

**PROTECTING ENVIRONMENTAL JUSTICE IN
LIGHT OF DEVELOPMENTAL AGENDAS: THE
CASE OF LAPSSET LAMU PORT.**

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Declaration

I, Wairimu Manyara, 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.

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ABSTRACT

This research undertakes to evaluate the existing environmental protection mechanisms that are accorded in Kenya in light of competing interests that include the ambitious developmental aims of developing states. The paper narrows the scope to LAPSSET which is one of the most advanced infrastructural developments that the Kenyan government has endeavoured. To further narrow the scope, the paper focuses on the Lamu Port and briefly refers to other projects such as the Lamu Coal Power Plant and other projects situated in Lamu. The research is premised on the conflict that is likely to exist due to the competing interests of the parties involved who in this case are the state, its citizenry and the local community and residents of Lamu. At this point the paper establishes the negative and positive impacts that are to accrue from the realisation of the venture. Furthermore, using the aforementioned samples, the paper seeks to characterise the environmental protection mechanisms in the state which in this case includes concepts such as public participation and access to information. More so, it enunciates several other institutional mechanisms such as the Strategic Environmental Assessments and the Environmental Social Impact Assessments. The implementation of LAPSSET in Lamu works as an ideal sample especially due to the recent jurisprudence on public participation, access to information and the role of the courts as a protection mechanism. After establishing the foundational elements of environmental rights, the paper further explores the barriers that currently exist in the implementation of those protection mechanisms and concludes by giving recommendations on improvements that can be made to further develop environmental protection in developing states such as Kenya.

LIST OF LEGAL INSTRUMENTS

International Instruments

Convention on the prevention of marine pollution by dumping of wastes and other matter, 23 June 1977, 1046 UNTS, 120.

Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, UN Doc. A/Conf.48/14/Revision 1, 1973.

Report of the World Commission on Environment and Development: Our Common future (WCED), 1987.

UN, Rio+20 UN Conference on Sustainable Development, The Future We Want, 20-22 June 2012, A/CONF.216/L.1.

National Laws, Policies and Statutes

Constitution of Kenya 2010.

Environmental Management and Co-ordination Act, 2012.

National Environmental Management Authority, NEMA SEA Guidelines, 2013.

The Environmental (Impact Assessment and Audit) Regulations, 2003.

Case Law

Government of the Republic of South Africa v Grootboom (2001), Constitutional Court of the Republic of South Africa.

Kesavananda Bharati Sripadagalvaru & Ors. v. State of Kerala (1970), The Supreme Court of India.

Kichwa v. Ecuador IACtHR Judgement of 27 June 2012, (Merits, Reparations and Costs).

Maathai v Kenya Times Media Trust Ltd [1989] eKLR.

Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR.

Northern Jamaica Conservation Association & Ors v The Natural Resources Conservation Authority and the National Environment & Planning Agency 2005, The Supreme Court of the Judicature of Jamaica.

Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another [2019] eKLR.

Speaker of the Senate & another v Hon. Attorney-General & another & 3 others [2013] eKLR.

LIST OF ABBREVIATIONS

EPZ – Export Processing Zone

ESIA - Environmental Social Impact Assessment

DEO – District Educational Officer

GDP – Gross Domestic Product

IAIA - International Association for Impact Assessment

LAPSSET - Lamu Port–South Sudan–Ethiopia Transport

NEMA - National Environment Management Authority

SEA - Strategic Environmental Assessment

SESA - Strategic Environmental and Social Assessment

SEZ - Export Processing Zones

UNESCO - United Nations Education, Science and Culture Organization

1.0 Chapter 1

1.1 Introduction

Kenya has widely publicized its development agenda and it has been at the forefront of political campaigns under the auspices of projects such as Vision 2030. One of the biggest development projects that the state has undertaken has been the LAPSETT Project. From the onset of the project, there have been several concerns regarding the effects of the project on Lamu given the fact that the island is a World Heritage protected site. It is hence essential to investigate the environmental protection mechanisms in place in the Kenyan legal framework which would secure the interests of Lamu County and its communities. Environmental justice concerns a population's rights to the equitable access and usage of environmental resources as well as equal dispersal of environmental pollution.¹ It specifically integrates concepts of social and economic justice with environmental resources and pollution.² This concept is essential in developing nations that are faced with development ambitions while still maintaining environmental obligations.

LAPSSET is spearheaded by the government of the Kenya and it stands for the Lamu Port and New Transport Corridor Development to South Sudan and Ethiopia. It exhibits one of the largest infrastructural developments advanced to expand regional access and connectivity. This would incorporate Kenya, Southern Sudan and Ethiopia and eventually through the Congo incorporate Cameroon in West Africa.³ In Lamu, which is the main focus of this study, it would encompass the Lamu Port, an oil refinery, a coal power plant and an international airport which would derive certain benefits and effects to the area. In Kenya, it includes, three international airports in Lamu, Isiolo and Lake Turkana.⁴

The main question that this research will seek to address is on the deployment of environmental justice mechanisms to ensure an equitable balance of interests. This will be done firstly, by ascertaining the theoretical framework that underpins environmental justice and sustainable development. This would be followed by a characterisation of the impacts that would accrue

¹ Glinski C, Environmental Justice in South African Law and Policy, 1 *Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 36, 2003, 49.

² Glinski C, Environmental Justice in South African Law and Policy, 49.

³ -< <http://www.lapsset.go.ke/> > on 25th July 2020

⁴ LAPSETT Development Corridor Authority, Strategic Environmental Assessment-SEA in the LAPSETT Corridor Infrastructure Development Project/ – *Main Draft* 1, January 2017, ii.

to all stakeholders such as the state and even communities in the areas of Lamu when specifically analysing the Lamu Port. A key point of analysis in solving the dilemma of competing interests would then be considered by outlining the environmental obligations and the justice mechanisms that are established in the current legal regime and furthermore, the challenges that they face in their enforcement. In concluding the research, this paper will pertinently confer observations on the major shortcomings of these mechanisms as well as the to provide appraisal or commendations on their successes.

1.2 Statement of Problem

Environmental justice is espoused as one of the methods to ensure the balancing of rights between competing interest of development and environmental preservation. This conflict comes as there are several environmental commitments and obligations that are placed on the state while there still anthropogenic needs such as development in need of being realised. LAPSETT in this case poses the dilemma as it is projected to manifest exponential benefits while concurrently impacting community and even environmental rights. The dilemma is then characterised by the existence of certain harms that are to ensue due to the development of the Lamu Port and Coal Power Plant while at the same time accruing benefits such as improved connectivity by infrastructural access and development, employment, and even tourism and revenue to the local economy.⁵ These predominant conflicts develop the necessity for an inquisition into the current mechanisms in place and their application in the legal system.

Due to recent developments such as the case of the Lamu Port⁶ in relation to the right of public participation and access to information, the question then remains whether there are environmental justice protection mechanisms in Kenya and if so what they are. In the determination of these mechanisms this paper also seeks to assess the role of the Environmental and Land Court in safeguarding the enforcement of environmental justice. Furthermore, it is also essential to analyse what challenges the implementation of these mechanisms face. These challenges stem from inefficiency of the National Environment Management Authority (NEMA), avoidance of Strategic Environmental Assessment (SEA) and Environment and Social Impact Assessment (ESIA) and even in some instances the blatant lack of compliance.

⁵ *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another* [2019] eKLR

⁶ *Mohamed Ali Baadi and others v Attorney General & 11 others* [2018] eKLR.

The question remains on the extent to which the objectives of sustainable development can be achieved within the prevailing socio-economic paradigm of development in the context of schemes such as the LAPSET project. Hence given the state of the environmental risks posed by the prioritisation of certain interests above others, this paper seeks to analyse the employment of environmental justice mechanisms in the realisation of sustainable development in Kenya.

1.3 Justification of the Study

There are numerous impacts that large infrastructural projects pose to the environment and in the case of the Lamu Port in the LAPSETT project, the Environmental Social Impact Assessment Report annotates some of the potential and assured harms. This serves as justification for the study as the study seeks to investigate the legal protection mechanisms put in place to mitigate these harms. The possible effects on the wildlife and biodiversity⁷ on the and the environment caused by the Lamu port in Lamu alone would be the loss of 2.4 hectares of mangroves, sedimentation due to dredging and dumping for the duration of construction of the berths, loss of corals and reduction in species diversity also due to the dredging, and a loss of benthic habitats and benthic fauna.

There are however also risks of potential oil spill impacts from construction works and in the future during operations, potential adverse impacts on water quality during construction due to contamination from suspended solids in site runoff and accidental discharge of pollutants and foul waste from the site. Additionally, potential negative impacts on air quality from activities such as gas emissions from increased traffic, construction machines, cargo handling equipment and ships are also prospective harms. Broadly there are also less impactful harms such as the effect of noise pollution which will be due to the additional traffic and also construction.

The study is relevant in the developing field of environmental law which has an essential role to play in climate change initiatives in Kenya. This is due to the competing interests in the implementation of environmental policies and the advanced development projects that the state is engaging in. Therefore, it is essential to strike a balance between the nature of these two obligations as the state and to generate solutions geared towards sustainable development.

⁷ Environmental and Social Impact Assessment Study Report for Construction of the First Three Berths of the Proposed Lamu Port and Associated Infrastructure, Ministry of Transport, February 2013, Final Report, 179-186.

1.4 Statement of Aim & Objectives

This study aims to investigate the balance between the competing interest of development which emerges in direct conflict with environmental protection initiatives in developing states such as Kenya.

1. To interrogate the impact of LAPSETT on the cultural, social and environmental rights of the community
2. To analyse the national and international environmental law mechanisms that have been implemented to protect environmental justice in Kenya
3. To analyse the barriers and challenges on the environmental justice mechanisms in light of ventures such as LAPSETT
4. To recommend techniques that aid in achieving sustainable development through protecting environmental justice

1.5 Research Questions

1. Does LAPSETT have an impact of on the cultural, social and environmental rights of the community?
2. Are there existing national and international environmental law mechanisms that have been implemented to protect environmental justice in Kenya?
3. Are there barriers and challenges to the environmental justice mechanisms in light of ventures such as LAPSETT?
4. Are there techniques that can aid in ensuring the protection of environmental justice?

1.6 Research Methodology

This research is founded on secondary sources of data. Furthermore, it will also interrogate the existing environmental justice structures and their role as a protection mechanism. It also uses books that have established key principles in the field of environmental law. The study further analyses several critiques and theories that have been developed by scholars in academic papers.

1.7 Literature Review

Sustainable development integrates three crucial pillars, that include economic development, social development, and environmental protection.⁸ To ensure that present needs do not compromise impending generations capability to address their own needs, the principle of sustainability is interpreted to make development sustainable.⁹ The principle of common but differentiated responsibilities ensures that developing states can still meet their developmental needs and not compromise the development agenda due to environmental constraints.¹⁰ This principle is essential in this paper's discussion as it posits the different developmental needs engrained in the global south.¹¹

Lynda Collins posits that there must be some form of legitimacy in environmental governance to have global compliance.¹² She introduces the concept of rights and responsibilities in the fulfilment of the balance of competing interests that is of sustainable development and environmental protection. She postulates that states ought to employ these concepts to ensure the best form of efficacy. She further suggests that the two exist in such polar paradigms that they are best integrated within the principle of intergenerational equity which is one the fundamental defining principles within the realm of sustainable development.¹³

There has been increased tensions over the global north and south division on the issue of sustainable development. Less economically developed states referred to as the global south conveyed concerns over the prioritization of environmental issues at the UN Conference on the Human Environment in 1972. These concerns stood based on their economic developmental needs, stating that the prioritization would propagate “existing unequal economic relations and technical dependence, miring them in poverty forever.”¹⁴

There are clearly existing tensions concerning the balancing of the three pillars as they seek different aims that can conflict. This is reflected in the Rio Declarations with reference to the

⁸ Birnie P, Boyle A, and Redgwell C, *International Law and the Environment*, Oxford University Press, New York, 2009, 116.

⁹ World Commission on Environment and Development, *Our Common Future*, Oxford University Press, New York, 1987, 8

¹⁰ Deleuil T, 'The Common but Differentiated Responsibilities Principle: Changes in Continuity after the Durban Conference of the Parties' *Review of Europe Community and International Environmental Law* 21(3), 2012, 271.

¹¹ French D, 'Developing States and International Environmental Law: The Importance of Differentiated Responsibilities' *International and Comparative Law Quarterly*, 49(1), 2000, 35 - 36.

¹² Collins L, 'Revisiting the Doctrine of Intergenerational Equity in Global Environmental Governance' 30 *Dalhousie Law Journal*, 2007, 82.

¹³ Collins L, 'Revisiting the Doctrine of Intergenerational Equity in Global Environmental Governance' 85.

¹⁴ Hecht S and Cockburn A, 'Rhetoric and Reality in Rio', *The Nation*, 254(24), 848.

green economy “in the context of sustainable development and poverty eradication.”¹⁵ Hence, there are challenges as to how to integrate the social, environmental and economic pillars as they are independent and one impacts the other.¹⁶ This is seen in the fact that insufficient integration of environmental matters can have disastrous effects on social aspects such as poverty alleviation, food and energy security. There are also probable harms to future economic prospects such as ecotourism if environmental imperatives are not adequately factored into economic development initiatives.¹⁷

There are certain mechanisms established to ensure environmental governance that include environmental assessment. Environmental assessment is one of the primary management tools for protecting the environment.¹⁸ In evaluating best environmental practices and good governance, it is important to evaluate the role of environmental assessment. Jane Holder proposes that it is one of the foundational tenants promoting sustainable development in light of developing states economic agendas.¹⁹ Environmental assessments predominantly function to first ensure that there is sufficient participation of all the stakeholders involved and that is one of the techniques in which to ensure minority rights are protected.²⁰ Consistent with public participation, it also ensures compliance with all affected parties having access to information on the projects that are likely to affect them.²¹ Most pertinently, it guarantees that all the potential environmental risks as a result of economic development are annotated, alternatives are sought if any are available and mitigation measures are adopted to promote equitable environmental governance.²²

1.8 Limitations

Currently the study is limited to Kenya. It uses examples from other developing states such as South Africa but the premise remains in Kenya. It also focuses on secondary sources of data as

¹⁵ Rio+20 United Nations Conference on Sustainable Development, ‘Green Economy in the Context of Sustainable Development and Poverty Eradication’, 12.

¹⁶ Alam S and Razzaque J, ‘Sustainable Development versus Green Economy: The Way Forward?’ in *International Environmental Law and The Global South*, Cambridge University Press, 2015, 614.

¹⁷ Adams W, ‘The Future of Sustainability: Re-thinking Environment and Development in the Twenty First Century’, *Gland: International Union for Conservation of Nature*, 2006, 12–13.

¹⁸ Joseph C, Gunton T, and Rutherford M, ‘A Method for Evaluating Environmental Assessment Systems’, *Journal of Environmental Assessment Policy and Management*, 2017, 245.

¹⁹ Holder J, *Environmental Assessment: The Regulation of Decision Making*, Oxford University Press, New York, 2004, 85.

²⁰ Morgan R, ‘Conceptualising best practice in impact assessment’ *Environmental Impact Assessment Review*, 66, 2017, 78-85.

²¹ Joseph C, Gunton T, and Rutherford M, ‘A Method for Evaluating Environmental Assessment Systems’ 247.

²² Holder J, *Environmental Assessment: The Regulation of Decision Making*, 85.

it explores the wide literature of environmental law. The data relied on was not primary given that the study is premised on analysing the best way to resolve the conflict of policies hence it was not challenging any existing data.

1.9 Hypotheses

This study is based upon the hypothesis that

1. That LAPSETT has an impact of on the cultural, social and environmental rights of the community in Lamu.
2. There are existing national and international environmental law mechanisms that have been implemented to protect environmental justice in Kenya.
3. There are barriers and challenges to these environmental justice mechanisms in light of ventures such as LAPSETT?

1.10 Chapter Breakdown

Chapter 1: Introduction and Background

Chapter 2: Theoretical Framework

Chapter 3: Legal framework on environmental obligations and environmental justice mechanisms

Chapter 4: Impact of LAPSETT on the social, cultural and economic rights on Lamu Residents

Chapter 5: Key barriers to environmental justice in Kenya.

Chapter 6: Conclusion and Recommendations

2. 0 Theoretical Framework

2.1 Introduction

The framework for environmental law is composed of several theories. They fall within the general foundation of environmental law as a human right. There has been a constant conflict between immanence and transcendence. Scholars have argued that they exist amid the aspiration to live as a fundamental part of nature which is ecocentrism against the determination of being superior to integration with nature, to dominating nature which is anthropocentrism.²³

²³ Bakari M, Mapping the 'Anthropocentric-Ecocentric' Dualism in the History of American Presidency: The Good, the Bad, and the Ambivalent, 17 *Consilience: The Journal of Sustainable Development* 1, 2017, 8.

This paper will use the bicentric approach to environmental conservation as this theory best incorporates the development needs of developing countries while meeting the environmental concerns that it proposes. This approach seeks to combine anthropocentric and ecocentric approach to environmental conservation. An ecocentric approach towards environmental rights aims principally to protect every state of being, which incorporates all facets of the environment concentrating on their intrinsic worth, not just those that benefit humans.²⁴ The anthropocentric is concentrated on the protection of environmental rights on the basis of protection of human welfare.²⁵

2.2 Historical Reliance of the Anthropocentric Approach on Environmental Law

Anthropocentrism esteems only human's inherent value, on the basis of their rationality and ability to experience pleasure, pain and reasoning. According to the approach, the influential value and worth of nature is correlated to its ability to enhance human well-being and experience.²⁶ It is also referred to as technocentrism and the harms that currently exist are due to the blatant disregard of the environment that human exploitation has caused due to the instrumentalist approach and prioritisation of human interests.²⁷ This approach would then neglect fundamental aspects on environmental protection.

The genesis of this approach can be linked to the Earth Charter which is the mother of all international environmental law as it enunciates foundational ethical principles of environmental actions to develop a sustainable, peaceful and just international community.²⁸ The premise of the anthropocentric approach focuses on defending and protecting environmental rights for future generations.²⁹ Other instruments such as the Stockholm and Rio Declaration were developed to specifically address aspirations that are towards the preservation of the environment so as to achieve sustainability of mankind. The Rio Declaration specifically

²⁴ Du Plessis A, 'Fulfilment of South Africa's constitutional environmental right in the local government sphere' Published LLD Thesis, North-West University, Potchefstroom, 2008, 35.

²⁵ Muir A, 'An interpretation of the South African constitutional "environmental right" (Section 24 of the Constitution of the Republic of South Africa, 1996) and an assessment of its relationship to sustainable development' 75.

²⁶ Carter N, *Environmental Philosophy*, 2nd ed, Cambridge University Press, Cambridge, 2007, 15:

²⁷ Bakari M, Mapping the 'Anthropocentric-Ecocentric' Dualism in the History of American Presidency: The Good, the Bad, and the Ambivalent, 7.

²⁸ Bosselmann K, and Engel J, *The Earth Charter: a framework for global governance*, 6th ed, KIT Publishers Amsterdam, The Netherlands, 2010, 78.

²⁹ *Rio Declaration on Environment and Development*, Rio De Janeiro, June 1992, Principle 2.

asserts that human beings are at the heart of sustainable development which entitles them to a healthy and prolific life experience coexisting with nature. This principle is a key issue of analysis in this paper is the most notable incorporation of the anthropocentric approach.

This approach is the one that is encompassed in Article 42 of the Constitution of Kenya and it provides limitations into the implementation of environmental protection as it only conserves the environment for the human value that can be derived from it and not for its intrinsic value.³⁰ These rights are then anthropocentric and this stems from the human need to conserve environmental rights exclusively for egocentric reasons. However, concurrently it is essential to note that even fulfilment of these anthropogenic objectives will be curtailed unless environmental rights inherently have an ecocentric quality.

2.3 Ecocentric approach to Environmental Protection³¹

The ecocentric approach rose in direct contradiction to the anthropocentric approach which places the human being at the centre of environmental protection.³² Ecocentrism or ecologism on the other hand is an ideology that is based on two foundations.³³ The first is the necessity for a comprehensive reconceptualization of the human to nature relationship to reconstruct the human being only as an fundamental aspect of nature as opposed to its dominant. The second premise is the requirement to set 'limits to growth' in the form of a precondition to growth strategies which with deeper analysis espouses sustainable development.³⁴

This approach espouses that all non-human entities, that is animals, humans and even includes non-living entities such as waterbodies and mountains have their own intrinsic value and that should be the basis of their conservation.³⁵ This belief also views man and nature as indivisible. Man is hence an essential part of nature and not in control of it.³⁶ The concept of 'ecological

³⁰ Satish C, 'Environmental ethics anthropocentric to eco-centric approach: A paradigm shift' 55 *Journal of Indian Law Institute* 4, 2013, 525.

³¹ Bakari M, Mapping the 'Anthropocentric-Ecocentric' Dualism in the History of American Presidency: The Good, the Bad, and the Ambivalent, 15.

³² Carter N, *Environmental Philosophy*, 6.

³³ Carter N, *Environmental Philosophy*, 6.

³⁴ Carter N, *Environmental Philosophy*, 6.

³⁵ Luke T, 'Deep Ecology: Living as if Nature Mattered: Devall and Sessions on Defending the Earth. Organization & Environment' 15 *Organisation and Environment* 2, 2002, 180.

³⁶ Luke T, 'Deep Ecology: Living as if Nature Mattered: Devall and Sessions on Defending the Earth. Organization & Environment' 180.

consciousness' has sought to change the people's perceptions of nature.³⁷ Ecologism for instance opines to be a more holistic aspect of ecologism and seeks to emphasize man's ethical duties towards nature. There is hence an interdependence of ecosystems which is essential to note to emphasize man's ethical duties towards nature.³⁸ However this view would require an overhaul of the current regime and would prioritise the environmental needs as opposed to the human ones such as development given the current state of environmental degradation. This view would find that the environmental costs on the environment of Lamu are enough to stay the LAPSETT project without considering the anthropocentric or developmental impacts that the project would have.

2.4 Incorporation of Bicentric Approach to fulfil Sustainable Development

Environmental rights need to incorporate both forms of rights in light of this paradoxical relationship between humans and the environment.³⁹ It is hence essential to protect human beings from the environment but coincidentally just as pertinent to preserve the environment from human beings.⁴⁰ To be able to achieve both aims it would necessitate environmental rights to simultaneously focus on the two actors. For that reason, environmental rights should be described as neither anthropocentric or ecocentric but as bicentric to incorporate both interests. The bicentric approach affords anthropocentric protection to humans from the environment and permits for the accumulation of human benefits from their environment. This is while concurrently boosting the ecocentric protection of the environment from humans and instituting trusteeship on humans with regard to their relationship with the environment.⁴¹

Sustainable development was conceptualised in the Report of the World Commission on Environment and Development: Our Common future, referred to as the Brundtland

³⁷Bakari M, Mapping the 'Anthropocentric-Ecocentric' Dualism in the History of American Presidency: The Good, the Bad, and the Ambivalent, 9.

³⁸ Luke T, 'Deep Ecology: Living as if Nature Mattered: Devall and Sessions on Defending the Earth. Organization & Environment' 182.

³⁹ Muir A, 'An interpretation of the South African constitutional "environmental right" (Section 24 of the Constitution of the Republic of South Africa, 1996) and an assessment of its relationship to sustainable development', 76.

⁴⁰ Collins, L. M. 'Revisiting the Doctrine of Intergenerational Equity in Global Environmental Governance' 30 *Dalhousie Law Journal*, 2007, 79.

⁴¹ Muir A, 'An interpretation of the South African constitutional "environmental right" (Section 24 of the Constitution of the Republic of South Africa, 1996) and an assessment of its relationship to sustainable development', 79.

Commission.⁴² It encompasses development which addresses the needs of the present generation without conceding the ability of future generations to address their own needs. At face value sustainable development would have been incorporated into the anthropocentric view as it is premised on human needs. However, with further analysis, its foundational basis is in the bicentric approach as it best balances the needs of both states of nature that is man and the environment. Environmental justice is best achieved in this approach as to achieve the actualisation of environmental needs and to ensure environmental protection as this cannot be done in a vacuum without development in the global south. This approach is the foundational element of this paper as it seeks to incorporate developmental and environmental interests as well.

2.5 Conclusion

Human and environmental rights have been traditionally conceptualised as divergent and autonomous categories of human rights. However, inextricably all humans depend on the environment for several needs that encompass human life such as a healthy, safe and sustainable environment. These rights are all integral and tied to the exploitation of an extensive range of human rights such as the right to life, and sanitation rights.⁴³ Human dignity is upheld and cannot be fulfilled without a healthy environment.⁴⁴ This then affirms the nuance that human rights are interdependent to the environment. Hence the most sustainable and prolific approach would be the bicentric approach due to its unique amalgamation of both needs.

3.0 Chapter 3: Impact of LAPSETT on Social Economic and Cultural Rights in Lamu

3.1 Introduction

This chapter deals with the different impacts that LAPSETT will have on environmental, social-economic and traditional cultural rights in Lamu. This is especially important as before one establishes the protection mechanism of these rights, it is essential to analyze the rights

⁴² Report of the World Commission on Environment and Development: Our Common future (WCED), 1987.

⁴³ Van de Bank C and Van de Bank M, 'Sustainable Development: The Human Rights Approach to Environmental Protection in South Africa' 9 *World Academy of Science, Engineering and Technology International Journal of Educational and Pedagogical Sciences* 2, 2015, 675.

⁴⁴ Van de Bank C and Van de Bank M, 'Sustainable Development: The Human Rights Approach to Environmental Protection in South Africa' 676.

and the possible impacts of the rights so as to characterize the scope of environmental justice. The 7th principle of the Rio Declaration is one of the main protections for these rights. It primarily obliges states to employ all possible steps towards the prevention of sea pollution by elements that are likely to harm human health (which denotes environmental rights), to harm living resources (which are mainly social-economic rights), to damage amenities or to interfere with other legitimate uses of the sea which are also social economic rights and also cultural rights.⁴⁵ The case of *Keshavananda Bharati vs. State of Kerala* enunciates on the principle and provides that, “Fundamental rights have in themselves no fixed content; most of them are empty vessels into which each generation must pour its content in the light of its experience.”

Social economic rights as conceptualised by the drafters of the Constitution of Kenya 2010 are not absolute and can face certain restrictions, abridgements, curtailment and abrogation when necessary. Their claim to supremacy or priority is liable to be overborne at particular stages in the history of the nation by the moral claims embodied⁴⁶ There are however economic benefits that can accrue in three levels, the first is to local communities in previously neglected areas in the country such as Lamu, Turkana, and Isiolo which are less developed. There are also regional economic benefits that are to accrue to the East African community especially due to the port, pipeline and railroad. Furthermore, the project has estimated impacts on the Kenyan GDP, industrial, energy and infrastructural sectors. Sustainable development and the green economy⁴⁷ have been advanced in order to develop a balance of the competing interest as both have intrinsic benefits to the livelihood and development of people which is a form of incorporation of the bicentric approach.

3.2 Economic Rights

During the undertaking of the ESIA report on the LAPSETT project, it was found that there were also prospective impacts on the social economic rights of the people which would then affect their livelihood. The proposed port was estimated to likely encroach on fishing grounds which would displace fishermen from some of their customary fishing sites and mooring locations. Furthermore, dredging was found to likely affect certain key sea routes such as

⁴⁵ *Rio Declaration on Environment and Development*, Rio De Janeiro, June 1992, Principle 7.

⁴⁶ *Kesavananda Bharati Sripadagalvaru & Ors. v. State of Kerala* (1970), The Supreme Court of India.

⁴⁷ Alam S and Razzaque J, ‘Sustainable Development versus Green Economy: The Way Forward?’ 6.

Mkanda which is the main fishing route used by different fishing communities.⁴⁸ This would lead to these fishermen with smaller vessels using alternative routes that tend to have either longer timing or are more tedious to navigate which severely alters their means of production and hence costs of production.

Eighty of the population of Lamu depends on fishing as a source of livelihood. Artisanal fishing especially is responsible for eighty percent of the two thousand and two hundred tons of yearly fishing product which is worth one hundred and eighty million which emphasizes its importance to the local economy. Due to coral reef preservation needs, marine fishing is further circumscribed to protected areas within the coral reef.⁴⁹ The LAPSETT management however proposed compensation of Kshs 1,760,424,000/-. Economic rights delve into both the anthropocentric and ecocentric approach due to the fact that for them to be realised, the integrity of the environment has to be preserved for human beings to gain and is one of the most pertinent examples of the bicentric approach.

3.3 Social and Cultural Rights

3.4 Ecological and Environmental Impacts

On environmental rights, there are vast international regimes that range from the London Convention of 1972 which focuses on the deterrence of marine pollution which occurs due to dumping of waste and other matter at sea to which Kenya is party.⁵⁰ Principle 6 and 7 of the Rio Declaration also enunciates respectively that the expulsion of toxic substances in magnitudes that surpass the capacity to cause harm to the environment shall not be freed to the environment. So as to describe the environmental damage or degradation that is to accrue to an area, it is important to highlight the ecosystem.⁵¹ Lamu's marine ecosystem is complex, as it comprises of the largest mangrove forests in Kenya, sea grass beds and coral reefs. These features further serve an ecological purpose of biodiversity as they foster breeding grounds for

⁴⁸ Environmental and Social Impact Assessment Study Report for Construction of the First Three Berths of the Proposed Lamu Port and Associated Infrastructure, 133.

⁴⁹ Environmental and Social Impact Assessment Study Report for Construction of the First Three Berths of the Proposed Lamu Port and Associated Infrastructure, 90.

⁵⁰ *Convention on the prevention of marine pollution by dumping of wastes and other matter*, 23 June 1977, 1046 UNTS, 120.

⁵¹ *Rio Declaration on Environment and Development*, Rio De Janeiro, June 1992, Principle 6 and 7.

other forms of marine life such as fish and further perform the protective role of coastline safeguarding from soil erosion.⁵²

According to the Environmental Social Impact Assessment Report of the Lamu Port, the port alone would have certain damaging effects on the environment and hence further the ecosystem. This loss would be due to the clearance of nearly two point four hectares of mangroves to create way to construct the first three berths of the proposed Lamu Port.⁵³ During the dredging and dumping of the berths, sedimentation is another likely effect that will result especially due to the dispersal of re-suspended dredged material.⁵⁴

The port also poses certain premeditated harms to the biodiversity through a loss of corals, benthic habitats, benthic fauna and reduction in species diversity and abundance which is also a bi-product of the dredging.⁵⁵ The report however negates the harms by stating that this loss will be temporary, localized and insignificant and hence negates the precautionary principle's application. There are also harms that are projected to occur during operations as well as during the construction stages. The first of this is potential oil spill impacts which can occur due to the shipping operations in the dock and also during construction.⁵⁶ There is also ballast water that can bring new species to contamination.⁵⁷

There is also noise pollution which is a direct impact on the people through loud noise levels that will occur due to construction noise and operations. This can however be mitigated as it is more of a nuisance. However, the report also relegated further potential impacts on water quality which could be as a result of accidental discharge of waste as well as prospective complications to the drainage system.⁵⁸ In line with climate change considerations there are also prospective airborne dust and gas emissions that are likely to cause potential negative

⁵² Idha M, 'The Mangroves of Lamu History, Socio-econornic and Conservation Issues' Eastern Africa Regional Workshop on Mangroves and Shrimp Aquaculture, Mombasa, Kenya, 3-6 February 1998, 1.

⁵³ Environmental and Social Impact Assessment Study Report for Construction of the First Three Berths of the Proposed Lamu Port and Associated Infrastructure, 185-186.

⁵⁴ Environmental and Social Impact Assessment Study Report for Construction of the First Three Berths of the Proposed Lamu Port and Associated Infrastructure, 144.

⁵⁵ Environmental and Social Impact Assessment Study Report for Construction of the First Three Berths of the Proposed Lamu Port and Associated Infrastructure, Ministry of Transport, February 2013, Final Report, 178.

⁵⁶ Environmental and Social Impact Assessment Study Report for Construction of the First Three Berths of the Proposed Lamu Port and Associated Infrastructure, 178.

⁵⁷ Environmental and Social Impact Assessment Study Report for Construction of the First Three Berths of the Proposed Lamu Port and Associated Infrastructure, 178

⁵⁸ Environmental and Social Impact Assessment Study Report for Construction of the First Three Berths of the Proposed Lamu Port and Associated Infrastructure, 183.

impacts on the air quality. These could be caused by a myriad of factors that include traffic, machinery and even port operations.⁵⁹

There exists a robust international protection framework on social cultural rights and they include the UNESCO Convention 1972 which is an international treaty that has been approved by United Nations Education, Science and Culture Organization (UNESCO). It establishes the duty of states is to ensure the identification, safeguard and diffusion of cultural and natural heritage for future generations. The aim is to identify, protect and preserve both cultural and natural heritage.⁶⁰ Lamu town is a protected World Heritage site that had been under protection since 16th December 2001 and this is due to the fact that Kenya has been a signatory to the Convention since 1991. Furthermore, there is also Principle 20 of the Vienna Declaration, that *“recognizes the inherent dignity and the unique contribution of indigenous peoples...and strongly reaffirms the commitment of the international community to their economic, social and cultural well-being.”*⁶¹

The effects of the twenty-first century has barely affected Stone Town in Lamu and it is one of the unique cultural features that has been preserved⁶² which has been attributed to how remote the island is and the prohibition of automobiles on the island so as to maintain the roads. Lamu has managed to maintain its cultural integrity as it has faced limited interference to its cultural practices by Western influence.⁶³ The community fears that the projects will rapidly increase the population as the proposed major city would attract upwards of 1.25 Million people and cause dilution of ethnic values and practices.⁶⁴ The native culture and sites are the reason for Lamu island being a protected World Heritage Site which contributes to their economic revenue through tourism and the residents hence fear that any threat to this environment may also affect their livelihood.⁶⁵

⁵⁹ Environmental and Social Impact Assessment Study Report for Construction of the First Three Berths of the Proposed Lamu Port and Associated Infrastructure, 182.

⁶⁰ RVI Nairobi Forum, LAPSET Meeting Report, 4 October 2013, 4.

⁶¹ World Conference on Human Rights, The Vienna Declaration and Programme of Action, UN DPI/1394-39399 (June 1993).

⁶² Wiggins, ‘Cultural Heritage Preservation Meets Modern Port Development: Securing the Integrity and Authenticity of the Lamu Town World Heritage Site in the Face of Current and Future Challenges’ *Independent Study Project Collection*, Spring 2010, 4.

⁶³ Wiggins, ‘Cultural Heritage Preservation Meets Modern Port Development: Securing the Integrity and Authenticity of the Lamu Town World Heritage Site in the Face of Current and Future Challenges’ 2.

⁶⁴ Environmental and Social Impact Assessment Study Report for Construction of the First Three Berths of the Proposed Lamu Port and Associated Infrastructure, 146.

⁶⁵ Wiggins, ‘Cultural Heritage Preservation Meets Modern Port Development: Securing the Integrity and Authenticity of the Lamu Town World Heritage Site in the Face of Current and Future Challenges’ 5.

Kichwa Indigenous People of Sarayaku v Ecuador established the requirement to consult indigenous communities on any form of likely infringement on their cultural rights but most importantly it characterised cultural rights as those rights which relate to ‘Sacred areas of cultural importance as well as traditional customs, the celebration of rites and other daily activities that form part of their cultural identity’ and furthermore contextualises the harms that emanate from the disruption of these rights which can cause serious damage to fundamental aspects of the community’s worldview and culture.⁶⁶ In this case there is an imposed duty on the state to consult the community not just on the Statutory basis of the implementation of the project but also due to the impacts likely to affect their cultural rights.

3.5 Positive economic impacts advanced by the state

3.5.1 Development of the East-African Community

The economic impacts are purely anthropocentric and serve the interest of the human in terms of economic, social and political gains and hence cannot be provided for in isolation of environmental rights due to the harms that may accrue. The East African Region is likely to be a large beneficiary of the LAPSETT project as it fosters infrastructural connections amid the East African countries of South Sudan, Ethiopia and Kenya.⁶⁷ It is also anticipated to accelerate African regional integration through communication and trade networks. Furthermore, the plan is expected to resuscitate the old trans-African transport network which would connect Eastern Africa to the Economic Community of West African (ECOWAS) which would facilitate trade between the two regions.⁶⁸

Technically, LAPSETT is constituted to link the Great Equatorial Land Bridge. This would facilitate a connection from Lamu to Juba, South Sudan which would then go to Bangui Central Africa Republic, and finally linking to West Africa through Douala, Cameroon. The project is also set to embellish certain industries which include oil refineries, petrochemical industries in the counties of Lamu and Isiolo, varied industries along the Corridor and thermal energy

⁶⁶ *Kichwa v. Ecuador* IACtHR Judgement of 27 June 2012, (Merits, Reparations and Costs), 37.

⁶⁷ RVI Nairobi Forum, LAPSETT Meeting Report, 4 October 2013, 3.

⁶⁸ WS Atkins International Ltd, Preliminary Master Plan for Lamu Port City and Investment Framework, LAPSETT Corridor Development Authority, April 2017, London 22.

generation.⁶⁹ This would be employed using the various oil resources from the participating states that are oil resourceful, namely South Sudan, Kenya, Uganda, DRC, and Ethiopia.

3.5.2 Development of Northern Kenya

Despite LAPSSSET impacting the state as a whole, the impacts are projected to reflect on a narrower scale to specific counties and regions that were previously sidelined. Historically, northern Kenya has been marginalized in terms of economic development which is evidenced in the infrastructural development, accessibility and provision of social amenities.⁷⁰ The creation of a second transport corridor is set to advance regional capacities in infrastructure which is estimated to developing 70% of the areas that were previously regarded remote since independence 50 years ago.⁷¹ LAPSSSET is also set to increase access to social amenities in the areas which can be seen through the establishment of resort cities in Lamu, Kipsing Hill, Isiolo and Lake Turkana. This would also be complemented by an airport in Lamu County, Isiolo and Lokichogio. Furthermore, this expected to raise county profiles in solidifying Kenya as a regional Hub in Eastern Africa and Central Africa.⁷² This road and railway network is projected to increase access to public services and market for the pastoral communities in the area.

3.5.3 Economic Benefits Accruing to Kenya

LAPSETT is linked to the enablement of other major economic boosters such as green energy initiatives as well as private sector investment in sectors such as tourism and agriculture. The project is estimated to increase the Kenyan GDP by six to ten percent which would bolster nearly two to three percent of the GDP into the economy.⁷³ This has also been projected to increase short, medium and long-term value chain investment opportunities in the economy.⁷⁴

In order to diversify and increase capacity, the project seeks to develop the Lamu Port into an International Gateway Port with a Free Trade Zone, a transit container centre, transshipment

⁶⁹ Silvester Kasuku, Lamu Port – South Sudan – Ethiopia Transport (LAPSSSET) Corridor Project, Presented during Kenya – UK Investment Conference, London, 3rd December 2013.

⁷⁰ RVI Nairobi Forum, LAPSSSET Meeting Report, 4 October 2013, 2.

⁷¹ Silvester Kasuku, Lamu Port – South Sudan – Ethiopia Transport (LAPSSSET) Corridor Project, Presented during Kenya – UK Investment Conference, London, 3rd December 2013.

⁷² Silvester Kasuku, Lamu Port – South Sudan – Ethiopia Transport (LAPSSSET) Corridor Project, Presented during Kenya – UK Investment Conference, London, 3rd December 2013.

⁷³ WS Atkins International Ltd, Preliminary Master Plan for Lamu Port City and Investment Framework, LAPSSSET Corridor Development Authority, April 2017, London, 14.

⁷⁴ Silvester Kasuku, Lamu Port – South Sudan – Ethiopia Transport (LAPSSSET) Corridor Project, Presented during Kenya – UK Investment Conference, London, 3rd December 2013.

container port, bulk cargo centre and a ship building and repair in order to substantially reduce over-dependence on the Mombasa Port.⁷⁵ Infrastructure is an essential element of the Kenyan economy hence continued expansion is essential in the country's economic advancement.⁷⁶ In the recent past, the sector has been essential to the recovery of the economy as it has previously boosted economic growth from 1.6% to 2.6% and 5.5% in 2008, 2009 and 2010 respectively.

Some of the other notable infrastructural developments include the oil pipeline which would begin in Lamu extending to Central Africa, a crude oil export facility as well as a standard gauge electric railway line.⁷⁷ These developments would substantially attract private sector investment and would be further supported by 'special economic zones' (SEZ) and export processing zones (EPZ).⁷⁸

In addition, the project would include electric power plants, supported by green and clean energy initiatives which would increase and improve consistency in power supply to propound industrialization.⁷⁹ Further development would be seen in the food and fish processing industry, chemical, and high-technology industry⁸⁰ which would facilitate strides towards socio-economic development, food security and even employment. Employment in this case being pertinent especially in both specialized areas and labour as it has intrinsic ties to the reduction of poverty and increase in the GDP.⁸¹

3.6 Mitigating harms and common interests

Principle 13 of the Rio Declaration speaks on compensation, it specifically stipulates that 'States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and

⁷⁵ Silvester Kasuku, Lamu Port – South Sudan – Ethiopia Transport (LAPSSET) Corridor Project, Presented during Kenya – UK Investment Conference, London, 3rd December 2013.

⁷⁶ Silvester Kasuku, Lamu Port – South Sudan – Ethiopia Transport (LAPSSET) Corridor Project, Presented during Kenya – UK Investment Conference, London, 3rd December 2013.

⁷⁷ Environmental and Social Impact Assessment Study Report for Construction of the First Three Berths of the Proposed Lamu Port and Associated Infrastructure, 195.

⁷⁸ Environmental and Social Impact Assessment Study Report for Construction of the First Three Berths of the Proposed Lamu Port and Associated Infrastructure, 197.

⁷⁹ Silvester Kasuku, Lamu Port – South Sudan – Ethiopia Transport (LAPSSET) Corridor Project, Presented during Kenya – UK Investment Conference, London, 3rd December 2013.

⁸⁰ Silvester Kasuku, Lamu Port – South Sudan – Ethiopia Transport (LAPSSET) Corridor Project, Presented during Kenya – UK Investment Conference, London, 3rd December 2013.

⁸¹ Silvester Kasuku, Lamu Port – South Sudan – Ethiopia Transport (LAPSSET) Corridor Project, Presented during Kenya – UK Investment Conference, London, 3rd December 2013.

compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.’⁸²

Mitigation is one of the protective mechanisms of environmental governance that have been employed to ensure sustainability and one of the function of the strategic environmental assessments is to ensure that all mitigation strategies have been employed as a mandatory measure.⁸³ It is predominantly a manifestation of the bicentric approach to environmental protection as it seeks to mitigate harms caused by the advancement of certain interest over others.

Several mitigation strategies have been employed to reduce the impacts of LAPSETT on the environment. They include replanting the mangroves that are estimated to be lost due to the construction of the Lamu Port. The proponents of the Lamu Port are to pay the sum of eight million Kenyan Shillings to the Kenya Forest Service for the reforestation of mangroves that had been destroyed in order to cater for the development of the Lamu Port.⁸⁴ On the aspect of cultural integrity, to preserve the heritage of Lamu Island, the government would have to draw up a management plan which it hasn’t done to maintain Lamu island as a UNESCO World Heritage protected Site.⁸⁵ This measures however do not end up being implemented due to the lack of compliance hence the communities are forced to live with the impact. The *Mohamed Ali Baadi Case* found that despite the compensation for fishermen being annotated, the payment would be delayed which would still cause economic losses for the fishermen which denotes some of the evident enforcement flaws in the system.⁸⁶

3.7 Conclusion

Sustainability governance incorporates the multifaceted pursuit among all actors that are governments, market actors, civil society, NGOs and international organizations in endorsing sustainable transition processes taking place at numerous levels and sectors which include infrastructure, industry and energy.⁸⁷ This chapter hence characterizes the main challenges that

⁸² *Rio Declaration on Environment and Development*, Rio De Janeiro, June 1992, Principle 13.

⁸³ Joseph C, Gunton T, and Rutherford M, ‘A Method for Evaluating Environmental Assessment Systems’ 247.

⁸⁴ *Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR*.

⁸⁵ *Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR*.

⁸⁶ *Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR*.

⁸⁷ Van Rijswijk H, Editorial, ‘The Road to Sustainability: How Environmental Law Can Deal with Complexity and Flexibility’, *Utrecht Law Review*, 2012, 8(3), 2.

exist on how integrate the social, environmental and economic pillars as they are independent and one impacts the other.⁸⁸ This can be seen in how the economic benefits that can accumulate to Kenya, the East African region and Northern Kenya but at the same time the lack of environmental protection mechanisms can threaten economic, community and even environmental rights of those very communities that are set to benefit. Hence there can be no sufficient argument for the prioritisation of one cause over another.

4.0 Legal framework on environmental obligations and environmental injustice mechanisms

4.1 Introduction

This chapter seeks to achieve several aims, the first is to conceptualize environmental justice in Kenya and its key tenants and will begin by looking at the legal framework that establishes the environmental law obligations in environmental governance. The second aim is to evaluate procedural justice in terms of public participation and access to information in the Kenyan context their impact as a protection mechanism. It further seeks to look the various provisions for environmental justice in Kenyan law so as to discuss the various obligations and rights that are outlined. Furthermore, it looks at the case of *Mohamed Ali Baadi and others v Attorney General & 11 others* on the LAPSETT project and the application of SEA and ESIA provisions.

4.2 International Structure of Environmental Obligations

Due to the nature of environmental law, the effects of the impacts on the environment were felt beyond state borders which then led to the need for an international framework of law. The Stockholm conference, which is the UN Conference on the Human Environment was the first notable conference on international environment law. It is the foundation for international environmental law and policy-making. This then led to the adoption of the Stockholm Declaration, whose twenty-six principles sought to inaugurate a common framework for the international environmental initiatives.⁸⁹ The Stockholm conference placed the unilateral obligation to both developing and developed states that then created conflicts as it placed

⁸⁸ Alam S and Razzaque J, 'Sustainable Development versus Green Economy: The Way Forward? 614.

⁸⁹ Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, UN Doc. A/Conf.48/14/Revision 1, 1973.

certain faults of environmental law on poverty and unsustainable use of resources. The Stockholm and Rio principles are some of the prominent examples of international legislation of the bicentric approach.

There are a few principles that illustrate the mandate of the states in protecting environmental justice. Principle 2 which deals with safeguarding the natural resources of the earth for the benefit of the existing and upcoming generations through vigilant planning, organization management which then impedes the obligation on the state to formulate policy. This requirement is further enunciated in Principle 17 which mandates national institutions within the state to control, manage and plan their environmental resources so as to enhance environmental excellence. The national institution in Kenya's context is NEMA. In the spirit of ecocentrism, principle 4 places a distinctive obligation on human beings to preserve and prudently manage wildlife heritage and their habitat, which are endangered. It further goes to speak on sustainable development in considering environmental conservation in economic development preparation and planning which then again inclines towards bicentrism. Principle 13 further reiterates this by commanding states in their developmental agendas and planning to adopt an integrated and harmonised approach.

The Rio Declaration on the Environment and Development also establishes certain key principles that are significant in the procedural rights and environmental justice context.⁹⁰ Where there are grave dangers of irreparable environmental damage, Principle 15 establishes the precautionary approach. Principle 11 denotes general standards in environmental legislation with key provisions of environmental standards, management objectives and priorities that legislation should fulfill. More so, providing that they are contextually applicable. On the establishment of environmental justice mechanisms, principle 17 sets out that states need to conduct an environmental impact assessment for projected undertakings, activities and projects that are estimated to have a substantial adverse impact on the environment. Public participation as well as the right to information are established under principle 10. It provides for individual access to information and the opportunity to participate in decision-making processes regarding the environment that is held by public authorities. This further extends the duty to facilitate and encourage public awareness and participation by the

⁹⁰ *Rio Declaration on Environment and Development*, Rio De Janeiro, June 1992, Principle 10.

availing of environmental information. Finally, it also provides for redress and remedy by mandating effective access to judicial and administrative proceedings.

4.3 Conceptualizing Environmental Justice in Kenya

Environmental justice denotes cultural norms, customs, beliefs, rules, regulations, behaviors, policies, and decisions that are tools to facilitate sustainable societies and communities. This is characterized by individual interactions in assurance of their safe, nurturing, and protective environments.⁹¹ This was defined by Bunyan Bryant who is one of the pioneer scholars on the concept of environmental justice. However, this concept is one that is broad and aspirational and there have been more elaborate definitions. This definition espouses several elements necessary for the proper articulation of environmental justice.

The concept of environmental justice varies depending on different jurisdictions and needs. Hence the conceptualisation of environmental justice for some incorporates minority rights while in contexts such as Kenya, this would encompass the rights of local communities. Key elements of environmental injustice entail distributive injustice which many times arises from the disproportionate exposure to environmental hazards, procedural unfairness caused by exclusion from environmental decision-making which involves access to information, public participation, and corrective injustice due to inadequate enforcement of environmental legislation.⁹²

4.4 2010 Constitutional Dispensation on Environmental Rights

The Kenya 2010 constitution has been described as a transformative constitution⁹³ as it mandates political and social transformation⁹⁴ through law which is reflected in how it seeks to address environmental rights. There have been extensive debates on the hierarchy of laws in Kenya especially as to whether the international law supersedes statutory legislation. The 1969 Constitution of Kenya inferred the environmental right to a clean and healthy environment

⁹¹ Environmental Justice: Issues, Policies, and Solutions, edited by Bunyan Bryant. Washington, D.C.: Island Press, 1995. Reviewed by Denise Lach.

⁹² Gonzalez G, 'Environmental Justice, Human Rights, and the Global South' 13 *Santa Clara Journal of International Law* 18, 2015, 155.

⁹³ Speaker of the Senate & another v Hon. Attorney-General & another & 3 others [2013] eKLR.

⁹⁴ The Constitution of Kenya, 2010: An Introductory Commentary by PLO Lumumba & L Franceschi, Strathmore University Press, Nairobi, 2014 Reviewed by Eric Kibet, Strathmore Law Journal, June 2015, 141.

articulated in Section 71 within the right to life.⁹⁵ In the case of environmental law, there seems to be a more elaborate legal framework as it addresses the specification included in the body of law. The 2010 Constitution however first characterised environmental rights under Article 10(2) of the Constitution where they list sustainable development as a national value which binds state officials in the application and interpretation of the Constitution and any other law and also in the implementation of public policy decisions.

The Constitution in Article 2 part 5 and 6 state that international laws shall form a part of Kenyan law which includes treaties and conventions that have been ratified by Kenya. This transformative Constitution has incorporated environmental rights directly through provisions such as Article 42 which allude to the right to a clean and healthy environment. It also incorporates these rights indirectly through salient references to right to clean water and other rights that are directly tied to the environment. Despite this ‘transformative’ characterisation, the realisation of these rights is simply tied to the value that human beings derive from the environment. Due to the application of international principles which are bicentric in nature, the 2010 Constitution is one that seeks to preserve environmental needs while not compromising the state’s development.

4.5 Environmental Rights as Human Rights

Environmental rights espoused in Chapter 4 under Rights and Fundamental freedoms. Article 42 guarantees the right to a clean and healthy environment and additionally includes the right to have the environment protected for the benefit of future and present generations. It also emphasises the right to have obligations relating to the environment fulfilled which are under article 70.

Chapter 5, which is pertinent to environmental justice addresses Land and the environment. It has been divided into land and the environment and natural resources which is more applicable to environmental law. This chapter provides for state the obligations on environmental law. Article 69(1)(a) mandates the state to guarantee sustainable exploitation, consumption, administration and preservation of the environmental resources. It also goes a step further and mandates the equitable distribution of the profits accrued. Part 1(d) warrants the application of

⁹⁵ P Kameri-Mbote, Towards Greater Access to Justice in Environmental Disputes in Kenya: Opportunities for Intervention Geneva: *International Environmental Law Research Centre*, Working Paper 2005, 1.

public participation in the management, protection and conservation of the environment strategies whose application is reflected in several cases including the *Lamu Coal Power Plant Case*⁹⁶ which the court revoked the licence that had been granted to Amu Power Company due to the lack of public participation. Part 1(e) mandates the protection of genetic resources and biological diversity which is one of the key questions that the claimants in the Lamu Port case are raising as one of the potential harms of the projects.⁹⁷

Biological resources remain diverse and scarce due to the high dependency as 80 per cent of the population depend on them.⁹⁸ Part 1 (f) compels the government to institute of environmental impact assessment, audit and monitoring schemes. The enforcement of this provision has been done through the creation of the National Environment Management Authority (NEMA) which was developed within the Environmental Management Authority and Coordination Act 1999. A key question in assessing the challenges of the implementation of climate change policies in light of development is assessing the role of NEMA and its efficiency. Furthermore, NEMA developed guidelines and administrative procedures for Environmental Impact Assessments (EIA) in local, transboundary and international treaties and agreements, for Environmental Audit and Monitoring, and for Strategic Environmental Assessment (SEA) in compliance with this and international law provisions.⁹⁹

Part 1(g) directs that the state should endeavour to eradicate procedures and actions likely to compromise the environment. Part 1(h) further instructs the government to exploit the environment and natural resources to benefit Kenyans. The justifications vary according to the context like in the Lamu Coal Power Project the justification is deemed to be economic and infrastructural development, employment and power supply.¹⁰⁰

Given that Article 69(1) stipulates the states' mandate in guaranteeing environmental rights, Article 69(2) expresses an individuals' duty. It imposes the duty to cooperate with state organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.

⁹⁶ *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another* [2019] eKLR.

⁹⁷ *Mohamed Ali Baadi and others v Attorney General & 11 others* [2018] eKLR.

⁹⁸ Ministry of Environment & Natural Resources, A Summary of the Kenya National Biodiversity Strategy and Action Plan, The National Environment Secretariat, Nairobi, 2000, 7.

⁹⁹ National Environment Management Authority - NEMA, Environmental Impact Assessment Guidelines and Administrative Procedures, NEMA, Nairobi, 2002, 18-22.

¹⁰⁰ Lamu Coal Power Project: Environment and Social Impact Assessment Summary, 8.

4.6 Enforcement of Environmental Rights

Article 70 deals with the implementation and enforcement of environmental rights. It mandates that, “If a person alleges that their rights under Article 42 have 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”. This operates as a guarantee that these rights are in fact enforceable in court. More so, constitutional interpretation has found that the Bill of Rights is enforceable both vertically and horizontally that is against the state and against private individuals.¹⁰¹

Chapter 10 speaks to judicial authority and the court system and this coincides with article 70. Under Article 162 of the chapter, it establishes the Environment and Land Court that has the authority of the High Court in the judicial hierarchy to determine disputes relating to the environment and land. This was a bold step towards the constitutions obligation to the preservation and enforcement of environmental rights.

The Fourth Schedule provides for the separation of duties between National and County government in environmental protection. The National Government is in charge of environmental and natural resource protection so as to establish a sturdy and sustainable developmental system specifically in relation to fishing, hunting and gathering in part 1(22) (a). It also applies to protection of animals and wildlife in part 1(22) (b), part 1(22) (c) on water protection, securing sufficient residual water, hydraulic engineering and the safety of dams, and finally on part 1(22) (d) which deals with energy policy. This illustrates the macro-level of influence by the national government towards environmental conservation and management. The County Governments are responsible for the implementation of specific national government policies on natural resources and environmental conservation according to schedule 4 part 2(10) (a) on soil and water conservation and part 2(10) (b) on forestry. Furthermore, these counties have legislative authority and may make any laws that are essential for the effective performance of the functions and application of their powers espoused in the Fourth Schedule.¹⁰² These functions extend to the reception, adoption and approval of plans and policies for the administration and exploitation of the county’s resources and the development and management of its infrastructure and organisations.¹⁰³

¹⁰¹ *Government of the Republic of South Africa v Grootboom* (2001), Constitutional Court of the Republic of South Africa.

¹⁰² Article 185, *Constitution of Kenya* (2010).

¹⁰³ Article 185, *Constitution of Kenya* (2010).

The Lamu Power Plant had then been approved by Lamu County and the challenge was towards public participation at the county level¹⁰⁴ hence the analysis was on the relevance of the county legislation and assembly towards the protection of environmental law. Finally, Article 72 instructs government to decree legislation that will fully realise the constitutional mandates regarding environmental protection within 4 years.¹⁰⁵

5.0 Chapter 5: Challenges facing Environmental Justice Mechanisms

5.1 Procedural Fairness: Access to Information and Public Participation

Public participation is founded on doctrines such as principle 10 of the *Rio Declaration*. It dictates that environmental matters are ultimately tackled with participation of all concerned citizens, at the relevant level. Furthermore, it stipulates that it is inextricably linked to access to information as it mandates that there should be appropriate access to information provided to every single individual on environmental matters. This duty is placed on public authorities, and incorporates material on hazardous constituents and community activities, and the opportunity to participate in the decision-making processes. This duty is further imposed on states to enable and boost public awareness and participation through creating access channels for this information for the citizenry. Finally, this principle is inextricably linked to effective access to court and administrative measures that include further access to redress and appropriate remedies.¹⁰⁶

Procedural fairness focuses on the fairness of the decision-making process as well as demanding the right to contribute and partake at every level of the decision-making process which primarily includes the assessment, preparation, implementation, enforcement and assessment stages at an equal footing, while taking into account individual needs.¹⁰⁷ It looks at justice through the lens of the process and not necessarily just the outcome. This section will be looking at the role of access to information and public participation in safeguarding

¹⁰⁴ *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another [2019] eKLR*.

¹⁰⁵ Fifth Schedule, *Constitution of Kenya* (2010).

¹⁰⁶ *Rio Declaration on Environment and Development*, Rio De Janeiro, June 1992, see principle 10.

¹⁰⁷ Petts, J., "Public Participation and Environmental Impact Assessment" in *Handbook of Environmental Impact Assessment Volume 1: Environmental Impact Assessment Process, Methods and Potential*, 1999, ed. J Petts, pp. 149.

environmental justice in the Kenyan context. Public participation is in the realm of environmental democracy.

The case of *Mohamed Ali Baadi and others v Attorney General & 11 others (Mohamed Ali Baadi Case)* which this paper heavily references, refers to public participation as, “the real involvement of all social actors in social and political decision-making processes that potentially affect the communities in which they live and work.”¹⁰⁸ This specific interpretation was crucial in the case in determining the role of the community in governmental infrastructural projects and the county government’s obligation, if it all exists.

There have been certain cases in the Kenyan context that illustrate the court’s interpretation of the relevance and function of public participation towards environmental justice. The evolution of environmental justice in Kenya is one that has been instrumental as it was previously marred by judicial injustice through dismissal based on procedural technicalities. Before the 2010 constitution there was no form of codification for public interest suits and so courts would dismiss cases on locus standi. This would essentially mean that there was no check on the state when it came to environmental impact and there were also limitations on the form of recourse available to communities.¹⁰⁹

State obligation to ensure public participation emanates from Article 10 of the Constitution that mandates every government body or entity, representative or officer to enable a consultative procedure with the community in their practices and functions in the implementation of any law, policy or resolution. This imposes a general duty of public participation on the state. However, section 17(1) of the Environmental Impact Assessment and Audit Regulations enforces the duty with regards specifically to projects such as the LAPSETT project. This obligation applies to the proponents of any scheme in correspondence with NEMA to pursue insights and observations of individuals who are likely to be affected by the venture.

The requirements to fulfil the obligations on the state and the proponents of the project are enumerated in conjunction with access to information as they are interdependent rights in that persons cannot participate in a process if they do not have access to the information. These regulations require the proponents to publicize the scheme and its estimated impacts as well as

¹⁰⁸ Piccolotti R & Taillant J, ‘Linking Human Rights and the Environment’ *University of Arizona Press*, 2003, 50.

¹⁰⁹ *Maathai v Kenya Times Media Trust Ltd [1989] eKLR*

benefits¹¹⁰ which is the information that furnishes fulfilment of public participation. They are to appoint a qualified co-coordinator to receive, record and even translate if needed oral and written comments during the public meetings.¹¹¹ The duty on NEMA remains to inform the public before deciding on the ESIA Report which can be done by inviting comments through print media on the report and to also hold public hearings where the proponents can present and respond to any queries raised at the public hearing.¹¹²

However, the effect of a breach of public participation does not necessarily invalidate the project but nullify ESIA's that have not been properly incorporated the measure. The case of *Belize Tourism Industry Association v National Environmental Appraisal Committee & 2 Others* found that the function of public participation is the involvement via consultation of those who are presumably going to be affected by the resolution. Conscientiously, the stipulated concerns should be factored in and addressed in the decision-making process.¹¹³ The question however is to what extent these concerns are addressed and what impact do they have on the issuing on the license as the aim of this is to collect information on the impact on the environment by those most affected.

5.2 The Role of ESIA AND SEA in Environmental Protection

Environmental social impact assessment refers to the performance of a methodical investigation in order to ascertain the adverse impacts of a programme, activity or venture on the environment¹¹⁴. This differs from a strategic environmental assessment which is an official and methodical procedure that seeks to analyse and address the environmental effects of policies, and other strategic initiatives¹¹⁵. The main difference between the two is in their scope and the timing. This is seen as the scope of the SEA is on the substantial impacts such schemes or projects have on the environment and they are recognized, pronounced, evaluated or appraised, and then further reported. Hence, it is more probable to transpire in the preparatory stages of the project. The *Mohammed Ali Baadi Case*, the court found that this had to be

¹¹⁰ Section 17(1), The Environmental (Impact Assessment and Audit) Regulations, 2003 Regulations, Legal Notice 101 of 2003.

¹¹¹ Section 21, The Environmental (Impact Assessment and Audit) Regulations, 2003 Regulations, Legal Notice 101 of 2003.

¹¹² Section 22, The Environmental (Impact Assessment and Audit) Regulations, 2003 Regulations, Legal Notice 101 of 2003.

¹¹³ *Northern Jamaica Conservation Association & Ors v The Natural Resources Conservation Authority and the National Environment & Planning Agency 2005*, The Supreme Court of the Judicature of Jamaica.

¹¹⁴ Section 2, Environmental Management and Co-ordination Act, 2012.

¹¹⁵ Section 2, Environmental Management and Co-ordination Act, 2012.

conducted for the whole project however the ESIA needs to be conducted for the individual developments of the LAPSETT venture.

The International Association for Impact Assessment (IAIA) defines an environmental impact assessment as “the process of identifying, predicting, evaluating and mitigating the biophysical, social, and other relevant effects of development proposals prior to major decisions being taken and commitments made”.¹¹⁶ It hence provides for a vast array of probable impacts which can be subordinate, aggregate, synergistic, diminutive, intermediate, longstanding, permanent, and even temporary.¹¹⁷ This assessment seeks to compel decision makers who many times are states to evaluate the environmental impact before undertaking these projects and decide the feasibility. The elements of the EIAs then differ from that of a SEA as they necessitate decision-makers and stakeholders to consider environmental values and to substantiate and justify their choices after careful environmental analysis and public participation on the potential environmental impacts.¹¹⁸ Basically they serve as a mechanism that ensures transparency on environmental impacts on the part of planning bodies to the various stakeholders involved.

The ESIA must assess both direct and indirect impacts of a scheme on certain elements. These factors can be the material assets, flora and fauna, the climate, landscape, humans, elements such as the soil, water, air, and cultural heritage.¹¹⁹ There exist certain requirements that a developer must comply with in order to complete a proper ESIA. These requirements include “A description of the project that is the location, design and size, possible measures to reduce significant adverse effects which is mitigation strategies, data required to assess the main effects of the project on the environment, the main alternatives considered by the developer, the main reasons for the alternative chosen and a non-technical summary of this information.”¹²⁰

¹¹⁶ Faith-Ell, C, “An Overview of Swedish Research On Impact Assessment” *Journal of Environmental Assessment Policy and Management*, 17(1) 2015, 6.

¹¹⁷ Faith-Ell, C, “An Overview of Swedish Research On Impact Assessment” 6.

¹¹⁸ Holder J, *Environmental Assessment: The Regulation of Decision Making*, Oxford University Press, New York, 2004, 85.

¹¹⁹ Saif S, Mehmood A, Chaudhry M, and Akhta S, ‘Evaluating the Adequacy and Quality of Environment Impact Assessment (EIA) Reports in Punjab, Pakistan’ *Journal of Environmental Assessment Policy and Management*, 17(3), 2015, 20.

¹²⁰ Part II, The Environmental (Impact Assessment and Audit) Regulations, 2003 Regulations, Legal Notice 101 of 2003.

SEA however differs from ESIA as it in the preparatory stages and is referred to as a proactive method that integrates environmental concerns into the advanced stages of decision-making process.¹²¹ Furthermore, it comprises an array of approaches that are analytical and participatory in nature to assimilate environmental contemplation into strategies, plans, or policies. This means that it incorporates economic and social considerations into the planning process.¹²² SEA pertains to a conglomeration of approaches that employs a multiplicity of implementations as opposed to a singular one. The procedure of the SEA elongates the purposes and doctrines of the EIA upstream in the decision-making process, so as to be able to integrate alternatives.¹²³

Stuart Bell & Donald McGillivray¹²⁴ are one of the strongest authorities on the role of SEA and ESIA in their book, ‘Environmental Law’ which is a core text in the field. They state that it is meant to be an iterative procedure through which the evidence gathered on the environment conditions ought to be applied in the decision-making method.”¹²⁵ Hence there is need for the study to be procedurally fair and so have the fairest and realest representation. The first mechanism to ensure that a process remains authentically iterative would require a guarantee that the precise design of the scheme, plan, or venture would accommodate amendments based on the information that has been acquired. Ideally, the second is that the scheme ought to encompass a form of monitoring on the environmental effects post the approval stage. This coincides with the main role played by SEA towards sustainable development is to achieve integration into policy-development, planning, decision-taking and development investment-making which had previously not been reflected in former systems.¹²⁶

Definitively it provides a process to evaluate the linkages between investments and the environment, which are usually the main conflicts in sustainable development. This helps in the establishment of development priorities, uniting stakeholders as well as divulging

¹²¹ Part II, The Environmental (Impact Assessment and Audit) Regulations, 2003 Regulations, Legal Notice 101 of 2003.

¹²² National Environmental Management Authority, NEMA SEA Guidelines, 2013, 4.

¹²³ National Environmental Management Authority, NEMA SEA Guidelines, 2013. 3.

¹²⁴ Bell S, and McGillivray D, *Environmental law*, Oxford University Press, 6th ed, London, 2006.

¹²⁵ *Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR*.

¹²⁶ Dalal C, Bass S, ‘The Challenges of Environmental Mainstreaming: Experience of Integrating Environment into Development Institutions and Decisions’ Environmental Governance No. 3. International Institute for Environment and Development, London, 2009, 22.

legislative weaknesses in institutions.¹²⁷ Strategic Environmental Assessments also fortify governance and institutions needed to manage and mitigate environmental impacts and this can be seen in adaptations such as the ‘World Bank’s Strategic Environmental and Social Assessment’ (SESA). This strengthening of institutions enhances policy-making through focusing attention on environmental and social priorities, for improved policy change and social accountability.¹²⁸ Hence the structures exist and one of the main challenges that exist is within the implementation structures and accountability.

5.3 Challenges facing NEMA as a coordination and oversight authority.

NEMA that is the ‘National Environment Management Authority’ is the main environmental body that is responsible for the implementation of government regulation that specifically pertains to environmental governance.¹²⁹ It was established under the Environmental Management and Coordination Act and began operating on 1st July 2002. NEMA has a multiplicity of roles and responsibilities which are enunciated in section 9 of the Act. These roles are all-inclusive and involve advising which is mainly to state entities, coordination, monitoring and quite broadly oversight roles. Its main function is the coordination of environmental management activities engaged by other government agencies but not to necessarily to carry out the environmental functions themselves.¹³⁰ One of the main overarching challenges that NEMA faces like many other state organs is corruption. Hence, certain discrepancies can result such as in the instance of the LAPSETT Lamu Port where the Strategic Environmental Assessment being marred by certain procedural technicalities.

Other occasions can include the case of the EIA licence for Silver Crest Limited which was a project that was to be established in the marine Park in Mombasa. In the matter, there was complete disregard of concerns and objections by Kenya Wildlife Services (KWS) who were in charge of the park that the proposed project was to be developed on.¹³¹ The issuance of this license despite key stakeholder objections is just one of the illustrations of the discrepancies in

¹²⁷ Dalal C, Bass S, ‘The Challenges of Environmental Mainstreaming: Experience of Integrating Environment into Development Institutions and Decisions’ 25.

¹²⁸ Slunge D, ‘Can Strategic Environmental and Social Assessment of Redd+ Improve Forest Governance?’ University of Gothenburg School of Business, Economics and Law, Working Papers in Economics No 493, 2011, 4.

¹²⁹ Section 9, Environmental Management and Co-ordination Act, 2012.

¹³⁰ Section 9, Environmental Management and Co-ordination Act, 2012.

¹³¹ Efficiency Monitoring Unit. Office of the Prime Minister. Management Audit Report for the National Environmental Management Agency. Nairobi: Government of Kenya, 2010 12.

NEMA's functions. Further investigations can be seen through licences granted by NEMA to Cobra Corner that was set up in the Mara Triangle. This license had been granted without proper consultation of the lead agencies and hence was procedurally flawed.¹³² There then exists a pattern in the functions of NEMA as if they have been found to be ineffective given the fact that an implication of their duties is to ensure the environmental justice.

NEMA operates on an annual budget of \$6.6¹³³ as of 2019 and runs at a resource gap of Kshs 2,844 billion¹³⁴ which is roughly \$30 million for their 2019 to 2024 Strategic Plan. These emphases how underfunded the organisation is which is likely to affect the efficacy of their operations. In the auditing process for instance, the organisation must evaluate typically 1600 EIA reports annually.¹³⁵ This manifests in understaffing which is reflected in the fact that Kenyan districts ought to have a DEO that is the District Educational Officer that aids in the auditing and monitoring of development projects but the DEOs are not enough for every district which limits the auditing and monitoring capacity. In addition to the lack of capacity inhibiting auditing, it also impedes their monitoring roles in that NEMA has been found to rarely visit remote projects as giving less scrutiny to smaller scale projects.¹³⁶ This can mainly be seen the study for the construction of Thika Highway where there was a lack of follow up which led to certain environmental harms and a lack of compliance with mitigation measures that had been encapsulated due to the malfeasance and negligence on NEMA's part.¹³⁷ The inhibitions of NEMA's capacity can be found to have detrimental effects on environmental oversight as one of the main tenets of environmental justice.

The role of NEMA is crucial to the protection of environmental justice as in the current system the main oversight body appears to be the Land and Environmental Court as the cases that have been evaluated in the chapter such as the *Mohamed Ali Baadi Case* where the court makes declaration on the lack of substantive and procedural efficacy in the implementation of

¹³² Efficiency Monitoring Unit. Office of the Prime Minister. Management Audit Report for the National Environmental Management Agency. Nairobi: Government of Kenya, 2010, 17.

¹³³ Report on Budget Implementation Review of the Following Ministries/Departments for the First Half of the 2018/19 Financial Year, Departmental Committee on Environment and Natural Resources, National Assembly, 3rd Session September 2019, 14.

¹³⁴ National Environment Management Authority Strategic Plan 2019-2024, National Environment Management Authority, 2019, 22.

¹³⁵ Barczewski B, How Well Do Environmental Regulations Work in Kenya? A Case Study of the Thika Highway Improvement Project June 2013, 6.

¹³⁶ Barczewski B, How Well Do Environmental Regulations Work in Kenya? A Case Study of the Thika Highway Improvement Project June 2013, 9.

¹³⁷ Irundu E and Malii J 'A Scoping Study Report on Environmental Impact Assessment Report for Thika Highway Improvement Project, University of Nairobi 2013, 16.

developmental projects. This furthermore, serves as an illustration of NEMA's inefficiency by the court taking on NEMA's role in pursuance of environmental compliance.

5.4 Conclusion: Reflections on the LAPSETT Case

The LAPSETT project however did not have a SEA conducted as it was not mandatory under Kenyan law as the NEMA SEA guidelines had not been established before 2013. However, the pioneer stage of the tripartite berths of the projected Lamu Port had already began. The *Mohamed Ali Baadi Case* however is established on failure to fulfil public participation as well as the access to information while outlining some key issues on environmental health.¹³⁸ The petitioners argued that the defendants conducted a shallow ESIA so as to claim legal compliance. These claims can be substantiated by the fact there are no alternatives suggested, adequate mitigation strategies which and furthermore procedural flaws. Hence there were no proper accountability checks on the feasibility on the entirety of the project or its separate sub-components.

The high court in the case found that SEA had not been conducted even despite the fact that the legal requirement remained for the part of the project that had not commenced but the LAPSETT proposers did not endeavour to do so.¹³⁹ There was then a legal obligation that existed for the parties to undertake this. The key tenants of environmental justice in infrastructural development seem to have gone unfulfilled which in essence should render the ESIA licence unfulfilled. The law is however clear on party obligations as well as the rights of the various parties involved. However, there is clearly of compliance that exists in the Kenyan enforcement of environmental justice. The preceding discussion evidently illustrates that Kenya's existing legal framework, encounters certain challenges in the EIA procedure that ought to be resolved in order to develop a robust mechanism for the protection of environmental justice and the promotion of sustainable development.

¹³⁸ *Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR.*

¹³⁹ *Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR.*

6.0 Chapter 6: Conclusion

6.1 Introduction

The nature of sustainable development is that it is intrinsically dynamic, indeterminate, and a disputed concept.¹⁴⁰ Its outcomes and implementation vary according to different regions especially due to levels of economic development and state strategic development.¹⁴¹ The UN Conference on Sustainable Development recognizes that there are grave disparities in policy and institutional frameworks, political circumstances, development levels, and economic and ecological interdependencies in the global community.¹⁴² This then explains the reasoning behind how there is need for indigenous evaluations to environmental governance rather than international structures to ensure environmental governance. This concluding chapter seeks to reflect on the various mechanisms that have been evaluated and how they can be improved to curb the harms of environmental injustice and to conclude on some of the finding of the study and what they dictate about the current state of environmental justice in Kenya.

6.2 Recommendations

6.2.1 Capacity Building for NEMA

NEMA has a vast array of roles that include coordination, research, management, monitoring mobilisation, oversight and advisory roles according to the National Environmental and Management Act. Capacity building for sustainable development is the method in which key stakeholders such as persons, organisations and communities enhance their aptitude in addressing environmental concerns, and natural resources management. Furthermore, it guarantees that there is sufficient integration of environmental sustainability into developmental strategies, policies, programmes and resolutions.¹⁴³

NEMA's Strategic Plan 2019 -2024 identifies certain key challenges faced by the organisation which include inadequate funding, with further lead to insufficient staffing levels, infrastructure, equipment and office space which is one of the major inhabitants of their

¹⁴⁰ Sustainable Development, "Introduction to the Proposal of the Open Working Group for Sustainable Development Goals," paragraph, 12, 13 and 18

¹⁴¹ UN, Rio+20 UN Conference on Sustainable Development, The Future We Want, 20-22 June 2012, A/CONF.216/L.1.

¹⁴² Organisation for Economic Co-operation and Development, Towards Green Growth, Paris OECD, 2011, 10.

¹⁴³ Practitioner's guide: capacity development for environmental sustainability, United Nations Development Programme, March 2011, 3.

capacity.¹⁴⁴ This inadequacy is seen especially in light of its broad mandate which then raises the need for capacity building in the organisation. Capacity building in this case for NEMA can be able to cure some of the limitations on the efficacy of the organisation and cure some of the ails that have been addressed in chapter 5 that include aspects such as short staffing inhibiting auditing in the case of the DEOs as well as monitoring when it came to the Thika Superhighway.

6.2.2 Access to Information and Public Participation

One of the main foundations of environmental justice is access to information and public participation and their tenets have been discussed in this paper. Article 35 of the 2010 Constitution is the main foundation of the principle of access to information in the Kenyan legal system. Article 35 states briefly that “every citizen has the right of access to information held by the State; and the State shall publicize any important information affecting the nation.” It informs provisions such as those that ensure that key environmental assessment documents and monthly monitoring reports are availed to the public. There is hence a greater need for capacity building within community groups and government institutions to increase awareness of environmental rights and the benefits of sustainable environment.¹⁴⁵ Appropriate interpretation of the article should foster public awareness which would nurture vibrant debate on the various projected infrastructural developments and their predicted environmental impacts.¹⁴⁶ As analysed in the study, it coincides with public participation as once the former is fostered, governments can provide avenues for the latter to exist in the system. More however needs to be done in terms of compliance as many times the process is simply marred by the lack of access to information.

6.2.3 Widening the Scope of Environmental Rights

The court in the case of *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment [2021]* is one of the novel court decisions in environmental governance as it finds that state officials have a duty of care to the future generation in the

¹⁴⁴ National Environment Management Authority Strategic Plan 2019-2024, National Environment Management Authority, 2019, 7 and 8.

¹⁴⁵ Barczewski B, How Well Do Environmental Regulations Work in Kenya? A Case Study of the Thika Highway Improvement Project, June 2013, 3.

¹⁴⁶ Barczewski B, How Well Do Environmental Regulations Work in Kenya? A Case Study of the Thika Highway Improvement Project, 4.

implementation of projects that are bound to affect climate change and hence their environmental rights.¹⁴⁷ The Applicants in the case are 8 Australian children who reside in Australia. Due to their lack of capacity as minors, the proceeding was instituted by their litigation representative. The first respondent is the Minister responsible for administering the Environment Protection and Biodiversity Conservation Act 1999 and is an officer of the Commonwealth. The second respondent is Vickery Coal Pty which is a subsidiary of Whitehaven Coal Pty Ltd.

The proceeding concerns the Minister's decision on whether to approve the extension of the coal project which would increase the total extraction of the mine from 135 to 168 million tonnes which upon combustion would produce nearly 100 Mt of CO₂. The Applicants sought declaratory and injunctive orders against the First Respondent as they were apprehensive on the Minister exercising their discretionary powers in favour of the approval of the project. The Applicants aver that the Minister owes the children a duty of care not to cause the children harm in them exercising their power.

In this case, the court confirmed that there were 17 salient features that had to be proved. They espoused general principles of tort but also specific elements in the case. Some of the key ones included the foreseeability of harm, the nature of the harm alleged, the degree and nature of control able to be exercised by the defendant to avoid harm and the degree of vulnerability of the plaintiff to harm from the defendant's conduct. This case suggests that application of environmental justice can be applied through general concepts of law such as Tort. To that extent even when all the procedural requirements have been met, it can still give the court the purview to evaluate the merits of the impact of the project to the environment.

This case can be applied to several cases in Kenya and the most notable one is the ***Lamu Coal Power Plant Case***. In 2014, the Kenyan Government awarded Amu Power Company the tender to design and build the Lamu Coal Plant.¹⁴⁸ The proposed project consisting of 1,050-megawatts¹⁴⁹ has been the subject of conflict between investors and climate change activists. Investors including the government argue that it would lower the overall cost of power generation in Kenya. This however, is to come at a cost as environmentalists contend that the immense impact of fossil fuels on the environment and on CO₂ emissions. The ***Lamu Coal Power Plant Case*** however was successful to the extent that the court granted orders that the

¹⁴⁷ *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* (2021), Federal Court of Australia.

¹⁴⁸ *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another* [2019] eKLR.

¹⁴⁹ *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another* [2019] eKLR.

project lacked Access to Information and Public Participation and stressed the importance of Strategic Environmental Assessments. This case adjudicated on procedural issues and the court did not evaluate the merits or substance of the impacts that the project would have to the environment and even climate change. However, there is still no check or accountability mechanism as to the impact the project on the current and future populations. There is yet to be a case that has been instituted on the substantive basis of the environmental impacts on a project and furthermore the court granting orders to halt or estop the state based on the substantive impacts and not the procedural ones.

6.3 Conclusion

One thing that is predominantly evident in the study is that the path to achieving sustainability is contingent on the participation and collaboration of both governments and private actors.¹⁵⁰ This then establishes that governance plays a critical role in the facilitation and promotion of sustainable development.¹⁵¹ Proper short and long-term environmental management is quintessential to sustainable urban development. According to the second chapter this is more inclined towards the bicentric approach which would seek to mitigate the impacts that were characterized in the third chapter. More so, some of the challenges that are addressed in chapter 5 can be curtailed with some of the recommendations above which can work to improve governance structures, and capacity building for NEMA. One of the major indicators of how environmental governance has been conducted is mainly through an anthropocentric perspective that seems to prioritize the achievement of economic development over environmental protection. However, there are established pillars of environmental justice that exist but are experiencing low levels of compliance such as public participation, access to information and environmental assessment. The role of NEMA is one that is so essential to protecting environmental justice as it secures coordination and monitoring which would also seek to reduce the number of court cases going to the Environment and Land Court due to the body's inefficiency. It is then clear that the existing mechanisms despite the perception of progressiveness are in need of further compliance and enforcement to ensure that environmental justice is protected and harms that permeate the prioritization of development do not further impact key stakeholders.

¹⁵⁰ Van Rijswijk H, Editorial, 'The Road to Sustainability: How Environmental Law Can Deal with Complexity and Flexibility', 2.

¹⁵¹ Van Rijswijk H, Editorial, 'The Road to Sustainability: How Environmental Law Can Deal with Complexity and Flexibility', 2.

Bibliography

1. -< <http://www.lapsset.go.ke/> > on 25th July 2020.
2. Adams W, 'The Future of Sustainability: Re-thinking Environment and Development in the Twenty First Century, *Gland: International Union for Conservation of Nature*, 2006.
3. Alam S and Razzaque J, 'Sustainable Development versus Green Economy: The Way Forward?' in *International Environmental Law and The Global South*, Cambridge University Press, 2015.
4. Bell S, and McGillivray D, *Environmental law*, Oxford University Press, 6th ed, London, 2006.
5. Bosselmann K, and Engel J, *The Earth Charter: a framework for global governance*, 6th ed, KIT Publishers Amsterdam, The Netherlands, 2010.
6. *Constitution of Kenya* (2010).
7. Bakari M, Mapping the 'Anthropocentric-Ecocentric' Dualism in the History of American Presidency: The Good, the Bad, and the Ambivalent, 17 *Consilience: The Journal of Sustainable Development* 1, 2017.
8. Barczewski B, How Well Do Environmental Regulations Work in Kenya? A Case Study of the Thika Highway Improvement Project June 2013.
9. Bird N and Kirira N, 'Government Institutions, Public Expenditure and the Role of Development Partners: Meeting Kenya's Environmental Challenges, Nairobi: *Overseas Development Institute*, April 2009.
10. Birnie P, Boyle A, and Redgwell C, *International Law and the Environment*, Oxford University Press, New York, 2009.
11. Carter N, *Environmental Philosophy*, 2nd ed, Cambridge University Press, Cambridge, 2007.
12. Collins L, 'Revisiting the Doctrine of Intergenerational Equity in Global Environmental Governance' 30 *Dalhousie Law Journal*, 2007.
13. *Convention on the prevention of marine pollution by dumping of wastes and other matter*, 23 June 1977, 1046 UNTS, 120.
14. Dalal C, Bass S, 'The Challenges of Environmental Mainstreaming: Experience of Integrating Environment into Development Institutions and Decisions' *Environmental Governance* No. 3. International Institute for Environment and Development, London, 2009.

15. Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, UN Doc. A/Conf.48/14/Revision 1, 1973.
16. Deleuil T, 'The Common but Differentiated Responsibilities Principle: Changes in Continuity after the Durban Conference of the Parties' *Review of Europe Community and International Environmental Law* 21(3), 2012.
17. Du Plessis A, 'Fulfilment of South Africa's constitutional environmental right in the local government sphere' Published LLD Thesis, North-West University, Potchefstroom, 2008.
18. Efficiency Monitoring Unit. Office of the Prime Minister. Management Audit Report for the National Environmental Management Agency. Nairobi: Government of Kenya, 2010.
19. Environmental and Social Impact Assessment Study Report for Construction of the First Three Berths of the Proposed Lamu Port and Associated Infrastructure, Ministry of Transport, February 2013, Final Report.
20. Environmental Justice: Issues, Policies, and Solutions, edited by Bunyan Bryant, Island Press, Washington, D.C., 1995, Reviewed by Denise Lach.
21. Faith-Ell, C, "An Overview of Swedish Research On Impact Assessment" *Journal of Environmental Assessment Policy and Management*, 17(1) 2015.
22. French D, 'Developing States and International Environmental Law: The Importance of Differentiated Responsibilities' *International and Comparative Law Quarterly*, 49(1), 2000.
23. Gliniski C, Environmental Justice in South African Law and Policy, 1 *Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 36, 2003.
24. Gonzalez G, 'Environmental Justice, Human Rights, and the Global South' 13 *Santa Clara Journal of International Law* 18, 2015.
25. *Government of the Republic of South Africa v Grootboom* (2001), Constitutional Court of the Republic of South Africa.
26. Hecht S and Cockburn A, 'Rhetoric and Reality in Rio', *The Nation*, 254(24).
27. Holder J, *Environmental Assessment: The Regulation of Decision Making*, Oxford University Press, New York, 2004.
28. Idha M, 'The Mangroves of Lamu History, Socio-econornic and Conservation Issues' Eastern Africa Regional Workshop on Mangroves and Shrimp Aquaculture, Mombasa, Kenya, 3-6 February 1998.

29. *Northern Jamaica Conservation Association & Ors v The Natural Resources Conservation Authority and the National Environment & Planning Agency 2005*, The Supreme Court of the Judicature of Jamaica.
30. Joseph C, Gunton T, and Rutherford M, 'A Method for Evaluating Environmental Assessment Systems', *Journal of Environmental Assessment Policy and Management*, 2017.
31. *Kesavananda Bharati Sripadagalvaru & Ors. v. State of Kerala* (1970), The Supreme Court of India.
32. *Kichwa v. Ecuador* IACtHR Judgement of 27 June 2012, (Merits, Reparations and Costs).
33. Lamu Coal Power Project: Environment and Social Impact Assessment Summary 8.
34. LAPSSET Development Corridor Authority, Strategic Environmental Assessment-SEA in the LAPSSET Corridor Infrastructure Development Project/ – *Main Draft 1*, January 2017.
35. Luke T, 'Deep Ecology: Living as if Nature Mattered: Devall and Sessions on Defending the Earth. Organization & Environment' 15 *Organisation and Environment* 2, 2002.
36. *Maathai v Kenya Times Media Trust Ltd [1989] eKLR*.
37. Ministry of Environment & Natural Resources, A Summary of the Kenya National Biodiversity Strategy and Action Plan 7, The National Environment Secretariat Nairobi, 2000.
38. *Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR*.
39. Morgan R, 'Conceptualising best practice in impact assessment' *Environmental Impact Assessment Review*, 66, 2017.
40. Muir A, 'An interpretation of the South African constitutional "environmental right" (Section 24 of the Constitution of the Republic of South Africa, 1996) and an assessment of its relationship to sustainable development'.
41. National Environment Management Authority - NEMA, Environmental Impact Assessment Guidelines and Administrative Procedures, NEMA, Nairobi, 2002.
42. National Environment Management Authority Strategic Plan 2019-2024, National Environment Management Authority, 2019.
43. *Northern Jamaica Conservation Association & Ors v The Natural Resources Conservation Authority and the National Environment & Planning Agency*.

44. Organisation for Economic Co-operation and Development, Towards Green Growth, Paris OECD, 2011.
45. Kameri-Mbote P, Towards Greater Access to Justice in Environmental Disputes in Kenya: Opportunities for Intervention Geneva: *International Environmental Law Research Centre*, Working Paper 2005.
46. Part II, The Environmental (Impact Assessment and Audit) Regulations, 2003 Regulations, Legal Notice 101 of 2003.
47. Petts, J., "Public Participation and Environmental Impact Assessment" in *Handbook of Environmental Impact Assessment Volume 1: Environmental Impact Assessment Process, Methods and Potential*, 1999, ed. J Petts.
48. Piccolotti R & Taillant J, 'Linking Human Rights and the Environment' *University of Arizona Press*, 2003.
49. Practitioner's guide: capacity development for environmental sustainability, United Nations Development Programme, March 2011.
50. Report of the World Commission on Environment and Development: Our Common future (WCED), 1987.
51. *Rio Declaration on Environment and Development*, Rio De Janeiro, June 1992.
52. Rio+20 United Nations Conference on Sustainable Development, 'Green Economy in the Context of Sustainable Development and Poverty Eradication'.
53. RVI Nairobi Forum, LAPSSET Meeting Report, 4 October 2013.
54. Saif S, Mehmood A, Chaudhry M, and Akhta S, 'Evaluating the Adequacy and Quality of Environment Impact Assessment (EIA) Reports in Punjab, Pakistan' *Journal of Environmental Assessment Policy and Management*, 17(3), 2015.
55. Satish C, 'Environmental ethics anthropocentric to eco-centric approach: A paradigm shift' *55 Journal of Indian Law Institute* 4, 2013.
56. *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another [2019] eKLR*.
57. The Environmental (Impact Assessment and Audit) Regulations, 2003 Regulations, Legal Notice 101 of 2003.
58. Environmental Management and Co-ordination Act, 2012.
59. Silvester Kasuku, Lamu Port – South Sudan – Ethiopia Transport (LAPSSET) Corridor Project, Presented during Kenya – UK Investment Conference, London, 3rd December 2013.

60. Slunge D, 'Can Strategic Environmental and Social Assessment of Redd+ Improve Forest Governance?' University of Gothenburg School of Business, Economics and Law, Working Papers in Economics No 493, 2011.
61. *Speaker of the Senate & another v Hon. Attorney-General & another & 3 others [2013] eKLR.*
62. Sustainable Development, "Introduction to the Proposal of the Open Working Group for Sustainable Development Goals," paragraph.
63. The Constitution of Kenya, 2010: An Introductory Commentary by PLO Lumumba & L Franceschi, Strathmore University Press, Nairobi, 2014 Reviewed by Eric Kibet, Strathmore Law Journal, June 2015.
64. UN, Rio+20 UN Conference on Sustainable Development, The Future We Want, 20-22 June 2012, A/CONF.216/L.1.
65. Van de Bank C and Van de Bank M, 'Sustainable Development: The Human Rights Approach to Environmental Protection in South Africa' 9 *World Academy of Science, Engineering and Technology International Journal of Educational and Pedagogical Sciences* 2, 2015.
66. Van Rijswijk H, Editorial, 'The Road to Sustainability: How Environmental Law Can Deal with Complexity and Flexibility', *Utrecht Law Review*, 2012, 8(3).
67. Wamukoya G and Situma F, Environmental Management in Kenya: A Guide to the Environmental Management and Coordination Act 2 (Nairobi: Centre for Environmental Legal Research and Education, CREEL, 2003.
68. Wiggins, 'Cultural Heritage Preservation Meets Modern Port Development: Securing the Integrity and Authenticity of the Lamu Town World Heritage Site in the Face of Current and Future Challenges' *Independent Study Project Collection*, Spring 2010.
69. World Commission on Environment and Development, Our Common Future, Oxford University Press, New York, 1987.
70. World Conference on Human Rights, The Vienna Declaration and Programme of Action, UN DPI/1394-39399, June 1993.
71. WS Atkins International Ltd, Preliminary Master Plan for Lamu Port City and Investment Framework, LAPSSET Corridor Development Authority, London, April 2017.