

**ENVIRONMENTAL CONSERVATION IN KENYA: CHALLENGES OF
ENFORCEMENT BY THE DEVOLVED SYSTEM OF GOVERNANCE**

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TABLE OF CONTENTS

STATUTE.....	ix
CHAPTER ONE: INTRODUCTION.....	1
1.1. BACKGROUND.....	1
1.2 STATEMENT OF THE PROBLEM	2
1.3 STATEMENT OF OBJECTIVES	3
1.3.1 Specific objective	3
1.4 RESEARCH QUESTIONS.....	3
1.5 JUSTIFICATION OF THE STUDY	3
1.6 LITERATURE REVIEW.....	4
1.7 LIMITATIONS OF THE STUDY.....	5
1.8 CHAPTER SUMMARY	6
1.8.1 Chapter 1: Introduction.....	6
1.8.2 Chapter 2: Theoretical, Conceptual Framework and Methodology	6
1.8.3 Chapter 3: Legal and Institutional Framework	7
1.8.4 Chapter 4: A Comparative Study.....	7
1.8.5 Chapter 5: Conclusion and Recommendations	7
1.8.6 Chapter 6: References/Appendices.....	7
CHAPTER 2: THEORETICAL, CONCEPTUAL FRAMEWORK AND METHODOLOGY	8
2.1 THEORETICAL FRAMEWORK	8
2.1.1 Neo-Malthusianism Theory.....	8
2.2 CONCEPTUAL FRAMEWORK	9
2.2.1 Environmental Governance Principle	9
2.2.2 County level of Governance	9
2.2.3 National Governance	11
2.3 METHODOLOGY.....	12
CHAPTER 3: LEGAL AND INSTITUTIONAL FRAMEWORKS.....	13
4.1 THE ADMINISTRATIVE FRAMEWORK BETWEEN THE NATIONAL LEGISLATURE AND COUNTY ASSEMBLY	13
4.2 THE ADMINISTRATIVE FRAMEWORK BETWEEN THE NATIONAL EXECUTIVE AND THE COUNTY EXECUTIVE.....	15
4.3 ADMINISTRATIVE FRAMEWORK BETWEEN CONSTITUTIONAL COMMISSIONS AND COUNTY GOVERNMENTS.....	15

4.4	POLICIES AND LEGAL CONTEXT	17
CHAPTER 4: A COMPARATIVE STUDY		20
3.1	THE CASE STUDY – SOUTH AFRICA.....	20
3.2	THE NATURE OF DEVOLVED UNITS	22
3.3	THE STRUCTURE OF DEVOLVED UNITS	24
3.2	THE POWERS AND SERVICE DELIVERY OF DEVOLVED UNITS	25
3.4	THE FISCAL ALLOCATION IN THE DEVOLVED UNITS	27
3.5	CONCLUSION	28
CHAPTER 5: CONCLUSION		30
5.1	SUMMARY OF RECOMMENDATIONS	30
5.1	CONCLUSION	31
CHAPTER 6: BIBLIOGRAPHY		33
6.1	BOOKS	33
6.2	CASE STUDIES	34
6.3	POLICIES	34
6.4	JOURNALS	35
6.5	ARTICLES, REVIEWS, REPORTS AND WORKING PAPERS.....	36
6.6.	DICTIONARY AND ENCYCLOPEDIA.....	42
6.7	CONFERENCES	43
6.8	WEBSITES	43

DEDICATION

First and foremost to thy Almighty Lord, to my guardians, lecturers, friends and colleagues for the support they had in guiding me through this research.

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DECLARATION

I, **OLIVE AWUOR MUMBO**, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:

MR. DESMOND TUTU

ABSTRACT

The research aims to evaluate the lack of coherency in the laws surrounding the county and national levels of government with regards to environmental conservation. It can be deduced that both levels of government lack coordination and cooperation on their functions in matters related to environmental conservation. The methodology used to conduct this research is mainly through qualitative analysis. A range of recommendations have been outlined at the concluding chapter which range from integrating the policies and laws to reflect the Constitution of Kenya to adapting strategies which if implemented will assist to fill the lacuna as identified.

LIST OF ABBREVIATIONS

ASAL:	Arid and Semi-Arid Lands.
FAO:	Food and Agriculture Organization.
IARU:	The International Alliance of Research Universities Synthesis.
ICRAF:	The World Agroforestry Centre.
NEMA:	The National Environment Management Authority.
UNICEF:	The United Nations Children's Emergency Fund.
UNDESA:	The United Nations Department of Economic and Social Affairs Division for Sustainable Development.
UNDP:	United Nations Development Programme.
UNEP:	The United Nations Environment Programme.
UNFCCC:	The United Nations Framework Convention on Climate Change.
UNHABITAT:	The United Nations Human Settlements Programme.
WB:	The World Bank.

STATUTE

1. *The Constitution of Kenya* (2010).
2. *The County Government Act*, Laws of Kenya (2012).
3. *Local Government Act*, Laws of Kenya (2010).
4. *The Climate Change Act*, Laws of Kenya (2016).
5. The Republic Of South Africa, *the Constitution* (2009).
6. *The Forest Conservation and Management Bill*, Laws of Kenya (2015).
7. *The Draft Wildlife and Management Bill*, Laws of Kenya (2012).
8. *The Intergovernmental Relations Act*, Laws of Kenya (2012).
9. *The Local Authority Act*, Laws of Kenya (2012).
10. *Transition to Devolved Government Act*, Laws of Kenya (2012).
11. *National Government Co-Ordination Act*, Laws of Kenya (2013).
12. *The Vienna Convention on Civil Liability for Nuclear Damage* (1977).

DEFINITION OF TERMS

Environment - has a very broad meaning and includes the physical factors of the surroundings of human beings including land, water, atmosphere, sound, odour, taste. The biological factors of animals and plants. The social factors of aesthetics and includes both the natural and the built environment.¹

Environmental Conservation - maintenance of the environment, maintenance of the habitat, preservation of the environs, protection of the environment.²

Devolution - the moving of power or responsibility from a main organization to a lower level, or from a central government to a local government.³

¹ Merriam-Webster Dictionary. See Link <https://www.merriam-webster.com/dictionary/environment>. Accessed 2017.

² William C. Burton, Burton's Legal Thesaurus, 2007. See Link <http://legal-dictionary.thefreedictionary.com/Environmental+Conservation>. Accessed in 2017.

³ Cambridge Dictionary. See Link <http://dictionary.cambridge.org/dictionary/english/devolution>. Accessed in 2017.

CHAPTER ONE: INTRODUCTION

This Chapter gives a background on the concept of devolution in regards to environmental conservation through the devolved system of governance in Kenya. The objective of the research being to assess the challenges that both levels of government with regards to environmental conservation. More so, a literature review which highlights different authors, scholarly writers and credible institutions opinions on the subject matter at hand has been duly encased. This is ensued by a detailed justification of the research and the limitations faced. Finally, a chapter breakdown of the dissertation as a whole has been outlined.

1.1. BACKGROUND

The Black's Law Dictionary defines devolution as the act or an instance of transferring one's rights, duties or powers to another.⁴ It is the practice in which the authority to make decisions in some sphere of public policy is delegated by law to sub-national territorial assemblies (e.g., a local authority) and entails transferring governmental or political authority.⁵ It is a political device for involving lower-level units of government in policy decision-making on matters that affect those levels.⁶ Devolution is premised on the rationale that institutions closest to the citizens are the most likely to meet and properly articulate needs of the citizen.⁷

As a newly industrializing country, Kenya faces the challenge of environmental conservation.⁸ The Government of Kenya understands and appreciates the important function that the environment plays in underpinning development.⁹ The government further recognises that “*the full integration of environmental concerns in development planning at all levels of decision making*

⁴ Bryan Garner, *Black's Law Dictionary*, 9th Edition, 2010.

⁵ Luis Franceschi, *The African Human Rights Judicial System: Streamlining Structures And Domestication Mechanisms Viewed From The Foreign Affairs Power Perspective*, 2014.

⁶ *The Constitution of Kenya Review Commission*, Main Report, 2005.

⁷ Katalin Tausz, *the Impact of Decentralisation on Social Policy*, 2003. The Author Argues Verbatim That, “... decentralization which provides that power over the production and delivery of goods and services should be handled over to the lowest unit capable of dealing with associated costs and benefits.”

⁸ United Nations Environment Programme Grid-Sioux Falls, *Chapter 1: Environment and Vision 2030*, 2009.

⁹ The Government of Kenya, *Poverty and Environment Initiative Kenya Poverty and Environment Issues: Governance Institutions, Institutional Frameworks and Opportunities for Communities*, 2006.

remains a challenge to the country” and further stresses that “in view of the high incidence of poverty in the country, the need to integrate environmental concerns in development activities should be given high priority.”¹⁰ However, to this end there is a lack of coordination, cooperation and clarity as to the roles of the county and national levels of government in environmental conservation.

The national government has a greater responsibility in relation to the environment than the county government.¹¹ However, as per Article 6 (2) of the Constitution of Kenya the dominant authority of the citizens of Kenya is exercised both at the national and county levels of government.¹² The National Assembly is expected to enact the major legislation concerning the environment.¹³ In conformity with the principles of devolution, the county legislative assemblies are expected to come up with legislation on the environmental issues in their jurisdiction.¹⁴ The county assembly legislation should be in conformity the national legislation.¹⁵ Nevertheless, this is not fragmented due to the lack of coordination, clarity and cooperation between both levels of government.

1.2 STATEMENT OF THE PROBLEM

The Constitution vests the role of protection of the environment with the National Government.¹⁶ More so, all natural resources are the control of the National Government.¹⁷ The same Constitution however, gives the responsibility of execution of some national government policies on environmental conservation on the County Governments.¹⁸ Nevertheless, there is lack of clarity; it is not clear what these national policies on natural resources are. Furthermore, there is lack of coordination and cooperation between both levels of governments, therefore a difficulty is generated on how each level is to discharge its functions.

¹⁰ The Government of Kenya, *Poverty and Environment Initiative Kenya Poverty and Environment Issues: Governance Institutions, Institutional Frameworks and Opportunities for Communities*, 2006.

¹¹ Steve Carter, *Environmental management and local government*, 1974.

¹² Article 6 (2), *the Constitution of Kenya* (2010).

¹³ Charles Nyachae, *Implementing Kenya's Constitution: status, achievements and challenges*, 2012.

¹⁴ Sophie Chapman, *Land and environmental governance related to REDD+ implementation in Kenya*, 2014.

¹⁵ Section 25, *the County Government Act* (2012).

¹⁶ 4th Schedule, Part 1 (22), *the Constitution of Kenya* (2010).

¹⁷ Article 62 (3), *the Constitution of Kenya* (2010).

¹⁸ Article 185 (4), *the Constitution of Kenya* (2010).

1.3 STATEMENT OF OBJECTIVES

To assess the coherency of the laws in play between the national and county level of governance within the context of environmental conservation.

1.3.1 Specific objective

This is premised on the fact that there is lack of clarity, coordination and cooperation between the county and national level of government in relation to environmental conservation as earlier mentioned.

1.4 RESEARCH QUESTIONS

- i. Whether there is clarity as to the roles adjudicated to the county and national levels of government in relation to environmental conservation;
- ii. Whether there is coordination between the county and national levels of government when performing their functions especially those geared towards environmental conservation;
- iii. Whether there is cooperation between the county and national levels of government in relation to their mandate to conserve the environment;
- iv. Whether there are overlaps in the laws currently in play with regards to environmental conservation between the county and national levels of government.

1.5 JUSTIFICATION OF THE STUDY

Although the national government has a greater responsibility in relation to the environment than the county government,¹⁹ the dominant authority of the people of Kenya is exercised both at the national level and the county level.²⁰ The findings of the current study are a necessity since there is a lack of coordination, cooperation and clarity of the roles that the county and national levels of government with regards to environmental conservation. Consequently, the research findings may be important in addressing these gaps because it is a necessity to tackle the challenges faced in environmental conservation.²¹

¹⁹ Linda Lobao And David Kraybill, *The Emerging Roles Of County Governments In Metropolitan And Nonmetropolitan Areas: Findings From A National Survey*, Ohio State University, 2005.

²⁰ Article 1 (4), *the Constitution of Kenya* (2010).

²¹ Stella Tadei, *Effectiveness of Financial Control Mechanism on Effective Management of Income Generating Activities in Public Universities: A Case of the Open University of Tanzania*, 2014.

1.6 LITERATURE REVIEW

Local authorities refer to the institutions which have authority over local governance in Kenya.²² These authorities in Kenya were governed by the Repealed Local Government Act, Cap 265, laws of Kenya.²³ Mazhindu in his study on local government processes and the environment in Africa stated that *by and large, the conventional planning approaches have either ignored or underestimated the growing environmental concerns.*²⁴ The search for planning responses to the devastating environmental concerns has culminated in the assembly of an ‘environmental tool box’ containing an assortment of instruments notably, pollution control and licensing, Environmental Impact Assessments (EIAs), natural resource management plans and environmental auditing.²⁵ Most of these instruments are quasi-planning in nature normally deployed to complement the conventional land–use planning tools but largely outside the traditional planning practice.²⁶ This points out that, in the mainstream planning activities, the emerging environmental management specialisations have increasingly drifted apart - theoretically, legally, administratively and in their specific responses to environmental problems.²⁷

In the study by Kapa on Lesotho’s local government system, he stated that there was need for control of natural resources like sand and stones as well as environmental protection like pollution land/site allocation, water supply and market provision.²⁸ The Ministry of Youth Affairs (2010) on Environmental and Social Management Framework (ESMF) stated that one of the key environmental and social issues in Kenya is health and environment and further explains that most

²² Citizens Information, *Functions of local authorities*, 2015. See Link http://www.citizensinformation.ie/en/government_in_ireland/local_and_regional_government/functions_of_local_authorities.html. Accessed in 2017.

²³ *Local Government Act, Laws of Kenya (2010)*.

²⁴ Peer Reviewed Research Conference Papers since 2008, 2015. See Link <https://www.linkedin.com/pulse/selected-peer-reviewed-research-conference-papers-since-mazhindu?forcenosplash=true>. Accessed in 2017.

²⁵ Samuel Kilikaa and Nicholas Mutua, *a Survey of the Environmental Conservation Costs by Local Authorities in Kenya*, 2013.

²⁶ Kilikaa and Mutua, *a Survey of the Environmental Conservation Costs by Local Authorities in Kenya*, 2013.

²⁷ Kilika Samuel, *a Survey of the Environmental Conservation Costs by Local Authorities in Kenya*, 2010.

²⁸ Motlamelle Kapa, *Lesotho’s Local Government System: A Critical Note on the Structure and Its Implications for Popular Participation and Service Delivery*, 2005.

of the urban areas in Kenya are faced by domestic waste and sewage management problems with only 32 out of the 175 local authorities having any form of sewage collection and disposal infrastructure.²⁹ The National Environment Management Authority (NEMA) in its strategic plan for 2005-2010 stated that there was lack of sewerage system and facilities for 143 out of 175 local authorities which led to increased cases of environmental health problems due to pollution of the ecosystem by heavy metals and chemicals such as nitrates.³⁰ Waema and Mitullah in their study on e-governance in local authorities in Kenya stated that the Local Authority Integration Financial Operation Management System (LAIFOMS) is limited to financial management and has only three main components, revenues, budgeting and financial management and expenditure, a study that fails to mention environmental accounting issues.³¹ According to Kibeti, environmental costs are obscured in conventional accounts and yet they are real costs that should be accommodated by all firms and industries.³² Management of the environmental costs will result in improved environment, production and generally wealth of the urban population in the study area.³³

1.7 LIMITATIONS OF THE STUDY

Responding to the research question effectively required new research efforts.³⁴ This was a drawback since parliament is enacting laws which are geared towards environmental conservation. An example would be recently in the Kenyan legal framework a Climate Change Act³⁵ was enacted by parliament and this has required the research to take a different direction from the earlier on submitted proposal.

²⁹ Ministry of Agriculture, Animal Industry and Fisheries, *Regional Pastoral Livelihoods Resilience Project- (RPLRP) Environmental and Social Management Framework (ESMF)*, 2013.

³⁰ The Republic of Uganda, *State of the Environment Report for Uganda*, 2010.

³¹ Amos Arowoshegbe and Uniamikogbo Emmanuel, *Accounting For Social and Environmental Challenges: A Theoretical Perspective*, 2010.

³² Lawrence Kibet, *Use of Environmental Accounting to Estimate Optimal Extraction Levels for Quarries: Case of Nakuru Municipality*, 2004.

³³ Kibet, *Use of Environmental Accounting to Estimate Optimal Extraction Levels for Quarries: Case of Nakuru Municipality*, 2004.

³⁴ Myers Samuel and Patz Jonathan, *Emerging Threats to Human Health from Global Environmental Change*, the Annual Review of Environment and Resources, 2010.

³⁵ *The Climate Change Act*, Laws of Kenya (2016).

There is an astonishing lack of reliable, fine-scaled, georeferenced data about population health, environmental conditions, or the host of factors that determine environmental conservation.³⁶ In response to new threats imposed by altered environmental conditions, people adapt. They move, they find alternative resources, they externalize their resource use, they trade, they alter behaviours, and they seek assistance from national and international organizations. Although filling data gaps is critically important, it is also important to acknowledge that the complexity of some of these relationships will always make exact impacts of changing environmental conditions on human well-being difficult to quantify.³⁷

Time factor in this instance is also a major limitation in that the research is expected to be conducted within a period of seven months and concrete raw information be provided within this period of time. More so, the defence and approval of the proposal came three months past the planned schedule for conducting an effective research.

1.8 CHAPTER SUMMARY

1.8.1 Chapter 1: Introduction

In the dissertation it gives a background as to the national perspective on environmental conservation and the challenges which the devolved system of governance is facing. The problem at hand being the duplication in the roles of the national and county level of government. The aim for conducting this study is to investigate the above factor and propose solutions or recommendations on the best way forward. Time factor is a limitation in this study seeing that the finalized dissertation has to be handed in within seven months.

1.8.2 Chapter 2: Theoretical, Conceptual Framework and Methodology

The main theories mentioned is neomalthunism theory. As for the conceptual framework the principle of environmental governance is reffered to in relation to the research. The research methodology that used in this research question to gather and analyze data is primarily qualitative the main sources of information being books, reports, articles, journals and information obtained from credible institutions.

³⁶ Myers and Patz, *Emerging Threats to Human Health from Global Environmental Change*, the Annual Review of Environment and Resources, 2010.

³⁷ Myers and Patz, *Emerging Threats to Human Health from Global Environmental Change*, the Annual Review of Environment and Resources, 2010.

1.8.3 Chapter 3: Legal and Institutional Framework

Several statutes, institutions and policies are mentioned thus answering the research question being whether there is a lack of coordination, cooperation and clarity on the roles of the county and national levels of government.

1.8.4 Chapter 4: A Comparative Study

An in depth comparative study is given of Kenya and South Africa in relation to the devolution systems that are currently in play for both countries. Similarities and differences are highlighted with regards to the roles that both governments have. More so, recommendations are made on what Kenya's government can implement in order to curb the challenges of environmental conservation through its devolved system of governance.

1.8.5 Chapter 5: Conclusion and Recommendations

This is the concluding section of the dissertation which furthermore provides concrete recommendations to the problem identified in the research question which can be put into practice. These suggestions can be put into play for future research work based on the findings and conclusions generated from this study.

1.8.6 Chapter 6: References/Appendices

A list references and appendices are provided for at the end of the dissertation which shows the main sources of information in this research. These range from case reports, raw data, books, articles, internet sources etc.

CHAPTER 2: THEORETICAL, CONCEPTUAL FRAMEWORK AND METHODOLOGY

The theoretical framework consists of the neo-malthusianism theory is used to denote the nexus between the county and national level of government with regards to environmental conservation. Environmental governance principle forms the conceptual framework of the research. The research methodology that is used mainly comprises of an analysis of data which is primarily qualitative outsourced from secondary and primary sources of information.

2.1 THEORETICAL FRAMEWORK

2.1.1 Neo-Malthusianism Theory

This theory is contended by Thomas Malthus; it holds that human populations, because of their tendency to increase exponentially if fertility is unchecked, will ultimately outstrip Earth's resources, leading to ecological catastrophe.³⁸ Neo-Malthusianism has been criticized for overlooking cultural adaptation, technological developments, trade, and institutional arrangements that have allowed human populations to grow beyond their local subsistence.³⁹ It also borrows from a demographic theory that describes fertility as an adjustment to risk, which argues that in situations where financial and insurance markets and government safety nets are poorly developed, children serve as old-age security.⁴⁰ Finally, it is partially derived from the ecologist Garrett Hardin's famous "*tragedy of the commons*," which holds that as long as incentives exist for each household to privatize open access resources, then there will be a tendency at the societal level to overexploit available resources to the detriment of all users.⁴¹

This theory is in line with devolution and environmental conservation since if left unchecked, by the national and county levels of government, the people might end up eventually destroying the environment at large. Both levels of government have a legal mandate under the Constitution of Kenya to perform duties which are geared towards environmental conservation.⁴² This is not the

³⁸ Alex Sherbinin, David Carr, Susan Cassels, and Leiwen Jiang, *Population and Environment*, Annual Review of Environment and Resource, 2007.

³⁹ Rafiqul Chaudhury, *Do Population Trends Matter To Agricultural Productivity? A Case Study of Bangladesh*, East West University, Dhaka, Bangladesh, 2013.

⁴⁰ Sherbinin, Carr, Cassels, and Jiang, *Population and Environment*, Annual Review of Environment and Resource, 2007.

⁴¹ Garrett Hardin, *the Tragedy of the Commons*, 1968.

⁴² Patrick Onyango, *Devolution Made Simple A Popular Version Of County Governance System*, 2013.

current case in the Kenyan situation because there is a lack of cooperation, coordination and clarity as to how both levels of government are expected to discharge such paramount functions.⁴³ The aforementioned theory requires that both levels of government perform their administrative and legal environmental tasks that are detrimental to public interest.⁴⁴

2.2 CONCEPTUAL FRAMEWORK

2.2.1 Environmental Governance Principle

Environmental governance denotes the procedures of decision-making involved in the control and management of the environment and natural resources.⁴⁵ It is the 'Multi-level interactions (i.e., local, national, international/global) among, but not limited to, three main actors, i.e., state, market, and civil society, which interact with one another, whether in formal and informal ways; in formulating and implementing policies in response to environment-related demands and inputs from the society; bound by rules, procedures, processes, and widely accepted behaviour; possessing characteristics of “good governance”; for the purpose of attaining environmentally-sustainable development’.⁴⁶

2.2.2 County level of Governance

A 1997 report observed a global consensus that sustainable development implementation should be based on local level solutions and initiatives designed with and by the local communities.⁴⁷ Community participation and partnership along with the decentralisation of government power to local communities are important aspects of environmental governance at the local level.⁴⁸ Initiatives such as these are integral divergence from earlier environmental governance approaches

⁴³ Heinrich Boll Stiftung, *Reality and Reform Needs in Development Cooperation. The Case of Kenya*, 2010.

⁴⁴ Ezekiel Mwenzwa, *Kenya's Social Development Proposals and Challenges: Review of Kenya Vision 2030 First Medium-Term Plan*, 2014.

⁴⁵ Saliem Fakier, Anthea Stephens And Jenny Tholin, *National State Of The Environment Project Environmental Governance*, African Institute For Corporate Citizenship, 2005.

⁴⁶ The International Union for Conservation of Nature (IUCN), *IUCN World Heritage Outlook 2014: A Conservation Assessment of All Natural World Heritage Sites*, World Heritage Programme, 2014.

⁴⁷ United Nations Economic and Social Council, *Commission on Sustainable Development: Report of the Ad Hoc Intergovernmental Panel on Forests on Its Fourth Session*, Fifth Session, 1997.

⁴⁸ Israel Massuanganhe, *Decentralization And District Development: Participatory & Multi-Sectoral Framework For Decentralized Policies And Local Development Strategies Addressed To Millennium Development Goals*, 2005.

which was “driven by state agendas and resource control”⁴⁹ and followed a top-down or trickle down approach rather than the bottom up approach that local level governance encompasses.⁵⁰ Local level governance shifts decision making power away from the state and/or governments to the grassroots.⁵¹ The local level of governance has an important impact even on a global scale.⁵² Environmental governance at the global level is defined as international and as such has resulted in the marginalisation of local voices.⁵³ Local level governance is important to bring back power to local communities in the global fight against environmental degradation.⁵⁴ Pulgar Vidal observed a “*new institutional framework, decision-making regarding access to and use of natural resources has become increasingly decentralized.*”⁵⁵ He noted four techniques that can be used to develop these processes: *formal and informal regulations, procedures and processes, such as consultations and participative democracy; social interaction that can arise from participation in development programs or from the reaction to perceived injustice; regulating social behaviours to reclassify an individual question as a public matter; within-group participation in decision-making and relations with external actors.*⁵⁶

He found that the key conditions for developing decentralized environmental governance are: *access to social capital, including local knowledge, leaders and local shared vision; democratic access to information and decision-making; local government activity in environmental governance: as facilitator of access to natural resources, or as policy maker; an institutional*

⁴⁹ Sherifa Fouad Sherif and Alia Abdel Hamid Aaref, *Managing Environmental Degradation: An Analysis of Environmental Governance and Its Impact in Egypt*, Public Policy and Administration Research, 2015.

⁵⁰ *Local And Regional Partners Contributing To Europe 2020 Brussels*, 2015.

⁵¹ Oscar Dassah, *the Journal of African & Asian Local Government Studies towards Localism: Providing For Grass-Roots Citizens' 'Voice' In Policy and Decision-Making for Sustainable Development*, School Of Management, Information Technology and Governance, University Of KwaZulu-Natal, Durban, South Africa, 2010.

⁵² John Gaventa And Camilo Valderrama, *Participation, Citizenship And Local Governance*, Institute Of Development Studies, 1999.

⁵³ Raffaele Marchetti, *the Role of Civil Society in Global Governance: Report on the Joint Seminar Organised By the Euiss, the European Commission / Dg Research, and Unu-Cris*, 2010.

⁵⁴ Sherif and Aaref, *Managing Environmental Degradation: An Analysis of Environmental Governance and Its Impact in Egypt*, Public Policy and Administration Research, 2015.

⁵⁵ Pulgar Manuel, *Gobernanza Ambiental Descentralizada (Decentralized Environmental Governance)*, 2005.

⁵⁶ Manuel; *Gobernanza Ambiental Descentralizada (Decentralized Environmental Governance)*, 2005.

*framework that favours decentralized environmental governance and creates forums for social interaction and making widely accepted agreements acceptable.*⁵⁷

2.2.3 National Governance

States play a crucial role in environmental governance, because *"however far and fast international economic integration proceeds, political authority remains vested in national governments."*⁵⁸ It is for this reason that governments should respect and support the commitment to implementation of international agreements.⁵⁹ At the state level, environmental management has been found to be conducive to the creation of roundtables and committees.⁶⁰ In France, *the Grenelle de l'environnement*⁶¹ process: included a variety of actors (e.g. the state, political leaders, unions, businesses, not-for-profit organizations and environmental protection foundations);⁶² allowed stakeholders to interact with the legislative and executive powers in office as indispensable advisors;⁶³ worked to integrate other institutions, particularly the Economic and Social Council, to form a pressure group that participated in the process for creating an environmental governance model;⁶⁴ attempted to link with environmental management at regional and local levels.⁶⁵ If

⁵⁷ Manuel, *Gobernanza Ambiental Descentralizada (Decentralized Environmental Governance)*, 2005.

⁵⁸ *Governance for a Sustainable Future Report by the World*, 2016. See Link [Http://Megaslides.Top/Doc/82569/Governance-For-A-Sustainable-Future-A-Report-By-The-World](http://Megaslides.Top/Doc/82569/Governance-For-A-Sustainable-Future-A-Report-By-The-World). Accessed in 2017.

⁵⁹ Department Of Economic And Social Affairs Office For ECOSOC, *Support And Coordination Achieving Sustainable Development And Promoting Development Cooperation Dialogues At The Economic And Social Council*, 2008.

⁶⁰ United Republic Of Tanzania, *National Report for the United Nations Conference on Sustainable Development, Rio+20*, The Vice President's Office, 2012.

⁶¹ The Ministry Of Environment Energy and Sea. See Link [Http://Www.Developpement-Durable.Gouv.Fr/-Le-Grenelle-De-L-Environnement-De-.Html](http://Www.Developpement-Durable.Gouv.Fr/-Le-Grenelle-De-L-Environnement-De-.Html). Accessed in 2017.

⁶² The Department Of Economic And Social Affairs Of The United Nations Secretariat, *7th Global Forum On Reinventing Government Building Trust In Government*, Vienna, Austria, 2007.

⁶³ The Department Of Economic And Social Affairs Of The United Nations Secretariat, *7th Global Forum On Reinventing Government Building Trust In Government*, Vienna, Austria, 2007.

⁶⁴ The Department Of Economic And Social Affairs Of The United Nations Secretariat, *7th Global Forum On Reinventing Government Building Trust In Government*, Vienna, Austria, 2007.

⁶⁵ The Department Of Economic And Social Affairs Of The United Nations Secretariat, *7th Global Forum On Reinventing Government Building Trust In Government*, Vienna, Austria, 2007.

environmental conservation issues are excluded from the economic agenda, this may delegitimize those institutions.⁶⁶

2.3 METHODOLOGY

The main instrument for collecting data on the research environmental conservation in the context of both the county and national level of governance with regards to environmental conservation was in-depth literature review, desk review and analysis of secondary data. Sources of information included the Government of Kenya reports (development plans, policies, legislations etc.), international reports (UN, World Bank, and International and local NGOs) and other relevant documents and scientific reports.

⁶⁶ Kerry Rittich, *the Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social*, 2006.

CHAPTER 3: LEGAL AND INSTITUTIONAL FRAMEWORKS

The Constitution of Kenya 2010 provides for an administrative framework between the national government and county government.⁶⁷ The Constitution envisages a relationship of mutuality and independence.⁶⁸ This section shall look at the administrative framework in detail by breaking into several categories for instance, the administrative framework between the legislature and county assembly, the administrative framework between the national executive and the county executive, and finally the administrative framework between constitutional commissions and county government in relation to environmental conservation.⁶⁹

4.1 THE ADMINISTRATIVE FRAMEWORK BETWEEN THE NATIONAL LEGISLATURE AND COUNTY ASSEMBLY

The Constitution of Kenya provides that the terrain of Kenya is divided into counties as specified in the First schedule.⁷⁰ Article 6 of the Constitution further provides that there are two levels of government that is at the national level and county level.⁷¹ Both levels of government are distinct and interdependent, however, they are expected to conduct their mutual relations on the basis of consultation and cooperation.⁷² The role of the national assembly being the determination of the alteration of boundaries of counties and allocation of national revenue between the two levels of government.⁷³ It is mandated to represent the counties and safeguard the welfares of the counties and their governments.⁷⁴ It also approves bills concerning county government and determines the allocation of revenues among county governments as provided for in Article 217 of the Constitution.⁷⁵ In addition to the functions mentioned, it also exercises oversight authority over

⁶⁷ Article 189, *the Constitution of Kenya* (2010).

⁶⁸ Christopher Forsyth, *Judicial Review and the Constitution*, University Of Cambridge. Centre for Public Law Hart Publishing, 2000.

⁶⁹ Patrick Onyango, *Devolution Made Simple A Popular Version Of County Governance System*, 2013.

⁷⁰ Article 6 and the First Schedule, *the Constitution of Kenya* (2010).

⁷¹ Article 6 (2), *the Constitution of Kenya* (2010).

⁷² Article 6, *the Constitution of Kenya* (2010).

⁷³ Article 94, *the Constitution of Kenya* (2010).

⁷⁴ Article 96, *the Constitution of Kenya* (2010).

⁷⁵ Article 217, *the Constitution of Kenya* (2010).

national revenue allocated to the county governments.⁷⁶ Both the national legislature and county assemblies are vested with legislative authority and Article 191 envisages a situation where conflicting laws may be enacted by both houses.⁷⁷ The Constitution provides for ways such conflicts may be resolved.⁷⁸ The national legislation will prevail over county legislation if: It applies uniformly throughout the country and therefore the legislation binds all county government;⁷⁹ it is aimed at preventing unreasonable action by a county government which is prejudicial to the economic, health or security interests of Kenya or another county or impedes the implementation of national economic policy;⁸⁰ if none of the above apply in any county legislation then a county legislation will prevail over the national legislation.⁸¹

The court may deliberate a conflict between both levels of government refer a reasonable interpretation that avoids a conflict to an alternative interpretation that results in conflict.⁸² When the court finally makes a determination on which legislation prevail over the other, it does not invalidate the other legislation but the other provisions in the legislation are inoperative to the extent of its inconsistency.⁸³ Parliament is mandated to ensure that county government has all the necessary support to perform its functions effectively.⁸⁴ Parliament has to pass legislation that provides for the intervention of the national government in case a county government is impotent and fails to perform its function or does not operate a financial management system that complies with the requirement of national legislation.⁸⁵

⁷⁶ Morris Kwando, John Ambani, *the New Constitution of Kenya: Principles, Government and Human Rights*, 2014.

⁷⁷ Article 191, *the Constitution of Kenya* (2010).

⁷⁸ Article 191, *the Constitution of Kenya* (2010).

⁷⁹ Article 191, *the Constitution of Kenya* (2010).

⁸⁰ Article 191, *the Constitution of Kenya* (2010).

⁸¹ Article 191, *the Constitution of Kenya* (2010).

⁸² Article 191 (5), *the Constitution of Kenya* (2010).

⁸³ *Meru Bar, Wines & Spirits Owners Self Help Group V County Government of Meru*, 2014, Eklr.

⁸⁴ Article 190, *the Constitution of Kenya* (2010).

⁸⁵ Article 190, *the Constitution of Kenya* (2010).

4.2 THE ADMINISTRATIVE FRAMEWORK BETWEEN THE NATIONAL EXECUTIVE AND THE COUNTY EXECUTIVE

The functions and powers of the national government and the county governments are clearly set out in the Fourth schedule of the Constitution.⁸⁶ A power or function conferred in more than one level of government is a function within the concurrent jurisdiction of each of those levels of government.⁸⁷ In a situation where a power or function is not assigned to either level by the Constitution, such power or function shall vest in the national government.⁸⁸ If circumstances need be there is the consent to transfer functions and powers between both levels of government in an instance where such power or function would be more effectively performed or exercised by the receiving government.⁸⁹ But such transfer should not be in regard to a power or function prohibited by legislation.⁹⁰ It is also noteworthy that in the performance of their functions, both government levels shall cooperate and may set up joint authorities and committees.⁹¹ Both government levels are also mandated to liaise for purposes for purposes of trading data, harmonizing policies, administration and enhancing capacity.⁹²

4.3 ADMINISTRATIVE FRAMEWORK BETWEEN CONSTITUTIONAL COMMISSIONS AND COUNTY GOVERNMENTS

The National Land Commission: The Constitution provides for the establishment of the National Land Commission whose functions include managing public land on behalf of the national government and the county government.⁹³ The Commission under the Land Act has a mandate to notify the county government of any land that has been compulsorily acquired by government and land where public right of way has been made.⁹⁴ The Commission is required to work closely with

⁸⁶ Fourth Schedule, *the Constitution of Kenya* (2010).

⁸⁷ Article 186, *the Constitution of Kenya* (2010).

⁸⁸ Article 186, *the Constitution of Kenya* (2010).

⁸⁹ Article 186, *the Constitution of Kenya* (2010).

⁹⁰ John Cheadle, *the Delegation of Legislative Functions*, 1918.

⁹¹ CK Lawyers Learning Library, *Administrative Framework between the County and National Government under the 2010 Constitution of Kenya*, 2013.

⁹² Article 189, *the Constitution of Kenya* (2010).

⁹³ Article 67, *the Constitution of Kenya* (2010).

⁹⁴ Article 67 (2), *the Constitution of Kenya* (2010).

the county government in the management of natural resources that fall within their jurisdiction and in efforts of environmental conservation.⁹⁵ Again it is paramount on the commission to encourage alternative and traditional disputes resolution mechanism in resolving land conflicts.⁹⁶

Environment Conservation and Management: The wide environmental management in Kenya is in the hands of NEMA, a parastatal within the ministry of environment and mineral resources.⁹⁷ However, environment being a multispectral phenomenon, there are several other government agencies that play a role as they manage their sectors.⁹⁸ With regard to national environmental management, the legal basis for the conservation of environmental goods and services is clearly set out within the overarching framework legislation, the Environmental Management and Co-ordination Act (EMCA).⁹⁹ Under the EMCA, a national policy forum called the National Environmental Council (NEC) was established.¹⁰⁰ This is where policies and priorities for the protection of the environment should be determined.¹⁰¹ NEMA was also established under the EMCA.¹⁰² NEMA became operational in 2002.¹⁰³ Its main function is to coordinate the environmental management activities undertaken by other government ministries, departments and

⁹⁵ Article 67 (2), *the Constitution of Kenya* (2010).

⁹⁶ Article 67 (2), *the Constitution of Kenya* (2010).

⁹⁷ Ministry Of Environment and Mineral Resources. See Link [Http://Www.Estis.Net/Sites/Kenya/Default.Asp?Site=Kenya&Page_Id=3d859b03-3223-4b59-8057-0973149c959d](http://www.estis.net/sites/kenya/default.asp?site=kenya&page_id=3d859b03-3223-4b59-8057-0973149c959d). Accessed in 2017.

⁹⁸ UN DESA, *Sustainable Development in Kenya: Stocktaking in the Run Up To Rio+20*, Nairobi Kenya, 2012. These include: the Ministry of Public Health and Sanitation-environmental health including; Public Health, the working environment radiation control and management of hazardous wastes; the Ministry of Water development-through management of water resources utilization; the Ministry of Local government-through management of urban environments by urban councils; the Ministry of Forestry and Wild Life-anti poaching and deforestation; the Ministry of Agriculture-Controls farming practices to prevent soil erosion in areas with sloppy land.

⁹⁹ Section 2, *the Environmental Management and Co-Ordination Act* (2015).

¹⁰⁰ Section 4 (1), *the Environmental Management and Co-Ordination Act* (2015).

¹⁰¹ Section 4 (1), *the Environmental Management and Co-Ordination Act*, (2015).

¹⁰² The Ministry Of Environment and Natural Resources. See Link [Http://Www.Environment.Go.Ke/?Cat=29](http://www.environment.go.ke/?Cat=29). Accessed in 2017.

¹⁰³ The Ministry Of Environment and Natural Resources. See Link [Http://Www.Environment.Go.Ke/?Cat=29](http://www.environment.go.ke/?Cat=29). Accessed in 2017.

agencies.¹⁰⁴ Policy priorities have evolved considerably in recent years as part of the national Vision 2030 strategy.¹⁰⁵ This was launched in 2008 as the Government's long-term development blueprint.¹⁰⁶ Four priority areas for government action are identified within the Strategy to help realise the national vision for the environmental sector.¹⁰⁷ These are: conservation of natural resources; pollution and waste management; high-risk disaster zone management and environmental planning and governance.¹⁰⁸

4.4 POLICIES AND LEGAL CONTEXT

The Constitution of Kenya, 2010: It supports management arrangements that ensure equitable sharing of benefits accruing from exploitation of natural resources.¹⁰⁹ This is enshrined in Article 69 (1) of the Constitution which provides that *the State shall ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits.*¹¹⁰ In addition the Fourth Schedule of the Constitution provides for the distribution of functions between the national and county Governments.¹¹¹ Further it gives the county governments powers to ensure and coordinate the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level.¹¹²

The Busia County Energy Development Bill, 2014: The Bill is an act of the county assembly of Busia to provide for county government to promote the production of energy through the use of

¹⁰⁴ The Ministry Of Environment and Natural Resources. See Link <Http://Www.Environment.Go.Ke/?Cat=29>. Accessed in 2017.

¹⁰⁵ Neil Bird and Alice Caravan, *Environmental Sustainability within the New Development Agenda: Opportunities and Challenges for Civil Society*, 2009.

¹⁰⁶ The Republic Of The Union Of Myanmar, *Myanm Ar' S Intended Nationally Determined Contribution-Ind*, 2015.

¹⁰⁷ Ministry Of State for Planning, National Development and Vision 2030, *First Medium Term Plan 2008 – 2012*, 2009.

¹⁰⁸ Republic Of Kenya, *Sessional Paper No. 10 of 2014 on the National Environment Policy, Ministry Of Environment Water and Natural Resources*, 2014.

¹⁰⁹ Article 69, *the Constitution of Kenya* (2010).

¹¹⁰ Article 69, *the Constitution of Kenya* (2010).

¹¹¹ Fourth Schedule, *the Constitution of Kenya* (2010).

¹¹² Fourth Schedule, *the Constitution of Kenya* (2010).

renewable energy sources in accordance with climate, environment and macroeconomic considerations in order to reduce dependence on fossil fuels, ensure security of supply and reduce emissions of carbon dioxide and other greenhouse gases and for connected purposes. It therefore goes hand in hand with targeting environmental conservation in the aforementioned county. Section 2 of the Bill gives an interpretation on the major terms used throughout the Bill these include: definition of conservation, biomass, consumer etc. These are reflected in the Energy Act, laws of Kenya.¹¹³ Furthermore, section 3 of the Bill outlines the policy objectives in play these range from: promoting diversity of supply of energy and its sources; facilitating effective management of energy demand and its conservation; providing for optimal supply, transformation, transportation, storage and demand of energy that are planned, organised and implemented in accordance with a balanced consideration of security of supply, economics, consumer protection and a sustainable development; providing for certain safety, health and environment matters that pertain to energy etc. Alternatively, the Energy Act establishes the existence of the Energy Regulation Commission (ERC) in its section 4. The Act moreover, outlines the objectives of the ERC in section 5 which are a duplication of the Bill's objectives as already mentioned. This indicates the lack of clarity as to how the ERC is to work hand in hand with the county in order to meet its objectives.

The Environmental Management and Co-ordination Act, 2015: The ultimate aim of this act is to provide a framework for integrating environmental considerations into the country's overall economic and social development.¹¹⁴ It specifically aims at harmonising the various sector specific legislations that touch on environment to ensure greater protection of the physical and social environment.¹¹⁵ The implementation of this Act is guided by the principal of public participation in the development of policies, plans and processes for environmental management. It also recognises the cultural and social principles traditionally applied by communities in Kenya for the management of natural resources.¹¹⁶ Section 50 of the Act addresses issue of biodiversity conservation.¹¹⁷ However, Article 124 A of the Act bestows upon the Cabinet Secretary the

¹¹³ Section 2, *the Energy Act*, Laws of Kenya (2007).

¹¹⁴ Section 2, *the Environmental Management and Co-Ordination Act* (2015).

¹¹⁵ Section 2, *the Environmental Management and Co-Ordination Act* (2015).

¹¹⁶ Section 38 and 40, *the Environmental Management and Co-Ordination Act* (2015).

¹¹⁷ Section 50, *the Environmental Management and Co-Ordination Act* (2015).

mandate to handle transactions which require parliamentary ratifications; this mandate extends to the county government.¹¹⁸ There is failure to mention the consultative procedures which are in place in matters regarding information flow between both levels of government.

¹¹⁸ Section 124 A, *the Environmental Management and Co-Ordination Act* (2015).

CHAPTER 4: A COMPARATIVE STUDY

There are important lessons for Kenya to be learned in the experiences of other countries with devolved forms of government, including historical lessons and the practicalities of devolution.¹¹⁹ This study examines South Africa's experience. It looks at the manner in which the country evolved its devolved system, as well as how they manage the crucial matter of fiscal decentralisation.¹²⁰ The conclusion realised is that the process and practicalities of devolution are complex matters, and the country under consideration are still very much works in progress.¹²¹

3.1 THE CASE STUDY – SOUTH AFRICA

While the country under consideration in this paper may seem to be quite different from Kenya, there is a reason why the lessons it offers should be noted when it comes to deciding on the course that devolution will take in Kenya.¹²² South Africa is important because its outsize influence on the continent means that we cannot ignore it.¹²³ Also, the proximity of the historical decisions made (the provinces were only delineated in 1994, and South Africa's devolution process can very well be viewed as work in progress) means that we can view, almost in real time, the decisions that they are making, the reasoning behind them, and learn from any mistakes they may commit.¹²⁴

As provided in the Constitution of South Africa, 1996, the country operates a three-tiered unitary system that is regarded as one of the best on the continent.¹²⁵ The three levels are national, provincial and municipality.¹²⁶ Just like in Kenya, the model does not subordinate the municipality to the provincial, and the national government has the mandate to coordinate sub-national

¹¹⁹ Joseph Mugore, *From Reform to Transformation UNDP'S Support to Public Sector Reforms in Kenya Lessons Learnt for Devolution*, 2015.

¹²⁰ Gordon Crawford and Christof Hartmann, *Decentralisation in Africa: A Pathway Out Of Poverty and Conflict?* Amsterdam University Press, 2008.

¹²¹ Albert Mwenda, *Devolution in Kenya Prospects, Challenges and the Future*, 2010.

¹²² Mary Nyikuri, Benjamin Tsofa, Edwine Barasa, Philip Okoth and Sassy Molyneux, *Crises and Resilience at the Frontline—Public Health Facility Managers under Devolution in A Sub-County on the Kenyan Coast*, 2015.

¹²³ Matthew Sandretto, *South Africa: Still the Gateway to Africa?* 2016.

¹²⁴ African Union Border Programme, *Delimitation and Demarcation of Boundaries in Africa General Issues and Case Studies*, 2013.

¹²⁵ The Republic Of South Africa, *the Constitution* (2009).

¹²⁶ *Government in South Africa*, 2015. See Link <https://www.brandsouthafrica.com/governance/government/gov>. Accessed in 2017.

governments.¹²⁷ The powers of provinces are derived from the national constitution which limits them to certain listed functional areas.¹²⁸ In certain cases there is a concurrence between national and provincial levels, while in others there are exclusive competences for each one.¹²⁹ This system is known as co-operative government.¹³⁰

Besides, the creation of a provincial constitution is optional, if the province government does not want do it rule additionally the national constitution.¹³¹ Ultimately, unlike the majority of federal systems, South Africa has a single national court system, and the administration of justice is the responsibility of the national government.¹³²

In comparison, a common feature shared by Kenya's and South Africa's Constitution is with reference to the devolved system of governance.¹³³ As per Chapter 11 of the Kenyan Constitution the national and county levels of government are expected to coordinate,¹³⁴ as for South Africa the national government is expected to function unanimously with its existing provinces and municipalities.¹³⁵ Also it should be noted that the word federal is not mentioned in either constitutions.¹³⁶

It can be argued that the design of the Kenyan Constitution was greatly influenced by the South African constitutional model of devolution.¹³⁷ Conversely, there are a number of differences; most

¹²⁷*Government in South Africa*, 2015. See Link <https://www.brandsouthafrica.com/governance/government/gov>. Accessed in 2017.

¹²⁸ Yonatan Routledge, *Ethnic Diversity and Federalism: Constitution Making In South Africa and Ethiopia*, 2016.

¹²⁹ Matthew Chaskalson and Jonathan Klaaren, *National Government*, 2015.

¹³⁰*Government in South Africa*, 2015. See Link <https://www.brandsouthafrica.com/governance/government/gov>. Accessed in 2017.

¹³¹*Government in South Africa*, 2015. See Link <https://www.brandsouthafrica.com/governance/government/gov>. Accessed in 2017.

¹³²*Government in South Africa*, 2015. See Link <https://www.brandsouthafrica.com/governance/government/gov>. Accessed in 2017.

¹³³ Chapter Eleven, *the Constitution of Kenya* (2010). Provides Details On Devolution. The Same Is Seen In Chapter Six Of, *The Constitution Of South Africa*.

¹³⁴ Chapter Eleven, *the Constitution of Kenya* (2010).

¹³⁵ Chapters 6 And 7, *the Constitution of South Africa* (1996).

¹³⁶ David Ayuo, *the Legal Framework for Devolution in Kenya*, 2014.

¹³⁷ Waruguru Kaguongo, *Constitution of Kenya – Institution for International and Comparative Law*, 2015.

outstanding is South Africa has two levels of government underneath the national government while Kenya has only one.¹³⁸

3.2 THE NATURE OF DEVOLVED UNITS

This question relates to the number and size of devolved units.¹³⁹ There are similarities in the problems faced by both Kenya and South Africa, but that the solutions have not been the same.¹⁴⁰ South Africa was conscious in drawing the provincial boundaries not to create ethnic enclaves which would repeat the ethnic boundaries of the apartheid Bantustans.¹⁴¹ Thus, the point of delineation was fiscal clustering in local development areas.¹⁴² In recent ANC policy documents, the call is to reform, rationalize and strengthen provinces by, among other things, having fewer provinces which are functional, effective, and economically sustainable, integrate communities on non-racial basis and do away with ethnic boundaries.¹⁴³ The redrawing boundaries to ensure non-ethnic provinces would be an impossible task.¹⁴⁴ Ethnic concentrations in devolved units cannot easily be avoided; instead they could be useful safety nets for ethnic interests.¹⁴⁵

At the same time as in Kenya, the link between the geographical size of a devolved unit, its population size and poverty profile is also present in South Africa.¹⁴⁶ The province with the largest

¹³⁸ Kenyan devolved system is divided into counties, while in South Africa; it is divided into provinces and municipalities.

¹³⁹ Javas Bigambo, *Governance, Human Rights and Development in Africa*, 2012.

¹⁴⁰ Terry Mays, *African Solutions for African Problems: The Changing Face of African-Mandated Peace Operations*, 2003.

¹⁴¹ Robert Cameron, *the History of Devolution of Powers to Local Authorities in South Africa: The Shifting Stands of State Control*, 1995.

¹⁴² Professor Fulong Wu, Dr Fangzhu Zhang and Zheng Wang Bartlett, *Planning China's Future: How Planners Contribute to Growth and Development*, School Of Planning, University College London, 2012.

¹⁴³ Nico Steyler, *Kenya: Implementing Devolution: Lessons From South Africa, East Africa Governance Kenya Legal Affairs South Africa*, 2014.

¹⁴⁴ This has also been the case in Kenya. In drawing the demarcation of the county boundaries, the independent electoral and boundaries commission went for 47 counties based on 1992 districts of Kenya.

¹⁴⁵ Njeru Kirira, *Public Finance under Kenya's New Constitution*, *Society for International Development*, Constitution Working Paper No. 5, 2014.

¹⁴⁶ Jumah Daniel, *A Detailed Discussion Of The Extent To The Objectives Of Devolution Have Been Realised By The Devolved Governments In Kenya*, 2015.

land mass, the Northern Cape, has the fewest people and one of the highest rates of poverty, all typical of semi-desert rural areas.¹⁴⁷ In the case of rural municipalities without an economic base, they are largely dependent on national transfers as they cannot generate the same income as large metropolitan municipalities.¹⁴⁸ One lesson from South Africa is that poverty and self-sustainability cannot be remedied by amalgamating two or more rural municipalities; the poverty level remains the same and the new municipality dependent on national transfers.¹⁴⁹ However, attracting and retaining suitable skilled staff remains a difficult problem because each municipality appoints its own staff and must comply with national competency levels for key positions.¹⁵⁰ South Africa has only adopted in 2011 a system of secondment whereby the national government may provide skilled staff on a temporary basis.¹⁵¹

Furthermore, just as in South Africa, Kenya will face the problem of the imposition of exactly the same legal framework on provinces and municipalities despite the fact that they are vastly different in resources, skills and economic development.¹⁵² The legal framework applicable to the metropolitan municipality of Johannesburg applies also to the most remote rural local municipality.¹⁵³ A metro is hamstrung by such uniformity, while the rural municipality cannot comply with the rigors of the law.¹⁵⁴ The current debate is thus about developing a system within the confines of the constitution that would allow for differentiation between municipalities.¹⁵⁵ When discussing the character of counties, the problem of the exclusion of minorities and

¹⁴⁷ Northern Cape Province, South Africa, 2011. See Link

<https://www.brandsouthafrica.com/tourism-south-africa/geography/northern-cape>. Accessed in 2017.

¹⁴⁸ John Kauzya, *Political Decentralization in Africa: Experiences of Uganda, Rwanda, and South Africa*, 2007.

¹⁴⁹ Trevor Manuel, *the Integrated Sustainable Rural Development Strategy (ISRDS)*, 2000.

¹⁵⁰ Kauzya, *Political Decentralization in Africa: Experiences of Uganda, Rwanda, and South Africa*, 2007.

¹⁵¹ Kauzya, *Political Decentralization in Africa: Experiences of Uganda, Rwanda, and South Africa*, 2007.

¹⁵² Martin Wittenberg, *Decentralisation in South Africa*, 2003.

¹⁵³ Steyler, *Kenya: Implementing Devolution: Lessons From South Africa*, East Africa Governance Kenya Legal Affairs South Africa, 2014.

¹⁵⁴ Jumah, *A Detailed Discussion Of The Extent To The Objectives Of Devolution Have Been Realised By The Devolved Governments In Kenya*, 2015.

¹⁵⁵ Jumah, *A Detailed Discussion Of The Extent To The Objectives Of Devolution Have Been Realised By The Devolved Governments In Kenya*, 2015.

marginalized groups has been raised in Kenya.¹⁵⁶ Where there is one dominant ethnic group in a county, it is likely to dominate the county assembly and executive to the exclusion of minority groups. This is, of course, the consequences of the first-past-the-post system.¹⁵⁷

3.3 THE STRUCTURE OF DEVOLVED UNITS

It is clear from the two constitutions that the levels of government in the two countries have the greatest differences.¹⁵⁸ As indicated above, Kenya has two levels of government while South Africa has three levels of government: national, provincial and local.¹⁵⁹ In South Africa, different categories of municipalities are provided for: metropolitan municipalities, and outside such areas, district and local municipalities.¹⁶⁰ The current 44 districts comprise of between three and nine local municipalities and perform a coordinating function and sometimes a service delivery role.¹⁶¹ In Kenya, counties have the combined characteristics of South Africa's provinces and municipalities, but not all the powers of provinces nor their political or financial clout that comes with being only nine.¹⁶²

Another difference is that Kenya went for a presidential system while South has a parliamentary system.¹⁶³ The electoral systems also differ: Kenya has the first past the post system while South Africa has a proportional representation system based on party lists.¹⁶⁴ In South Africa this has meant very inclusive legislative bodies, but has strengthened the iron hand of party bosses over

¹⁵⁶ Jumah, *A Detailed Discussion Of The Extent To The Objectives Of Devolution Have Been Realised By The Devolved Governments In Kenya*, 2015.

¹⁵⁷ Ujiri Monte, *Kenya-South Africa Conference on Devolution*, 2013.

¹⁵⁸ Othieno Nyanjom, *Society for International Development (Sid), Devolution in Kenya's New Constitution*, 2011.

¹⁵⁹ Government in South Africa, 2015. See Link <https://www.brandsouthafrica.com/governance/government/gov>. Accessed in 2017.

¹⁶⁰ Local Government. See Link <http://www.gov.za/about-government/government-system/local-government>. Accessed in 2017.

¹⁶¹ Ujiri Monte, *Kenya-South Africa Conference on Devolution*, 2013.

¹⁶² Ayuo, *The Legal Framework for Devolution in Kenya*, 2014.

¹⁶³ Ilona Mária Szilágyi, *Presidential Versus Parliamentary Systems*, 2009.

¹⁶⁴ Kauzya, *Political Decentralization in Africa: Experiences of Uganda, Rwanda, and South Africa*, 2007.

their legislative representatives at the cost of weakening the accountability of members of provincial legislatures to their voters.¹⁶⁵

In practice the nature of the political parties is also very different.¹⁶⁶ In Kenya it seems that political parties are generally fragmented along ethnic lines with no clear political ideology.¹⁶⁷ In South Africa, the opposite is the case.¹⁶⁸ The ANC is a national party and the main opposition party, the Democratic Alliance, has national aspirations although its support base is limited to minority groups.¹⁶⁹ The two parties also differ sharply on ideology on matters of economic policy.¹⁷⁰

3.2 THE POWERS AND SERVICE DELIVERY OF DEVOLVED UNITS

In light of their constitutional design, both Kenya and South Africa have a lot of similarities in the areas of the allocation of powers.¹⁷¹ Both systems work with the concept of concurrent powers as well as exclusive powers for provinces and counties.¹⁷² The exercise of devolved powers is also subject to an enforceable bill of rights which includes similar socio-economic rights.¹⁷³ The experience of South Africa may thus be appropriate.¹⁷⁴

Concerning the legislative mandate, the provinces have passed a very limited number of laws.¹⁷⁵ The reasons proffered have been limited technical capacity and political uniformity.¹⁷⁶ Even the Western Cape provincial legislature, which is in opposition hands, produced no more than ten laws

¹⁶⁵ Kauzya, *Political Decentralization in Africa: Experiences of Uganda, Rwanda, and South Africa*, 2007.

¹⁶⁶ Wilhem Hofmeister and Karsten Grabow, *Political Parties: Functions and Organisation in Democratic Societies*, 2011.

¹⁶⁷ Sabine Carey, *A Comparative Analysis of Political Parties in Kenya, South Africa, Zambia and Former Zaire*, 2001.

¹⁶⁸ Carey, *A Comparative Analysis of Political Parties in Kenya, South Africa, Zambia and Former Zaire*, 2001.

¹⁶⁹ Fiona Anciano, *Non-Racialism and Political Parties: The Democratic Alliance*, 2001.

¹⁷⁰ Anciano, *Non-Racialism and Political Parties: The Democratic Alliance*, 2001.

¹⁷¹ Ayuo, *the Legal Framework for Devolution in Kenya*, 2014.

¹⁷² Kauzya, *Political Decentralization in Africa: Experiences of Uganda, Rwanda, and South Africa*, 2007.

¹⁷³ Thomas Kibua and Germano Mwabu, *Decentralization and Devolution in Kenya*, 2008.

¹⁷⁴ Steyler, *Kenya: Implementing Devolution: Lessons From South Africa*, *East Africa Governance Kenya Legal Affairs South Africa*, 2014.

¹⁷⁵ Ayuo, *the Legal Framework for Devolution in Kenya*, 2014.

¹⁷⁶ Kauzya, *Political Decentralization in Africa: Experiences of Uganda, Rwanda, and South Africa*, 2007.

per year.¹⁷⁷ In the field of concurrent powers, the standard pattern has been for the national government to pass laws and for provinces meekly to accept their role as mere implementers.¹⁷⁸ This pattern is also to be found among municipalities, even the metropolitan ones.¹⁷⁹ Thus, having legislative competencies does not necessarily translate into active legislatures.¹⁸⁰

Next, the apparent demarcation of powers between the three levels of government has been problematic.¹⁸¹ Without clarity where the duties of one level of government begin and the other's stop, there are cases of duplication¹⁸² or neglect.¹⁸³ Most importantly, there are no clear lines of accountability.¹⁸⁴ Intergovernmental relations structures and processes are not always the best way of resolving these uncertainties.¹⁸⁵ They often hide the question of who is responsible for what.¹⁸⁶ It is a case of where everyone is responsible for everything and no one is accountable for anything.¹⁸⁷ Consequently, the distinctive blend of provinces and municipalities with listed competencies and enforceable socio-economic rights, gives the courts an important role in defining the devolved units' powers and obligations.¹⁸⁸ In the first instance, where a provincial competence

¹⁷⁷ Antoinette Handley, Christina Murray and Richard Simeon, *Learning To Lose, Learning To Win Government And Opposition In South Africa's Transition To Democracy*, 2000.

¹⁷⁸ Kauzya, *Political Decentralization in Africa: Experiences of Uganda, Rwanda, and South Africa*, 2007.

¹⁷⁹ Kauzya, *Political Decentralization in Africa: Experiences of Uganda, Rwanda, and South Africa*, 2007.

¹⁸⁰ This may provide a good lesson to county assemblies in Kenya. However, the past few months have shown that the county assemblies have been actively in making laws, although some of those laws have been controversial.

¹⁸¹ Bertus De Villiers, *Review of Provinces and Local Governments in South Africa: Constitutional Foundations and Practice*, 2008.

¹⁸² This is where two levels of government do the same thing.

¹⁸³ This may arise where the two levels think the other is doing it.

¹⁸⁴ It may not be a surprise to find that one level shifts blame to the other.

¹⁸⁵ Bertus De Villiers, *Codification of Intergovernmental Relations By Way Of Legislation: The Experiences of South Africa and Potential Lessons for Young Multitiered Systems*, 2012.

¹⁸⁶ Villiers, *Codification of Intergovernmental Relations By Way Of Legislation: The Experiences of South Africa and Potential Lessons for Young Multitiered Systems*, 2012.

¹⁸⁷ Villiers, *Codification of Intergovernmental Relations By Way Of Legislation: The Experiences of South Africa and Potential Lessons for Young Multitiered Systems*, 2012.

¹⁸⁸ Villiers, *Codification of Intergovernmental Relations By Way Of Legislation: The Experiences of South Africa and Potential Lessons for Young Multitiered Systems*, 2012.

such as housing¹⁸⁹ overlaps with the right of access to housing, it becomes a concrete obligation.¹⁹⁰ In the second instance, the South African Constitutional Court has expanded the powers of municipalities, by saying that they, being the government closest to the people, are responsible for the emergency housing of persons evicted from private land, although housing is not their function.¹⁹¹ Finally, the Constitutional Court has also imposed new enforceable obligations on municipalities and, reciprocally, given residents the right to basic municipal services, which include at least access to electricity.¹⁹²

3.4 THE FISCAL ALLOCATION IN THE DEVOLVED UNITS

There are a lot of similarities between Kenya and South Africa.¹⁹³ Both countries have adopted a very centralized financial system for its devolved units.¹⁹⁴ The national government controls the major revenue bases.¹⁹⁵ Unlike the counties, provinces have no constitutionally entrenched taxing powers.¹⁹⁶ Local government has, like the counties, control of property taxes.¹⁹⁷ Municipalities also generate income from selling services such as water, electricity and sanitation.¹⁹⁸ The result has been that while provinces only generate three percent of their revenue, local government is

¹⁸⁹ It is concurrent function of the national and provincial governments.

¹⁹⁰ Villiers, *Review of Provinces and Local Governments in South Africa: Constitutional Foundations and Practice*, 2008.

¹⁹¹ Pius Mugambi Murugu, *the Challenges and Opportunities of Decentralized Political Systems: Lessons for Kenya from India, South Africa and Nigeria*, 2014.

¹⁹² Murugu, *the Challenges and Opportunities of Decentralized Political Systems: Lessons for Kenya from India, South Africa and Nigeria*, 2014.

¹⁹³ Murugu, *the Challenges and Opportunities of Decentralized Political Systems: Lessons for Kenya from India, South Africa and Nigeria*, 2014.

¹⁹⁴ Nico Steyler, *the Place and Role of Local Government in Federal Systems*, 2005.

¹⁹⁵ Steyler, *Kenya: Implementing Devolution: Lessons From South Africa, East Africa Governance Kenya Legal Affairs South Africa*, 2014.

¹⁹⁵ Jumah, *A Detailed Discussion Of The Extent To The Objectives Of Devolution Have Been Realised By The Devolved Governments In Kenya*, 2015.

¹⁹⁶ Kauzya, *Political Decentralization in Africa: Experiences of Uganda, Rwanda, and South Africa*, 2007.

¹⁹⁷ Murugu, *the Challenges and Opportunities of Decentralized Political Systems: Lessons for Kenya from India, South Africa and Nigeria*, 2014.

¹⁹⁸ Villiers, *Review of Provinces and Local Governments in South Africa: Constitutional Foundations and Practice*, 2008.

responsible for 70 percent of its income.¹⁹⁹ For the remainder of their income, provinces and municipalities are dependent on an equitable share of the revenue raised nationally and conditional grants.²⁰⁰

In light of the above, some lessons may be drawn.²⁰¹ First, the measure of accountability that a devolved unit owes its residents is directly related to the amount of revenue it collects from them.²⁰² Since provinces receive almost all their revenue from the National Treasury, their line of accountability is inevitably to the National Treasury.²⁰³ In contrast, municipalities that are dependent on their residents for the bulk of their income are in practice directly answerable to an active civil society.²⁰⁴ Second, when the revenue raised nationally must be divided equitably among provinces and municipalities, the process must be transparent, predictable and free of political favouritism or punishment.²⁰⁵ In this South Africa's independent Financial and Fiscal Commission²⁰⁶ has played a positive role, showing a high level of expertise, independence, and integrity.²⁰⁷

3.5 CONCLUSION

Indeed devolution is of vital importance in a State because it ensures that there is de-concentration of the power from a central government closer to the people who had initially given such

¹⁹⁹ Martin Wittenberg, *Decentralisation in South Africa*, 2003.

²⁰⁰ Jumah, *A Detailed Discussion Of The Extent To The Objectives Of Devolution Have Been Realised By The Devolved Governments In Kenya*, 2015.

²⁰¹ Kauzya, *Political Decentralization in Africa: Experiences of Uganda, Rwanda, and South Africa*, 2007.

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²⁰³ International Monetary Fund, *Fiscal Decentralization In East And Southern Africa: A Selective Review of Experience and Thoughts on Moving Forward, Conference on Fiscal Decentralization*, 2000.

²⁰⁴ Neelmani Jaysawall, Civil Society, *Democratic Space, and Social Work*, 2013.

²⁰⁵ Murugu, *the Challenges and Opportunities of Decentralized Political Systems: Lessons for Kenya from India, South Africa and Nigeria*, 2014.

²⁰⁶ This commission is very similar to the Kenyan commission on revenue allocation.

²⁰⁷ Tri Widodo Utomo, *Balancing Decentralization and Deconcentration: Emerging Need for Asymmetric Decentralization in the Unitary States*, 2009.

government power.²⁰⁸ More importantly is the fact that services and resources are used closer to the individuals to their benefit.²⁰⁹ In Kenya, this should be the case but it seems it would take time before the fruits of devolution are bore.²¹⁰ This is a result of the pitfalls grappling devolution in Kenya that may be detrimental to the entire devolution process.²¹¹ It is therefore prudent that such issues be resolved well in time so that Kenya does not get itself in the position where the former devolution status previously were and to the point of collapse.²¹²

²⁰⁸ Utomo, *Balancing Decentralization and Deconcentration: Emerging Need for Asymmetric Decentralization in the Unitary States*, 2009.

²⁰⁹ Utomo, *Balancing Decentralization and Deconcentration: Emerging Need for Asymmetric Decentralization in the Unitary States*, 2009.

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²¹² Utomo, *Balancing Decentralization and Deconcentration: Emerging Need for Asymmetric Decentralization in the Unitary States*, 2009.

CHAPTER 5: CONCLUSION

This chapter will outline recommendations and gives a brief conclusion at the end to as to the efforts Kenya has put into play to date.

5.1 SUMMARY OF RECOMMENDATIONS

- i) **Involvement in decision making:** Strengthen the capacity of County governments to debate and negotiate agreements with the national government to devolve functions in environmental conservation to County governments of Busia, Marsabit and Samburu as provided for under Article 187 of the Constitution.²¹³
- ii) **Record keeping:** inputs should be prepared that the County governments shall present to the national government on devolution.²¹⁴
- iii) **New legislation:** parliament has the mandate to create new laws in environmental conservation which are in line with the Constitution.²¹⁵
- iv) **Tackle the previous past errors:** Efforts should be put into play to address the Ministry of Forest & Wildlife and Kenya Wildlife Service to subject the Wildlife Conservation & Management Bill, 2013 to further stakeholder consultative process for another one year period.²¹⁶
- v) **Involvement of third parties:** The national and county government needs to take steps into involving potential partners and stakeholders, including active NGOs and community user groups, on board at County level to advocate for change management in environmental conservation.²¹⁷
- vi) **Fund allocation:** Means to mobilize funding from government agencies, donors and stakeholders to support policy reform in this transitional phase need to be effectuated.²¹⁸

²¹³ Article 187, *the Constitution of Kenya* (2010).

²¹⁴ Kenya Devolution, *Practical Approaches for County Governments to Facilitate Public Participation in the Planning and Budget Process*, Working Paper 6, 2015.

²¹⁵ *The Forest Conservation and Management Bill* (2015).

²¹⁶ *Draft Wildlife and Management Bill* (2012).

²¹⁷ Policy Brief, *Decentralizing Forest Eco-System Management in Marsabit and Samburu Counties*, 2014.

²¹⁸ UNDP, *Electoral Assistance Implementation Guide, Democratic Governance Group, Bureau for Development Policy*, 2007.

- vii) **Integration of laws:** Both levels of government ought to integrate cross-cutting issues (biodiversity, climate change, endangered species, and desertification) in policy and management tools at county level.²¹⁹
- viii) **Assessment of policy, legislation and institutions:** Means to develop evidence-based methodologies to assess and develop the policy, legislation and institutions to support country level work in areas of: donor funding and technical cooperation; participation and leadership of youth, women and informal settlement dwellers in urban governance; multi-level collaborative governance; and transparency and anticorruption should be put into play.²²⁰

5.1 CONCLUSION

Efforts to enhance the county government's capacity to implement the laws and to organize communities to participate in the conservation of the environment have been overshadowed by lack of awareness among communities on their responsibilities in environmental conservation as provided by the law.²²¹ An illustration in that regard is the existence of the Kenya Forest Service (KFS) whose role is to conserve, develop and sustainably manage forestry resources nationally, this has not helped much due to lack of synergy in the existing forest ecosystem management structures in the devolved system and insufficient stakeholder participation in forest management.²²²

While benefit sharing is critical to the sustainable management of the environment, the existing legislation and policies are yet to transfer the administration of such an arrangement to the devolved system of government.²²³ Communities have felt left out in the management and in

²¹⁹ Policy Brief, *Decentralizing Forest Eco-System Management in Marsabit and Samburu Counties*, 2014.

²²⁰ Republic Of Kenya, *National Environment Policy*, 2013.

²²¹ Policy Brief, *Decentralizing Forest Eco-System Management in Marsabit and Samburu Counties*, 2014.

²²² Republic Of Kenya, *National Forest Programme 2016–2030*, Ministry Of Environment And Natural Resources, 2016.

²²³ Dilys Roe, Fred Nelson and Chris Sandbrook, *Community Management Of Natural Resources In Africa Impacts, Experiences And Future Directions*, International Institute For Environment And Development (Uk), 2009.

sharing the benefits of that the environment offers.²²⁴ This has often led to conflicts.²²⁵ At times this discourages communities from taking part in sustainable environmental conservation.²²⁶ Also, the Constitution puts the responsibility of implementing the law and organizing the communities to participate in the environmental conservation mechanisms in the hands of the county government.²²⁷

²²⁴ Fatima Eshun, *Community Participation In The Management Of Forest Resource A Means To Reduce Poverty For Sustainable Development The Case Of Kakum National Park*, 2008.

²²⁵ Eshun, *Community Participation In The Management Of Forest Resource A Means To Reduce Poverty For Sustainable Development The Case Of Kakum National Park*, 2008.

²²⁶ Hezron Mogaka, Gacheke Simons, Jane Turpie, Lucy Emerton And Francis Karanja, *Economic Aspects Of Community Involvement In Sustainable Forest Management In Eastern And Southern Africa*, 2001.

²²⁷ Republic Of Kenya, *Draft National Forest Policy 2015*, Ministry Of Environment, Water And Natural Resources, 2015.

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