

**A CRITIQUE ON THE FULFILLMENT OF KENYA'S FIDUCIARY DUTY UNDER
ARTICLE 69 OF THE CONSTITUTION REGARDING THE CONSTRUCTION OF
THE GIBE III DAM**

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Declaration

I, SANDRINE ATOK EWOTON, 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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This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....

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LIST OF CASES

Friends of Lake Turkana v AG, 2012

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LIST OF LEGAL INSTRUMENTS

Constitution of Kenya, 2010

Water Act, 2016

LIST OF ABBREVIATIONS

Friends of Lake Turkana (FOLT)

Public Trust Doctrine (PTD)

World Heritage Committee (WHC)

Environmental Impact Assessment (EIA)

Strategic Environmental Assessment (SEA)

African Development Bank (AfDB)

Ethiopian Electric Power Cooperation (EEPCo)

Joint Ministerial Commission (JMC)

A CRITIQUE ON THE FULFILLMENT OF KENYA'S FIDUCIARY DUTY UNDER ARTICLE 69 OF THE CONSTITUTION REGARDING THE CONSTRUCTION OF GIBE III DAM

ABSTRACT

This study, recognising the significance of the environment on the livelihood of communities, embarks on a journey to determine the extent of state protection over lake Turkana by the government of Kenya. It compares the acts of the state to its obligation under article 69 of the Constitution prior and during the construction of Gibe III dam. The research objectives include establishing whether a fiduciary duty over the environment exists on the part of the state, what is entailed by this duty and the extent to which the State fulfilled this duty with regards to the construction of the Gibe III dam. The conceptual framework used in this study is Sustainable development, a theme present in the analysis of the environmental obligations of the State and the evidenced responses with these obligations in mind. In a comparison study, the La Plata river basin treaty is used as a desirable model, whose emulation the Lake Turkana basin would have benefited from.

CHAPTER 1

1.1 INTRODUCTION

The global struggle states are facing is balancing mass energy production and environmental preservation.¹ The growing need for efficient energy requires states to employ various methods including hydroelectric power generation. As Africa holds 12% of the world's hydropower potential, African states are making efforts on tapping this potential to cater for the needs of their population.² Complications arise when states intend on exploiting shared watercourses for hydroelectric power, as this shall involve manipulating the watercourse and compromising the interests of co-riparian states.

¹ Clemons K S, 'Hydroelectric dams: Transboundary environmental effects and international Law', *Florida State University Law Review*, Vol. 36, 2009, 488.

² Appleyard D, 'Africa's Hydropower Future', <https://www.hydroworld.com/articles/print/volume-22/issue-1/regional-profile/africa-s-hydropower-future.html> on 1/1/2014.

Africa is in abundance of transboundary waters; waters that cross national boundaries, as 62% of Africa's total land area is covered by these transboundary river basins.³ Thus, instances where states disagree on the use of shared waters are more than likely to occur. Hydropower is harnessed in two ways, through a run-of-the-river plant that uses little or no stored water, and using a storage plant or reservoir.⁴ The latter is highly implemented in Africa, with the rising concentration of dams in linked river basins.⁵ While one state may affirm that the benefits of constructing a dam for energy-provision outweigh the detriments, the co-riparian state may not agree.⁶

Ethiopia has a huge energy potential, with its abundant renewable energy resources. It is however challenged with providing for over 100 million people and meeting the growing electricity demand.⁷ In an effort to fulfil its obligations, the Ethiopian government embarked on the construction of the Gibe III dam on the river Omo. The effects of the dam are two-fold, however this paper exploits the negative implications of its construction in Kenya, with whom Ethiopia shares the waters of river Omo. In particular, the exertion of the Kenyan government during the dam's construction,

1.2 BACKGROUND

In 2006, the company Salini Impregilo for the benefit of the Ethiopian government began the construction of Gibe III.⁸ The dam which sits on the Omo River is located to the southwest of Addis Ababa, Ethiopia's capital.⁹ The river is the only perennial affluent of Lake Turkana, found in northern Kenya.¹⁰ Concern was raised over the construction of Gibe 3 dam, and not the preceding projects of Gibe I and II, because the prior two do not impound any water and thus have no substantial effect on the water levels of lake Turkana.¹¹

³ Lautze J, Giordano M, 'Transboundary water law in Africa: Development, nature and geographic', *Natural Resources Journal*, Vol. 45, 2005, 1053.

⁴ 'Harnessing Hydropower: The Earth's Natural Resource', 3.

⁵ Conway D, 'Hydropower in Africa: Plans for new dams could increase the risk of disruption to electricity supply', <http://www.lse.ac.uk/GranthamInstitute/news/africa-hydropower-new-dams-increase-risk-supply-disruption/> on 13, December, 2017.

⁶ Clemons K S, 'Hydroelectric Dams', 489.

⁷ Ethiopia Country Commercial Guide, <https://www.export.gov/article?id=Ethiopia-Energy> on 5/11/2018.

⁸ Business and Human Rights Resource Centre, <https://www.business-humanrights.org/en/ethiopia-gibe-iii-dam-impacts-indigenous-people-in-lake-turkana-and-omo-river-region>

⁹ Avery S, 'What future for Lake Turkana? The impact of hydropower and irrigation development on the world's largest Desert Lake', University of Oxford African Studies Centre, 2013, 7.

¹⁰ East African Lakes, <https://www.britannica.com/place/East-African-lakes#ref417927>

¹¹ 'Balancing economic development and protecting the cradle of mankind- Lake Turkana Basin', UNEP Global Environmental Alert Service, June 2013

The dam's construction sparked controversy due to the calculated effects. The outcomes of the dam's construction on the lake Turkana basin are predicted to be severe, from various scientific environmental assessments. The impounding of water by the dam is bound to decrease the water levels of lake Turkana by half.¹² The reduction in freshwater coming into the lake shall consequently increase the salinity of the lake, making it less potable for the residents in the semi-arid area.¹³ Additionally, the lake's fish stocks shall also decrease.¹⁴ Ultimately, the effects of the dam gravely affect the livelihood of the people dependent on the lake. The International Rivers, through the Friends of Lake Turkana instituted a case against the Kenyan government on behalf of the people that hold an interest in the lake.¹⁵ Among the claims was that the government failed in its onus to protect the environment and its people from harm as obliged through its role as trustee of natural resources. The FOLT also argued that the government violated the citizens' right to information as it withheld documents containing agreements with Ethiopia.¹⁶

The Kenyan government on separate occasions, during sessions in the National Assembly, recognised the acknowledged the construction of the dam by the Ethiopian government.¹⁷ In 2010, a member of the house sought a Ministerial statement from the Ministry of Water and Irrigation, on the agreements between Kenya and Ethiopia.¹⁸ He further inquired whether there were any Environmental Impact Assessments conducted by the National Environment Management Authority.¹⁹ The following year, motions were raised still on this matter. In February, there were talks on a joint commission with Ethiopia to facilitate basin projects in lake Turkana.²⁰ The Ministry of Water and Irrigation was questioned on what urgent measures it had taken to halt the damming of the river, retaliating with the response that it had no control over Ethiopia's conduct.²¹ In May of the same year, another motion was raised invoking a response on the progress of the consultation between Ethiopia and Kenya.²²

¹² Environmental and social impacts of the proposed Gibe III hydroelectric project in Ethiopia's lower Omo river Basin, 7.

¹³ Case Study: Friends of Lake Turkana, National Geographic Society
<https://www.nationalgeographic.org/news/case-study-friends-lake-turkana/> on May 16, 2012.

¹⁴ Case Study: Friends of Lake Turkana,

¹⁵ *Friends of Lake Turkana v AG*, 2012, eKLR.

¹⁶ *Friends of Lake Turkana v AG*, 2012, eKLR.

¹⁷ Kenya National Assembly Official Hansard, 21 October 2010.

¹⁸ National Assembly Hansard Report, 21 October 2010, 19-20.

¹⁹ National Assembly Hansard Report, 21 October 2010, 19-20.

²⁰ National Assembly Hansard Report, 15 February 2011, 19.

²¹ National Assembly Hansard Report, 15 February 2011, 19.

²² National Assembly Hansard Report, 25 May 2011, 3.

In order to claim the existence of a fiduciary duty owed by the government of Kenya to its citizens, it is necessary to define when such a duty arises and if it exists in this instance. A fiduciary relationship exists when there is an imbalance of power between the fiduciary who wields the power and a beneficiary whose legal or practical interests are affected by that power.²³ Using the case of the *Frame v Smith*, the three indicia of determining the same is that the fiduciary has room to exercise some discretion, the fiduciary can implement that power or discretion so as to affect the beneficiary's legal or practical rights and that the beneficiary is markedly vulnerable.²⁴ The fiduciary relationship can be levied on the state-citizen relationship as citizens cede many of their rights to the state.²⁵ The fiduciary duty arises from the potency of the state to affect citizens' interests, and it is therefore justified in using those powers in their interest.²⁶

The Constitution of Kenya, through article 42, accords every Kenyan the right to a clean, healthy environment and calls for the protection of the same for the benefit of present and future generations.²⁷ The protection of the environment is entrusted in the hands of the state through article 69 of the Constitution.²⁸ It is required to ensure the sustainable exploitation, utilisation, management and conservation of the environment and natural resources.²⁹ Section 5 of the Water Act vests every water resource under the mandate of the national government to be held in trust for the people of Kenya.³⁰ The State is therefore obliged to use its mandate to conserve Kenya's natural resources. In *Friends of Lake Turkana v AG*, the 2nd respondent argued that since the construction of Gibe III was an undertaking of the Ethiopian government and as such the government of Kenya could not do much.³¹ The casual stance of the government can be inferred from these defences. Additionally, the government withheld information on its involvement with the government of Ethiopia concerning the identification and subsequent mitigation or prevention of the negative effects of the dam.³² This includes information on the Environmental Impact Assessment, if at all conducted. The use of Environmental Impact

²³ Lui H, 'A fiduciary perspective on the state's duty to protect the environment,' *Auckland University Law Review*, Vol. 20, 2014, 105.

²⁴ *Frame v Smith*, 1987, SCC

²⁵ Lui H, 'A fiduciary perspective on the state's duty to protect the environment,' 107.

²⁶ Lui H, 'A fiduciary perspective on the state's duty to protect the environment,' 108.

²⁷ Article 42, *Constitution of Kenya* (2010)

²⁸ Article 69, *Constitution of Kenya* (2010)

²⁹ Article 69, *Constitution of Kenya* (2010)

³⁰ Section 5, *Water Act* (Act No. 43 of 2016)

³¹ *Friends of Lake Turkana v AG*, 2012, *eKLR*,

³² *Friends of Lake Turkana v AG*, 2012, *eKLR*,

Assessments is based on the misguided belief that humans with the aid of science can fully understand and predict the impact of their actions on the environment.³³

1.3. STATEMENT OF THE PROBLEM

This study aims to establish to what extent the government of Kenya exercised its fiduciary duty under article 69 of the Constitution, prior to the construction of Gibe III dam, and the consequences on the rights to a clean and healthy environment of the dependants of lake Turkana.

1.4. GENERAL AIMS OF THE STUDY

HYPOTHESIS

That the state exhibited laxity in fulfilling its fiduciary duty under article 69 of the Constitution prior to the construction of Gibe III dam, thus jeopardising the right to a clean and healthy environment of the dependants of lake Turkana upon its completion.

RESEARCH QUESTIONS

This study shall be conducted by answering the following research questions:

1. What does article 69 of the COK entail with respect to the State's fiduciary duty?
2. To what extent did the government of Kenya exercise its fiduciary duty prior to the construction of the dam by the Ethiopian government?
3. In what way shall the rights to a clean and healthy environment be affected by the vigilance, or lack thereof, in exercising its fiduciary duty prior to the construction of Gibe III dam?

RESEARCH OBJECTIVES

The main objectives of this research include:

1. Determining the state's homage as outlined by article 69 of the Kenyan Constitution.
2. Determining to what extent the government fulfilled its fiduciary duty prior the construction of Gibe III dam.

³³ Raffensperger C, Tickner J A, 'Protecting Public Health and the Environment,'2

3. Determining the effects of the state's vigilance or lack thereof in exercising its fiduciary duty.

JUSTIFICATION

The beneficiaries of this study are Kenyans, particularly those around lake Turkana. The study aims to show what is entailed under the fiduciary duty of the state. Establishing the extent of the fulfilment of the imposed duties shall aid in developing measures to mitigate the effects.

RESEARCH DESIGN AND METHODOLOGY

The research method applied shall be desktop research, using primary and secondary sources. This includes local and foreign journals, publications, municipal and international legislations and other reliable and relevant materials.

ASSUMPTIONS

1. That there will always be dependence on Lake Turkana.
2. The state shall always have the obligation to protect the environment.

LIMITATIONS

The main limitation of this study is the inaccessibility of vital information in the form of communication and agreements between the governments of Kenya and Ethiopia.

OUTLINE OF THE DISSERTATION

The first chapter is the introduction to the study. It shall introduce the subject and the background of the study. Alongside this, the first chapter introduces the research questions and objectives. It also contains the assumptions held whilst conducting the study, as well as limitations to it. A brief encounter with the conceptual framework is experienced in the first chapter. The literature review is also highlighted in this chapter.

Chapter two of this study is a broader exploration of the conceptual framework that is sustainable development. The chapter introduces the perspective with which the research shall be conducted. Chapter three is the case study. In this chapter, the research questions are answered in an attempt to achieve the research objectives. Chapter 4 of this study serves the purpose of presenting and explaining the findings of the research. Chapter five is a discussion on the findings in relation to the conceptual framework. Chapter six holds the conclusion of the research and the various recommendations based on the findings.

SUMMARY OF OVERALL RESULTS

Due to the limitation of accessing information on the agreements between Kenya and Ethiopia, much has been collected from reports conducted by independent institutions. One such report was commissioned by the African Development Bank and the World Heritage Committee. The findings of this study reveal that the state had done little before and during the construction of the dam despite having knowledge of the project underway. There were no attempts by the state to ensure public participation on the matter, as information on government response was withheld.

SUMMARY OF OVERALL CONCLUSION

The overall results indicate that the response by the state did not embody the diligence required by the holder of such fiduciary duty of conserving natural resources. This is inferred from the failure to conduct an EIA before the completion of the project, to the failure to ensure public participation in the matter.

CHAPTER SUMMARY

This chapter is the introduction to this study as it provides a background to the problem and the aims of the research in an attempt to address the problem in a relevant manner.

LITERATURE REVIEW

The enforcement of affirmative claims is against the duty bearer, an entity commanded by the society to act or forbear for the benefit of others.³⁴ This can be done directly between individuals or on behalf of many through a representative. The rights of Kenyan citizens to the environment is to be ensured through the state.³⁵ There exists an obligation of the state to enforce the rights, and a subsequent duty on it. Mary Christina Wood posits that the Public Trust Doctrine(PTD) creates a fiduciary relationship between the state and its citizens.³⁶ The doctrine is unending, aimed at securing the natural resources needed by both future and present generations.³⁷ It serves as a restraint on government's avowal of power to allow natural damage because it imposes an obligation on the government to manage natural assets for the benefit of

³⁴Andrews M, 'Hohfeld's Cube', 16 *Akron Law Review*, 3,1983, 473.

³⁵ Article 42, *Constitution of Kenya* (2010).

³⁶Wood M C, 'Advancing the sovereign trust of government to safeguard the environment for present and future generations: Ecological realism and the need for a paradigm shift', *Environmental Law, Lewis and Clark Law School*, Vol. 39, 2009, 67.

³⁷ Wood M C, 'Advancing the sovereign trust of government to safeguard the environment for present and future generations', 68.

the public.³⁸ In her second article she identifies the substantive duties arising from this relationship as the duties of protection, restoration and recouping natural resource damages.³⁹ Bernard Cohen recognised the PTD as making the government the public guardian of valuable natural resources which are not capable of self-regeneration and for which man cannot make substitutes.⁴⁰

Article 69 of the Constitution enshrines procedural rights such as involvement in decision-making in environmental matters and substantive duties of the state in protecting the environment, including through eliminating processes that are likely to endanger the environment.⁴¹ The article outlines the measures the state shall undertake in protecting and conserving the environment.⁴² Kariuki Muigai and Francis Kariuki highlight the environmental rights envisioned in the 2010 Constitution. This study shall focus the obligations against those rights in relation to the state action over the construction of Gibe III dam. The Republics of Zimbabwe and Zambia through a bilateral agreement, display the duties of state to protect the environment.⁴³ The aim of the agreement is to ensure the equitable use of the Zambezi river, following the construction of the Kariba dam.⁴⁴

In *Kenya Association of Manufacturers and another v the Cabinet Secretary, Ministry of Environment and 3 others*, the Environment and Land Court, being guided by the principles of sustainable development, held that the state had to consider the public interest in making policies to conserve the environment.⁴⁵

The effects of the dam's construction cannot fully be predicted, as is the case with human acts on the environment, as according to Albert Schweitzer "Man has lost the capacity to foresee

³⁸ Wood M C, 'Advancing the sovereign trust of government to safeguard the environment for present and future generations', 68.

³⁹ Wood M C, 'Advancing the sovereign trust of government to safeguard the environment for present and future generations: Instilling a fiduciary obligation in governance', 94-97.

⁴⁰ Cohen B S, 'The Constitution, the Public Trust

⁴¹ Article 69, *Constitution of Kenya* (2010).

⁴² Muigai K, Kariuki F, 'Safeguarding environmental rights in Kenya', http://erepository.uonbi.ac.ke/bitstream/handle/11295/90689/Muigua_Safeguarding%20Environmental%20Rights%20in%20Kenya.pdf?sequence=1&isAllowed=y

⁴³ Agreement between the Republic of Zimbabwe and the Republic of Zambia concerning the utilization of the Zambezi River signed at Harare, 28 July 1987.

⁴⁴ Article 18, Agreement between the Republic of Zimbabwe and the Republic of Zambia concerning the utilization of the Zambezi River signed at Harare, 28 July 1987.

⁴⁵ *Kenya Association of Manufacturers and another v the Cabinet Secretary, Ministry of Environment and 3 others* (2017), eKLR

and forestall and he will end up destroying the earth”.⁴⁶ The application of the precautionary principle, that anticipatory measures should be taken to avoid harm on the environment. This study shall engage this principle in determining the extent of its application to mitigate the dam’s effects.

CHAPTER 2

CONCEPTUAL FRAMEWORK

The demand for raw materials and the impact of humanity’s attempt to meet these needs on the environment have been a constant issue throughout human history.⁴⁷ Long before the term was coined, the concept was presented in a number of publications, what would be called sustainable development today. John Stuart Mill’s publication, *Principles of Political Economy* featured a chapter on the ‘stationary state’, which implied an inert state of capital and population, but not of human advancement.⁴⁸ He stated that the human society should be content with being stationary long before necessity compels them to for that was where they were headed.⁴⁹ The Industrial Revolution as a stage in the horizontal line of humanity’s progression fostered the expectation of unlimited economic growth and wealth creation.⁵⁰ Sustainability problems took a backseat in favour of a progressive economy.⁵¹

In the 1970’s the term ‘sustainable development’ gained traction in its use and consideration in development discourses.⁵² The concept emerged as a compromise between the notions of development and conservation that were formerly well-thought-out as irreconcilable.⁵³ The commonplace definition of the concept, that is taken as fact, is that of the report by the Brundtland Commission that calls for the use of resources to meet the needs of the current population without compromising the ability of the future generation to meet theirs.⁵⁴ However, the concept of sustainability raises a plethora of questions ranging from what is considered an

⁴⁶Raffensperger C, Tickner J A, ‘*Protecting Public Health and the Environment: Implementing the precautionary principle*,’ Island Press, Washington, 1999, 1.

⁴⁷ Van Zon H, ‘*History & sustainable development: Sustainable development in historical perspective, a few explorations*’, 1, 9, 10, 2002.

⁴⁸ Mill J.S, ‘*Principles of political economy in late imperial Russia*’, John Parker, London, 1883, 452 – 454.

⁴⁹ Mill J.S, ‘*Principles of political economy*’, 452 – 454.

⁵⁰ Jacobus A.Du Pisani, ‘Sustainable Development: Historical roots of the concept’, *Environmental Sciences* Vol. 3, Issue 2, 2006.

⁵¹ Hicks, J R., ‘*Value and capital: An inquiry into some fundamental principles of economic theory*,’ Oxford: Clarendon Press, 1941.

⁵² Jacobus A.Du Pisani, ‘*Sustainable Development*’, 183

⁵³ Jacobus A.Du Pisani, ‘*Sustainable Development*,’ 184

⁵⁴ Borowy I, ‘*Defining Sustainable Development for Our Common Future: A history of the World Commission on Environment and Development (Brundtland Commission)*’ Earthscan from Routledge, 2014, 3.

acceptable element of desirable development, to how long a development should be sustained for it to count as sustainable.⁵⁵

The concept comprises two independent terms that have had varying definitions within the progress of the human society. The term development has evolved, with different approaches being emphasized at different times.⁵⁶ The idea of development as it is known today did not exist before the 1940's, as colonial powers did not entertain the thought of their colonies ever benefiting from the raw materials and manpower they provided, beyond the advancement of their 'masters'.⁵⁷ The original emphasis of development was on promoting more productive agriculture and industrialisation.⁵⁸ The late 1970's featured a focus on basic needs, advocated by Paul Streeten among others.⁵⁹ The central components of this approach include education, nutrition, sanitation and employment for the poor. This interpretation of development is relevant particularly for this study as shall be revealed through the following chapters.

Sustainability in the environmental realm refers to the ongoing viability of the ecosystems that provide the basis for all life on earth.⁶⁰ Development that does not meet the intergenerational equity criterion simply must be bad development.⁶¹ Development intrinsically involves trade-offs between "seemingly" conflicting goals, such as between economic growth and environmental conservation.⁶² Note that the usage of the term seemingly follows from the approach that environmental conservation and economic progress are not conflicting, as real development is not achieved by compromising natural resources for profit only to face the repercussions in the future.

Posited by Barbier, actual sustainable economic development cannot transpire unless the tactics being framed and executed are ecologically sustainable over the long term, are consistent with social values and institutions and encourage "grassroots" participation in the development process.⁶³ This approach is necessary in analysing the sustainability of the Gibe III project and

⁵⁵ Borowy I, 'Defining Sustainable Development for Our Common Future,' 2

⁵⁶ Harris J.M, 'Basic principles of Sustainable Development', Global Development and Environment Institute Working Paper 00-04, 2000,

⁵⁷ Harris J.M, 'Basic principles of Sustainable Development', 3

⁵⁸ Harris J.M, 'Basic principles of Sustainable Development', 3

⁵⁹ Streeten P, Shahid B, Mahbub Ul Haq, Hicks N and Stewart F, 'First Things First: Meeting Basic Human Needs in the Developing Countries', Published for the World Bank. New York and Oxford: Oxford University Press, 1981

⁶⁰ Hardisty P. E, 'Environmental and Economic Sustainability', 6

⁶¹ Holmberg J, 'Making development sustainable: Redefining institutions, policy and economics', Island Press, Washington DC, 1992, 23

⁶² Holmberg J, 'Making development sustainable: Redefining institutions policy and economics', 23

⁶³ Barbier E.B, 'The concept of sustainable economic development', *Environmental Conservation* Vol. 14, No. 7, 1987, 109.

the role of the Kenyan government prior to its construction. The concept of sustainable development calls for 'total' development of society; that is, economic, environmental and social. This goes to say that the three pillars progressing in isolation does not reflect true development.

Economic system goals include satisfying basic needs, equity-enhancement and avoiding sectoral imbalances.⁶⁴ Ethiopia embarked on the project of constructing the Gibe III dam, with its storage capacity of 14.7 billion cubic meters, so as to generate hydroelectric power.⁶⁵ According to a study conducted in 2018, approximately 58 million Ethiopians lack electricity, and the overall electrification rate as a percentage of the total population is 43%.⁶⁶ The power produced by the project will not only be used to increase Ethiopia's own electricity coverage, but will also make the power-export program of the country viable.⁶⁷ The electricity produced is set to benefit Kenya, following the agreement to purchase electricity from Ethiopia.

The environmental system requires the maintenance of a stable resource base, avoiding over-exploitation of resources and achieving intergenerational equity through environmental conservation.⁶⁸ The Gibe III dam shall reduce the levels of Lake Turkana in several ways, one being during the filling of the dam's reservoir which will take several years.⁶⁹ Furthermore, the impacts have not been quantified in project documents.⁷⁰ The African Development Bank; before being informed that its funding was no longer necessary for the project, conducted an updated study of the hydrological impacts of the project on Lake Turkana.⁷¹ The findings of the report indicate that the filling of the dam [Gibe III] has the potential to dry up Ferguson's Gulf, the most productive fishing areas on the Lake.⁷² The impacts of the proposed regulated flows by the dam have not been entirely and scientifically quantified, and the fisheries resource of the Lake has not been updated.⁷³ Thus, the claims that the water levels shall not decrease due to annual flood release from the reservoir cannot be ascertained.

⁶⁴ Barbier E.B, 'The Concept of Sustainable Economic Development', 104.

⁶⁵ Power Technology, < <https://www.power-technology.com/projects/gilgel-gibe-iii-hydroelectric-power-project/>

⁶⁶ Perera A, 'Electricity in Ethiopia', Oxford Policy Management, 2018, 3.

⁶⁷ Perera A, 'Electricity in Ethiopia', Oxford Policy Management, 2018, 6

⁶⁸ Harris J.M, 'Basic Principles of Sustainable Development', 6.

⁶⁹ 'Ethiopia's Gibe III Dam: Sowing Hunger and Conflict', International Rivers, < <https://www.internationalrivers.org/sites/default/files/attached-files/gibe3factsheet2011.pdf> on January, 2011, 2.

⁷⁰ 'Ethiopia's Gibe III Dam: Sowing Hunger and Conflict', 2.

⁷¹ Independent Review Mechanism Compliance Review and Mediation Unit Problem Solving Report, 2010, 15

⁷² Avery Sean, 'Updated Draft Report on the Assessment of Hydrological Impacts of Ethiopia's Omo Basin on Kenya's Lake Turkana Water Levels,' 14

⁷³ Avery Sean, 'Updated Draft Report on the Assessment of Hydrological Impacts of Ethiopia's Omo Basin on Kenya's Lake Turkana Water Levels,' 14

This then ties into the social system, that requires the non-disruption of community life, public participation, achieving distributional equity and provision of social services including health and sanitation.⁷⁴ Public involvement, as a generic umbrella term, has been used to cover the assortment of techniques that can be used to inform, consult or interact with stakeholders affected by a proposal.⁷⁵ Public involvement as conceptualised in the Aarhus Convention includes access to environmental information, public participation in environmental decision-making and access to justice.⁷⁶ The consultation of the stakeholders of Lake Turkana was not undertaken until the project was 32% done.⁷⁷ The public consultation was conducted by the African Development Bank following pressure from interested groups such as the FOLT. Among the findings from the consultation was that the Kenyan government was already willing to purchase electricity from the project even before impact assessments had been conducted.⁷⁸ The knowledge of which left the stakeholders of the lake unimpressed. The consultation seemed like a mockery to the process of public participation due to the timing.

In the *Friends of Lake Turkana v the AG* case, the court agreed that there was no public participation in deliberations between the Kenyan government and the Ethiopian government.⁷⁹ The interested parties in particular, were denied information on what transpired of the talks between the two states. Involvement of the public was therefore lacking, especially with regards to the MOU between the Kenyan and the Ethiopian government.

METHODOLOGY

The methodology in application in this study is desktop research. This involves the use of published reports, data from government agencies, commissioned studies by reputable institutions such as the AfDB and from secondary sources such as books and journals. The information used shall be put through the scrutiny of originating from a reputable source.

Field research cannot be applied in this study due to the costs as well as time constraints. Questionnaires would require a lengthy amount of time to hand out and compile the

⁷⁴ Harris J.M., 'Basic Principles of Sustainable Development', 6.

⁷⁵ Furman E, Hilden M, Nicro S, Dass S, 'Evolution of Public Involvement in Environmental Issues Within the Asem- Partners: An Analysis of International Regional and Bilateral, Conventions, Agreements and Other Initiatives', Asia-Europe Environmental Technology Centre, 11

⁷⁶ European Commission and the Aarhus Convention, <https://ec.europa.eu/environment/aarhus/> on 07/08/2019

⁷⁷ Kaijage A.S., Nyagah N.M., 'Socio-Economic Analysis and Public Consultation of Lake Turkana Communities in Northern Kenya,' 2009, 32

⁷⁸ Kaijage A.S., Nyagah N.M., 'Socio-Economic Analysis and Public Consultation of Lake Turkana Communities in Northern Kenya,' 2009, 32

⁷⁹ *Friends of Lake Turkana and 2 others v AG*, eKLR

information, particularly with regard to the demographic involved. Sampling opinions of the communities considered stakeholders in the study would require more time and manpower as interviewing a few would lead to inaccurate conclusions. Thus, this study shall rely on the findings of studies already conducted and concluded by reliable institutions.

CHAPTER 3

CASE STUDY

3.1 What does article 69 of the COK entail with respect to the State's fiduciary duty?

Prior to assessing the obligations of the state under article 69 of the constitution, it is necessary to establish the existence of a fiduciary relationship. As pointed out in chapter one, a fiduciary relationship is imposed where there exists a power imbalance between the fiduciary and beneficiary such that the former has the power to affect the beneficiary's legal and practical interests.⁸⁰ The three indicia that can be used to qualify a relationship as one of a fiduciary nature are set out in *Frame v Smith* where Justice Wilson makes the following proposals:⁸¹

- The fiduciary has the capacity to use some discretion or power
- The fiduciary can singly use that power or discretion to affect the beneficiary's legal or practical interests
- The beneficiary is susceptible to the discretionary capacity of the fiduciary

The justification of imposing a fiduciary duty is dependent on the beneficiary having a right to the duty in the circumstances of its application.⁸² In his conceptualisation of rights, Kant posits two types of rights that typify a person's moral capability to impose obligations on another; acquired rights and innate rights.⁸³ For acquired rights, the right-holder agrees to obtain a set of rights while the other party attains corresponding duties.⁸⁴ Those duties are as a result of the moral capacity of the right-holder to delegate decision-making powers to someone entrusted to care for his or her interests.⁸⁵ According to Kant, every person has only one innate right- the right to as much freedom as can exist with everyone else's freedom.⁸⁶

⁸⁰ Criddle E.J, Fox-Decent E, 'A Fiduciary Theory of Jus Cogens', *Yale J International L* 331, Vol 34, 2009,349.

⁸¹ *Frame v Smith*, 1987, 12 SCR 99, 136.

⁸² Fox-Decent E, 'The Fiduciary Nature of State Legal Authority', *Queen's Law Journal*, Vol. 31, 2005,276.

⁸³ Kant I, '*The Metaphysics of Morals*', Cambridge University Press, Cambridge, 1996,29- 30.

⁸⁴ Himmy L, 'A Fiduciary Perspective on the State's Duty to Protect the Environment', *Auckland University Law Review*, Vol. 20, 2014, 106

⁸⁵ Himmy L, 'A Fiduciary Perspective on the State's Duty to Protect the Environment', 106

⁸⁶ Kant I, '*The Metaphysics of Morals*',20-30.

In light of Kant's conceptualisation of rights as well as the indicia of classifying fiduciary relationships, the state-citizen relationship is ideal for the imposition of a fiduciary duty.⁸⁷ Citizens surrender many of their legal and political rights to the state.⁸⁸ The fiduciary duty follows from the State's immense discretionary power to affects its citizens' rights.⁸⁹ The content of the duty is informed by the right. The duty of state is to act in the best interest of its citizens that have ceded their rights to the state. Kenya as a state owes a fiduciary duty to its citizens in safeguarding their interests. The interests are defined by the specific rights. In this instance, the right to a clean and healthy environment is accorded to every Kenyan citizen through article 42 of the Constitution.⁹⁰ The environment is to be protected for the benefit of present and future generations particularly through the measures outlined under article 69 of the Constitution of Kenya.⁹¹ The duties of the state highlighted but not limited to article 69 of the Constitution are informed by the right enshrined under article 42.

In addition to the measures contemplated under article 69, the State should use legislative and other measures to protect the environment.⁹² The obligations of the State with regards to the environment are not to the letter. Article 69 highlights the requirements of the State, a sort of general aim that State action in respect to the environment should live up to. It outlines what the State should do but not how the State should do it in its entirety. The State is required to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources.⁹³ From this general requirement, the State should then formulate specific legislations for the protection of the various natural resources. The Forests (participation in Sustainable Forest Management) rules is an example of State exercise in ensuring the sustainable management of forests. The rules are to regulate the participation of the private sector and the forest communities in the sustainable management of forests.⁹⁴

The State is also required to encourage public participation in the management, protection and conservation of the environment.⁹⁵ Public participation is an important component of environmental management.⁹⁶ Effective public participation is likely to guarantee that the

⁸⁷ Fox-Decent E, 'The Fiduciary Nature of State Legal Authority', 308

⁸⁸ Himmy L, 'A Fiduciary Perspective on the State's Duty to Protect the Environment', 107

⁸⁹ Himmy L, 'A Fiduciary Perspective on the State's Duty to Protect the Environment', 108

⁹⁰ Article 42, *Constitution of Kenya*, (2010)

⁹¹ Article 42, *Constitution of Kenya*, (2010)

⁹² Article 42, *Constitution of Kenya*, (2010)

⁹³ Article 69(1)(a), *Constitution of Kenya*, (2010)

⁹⁴ The Forests (Participation in Sustainable Forest Management) Rules, 2009

⁹⁵ Article 69(1)(d), *Constitution of Kenya*, 2010

⁹⁶ *Joseph Leboo & 2 others v Director Kenya Forest Services & Another*, ELC, 2013, eKLR

processes and outcomes of planning, policy, and decision-making are to be more efficient, equitable, and sustainable.⁹⁷ Mechanisms of public participation in Kenya are spelt out in the Constitution and various laws that inform the implementation of devolved government such as the County Government Act and the model law on public participation developed by the Kenya Law Reform Commission.⁹⁸ A report on public participation conducted by Inter-Governmental Relations Technical Committee concluded that despite efforts in both levels of government, there is no precision on what constitutes satisfactory participation, the nature of the participation that meets the constitutional threshold or the most operational methods of public participation.⁹⁹ This conclusion does not excuse the State from applying best practice when effecting public participation.

It is the obligation of the State to protect genetic resources and biological diversity.¹⁰⁰ Genetic resources refer to genetic material of actual or potential value and include material of plant, animal or microbial origin.¹⁰¹ Biological diversity is the variability among living organism from all sources and the ecological complexes which they are part of; this includes diversity within species, between species and of ecosystems.¹⁰² Protection of biodiversity does not benefit the vast animal and plant life in ecosystems only, but human beings as well as members of the ecosystem. The Environmental Management and Co-Ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations of 2006 exhibit the efforts of the state in establishing a framework for the protection of biodiversity and genetic resources as well as sharing the benefit accrued from the sustainable exploitation of the same.

The State is also required to establish systems of environmental impact assessment, environmental audit and monitoring of the environment.¹⁰³ An Environmental Impact Assessment (EIA) is an essential tool in environmental management. It is a critical examination of the impacts of a project on the environment.¹⁰⁴ The information gathered upon the

⁹⁷ Krishnaswamy A, 'Strategies and Tools for Effective Public Participation', Forum for Research and Extension in Natural Resources, Canada, 2009, 1.

⁹⁸ Odhiambo M, Opiyo R, 'Effective Public Participation Mechanisms in Mombasa, Kilifi, Taita Taveta and Kajiado Counties', Comitato Internazionale per lo Sviluppo dei Popoli, 2017,10

⁹⁹ Odhiambo et al, 'Effective Public Participation Mechanisms in Mombasa, Kilifi, Taita Taveta and Kajiado Counties',13

¹⁰⁰ Article 69(1)(e), *Constitution of Kenya*, (2010)

¹⁰¹ <https://www.wipo.int/tk/en/genetic/> >

¹⁰² Millennium Ecosystem Assessment, 'Ecosystems and Human Well-Being: Biodiversity Synthesis', World Resources Institute, Washington, 2005,1.

¹⁰³ Article 69(1)(f), *Constitution of Kenya* (2010)

¹⁰⁴ National Environment Management Authority
http://www.nema.go.ke/index.php?option=com_content&view=article&id=119&Itemid=144 on EIAs

completion of an EIA is what aids in decision-making concerning the proposed development. Part 6 of the Environmental Management and Coordination Act contains the provisions on EIAs. It involves the systematic documentation, periodic and objective evaluation of the activities and processes of an ongoing project to determine how far these activities and programs conform with the approved environmental management plan of that specific project and sound environmental management practices.¹⁰⁵ These processes are meant to serve as checks on development projects in order to ensure that their effects are not adverse on the environment or to mitigate the adversity of the impacts.

It is the obligation of the State to eliminate processes and activities that are likely to endanger the environment.¹⁰⁶ This Constitutional provision places on the State the burden of identifying what is likely to destroy the environment. It calls on the vigilance of the State in the timely identification of possible threats to the environment. The State should also utilise the environment and natural resources for the benefit of its citizens.¹⁰⁷ Since the control over the environment and natural resources are vested in the State on behalf of the citizenry, it follows that the sustainable exploitation of the same should be for the benefit of the citizens.

The Constitution imposes a duty on persons to cooperate with State organs to protect and conserve the environment and ensure ecologically sustainable development.¹⁰⁸

3.2 To what extent did the government of Kenya exercise its fiduciary duty prior to the construction of the dam by the Ethiopian government?

As established in chapter 3.1, the state has various obligations to its citizens regarding the environment. Since the state as a fiduciary has power that renders the citizens vulnerable to its actions, it ought to exercise such power in a manner that safeguards the citizen's interests. The construction of Gibe III; an initiative of Ethiopian government to increase the nations' electricity supply, began in 2006. The dam's construction has caused controversy due to environmental concerns predicted to be as a result of its completion. Of particular concern in this project is the impounding of water from the Omo river and its effects on Lake Turkana in Kenya.

¹⁰⁵NEMA http://www.nema.go.ke/index.php?option=com_content&view=article&id=155&Itemid=274

¹⁰⁶ Article 69 (1)(g), *Constitution of Kenya*, (2010)

¹⁰⁷ Article 69(1)(h), *Constitution of Kenya*, (2010).

¹⁰⁸ Article 69(2), *Constitution of Kenya*, (2010)

Every water resource in Kenya is vested in the State, subject to its control.¹⁰⁹ The components that constitute the environment do not always persist within jurisdictional boundaries as they often cross these political boundaries.¹¹⁰ Transboundary environmental issues are the issues of mutual concern that arise from a shared natural area, resource, system or migratory species.¹¹¹ Cooperative environmental management and policy-making is necessary to manage such resources. Lake Turkana is one such resource that elicits transboundary issues as it is located in the arid north-western part of Kenya and the south-western portions of Ethiopia.¹¹² Cooperation between riparian states is best facilitated with the presence of a cooperation agreement or treatise. Such agreements are beneficial as they bind the parties to their obligations under the agreement. However, prior to the initiation of the project there lacked a formal agreement on the management of the transboundary water resource.¹¹³ This precluded appropriate consultation between the two countries and therefore allowing the Ethiopian government to pursue its development plans on the Omo river without limits or safeguards on its activities.¹¹⁴ Even with positive influence from the World Heritage Committee resulting in increased bilateral talks after the completion of the project, the state reported instances where there was no response from the Ethiopian government and stagnated bilateral talks.¹¹⁵

Kenya has an obligation to ensure that the environment and natural resources are conserved.¹¹⁶ Lake Turkana automatically qualifies for protection by virtue of it being a water resource within Kenya's territory. Conservation of natural resources is closely tied to the concept of sustainable development as it calls for a balance to be struck between present and future needs.¹¹⁷ State activities in the area of resource management should not amount to mere legislative declarations of policy but to administrative control over specific resources.¹¹⁸ The path to achieving conservation is not strictly paved, as it may call for varying measures depending on the resources involved.

Word on the construction of Gibe 3 dam in Ethiopia caught wind in 2006 when the country commissioned an Italian company to complete the project. The predicted negative effects of

¹⁰⁹ Section 3, *Water Act*, (2012)

¹¹⁰ UNEP, 'Atlas of our changing environment', 67

¹¹¹ UNEP, 'Atlas of our changing environment', 67

¹¹² UNEP, 'Atlas of our changing environment', 78

¹¹³ Bierne J, 'Gilgel Gibe III: Dam induced displacement in Ethiopia and Kenya', 232

¹¹⁴ Bierne J, 'Gilgel Gibe III: Dam induced displacement in Ethiopia and Kenya', 232

¹¹⁵ Conservation Issues Presented to the World Heritage Committee <https://whc.unesco.org/en/soc/3848>, 2019.

¹¹⁶ Article 69(1)(a), Constitution of Kenya, 2010.

¹¹⁷ Randall R.H, 'Conservation of natural resources', The Annals of the American Academy of Political and Social Science, 206(1), 142.

¹¹⁸ Randall R.H, 'Conservation of natural resources', 142

the dam caused controversy among many civil rights groups as the effects of the dam's construction were not to be limited within its boundaries due to river Omo's transboundary nature. The public outcry at the time should have been sufficient to evoke significant State action on the matter. The court in *FOLT v Ag* affirmed that the State should take all steps necessary to ensure that the resources of Lake Turkana are used sustainably and conserved.¹¹⁹

The environmentally sound response on the part of Kenya would then be to conduct an independent EIA in order to scientifically conclude the impacts or benefit of the project on its end. Ethiopia's Environmental Protection Authority approved of the Gibe 3 Environment and Social Impact Assessment (ESIA) in 2008 and released the final version of the reports in 2009.¹²⁰ The documents are accused of being fabricated with the aim of furthering the aims of the government in completing the dam.¹²¹ The ESIA released indicates that the dam has more benefits than negative impacts. While stating the impacts, it vaguely states that all the negative implications of the dam have been calculated and measures to mitigate the said effects have been put in place.¹²² This is done without stating the measures of mitigation.

In a commentary by Africa Resources Working Group on the EIA commissioned by the Ethiopian Electric Power Corporation, the reporters came to the informed supposition that the quantitative (and qualitative) data included in nearly all major sections of the report were undoubtedly selected for their consistence with the prearranged objective of authenticating the completion of the Gibe III dam.¹²³ It is not difficult to imagine the manipulation of results in favour of one's interests, particularly since states ought to act in the best interests of their citizens.

To date there has been no independent EIA conducted by the state over the Omo-Turkana basin. Instead, the State was already willing to purchase electricity from the project even before the EIA commissioned by Ethiopia on the Gibe 3 had been completed.¹²⁴ The earliest mention date of the then ongoing construction of the dam in the National Assembly was in 2011. While addressing the house, Dr. Otichilo raised the motion that the government should halt Ethiopia's

¹¹⁹ *FOLT and another v Ag and 2 others*, 2012, eKLR

¹²⁰ *Ethiopia's Gibe 3 Dam: Sowing hunger and conflict*, International Rivers ,4.

¹²¹ *Ethiopia's Gibe 3 Dam: Sowing hunger and conflict*, International Rivers,4.

¹²² EEPCO, 'Gibe III Hydroelectric project Environmental and Social Impact Assessment: Additional study on downstream impact',142

¹²³ Africa Resources Working Group, 'A Commentary on the Environmental, Socioeconomic and Human Rights Impacts of the Proposed Gibe III Dam in the Lower Omo River Basin of Ethiopia', 2009, 4.

¹²⁴ Kaijage A.S., Nyagah N.M. , 'Socio-Economic Analysis and Public Consultation of Lake Turkana Communities in Northern Kenya,' 2009, 32

construction of the dam until an independent and comprehensive environmental and social impact assessment is undertaken and appropriate mitigation measures put in place.¹²⁵ His presentation before the house further acknowledges that no independent EIA had been conducted prior to the construction of the dam. Even whilst the project was underway, the state demonstrated a lax response to the project and its effects on the Lake Turkana basin.

A report by the World Heritage Committee reveals that the two countries were engaged in increased bilateral talks after the completion of the dam through an expert panel in the already-existent Joint Ministerial Committee.¹²⁶ It is difficult to be convinced that the representatives of the Kenyan citizens were putting forward their people's interests from an informed position given that the state had not conducted an independent EIA. The World Heritage Committee in 2011 recommended that both Kenya and Ethiopia invite a joint World Heritage Centre/IUCN reactive monitoring mission to review the likely impacts of the GIBE III dam on Lake Turkana, and to also request them to provide complete information on all hydro-electric development and large-scale irrigation plans in the Omo region.¹²⁷ Upon recommendation from the World Heritage Committee, Kenya agreed to conduct a joint Strategic Environmental Assessment (SEA) to evaluate the snowballing impacts of all developments with an effect on the Lake Turkana basin in order to recognise suitable curative methods to ensure that the water level in Lake Turkana, as well as a level of seasonal variation is maintained.¹²⁸

Despite the fact that to date the SEA has not been conducted as it awaits funding from the two states, it is peculiar that such a significant effort would be made after the completion of the project.¹²⁹ It displays the under-estimated value placed on the precautionary principle that is a guiding principle in effective environmental management.

Kenya has an obligation to make certain public participation in the management of the environment.¹³⁰ Public participation can be used as a tool of achieving sustainable development, particularly the socio-economic pillars as it engages the public and takes into account their fears with regards to development projects and implements them in management policies. The importance of public participation is globally recognised with its inclusion in

¹²⁵ Kenya National Assembly Official Record (Hansard) 25 May 2011,3.

¹²⁶ Analysis and Conclusion by World Heritage Centre and the Advisory Bodies in 2016, <https://whc.unesco.org/en/soc/3455>

¹²⁷ The World Heritage Committee, 35 COM 7B.3, Lake Turkana National Parks (Kenya) (N 801bis)

¹²⁸ The World Heritage Committee, 36 COM 7B.3, Lake Turkana National Parks (Kenya) (N 801bis)

¹²⁹ The World Heritage Committee, 43 COM 7A.12, Lake Turkana National Parks (Kenya) (N 801bis)

¹³⁰ Article 69(1)(d), Constitution, 2010

major instruments and documents such as the Aarhus Convention and the World Commission on Dam's core values.

The value pillars of public participation are the right to information, the right to participate in decision-making process and the right to access justice.¹³¹ The Aarhus Convention acknowledges the right of everyone to receive environmental information held by public authorities, including information on policies or measures taken.¹³² The convention also stipulates that arrangements should be made by public authorities in order to enable the public and environmental NGOs to participate in environmental decision-making.¹³³ The Convention highlights access to justice as the right to review procedures in a bid to challenge decisions that are made without respecting the rights to information and participation in decision-making.¹³⁴

It is only when these three pillars are in place that effective public participation can be achieved. Good public participation shall be classified as such depending on the issue at hand and the extent of public participation deserving of it, a choice best made by the decision-maker.¹³⁵ The spectrum of public participation as identified by the International Association for Public Participation ranges from the weakest end whose aim is simply to inform the public to the strongest level being to empower people.¹³⁶

Public involvement that aims at informing the people seeks to achieve the said result by providing balanced and objective information to the public to help them understand the problem along with the possible solutions.¹³⁷ The public may be kept informed using methods such as fact sheets and websites.¹³⁸ The next level of public participation on the spectrum is consultation, where the aim is to obtain public feedback on the analysis and alternatives.¹³⁹ It takes into account the right to be heard as it involves listening and acknowledging public opinion as well as providing feedback on how the said opinion influenced the decision.¹⁴⁰ The

¹³¹ Atapattu S.A., 'Emerging Principles of International Environmental Law', Transnational Publishers Incorporation, New York, 2006,353-378

¹³² The European Union and the Aarhus Convention, < <https://ec.europa.eu/environment/aarhus/> on 13,3, 2020.

¹³³ The European Union and the Aarhus Convention, < <https://ec.europa.eu/environment/aarhus/> on 13,3, 2020.

¹³⁴ The European Union and the Aarhus Convention, < <https://ec.europa.eu/environment/aarhus/> on 13,3, 2020.

¹³⁵ Theelen A, 'Public Participation in Environmental Management: The Christchurch Rebuild, A Case Study', Published student dissertation, University of Otago,2012, 17

¹³⁶ International Association for Public Participation, 'Spectrum of Public Participation',https://cdn.ymaws.com/www.iap2.org/resource/resmgr/pillars/Spectrum_8.5x11_Print.pdf, 2018

¹³⁷ International Association for Public Participation, 'Spectrum of Public Participation'

¹³⁸ Theelen A, 'Public Participation in Environmental Management',18

¹³⁹ International Association for Public Participation'
https://cdn.ymaws.com/www.iap2.org/resource/resmgr/pillars/Spectrum_8.5x11_Print.pdf, 2018

¹⁴⁰ International Association for Public Participation, 'Spectrum of Public Participation'

third level on the spectrum aims at involving the public in the decision-making process.¹⁴¹ It is somewhat similar to the next level of public participation that is collaboration as the two aim at actively involving the public in the processes of decision-making. At the strong end of the spectrum is empowerment which seeks to place the final decision in the hands of the public by promising to implement what is decided by the public.¹⁴²

As earlier noted, there lacks a nationwide criterion for effective public participation. What is currently available is the Public Participation Bill of 2018 that can only be referred to as a guideline as it is not yet legislation.¹⁴³ The bill embodies two of the common routes of public engagement; notice and a consultation framework.¹⁴⁴ Despite the delay in the creation of legislation furthering the Constitutional provision for public participation, the State is still bound to its Constitutional obligations.

In a letter directed at the Compliance Review and Mediation Unit of the African Development Bank, the chairperson of FOLT stated that the organisation's knowledge of the project was through academic researchers and not the Kenyan or Ethiopian governments.¹⁴⁵ While requesting for a mediation with the African Development Bank, FOLT insisted on a public consultation on the communities in Northern Kenya as none had been conducted with regards to the project.¹⁴⁶ The EIA conducted by the Ethiopian government included reports of public consultation only on the Ethiopian side.¹⁴⁷

Among the findings of the report by the AfDB is that the stakeholder communities of Northern Kenya had little knowledge on the project.¹⁴⁸ Many expressed their fears in a manner termed as 'misinformed' by the consultants.¹⁴⁹ However, this displays the lack of information given to the people. The fact that news on the projects was received through media outlets and civil rights groups campaigns makes it evident that the state had no active role in conveying the state

¹⁴¹ International Association for Public Participation, 'Spectrum of Public Participation'.

¹⁴² International Association for Public Participation, 'Spectrum of Public Participation'.

¹⁴³ Public Participation Bill (2018)

¹⁴⁴ Public Participation Bill (2018)

¹⁴⁵ International Rivers, 'Kenyan Request for Investigation of AfDB and Gibe 3'

<https://www.internationalrivers.org/resources/kenyan-request-for-investigation-of-afdb-gibe-iii-dam-3146> on February 5, 2009.

¹⁴⁶ Independent Review Mechanism Compliance Review and Mediation Unit, 'Problem Solving Report', 78

¹⁴⁷ EEPKO, 'Gibe III Hydroelectric Project Environmental and Social Impact Assessment: Additional Study on Downstream Impact', 158.

¹⁴⁸ Independent Review Mechanism Compliance Review and Mediation Unit, 'Problem Solving Report', 78

¹⁴⁹ Criticism on the Findings and Recommendations of the Public Consultation Report

of affairs to the people. The state therefore did not achieve the weakest level of public participation on the spectrum that is information-giving.

The World Heritage Committee over the years has recorded the progress of its attempts to get the states of Kenya and Ethiopia to collaborate on the protection of Lake Turkana National Parks as a World Heritage Site. The documents include state reports on bilateral talks between the two states. However, it is only under due diligence does one come across this information. It is not readily available to the general public in Kenya. The state has not taken any measures to ensure that the citizens are aware of the progress of the talks. This shows that even after the completion of the project the state is not pressed to ensure public participation on the matter.

3.3 IN WHAT WAY SHALL THE RIGHTS TO A CLEAN AND HEALTHY ENVIRONMENT BE AFFECTED BY THE VIGILANCE, OR LACK THEREOF, IN EXERCISING ITS FIDUCIARY DUTY PRIOR TO THE CONSTRUCTION OF GIBE III DAM?

In 2018, the WHC decided to inscribe Lake Turkana National Parks on the List of World Heritage in Danger upon recognising a number of factors threatening the natural existence of Lake Turkana.¹⁵⁰ The committee reported that due to a much delayed Strategic Environmental Assessment(SEA) as well as the Kuraz Sugar Development Project that was undertaken in the Omo basin without an EIA posed a threat to the lake.¹⁵¹ It is important to note that these developments are all after the completion of the project, particularly the delayed SEA.

The rationale of conducting an EIA before the initiation of a project is to avoid or mitigate the negative implications of projects. The state ought to have engaged the Ethiopian government prior to the start of the project in order to ascertain its impact on Kenya's Lake Turkana. The Gibe III dam will affect both the quality and quantity of the water downstream.¹⁵² The decrease in the lake's water level will result in a large scale retreat of much of Lake Turkana, with harshly rising saline conditions which would lead to a decline of aquatic ecosystems – including fish stocks, the loss of potable water for human populations and livestock, and the obliteration of important commercial interests (fishery, tourism, etc.) at the lake.¹⁵³

¹⁵⁰ The World Heritage Committee, 42 COM 7B.92, Lake Turkana National Parks (Kenya)

¹⁵¹ The World Heritage Committee, 42 COM 7B.92, Lake Turkana National Parks (Kenya)

¹⁵² Hodbod J, Stevenson E.G.J, Akall G, Akuja T, Angelei I, Alemu E B, Buffavand L, Derbyshire S, Eulenberger I, Gownaris N, Kamski B, Kurewa A, Lokuruka M, Mulugeta M.F, Okenwa D, Rodgers C, Tebbs E, 'Social-ecological change in the Omo-Turkana basin: A synthesis of current developments', *Ambio Vol. 48*, Issue 10, 2019, 1099-1015

¹⁵³ Africa Resources Working Group, 'A commentary on the environmental, socioeconomic and human rights impacts of the proposed Gibe III Dam in the lower Omo river basin of Ethiopia', 4

The EIA by the Ethiopian government states artificial flooding as benefit of the dam, however, the interference of the natural flooding system is likely to have a negative impact on the fish population in Lake Turkana, which may in turn affect the stability of the ecosystem, the livelihoods of the local fishing communities and the floodplains, which support herbivore species.¹⁵⁴ The livelihoods of the stakeholder communities dependent on lake Turkana shall be affected due to the effect on fish stocks and potable value of the water for livestock. Salinity shall also impede the right to water for the inhabitants of the arid area.

CHAPTER 4

FINDINGS

The state has several obligations under article 69 of the Constitution of Kenya. These obligations act as blueprints for what is generally required of the state, while the specific acts in fulfilment of these obligations are subject to the state's best judgement and administrative control. As the holder of all natural resources on behalf of its citizenry, the state ought to ensure the sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of resources.¹⁵⁵

When word on the construction of the Gibe III dam caught wind, civil rights groups such as the FOLT exhibited no hesitation in voicing their concerns over the implications of the project. However, the state did not conduct any independent EIA in order to inform any further action on its part. Instead, a report commissioned by the AfDB indicated that Kenya was already expressing interest on purchasing electricity from the project once completed.¹⁵⁶

The project was first mentioned in the National Assembly in 2010, when a member requested for ministerial statement on the agreements between Kenya and Ethiopia, as well as an inquiry on whether an EIA was conducted by the state. The following year, motions were raised still on this matter. In February, there were talks on a joint commission with Ethiopia to facilitate basin projects in lake Turkana.¹⁵⁷ The Ministry of Water and Irrigation was questioned on what urgent measures it had taken to halt the damming of the river, retaliating with the response that it had no control over Ethiopia's conduct.¹⁵⁸ In May of the same year, another motion was raised

¹⁵⁴ The World Heritage Committee ,42 COM 7B.92, Lake Turkana National Parks (Kenya)

¹⁵⁵ Article 69, *Constitution of Kenya* (2010)

¹⁵⁶ Independent Review Mechanism Compliance Review and Mediation Unit, '*Problem Solving Report*',78

¹⁵⁷ National Assembly Hansard Report, 15 February 2011, 19.

¹⁵⁸ National Assembly Hansard Report, 15 February 2011, 19.

invoking a response on the progress of the consultation between Ethiopia and Kenya.¹⁵⁹ The state was well aware of the project but very few motions were raised and entertained in the National Assembly proceedings. It took listing Lake Turkana as an endangered site and meetings facilitated by the WHC for Kenya and Ethiopia to put a joint SEA on the agenda, despite it being undone to date as both countries have not raised funding for the same.

The state is also required to ensure public participation in environmental matters.¹⁶⁰ The Aarhus convention on public participation highlights three pillars for the achievement of the same. These are access to information, participation in decision-making and access to justice on environmental matters.¹⁶¹ A report commissioned by the AfDB upon the request of the FOLT revealed that many of the dependents of the lake Turkana basin on the Kenyan side had little and misguided information on the construction of the dam.¹⁶² FOLT raised as an issue in its suit against the state; the infringement of the right to information in the form of the government failing to make public documents on its communications and agreement with Ethiopia over the project.¹⁶³

The failure by the state to adequately inform the public of its actions regarding the project raise obvious doubts as to its diligence in responding to the apparent concerns. The findings are discussed in the following chapter.

CHAPTER 5

DISCUSSION

By virtue of article 69 of the Constitution, it is the obligation of the state to ensure the management, conservation and sustainable utilisation of the environment and natural resources through all necessary measures.¹⁶⁴ The case study of this research embarked on a journey of determining the extents to which the state went in order to fulfil its obligation with regards to the protection of Lake Turkana in light of the Gilge Gibe III dam project in Ethiopia.

As earlier stated, transboundary resources are best managed under a cooperative framework between the countries sharing the resources. Such cooperation promises the achievement of regional public good. Public goods are non-excludable and non-rivalled; that is, no one can be

¹⁵⁹ National Assembly Hansard Report, 25 May 2011, 3.

¹⁶⁰ Article 69, *Constitution of Kenya* (2010)

¹⁶¹ The European Union and the Aarhus Convention, < <https://ec.europa.eu/environment/aarhus/> on 13,3, 2020.

¹⁶² Independent Review Mechanism Compliance Review and Mediation Unit, ‘*Problem Solving Report*’,78

¹⁶³ FOLT v AG and 2 others, eKLR

¹⁶⁴ Article 69, *Constitution of Kenya* (2010)

excluded from it and the consumption by one party does not reduce its availability for use by others.¹⁶⁵ States should exercise vigilance in identifying impending environmental threats and take necessary measures to avoid or mitigate the same. Even with the international principle of cooperation and good neighbourliness, states ought to be sharp-eyed and dedicated to securing and safeguarding their interests as that of their citizenry.

Prior to the construction of the dam, the State of Kenya did not conduct a comprehensive EIA in order to predict the effects of the dam on the lake. The Ethiopian government conducted one two years after the project began, beating the purpose of an EIA. It is difficult to determine the environmental information relied on by Kenya in its consultation with the Ethiopian government given that the EIA is accused of fabrication in such a manner that benefits the completion of the project.¹⁶⁶ Furthermore, the consultations between the two states were furthered with the involvement of the WHC in efforts to preserve the Lake Turkana National Parks. The consultations between the two countries through the JMC only focuses on the improvement of trade between the two and does not address the environmental concerns raised by the project, evident in the resolve to deepen cooperation in trade, avoidance of double taxation, education, tourism, public health, fisheries and on different legal matters.¹⁶⁷

Public participation is barely enforced as the consultations between the two governments are not available to the general public. Even the Memorandum of Understanding on the transmission of electricity to Kenya is not publicly available. This raises doubt as to the interests furthered by the state and whether they are in the interest of the citizenry.

The state was already willing to purchase electricity from Ethiopia even before conducting a study on the effects of the project. The rationale of the state in such a move would be the promotion of economic development and the quality of life through increasing the access to electricity. However, the question raised is whether the move adheres to the concept of sustainable development. It would seem that the economic pillar offsets the environmental and social pillars. However, this may not be the case due to the fact that the economic viability

¹⁶⁵ Hensengerth O, 'Transboundary river cooperation and the public good: The case of the Mekong River', *Contemporary Southeast Asia*, Vol. 31, No. 2, 2009, 327.

¹⁶⁶ Africa Resources Working Group, 'A Commentary on the environmental, socioeconomic and human rights impacts of the proposed Gibe III dam in the lower Omo river basin of Ethiopia', 4.

¹⁶⁷ 1st Technical Experts Review of the Kenya-Ethiopia Joint Ministerial Commission, <https://www.kenyaembassyaddis.org/2012/05/1st-joint-technical-experts-review-of-the-kenya-ethiopia-joint-ministerial-commission/>

looked at beyond the face-value does not accrue more benefit than detriment to the environmental and social aspects.

The effects of the project are far more reaching on the stakeholders than the benefits of the purchased electricity. In 2018, Ethiopia reported to the WHC the stable water levels except for seasonal changes, however information delivered showed an overall rapid waning in water levels since January 2015 when the impounding of the Gibe III reservoir commenced, and that seasonal fluctuation patterns have been heavily disrupted.¹⁶⁸

CHAPTER 6

CONCLUSION AND RECOMMENDATIONS

In conclusion, the efforts of the state prior to the construction and even after the completion of the project were not sufficient to fulfil its obligation to its citizenry. The effect is the threat to the access to a clean and healthy environment to which the stakeholder communities are entitled.

With the Aarhus Convention Principles on public participation as a guide, this study recommends that the State discloses the Memorandum of Agreement and any other communications with the government of Ethiopia over the construction of the dam. This is in respect of the right to access information on environmental matters. Moving forward, the State should ensure public participation in decision-making on the future of the lake's basin by putting in mechanisms to enable this.

This study also recommends that the SEA proposed by the WHC is completed in order to identify the specific effects of the dam on the Turkana basin and compile measures to mitigate the same as it is too late to avoid them since the dam is already complete. Kenya should also complete the independent EIA proposed in the National Assembly in order to ascertain the effects of the dam's construction on Lake Turkana's basin.

It is also recommended that a formal agreement is entered into by the two states in order to govern any future undertakings on the river Omo such as the prospective Gibe IV and V as well as the Kuraz Sugar Scheme. The reason for half-hearted consultations under the facilitation of the WHC is due to the lack of a binding agreement between Kenya and Ethiopia. The existence of agreements over transboundary waters in Africa has long been a preserve of

¹⁶⁸ Analysis and conclusion by World Heritage Centre and the Advisory Bodies in 2018, World Heritage Committee, <https://whc.unesco.org/en/soc/3676>.

larger basins such as the Nile. However, a model similar to the La Plata Treaty would be beneficial to the Lake Turkana basin. Focus should be on the model's promotion of cooperation and development. The treaty requires the cooperation of states before the commencement of projects and allows for the participation of interest groups as well as individuals in decision-making. The transboundary water management model of the La Plata River Basin Treaty is ideal as it not only facilitates cooperation between the states but it also allows for the participation of all stakeholders. The existence of such a framework would enable the Kenyan government to fulfil its environmental obligation to its citizenry as well as discussing development and benefit-sharing with Ethiopia.

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