ('global warming') has caused massive thinning and melting and has reduced this to only 0,4km² as at 2000. In the 1900s, there were eighteen 'cirque' and 'valley glaciers' on the mountain summit, but today only seven remain and they are under imminent threat of disappearing.⁵¹⁹ In addition to its awe and beauty, the glacial melt has significantly affected the tourism industry, an economic lifeline for Kenya. Many people, particularly women, thrive on the income from tourist curio shops located within the vicinity of this historical site.⁵²⁰ Reduced rainfall on and around the mountain area has also resulted in a considerable reduction in water levels. Mount Kenya is a vital water catchment area for the country, supplying the Ewaso Nyiro and the Tana – Kenya's largest rivers. Mount Kenya's contribution to the Tana River is critical for hydropower and agriculture.⁵²¹

⁵¹⁷*Daily Nation* "Son Emulates Father to Hoist Flag on Mt. Kenya" available at <http://www.nation.co.ke/news/Son-emulates-his-father-to-hoist-flag-on-Mt-Kenya--/1056-999254-u0pcafz/index.html> (date of use: 3 May 2017).

⁵¹⁸Voda et al "Climate change effects on Mount Kenya's Glaciers" available at <http://www.wseas.us/e-library/conferences/2008/bucharest2/ncu/ncu12.pdf> (date of use: 3 May 2017); UNEP "Kenya: Atlas of our changing environment" (2009) available at http://staging.unep.org/pdf/Kenya_Atlas_Full_EN_72dpi.pdf (date of use; 3 May 2017); *New York Times* "Mount Kenya's Vanishing Glaciers" available at https://www.nytimes.com/2014/12/21/magazine/mount-kenyas-vanishing-glaciers.html?_r=0 (date of use: 3 May 2017).

⁵¹⁹The info list "Retreat of Glaciers since 1850" available at <http://www.theinfolist.com/php/SummaryGet.php?FindGo=Retreat%20of%20glaciers%20since%201850> (date of use: 4 May 2017); Young & Hastenrath "1991 U.S Geological Survey" Professional Paper at 54-6 available at <https://pubs.usgs.gov/pp/p1386g/front.pdf> (date of use: 3 May 2017). A 'cirque glacier' is formed in a cirque, a bowl-shaped depression generally high on the side of a mountain. 'Valley glaciers' are streams of flowing ice that are confined within steep-walled valleys. The downward erosive action of the ice carves the valley into a broad U shape. See *Glossary of Glacier Terminology* available at <https://pubs.usgs.gov/of/2004/1216/text.html> (date of use: 3 May 2017).

⁵²⁰UNEP "Kenya: Atlas of our changing environment" (2009) available at http://staging.unep.org/pdf/Kenya_Atlas_Full_EN_72dpi.pdf (date of use; 3 May 2017).

⁵²¹The Tana River supplies water to numerous hydropower stations in Kenya as well as to major irrigation schemes such as the Mwea rice scheme, the Bura settlement scheme, and the Tana Delta irrigation scheme. The Ewaso Nyiro River is the main river crossing the semi-arid Laikipia plateau and the

4.5.3.1 The Kyoto Protocol: A project doomed to fail?

The 1997 Kyoto Protocol⁵²² is a legally binding treaty adopted to control greenhouse emissions by industrialised states. The Kyoto Protocol sets specific emission-reduction targets for each industrialised nation, and also provides for financial support to poor countries by the polluting countries. Its first commitment period started in 2008 and ended in 2012. At the core of the Protocol was the agreement to reduce emissions by an average of 5,2 per cent by the year 2012. One hundred and ninety-one states, including Kenya, have signed and ratified the Protocol. The only party state that has signed the treaty but has no intention of ratifying it is the USA, one of the world's top polluters.⁵²³ The USA government claimed that ratifying the treaty would have a severe impact on the economy of the country.⁵²⁴ Canada renounced the Convention effectively on 15 December 2012 and ceased to be a member from that date. The decision to withdraw from the treaty was to save the government an estimated \$14 billion in penalties prescribed by the treaty for non-adherence. Both the USA and Canada have been criticised for abdicating their international obligations to cut carbon emissions despite being among the highest carbon emitters.⁵²⁵

Emissions trading is a flexible mechanism that the Kyoto Protocol provides to enable polluting countries to meet their greenhouse gas emission targets.⁵²⁶ However, this system is hugely controversial and has the potential to exacerbate environmental and social injustice. The arrangement establishes a process for the buying and selling of

Samburu plains and deserts beyond. UNEP "Kenya: Atlas of our changing environment" (2009) available at http://staging.unep.org/pdf/Kenya_Atlas_Full_EN_72dpi.pdf (date of use; 3 May 2017).

⁵²²Kyoto Protocol to the United Nations Framework Convention on Climate Change (1998) 37 *ILM* 22 10 Dec 1997 UN Doc FCCC/CP/1997/7/Add.1 available at <https://unfccc.int/resource/docs/convkp/kpeng.pdf> (date of use: 18 February 2018).

⁵²³The USA accounts for more than twenty per cent of the world's greenhouse gas and a quarter of the world's economic input. See Brunel 2004 *European Journal of International Law* 618.

⁵²⁴NBC News "Bush: Kyoto Protocol would have hurt economy" available at <http://www.nbcnews.com/id/8422343/ns/politics/t/bush-kyoto-treaty-would-have-hurt-economy/> (date of use: 3 May 2017).

⁵²⁵CBC News "Canada Pulls out of Kyoto Protocol" available at <http://www.cbc.ca/news/politics/canada-pulls-out-of-kyoto-protocol-1.999072> (date of use: 3 May 2017); BBC News Q & A "The USA and Climate Change" available at <http://news.bbc.co.uk/2/hi/americas/1820523.stm> (date of use: 3 May 2017).

⁵²⁶Damro & Luaces-Mendez "Kyoto Protocol Emissions Trading System" available at <http://aei.pitt.edu/874/1/Kyoto.pdf> (date of use: 3 May 2017).

'permits to pollute' as though they were akin to any other international commodity. A fundamental problem with emissions trading is its tendency to perpetuate and aggravate environmental injustice by creating a property rights regime for the atmosphere, controlled by rich and politically powerful polluters.⁵²⁷

Through this mechanism, polluting countries are allocated a set number of 'emissions credits' with which to meet their pollution limits. Several possibilities then exist for a polluting country. These are:⁵²⁸

1. A polluter that has satisfied its Kyoto pollution limit but still has excess pollution credits, can sell its excess carbon allowance to countries struggling to meet their limits.
2. A polluter that has satisfied the Kyoto pollution limit but still has excess carbon allowance credits can save or bank the remaining credits for the next time period.
3. The polluter may also use up its whole allowance in the allotted time period by excessive polluting. In order to remain in compliance, it must purchase spare credits from another polluter that has not used up its full allowance.
4. The polluter can invest in pollution reduction schemes in other countries and earn credits which can then be sold, banked, or used to make up any deficit in its original allowance.⁵²⁹

The general failure of the Kyoto Protocol to reduce global carbon emissions and adequately and effectively deal with climate change, is representative of wider issues of inequity and injustice that permeate international relationships. Legal, moral, and political issues are intrinsic to the global climate-change debate and world environmental negotiations.⁵³⁰ Over the past twenty years, outcomes in international

⁵²⁷Bachram "Climate Fraud and Carbon Colonialism: The new trade in greenhouse gasses" available at <http://www.carbontradewatch.org/pubs/cns.pdf> (date of use: 18 February 2018).

⁵²⁸Ibid 3-4.

⁵²⁹International Emissions Trading Association website http://www.ieta.org/Documents/New_Documents/StatusonDomesticTradingSchemes_GeirHoybe.htm (date of use: 15 August 2016).

⁵³⁰Inequality and justice have been central issues at every major environmental conference since the 1972 UN Conference on the Human Environment in Stockholm, Sweden; Nairobi in 1982; Rio in 1992;

environmental politics have been shaped by material self-interest, bargaining power, and the ability to strong-arm weaker states.⁵³¹

4.5.3.2 Towards a new climate change regime: Durban, 2011

The objective of the United Nations Climate Change Conference held in Durban, South Africa, was to secure a second commitment period and a new universal legal agreement on the possibility of enhanced mechanisms and rules of adherence to curb greenhouse gas emissions. This was necessary as the Kyoto Protocol's first commitment term (2008–2012) was ending on 31 December 2012.⁵³² Although the governments represented at Durban were ambitious enough to agree to the conclusion of a further climate change treaty by 2015, and to the creation of a 'kitty' through the Green Climate Fund (GCF) to support poor and most vulnerable countries to adapt to climate change impacts by contributing US\$ 100bn a year, certain salient issues remain unresolved which may yet see the collapse of the new climate regime. These include: the required commitment to do away with the contentious emissions-trading system through a watertight emission cut-back regulation; the need to bring on board politically powerful states that are large-scale contributors to climate change, such as the USA which never ratified the Kyoto Protocol; and the need to deal with the prevailing historical inequalities and underlying political problems in promoting global climate justice.⁵³³

Criticism of a measure of reluctance and stalling can be levelled against previous climate change negotiations by developed countries, and things were no different in

Rio in 1992; Rio + 5 in New York and Johannesburg in 2002, and so on. Parks & Roberts (2008) 21/ 4 *Cambridge Review of International Affairs* 622.

⁵³¹ Parks & Roberts *ibid.*

⁵³² United Nations Framework Convention on Climate Change (UNFCCC) "Durban: Towards full implementation of the UN Climate Change Convention" available at http://unfccc.int/key_steps/durban_outcomes/items/6825.php (date of use: 3 May 2017).

⁵³³ *Ephemerajournal* "Durban's Conference of Polluters, Market Failure and Critic Failure" available at <http://www.ephemerajournal.org/contribution/durban%E2%80%99s-conference-polluters-market-failure-and-critic-failure> (date of use: 10 May 2017); Global Issues "COP 17- Durban Climate Conference" available at <http://www.globalissues.org/article/797/cop17-durban-climate-conference> (date of use: 10 May 2017).

Durban. Despite the urgency of the climate change crisis, industrialised countries were reluctant to raise their pledges to cut back their emissions, with some countries even stating that they would not participate in the second commitment period.⁵³⁴ By September 2012, during the Bangkok climate talks in preparation for the next climate change negotiations in December 2012 in Doha, Qatar (the follow-up to the Durban Conference), several countries⁵³⁵ had not yet submitted their Quantified Emissions Limitation and Reduction Objectives.⁵³⁶ The Doha Amendment to the Kyoto Protocol adopted in 2012 establishes the Kyoto Protocol's second commitment period (from 2013 until 2020). As at 12 April 2017, only 77 countries had ratified the Doha Amendment, again marking a lack of urgency in tackling the climate change global catastrophe.⁵³⁷ This negates the protection of the atmospheric resource for the benefit of all the countries of the world, emphasised at the Rio de Janeiro Summit on Sustainable Development in June 2012.⁵³⁸

The Paris Climate Agreement was negotiated by world leaders of 195 countries within the United Nations Framework Convention on Climate Change gathering in Paris from 30 November to 13 December 2015. The agreement was adopted on 12 December

⁵³⁴These are Japan and the Russian Federation. United Nations Framework Convention on Climate Change (UNFCCC) "Outcome of the work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol at its sixteenth session" at 6 available at

https://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/awgkp_outcome.pdf (date of use: 10 May 2017).

⁵³⁵These include Australia, New Zealand, Monaco, Kazakhstan and Ukraine. Economic Times Commentary "Environmental Issues: Time to Abandon Blame Games and Become Proactive" available at <http://economictimes.indiatimes.com/opinion/et-commentary/environmental-issues-time-to-abandon-blame-games-and-become-proactive/articleshow/17621136.cms?inttarget=no> (date of use: 10 May 2017); Boston "A New Global Climate Change Treaty: Can Humanity Deliver? Our Challenge after Durban 2015" paper delivered at University of Otago 14 March 2012 at 12 available at www.otago.ac.nz/ctpi/otago031423.pdf (date of use: 18 February 2018).

⁵³⁶Quantified Emission Limitation or Reduction Objective (QELRO) is a stated commitment generally in percentage form that represents a substantive carbon emission reduction by a country for a given period. Australian Government "Quantified Emission Limitation or Reduction Objective (QELRO)" available at <http://dfat.gov.au/international-relations/themes/climate-change/submissions/Pages/quantified-emission-limitation-or-reduction-objective-qelro.aspx> (date of use: 3 May 2017).

⁵³⁷United Nations Framework Convention on Climate Change (UNFCCC) "Status of the Doha Amendment" available at http://unfccc.int/kyoto_protocol/doha_amendment/items/7362.php (date of use: 3 May 2017).

⁵³⁸Pisano, Endl & Beger "The Rio+20 Conference 2012: Objectives, processes and outcomes" 2012 available at http://www.sd-network.eu/quarterly%20reports/report%20files/pdf/2012-June-The-Rio+20_Conference_2012.pdf (date of use: 10 May 2017).

2015 with the aim of reducing greenhouse gas emissions so as to reduce the risks and impact of climate change.^{539 540}

The Paris deal is the new world's first comprehensive climate agreement but will only take effect in 2020.⁵⁴¹ The delay in the treaty taking effect is in sharp contrast to scientific evidence warning that more urgent action is needed. It creates a vacuum of vulnerability for poor countries in dealing with the menace of climate change.⁵⁴² On June 1, 2017, United States President, Donald Trump, announced that the USA would cease all participation in the 2015 Paris Agreement on climate change mitigation. Trump stated that: 'The Paris accord will undermine [the US] economy', and 'puts [the US] at a permanent disadvantage'.⁵⁴³ There is no doubt that USA's withdrawal will make it more challenging for the world to reach the environmental targets it set in reducing climate change impacts in the Paris Agreement. The withdrawal by the USA has been regarded as an 'extremely isolationist and hasty move when the planet needs coordinated strategies to overcome and fight the effects of climate change'.⁵⁴⁴

4.5.4 *Inequitable trade globalisation and its link to environmental injustice*

In the age of growing trade integration, mounting inequalities between rich and poor countries have been brought into sharp focus. This is attributable to a neo-liberal

⁵³⁹United Nations Framework Convention on Climate Change (UNFCCC) "Paris Agreement: Status of Ratification" available at http://unfccc.int/paris_agreement/items/9444.php (date of use: 13 May 2017).

⁵⁴⁰Paris Agreement available at <https://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf> (date of use: 3 May 2017).

⁵⁴¹On 5 October 2016, the threshold for entry into force of the Paris Agreement was achieved see United Nations Framework Convention on Climate Change (UNFCCC) "Paris Agreement: Status of Ratification" available at http://unfccc.int/paris_agreement/items/9444.php (date of use: 13 May 2017); CBS News "US China Finally Enter Climate Change Deal" available at <http://www.cbsnews.com/news/us-china-enter-climate-change-deal/> (date of use: 12 May 2017).

⁵⁴²*The Guardian* "Global climate change treaty in sight after Durban breakthrough" available at <https://www.theguardian.com/environment/2011/dec/11/global-climate-change-treaty-durban> (date of use: 10 May 2017).

⁵⁴³Chakraborty "Paris Agreement on climate change: US withdraws as Trump calls it 'unfair'" available at <http://www.foxnews.com/politics/2017/06/01/trump-u-s-to-withdraw-from-paris-climate-pact-calls-it-unfair-for-america.html> available at (date of use: 18 February 2018).

⁵⁴⁴*Institute of Strategic Studies* "US withdrawal from the Paris Climate Change Agreement: Consequences and Outcomes" available at http://issi.org.pk/wpcontent/uploads/2017/08/Final_IB_Sarah_dated_29-8-2017.pdf (date of use: 18 February 2018).

economic globalisation paradigm aimed at promoting free and deregulated trade. While this is intended to allow countries to benefit from economic synergy, it is nonetheless geared towards a profit-making market mechanism that often impacts negatively on human considerations (and needs). It commodifies people and the environment by basing their value on how much they can produce and contribute to the profit margin of large private firms/companies and international corporations which are key economic players in the global market.⁵⁴⁵ Vulnerable people from the Third World are victims of this commercialised global policy. These injustices include: unfair wages; unsafe and poor working conditions; consumer unfriendly commodities that are harmful to human health; the abuse of rights of consumers, especially those from poor communities; and increasingly callous and unfeeling exploitation of the natural environment.⁵⁴⁶

The legal regimes for commerce, as represented in the World Trade Organisation (WTO)⁵⁴⁷ and multilateral trade treaties, are designed to reduce 'barriers' to international commerce. In practice, even policy measures designed to address environment, health, or human rights have been targeted as 'trade barriers'. The WTO rules and pertinent international provisions have been designed to reduce 'barriers' to international commercial activity of any kind.⁵⁴⁸ The WTO rules affect public services,

⁵⁴⁵Sreenivasan "Private, Public and the Planet: Global Economic Justice and the Environment" paper commissioned by Canadian Council for International Corporation (2009) at 2-3 available at http://www.ccic.ca/files/en/what_we_do/002_environmental_justice_2009-0114_brief_1_enviro_justice.pdf (date of use: 10 May 2017).

⁵⁴⁶These include overworking employees by increasing working hours from 40 to 50 hours a week but with very low wages; sexual harassment of female employees, and unfair dismissals. John *Justice in a Global Economy* 121.

⁵⁴⁷The World Trade Organisation (WTO) is an organisation whose function is to supervise and liberalise trade. The organisation deals with regulation of trade between participating countries; it provides a framework for negotiating and formalising trade agreements. The WTO currently has 164 members. Institute for Government "10 Things to Know about the World Trade Organisation (WTO)" available at <https://www.instituteforgovernment.org.uk/brexit-explained/brexit-explained-10-things-know-about-world-trade-organization-wto> (date of use: 3 May 2017).

⁵⁴⁸The trade and investment rules have actually stripped governments of many of the policy tools required proactively to protect and fulfil human rights and environmental obligations – from tariffs on goods, to performance requirements on investment, to government expenditures, to public interest regulations among others. Sreenivasan "Private, Public and the Planet: Global Economic Justice and the Environment" paper commissioned by Canadian Council for International Corporation (2009) at 2-3 available at http://www.ccic.ca/files/en/what_we_do/002_environmental_justice_2009-0114_brief_1_enviro_justice.pdf (date of use: 10 May 2017).

intellectual property, investment, and a myriad of government regulations from food safety to environmental protection.⁵⁴⁹

Both civil society organisations and the United Nations have undertaken considerable research on how trade and investment policies have led to violations of the right to food and the right to health, or may threaten the effectiveness of multilateral environmental agreements (MEAs), such as the Kyoto Protocol or the United Nations Framework Convention on Climate Change,⁵⁵⁰ the Convention on Biological Diversity,⁵⁵¹ the Convention to Combat Desertification,⁵⁵² the Convention on International Trade in Endangered Species (CITES),⁵⁵³ or the Convention on Persistent Organic Pollutants.⁵⁵⁴
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The South attributes the increase in pollution and natural-resource depletion to industries from the North. This phenomenon is referred to as the ‘race to the bottom’ argument.⁵⁵⁶ Countries in the South have fewer environmental regulatory standards than those in the North. These industries have the incentive to move to countries with less stringent environmental standards, also known as ‘pollution havens’. In effect, it can be said that these industries cause more pollution and environmental degradation

⁵⁴⁹The United Nations stresses the balance between environmental and trade policy. Such an integrated policy requires the ability to anticipate and prevent environmental damage. Santarius *Balancing Trade and the Environment* 6.

⁵⁵⁰The United Nations stresses the balance between environmental and trade policy. Such an integrated policy requires the ability to anticipate and prevent environmental damage. Santarius *ibid*; Kyoto Protocol to the United Nations Framework Convention on Climate Change UN Doc FCCC/CP/1997/7/Add110 Dec 1997; (1998) 37 *ILM* 22.

⁵⁵¹Convention on Biological Diversity 5 June 1992, Rio de Janeiro, Brazil [1993] ATS 32 / 1760 UNTS 79; (1992)31 *ILM* 818.

⁵⁵²United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa 1954 UNTS 3; (1994) 33 *ILM* 1328.

⁵⁵³Convention on International Trade in Endangered Species of Wild Fauna and Flora 27 UST 1087; TIAS 8249; 993 UNTS 243.

⁵⁵⁴Stockholm Convention on Persistent Organic Pollutants 2256 UNTS 119; (2001) 40 *ILM* 532.

⁵⁵⁵This indicates a conflict between the objectives of trade regulations and environmental laws. For example, many environmental organisations are not content with the longstanding discussions at the WTO that have yet to clarify that measures required under MEAs must be considered consistent with WTO rules, or to recognise that trade law obligations must themselves be placed in a wider context of legal commitments. CSOs also insist that disputes over the implementation of MEAs should be resolved by MEAs, not by the WTO. Sreenivasan “Private, Public and the Planet: Global Economic Justice and the Environment” paper commissioned by Canadian Council for International Corporation (2009) at 2-3 available at

http://www.ccic.ca/_files/en/what_we_do/002_environmental_justice_2009-0114_brief_1_enviro_justice.pdf (date of use: 10 May 2017).

⁵⁵⁶Hassoun (2008) 22/4 *Public Affairs Quarterly* 353.

for the South than they would in the North where they would be subject to stricter controls.⁵⁵⁷

Small-scale farmers are exposed to unfair competition from industrially-produced (and often subsidised) imported produce. A recent study undertaken by the Ecumenical Advocacy Alliance together with the Food First Information and Action Network (FIAN), documents how trade liberalisation measures have resulted in undercutting small-scale farmers and the unintended outcome of a significant violation of the right to food.⁵⁵⁸

4.5.4.1 Exploitation of genetic resources and indigenous knowledge without benefit-sharing

A liberalised economy allows the open and free access to genetic resources and indigenous knowledge for exploitation and commercialisation by countries with technological expertise. This occurs without the consent of and benefit-sharing with indigenous people or their governments, despite they being the stewards of these resources and knowledge.⁵⁵⁹ African countries have contributed significantly to the global drug industry. For example, some US\$ 4 billion in the US economy is created from twenty plant species from the tropics.⁵⁶⁰ The knowledge is then patented by foreign corporations who may bring or threaten penalties and economic sanctions against the African country if it is seen to be allowing encroachments on the companies' property rights. The knowledge is patented as private information to be used by the developed countries to create products for profit. By embedding intellectual property standards in trade agreements, developing countries are prohibited from benefiting economically

⁵⁵⁷ Ibid at 358.

⁵⁵⁸ These small-scale farmers globally are a group of people traditionally vulnerable to poverty and food insecurity. FIAN and Ecumenical Advocacy Alliance "Trade policies and hunger: The impact of trade liberalisation on the right to food of rice farming communities in Ghana, Honduras, and Indonesia" (2008) at 16 available at www.e-alliance.ch/en/s/food/rice/index.html (date of use: 18 February 2018).

⁵⁵⁹ Mugabe, Kameri-Mbote & Mutta "Traditional Knowledge, Genetic Resource and Intellectual Property Protection: Towards a New International Regime" International Environmental Law Research Working Paper 1 (2005) at 2 -3 available at <http://www.ielrc.org/content/w0105.pdf> (date of use: 18 February 2018).

⁵⁶⁰ Okoth-Owiro & Juma "Property Rights".

from such knowledge (often taken without consent from developing countries).⁵⁶¹ The granting of exclusive rights to private companies to profit from Mother Nature is a much debated issue in intellectual property law.⁵⁶²

Kenya's case 6: Procter and Gamble and Genencor International: The *Extremophiles*

Extremophiles are single-celled organisms found in some of the planet's harshest environments, such as boiling rift vents, volcanic craters, and polar glaciers. In Kenya, they are found in the hot springs of the Rift Valley. Their ability to withstand such harsh climatic conditions has attracted the attention of foreign biotechnology companies who wish to 'use' their genetic composition to mass-produce industrial-strength enzymes for such products as detergents, cleaner chemicals, and more effective DNA fingerprints.⁵⁶³ In 2002, Genencor International Incorporated, a USA biotechnology corporation with interests in Europe, announced the development of an enzyme that results in a 'stonewashed' or faded effect on denim. It later sold this enzyme to its business partner, Procter and Gamble, which ultimately used it to create and develop a successful line of 'Tide' bleach.⁵⁶⁴ Previously, the clothing industry used pumice stone on new denim to produce the 'faded look'. The enzyme makes this process faster and at the same time saves the fabric from frictional tearing created by the pumice stone. The company acknowledged the extraction of the enzyme by one of its scientists from the

⁵⁶¹Sreenivasan "Private, Public and the Planet: Global Economic Justice and the Environment" paper commissioned by Canadian Council for International Corporation (2009) at 2-3 available at http://www.ccic.ca/_files/en/what_we_do/002_environmental_justice_20090114_brief_1_enviro_justice.pdf (date of use: 10 May 2017).

⁵⁶²On the one hand there is the argument that biological genetic resources are common heritage of humankind and therefore free to all. On the other hand, the argument is shifting to acknowledging that states can have sovereignty and control over genetic natural resources and indigenous knowledge systems in the benefits and uses associated with those resources. Diaz *Intellectual Property and Biological Resources* 5.

⁵⁶³Wired Staff Science "Extremophiles Prove their Worth" available at <https://www.wired.com/2004/06/extremophiles-prove-their-worth/> (date of use: 13 Dec 2017).

⁵⁶⁴'Tide' is a Procter and Gamble laundry and fabric care detergent. See <https://tide.com/en-us> (date of use: 3 May 2017); *The East African* "Kenya Wildlife Service (KWS) Seeks Millions from Procter and Gamble" available at <http://www.theeastafrican.co.ke/news/2558-244242-view-printVersion-10lgau/index.html> (date of use: 10 May 2017).

extremophiles organisms found in Lake Bogoria, a Kenyan saline lake in the Rift Valley.⁵⁶⁵

In 2004, the Kenyan Wildlife Society (KWS), in conjunction with the International Centre for Insect Physiology and Ecology (ICIPE), launched a claim in the US courts for a share in the proceeds accruing to the multinational companies Procter and Gamble and Genencor International, with respect to the sales of the bleach detergent and stonewashing product whose active ingredient – *extremophiles* – were illegally acquired in Kenya.⁵⁶⁶ The issue remains an unresolved and debated topic to this day.

Kenya's Case 7: United States National Cancer Institute: The *maytenus buchananii* shrub

The *maytenus buchananii* is a shrub found in the Shimba Hills area that has been used by the indigenous Digo community to treat cancerous conditions for many generations. In the 1970s the USA National Cancer Institute (NCI) led by the knowledge of the Digo community, undertook a major screening program and found levels of maytansine⁵⁶⁷ in the shrub with medicinal potential for the treatment of pancreatic cancer.⁵⁶⁸ More than 27,2 tonnes of the shrub were collected.⁵⁶⁹ The NCI appropriated and traded the knowledge to treat pancreatic cancer without the consent of the indigenous people or

⁵⁶⁵Okidi, Kameri-Mbote & Aketch *Environmental governance in Kenya: implementing the framework law* 392; Heuer "The Lake Bogoria Extremophiles: A case study" available at <http://www.public.iastate.edu/~ethics/LakeBogoria.pdf> (date of use: 13 December 2017).

⁵⁶⁶*The East African* "Kenya Wildlife Service (KWS) Seeks Millions from Procter and Gamble" available at <http://www.theeastafrican.co.ke/news/2558-244242-view-printVersion-10lgaug/index.html> (date of use: 10 May 2017).

⁵⁶⁷Maytansine is a compound that induces, arrests, and kills tumor/cancer cells. Lopus "Maytansine and cellular metabolites of antibody-maytansinoid conjugates strongly suppress microtubule dynamics by binding to microtubules" <https://www.ncbi.nlm.nih.gov/pubmed/20937594> (date of use: 3 May 2017).

⁵⁶⁸Mugabe, Kameri-Mbote & Mutta "Traditional knowledge, genetic resources and intellectual property: Towards a new international regime" International Environmental Law Research Working Paper (2001) at 3 available at www.ielrc.org/content/w0105.pdf (date of use: 18 February 2018).

⁵⁶⁹Nnadozi *African Genetic Resources* 19.

the authority of the Kenyan government.⁵⁷⁰ There has also been no benefit sharing in the commercial use of this knowledge.⁵⁷¹

4.5.4.2 The Convention on Biological Diversity and 'rejection' by the USA

The Convention on Biological Diversity (CBD) is the only comprehensive agreement dedicated to the conservation and sustainable use of biodiversity. The CBD⁵⁷² enshrines the sustainable use of natural resources; the fair and equitable sharing of benefits arising from genetic resources and traditional knowledge; and requires prior informed consent to the use of such knowledge. The Convention also recognises states' sovereignty over genetic resources.⁵⁷³

The only non-parties to the treaty are the USA, Andorra, the Holy See, and states with limited recognition.⁵⁷⁴ The appearance of the USA on the list makes it starkly isolated from the rest of the world as a non-party in dealing with global biodiversity loss.⁵⁷⁵ Ironically, the USA was extensively involved in the six-year drafting and negotiation phases of the CBD. However, when the instrument was opened for signature in 1992 at the Rio de Janeiro 'Earth Summit', the USA declined to sign it until a year later in

⁵⁷⁰Mugabe, Kamari-Mbote & Mutta "Traditional knowledge, genetic resources and intellectual property: Towards a new international regime" International Environmental Law Research Working Paper (2001) at 3 available at www.ielrc.org/content/w0105.pdf (date of use: 18 February 2018).

⁵⁷¹Ibid.

⁵⁷²5 June 1992, 1760 UNTS 79, 143; (1992) 31 *ILM* 818.

⁵⁷³Preamble and art 1.

⁵⁷⁴An entity has limited recognition as a state if it does not meet the threshold for a legal person in international law, for example if it lacks: a defined territory; a permanent population; a government, and capacity to enter into relations with other states. Examples include: Republic of China (Taiwan), Somaliland, Jubaland, and Puntland among many others. Pacific American School Model United Nations (PASMUN) "Clarifying States with Limited Recognition" Research Report (2016) at 1-11 "Countries of the World: States with Limited Recognition" available at http://geo.koltyrin.ru/eng_countries_limited_recognition.php (date of use: 3 May 2017).

⁵⁷⁵Defenders of Wildlife "The United States and the Convention on Biological Diversity" http://www.defenders.org/publications/the_u.s._and_the_convention_on_biological_diversity.pdf (date of use: 3 May 2017).

1993.⁵⁷⁶ In 1993, the instrument was transmitted to the country's Senate for advice which would accompany the ratification of the CBD. However, the CBD failed to receive a ratification vote on the Senate floor.⁵⁷⁷ The issue of its ratification is a matter that has to date not been revisited.⁵⁷⁸

The 'rejection' is concerned with the USA's legal misgivings and policy tensions and interests in response to the Convention. These include multifaceted political, environmental and economic arguments ranging from the country's foreign affairs, to its international environmental obligations, to corporate interests.⁵⁷⁹

The lack of ratification of the CBD (and other key global environmental instruments) by the USA, signals a kind of 'compromise' by the country in committing to global environmental leadership as a world superpower.⁵⁸⁰ This is demonstrated through its low profile when a critical international environmental instrument has a potentially adverse effect on the competitiveness of the country's economy.⁵⁸¹ Akaka, providing an Hawaiian perspective on the failure of the USA to sign the Biological Diversity Convention, remarks:⁵⁸²

The United States failure to sign the biodiversity convention is an especially disturbing development. In rejecting this treaty, the [U.S.] administration professed a desire to preserve economic development opportunities for [U.S.] industry. What the administration fails to recognise is that there can be no economic development without biological diversity... Given that natural organisms are the source of nearly three-quarters of all medicines, the loss of biological diversity has grave implications for the quality of life on Earth. When these species disappear so do the

⁵⁷⁶Before its rejection, President Clinton stated that USA had sufficient laws and programs for the efficient implementation by the USA of her responsibilities under the Convention. See Dickie "The US is the only country that hasn't signed on to a key international agreement to save the planet" available at <https://qz.com/872036/the-us-is-the-only-country-that-hasnt-signed-on-to-a-key-international-agreement-to-save-the-planet/> (date of use: 10 May 2017).

⁵⁷⁷In his advice not to ratify the CBD Senator Dole commented: "Environmental laws and regulations governing nearly every aspect of life in America are stronger in the United States than they are in any other country in the world. We have laws on air emissions, water discharges ... and dredging wetlands and waterways, disposal of every type of waste from common household garbage to toxic chemicals to radioactive waste. We regulate almost to the absurd..." See Blomquist (2002) 32/4 *Golden Gate University Law Review* 29.

⁵⁷⁸Defenders of Wildlife *ibid.*

⁵⁷⁹Blomquist (2002) 32/4 *Golden Gate University Law Review* 94.

⁵⁸⁰*Ibid*; Defenders of Wildlife *ibid.*

⁵⁸¹Blomquist (2002) 32/4 *Golden Gate University Law Review* 26.

⁵⁸²*Ibid* 33.

cures for the ills that plague us... As my colleague Senator [George] Mitchell [D-ME] warned in his book 'World on Fire': 'When we let species become extinct, we foreordain our own extinction.' Nowhere is the significance of the biological diversity convention more apparent than in Hawaii. Hawaii is famed for its unique natural heritage. No other place on Earth has a higher percentage of unique plant and animal species... The availability of ... science to contribute to human welfare rests in large part on the knowledge waiting to be discovered in the tropical forests. Yet Hawaii has already lost most of its original tropical forests, half of its original bird species, and an untold number of other wildlife and plants.

4.6 Conclusion

The global North-South divide is a crucial socio-economic and political divide that clearly presents a global challenge that must be addressed. An international human rights paradigm is one of the avenues through which social ills and environmental injustices should be tackled globally in order to promote the well-being of the people of poorer countries. Global environmental injustices are human rights violations against the Third World. Socio-economic status and political subjection are major factors influencing the extent of inequality and environmental injustice in Africa, with poorer nations bearing the 'lions' share' of the environmental burden.

In the next (and final) chapter I discuss the promotion and protection of environmental justice initiatives in Kenya in terms of the 'new' 2010 Constitution of Kenya. In the chapter I also discuss Kenya's policy blue-print – 'Vision 2030' – as a roadmap for advancing environmental justice in Kenya through the principle of sustainable development.

CHAPTER 5

THE 2010 CONSTITUTION AND KENYA'S 'VISION 2030' AS ROADMAP FOR THE REALISATION OF ENVIRONMENTAL JUSTICE IN KENYA: CONCLUSIONS AND RECOMMENDATIONS

5.0 Introduction

The preceding chapter highlighted the loopholes and weaknesses arising from the previous Constitution of Kenya which impeded the protection of environmental rights and the nurturing of international environmental principles such as sustainable development and environmental justice. One of these weaknesses was the lack of explicit constitutional environmental provisions. Okidi et al argue that advocates of environmental protection were invariably seeking for the constitutionalisation of environmental rights so that they could rely on the force of the Constitution for environmental protection. Their efforts resulted in the enactment of the Constitution of Kenya, 2010, which recognised environmental rights.⁵⁸³ This chapter unveils the rich catalogue of environmental provisions in the new Constitution and their impact on the recognition and application of environmental justice in Kenya.

The chapter also addresses the new long-term development blueprint for the country – 'Kenya Vision 2030'. The document is the boldest and most ambitious development plan in Kenya's history and aims to transform Kenya from a Third World country into the league of middle-income countries. The blue-print is founded on environmental justice as one of its overarching principles/standards in the realisation of the development goal. Environmental justice is reflected in its integrated and careful application of the concepts of social justice, equitable regional development, distributive equity, and the provision of opportunities to the poor, protection of vulnerable groups, human rights,

⁵⁸³Okidi "Concept, function and structure" 142-82.

environmental protection, public participation, and the sustainable development principle throughout the entire policy document.^{584 585}

The 2010 Constitution of Kenya and the Kenya Vision 2030 respectively, are the primary legal and policy frameworks for sustainable development in the country, and by extension, also for environmental justice. They both provide the bedrock for environmental thinking and decision-making which advances environmental justice initiatives. The two principle documents constitute environmental justice pillars for the country, which, in turn, provide the values and standards that guide the achievement of sustainable development/environmental justice.

5.1 The 2010 Constitution and its environmental provisions pertinent to environmental justice

The new Constitution not only provides for the right to a clean and healthy environment,⁵⁸⁶ but also dedicates an entire chapter⁵⁸⁷ to land, the environment, and natural resource management. The chapter on land and environment deals with the overriding principles of land policy in Kenya which require legislative implementation by the national government. They include: equitable access by all; security of land rights; transparent and accountable administration of land; equity and elimination of discrimination in relation to land ownership; and the equitable settlement of land disputes among local communities.⁵⁸⁸ The chapter, moreover, provides for the classification of land into three categories: collective or public ownership of land by Kenyans as a nation (such as lakes, rivers, national parks and forests); a communal category (ie, communal land held through cultural association of a group of people); and

⁵⁸⁴Government of Kenya "Kenya Vision 2030: Globally Competitive and Prosperous Kenya" (2007) at 19-21 on guiding principles of the Vision. These include among others: constitutional supremacy, equality of citizens, the Bill of Rights, public participation, decentralisation of decision-making and resources and the rule of law.

⁵⁸⁵The above concepts spearheaded in the Vision area is also firmly embedded in the environmental justice principle. See Chapter 3 of this dissertation which discusses the meaning of the environmental justice, and its related principle of sustainable development examined in Chapter 4.

⁵⁸⁶Article 42.

⁵⁸⁷Chapter 5.

⁵⁸⁸Article 60.

an individual category (ie, private land registered to a person through a defined tenure of ownership) for effective land management and equitable land administration in the country.⁵⁸⁹ All these provisions have a significant impact on environmental justice concerns by ensuring equitable ownership, distribution and management of land and environmental resources in Kenya.

Kenya is one of many countries today to have adopted legally enforceable environmental protection in its Constitution. The Constitution compels Kenya's government to provide for environmental protection through meticulous legislative activity, and not merely through directive principles and state policy initiatives.⁵⁹⁰ Kenya's Constitution enshrines environmental protection in a number of its provisions (starting with its preamble), and puts an end to an age when environmental protection was a mere statutory right without constitutional fortification.⁵⁹¹ Apart from statutory protection, the 2010 Constitution's preamble emphasises environmental protection in Kenya as a primary and prioritised national concern. It provides that:

...We the people of Kenya...Respectful of the environment, which is our heritage, and determined to sustain it for the benefit of future generations: Committed to nurturing and protecting the well-being of the individual, the family, communities and the nation: Recognising the aspirations of all Kenyans for a government based on essential values of human rights, equality, democracy, social justice and the rule of law...

The common thread running through the principles and values set out in the preamble, is their anthropocentric nature and their sustainable development and environmental justice 'flavour'.⁵⁹² The Constitution places human beings at the centre of environmental protection and governance. It also calls for their meaningful involvement in governance,

⁵⁸⁹ Articles 61-64.

⁵⁹⁰ Not all countries have this quality in their constitutions. Daly (2012) 17/2 *International Journal of Peace Studies* 71 notes that Constitutional Environmental Rights (CER) come in different forms in various constitutions of nations, some demand legislative measures while others stand as mere policy directives.

⁵⁹¹ The environmental right is included in the Environmental Management and Coordination Act 8 of 1999 which is the main framework legislation for environment in Kenya. Section 3(1) provides for the right to a clean and healthy environment. The previous constitutional dispensation before the 2010 Constitution lacked an environmental right. See Chapter 4 of this dissertation for a discussion of environmental protection prior to the 2010 Constitution and the environmental statutory right.

⁵⁹² See Chapters 1, 2 and 3 of this dissertation for a discussion of the anthropocentric meaning of 'environment' and its relevance to environmental justice and the promotion of sustainable development.

including the governance of natural resources.⁵⁹³ Placing people's well-being at the centre of environmental thinking and protection, is a central theme in environmental justice. The promotion of human well-being is also an important tenet of sustainable development, a principle with strikingly similar objectives to those of environmental justice.

While some of the Constitution's environmental provisions are express – for example, that in the preamble above, or the right to a clean and healthy environment (discussed below) – others are implied though their embodiment in the Bill of Rights – for example, the right to life⁵⁹⁴ and the socio-economic rights to health, to food, and to education.⁵⁹⁵ These rights and their interrelationship with the environment and in furthering environmental justice, are discussed below.

Environmental justice can, therefore, be applied in a significant measure through the Constitution's guarantees and through a purposive interpretation of the spirit and values of the Constitution⁵⁹⁶ such as sustainable development, equality and human dignity, non-discrimination, social justice, public participation and inclusiveness, and protection of vulnerable and marginalised persons.^{597,598} This provides an opportunity for the

⁵⁹³Muigua & Kariuki "Towards Environmental Justice in Kenya" available at www.kmco.co.ke/.../Towards%20Environmental%20Justice%20in%20Kenya-January%202015.pdf (date of use: 11 June 2017).

⁵⁹⁴Article 26.

⁵⁹⁵Article 43.

⁵⁹⁶In Kenya there has been a heated argument that the Constitution should be interpreted as a document with a living soul that embodies fundamental values and principles. Therefore, the values should be given priority and key importance whenever the Constitution is interpreted or applied. See <http://johnnyanje.blogspot.co.ke/2012/11/constitutional-interpretation-in-kenya.html> (date of use: 6 November 2017).

⁵⁹⁷Article 10 provides for national values and principles of governance which bind all state organs and public officers when applying or interpreting the Constitution; applying or interpreting any law; or making or implementing public-policy decisions. These include: rule of law; democracy; devolution of power; public participation; social justice; human dignity; equality; good governance; and sustainable development. See Chapters 1 and 2 of this dissertation on the relevance of the national values to environmental justice. Also see Chapter 3 of the dissertation on the discussion of the close relationship between sustainable development and environmental justice and their common underpinning principles, and how the Kenyan Constitution incorporates these principles in art 10.

⁵⁹⁸Article 56 is dedicated to the protection of marginalised groups. It provides that: the state shall put in place affirmative action programs designed to ensure that minorities and marginalised persons, among other things, participate and are represented in governance, are provided special opportunities in

development of pro-environmental justice initiatives, activities, measures, and laws in the country.

5.2 Substantive and procedural constitutional environmental rights in promoting environmental justice

The law can generally be broadly classified into two main groups: substantive law and procedural law. Substantive law is the part of the law that creates, defines, and regulates the rights, duties, and powers of parties. On the other hand, procedural law defines the procedures or methods that must be observed in enforcing substantive law.⁵⁹⁹ Procedural law sets out the rules that prescribe the steps for having a right or duty judicially enforced. However, the distinction between substantive law and procedural law is not always watertight as the two groups may at times merge and overlap in the protection of rights. It further happens that courts may deem the rules that appear procedural also to be of substantive importance.⁶⁰⁰

The Kenyan Constitution encompasses both substantive and procedural environmental rights that light the way for the realisation of environmental justice objectives in Kenya. Substantive environmental rights guarantee the right to a quality environment. In other words, they demand of courts to assess what the environment is, and what is required in order for the environment to be safe, healthy, or clean.⁶⁰¹ A good example in the Constitution is the right to a clean and healthy environment (discussed in detail below).

educational and economic fields, are provided special opportunities for access to employment, and have reasonable and access to water, health services and infrastructure.

⁵⁹⁹Olson “Environmental Law and Standards” available at http://www.me.mtu.edu/~jwsuther/erdm/env_law.pdf (date of use: 1 June 2017).

⁶⁰⁰For example, the statute of limitations may be considered substantive in general. However, its rules governing the time to answer and register appearance are procedural. Statutes of limitation are legislation in common-law systems passed to set the maximum time after an event within which legal proceedings may be initiated. When the period specified in a statute of limitations expires, a claim may no longer be filed, or, if filed, may be liable to be struck off if the defence against that claim is, or includes, that the claim is time-barred as having been filed after the statutory limitations period. See Gerdy (2000) 9 *Perspectives* 6-7; See too <http://www.courts.ca.gov/9618.htm> (date of use: 6 November 2017).

⁶⁰¹Daly (2012) 17/ 2 *International Journal of Peace Studies* 72; Shelton (2010) 1/1 *Journal of Human Rights and the Environment* 89.

Procedural environmental rights, by contrast, demand that courts identify specific procedures by which certain decisions are to be made that impact on the environment, such as those involving environmental justice, to produce equitable and proportional environmental policies and laws.⁶⁰² Procedural environmental rights can enhance accountability and transparency in decision-making as regards the protection of the marginalised and vulnerable who are among the main concerns of environmental justice.⁶⁰³ In addition, many countries' judicial systems, including Kenya's, make provision for specific environmental tribunals, chambers, or courts⁶⁰⁴ which are subject to special procedures designed to facilitate the institution of actions to promote the vindication of environmental rights.⁶⁰⁵ (See further examples of procedural environmental rights discussed below.⁶⁰⁶) Procedural environmental rights are, therefore, the tools and vehicles for the realisation of substantive environmental rights. Without the requisite supportive infrastructure of procedural rights, substantive rights may be seen as no more than empty promises.⁶⁰⁷

Generally, the procedural environmental rights encountered in many recent Constitutions (those enacted post-1998, in particular) including Kenya's, have a tendency to follow the template set out in the European Union's Aarhus Convention,⁶⁰⁸ which is regarded as the most comprehensive treaty on environmental procedural rights to date, and which has been the subject of proposals for its conversion into a global treaty.⁶⁰⁹ The Kenyan Constitution focuses on the 'three pillars of procedural rights' –

⁶⁰²Daly *ibid.*

⁶⁰³Muigua & Kariuki "Safeguarding Environmental Rights in Kenya" at 8 available at <http://www.kmco.co.ke/attachments/article/105/A%20Paper%20on%20%20Safeguarding%20Environmental%20Rights%20in%20Kenya.pdf> (date of use: 20 February 2018).

⁶⁰⁴See discussion below on the Environment and Land Court established under art 162 of the Constitution.

⁶⁰⁵Daly (2012) 17/ 2 *International Journal of Peace Studies* 72.

⁶⁰⁶*ibid.*

⁶⁰⁷Muigua & Kariuki "Safeguarding Environmental Rights in Kenya" at 8 available at <http://www.kmco.co.ke/attachments/article/105/A%20Paper%20on%20%20Safeguarding%20Environmental%20Rights%20in%20Kenya.pdf> (date of use: 20 February 2018).

⁶⁰⁸Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 25 June 25 (1998) 38 *ILM* 517.

⁶⁰⁹So far, the Aarhus Convention is the best illustration of a comprehensive codification of environmental procedural principles. Although, with limited geographical application as a regional treaty, various countries (including Kenya) have relied in its model of environmental procedural rights and applied it in their national Constitutions. Daly (2012) 17/ 2 *International Journal of Peace Studies* 72.

access to information; participation in decision-making; and access to justice (discussed further below). The three procedural provisions are also recognised as pillars of ‘procedural environmental justice’ by providing for public participation in environmental decision-making and the enforcement of environmental decisions.⁶¹⁰ Procedural environmental justice links to environmental laws dealing with notice, access to information, consultation, and standing to bring court proceedings. Should disadvantaged groups be able to have a say in what happens to their environment and to obtain information about the risks and impacts of environmental decisions – including risks to their health; degradation of the environment; and loss of access to resources, as well as obtaining access to legal redress (where their rights are threatened or infringed), then environmental justice can be said to have been achieved.⁶¹¹

The interplay between substantive and procedural environmental rights may be established by the practice in certain Constitutions of ‘combining’ procedural and substantive environmental rights.⁶¹² However, Boyd cautions that while there is a thin line separating the function of the two classes of right in enhancing comprehensive environmental protection, “procedural environmental rights are viewed as a complement to, rather than a substitute for substantive environmental rights”, and even if they are often found together, their roles should not be clumped together but should be clearly distinguished and understood for the effective application and development of environmental rights and principles.⁶¹³

⁶¹⁰Millner “Access to Environmental Justice” available at https://www.deakin.edu.au/data/assets/pdf_file/0004/258205/essay-11.pdf (date of use: 4 June 2017).

⁶¹¹Ibid.

⁶¹²Daly (2012) 17/ 2 *International Journal of Peace Studies* 72.

⁶¹³Discussions of environmental justice often distinguish procedural environmental justice from substantive environmental justice. Procedural environmental justice is usually understood to require the opportunity for all people regardless of race, ethnicity, income, national origin or educational level to have meaningful involvement in environmental decision-making. Substantive (or distributive) environmental justice usually ensures that environmental benefits and burdens are distributed fairly. See https://www.staff.ncl.ac.uk/g.m.long/environmental_justice.html (date of use: 20 June 2017); Kuehn (2000) 30 *Environmental Law Reporter*.

5.3 Scope of the right to a clean and healthy environment to promote and achieve environmental justice in Kenya

Article 42 of the Kenyan Constitution provides:

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 means particularly those contemplated in Article 69;
- b) To have obligations relating to the environment fulfilled under Article 70;

Article 69 provides for the state's obligations in respect of the environment and articulates:

Article 69

(1) The state shall-

- a) Ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure equitable sharing of the accruing benefits;
- b) Work to achieve and maintain a tree cover of at least ten percent of the land 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.

(2) Every person has a duty to cooperate with the State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.

Article 70 provides for the enforcement of environmental rights and redress where a person alleges that the right to a clean and healthy environment has been infringed or is threatened.

Article 70 states:

(1) 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.

(2) On application under clause (1), the court may make any order or give any directions, it considers appropriate-

- a) To prevent, stop or discontinue any act or omission that is harmful to the environment;
- b) To compel any public officer to take measure to prevent or discontinue any act or omission that is harmful to the environment; or
- c) To provide compensation for any victim of a violation of the right to a clean and healthy environment;

(3) For the purposes of this Article an applicant does not have to demonstrate that any person has incurred loss or suffered injury.

The constitutional environmental right (under cl 42(a)) includes having ‘the environment protected for the benefit of present and future generations through legislative and other means, particularly those contemplated in article 69’. This provision requires the enactment of laws and policies in order to realise the environmental right and remove it from the realm of mere aspiration.⁶¹⁴ Article 69 provides for the ‘other means’ – apart from legislation – by which the environmental right should be made achievable by the state by providing a list of state obligations in respect of the environment. Article 69 provides a broad range of responsibilities for the state which include not only environmental management obligations, but also essential environmental justice initiatives such as: ensuring the equitable sharing of environmental benefits; encouraging public participation in environmental management; establishing environmental impact assessment mechanisms; environmental audit and monitoring;

⁶¹⁴Kibugi (2011) 1 *International Union for Conservation of Nature (IUCN) Academy of Environmental Law e-Journal* 137 available at www.iucnael.org/en/documents/677-kenya/file (date of use: 11 June 2017).

eliminating processes and activities that are likely to endanger the environment and the people; and utilising environmental resources for the benefit of the people of Kenya. It can be said that for the first time in the Kenyan legal system, article 69 of the Constitution creates a legal basis for the subsequent review of the various sectoral statutes and environmental policies should they not adhere to their constitutional obligations.⁶¹⁵

Article 42 read with article 69, calls on the state to implement measures, whether in policy, legislation, decision-making, or other environmental initiatives or mechanisms, as part of giving effect to the right to a clean and healthy environment.⁶¹⁶ Article 69(2) imposes, inter alia, a duty on private individuals, organisations, companies, or industries to comply with environmental standards and obligations set by the state.

The realisation of the environmental right and obligations will require significant law and policy development, governance reform, civic education, and judicial enforcement.⁶¹⁷ Legislative and policy mechanisms are imperative to providing clear provisions on how to achieve the requirements under article 69 such as public participation and environmental impact assessments, auditing, and monitoring of the environment, as measures relating to environmental management and environmental justice.⁶¹⁸ Although the Environmental Management and Coordination Act (which preceded the new Constitution)⁶¹⁹ to an extent provides for environmental impact assessment and audit, enshrining this requirement in the Constitution is praiseworthy in that it underscores the obligation of assessing environmental risks when facilitating mitigation for disadvantaged groups at the early stages of decision-making by the government and other relevant stakeholders which advances environmental justice objectives.⁶²⁰

⁶¹⁵ *Ibid* at 138.

⁶¹⁶ *Ibid*.

⁶¹⁷ *Ibid*.

⁶¹⁸ *Ibid*.

⁶¹⁹ Act 8 of 1999 ss 58-60.

⁶²⁰ Walker "Environmental justice, impact assessment and the politics of knowledge: The implications of assessing the social distribution of environmental outcomes" available at <http://www.sciencedirect.com/science/article/pii/S0195925510000661> (date of use: 3 June 2017); Muigua "Reconceptualising the Right to Clean and Healthy Environment in Kenya" available at

The scope of the right to a clean and healthy environment as envisaged in the Constitution is wide-ranging and has a fundamental impact on the realisation of other, inextricably linked, human rights in the Bill of Rights.⁶²¹ The protection of the environment is important in relation to the rights to life, health, culture, and living standards.⁶²² For example, the right to life cannot be realised without the basic right to clean water, air, and land. Civil and political rights in the Constitution – for example, the right to life, human dignity, equality and freedom from discrimination, freedom of expression and association, and the right to vote⁶²³ – create the moral and political order necessary for the promotion of sustainable development.⁶²⁴ These rights are also key to the application of environmental justice measures in the protection of poor and vulnerable persons who often face an unfair burden of environmental risks, by giving them a voice in the policy and law-making process. Adebowale et al note that:

A human rights perspective to sustainable development moves ... to a wider approach to protecting the most vulnerable in society. These rights can provide a platform for environmental and sustainable improvements [the rights] are likely to benefit the most marginalised people, the poor, women, and minorities... Environmental human rights support a bottom up approach. Active involvement and shared control, by the people ... most affected by a degraded environment is fundamental at local, national and global levels.⁶²⁵

Economic, social and cultural rights provide substantive standards for an individual's wellbeing.⁶²⁶ Environmental, economic and social rights are interrelated.⁶²⁷ Economic

<http://www.kmco.co.ke/attachments/article/161/RIGHT%20TO%20CLEAN%20AND%20HEALTHY%20ENVIRONMENT%20IN%20KENYA.docx%20th%20september%202015.pdf> (date of use: 3 June 2017).

⁶²¹The right to a clean and healthy environment is so interwoven with the realisation and enjoyment of other fundamental rights that any attempt to classify it as an inferior right sabotages the realisation of all the other basic rights, including life, health, livelihood and well-being, amongst others. Muigua *ibid*.

⁶²²Adebowale et al "Environment and Human Rights: A New Approach to Sustainable Development" paper commissioned by the International Institute for Environment and Development (IIED) (2001 available at <http://unac.org/wp-content/uploads/2013/07/HRandSD-EN-PDF.pdf> (date of use: 20 February 2018)).

⁶²³Articles 26-38. The rights are also protected in the Universal Declaration of Human Rights GAres 217A (III) UN Doc.A/810 at 71 (1948); United Nations res A/RES/70/1 25 September 2015; and the International Covenant on Civil and Political Rights 16 December 1966, 999 UNTS 6 (1967) *ILM* 368.

⁶²⁴Adebowale et al "Environment and Human Rights: A New Approach to Sustainable Development" paper commissioned by the International Institute for Environment and Development (IIED) (2001 available at <http://unac.org/wp-content/uploads/2013/07/HRandSD-EN-PDF.pdf> (date of use: 20 February 2018)).

⁶²⁵*Ibid*.

⁶²⁶*Ibid*.

and social rights in the Constitution include the right to the highest attainable standard of health, accessible and adequate housing, reasonable standards of sanitation, freedom from hunger, adequate food, the right to clean and safe water in adequate quantities, social security, and education. Article 21(2), for example, enjoins the state to pursue 'legislative, policy and other measures including the setting of standards to achieve the progressive realisation of the economic and social rights'.⁶²⁸ The constitutional requirement of 'other measures', borrowed from the South African Constitution⁶²⁹ in sections 24 (the environmental right) and 27 (socio-economic rights – 'health care, food, water and social security'),⁶³⁰ means measures that are: comprehensive and coordinated, clearly allocate responsibilities and tasks; are capable of promoting the realisation of the right; reasonable in conception and realisation; balanced and flexible, provide for needs of different degrees of urgency and do not exclude significant elements of society; and are responsive to the most urgent needs and the management of crises.⁶³¹

Article 21(4) further requires the state to 'enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms' in the Constitution. The article guarantees the realisation and implementation of the Bill of Rights, which, in turn, assists in furthering constitutional objectives (including

⁶²⁷Muigua & Kariuki "Safeguarding Environmental Rights in Kenya" at 5-6 available at <http://www.kmco.co.ke/attachments/article/105/A%20Paper%20on%20%20Safeguarding%20Environmental%20Rights%20in%20Kenya.pdf> (date of use: 20 February 2018).

⁶²⁸Article 21 generally provides for the implementation of rights and fundamental freedoms in the Constitution by the state.

⁶²⁹Constitution of the Republic of South Africa, 1996.

⁶³⁰"Section 24 (environment)

Everyone has the right—

(a) to an environment that is not harmful to their health or well-being; and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures ..."

"Section 27 (Health care, food, water and social security)

...The state must take legislative and other measures...to achieve progressive realisation of these rights."

⁶³¹United Nations Independent Expert on Human Rights and the Environment, United Nations Environment Programme, the Office of the High Commissioner for Human Rights, and the Legal Resources Centre of South Africa "Human Rights and the Environment: Regional Consultation on the Relationship between Human Rights Obligations and Environmental Protection with a Focus on Constitutional Environmental Rights" Report of consultation convened on 23-24 January 2014, Johannesburg at 5 available at srenvironment.org/.../uploads/2014/...consultation-report-final1.pdf (date of use: 20 February 2018).

environmental justice and sustainable development principles) that are paramount concepts or values in the interpretation and application of the Constitution or in enacting public-policy decisions.⁶³²

The close link between economic and social rights and the environment in promoting human wellbeing was affirmed in the Kenyan case of *Friends of Lake Turkana Trust v Attorney General & 2 others*⁶³³ where the judge stated, inter alia, that the right to life, dignity and economic and social rights are all connected and indivisible, and it cannot be said that one set of rights is more important than another. All these rights (economic, social and environmental) therefore need to be observed by the state for a person to enjoy a reasonable standard of living.⁶³⁴

In reinforcing the inter-relationship between the environmental right and socio-economic rights to strengthen sustainable development, the South African case of *Fuel Retailers Association of Southern Africa v DG Environmental Management, Department of Agriculture, Conservation and Environment Mpumalanga Province*⁶³⁵ similarly ruled that section 24(b)(iii) of the Bill of Rights (which provides that everyone 'has the right[to] — ... (b)(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development') obliges the government to treat the objectives of environmental protection and socio-economic development as interdependent, and to refrain from pursuing one at the expense of the other. The court held that the government's obligation to consider economic interests and its obligation to consider environmental interests are mutually contingent upon one another. The court further stated: 'It [the Constitution] envisages that environmental considerations

⁶³²These include: rule of law, public participation, human dignity, equity, equality, social justice, non-discrimination, and protection of the marginalised, and sustainable development among others. See art 10 of the Constitution on the national values and principles of governance. The values bind the state or all persons when interpreting or applying the Constitution, when making or interpreting any law or during any public policy making.

⁶³³Environment and Land Court Suit 825 of 2012.

⁶³⁴At 11.

⁶³⁵2007 (6) SA 4 (CC) at paras 25-26, 45.

will be balanced with socio-economic considerations through the ideal of sustainable development'.⁶³⁶

In confirming the importance and role of the Kenyan courts in the continued safeguarding of all constitutional fundamental rights and freedoms in the promotion of human dignity and wellbeing, the case of *Musa Mohammed Dagane & 25 others v Attorney General & Another*⁶³⁷ ruled, under the previous Constitution, that:

...the State has a constitutional obligation towards the applicants. The State must provide services to the applicants in a sustainable manner to promote social and economic development and encourage the growth and the sustenance of basic rights. The State also must respect, protect, promote and fulfill the basic rights enshrined in our constitution to ensure there is no violation or encroachment on the said rights on any entity or organ of the State. By evicting the applicants from their ancestral home, the respondents engaged in acts and in a manner that is broadly at odds with the spirit and purpose of constitutional obligations.⁶³⁸

A wide interpretation of the right to a clean and healthy environment is paramount in the protection of other fundamental freedoms afforded by the Bill of Rights. Courts will be required to expand on the definition of the right to a clean and healthy environment so as to provide for diversified human wellbeing protection, taking into consideration both the interdependence of all human rights and the reinforcement of sustainable development.⁶³⁹ Moreover, a broad and purposive interpretation of the environmental right is also significant for in protection of environmental justice.⁶⁴⁰

Although it can be said the concept of environmental justice is new and evolving in Kenyan jurisprudence under the new Constitution, some judges under the previous Constitution applied their minds to acknowledging the concept of environmental justice by attempting a wide interpretation of the right to a healthy environment (protected in the Environmental Management and Coordination Act).⁶⁴¹ This approach could form a

⁶³⁶ At para 45.

⁶³⁷ Constitutional Petition 56 of 2009 eKenya Law Reports [Unreported] available at http://kenyalaw.org/Downloads_FreeCases/84205.pdf (date of use: 13 December 2017).

⁶³⁸ At 7.

⁶³⁹ Muigua & Kariuki "Safeguarding Environmental Rights in Kenya" at 2-3 available at <http://www.kmco.co.ke/attachments/article/105/A%20Paper%20on%20%20Safeguarding%20Environmental%20Rights%20in%20Kenya.pdf> (date of use: 20 February 2018).

⁶⁴⁰ Muigua & Kariuki *ibid.*

⁶⁴¹ Section 3(1) provides: "Every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment".

solid foundation for further decisions embracing both the sustainable development principle and environmental justice. An interesting decision is the case of *Peter K Waweru v Republic*.⁶⁴² Here the judge held that every person is entitled to benefit equally from the right to a clean and healthy environment, and even equated the right to the principle of environmental justice (see below). Although not primarily directed at the protection of environmental justice but rather at the protection of the right to a clean and healthy environment, the decision demonstrates the potential of Kenyan courts further to develop the concept of environmental justice with the aid of the new Constitution. In this case the judge observed that:

...environmental crimes under the Water Act, Public Health Act and EMCA⁶⁴³ cover the entire range of liability including strict liability and absolute liability and ought to be severely punished because the challenge of the restoration of the environment has to be tackled from all sides...In the name of environmental justice water was given to us by the Creator and in whatever form it should never ever be the privilege of a few – the same applies to the right to a clean environment.⁶⁴⁴

As the constitutional right to a clean and healthy environment is relatively new and a novel area in Kenya, its ‘proper’ interpretation can be promoted by the use of comparable jurisdictions such as that of neighbouring Uganda which has protected the environmental right since 1995 through the enactment of the Uganda Constitution.⁶⁴⁵ In interpreting the right to a clean and healthy environment, the Ugandan courts have given a broad meaning to the right by promoting the various aspects of human wellbeing. For example, in the Ugandan decision of *Uganda Electricity Transmission Co Ltd v De Samaline Incorporation Ltd*,⁶⁴⁶ the court interpreted the right to a clean and healthy environment as

...the right to a clean and healthy environment...should be regarded as a holistic social-cultural phenomenon because it is concerned with physical and mental wellbeing of human beings...a clean and safe environment is measured in both ethical and medical context. It is about linkages in

⁶⁴²Misc Civ Applic 118 of 2004.

⁶⁴³Environmental Management and Coordination Act 8 of 1999.

⁶⁴⁴At 14.

⁶⁴⁵Article 39 of the Constitution of the Republic of Uganda, 1995, provides: “Every Ugandan has a right to a clean and healthy environment”. Available at <http://www.ulii.org/node/23824> (Date of use: 3 June 2017).

⁶⁴⁶Misc Cause 181 of 2004 (High Court of Uganda).

human wellbeing. These may include social injustice, poverty, diminishing self-esteem. And poor access to health services. That right is not restricted to a clinical model.⁶⁴⁷

Furthermore, although it is not strictly applicable to Kenya, it may be argued that the European Charter on Environment and Health⁶⁴⁸ can provide some guidance on broadening the interpretation of the right to a clean and healthy environment for the purposes of environmental justice protection, and the development of environmental policies for the advancement of human wellbeing both of which are central to sustainable development. Despite its enactment so many decades ago (back in 1989), the Charter's provisions on health and environmental principles relating to public policy remain relevant today as guidelines for the sustainable development⁶⁴⁹ of nations and the environmental justice discourse.⁶⁵⁰ The Charter provides, inter alia.⁶⁵¹

Good health and wellbeing require a clean and harmonious environment in which physical, psychological, social and aesthetic factors are all given their due importance. The environment should be regarded as a resource for improving living conditions and increasing wellbeing.

The health of every individual, especially those in vulnerable and high-risk groups, must be protected. Special attention should be paid to disadvantaged groups.

All aspects of socio-economic development that relate to the impact of the environment... and wellbeing must be considered.

Governments, public authorities and private bodies should aim at both preventing and reducing adverse effects caused by potentially hazardous agents and degraded urban and rural environments

Development assistance should promote sustainable development and the safeguarding and improvement of human health as one of its integral components.

⁶⁴⁷Muigua & Kariuki "Safeguarding Environmental Rights in Kenya" at 6 available at <http://www.kmco.co.ke/attachments/article/105/A%20Paper%20on%20%20Safeguarding%20Environmental%20Rights%20in%20Kenya.pdf> (date of use: 20 February 2018).

⁶⁴⁸European Charter on Environment and Health, 1989, (First European Conference on Environment and Health) available at http://www.euro.who.int/data/assets/pdf_file/0017/136250/ICP_RUD_113.pdf (date of use: 3 June 2017).

⁶⁴⁹The preamble acknowledges the report of the World Commission on Environment and Development (which established the sustainable development principle). The preamble also provides that the maintenance and improvement of human wellbeing requires the sustainable development principle which is a principle that anchors environmental justice.

⁶⁵⁰Muigua & Kariuki "Safeguarding Environmental Rights in Kenya" at 8-9 available at <http://www.kmco.co.ke/attachments/article/105/A%20Paper%20on%20%20Safeguarding%20Environmental%20Rights%20in%20Kenya.pdf> (date of use: 20 February 2018).

⁶⁵¹Principles 1, 3, 7, 9 and 14.

5.4 Making environmental justice attainable through constitutional procedural environmental rights: Access to information, public participation in decision-making, and access to justice

Procedural environmental rights can be summarised by the statement that, through making environmental information widely available to the citizenry and involving the public in environmental decision-making, it becomes easier for aggrieved persons to seek justice and protection of environmental rights.⁶⁵² Procedural environmental rights enable citizens to play an active part in the realisation of environmental justice.⁶⁵³ The rights to information, participation, and access to justice allow disadvantaged members of society (who are the most likely to bear the burden of environmental impact) to participate in and have a say over the making and enforcement of environmental laws and decisions.⁶⁵⁴ ‘Procedural environmental justice’ refers to the existence of laws that provide for public participation in environmental decision-making and the enforcement of environmental decisions.⁶⁵⁵ Therefore, procedural environmental rights in the Constitution empower the public and civil society groups to make social and environmental claims and to hold the state, private entities, and individual actors answerable for their actions or omissions.⁶⁵⁶

⁶⁵²Muigua & Kariuki “Safeguarding Environmental Rights in Kenya” at 8 available at <http://www.kmco.co.ke/attachments/article/105/A%20Paper%20on%20%20Safeguarding%20Environmental%20Rights%20in%20Kenya.pdf> (date of use: 20 February 2018).

⁶⁵³Adebowale et al “Environment and Human Rights: A New Approach to Sustainable Development” paper commissioned by the International Institute for Environment and Development (IIED) (2001 available at <http://unac.org/wp-content/uploads/2013/07/HRandSD-EN-PDF.pdf> (date of use: 20 February 2018).

⁶⁵⁴Adebowale et al “Environment and Human Rights: A New Approach to Sustainable Development” paper commissioned by the International Institute for Environment and Development (IIED) (2001 available at <http://unac.org/wp-content/uploads/2013/07/HRandSD-EN-PDF.pdf> (date of use: 20 February 2018).

⁶⁵⁵Millner “Access to Environmental Justice” available at https://www.deakin.edu.au/data/assets/pdf_file/0004/258205/essay-11.pdf (date of use: 4 June 2017).

⁶⁵⁶United Nations Non-Governmental Liaison Service “Human Rights Approaches to Sustainable Development” available at <http://www.un-ngls.org/orf/pdf/ru90hrsd.pdf> (date of use: 7 June 2017).

Principle 10 of the Rio Declaration⁶⁵⁷ elaborates on the notion of procedural environmental rights as follows:

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

5.4.1 The right of access to information and its link to environmental justice

Logically, the right of access to environmental information is the first procedural right that should be available for securing environmental justice. This is to enable effective participation by underprivileged groups in particular (such as the poor) in the decision-making process. Access to information enables vulnerable persons and/or groups who are likely to bear the brunt of the unfair impact of any environmental action, to contribute to the policy and law-making process, and to participate in the implementation of environmental decisions that are likely to affect them adversely.⁶⁵⁸ Access to information on government processes, such as policy development or environmental impact assessments (EIAs), empowers the public to understand ‘why’ and ‘how’ environmental decisions are made and to participate in that process.⁶⁵⁹ The value of transparent and accessible information systems is generally recognised as a vital ingredient in the achievement of a democratic society and an indispensable constituent for achieving sustainable development.⁶⁶⁰

The Kenyan Constitution deals with access to information in article 35 which provides that:

⁶⁵⁷ *Ibid.*

⁶⁵⁸ Millner “Access to Environmental Justice” available at https://www.deakin.edu.au/data/assets/pdf_file/0004/258205/essay-11.pdf (date of use: 4 June 2017).

⁶⁵⁹ *Ibid.*

⁶⁶⁰ Schwarte “Access to Environmental Information in Uganda” paper commissioned by the Foundation for International Environmental Law and Development (FIELD) 1 available at www.accessinitiative.org/sites/default/files/field_access_uganda.pdf (date of use: 20 February 2018).

- 35(1) Every citizen has the right of access to-
- (a) Information held by the State; and
 - (b) Information held by another person and required for the exercise or protection of any right or fundamental freedom.

Gathu and Kahindi submit that from article 35(1)(a) of the Constitution it is clear that the state is the ‘custodian’ of the country’s information which it holds in trust on behalf of citizens.⁶⁶¹ It also follows that citizens have the right of access to information held by the state that can help in the protection of their rights. Article 35(1)(b) obliges private persons other than the state to make information accessible to the public for the protection of fundamental rights and freedoms. The Access to Information Act⁶⁶² was passed in 2016 to give effect to the constitutional provision and provides a framework for public entities and private bodies pro-actively to disclose information for the purposes stated in article 35 the Constitution.⁶⁶³ The Act requires a private person 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, to disclose that information.⁶⁶⁴ In terms of the Act, a person may request access to environmental information without having to state an interest or give a reason.⁶⁶⁵

Environmental information includes information on measures such as policies, legislation, plans, programs, and activities affecting, or likely to affect, the environment, as well as measures or activities designed to protect it. Reports on the implementation of environmental legislation also constitute environmental information.⁶⁶⁶ The Kenya Environmental Information Network (KEIN) is a project initiated by the United Nations Environment Programme (UNEP) and the government to facilitate open access to

⁶⁶¹Gathu & Kahindi “Access to Information in Kenya” (2015) 155 *Adili* 1.

⁶⁶²31 of 2016.

⁶⁶³Section 3(b).

⁶⁶⁴Section 2.

⁶⁶⁵Section 4(2)(b).

⁶⁶⁶Access to information, public participation and access to justice in environmental matters at Community level – A Practical Guide on the Aarhus Convention Regulations available at <http://ec.europa.eu/environment/aarhus/pdf/guide/AR%20Practical%20Guide%20EN.pdf> (date of use: 7 June 2017).

environmental data and information to promote sustainable development in the country.⁶⁶⁷

Ideally, any environmental information should be readily available, clear, and easily understood. It should also contain sufficient detail to allow members of the public to understand the effect and implications of the information provided and how it will impact on their rights to seek proper redress. Information should be provided timeously and should be accurate in order adequately to equip and empower the public with the knowledge required to participate effectively in the decision-making process. Moreover, the information should be provided in multiple languages and be published in accessible media.⁶⁶⁸ Scientific information should be provided in a format that is comprehensible to the public.⁶⁶⁹ Access to information not only fosters democracy, it also ensures openness and transparency in decision-making.⁶⁷⁰ An informed public is more likely to be vigilant in guarding against environmental injustices and those vices which trigger social injustice and inequality.⁶⁷¹ The right of access to information⁶⁷² also gives the public a practical tool to oversee government environmental decision-making and conduct.⁶⁷² The ability to gain access to information is also important in allowing the public to participate in the non-legislative and informal processes involved in environmental decision-making and environmental injustices. These might include protest, self-education, community education, and other means of influencing and engaging in public debate and attempting to influence government policy development and the environmental outcomes envisaged.⁶⁷³

⁶⁶⁷ See https://www.nema.go.ke/index.php?option=com_content&view=article&id=46&Itemid=1 (date of use: 13 December 2017).

⁶⁶⁸ Millner "Access to Environmental Justice" available at https://www.deakin.edu.au/data/assets/pdf_file/0004/258205/essay-11.pdf (date of use: 4 June 2017).

⁶⁶⁹ Ibid.

⁶⁷⁰ Gathu & Kahindi "Access to Information in Kenya" (2015) 155 *Adili* 1.

⁶⁷¹ Ibid.

⁶⁷² Schwarte "Access to Environmental Information in Uganda" paper commissioned by the Foundation for International Environmental Law and Development (FIELD) 6 available at www.accessinitiative.org/sites/default/files/field_access_uganda.pdf

⁶⁷³ Millner "Access to Environmental Justice" available at https://www.deakin.edu.au/data/assets/pdf_file/0004/258205/essay-11.pdf (date of use: 4 June 2017).

The right of access to information further involves the free dissemination of information to raise public awareness and knowledge, and by so doing, to enhance the appreciation of the best ways in which to protect and manage the environment. For instance, degradation of the environment leads to a scramble for scarce resources which culminates in environmental injustices, poverty, and social conflict.⁶⁷⁴

5.4.2 *The role of public participation in promoting environmental justice*

Environmental justice can be defined as the “fair treatment and meaningful involvement of all people regardless of race, colour, national origin, culture, education, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies”.⁶⁷⁵ Public participation above all requires that vulnerable and disadvantaged groups who are normally at the receiving end of environmental risks, be given an appropriate opportunity to participate in decisions about a proposed activity, policy, or law that will affect their environment, livelihood and/or health.⁶⁷⁶ Public participation can be seen as one of the cornerstones of environmental justice.⁶⁷⁷ As a procedural right, the right to participate can be defined as “the right to treatment as an equal”.⁶⁷⁸ If the interests and needs of affected persons are not represented at the deliberation table, it is likely that an unfair outcome which side-lines the voice of the marginalised may result. Aristotle referred to participation as a status under which individuals have an “equal share in ruling and being ruled”.⁶⁷⁹ Public participation not

⁶⁷⁴Wangari Maathai-an excerpt from the Nobel Peace Prize winner’s acceptance speech, ‘*Earth Island Journal*’ available at http://www.earthisland.org/journal/index.php/eij/article/wangari_maathai_an_excerpt_from_the_nobel_peace_prize_winners_acceptance_sp/ (date of use: 5 June 2017).

⁶⁷⁵United States Environmental Protection Agency (EPA) available at <https://www.epa.gov/environmentaljustice> (date of use: 10 June 2017). See also Chapter 1 of this dissertation on the introduction to environmental justice.

⁶⁷⁶George Washington University Law School “The Role of Public Participation in Advancing Environmental Justice” available at www.iucnael.org/...public-participation...environmental-justice/file (date of use: 10 June: 2017).

⁶⁷⁷Ibid.

⁶⁷⁸Kuehn (2000) 30 *Environmental Law Reporter* 10683.

⁶⁷⁹Aristotle was a Greek philosopher living between 384-322 BC whose writings cover many subjects including, physics, biology, zoology, metaphysics, logic, ethics, aesthetics, poetry, theater, music, rhetoric, linguistics, politics and government. His works constitute the first comprehensive system of Western philosophy. Stanford *Encyclopaedia of Philosophy* available at <https://plato.stanford.edu/> (date of use: 13 December 2017).

only involves the way in which a decision is made, but also the fairness of the decision-making process.⁶⁸⁰

Public participation is a value highlighted in various provisions in the new Constitution. This suggests that the Constitution places a high premium on public participation as one of its foundational principles which forms the bedrock of environmental justice protection. For example, article 10(2)(a) of the Constitution recognises public participation as one of the national values and a principle of governance in applying and interpreting the Constitution, interpreting any law, and taking public-policy decisions. Article 69(1)(d) requires the state to promote public participation in the management and protection of the environment. Public participation is also encouraged by article 56(a) through the provision for the participation and political representation of minorities and marginalised groups in governance. Article 232(1)(d) recognises peoples' participation in the process of policy-making as one of the values and principles of public service. All these constitutional principles are vital in challenging environmental policies, programs, and laws that have a prejudicial impact, and which do not safeguard the environment and human wellbeing.

In *Friends of Lake Turkana Trust v Attorney General & 2 others*⁶⁸¹ the court was of the view that access to environmental information was a prerequisite for effective public participation in decision-making and monitoring government and public-sector activities impacting on the environment. The court also observed that article 69(1)(d) of the Constitution of Kenya, 2010, obliges the state to encourage public participation in the management, protection, and conservation of the environment, and that public participation is only possible if the public has access to information.

⁶⁸⁰George Washington University Law School "The Role of Public Participation in Advancing Environmental Justice" available at www.iucnael.org/...public-participation...environmental-justice/file (date of use: 10 June: 2017).

⁶⁸¹Ibid.

Public participation may involve various forums at the community, grassroots level including public hearings or public meetings involving local leaders such as chiefs.⁶⁸² However, these forums do not in themselves fully constitute conditions necessary for effective, meaningful and ‘authentic’ public participation.⁶⁸³ In other words, mere consultation and informing the public about a particular environmental proposal do not in themselves conclusively constitute proper and efficient public participation. Adequate participation must also involve meaningful exchanges between the decision-maker and the public, with the possibility that the input by the public can influence the ultimate decision.⁶⁸⁴ Ultimately, genuine attempts to address the public concerns should be made. Appropriate weight should be attached to and suitable attention should be given to these concerns when any environmental decision is ultimately taken.⁶⁸⁵

Another form of environmental public participation is the right to lobby. The Constitution guarantees freedom of association⁶⁸⁶ and the right to assemble, demonstrate, picket, and to present petitions to public authorities.⁶⁸⁷ These are important tools that local communities can use to campaign for environmental justice. For example, communities can, by staging demonstrations and protests, stop corporations that are causing environmental pollution.⁶⁸⁸ A good example of the application of lobbying in promoting environmental justice is the ongoing Maasai land claims initiative the overall goal of which is to redress historical injustices and wrongs arising from the appropriation of

⁶⁸²Muigua & Kariuki “Safeguarding Environmental Rights in Kenya” at 3 available at <http://www.kmco.co.ke/attachments/article/105/A%20Paper%20on%20%20Safeguarding%20Environmental%20Rights%20in%20Kenya.pdf> (date of use: 20 February 2018).

⁶⁸³George Washington University Law School “The Role of Public Participation in Advancing Environmental Justice” available at www.iucnael.org/...public-participation...environmental-justice/file (date of use: 10 June: 2017).

⁶⁸⁴Australian and New Zealand Environment and Conservation Council and National Advisory Body and Scheduled Wastes Management Group “A Case Study of Problem Solving through Effective Community Consultation” July 2000 available at <http://www.ntn.org.au/cchandbook/library/documents/problem%20solving.pdf> (date of use: 3 June 2017).

⁶⁸⁵Millner “Access to Environmental Justice” available at https://www.deakin.edu.au/data/assets/pdf_file/0004/258205/essay-11.pdf (date of use: 4 June 2017).

⁶⁸⁶Article 36.

⁶⁸⁷Article 37.

⁶⁸⁸Muigua & Kariuki “Safeguarding Environmental Rights in Kenya” at 8 available at <http://www.kmco.co.ke/attachments/article/105/A%20Paper%20on%20%20Safeguarding%20Environmental%20Rights%20in%20Kenya.pdf> (date of use: 20 February 2018).

Maasai ancestral land by the British colonial government following the Maasai Agreements of 1904 and 1911, and the failure by successive governments of independent Kenya to address these injustices and wrongs.⁶⁸⁹

5.4.2.1 Enhancing environmental justice through public participation in any environmental impact assessment (EIA) process

Article 69(f) of the Constitution obliges the government to establish systems of environmental impact assessments (EIAs), environmental audits (EAs), and the monitoring of the environment.⁶⁹⁰ The Constitution recognises the EIA as a fundamental process in the achievement of the right to a healthy and clean environment under article 42(b).

The EIA is a procedure or tool for evaluating the likely impact of a proposed activity on the environment. Its purpose is to provide decision-makers (including the government and the public) with information as to the possible effects and impact of a project before issuing an authorisation to proceed.⁶⁹¹ The EIA entails a process through which a report detailing the foreseeable environmental effects of a proposed policy or project is made available to the affected public for comment and input. The EIA provides environmental decision-makers with information on the possible consequences of the proposed activities, programs, and policies and their impact on the environment. It also enables public participation by potentially affected persons in the decision-making process. The EIA is primarily aimed at designing projects or plans that are not only 'environmentally sound but also socially compatible and equitable', ie, only plans/policies/programs or actual projects that have a positive effect on both the environment and the local

⁶⁸⁹Koissaba "Maa Civil Society Forum: Issues Arising from Anglo - Maasai Treaties of 1904 and 1911" at 4 available at <http://equalinrights.pbworks.com/f/Write+up+on+Anglo+Maasai+Treaties.pdf> (date of use: 15 June 2017). Also see Chapter 4 of this dissertation on the environmental history of Kenya and colonial environmental injustices.

⁶⁹⁰Ibid.

⁶⁹¹Muigua "Environmental Impact Assessment (EIA) in Kenya" available at <http://www.kmco.co.ke/attachments/article/109/A%20Paper%20on%20Environmental%20impact%20assessment.pdf> (date of use: 10 June 2017).

community should proceed.⁶⁹² The EIA has become an important tool in environmental management world-wide and in curbing environmental injustices since its origin in the USA in 1969 and its adoption by the 1972 Stockholm Conference.⁶⁹³

The EIA is critical in analysing and screening environmental wrongs and in providing solutions to prevent them altogether, or to mitigate them to acceptable levels. It is a fundamental process in achieving human wellbeing and sustainable development.⁶⁹⁴ For instance, the EIA can be a powerful tool by which to monitor and control operations of private bodies such as multinational corporations in a country so as to ensure the environmental safety of the public.⁶⁹⁵

It has been found that an effective EIA should, inter alia:⁶⁹⁶

- i provide an opportunity for public scrutiny and participation in decision-making;
- ii facilitate better-informed judgments when balancing environmental and developmental needs; and
- iii contribute to the implementation of national policies on sustainable development.

To achieve the desired outcome the EIA is guided by certain set principles including:⁶⁹⁷

- i. it should be aimed at achieving sustainable development;
- ii. it should be applied to all proposed actions likely to have a significant adverse effect on environment and human health;
- iii. it should include an analysis of feasible alternatives to the proposed action;

⁶⁹²Sands *International Environmental Law* 799-800.

⁶⁹³EIA was first formally established in USA through the National Environmental Policy of 1969 after concerns over widespread environmental damage. Glasson, Thrivel & Chadwick *Environmental Impact Assessment* 31.

⁶⁹⁴Ouran (2015) 4/7 *International Journal of Current Microbiology and Applied Sciences* 862-71.

⁶⁹⁵Muigua "Environmental Impact Assessment (EIA) in Kenya"

available at

<http://www.kmco.co.ke/attachments/article/109/A%20Paper%20on%20Environmental%20impact%20assessment.pdf> (date of use: 10 June 2017).

⁶⁹⁶*Ibid.*

⁶⁹⁷*Ibid.*

- iv. it should include meaningful opportunities for public participation; and
- v. it should be carried out in a multi-disciplinary manner using practicable science to foresee the impact of the project on various human aspects such as environmental, social, economic, and cultural.

The EIA process is prescribed in sections 58 and 59 of the Environmental Management and Coordination Act of 1999. Section 58,⁶⁹⁸ inter alia, obliges the proponent of a project to undertake or cause to be undertaken an environmental impact assessment study and to prepare a report containing the findings. A proponent is prohibited from implementing a project likely to have a negative environmental impact or for which an EIA has not been concluded or approved by the National Environmental Management Authority (NEMA). The NEMA is established under the Environmental Management and Co-ordination Act as the principal government mechanism for the implementation of all policies relating to the environment.⁶⁹⁹

An EIA study must take into account, inter alia, social considerations such as the presence of low-income communities and vulnerable persons, and should factor in how such communities or persons would be affected by the proposed project either positively, such as economic and other benefits, or negatively.⁷⁰⁰ The study should:⁷⁰¹

⁶⁹⁸Section 58: Application for an Environmental Impact Assessment Licence:

“(1) Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before for an 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.

(2) The proponent of a project shall undertake or cause to be undertaken at his own expense an environmental impact assessment study and prepare a report thereof where the Authority, being satisfied, after studying the project report submitted under subsection (1), that the intended project may or is likely to have or will have a significant impact on the environment, so directs.

(3) The environmental impact assessment study report prepared under this subsection shall be submitted to the Authority in the prescribed form, giving the prescribed information and shall be accompanied by the prescribed fee.”

⁶⁹⁹Section 7.

⁷⁰⁰Muigua “Environmental Impact Assessment (EIA) in Kenya” available at

- i identify the anticipated environmental impacts of the project and the scale of the impacts;
- ii identify and analyse alternatives to the proposed project;
- iii propose mitigation measures to be taken during and after the implementation of the project; and
- iv develop an environmental management plan with mechanisms for monitoring and evaluating the compliance and environmental performance which shall include the cost of mitigation measures and the time frame of implementing the measures.

In order for the EIA report to provide sufficient detail to guide environmental decision-making, it should include information such as, among other things:⁷⁰²

- i the proposed location of the project;
- ii relevant information relating to the project such as its objectives;
- iii the technology, procedures, and processes to be used, in the implementation of the project;
- iv the materials to be used in the construction and implementation of the project;
- v the products, by-products, and waste to be generated by the project;
- vi a description of the potentially affected environment;
- vii the environmental effects of the project, including the anticipated social and cultural effects and the direct, indirect, cumulative, irreversible, short-term and long-term effects;
- viii alternative technologies and processes available and reasons for preferring the chosen technology and processes; and

<http://www.kmco.co.ke/attachments/article/109/A%20Paper%20on%20Environmental%20impact%20assessment.pdf> (date of use: 10 June 2017).

⁷⁰¹Regulation 16 of Legal Notice 101, the Environmental (Impact Assessment and Audit) Regulations, 2003.

⁷⁰²Regulation 18(1).

- ix An environmental management plan proposing the measures for eliminating, minimising, or mitigating adverse impacts on the environment including the cost, time-frame, and responsibility to implement the measures.

Public awareness and participation is central to the EIA. During the process of conducting an EIA study the proponent must, in consultation with the NEMA, include input from the community or individuals affected by the proposed project.⁷⁰³ The public must be given an opportunity to participate in deciding whether the proposed project is viable. After the EIA report has been approved by the NEMA, the proponent of the project must make the project known and include in its publication the anticipated effects and benefits of the project by, inter alia:⁷⁰⁴

- i posting posters in strategic public places in the vicinity of the site of the proposed project informing the affected parties and communities of the proposed project;
- ii publishing a notice of the proposed project for two successive weeks in a newspaper that has a nation-wide circulation;
- iii making an announcement of the notice in both official and local languages in a radio broadcast with a nation-wide coverage at least once a week for two consecutive weeks;
- iv holding at least three public meetings with the affected parties and communities to explain the project and its effects, and to receive their oral or written comments; and
- vi ensuring that appropriate notices are sent out at least one week prior to the meetings, and that the venues and times of the meetings are convenient for the affected communities and the other concerned parties.

The EIA can help prevent and mitigate negative environmental effects and environmental injustices when meaningful and authentic participation by affected sectors of the population is facilitated. Strengthening environmental compliance through

⁷⁰³Regulation 17(1).

⁷⁰⁴Regulation 17(2).

the EIA process also requires concerted efforts by both the public and private sectors each playing its role in ensuring that industries and local authorities adhere to environmental legal standards. Government officials, particularly inspectors, investigators, and prosecutors, must exercise public authority in accordance with the standards of good governance as provided for in the Constitution with a view to protecting and improving public wellbeing.⁷⁰⁵ For example, in 2015 an example of environmental injustice emerged when a low-income village in Mombasa was affected by lead poisoning originating from a factory. The government authorities were blamed for being lax and failing to monitor the factory's compliance with health and environmental standards and regulations. Civil society led a protest campaign which resulted in the closure of the company by the government.⁷⁰⁶

5.4.3 The right of access to justice through the courts in promoting environmental justice

Access to justice gives voice to vulnerable and disadvantaged persons in the promotion of the right to a clean and healthy environment. Access to justice is an instrument that provides the structural framework necessary for the realisation of constitutional guarantees which include non-discrimination, the rule of law, equality, social justice, protection of the marginalised, the promotion of human well-being, and sustainable development.⁷⁰⁷

Access to justice in relation to the realisation and protection of environmental justice involves the ability to obtain an array of appropriate remedies through institutions of justice – both formal (ie, the judiciary) and informal (ie, through alternative dispute

⁷⁰⁵Muigua & Kariuki "Safeguarding Environmental Rights in Kenya" available at <http://www.kmco.co.ke/attachments/article/105/A%20Paper%20on%20%20Safeguarding%20Environmental%20Rights%20in%20Kenya.pdf> (date of use: 20 February 2018).

⁷⁰⁶*Daily Nation* "MP to compensate families injured by lead poison 'if guilty'" available at <http://www.nation.co.ke/news/politics/MP-to-compensate-families-injured-by-lead-poison-if-guilty/1064-2701594-o1e8d1z/index.html> (date of use 3 June 2017); Chege (2013) 8/17 *International Journal of Physical Sciences* 835-9.

⁷⁰⁷Cullet (1995) 13 *Netherlands Quarterly of Human Rights* 25, 37.

resolution and other conflict-management mechanisms).⁷⁰⁸ Access to environmental justice is achieved when poor, marginalised, and vulnerable groups and individuals in society who usually face the heaviest burden of environmental harm, are able to find solutions within a judicial system (both formal and informal) that are accessible, affordable, and comprehensible to the common man, woman, or even groups, and which dispense justice fairly, speedily, and without discrimination, fear, or favour.⁷⁰⁹ Access to justice in promoting (and ensuring) environmental justice thus entails the opening up of formal and informal systems and legal structures to disadvantaged groups in society by the removal of legal, financial, and social barriers such as language, lack of awareness of legal rights, and the elimination of any form of intimidation or fear that proves a hindrance to approaching the judiciary.⁷¹⁰ Access to justice was summarised in the Kenyan case of *Dry Associates Limited v Capital Markets Authority & Another Interested Party Crown Berger (K) Ltd*⁷¹¹ as constituting: the awareness and understanding of the law by aggrieved persons; equality in the protection of rights; availability of physical legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases; and enforcement of judicial decisions without delay.

The Constitution considers access to justice the central pillar in the achievement of its core values and key objectives. The protection of environmental justice is anchored in the Constitution's promotion of fairness, justice, and equity. Article 48 of the Constitution guarantees access to justice for all.⁷¹² Article 159 guarantees that justice shall be done to all, irrespective of status; justice shall not be delayed; alternative forms of dispute resolution and traditional (African) dispute resolution mechanisms shall be promoted;

⁷⁰⁸United Nations Development Program "Programming for Justice: Access for All: A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice" (2005) Bangkok available at https://www.un.org/ruleoflaw/files/Justice_Guides_ProgrammingForJustice-AccessForAll.pdf (date of use: 8 June 2017).

⁷⁰⁹Ladan "Access to Justice as a Human Right under the Ecowas Community Law" available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336105 (date of use: 10 June 2017).

⁷¹⁰Global Alliance against Traffic in Women (GAATW) "Access to Justice" available at <http://www.gaatw.org/atj/> (date of use: 7 June 2017).

⁷¹¹Petition 328 of 2011 para10.

⁷¹²Article 48 states: "The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice".

justice shall be administered without undue regard to technicalities; and the purposes and principles of the Constitution shall be protected and promoted.

5.4.3.1 Extending locus standi and its impact on the promotion of environmental justice

The strict approach to standing (*locus standi*) in Kenya under the old constitutional regime restricted the realisation of environmental justice by requiring that only individuals who had a personal stake in a matter could institute legal claims.⁷¹³ The 2010 Constitution, recognising this serious flaw which resulted in massive abuse of fundamental human rights, expanded 'standing' to allow both individuals and groups to bring claims without having to show a direct, personal interest.

An extended *locus standi* is an important element in ensuring access to environmental justice. In promoting access to justice, article 22(2) of the Constitution provides that in protecting fundamental rights, the following may institute actions in court:

- a) a person acting in his or her own interest;
- b) a person acting on behalf of another person who cannot act in his or her own name;
- c) a person acting as a member of, or in the interest of, a group or class of persons;
- d) a person acting in the public interest; or
- e) an association acting in the interest of one or more of its members.

Article 70(3) further provides that when seeking protection of the environmental right an applicant need not show that any person has incurred loss or suffered injury.

Through articles 22(2) and 70(3) the Constitution recognises public-interest litigation which is both a viable and an effective way of promoting environmental justice in Kenya.

⁷¹³See Chapter 4 of this dissertation for a detailed discussion of the restriction of public interest litigation due to a limited *locus standi* under the old constitutional dispensation.

Public-interest litigation is an important tool in restraining the government from embarking on actions, programs, and policies that have a negative impact on the environment and the wellbeing of communities.⁷¹⁴

5.4.3.2 The role of the Environmental and Land Court in promoting environmental justice

One of the fundamental gains of the new Constitution is the establishment of an Environmental and Land Court (ELC) exclusively to determine environmental matters in Kenya. The ELC carries a status similar to that of a High Court (superior court) which once again illustrates the high regard given to the environment in the new constitutional dispensation.⁷¹⁵ The Environment and Land Court Act⁷¹⁶ establishes an ELC to hear matters dealing with the environment and land. The establishment of the court is also a recognition of the need to improve access to justice in environmental matters. Previously, environmental and land court matters were heard in the ordinary courts and it could take years before justice was seen to be done by the parties.⁷¹⁷

Notably, the Environment and Land Court Act furthers the realisation of justice in environmental matters by giving the court *suo moto* jurisdiction.⁷¹⁸ Courts may therefore act without necessarily waiting for the filing of case in public-interest litigation. Moreover, it is arguable that *suo motu* jurisdiction also allows judges to engage in judicial

⁷¹⁴Muigua & Kariuki "Towards Environmental Justice in Kenya" (2015) available at www.kmco.co.ke/.../Towards%20Environmental%20Justice%20in%20Kenya-January%202015.pdf (date of use: 11 June 2017).

⁷¹⁵Article 162(2)(b) of the Constitution..

⁷¹⁶Act 19 of 2011.

⁷¹⁷Muigua & Kariuki "Towards Environmental Justice in Kenya" (2015) available at www.kmco.co.ke/.../Towards%20Environmental%20Justice%20in%20Kenya-January%202015.pdf (date of use: 11 June 2017).

⁷¹⁸Section 20(1) of the Environment and Land Court 19 of 2011 provides that: "Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of the Constitution".

activism.⁷¹⁹ In safeguarding environmental rights the ELC is also guided by informal justice devices envisaged in article 159(3)⁷²⁰ of the Constitution so as to promote greater access to justice.⁷²¹

Judicial review is also an important tool in the realisation of environmental justice. This can be undertaken by the ELC by virtue of its status as a High Court through its supervisory power to monitor decisions or failure to act by the government by ensuring that public bodies are bound by the rule of law and give due weight to critical environmental factors.⁷²²

Notwithstanding the establishment of the ELC, High Courts other than the ELC are not prevented from hearing claims in respect of the right to a clean and healthy environment. In *Said Tahir & 2 others v County Government of Mombasa & 5 others*⁷²³ the judge ruled that the right to a clean and healthy environment is a right under the Bill of Rights and is enforceable in the High Court under article 23(1) of the Constitution.⁷²⁴

⁷¹⁹The expression 'judicial activism' signifies the objective of courts to find an appropriate remedy for the aggrieved by formulating a new rule to settle the conflicting questions in the event of lawlessness or uncertain laws. Ghosh (2013) 1/1 *Galgotias Journal of Legal Studies* 17.

⁷²⁰Article 159(2) of the Constitution provides: "In exercising judicial authority, the courts and tribunals shall be guided by the following principles:

- (a) justice shall be done to all, irrespective of status;
- (b) justice shall not be delayed;
- (c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted (in so far they are not repugnant to justice or morality or inconsistent with the Constitution - Article 159(3))."

⁷²¹Muigua & Kariuki "Towards Environmental Justice in Kenya" (2015) available at www.kmco.co.ke/.../Towards%20Environmental%20Justice%20in%20Kenya-January%202015.pdf (date of use: 11 June 2017).

⁷²²Public Law Project "An introduction to Judicial Review" available at http://www.publiclawproject.org.uk/data/resources/6/PLP_Short_Guide_3_1305.pdf (date of use: 8 June 2017) at 1.

⁷²³Petition 6 of 2015.

⁷²⁴Article 23(1) provides that the High Court has jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to a right to fundamental freedom in the Bill of Rights. Article 23(3) further provides the relief that a High Court may grant in enforcing the Bill of Rights. These include: (1) a declaration of rights; (2) an injunction; (3) a conservatory order; (This is an interim measure granted to preserve the *status quo* of the subject matter in a dispute. A party may seek the relief before or during the court proceedings. The party seeking the interlocutory measure should establish that: the matter has a likelihood of success on the merits; irreparable harm might be caused if the interim relief were denied; and the balance of convenience is in its favour.) See <http://www.internationallawoffice.com/Newsletters/Arbitration-ADR/Kenya/Njoroge-Regeru-Company/Conservatory-orders-are-not-automatic> (date of use: 28 November 2017); (4) a declaration of invalidity of law that violates a right; (5) an order of compensation; and,(6) an order of judicial review.(Judicial review as a way of relief means that courts of law have the power to test the validity of

There is thus a jurisdictional duality between the High Courts and the ELC as regards the enforcement of the right to a healthy environment. The High Courts' power to confer remedies in environmental matters as such, derives from section 13(7) of the Environment and Land Act.⁷²⁵

It is expected that with the establishment of a specialised court system to deal with strictly environmental matters, the ELC will play a significant role in the interpretation and development of progressive environmental law and jurisprudence which furthers sustainable development aims. Concepts such as environmental justice are expected to find greater recognition and application in furthering the objectives and principles underpinning the new Constitution in the protection of the right to a clean and healthy environment.

5.4.3.3 Quasi-judicial bodies and alternative dispute resolution mechanisms in the promotion of environmental justice

The use of alternative dispute mechanisms is an important tool in the promotion of environmental justice in environmental conflicts in Kenya.⁷²⁶ Many people in Kenya do not have ready access to the judiciary for various reasons such as high filing fees,

legislative as well as other governmental action with reference to the provisions of the Constitution.) The Constitution of Kenya has now given the judiciary the broad jurisdiction to rule on the constitutionality of legislative and administrative actions through the power of judicial review. Article 47 of the Constitution provides for the right to fair administrative action. The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function (art 165.) See

<http://kenyalaw.org/kenyalawblog/the-constitution-of-kenya-2010-and-judicial-review-odumbe-case/> (date of use: 23 November 2017).

Section 13(7) of the Environment and Land Court Act 19 of 2011 provides a list of remedies which the court may grant including: (a) interim or permanent preservation orders including injunctions; (b) prerogative orders; (c) award of damages; (d) compensation; (e) specific performance; (f) restitution; (g) declaration; or (h) costs.

⁷²⁵Muigua & Kariuki "Towards Environmental Justice in Kenya" (2015) available at www.kmco.co.ke/.../Towards%20Environmental%20Justice%20in%20Kenya-January%202015.pdf (date of use: 11 June 2017).

⁷²⁶Kameri-Mbote "Towards Greater Access to Justice in Environmental Disputes in Kenya" International Environmental Law Research Centre Working Paper (2005) 8 available at www.ielrc.org/content/w0501.pdf (date of use: 20 February 2018).

bureaucracy, complex procedures, illiteracy, and long distances from the courts.⁷²⁷ The Constitution recognises and acknowledges this reality by promoting the use of alternative justice systems. Article 50(1) provides

every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

Moreover, article 159(2)(c) of the Constitution, makes provision for the use of alternative forms of dispute resolution including reconciliation, mediation, and arbitration in dispensing justice.

Alternative dispute mechanisms are important in environmental justice in that they promote public participation.⁷²⁸ Alternative dispute mechanisms such as mediation and conciliation promote environmental democracy through participation, and are aimed at producing 'win-win' environmental decisions rather than the strict enforcement of the rights of the parties.⁷²⁹

The Environmental Management and Coordination Act makes provision for quasi-judicial bodies which play an essential role in making justice in environmental matters more accessible to the public. These bodies include:

- (i) the National Environmental Tribunal (NET); and
 - (ii) the Public Complaints Committee (PCC).
-
- (i) The National Environmental Tribunal (NET)

The NET was established under section 125 of the Environmental Management and Coordination Act. It is aimed at offering expeditious and less costly justice than the

⁷²⁷Muigua & Kariuki "Towards Environmental Justice in Kenya" (2015) available at www.kmco.co.ke/.../Towards%20Environmental%20Justice%20in%20Kenya-January%202015.pdf (date of use: 11 June 2017).

⁷²⁸Ibid.

⁷²⁹Ibid.

ordinary court system. No costs are levied for filing proceedings before the tribunal and its procedure is simplified, flexible, and free from legal technicalities. The NET is not bound by the rules of evidence (as set out in the Evidence Act).⁷³⁰ It consists of environmental experts from different professional backgrounds whose function is to facilitate the effective delivery of justice. These include: a chairman nominated by the Judicial Service Commission, who shall be a person qualified for appointment as a judge of the High Court of Kenya; an advocate of the High Court of Kenya nominated by the Law Society of Kenya; a lawyer with professional qualifications in environmental law appointed by the Minister of the Environment; and two persons appointed by the Minister, who have demonstrated exemplary academic competence in the field of environmental management.⁷³¹ The administration of justice at the NET is enhanced by the requirement of supervisory jurisdiction of the High Court of any of the NET's decisions through either judicial review, or a right of appeal to the High Court.⁷³²

Access to justice via the NET is nevertheless hampered by its lack of 'original' jurisdiction as it functions as an appellate body over decisions of other administrative environmental organs under the Environmental Management and Coordination Act.⁷³³ Its appellate jurisdiction denies people the opportunity to approach the NET directly for the resolution of environmental matters. One can only approach NET via appeal from other environmental bodies such as the NEMA on decisions on the issuing, denial, or revocation of EIA licences, among other matters.⁷³⁴

(ii) The Public Complaints Committee (PCC)

The Public Complaints Committee (PCC) was established under section 31 of the Environmental Management and Coordination Act to serve as an environmental

⁷³⁰Section 126(1) of the Environmental Management and Coordination Act 8 of 1999; Evidence Act Cap 80 Laws of Kenya.

⁷³¹Section 125(1) of the Environmental Management and Coordination Act 8 of 1999.

⁷³²Ibid s 130.

⁷³³Ibid s 129.

⁷³⁴Kameri-Mbote "Towards Greater Access to Justice in Environmental Disputes in Kenya" International Environmental Law Research Centre Working Paper (2005) 7 available at www.ielrc.org/content/w0501.pdf (date of use: 20 February 2018).

ombudsman. The membership comprises: a chairman appointed by the Minister of Environment who shall be a person qualified for appointment as a judge of the High Court of Kenya; a representative of the Attorney-General; a representative of the Law Society of Kenya; a representative of non-governmental organisations who shall be the secretary of the Complaints Committee; a representative of the business community appointed by the Minister of Environment; and two members appointed by the Minister for their active role in environmental management.⁷³⁵

The functions of the PCC include: investigating and addressing environmental complaints reported to it against the NEMA by the public; investigating, on its own motion, any suspected case of environmental degradation; and the preparation of reports which form part of the annual report on the state of the environment presented in parliament by the Minister of Environment.⁷³⁶

The PCC has the potential to improve access to justice and promote human wellbeing as an intermediary between the state and the public in environmental justice claims. The PCC has to date investigated cases of air pollution caused by uncontrolled burning of garbage, emission of noxious gases by factories and industries, the discharge of untreated water into water bodies, and the drying-up of water masses due to diversion of rivers.⁷³⁷

5.4.3.4 Traditional dispute resolution mechanisms in enhancing environmental justice

Resource-based conflicts are a common feature in environmental injustice in communities in Kenya which depend primarily on natural resources such as grazing land. These issues arise due to a scarcity of natural resources and can lead to injustices and social disintegration. Proper handling of the conflicts is essential in promoting

⁷³⁵Section 31(1)(a) of the Environmental Management and Coordination Act 8 of 1999.

⁷³⁶Ibid s 32.

⁷³⁷Kameri-Mbote "Towards Greater Access to Justice in Environmental Disputes in Kenya" International Environmental Law Research Centre Working Paper (2005) 8 available at www.ielrc.org/content/w0501.pdf (date of use: 20 February 2018).

sustainable development through conflict management systems that are readily accessible to these communities and allow them to enjoy autonomy over the process as well as the outcome of the conflict resolution mechanism, and in this way foster amicable relationships and the restoration of order.⁷³⁸ Article 159(3) of the Constitution recognises traditional dispute resolution mechanisms as an important avenue in promoting access to justice.

Community traditional leaders such as chiefs and councils of elders play a significant role in the promotion of community environmental justice in natural resource distribution, management, and conflict resolution. Traditional chiefs and elders in today's Kenyan society remain an integral part of democracy as true representatives of communities in rural areas.⁷³⁹ They are accessible, respected, and frequently act in day-to-day community affairs. Traditional dispute resolution mechanisms are typically characterised by their participatory nature. For example, in Kenya community gatherings commonly known as 'baraza' offer an opportunity for members of the community to voice their grievances and opinions on issues affecting them.⁷⁴⁰ The chief, as the African saying asserts, 'is like a swamp where fire ceases to burn' and as such plays an important role in dispensing swift, inexpensive, and popular justice.⁷⁴¹

Keulder, in capturing the important role of traditional leaders in promoting access to justice in the community, opines⁷⁴²

... the institution of traditional leaders and its procedures of governance is not only a simpler form of government, but also a more accessible, better understood, and a more participatory one. It is more accessible because it is closer to the subjects than any other system of government; subjects have more direct access to their leaders because they live in the same village and because any individual can approach the leader and ask him or her to call a meeting...decision making is based on consensus, which creates greater harmony and unity; it is transparent and participatory because most people may attend tribal meetings and express their views, directly...and lastly, harmony and

⁷³⁸ *Ibid.*

⁷³⁹ See Chapter 4 of this dissertation on the history of environmental protection in Kenya for a detailed discussion of the role of traditional leaders in African traditional society.

⁷⁴⁰ Logan "Traditional Leaders in Modern Africa" Afro Barometer working paper 93 (2008) 1, 3 available at http://pdf.usaid.gov/pdf_docs/PNADL326.pdf (date of use: 20 February 2018).

⁷⁴¹ Mwaura "Leave Our Chiefs Alone: They Provide Swift, Cheap and Popular Justice" available at <http://allafrica.com/stories/201009200207.html> (date of use: 16 June 2017).

⁷⁴² Keulder *Traditional Leaders* 11.

unity prevail because the interests of the tribal unit, rather than an individual or group of individuals, are pursued and expressed.

The council of elders (*Jaarsa Dedha*) in the Boran community is responsible for decisions regarding the management of resources.⁷⁴³ Among the Turkana, the *Ng'ekeliok* is the most senior body dealing with conflict resolution, and guides the community on matters concerning possible starvation and impending droughts. In the proportional distribution of resources, the *Nge'ekeliok* group of elders is responsible for restricting access to mountainous areas which are protected for the drier seasons. In the Gabra community, the *Yaa* council of elders is responsible for protecting the reserved hilly areas. Only destitute members of the community who have lost livestock during a drought, for example, may be permitted to settle temporarily in these areas until their herds have been rebuilt.⁷⁴⁴ Moreover, in the majority of communities in Northern Kenya which is a drought-prone area, the councils of elders play a role as the custodians of water resources. For instance, they are involved in managing water extraction from boreholes, ensuring fair resource distribution, and so, in essence, for dispensing environmental justice.⁷⁴⁵

Peace committees are also responsible for bridge-building initiatives in restoring order and forming amicable relationships between resource-conflicting communities in promoting environmental justice in Kenya. Peace committees are hybrid bodies applying both the traditional conflict resolution mechanisms and formal arbitration processes.⁷⁴⁶ Examples of such peace committees include the Wajir Peace and

⁷⁴³Adan & Pkalya "The concept peace committee: A snapshot analysis of the concept peace committee in relation to peace building initiatives in Kenya" (2006) at 9 available at <https://practicalaction.org/concept-peace-committee> (date of use: 18 June 2017).

⁷⁴⁴Robinson, Sinclair & Spaling "Traditional pastoralist decision-making processes: Lessons for reforms to water resources management in Kenya" (2010) 53/7 *Journal of Environmental Planning and Management* 12.

⁷⁴⁵Kameri-Mbote "Towards Greater Access to Justice in Environmental Disputes in Kenya" International Environmental Law Research Centre Working Paper (2005) 8-10 available at www.ielrc.org/content/w0501.pdf (date of use: 20 February 2018).

⁷⁴⁶Adan & Pkalya "The concept peace committee: A snapshot analysis of the concept peace committee in relation to peace building initiatives in Kenya" (2006) at 9 available at <https://practicalaction.org/concept-peace-committee> (date of use: 18 June 2017).

Development Committee (WPDC) and the Tana River Peace and Reconciliation Committee (TRPRC).⁷⁴⁷

Wajir is a district in the North Eastern province of Kenya characterised by poverty, marginalisation, underdevelopment, and lack of social infrastructure such as education and health facilities. The majority of the population are nomadic pastoralists who compete for scarce resources, including water and grazing. The competition for scarce natural resources is a major source of conflict and environmental injustice. For example, between 1991 and 1992 resource-based violence culminated in the killing of 1 200 people, while thousands of others were either robbed, raped, or wounded. Livestock estimated at a value of US\$ 900 000 was also destroyed. The WPDC, established in the aftermath of the violence, has helped to build peace and foster environmental justice in the area.⁷⁴⁸

Some of the roles and functions of peace committees involve: facilitating peace, dialogue, and reconciliation; fining wrongdoers; ‘cursing’ perpetrators in accordance with to respective traditional customs; enhancing and empowering community participation in peace building; and raising conflict awareness by educating the community on their role in resource distribution at the grassroots level.⁷⁴⁹

5.5 A summary of the impact of the 2010 Constitution in achieving environmental justice in Kenya

The best way, to my mind, to illustrate the impact of the 2010 Constitution following upon my discussion of the Constitution above, is to enumerate by means of a summary

⁷⁴⁷Issifu (2016) 9/1 *Africology: The Journal of Pan African Studies* 149; Wiser Directory “Tana River Peace, Reconciliation and Development” available at <https://wiser.directory/organization/tana-river-peace-reconciliation-and-development-trprd/> (date of use: 7 June 2017).

⁷⁴⁸Issifu *ibid*; Tongeren “Infrastructures for Peace is a promising approach” (2013) available at <http://peacemonitor.org> (date of use: 20 June 2017); Menkhaus (2008) 21/2 *Afrika Focus* 23-38.

⁷⁴⁹Adan & Pkalya “The concept peace committee: A snapshot analysis of the concept peace committee in relation to peace building initiatives in Kenya” (2006) at 9 available at <https://practicalaction.org/concept-peace-committee> (date of use: 18 June 2017).

the many ways in which the recognition of the concept 'environmental justice' manifests itself in the Constitution, albeit for the most part indirectly.

It can be argued that environmental justice is indeed a recognisable principle underpinning the Constitution. Although environmental justice is not expressly mentioned in the Kenyan Constitution, it can be clearly identified in the new constitutional dispensation's key initiatives, purposes, and overarching principles including sustainable development, human dignity, non-discrimination, and equity. These values or principles essentially form the spirit of the Constitution and guide the public decision-making process in Kenya including: the challenging of objectives reflecting environmental injustices; the enactment of environmental laws; and the adoption of policies, directives, initiatives, and measures suggesting environmental thinking.

- 1) Through the recognition of the right to a clean and healthy environment the object of the right has been shown to be multi-faceted and diversified calling for an holistic, comprehensive, and integrated approach in promoting human wellbeing and environmental justice. The protection of environmental justice involves the protection of all human rights including civil, cultural, economic, political, and social rights which are universal, interdependent, and indivisible. Once again it can be said that although environmental justice is not mentioned directly in the Kenyan Constitution, it can be identified in the dispensation's key initiatives, purposes, and over-arching principles.
- 2) Through the provision of substantive and procedural environmental rights in the Constitution, the standard, benchmark and threshold for environmental thinking, objectives, legislation, programs, and decision-making in the country are confirmed. Concerted efforts from all the stakeholders, including the general public and private sector, can ensure that the compliance and enforcement framework is applied to safeguard the right to clean and healthy environment as envisaged in the Constitution.

- 3) The environmental impact assessment (EIA) which is expressly provided for in the Constitution, is an essential and critical public-participation tool to promote procedural environmental justice. It can achieve its objectives if the public appreciates and understands through civil education and sensitisation, the role of EIA as an essential system for the protection of the right to clean and healthy environment (and by implication environmental justice) as opposed to a mere formal requirement set out on paper.⁷⁵⁰

- 4) Environmental justice protection requires a progressive role for the judiciary in applying the new Constitution through a broadened and flexible interpretation – in other words, through a purposive approach towards constitutional interpretation. This requires in-depth and carefully considered judicial innovation and creativity in which the environmental justice concept can be acknowledged and further developed as a legal and constitutional concept in its own right in Kenya.⁷⁵¹ Judicial commitment and dedication is required in Kenya in the development of a novel, broad and wide interpretation of the right to a clean and healthy environment that addresses multi-dimensional human wellbeing.⁷⁵²

From the foregoing interpretations of the environmental right, the protection of environmental justice in Kenya will depend on how well the courts are willing to and capable of construing and passing judgment on the meaning of the right to a clean and healthy environment. It is suggested that the courts should approach this in such a way that they position and capture human interests in the widest way possible and establish these interests as a central focus in environmental protection and sustainable development.

⁷⁵⁰Muigua & Kariuki “Towards Environmental Justice in Kenya” (2015) available at www.kmco.co.ke/.../Towards%20Environmental%20Justice%20in%20Kenya-January%202015.pdf (date of use: 11 June 2017).

⁷⁵¹Muigua & Kariuki “Safeguarding Environmental Rights in Kenya” available at <http://www.kmco.co.ke/attachments/article/100/A%20Paper%20on%20%20Safeguarding%20Environmental%20Rights%20in%20Kenya.pdf> (date of use: 3 June 2017).

⁷⁵²Ibid.

Boyd argues that a broad interpretation of the right to a clean and healthy environment may open the door to a wide range of legal and extra-legal initiatives that enhance environmental protection. These include: providing impetus for stronger environmental legislation; bolstering the implementation and enforcement of existing environmental laws and policies; and filling gaps in environmental regulation. Thus, Boyd suggests, the ‘existence of a constitutional right to a healthy environment gives concerned citizens or communities a set of tools that may be effective in addressing problems despite the absence of legislation’.⁷⁵³ Such a generous interpretation also provides a constitutional threshold for environmental protection by establishing ‘a floor below which rules for environmental protection cannot descend’;⁷⁵⁴ provides greater government accountability and protection for vulnerable groups who shoulder a disproportionate burden of environmental harms; and increases citizen participation in decisions and actions to promote environmental justice.

In order to conceptualise environmental justice appropriately in the Constitution, calls for a comprehensive and integrated human rights approach to the protection of various aspects of human wellbeing in the widest manner possible.⁷⁵⁵

- 5) Constitutional environmental rights in the Kenyan Constitution ought to be upheld not in isolation, but in tandem with other fundamental rights in the Bill of Rights.⁷⁵⁶ Such an integrated approach would strengthen the protection of environmental justice and sustainable development.⁷⁵⁷ Allowing the broadening of a human rights approach to environmental justice protection to be integrated

⁷⁵³ Boyd *Environmental Rights Revolution* 30.

⁷⁵⁴ Ibid.

⁷⁵⁵ Muigua & Kariuki “Safeguarding Environmental Rights in Kenya” available at <http://www.kmco.co.ke/attachments/article/100/A%20Paper%20on%20%20Safeguarding%20Environmental%20Rights%20in%20Kenya.pdf> (date of use: 3 June 2017).

⁷⁵⁶ Ibid. The preamble provides sustainable development as an overarching principle in the Constitution. Also see art 10 of the Constitution on national values and principles. See Chapter 3 of this dissertation for a discussion of sustainable development as a core principle in the Kenyan Constitution.

⁷⁵⁷ The interrelationship of sustainable development and environmental justice is discussed in detail in Chapter 3 of this dissertation.

into environmental decision-making, will advance a proper quality of life for all, and in particular, the most vulnerable.⁷⁵⁸

5.6 The Kenya *Vision 2030*: The progress of the public policy and environmental justice journeys in Kenya

Kenya aspires to be a middle-income economy, rapidly industrialising by the year 2030 to provide in this way ‘a high quality of life to all its citizens in a clean and secure environment’.⁷⁵⁹ The ‘Kenya Vision 2030’ (the Vision) provides the political, legal, social, economic, and environmental breeding ground for the attainment of environmental justice and sustainable development initiatives in Kenya. The development blueprint seeks to offer a better standard of life for all people in relation to social services, governance, and management of the environment. The Vision shows a special concern for the poor, marginalised, and vulnerable people who have long been faced with social injustices, discrimination, and have not enjoyed the same quality of life and humane standard of living as others.

5.6.1 Background to Kenya Vision 2030

Since independence, Kenya had adopted various national policies with a view to achieving the aims of sustainable development initiatives and raising the quality of life of Kenyans. Subsequent policies have been a refinement of and improvement on earlier versions and reflect lessons learnt. Parts of the lessons learnt reflect environmental justice concerns – in particular, the need for grassroots development and community involvement in policy and decision-making. As part of the colonial legacy, centralised development planning in Kenya has for long largely limited local communities to playing an insignificant role in the decision-making, planning and implementation of

⁷⁵⁸Adebowale et al “Environment and Human Rights: A New Approach to Sustainable Development” paper commissioned by the International Institute for Environment and Development (IIED) (2001) at 2 available at unac.org/wp-content/uploads/2013/07/HRandSD-EN-PDF.pdf (date of use: 20 February 2018).

⁷⁵⁹Government of Kenya “Kenya Vision 2030: Globally Competitive and Prosperous Kenya” (2007) at 2,3,12 available at https://www.researchictafrica.net/.../Kenya_Vision_2030_-_2007.pdf (date of use: 20 February 2018).

development strategies.⁷⁶⁰ The ‘top-down’ colonial approach to development has been largely responsible for producing disparate policies in Kenya and the proliferation of environmental injustices, due to the lack, or even the exclusion, of public involvement in development.⁷⁶¹ The effect of such development policies has, for the most, been passive as opposed to active participation in development and an increasing pattern of a lack of public ownership in the development process, as well as over-dependency on the state for implementation. Some of the most severe results of such an exclusionary policy have been the loss of resources due to stalled, delayed, or ‘white elephant’ projects that resulted in no benefit to the people most in need of them.⁷⁶²

Recent development policies in Kenya have begun to focus on expanding the concept of decentralisation and devolution of decision-making powers to the grassroots level (communities) as a fundamental tool in the planning and implementation of development policies. Moreover, development strategies have adopted a multi-sectoral approach which focuses on meeting political, environmental, economic, and social needs of the people, while aiming for holistic and long-term sustainable development.⁷⁶³

Kenya has drafted several development plans since independence which have impacted on realising sustainable development initiatives in the country. One of the most notable and popular policy documents in this regard, was published immediately upon the attainment of independence. The policy was set out in ‘Sessional Paper No 10 of 1965 on African Socialism and its Application to Planning in Kenya’.⁷⁶⁴ This document

⁷⁶⁰The top-down framework of governance is partly to blame for the development malaise in much of the developing world. The colonial development framework as a highly centralised bureaucratic structure has played a leading role in coordination of development in post-colonial Kenya. Mwenzwa & Misati (2014) 4/1 *American International Journal of Contemporary Research* 246.

⁷⁶¹Ibid.

⁷⁶²‘People-centred approach’ to development is a view in the development process that is based on the premise that humans need to be empowered to reach their potential and therefore the development process should involve empowering groups to be fundamental contributors to development policy. Hub “What is Development?”

available at <http://www.hubcymru.org/images/user/Hub%20What%20is%20Development.pdf> (date of use: 24 May 2017). Mwenzwa & Misati (2014) 4/1 *American International Journal of Contemporary Research* 246.

⁷⁶³Mwenzwa & Misati ibid 247.

⁷⁶⁴Government of Kenya “African Socialism and its Application to Planning in Kenya” sessional paper 10(1965)

has been identified as the first stepping-stone towards sustainable development and fortifying the 'African Renaissance' after years of colonial repression, and was aimed at restoring the just and equitable Kenyan society that existed in pre-colonial times.⁷⁶⁵ This historic document advocated key principles closely linked to and interrelated with sustainable development and environmental justice. The object of the policy document was to foster economic and social development in Kenya which actively promoted, inter alia:⁷⁶⁶ political equality; social justice; freedom from want and poverty, disease, and exploitation; equal opportunities; and high growth in per capita income. The phrase 'African socialism' in the title of the document encapsulated the notion that a foreign ideology was not to be imported into Kenya, but that a system that was in itself African and had African *Ubuntu* characteristics, was to be applied.⁷⁶⁷ African socialism, as represented in the policy document, described an African political and economic system that was positively African and that was neither imported from any other country, nor a blueprint borrowed from foreign ideology, but one with practical application to Kenya's developmental needs and the challenges facing her people. Some of the principal conditions proposed in the policy that had to be satisfied in promoting African socialism included:

- (i) It had to draw from the best of African traditions and the *Ubuntu* system in

available at

[http://siteresources.worldbank.org/INTAFRICA/Resources/257994-1335471959878/Sessional-Paper-No-10-\(1965\).pdf](http://siteresources.worldbank.org/INTAFRICA/Resources/257994-1335471959878/Sessional-Paper-No-10-(1965).pdf) (date of use: 29 May 2017). Tom Mboya (1930- 1969), the author of the sessional paper, was a renowned political activist who served as a Minister for Labour, Minister for Justice and Constitutional Affairs and Minister for Economic Planning and Development in Kenya. See Tom Mboya.org "Mboya as a Minister" available at <http://www.tommboya.org/index.php/events-2/an-evening-with-tom-mboya/75-mboya-as-a-minister> (date of use: 29 May 2017).

⁷⁶⁵African Renaissance implies a 'reawakening' and revival of the African hope for a positive vision for peace, democracy, and prosperity. It is a challenge for all African countries to confront harsh realities of human deprivation and to take greater responsibility for reversing them. Former South African president, Thabo Mbeki is seen as the originator and principal driver of the concept. Louw "The Concept of the African Renaissance as a Force Multiplier to Enhance Lasting Peace and Stability in Sub-Saharan Africa" available at

http://www.africavenir.org/fileadmin/_migrated/content_uploads/

LouwAfricanRenaissanceForceMultiplier_03.pdf (date of use: 29 May 2017).

⁷⁶⁶Courtney Nelson Development Strategies "Administration and Economic Planning in Eastern Africa: A Ford Foundation Program Evaluation" available at <http://www.developmentstrategies.org/Archives/1977ReviewEastAfrica/rea2.htm> (Date of use: 23 May 2017).

⁷⁶⁷See Chapter 4 of this dissertation on the discussion of pre-colonial environmental protection Kenya (including the definition of the African *Ubuntu* philosophy and its relevance in promoting environmental justice).

particular. These constitute the African traditional value system that connotes, among other things, respect for nature and human life, good governance, equity, and social justice.

- (ii) It had to be adaptable to new and rapidly changing circumstances.⁷⁶⁸

The policy document identified specific African traditions that were essential in the promotion of African socialism and human development in post-independence Kenya. Among these were political democracy and mutual social responsibility. Traditional African political democracy implies that each member of society is equal in his or her political rights and that the state, therefore, can never become the tool for special interests, catering for the desires of a minority social class at the expense of the needs of the majority. With regard to the policy, the newly-elected independence government had an obligation to ensure equal opportunities for all its citizens, eliminate exploitation and discrimination, and provide much needed social services such as education and medical care to all.⁷⁶⁹ Some of the significant successes of the policy include the eradication of racial policies which involved the streamlining of opportunities to represent all racial groups fairly. For instance, the public sector top jobs were initially, in the main, occupied by the British; the middle jobs by the Arab community; while the lowest level was populated by Africans. The salaries were, of course, disproportionate and biased.⁷⁷⁰ The policy also played a major role in abolishing segregation in the

⁷⁶⁸Government of Kenya “African Socialism and Its Application to Planning In Kenya” sessional paper 10 (1965) at 2 available at <https://www.knbs.or.ke/download/african-socialism-and-its-application-to-planning-in-kenya/> (date of use: 20 February 2018).

⁷⁶⁹Kwani.org “African Socialism and its Application of Planning in Kenya- Then and now?” available at http://www.kwani.org/editorial/report_essay/40/%E2%80%9Cafrican_socialism_and_its_application_to_planning_in_kenya%E2%80%9D_%E2%80%93_then%E2%80%A6and_now.htm (date of use: 23 May 2017).

⁷⁷⁰Mugore “From Reform to Transformation UNDP’s Support to Public Sector Reforms in Kenya: Lessons Learnt for Devolution” paper commissioned by United Nations Development Programme (2015) at 5 available at <http://www.ke.undp.org/content/dam/kenya/docs/Democratic%20Governance/LESSONS%20LEARNT%20FOR%20DEVOLUTION%2012.3%20Singles.pdf> (date of use: 20 February 2018).

education system by replacing it with a unitary national education system that applied uniformly to all.⁷⁷¹

Despite the fundamental progress resulting from the overarching policy paper, it has not been immune to criticism and has been classed as weak in some respects. For instance, Barack Obama senior (1936-1982),⁷⁷² in criticising the sessional paper, argued that the African tradition of communal ownership of land (which is still practised by pastoral communities such as the Maasai) was not provided for in the policy paper, nor was the principle recognised or promoted. He suggested that by recognising this fundamental African tradition, the concentration of economic power and land administration in Kenya could be standardised and controlled, while also promoting equitable land distribution. Distribution of land and its administration were a cause of serious conflict in Kenya.⁷⁷³ Obama also claimed that the policy paper did not effectively involve and assimilate all racial groups in nation building.^{774 775}

In the discussion of the concept 'environmental justice', the notion of 'development' plays a crucial role. Recently, the right to development of nations has become a global entitlement by virtue of international legal instruments emanating from the United Nations (see below). The right was first expressed in the African Charter on Human and Peoples' Rights.⁷⁷⁶ Article 22(1) provides that:

⁷⁷¹Standard Media "Challenges, Successes of Education System since Uhuru (independence)" available at <https://www.standardmedia.co.ke/article/2000100030/challenges-successes-of-education-system-since-uhuru> (date of use: 23 May 2017).

⁷⁷²Barack H. Obama snr was a Kenyan senior governmental economist in the Ministry of Finance and Economic Planning. He was the father of Barack Obama, the 44th President of the United States. Barack H Obama Foundation "Barack Hussein Obama" available at <http://www.barackhobamafoundation.org/Barack-H-Obama-Sr.html> (date of use: 29 May 2017).

⁷⁷³See Chapter 4 of this dissertation on post-colonial environmental injustices.

⁷⁷⁴Barack Obama "Problems Facing our Socialism" published in the *East Africa Journal* in 1965. available at <https://prestopundit.wordpress.com/2008/04/10/problems-facing-our-socialism-by-barack-h-obama/> (date of use: 29 May 2017).

⁷⁷⁵The 2010 Constitution now recognises communal land ownership in art 61. It provides that "all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals". Also see the sessional paper 3 of 2009 "The National Land Policy on communal land ownership in Kenya" available at www1.uneca.org/.../Land%20Policy%20Documents/Sessional-paper-on-Kenya-National-Land-Policy.pdf (date of use: 30 May 2017).

⁷⁷⁶African(Banjul)Charter on Human and Peoples' Rights 27 June 27 1981, Organisation of African Union Doc CAB/LEG/67/3 rev.5, (1982) 21 *ILM* 58.

All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

This provision affirms non-discrimination and equality and the protection of human dignity as an entitlement of every person. The instrument propagates environmental justice by its assertion of the principles of equal benefit and human dignity, not only in economic development, but also in other fundamental aspects in human development.

The right to development has subsequently been recognised in various United Nations' legal instruments, albeit as soft law.⁷⁷⁷ For example, the preamble to the Declaration on the Right to Development states:

[D]evelopment is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.

This provision acknowledges that public participation and equitable distribution are underpinning principles that reinforce environmental justice and sustainable development. The Vienna Declaration and Programme of Action, further recognises the right to development and reaffirms that “democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing”.⁷⁷⁸

‘Development’ signifies and exemplifies a change for the better or an improvement.⁷⁷⁹

Thomas explains three ways in which the term ‘development’ can be used.⁷⁸⁰

⁷⁷⁷UNGA Declaration on the Right to Development: Resolution adopted by the General Assembly, 4 December 1986, A/RES/41/128 available at <http://www.refworld.org/docid/3b00f22544.html> (date of use: 1 December 2017); UNGA Vienna Declaration and Programme of Action 12 July 1993A/CONF.157/23 available at: <http://www.refworld.org/docid/3ae6b39ec.html> (date of use: 1 December 2017); International Covenant on Civil and Political Rights 16 Dec 1966 art 1 999 UNTS 6 (1967) 6 ILM 368; International Covenant on Economic, Social and Cultural Rights 16 Dec 1966 art 6 993 UNTS (1967) 6 ILM 360; Universal Declaration of Human Rights GA res 217A (III) UN Doc.A/810 at 71 (1948) UN res A/RES/70/1 of 25 September 2015 Preamble, arts 25 and 26.

⁷⁷⁸Principle 8.

⁷⁷⁹Hub “What is Development?” available at <http://www.hubcymru.org/images/user/Hub%20What%20is%20Development.pdf> (date of use: 30 May 2017).

⁷⁸⁰Ibid.

1. Development as a vision that encompasses goals to be achieved. A development goal is, therefore, understood as a goal-oriented method combining people, resources, and processes to achieve a better and sustainable life for the present and future generations.
2. Development as an historical process that tells of a journey towards social change.
3. Development as an action that takes deliberate steps to change things for the better. For example, by providing access to a service such as education the illiteracy and poverty are alleviated; or, by providing health care, human wellbeing and the quality of life is improved.

Kenya's economic and social development history has, in general, not been particularly impressive. The country has not been able to achieve a prolonged and sustained growth spell that could ultimately equitably meet the social needs of its people. Considerable growth 'spurts' were experienced in the 1960s and early 1970s but dwindled by the 1990s in the face of political repression within the country – a situation which prevailed until 2002.⁷⁸¹ The proportion of people living in poverty has been estimated to have increased from approximately 48,8 percent in 1990, to in excess of 56 percent by the end of 2002, with some areas in the country experiencing even greater poverty levels. Social indicators such as the availability of social services to the poor and vulnerable persons, worsened between the mid-1980s and 2002. Life expectancy declined from 57 years in 1986, to 47 years in 2000. Furthermore, according to the Kenya Demographic and Health Survey conducted in 2003, the infant mortality rate increased from 62 per thousand in 1993, to 78 per thousand in 2003, while under-five mortality increased from 96 per thousand births to 114 per thousand

⁷⁸¹General elections were held in Kenya on 27 December 2002. They saw the end of the long-standing dominance of the Kenya African National Union, which had governed the country since independence in 1963, including 23 years as the only legal party. They were the first truly free general elections held in Kenya since independence in 1964. The New York Times "Kenya's Ruling Party is Defeated after 39 Years" <http://www.nytimes.com/2002/12/30/world/kenya-s-ruling-party-is-defeated-after-39-years.html> (date of use: 13 December 2017).

during the same period. These statistics reflect the negative situation of unsustainable development and environmental injustices as regards the ability of the poor and marginalised to access social services which prevailed in post-colonial Kenya long after the attainment of independence.⁷⁸² These conditions created the background against which Kenya's 'Economic Recovery Strategy for Wealth and Employment Creation' (ERS)⁷⁸³ was formulated by the government in 2003, and formed the basis for the formulation of Kenya Vision 2030 (see below). It is noteworthy that the ERS was a five-year plan set to expire in the 2007/2008 financial year. Therefore, in 2007 the government began developing a new long-term strategy that would take over from the ERS.⁷⁸⁴

Kenya Vision 2030 was published on 30 October 2007 as the new long-term development blueprint policy for the country. It was deliberated and designed against a progressive backdrop of the best phase of sustained economic growth in the century resulting from the ERS policy. The long-term blueprint policy was intended as the means by which to provide the impetus for comprehensive and balanced economic, social, and environmental development in Kenya. The blueprint was devised and formulated with the object of improving human quality of life, especially for the poorest and neediest who are so often side-lined in the provision of opportunities such as jobs, decent housing, health care, and education, and often have no voice in national development. The Vision came as a ray of hope for the improvement of environmental justice in Kenya by paying close attention to vulnerable communities, who often fall victim to social injustice and marginalisation.

The phase of economic development that inspired the Vision was recorded between 2003 and 2007 during the successful implementation of the ERS. The recovery policy was introduced to set the country on a trajectory of economic growth after a period of

⁷⁸²Thugge, Ndungu & Otieno "Unlocking the Future Potential for Kenya – The Vision 2030" available at <https://www.csae.ox.ac.uk/conferences/2009-EdiA/papers/509-Owino.pdf> (date of use: 25 May 2017).

⁷⁸³Government of Kenya "Economic Recovery Strategy for Wealth and Employment 2003-2007"(June 2003) available at <http://siteresources.worldbank.org/INTPRS1/Resources/Country-Papers-and-JSAs/cr0511.pdf> (date of use: 20 February 2017).

⁷⁸⁴See <http://www.kenyaembassy.com/economy.html> (date of use: 28 November 2017).

alarming stagnation that had undermined the wellbeing of Kenyans.⁷⁸⁵ As an emergency rescue plan for accelerated economic growth, the Ministry of Planning and National Development introduced the ERS in 2003. It provides:

The central focus of the Plan is job creation through sound macroeconomic policies, improved governance, efficient public service delivery, an enabling environment for the private sector to do business, and through public investments and policies that reduce the cost of doing business. The Plan also includes an equity and social-economic agenda focusing on reducing inequalities in access to productive resources and basic goods and services. It further pays particular attention to promoting actions leading to the sustainable management of natural commons such as land, water, forests to which the very poor depend on. The Plan is therefore the Government's social contract with the people of Kenya. Its implementation will translate into sustained economic growth, wealth creation and poverty reduction, and a broad improvement in the well-being of Kenyans, therefore fulfilling the aspirations and expectations...⁷⁸⁶

The policy saw Kenya's GDP rise from a mere 0,6 percent in 2002 to over six percent in 2007. This reduced the poverty levels from 56 percent in 2002 to 46 percent in 2006, and saw the improvement in quality of life for many underprivileged Kenyans through access of basic social services.⁷⁸⁷ This also saw the achievement of environmental justice in places previously marginalised and discriminated against as regards access to social services. By 2007, which marked the end of implementation of the ERS, the Kenyan economy had stabilised and was on a rapid growth trajectory.⁷⁸⁸ The ERS has been regarded as the most successful policy design implemented in Kenya to have achieved virtually all its desired results.⁷⁸⁹ It also signaled the achievement of environmental justice objectives in the country and a greater realisation of the overarching principle of sustainable development.

Under the ERS, social development, including an improvement in education in that both school and tertiary enrolment figures were the highest ever recorded in Kenyan history. This saw the realisation of the right to education for many poor and marginalised

⁷⁸⁵ Preamble to Government of Kenya "Economic Recovery Strategy for Wealth and Employment 2003-2007" (June 2003) available at <http://siteresources.worldbank.org/INTPRS1/Resources/Country-Papers-and-JSAs/cr0511.pdf> (date of use: 20 February 2018).

⁷⁸⁶ Ibid.

⁷⁸⁷ Government of Kenya "Kenya Vision 2030: Globally Competitive and Prosperous Kenya" at ii available at https://www.researchictafrica.net/.../Kenya_Vision_2030_-_2007.pdf (date of use: 20 February 2018).

⁷⁸⁸ Thugge, Ndungu & Otieno "Unlocking the Future Potential for Kenya – The Vision 2030" available at <https://www.csae.ox.ac.uk/conferences/2009-EdiA/papers/509-Owino.pdf> (date of use: 25 May 2017).

⁷⁸⁹ Ibid.

communities especially in low income regions in Kenya. With the introduction of free primary education in 2002, primary school enrolment rose from 6,1million in 2002 to 8,2million in 2007, a net national enrolment figure of 91,6 percent marking a decentralisation of the social benefit to the neediest children. Thus, the ERS policy made basic primary education accessible to all in Kenya regardless of income or regional background.⁷⁹⁰ Also with the further introduction of free secondary education, the transition rate from primary to secondary level rose from 47 percent in 2002, to 70 percent in 2007 with the number of student high school enrolment jumping from 778 000 in 2002 to 1,2 million in 2007. The number of students enrolled in public and private universities in Kenya also rose from 71349 in 2002 to 118 239 in 2007.⁷⁹¹ The ERS marks an historical milestone in achieving environmental justice in Kenya as regards the decentralisation of national development and social benefits. The policy succeeded in reducing regional inequalities that had been experienced intensely since colonial times. It was an essential policy tool in fortifying sustainable development by making social services more accessible to the poorest and neediest in society.

As a result of the economic growth registered under the ERS, many other sectors benefited through increased budgetary allocations. For example, in health this promoted an increase in drug supplies, the rehabilitation of healthcare facilities and the construction of new facilities, an increase in medical personnel, and the devolution of health care. These achievements resulted in increased access to basic health services, especially for those at grassroots level, and so reinforced environmental justice in areas previously excluded from healthcare services.⁷⁹²

⁷⁹⁰Government of Kenya Poverty Reduction Strategy Paper IMF Country Report 10/224 July 2010 available at <https://www.imf.org/external/pubs/ft/scr/2012/cr1210.pdf> (date of use: 20 February 2018).

⁷⁹¹Ministry of Education Science and Technology Support Programme 2005-2010 available at <http://www.bing.com/search?q=Ministry+of+Education+Science+and+Technology+Support+Programme+20052010&q&form=QBRE&sp1&pq=undefined&sc=072&sk=&cvid=8AA12B7A7DC64644B92E3C97692488ED> (date of use: 20 February 2018)

⁷⁹²Preamble to Government of Kenya "Economic Recovery Strategy for Wealth and Employment 2003-2007" (June 2003) at 32 available at <http://siteresources.worldbank.org/INTPRS1/Resources/Country-Papers-and-JSAs/cr0511.pdf> (date of use: 20 February 2018). These were effected through government devolution schemes such as the Constituency Development Fund, the Local Authority Transfer Fund, the Constituency Bursary Fund and the Constituency Aids Fund. Mwendwa & Misati (2014) 4/1 *American International Journal of Contemporary Research* 248.

To sustain the economic recovery under the ERS, and to move it upwards on an even higher growth and development path, the Kenya government formulated a new long-term development blueprint for the country Kenya Vision 2030. The Vision aimed to be a development strategy that would succeed the ERS in providing a higher quality of life to all its citizens, with special concern for the vulnerable and poor in Kenya who suffer exclusion from social services and humane living conditions.⁷⁹³ The Vision would be the foundation for the sustainable development principle and its core values, most notably environmental justice, as a model for raising standards of poor and needy Kenyans living in social exclusion.

5.6.2 *Kenya Vision 2030: Blueprint and foundational framework*

The term ‘blueprint’ is used in the text of Kenya Vision 2030 to describe the policy plan⁷⁹⁴ which serves as the principal driving policy which guides all development plans in the country.

The term ‘blueprint’ is borrowed from a technological term used in the nineteenth century in the building and construction industry. A ‘blueprint’ would result when an architect, engineer, or draftsman drew his plan in pencil or ink on paper, then laid that paper over a sheet of special chemically-treated paper and exposed it to a special, strong light for several minutes. Upon treatment with ammonia fumes, the chemically-treated paper would turn blue where the light struck it and remain white where the pencil/ink lines blocked the light. The blue-print process was characterised by light-coloured lines on a blue background. The introduction of the blueprint process

⁷⁹³Thugge, Ndungu & Otieno “Unlocking the Future Potential for Kenya – The Vision 2030” available at <https://www.csae.ox.ac.uk/conferences/2009-EdiA/papers/509-Owino.pdf> (date of use: 25 May 2017).

⁷⁹⁴Government of Kenya “Kenya Vision 2030” at 1 https://www.researchictafrica.net/.../Kenya_Vision_2030_-_2007.pdf (date of use: 20 February 2018).

eliminated the reproduction of original drawings by hand-tracing and permitted more accurate reproductions of the original drawing for clearer guidance of builders in the construction process.⁷⁹⁵

Deriving from the technical explanation, a 'blueprint' can also be described as an accurate and clear early plan or design that explains how something might be achieved. It shows how someone, like a builder, will build or achieve an objective.⁷⁹⁶ Accordingly, the development blueprint 'Kenya Vision 2030' should be approached as a clearly defined, time-bound and specific long-term direction of what the country intends to achieve. It prescribes Kenya's sustainable development aims, enlists actions by various sectors, and highlights how the country intends to use her resources in order to generate a better economic, political, and social life for her people – especially the poor and vulnerable – in 'a clean and safe environment'.⁷⁹⁷

Vision 2030 replaced the ERS which expired during December 2007. The government initiated and launched Vision 2030 on 10 June 2008 with the National Economic and Social Council (NESC) as the supervisory authority, and the Ministry of Planning and National Development in charge of coordinating the technical and financial aspects of the process. Kenya Vision 2030 was the product of a participatory and all-inclusive stakeholder process involving local and international experts, business leaders, top public sector officials, parliamentarians, NGOs, and ordinary Kenyans drawn from all over the country.⁷⁹⁸ The Vision development process was also driven by a public and private sector collaborative structure involving a National Vision Steering Committee, Operational Committee, Core Team, Sector Teams, and a team of international consultants.⁷⁹⁹

⁷⁹⁵Woods *from Craft to Profession* 239-40.

⁷⁹⁶ *Cambridge Dictionaries Online* available at <http://dictionary.cambridge.org/dictionary/english/blueprint> (date of use: 23 May 2017).

⁷⁹⁷Mwenzwa & Misati (2014) 4/1 *American International Journal of Contemporary Research* at 246.

⁷⁹⁸Government of Kenya, Office of the Prime Minister: Ministry of State for Planning "National Development and Vision 2030" (2012) at ii available at <http://www.foresightfordevelopment.org/sobipro/55/1263-sessional-paper-no-10-of-2012-on-kenya-vision-2030> (date of use: 20 February 2018).

⁷⁹⁹Government of Kenya "Kenya Vision 2030" available at Government of Kenya "Kenya Vision 2030" at 1 https://www.researchictafrica.net/.../Kenya_Vision_2030_-_2007.pdf (date of use: 20 February 2018).

The aim of the Vision is to create a 'globally competitive and prosperous country providing a high quality of life to its people by 2030'.⁸⁰⁰ It has been developed through input from leading local and international experts on how newly industrialising countries have made it from low to growing medium-income nations that have improved the lives of their people in a span of 20-30 years, with particular reference to the South East Asian countries such as Malaysia, and closer to home, Mauritius. The Vision was formulated along the lines of thinking of the quickest ways of increasing employment, widening access to quality education, providing adequate housing, water, and healthcare to a poor and marginalised Kenyan population who currently have no access to these facilities.⁸⁰¹ The blueprint is, therefore, clearly an environmental justice plan or strategy for the country.

The Vision is underpinned by three fundamental pillars that have been formulated to enhance sustainable development in Kenya. These pillars emphasise the achievement of environmental justice in key fundamental areas to improve the quality of life. These areas are:⁸⁰²

1. economic;
2. social and environmental; and
3. political.

The economic pillar aims at maintaining a sustained economic growth rate of ten percent per annum and focuses on key sectors as key growth-drivers expected to generate an increase in GDP. These include drivers such as tourism, agriculture, manufacturing, trade, and ICT which will facilitate the provision of basic services to the Kenyan people.⁸⁰³

⁸⁰⁰ Ibid at 2.

⁸⁰¹ Ibid at 1-5.

⁸⁰² Ibid.

⁸⁰³ Ibid at 4.

The social pillar involves ‘investing in the people by the creation of a just and cohesive society that enjoys equitable social development in a clean and secure environment’.⁸⁰⁴ The social pillar reinforces the attainment of environmental justice through various measures taken to provide better access to social services to vulnerable persons who have often encountered exclusion and marginalisation. The blueprint’s social development model is strongly founded in the concerns of equity and social justice which are core tenets of environmental justice, essential to the achievement of the underpinning goal of sustainable development.⁸⁰⁵ Kenya Vision 2030 is also based upon a socially sustainable system within the principle of sustainable development that is intentional and strategic in the achievement of distributional equity, adequate provision of social services including health and education, gender equity, and political accountability and participation – again basic concerns in environmental justice.⁸⁰⁶

The social pillar also aims at improving key social sectors such as education, health, water and sanitation, the environment, housing and urbanisation. In advancing its development objectives, the blueprint acknowledges in principle the need to protect, manage, and sustain the natural environment as the basis for human development. The document specifically states that environmental sustainability and conservation of biodiversity are the core elements that underpin human wellbeing.⁸⁰⁷ To support the social pillar – and its accompanying environmental pillar – Kenya aims to provide her citizens with a clean, secure, and sustainable environment by the year 2030. To achieve this, the nation has set a number of goals which include:⁸⁰⁸

⁸⁰⁴ Ibid at 1.

⁸⁰⁵ Harris “Basic principles of sustainable development” Global Development and Environment Institute Working paper 00-04 (2000) at 1 available at http://www.ase.tufts.edu/gdae/publications/working_papers/Sustainable%20Development.PDF (date of use: 15 May 2017).

⁸⁰⁶ Ibid at 6.

⁸⁰⁷ Government of Kenya “Environment and Kenya Vision 2030” available at https://na.unep.net/atlas/kenya/downloads/chapters/Kenya_Screen_Chapter1.pdf (date of use: 28 November 2017).

⁸⁰⁸ Government of Kenya “Kenya Vision 2030” 14-15 available at https://www.researchictafrica.net/.../Kenya_Vision_2030_-_2007.pdf (date of use: 20 February 2018).

- Water catchment management. This project entails the complete rehabilitation of the country's degraded five major water towers: the Mau Escarpment; Mount Kenya; the Aberdare Ranges; the Cherangany Hills; and Mount Elgon.
- Forest conservation and biodiversity. The aim is to increase current forest cover more than 50 percent.
- Enhancing disaster preparedness in all disaster-prone areas and improving the country's capacity to adapt to the impacts of global climate change which mainly affect the poorest and most vulnerable in society.
- Pollution and waste management. This involves the development of an intensive solid waste management system and technology. This will include the relocation of the biggest dumping site in Kenya, the Dandora dumpsite, which is currently located in a low-income settlement area in Nairobi. It is a major example and case study of environmental injustice which negatively impacts on the urban poor in Kenya.⁸⁰⁹
- The plastic-bags initiative. This initiative involves regulating the use of plastic bags and other manufactured hazardous products. Plastic bags constitute the biggest challenge to solid waste management in Kenya.⁸¹⁰ Research conducted by the NEMA in conjunction with the UNEP and The Kenya Institute for Public Policy Research and Analysis (KIPPRA), revealed that 100 million plastic bags are handed out in Kenya by supermarkets alone.⁸¹¹

⁸⁰⁹See Chapter 4 of this dissertation for the discussion of the negative impacts of the Dandora dumpsite.

⁸¹⁰Available at <http://www.bbc.com/news/world-africa-41069853> (date of use: 25 November 2017).

⁸¹¹National Environmental Management Authority (NEMA) "Government bans plastic carrier bags" available at <https://www.nema.go.ke/images/Docs/Awarness%20Materials/NEAPS/NEMA%20Quarterly%20Magazine-Jan-March%202017.pdf> (date of use: 25 November 2017).

Plastic bags remain in the environment ‘forever’, as they take 500 to 1 000 years to biodegrade.⁸¹² They enter the human food chain through fish and other animals. In Nairobi’s slaughterhouses, cows slaughtered and destined for human consumption have had plastic bags removed from their stomachs. Plastic bags are the major cause of the blockage of rivers in the country. When they drift into the ocean, they cause strangulation and suffocation among turtles, seabirds, and fish. Habib El-Habr, an expert on marine pollution working with the UNEP in Kenya on the unacceptable state of plastic bag pollution in the country, comments: ‘If we continue like this, by 2050, we will have more plastic in the ocean than fish’.⁸¹³ Kenya joined more than 40 other countries, including China, France, Rwanda, and Italy, which have banned, partly banned, or taxed the use of plastic bags.⁸¹⁴ A ban on plastic bags was put into force by NEMA on 28 August 2017. Anyone found selling, manufacturing, or using plastic bags can now face a fine of up to US\$ 38 000 or imprisonment of up to four years.⁸¹⁵ The High Court upheld the ban despite a suit by the Kenya Association of Manufacturers (KAM) challenging the ban on the ground that outlawing plastic bags would amount to economic sabotage as millions of Kenya are directly or indirectly involved in the plastic business.⁸¹⁶ Kenya Vision 2030 forges ahead with the regulation and implementation of environmental regulation that abolishes hazardous products which compromise environmental safety and undermine human life.

⁸¹² Available at https://www.the-star.co.ke/news/2017/08/28/kenya-imposes-worlds-toughest-law-against-plastic-bags_c1624712 (date of use: 25 November 2017); National Environmental Management Authority (NEMA) *ibid.*

⁸¹³ *The Guardian* “Kenya brings in world’s toughest plastic bag ban: four years jail or \$40,000 fine” available at <https://www.theguardian.com/environment/2017/aug/28/kenya-brings-in-worlds-toughest-plastic-bag-ban-four-years-jail-or-40000-fine> (date of use: 25 November 2017).

⁸¹⁴ *Ibid.*

⁸¹⁵ *Daily Nation* “World urged to follow Kenya’s lead in ban on plastic bags” available at <http://www.nation.co.ke/news/NY-Times-praises-Kenya-plastic-ban/1056-4097004-idnbykz/index.html> (date of use: 25 November 2017).

⁸¹⁶ *Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others* [2017] Eklr available at <http://kenyalaw.org/caselaw/cases/view/140427/> (date of use: 13 December 2017).

- Harmonisation of environmental laws for better environmental administration and governance. This initiative includes the development of a policy framework that streamlines environmental standards, regulations and institutions, and promotes the capacity for collective enforcement of environmental standards and multilateral environment agreements (MEAs).⁸¹⁷

The social pillar makes particular provision for the protection of marginalised groups as a primary concern in enhancing environmental justice aims in the country. In this regard, the Vision recognises education as an important tool in reducing poverty rates and increasing quality of life. In education and training, the government plans to reduce illiteracy by increasing access to education and by improving the transition rate from primary to secondary schools. Improvement of education further includes the integration of learners with special needs who have traditionally been excluded from enjoying the right to education. Reinforcement of education also targets increasing the adult literacy rate, increasing the net enrolment rate to education facilities, and increasing the transition rates to technical institutions and universities, while also expanding access to university education.⁸¹⁸

In the health sector, the government undertakes to reduce inequalities in accessing healthcare and provide better access to the services for the poor who have been facing exclusion from healthcare services based largely on finance.⁸¹⁹

The blueprint policy for the country also provides for the strategic implementation of adequate and decent housing, and acknowledges the acute need for effective urban development planning. It provides for better access to affordable decent housing.⁸²⁰ Under the water, sewerage, and sanitation rubric, the blueprint undertakes to create

⁸¹⁷Government of Kenya “Kenya Vision 2030” at 14 available at https://www.researchictafrica.net/.../Kenya_Vision_2030_-_2007.pdf (date of use: 20 February 2018).

⁸¹⁸Government of Kenya “Kenya Vision 2030” ibid at 11.

⁸¹⁹Ibid at 12.

⁸²⁰Ibid at 15-16.

better accessibility for all, especially those in rural areas and the urban poor who have often been marginalised in accessing these services.⁸²¹

The social pillar further specifically recognises the vulnerable and marginalised. The development blueprint provides for the improvement of livelihood for vulnerable groups and the reduction of social inequalities. The Vision provides for an increase in opportunities for all disadvantaged groups, as well as increasing their participation in all economic, social, and political decision-making. It also undertakes to improve social services to disadvantaged groups.⁸²² The social pillar also provides for equity and guarantees equality of opportunity. The government undertakes to take correctional measures to extend opportunities to regions and communities facing exclusion and marginalisation, for example: the allocation of 'devolved funds' to local communities; increasing school enrolment for children from poor, rural, and slum communities; widening coverage of essential healthcare services; the equitable distribution of water services; and equitable access to justice.⁸²³

The political pillar aims at the achievement of key objectives relevant to the promotion of environmental justice in the country. These include realising a democratic political system founded on issue-based politics which respect the rule of law and protect the rights and freedoms of every individual in Kenyan society. The political pillar also provides for the realisation of public interests and public participation in policies and resource allocation processes. It further provides for an accountable system of governance that is open, transparent, and permits free accessibility of information. Some of the significant flagship projects under this pillar include judicial and legal reform initiatives, as well as reforming government institutions, especially those involving public participation in governance and those associated with transparency and accountability within the public sector.⁸²⁴

⁸²¹ Ibid at 17.

⁸²² Ibid.

⁸²³ Ibid at 16-17.

⁸²⁴ Ibid at 18-25.

To realise of the goals under each pillar of Kenya Vision 2030 guiding governance principles are established which should be transferred from one governing regime to the next to allow for continuity in the achievement of the blueprint goals. These include: constitutionalism; sovereignty of the people; equality; the Bill of Rights; separation of powers; devolution and decentralisation; public participation; and national peace building.⁸²⁵ These principles are the bedrock for the establishment of sustainable development in the country, and at the same time enhance the achievement of environmental justice by promoting human dignity, equality, and equity.⁸²⁶

In implementing the global United Nations Sustainable Development Goals (SDGs),⁸²⁷ in 2016 the government of Kenya launched the national implementation plan for the realisation of the SDGs. This was part of its commitment to improve human wellbeing as envisaged in the universal goals. The goals shall be met in tandem with the Kenya Vision 2030 through a grassroots level execution. This shall be implemented via devolved system of governance in which states are expected to integrate SDGs in their development plans. The devolution of development to state governments enables states to plan their development to meet their peculiar priorities and challenges. This grassroots strategy will also assist in the distribution of the benefits of development more evenly at the community level, and will reduce environmental injustice between regions. On the other hand, the national implementation plan envisages, among others, to conduct extensive advocacy and awareness initiatives regarding the implementation of the goals by government agencies and stakeholders; mainstream the goals into the national development process; domesticate and localise the sustainable-development goals agenda; monitor and evaluate the implementation progress; and support building capacity in devolved governments⁸²⁸ to implement the goals.⁸²⁹

⁸²⁵ Ibid at 19-25.

⁸²⁶ See discussion of environmental justice and sustainable development as related principles in Chapter 3 of this dissertation.

⁸²⁷ See Chapter 3 for a discussion of the United Nations Sustainable Development Goals.

⁸²⁸ Chapter 11 of the 2010 Constitution introduced the devolved system of government which seeks to bring government closer to the people, with county governments (47 in number) at the centre of dispersing political power and economic resources to Kenyans at the grassroots level. See <https://softkenya.com/kenya/devolved-government/> (date of use: 20 February 2018).

⁸²⁹ UNDP "Leave No One Behind: Kenya Government Gives Road Map to implementation of SDGs"

The implementation of the SDGs together with Vision 2030 are anticipated to support the realisation of environmental justice since the overall objectives expressed in the goals tackle pertinent issues which have had a devastating impact on poor and vulnerable persons. These include: social inequalities; poverty; lack of access to healthcare; hunger; lack of access to education; climate change; and other environmental problems.⁸³⁰ The SDGs will also offer a critical platform for the country to evaluate her progress and work on the existing gaps to ensure the achievement of sustainable development in the country through the blueprint policy which will, in turn, assist in evaluating the progress in achieving environmental justice.⁸³¹ In January 2016, the Sustainable Development Goals Kenya Forum, commissioned a study to assess the policy environment in the country for the effective implementation of the SDGs. In particular, the study aimed at establishing the extent to which the global goals align and complement the aims of Kenya's main development blueprint. The study found that for the successful implementation of the Vision and the goals, it was imperative to align them as they both represent principal sustainable development objectives for the country if it is to improve standards of living for the people, especially the most vulnerable.⁸³²

5.6.3 *Delivery and implementation*

The Vision will be implemented through medium-term implementation plans, the first covering the period 2008 to 2012; the next, the period 2012 to 2017, and so on until 2030. The Vision identifies a number of flagship projects and practical measures under the goals of each pillar, with certain areas earmarked for priority interventions. During

available at <http://www.ke.undp.org/content/kenya/en/home/presscenter/pressreleases/2016/leave-no-one-behind--kenya-government-gives-road-map-to-implemen.html> (date of use: 28 May 2016).

⁸³⁰The United Nations Sustainable Development Goals available at <http://www.un.org/sustainabledevelopment/sustainable-development-goals/> (date of use: 29 May 2017).

⁸³¹Ministry of Development and Planning "Localising and Mainstreaming Sustainable Development Goals at the County Government" available at http://www.devolutionplanning.go.ke/?post_type=news&p=1761 (date of use: 29 May 2017); SDGs Kenya Forum for Sustainable Development "Vision 2030's Medium Term Plan as a Framework for Implementation of the Sustainable Development Goals" available at <https://www.developlocal.org/wp-content/uploads/2016/04/ImplementingTheSDGs.pdf> (date of use: 29 May 2017).

⁸³²SDGs Kenya Forum for Sustainable Development *ibid.*

the currency of the Vision, strategies and action plans will be systematically reviewed and adjusted every five years in order to respond effectively to the changing global, regional, and local environments.⁸³³

A semi-autonomous government agency (SAGA) has been established to oversee the implementation of all Vision 2030 flagship projects. The agency will work closely with government ministries and departments as well as the private sector, civil society, and other relevant stakeholder groups.⁸³⁴ The Vision Delivery Commission (VDC) has also been created to provide strategic leadership and direction in the realisation of Vision goals and ensure timely implementation of the flagship projects. The VDC will be managed by a Director-General of the Vision 2030 Office, under the overall guidance of the Vision 2030 Delivery Board which shall play a policy-making and advisory role. The VDC will be organised by way of several departments which correspond to the main project sectors of the Vision under the three pillars. Among other things, the VDC will provide strategic leadership and direction in advancing the realisation of Vision 2030 goals, and collaborate closely with line ministries in developing the five-year, medium-term plans for the realisation of the blueprint. The VDC will also have institutional links to both the public and private sectors in implementing the Vision.⁸³⁵ An IT-based National Integrated Monitoring and Evaluation System (NIMES) is currently being used to track progress with the implementation of the Vision, and enables public participation through publication of annual progress reports at national and county levels. To date three progress reports have been published.⁸³⁶ The Vision 2030 Delivery Secretariat (VDS) receives quarterly reports from implementing ministries, departments, and agencies. The work of the VDS is closely tied to that of the VDC in ensuring timely realisation of the flagship projects.⁸³⁷

5.6.4 Achievements of the Kenya Vision 2030 in realising environmental justice

⁸³³Government of Kenya “Kenya Vision 2030” at 25 available at https://www.researchictafrica.net/.../Kenya_Vision_2030_-_2007.pdf (date of use: 20 February 2018).

⁸³⁴Ibid at 26.

⁸³⁵Ibid at 26-7.

⁸³⁶Kenya Vision 2030 Flagship Project Report (2014) at 2 available at www.vision2030.go.ke/lib.php?f=latest-briefing-flagship-projects (date of use: 20 February 2017).

⁸³⁷Ibid.

In its first and second five-year periods of implementation of Kenya Vision 2030 covering 2008-2012 and 2012-2017, Kenya has made significant steps in the realisation of the goals outlined in the blueprint for improving the lives and raising the standards of living of people through its three main pillars of economic, social/environmental, and political development. Monitoring reports on the implementation of the Vision show that Kenya is on an impressive track to the realising the overall objectives established in the blueprint development plan which provides a fundamental direction for the achievement of environmental justice and sustainable development in Kenya. Both the first and second terms of implementation of the development blueprint were centred on the theme 'Transforming Kenya: Pathway to Devolution, Social-Economic Development, Equity and National Unity' which contributes greatly to the principle of environmental justice in the country through striving for equitable distribution and greater access to resources by the poor.⁸³⁸ (These achievements are discussed below.)

In relation to improvement of access to and quality of health services, various projects have been undertaken including: building and strengthening capacity of devolved community health extension workers; construction of more health centres around the country to increase access to basic health services with the aim of reducing maternal and infant mortality, especially in marginalised areas; the introduction of free maternity services in public health facilities; and de-worming of school-going children. In 2012, there were 105 369 registered medical personnel, 48 health facilities were upgraded to hospital status; 92 hospitals were rehabilitated; and 201 model health centres were built. In addition, five referral hospitals were equipped with renal equipment, and cancer equipment was installed at the Kenyatta National Hospital which is the largest public referral hospital in Kenya.⁸³⁹

Various projects and improvements have also been carried out to improve the quality of and access to education in the country as a basis for reducing poverty levels, especially

⁸³⁸Ibid.

⁸³⁹Ibid at 32; Government of Kenya "Kenya Vision 2030 Second Medium Term Plan (2013-2017)" at 78 available at www.vision2030.go.ke/lib.php?f=second-medium-term-plan-2013-2017 (date of use: 30 May 2017).

in remote and marginalised areas. The number of pupils has increased from 8,56 million in 2008, to 9,97 million in 2012, with 4,96 million and 5,01 million girls and boys respectively.⁸⁴⁰ The overall national transition rate from primary to secondary education has increased from 64,1 percent in 2008, to 77 percent in the first term of implementation of the Vision.⁸⁴¹ Between 2008 and 2012, 29 060 teachers were employed exceeding the target of 28 000.⁸⁴² There has also been a strengthening of tertiary education through the construction and equipping of youth polytechnics in various regions in the country to increase access to training. Several technical colleges have been upgraded to university status to decentralise higher learning in various regions of the country, especially areas that have been facing marginalisation in accessing tertiary learning facilities.⁸⁴³ The number of students enrolled for university education increased by 103 percent from 118 239 in 2008, to 240 551.⁸⁴⁴

The flagship project in education entailed a review of the policy and institutional framework for ICT integration in education and training, especially in special needs education. Schools with the greatest need to improve learning infrastructure, found mainly in marginalised regions, were earmarked to benefit from the disbursement schedule. Several schools in arid and pastoral communities have benefited from the construction and rehabilitation of learning infrastructure to increase school enrolment and improve the learning environment for students.⁸⁴⁵

Several changes have also been made to enable access to affordable and decent housing, especially for the urban poor living in slums and informal settlements who are also surrounded by poor sanitation. The flagship project under this sector has involved

⁸⁴⁰ Ibid at 71.

⁸⁴¹ Ibid at 2.

⁸⁴² Ibid at 71.

⁸⁴³ Kenya Vision 2030 Presentation by the Hon. Wycliffe Ambetsa Oparanya (MP) Minister of State for Planning, National Development and Vision 2030 at the London Investment Summit 31 July 2012 available at

http://cemusstudent.se/wp-content/uploads/2013/01/Vision_2030_Minister_of_State_Planning_National_Development_and_Vision_2030.pdf (date of use: 30 May 2017).

⁸⁴⁴ Government of Kenya “Kenya Vision 2030 Second Medium Term Plan (2013-2017)” at 78 available at www.vision2030.go.ke/lib.php?f=second-medium-term-plan-2013-2017 (date of use: 30 May 2017).

⁸⁴⁵ Kenya Vision 2030 Flagship Project Report at 33 available at www.vision2030.go.ke/lib.php?f=latest-briefing-flagship-projects (date of use: 20 February 2018).

the building of housing units to improve the lives of people living in informal settlements. Several housing units and sanitary facilities are in the process of construction in low-income urban areas around the country. The project aims to spearhead delivery of affordable housing units in collaboration with other stakeholders, including the private sector.⁸⁴⁶

The 2010 Kenyan Constitution dealing with the chapter on land and environment provides, inter alia, for the development of a policy that caters for the equitable and sustainable management of land through equity in land rights and security of tenure, transparency in the administration of land, elimination of discrimination related to land ownership, and the resolution of local land disputes between communities.⁸⁴⁷ The government has made fundamental inroads as regards the management of land resources and the fortification of environmental justice through the blueprint policy. For example, the government identified land reform as one of the priority areas to be addressed under the second Medium Term Plan (2013-2017) of the Kenya Vision 2030 blueprint. This involves an intensive review of land policy and pertinent legal and institutional instruments required to ensure compliance with land management interventions within the constitutional mandate.⁸⁴⁸ The government initiated the National Land Information Management System to synchronise national land registration for effective, fair, and equitable administration of land ownership. Several land registries across the counties⁸⁴⁹ have been established. Numerous title deeds have been registered and issued countrywide. The process has also involved the modernisation of land registries, such as the digitisation of land records and the establishment of a

⁸⁴⁶ Ibid.

⁸⁴⁷ Article 60 enshrines principles of land policy: It provides: "Article 60(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 recognised 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".

⁸⁴⁸ Kenya Vision 2030 Flagship Project Report available at www.vision2030.go.ke/lib.php?f=latest-briefing-flagship-projects (date of use: 20 February 2018).

⁸⁴⁹ See chapter 11 of the 2010 Constitution of Kenya on the devolved system of government and the establishment of county governments which decentralises power from the national government.

national bulk titling centre to fast-track the issuing of land titles across the various regions of the country.

The establishment of special community land tribunals for settling land disputes is in the process of being implemented.⁸⁵⁰

The 2010 Kenyan Constitution enshrines the national values and principles of governance including: devolution of power; the rule of law; democracy; participation by the people; human dignity; equity; social justice; inclusivity; equality; human rights; non-discrimination and protection of the marginalised; good governance; integrity; transparency and accountability; and sustainable development. These values are binding on all state organs and public officers.⁸⁵¹ The values and principles have been reiterated as key principles that drive the actualisation of Kenya Vision 2030.⁸⁵² The values are also key concerns in the promotion and protection of environmental justice.⁸⁵³ A monitoring and status report of the national values and ethics will be published periodically. The VDS like the VDC will engage in public participation to inculcate the national values as a driving force in the implementation of the development blueprint.⁸⁵⁴ Moreover, in regard to reforms and building capacity in the Kenyan public service sector to promote good governance, the Kenya School of Government was established on 9 May 2012 and offers various programmes targeting public servants and county leaders in the use of effective governance as a tool to promote sustainable development in the blueprint policy. Similar institutions have been opened in various regions of the country.⁸⁵⁵ Capacity building for county governments

⁸⁵⁰Kenya Vision 2030 Second Medium-Term Plan (2013-2017) at 28 available at <https://www.usaid.gov/sites/default/files/documents/1860/1%29%20Second%20Medium%20Term%20Plan%202013%20-%202017.pdf> (date of use: 20 February 2018).

⁸⁵¹ Article 10.

⁸⁵²Government of Kenya Kenya Vision 2030 at 19-20 available at www.vision2030.go.ke/lib.php?f=latest-briefing-flagship-projects(date of use: 20 February 2018)

⁸⁵³ See Chapters 1, 2 and 3 of this dissertation.

⁸⁵⁴Kenya Vision 2030 Flagship Project Report at 23 available at www.vision2030.go.ke/lib.php?f=latest-briefing-flagship-projects (date of use: 20 February 2018).

⁸⁵⁵Ibid at 19.

was introduced and is being carried out to aid in furthering sustainable development objectives at grassroots level.⁸⁵⁶

5.6.5 Kenya Vision 2030 and the expansion of environmental justice: Prognosis, conclusion and recommendations

Kenya Vision 2030 is, among others, a strategic environmental justice project for Kenya. It is well structured, carefully thought through, and firmly rooted in sustainable development principles. The new Constitution of Kenya provides the legal framework for implementing the Vision. Moreover, the development blueprint facilitates the holistic fulfillment of all basic human rights.

The success of the actualisation of the blueprint Vision is, however, hugely dependent on the ability of the country to confront and harness possible challenges and threats that stand in the way of the envisaged transformation resulting from the implementation of the Vision. These challenges and threats include:

- dealing with economic and social disparities across regions of the country;
- fighting international environmental injustices;
- a commitment to good governance and a dedicated political will;
- realising sound organisation and cohesion in the monitoring and evaluation of performance; and
- promoting security;

I shall now elaborate on each of these by way of a conclusion and offer recommendations to 'combat' these challenges and threats.

- (1) Dealing with economic and social disparities across regions of the country

⁸⁵⁶Ibid at 20.

In Kenya, regional and socio-economic disparities are acute. Development has been highly skewed in favour of some regions, and the upper- and middle-income social classes. Poorer income areas lag far behind and have been significantly impacted through exclusion from social benefits. Inequality is a national battle to be waged as it has far-reaching implications for the achievement of national and balanced development in the country, and the realisation of Kenya Vision 2030 targets. For example, the arid, semi-arid, urban informal settlements, and other marginalised areas, are in dire need of the very basic infrastructure and human resources/personnel that are critical to the actualisation of the blueprint. Bridging the emerging disparities requires pumping enormous monetary resources in particular into these marginalised communities.⁸⁵⁷ Environmental justice and equity thus appear to be both a challenge to the realisation of the Vision, and an overarching objective of the blueprint policy. A greater commitment by the government is thus needed to deal with inequalities and environmental injustices as a means by which to achieve equitable development which will add force to the realisation of the blueprint. In light of the promulgation of the 2010 Constitution of Kenya, the implementation of Kenya Vision2030 takes into account the devolved structure of government in dealing with these inequalities.⁸⁵⁸

(2) Fighting international environmental injustices

Many areas in Kenya experience perennial hunger, malnutrition, and starvation due to adverse weather patterns. This leads to deepening poverty levels and a greater struggle to meet basic needs. These devastating conditions leave vulnerable people in need of humanitarian assistance. These events have the tendency to retard development as

⁸⁵⁷Letter from Kenya “Is Kenya’s Development Vision 2030 A Mirage or a Myth?” available at <https://kangethemb.wordpress.com/2013/03/25/is-kenyas-development-vision-2030-a-mirage-or-a-myth/> (date of use: 29 May 2017).

⁸⁵⁸Government of Kenya Kenya Vision 2030 available at www.vision2030.go.ke/lib.php?f=latest-briefing-flagship-projects (date of use: 20 February 2018).²⁷² Kenya Vision 2030 Second Medium-Term Plan (2013-2017) at 3 available at <https://www.usaid.gov/sites/default/files/documents/1860/1%29%20Second%20Medium%20Term%20Plan%202013%20-%202017.pdf> (date of use: 20 February 2018).

more resources are deployed to deal with emerging catastrophes and their impact. This is a serious impediment to the timely realisation of Vision 2030. It is imperative that viable disaster preparedness and early-warning systems be developed for disaster-prone areas so as to mitigate the consequences of such disasters.⁸⁵⁹ There is also a need for the developing world to push for equity and democracy in international environmental decision-making to curb the problem of climate injustice as they are the ones most affected by the catastrophe.

Addressing global inequalities and environmental injustice involves a concerted global effort. Global inequality across countries, results in the asymmetric distribution of benefits and adverse environmental impacts which, in the final analysis, leave developing countries poorer and more vulnerable.⁸⁶⁰

Several theoretical explanations have been posited to explain the scenario. Among them is Economic Contingency Perspective theory (ECP). The behaviour of countries 'at the top level' can be attributed to their hierarchy of economic and social needs which is incomplete contrast to the hierarchy of needs of the 'bottom level' countries. For example, while the latter are, in the main, more concerned about meeting the immediate and most pressing basic needs, or even just surviving; the former, with their more sophisticated hierarchy of needs, would in all probability be more concerned about meeting needs such as aesthetics, improving the quality of life – ie, needs that are not as immediately basic as those of the 'bottom'.⁸⁶¹ In light of this inequality, therefore, equity means that a balance must be struck to ensure that each group is able to meet its peculiar needs without compromising the ability of the other group in meeting its needs – fundamental principle of both sustainable development and environmental justice.⁸⁶²

⁸⁵⁹Mwenzwa & Misati (2014) 4/1 *American International Journal of Contemporary Research* at 252.

⁸⁶⁰Global Economic Symposium "G20 Recommendations on Inequality, Climate Change, Food Security and Water Availability" available at <http://www.global-economic-symposium.org/about-the-ges/council-of-global-problem-solving/recommendations/g20-recommendations-on-inequality> (date of use: 12 May 2017).

⁸⁶¹Adeola (1998) 11/ 4 *Society and Natural Resources* 343.

⁸⁶² See Chapter 3 of this dissertation for a discussion of sustainable development and environmental justice.

Goal 10 of the United Nations SDGs for 2030, recognises the need to end inequality between countries as a world challenge that is having a devastating impact on the poor, mainly those found in the Third World countries.⁸⁶³ In response to the global challenge, environmental organisations, the United Nations, economic policy- development organisations, financial market groups, human rights groups, and environmental justice authors, have made recommendations and suggested pointers as to how global inequality and injustice can be reduced to achieve a workable balance between the poor and rich countries. These include:

(i) *Democratic international trade policy*

An open and democratic international trade policy should promote public interest, environmental protection, and health. Undemocratic trade policies that place corporate profits above the environment and the people (the public, workers, and even consumers) contribute to environmental injustices and human rights abuses especially for people in poor and vulnerable countries.⁸⁶⁴

(ii) *Pro-equity policies*

International policies that explicitly address equity need to be advanced. These should pay attention to the needs of disadvantaged and marginalised populations.⁸⁶⁵ For

⁸⁶³The United Nations Sustainable Development Goals available at <https://sustainabledevelopment.un.org/topics/sustainabledevelopmentgoals> (date of use: 13 May 2017). See Chapter 3 of this dissertation on a discussion of the Sustainable Development Goals.

⁸⁶⁴Inequality.org “Eight Ways to Reduce Global Inequality” available at <http://inequality.org/8-ways-reduce-global-inequality/> (date of use: 10 May 2017).

⁸⁶⁵United Nations Sustainable Development Goals “Goal 10: Reduce Inequalities within and among Countries” available at <http://www.un.org/sustainabledevelopment/inequality/> (date of use: 10 May 2017); Global Citizen “Ending global inequality requires US leadership” available at

instance, goods and services should be distributed primarily on the basis of the level of need.⁸⁶⁶ Unfortunately, due to considerable global inequity, access to social goods and/or services is determined by power balances in the political, economic, and social spheres, often leading to social exclusion.

(iii) *Equitable participation in international decision-making*

‘Equitable’ participation means that both developing and industrialised countries must have a ‘just’ and ‘fair’ share in all international environmental negotiations and decision-making processes. In order to ensure that neither the North nor the South wins predominance over the other, voting procedures in environmental decision-making in international organisations should be designed in such a way that they produce outcomes which developing countries regard as just and fair.⁸⁶⁷

(iv) *Sustainable development*

The principle of sustainable development provides for a close interdependence between the competing goals of development and environmental protection. It prevents all actors in international relations from taking actions that do not fairly balance the developmental, environmental, and social needs involved. Sustainable development shows both an ‘intra-generational’ and an ‘inter-generational’ dimension,⁸⁶⁸ it is concerned with relationships both among members of the present generation, ie, between states and between the present and future generations. The concept is thus an

<https://www.globalcitizen.org/en/content/inequality-must-end-now/> (date of use: 10 May 2017).

⁸⁶⁶Johns H “Equity in development: Why it is important and how to achieve it” available at <https://www.odi.org/publications/3480-equity-development-working-paper> (date of use: 13 December 2017).

⁸⁶⁷Beyerlin *Bridging the North-South Divide* 281-2; Movsisyan “Decision Making by Consensus in International Organisations as a form of Negotiation” available at http://www.noravank.am/upload/pdf/337_en.pdf (date of use: 13 December 2017).

⁸⁶⁸“Intra-generational equity is concerned with equity between people of the same generation. This is separate from inter-generational equity, which is about equity between present and future generations. Intra-generational equity includes considerations of distribution of resources and justice between nations. It also includes considerations of what is fair for people within any one nation”. See <https://www.uow.edu.au/~sharonb/STS300/equity/meaning/intragen.html> (date of use: 13 December 2017).

extended form of environmental justice that strives to balance the needs of both the rich and poor countries without compromising the ability of either to achieve both their present and future needs.⁸⁶⁹

(v) *Common-but-differentiated responsibilities*

The principle of international environmental law emphasises the need for the collective responsibility of all states in the preservation of the global environment, but declares that the responsibility though ‘common’, is also ‘differentiated’.⁸⁷⁰ In the latter respect, it points to “the urgency to take account of differing unique circumstances of countries for example in relation to each state’s contribution to the creation of a particular environmental problem, and its ability such as financial, infrastructural and so on to prevent, reduce and control the threat”.⁸⁷¹ Accordingly, industrialised states ought to carry a heavier share of the ‘burden’ (which could be financial, technological, environmental, and so on) than developing countries in order to protect the global environment effectively. Moreover, due to their higher ‘hierarchy of needs’ and greater responsibility to protect the environment, they should also be prepared to enter into agreements that impose more stringent obligations on them than those falling to developing country parties.⁸⁷²

(vi) *Equitable sharing of benefits arising from the use of genetic resources*

Today, striking a balance and cooperating in the conservation and sustainable use of biological diversity is a particularly crucial issue in the North-South context. This is because states with valuable biological resources in their territories quite often are not

⁸⁶⁹Beyerlin *Bridging the North-South Divide* 273-7.

⁸⁷⁰Principle 7 of the Rio Declaration on Environment and Development UN Doc A/CONF. 151/26 (vol1), (1992) 31 *ILM* 874 stipulates: “States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command”.

⁸⁷¹Sands *Principles of International Environmental Law* (2003) 253.

⁸⁷²Beyerlin *Bridging the North-South Divide* 278.

the states with the technological 'know-how' required for the exploitation and economic use of such resources. While the former states predominantly belong to the developing world, the latter are, in the main, highly skilled industrialised states. Most often the interests of states with the technical knowledge conflict with the conservation needs of the country with the biological resource. This may result in exploitation of the natural resource on a level which excludes the demands for its sustainable use. In seeking to reconcile the conflicting interests of the North and South 'distributive justice' as a concept within international justice, is essential.⁸⁷³ Distributive justice lays a foundation for North-South cooperation that is aimed at a co-equal partnership.

(4) A commitment to good governance and a dedicated political will⁸⁷⁴

Corruption and other malpractices such as patronage and poor governance pose a serious threat to the realisation of Kenya's development blueprint. Corruption leads to the irregular transfer of colossal sums of money from the government's development

⁸⁷³Article 15 of the Convention on Biological Diversity, 5 June 1992 1760 UNTS 79, 143; (1992) 31 *ILM* 818 is apparently inspired by the idea of international justice and uses the language of equity. It creates a legal framework for balancing the sovereign rights of states over their natural resources and the capitalistic interests of foreign states and their companies in exploiting these resources. The guidelines are intended to assist parties to the CBD to develop an overall mutual access and benefit-sharing strategy. Article 15 of the Convention provides:

"1. Recognising the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation.

2. Each Contracting Party shall endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses by other Contracting Parties ...

3. ...

4. Access where granted, shall be on mutually agreed terms ...

5. Access to genetic resources shall be subject to prior informed consent of the Contracting Party providing such resources ...

6. ...

7. Each Contracting Party shall take legislative, administrative or policy measures, as appropriate, ... with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of genetic resources with the Contracting Party providing such resources. Such sharing shall be upon mutually agreed terms".

⁸⁷⁴Kenya Vision 2030 Second Medium Term Plan (2013-2017) at 102 available at <https://www.usaid.gov/sites/default/files/documents/1860/1%29%20Second%20Medium%20Term%20Plan%202013%20-%202017.pdf> (date of use: 20 February 2018).

purse to private individuals' accounts. The funds and resources diverted through corruption have dire consequences for crucial reforms, development agendas, and access to essential social service sectors such as health and education, especially for the poorest.⁸⁷⁵ The achievement of Kenya's noble socio-economic and political development ideals espoused in Vision 2030 can be robustly accomplished by confronting governance vices through adherence to the rule of law and constitutionalism.

In line with the perception that corruption is an impediment to the achievement of development and constitutes an environmental injustice against the poor, Annan notes:

Corruption undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish. This evil phenomenon is found in all countries—big and small, rich and poor—but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a Government's ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment. Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development.⁸⁷⁶

(5) Realising sound organisation and cohesion in the monitoring and evaluation of performance⁸⁷⁷

The actualisation of Kenya Vision 2030 faces the challenge of synchronising functions and roles of multi-sectoral agencies that cut across departments within government. Instances of overlapping responsibilities and a multiplicity of efforts among the agencies have been experienced. This has proved challenging in some key projects due to the

⁸⁷⁵Kenya National Commission on Human Rights (KNHCR) Report "Corruption: A Serious Threat to the Enjoyment of Human Rights That MUST be Urgently Tamed" (2015) at 2 available at knchr.org/Newsroom/PressStatements.aspx (date of use: 20 February 2018).

⁸⁷⁶Kofi Annan "United Nations Convention against Corruption" available at http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (date of use: 23 May 2017).

⁸⁷⁷Kenya Vision 2030 Second Medium Term Plan (2013-2017) available at <https://www.usaid.gov/sites/default/files/documents/1860/1%29%20Second%20Medium%20Term%20Plan%202013%20-%202017.pdf> (date of use: 20 February 2018).

lack of properly demarcated and efficient alignment of the Vision to specific players. The establishment of the Vision 2030 Delivery Secretariat followed way after the Vision 2030 document had been developed and accepted. This means that despite Vision 2030 being a participatory process, those charged with its monitoring and evaluation were not even 'present' during its critical formative and primary stages. It is vital that strategic objectives, implementation, and clear coordination among government agencies, the public, the private sector, and other stakeholders, be realigned for clearer actualisation of the blueprint's plans.⁸⁷⁸ There should be a seamless alignment between the national and county levels of governance in the implementation of the Vision. This can be promoted by periodic – for example, at the start of every financial year – county and national review meetings. The meetings should be open and involve all the stakeholders and members of the public, where a candid assessment of the annual achievements on all the strategic initiatives should be undertaken with a view of scaling-up the implementation process or addressing emerging challenges.⁸⁷⁹

(6) Promoting security⁸⁸⁰

Civil stability is vital for fostering development in the country. National cohesion and international security are essential tools in furthering the actualisation of the Vision. The 2007/2008 post-election violence reversed many of the development gains through destruction of infrastructure, property, loss of human capital through loss of lives, as

⁸⁷⁸Mwita "The Challenges Faced by Kenya Vision 2030 Delivery Secretariat in the Implementation of the Kenya Vision 2030 Strategy"(2013) are search project submitted in partial fulfillment of the requirement for the award of the degree of Master of Business Administration (School of Business) University of Nairobi at 29 available at

http://erepository.uonbi.ac.ke/bitstream/handle/11295/59281/Nyamai_The%20challenges%20faced%20by%20kenya%20vision%202030%20delivery%20secretariat%20.pdf?sequence=3 (date of use: 20 February 2018); Nkrote "Challenges Faced by the Implementation of Kenya Vision 2030" (2011) a research project submitted in partial fulfillment of the requirement for the award of the degree of Master of Business Administration (School of Business) University of Nairobi at 39 available at

http://erepository.uonbi.ac.ke/bitstream/handle/11295/95599/Kithinji%20_Challenges%20facing%20the%20implementation%20of%20Kenya%20vision%202030?sequence=1 (date of use: 20 February 2018).

⁸⁷⁹Kilonzi & Ndung'u "Challenges Affecting Implementation of Vision 2030 Strategic Decisions in the Public Sector in Laikipia County, Kenya" (2014) at 92 available at http://pparnet.com/journals/ppar/Vol_2_No_2_June_2014/5.pdf (date of use: 29 May 2017).

⁸⁸⁰Kenya Vision 2030 Second Medium Term Plan (2013-2017) at 3 <https://www.usaid.gov/sites/default/files/documents/1860/1%29%20Second%20Medium%20Term%20Plan%202013%20-%202017.pdf> (date of use: 20 February 2018).

well as diverting investment interests in the country, which all have a direct impact on national development.⁸⁸¹ Constitutional reforms, including the strengthening of the judiciary and fortification of the democratic process and the role played by the National Cohesion and Integration Commission (established in 2008), contribute significantly in fostering equity and social justice which are essential for the achievement of the economic, social/environmental, and political aspirations of the country.⁸⁸² Other measures include: deepening policy, legal and institutional reforms for the improvement in the enforcement of law and order, and promoting peace building and reconciliation to improve conflict management and ensure sustained peace within the country.⁸⁸³

Sustainable peace and tranquility has eluded the East African region for the last two decades since the fall of the Siad Barre regime in the former Republic of Somalia.⁸⁸⁴ The impact can be seen in the proliferation of terrorist gangs and the movement of illegal firearms and ammunition into Kenya. There is need to fortify national and regional security to provide a safe haven for investment and so assist in the actualisation of the blueprint which will bolster the achievement of Kenya's environmental justice aims.⁸⁸⁵

In wrapping up, the 2010 Constitution of Kenya and the Kenya Vision 2030 play the role of a midwife in the attainment of sustainable development and environmental justice in Kenya. The legal framework and policy document respectively, are critical as they complement each other in providing the vital ground for directing, evaluating, and measuring progress in the improvement of quality of life. Both documents reinforce

⁸⁸¹Mwenzwa & Misati (2014) 4/1 *American International Journal of Contemporary Research* at 251-2.

⁸⁸²Sessional Paper 9 of 2013 on National Cohesion and Integration at 1-3 **available at** www.cohesionandvalues.go.ke/wp-content/uploads/ (date of use: 18 February 2018).

⁸⁸³Government of Kenya Office of the Prime Minister: Ministry of State for Planning "National Development and Vision 2030" available at <http://0-www.worldcat.org.novocat.nova.edu/identities/lccn-n2008200508/> (date of use: 16 February 2018).

⁸⁸⁴World Bank Report "Conflict in Somalia: Drivers and Dynamics" (2005) available at <https://siteresources.worldbank.org/INTSOMALIA/Resources/conflictinsomalia.pdf> (date of use: 20 February 2018).

⁸⁸⁵*Kenya Vision 2030* Second Medium Term Plan (2013-2017) at 3 <https://www.usaid.gov/sites/default/files/documents/1860/1%29%20Second%20Medium%20Term%20Plan%202013%20-%202017.pdf> (date of use: 20 February 2018).

human dignity and characterise standards which buttress social justice, equity, and participation in governance. These significantly outline the pillars and core ingredients that provide the benchmark for promoting the living conditions of vulnerable people at the margins of society who suffer from abuse, neglect, and environmental injustices.

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