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ARTICLE

FINANCING ENVIRONMENTAL MANAGEMENT IN KENYA'S EXTRACTIVE INDUSTRY: THE PLACE OF THE POLLUTER PAYS PRINCIPLE

G Omedo, K Muigua and R Mulwa

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1

INTRODUCTION

The main aim of the Polluter Pays Principle (PPP) is to provide for the would-be polluter(s) to bear the full expenses of undertaking potentially polluting activities. This is done through measures that promote the allocation of adequate costs of pollution prevention and control for more environmentally sensitive processes, beyond their private costs of production.¹ It is widely recognized² that for the PPP to be effective, it needs to be effectively regulated and robustly promoted. Literature finds the PPP to have great potential to strengthen the economic, ethical and legal compliance mechanisms,³ leading to good environmental management practices.⁴ The polluter pays principle also avails the much-needed resources for environmental management, reducing the pressure on the available public finance,⁵ while encouraging research and innovation within the private sector for pollution management. A shared approach to managing pollution between States and private sector players enhances sustainable development.

In Kenya, the polluter pays principle is defined in the framework Environmental Management and

Coordination Act of (Amended) 2015,⁶ as ‘the cost of cleaning up any element of the environment damaged by pollution, compensating victims of pollution, cost of beneficial uses lost as a result of an act of pollution and other costs that are connected with or incidental to the foregoing, and is to be paid or borne by the person convicted of pollution’⁷. But while these provisions propose that the convicted polluter is to squarely bear these costs thereof, there is little in terms of the demonstrable evidence of how this is implemented.

Globally, the PPP advances four key components required for effective regulation including the need for internalization of costs by the would-be polluter; the importance of proper identification of the cost-bearer; the definition of the means of internalization of pollution costs; and the delineation of the overall bounds within which such internalization has to take place.⁸ The PPP was originally articulated by the OECD in 1975 as one of the guiding principles of international economic aspects of environmental policies,⁹ and gained prominence during the global conference on sustainable development of 1992 in Rio de Janeiro, where it was adopted as the 16th principle for Sustainable Development. Consequently, national authorities were to ‘endeavour to promote the internalization of environmental costs and the use of economic instruments, considering the approach that

1 Priscilla Schwartz, ‘The Polluter-Pays Principle’ in M Fitzmaurice, D M Ong and P Merkouris (eds), *Research Handbook on International Environmental Law* (Edward Elgar 2010) 243-61.

2 Organisation for Economic Co-Operation and Development (OECD), ‘The Polluter Pays Principle: OECD Analyses and Recommendations’ (1992) <[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=OCDE/GD\(92\)81&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=OCDE/GD(92)81&docLanguage=En)>.

3 *ibid*.

4 Mizan R Khan, ‘Polluter-Pays-Principle: The Cardinal Instrument For Addressing Climate Change’ (2015) 4(3) *Laws* 638-653.

5 Alan Boyle, ‘Making the Polluter Pay? Alternatives to State Responsibility in the Allocation of Transboundary Environmental Cost’ in F Franzioni and T Scovazzi (eds), *International Responsibility for Environmental Harm* (Graham & Trotman 1991) 363.

6 Refers to the Preliminary Section of the EMCA 1999, Interpretation, where the polluter pays principle is defined. The next reference to the polluter pays principle is in Part II - General Principles, Section 3 (5) (e) where the High Court shall be guided by the principles of sustainable development, PPP included. Not much is available to guide how the interpretation of the PPP can be used to enforce good environmental practice.

7 Environmental Management and Coordination Act 2015.

8 OECD (n 2).

9 Edwin Woerdman and others, ‘Emissions Trading and the Polluter-Pays Principle: Do Polluters Pay under Grandfathering?’ (2008) 4(2) *Review of Law & Economics* 565-590; OECD, *The Polluter Pays Principle: Definition, Analysis, Implementation* (OECD 1975).

the polluter should, in principle, bear the cost of pollution, with regard to the public interest and without distorting international trade and investment'.¹⁰ Because of this, many governments including Kenya integrated this principle, among the other soft-law principles within the legal framework enacted for environmental management.

However, many governments generally implement the PPP through the creative blend of both command and control and economic incentive instruments, such as market-based instruments.¹¹ For both command and control and economic instruments to work effectively, there needs to exist an effective regulatory system in relation to four important aspects. These are the rule of law, effective governmental authority, an effective and consistent fiscal system, and clear and consistent property rights.¹² For the purpose of this article, we analyse the place of the polluter pays principle within Kenya's robust laws, amidst the growing environmental challenges associated with a growing extractives industry portfolio in Kenya. The article reviews the PPP's implementation through a comprehensive review of the country's regulatory regime and some of the economic incentive/disincentive strategies applied for pollution management. The article is premised on the understanding that while Kenyans have legitimate expectations to benefit fully from the wide array of extractives resources that have been discovered recently (titanium, gold, oil and gas, etc), they equally deserve to be protected from the negative environmental impacts that are likely to result from any unsustainable

extraction. Hence, the effective application of the PPP is an important avenue of realizing this across the mining value chains, especially during the costly stages of mine closure and decommissioning requiring mine rehabilitation and restoration.

The main objective of this article is to critically analyse the implementation of the polluter pays principle in Kenya. To achieve this objective, a qualitative research design was adopted. This was achieved through a set of research questions covering each of the four categories for reviewing baseline legal and administrative conditions set in Kenya's legal edifice: (1) the rule of law; (2) efficient and effective property rights; (3) fiscal systems; and (4) effective governmental authority. To answer the research questions, data collection strategies involved rigorous content analysis of the relevant legal documents (laws, statutes, regulations etc.) and administration of an interview schedule to a carefully selected sample of respondents. The respondents were divided into four categories which included government agents, private sector players in the extractive industry, research and academic agents, and civil society representatives.

2

ENVIRONMENTAL MANAGEMENT IN THE EXTRACTIVE RESOURCE INDUSTRY

The main extractive resources in Kenya are minerals and petroleum (oil and gas) and these have a host of environmental problems associated with their exploitation, extraction and processing.¹³ Such

10 Jorge E Vinuales, *The Rio Declaration on Environment and Development* (Oxford University Press 2015).

11 Ondřej Vácha, 'The Polluter-Pays Principle in OECD Recommendations and its Application in International and EC/EU Law' [2011] 2 (Czech Society of International Law) *Czech Yearbook of Public & Private International Law* 57-67.

12 United Nations Environment Programme (UNEP), 'Training Resource Manual: The Use Of Economic Instruments For Environmental And Natural Resource Management' (2009) <<https://www.unpei.org/sites/default/files/PDF/Training-Resource-Manual-DEPI-ETB-DTIE.pdf>>.

13 Philip Otieno, Interview with Obadiah Mungai, Chief Economist, NEMA, 'The Polluter Pays Principle in Kenya's Extractive Industry' (NEMA Offices, Nairobi, 15 February 2018).

environmental problems include; effects on ambient air, soil, landscape, vegetation, habitats, and water.¹⁴ The environmental and social impact assessment report for the titanium mining project in Kwale Kenya enumerates various environmental impacts such as de-vegetation in the mine area expected to 'produce a significant change in the' flora and fauna 'species' population, 'including impacts on species diversity and loss of special habitats such as those used for breeding, resting, food, or migratory sites'; mining activities at the primary plant requires 'a large volume of water and electrical power'.¹⁵ This can lead to over abstraction of ground water and a general decline of environmental reserve flows if streams and rivers are diverted or dammed.¹⁶ Indeed, the downstream community at the confluence of River Mukurumudzi and the Indian Ocean reported a near total water loss due to damming of the river for titanium mining and sugar production in Kwale county which might have long term effects on the productivity of the mangroves.¹⁷ Other challenges noted in the environmental impact assessment study include the need to put in place measures of 'handling of suspended solids and dissolved heavy metal substances' which may seep into water courses; and dust leading to 'suspended particulate matter in the air' with their 'associated environmental health risks to the workers and' neighbouring 'communities'.

Other challenges that were expected during the environmental impact assessment included problems linked to tailings disposal dams especially the fear of

leakage from such sludge dams, 'risk of seepage, leaching or breakage of tailings' dams, with the dust erosion from dried tailings during drought exposing works and 'people living in' the neighbourhoods to 'potentially harmful dust'.¹⁸ Other environmental effects related to supportive infrastructural development may include acid rain and greenhouses due to air pollution from diesel-powered plants to generate electricity.¹⁹ These challenges are not just for the mining sector, but extraction of oil and gas is equally associated with several negative environmental consequences.²⁰

Environmental protection is therefore a critical factor across the entire mining value chain, and Kenya's legal framework does well in anticipating the need for a robust management regime.²¹ Of critical importance is the subject of financing environmental protection, where innovative tools such as the polluter pays principle would provide the much-needed resources to complement the scarce public resources available through the public finance management avenues.

2.1. Review of the Regulatory Environment for Polluter Pays Principle in Kenya

Kenya's principal environmental management law is the Environmental Management and Coordination Act (Amended) 2015.²² The EMCA's robust environmental management ideals are to be realized

14 Interviews with Edward Wabwoto, Legal Officer, NEMA 'The Polluter Pays Principle in Kenya's Extractive Industry' (Nairobi, 28 March, 15 August, 2018 & Mombasa, Jan 2019).

15 Base Titanium Ltd, 'Kwale Mineral Sands Project: Environmental and Social Impact Assessment Summary Report' (Base Titanium Ltd 2012).

16 *ibid.*

17 Interview with Local Community Focused Group Discussion (Mukurumudzi in Kwale County, 10 March, 2018).

18 JOZ Abuodha, 'Environmental Impact Assessment of the Proposed Titanium Mining Project in Kwale District, Kenya' (2002) 20(3) *Marine Georesources & Geotechnology* 199-207.

19 *ibid.*

20 Elanders Novum, *Guidelines for the Review of Environmental Impact Assessments* (SIDA Environmental Policy Division 2003).

21 Interview with Faith Pesa, Ministry of Mining, 'The Polluter Pays Principle in Kenya's Extractive Industry' (Nairobi, 19 April 2018).

22 Omedo (n 17).

through the over 13 regulations²³ that have since been enacted.²⁴ All these define the various environmental management standards as well as the accompanying offenses for non-compliance, including the prescribed penalties, deemed appropriate for enforcing best practices in environmental management, and for discouraging shirking from these responsibilities.²⁵ These are the direct control measures which impose an absolute obligation for individuals and entities to comply with process and product standards, as well as fees or charges fixed by law at national or county levels for potentially non-compliant entities to follow.²⁶ By and large, the prescribed standards define the legally enforceable thresholds, whereby the accompanying regulatory function limits directly or indirectly the quantity of residuals that each actor must generate or

that must be generated from each source. This regulatory limitation is based on the level of control that can be achieved-either in reliance of an appropriate technology, setting environmental quality targets, or setting aggregate limits on pollution loading.²⁷ The EMCA (Amended) 2015 and its plethora of regulations and guidelines have embedded polluter pays principle provisions, through proscribed penalties for non-adherence of the set standards, as well as offences for breaches of the law.²⁸ However, these penalties and offences can only be levied by the courts, once convictions have been secured after due process.

Table 1 below shows some of the standards stipulated in the law as well as the proscribed fees for non-adherence to the law.

23 Regulations that have been enacted to support EMCA include the Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing Regulation 2016; the Environmental Management and Coordination (Water Quality) Regulations 2006; the Wetlands Regulations 2009; the Waste Management Regulations 2006; the Revised Environmental Impact Assessment Regulations 2003; the Noise and Excessive Vibration Pollution Control Regulations 2009; the Toxic and Hazardous Industrial Chemicals and Materials Management Regulations 2013; the Controlled Substances Regulations 2007; the Prevention of Pollution in Coastal Zone and Other Segments of the Environment regulation, 2003; the Air Quality Regulations, 2014; the Waste Tyre Management Regulations 2013 among a host of other regulations that are still in draft form.

24 Interview with Oceanic Sakwa, Compliance Officer, NEMA, 'The Polluter Pays Principle in Kenya's Extractive Industry' (Mombasa, 30 Jan, 2018).

25 Interview with Zephaniah Ouma, NEMA, 'The Polluter Pays Principle in Kenya's Extractive Industry' (Naivasha, 28 March 2018).

26 Interview with Peter Odhengo, National Treasury, 'Performance Deposit Bonds in Kenya's Extractive Industry' (Nairobi, 20 April 2018).

27 Interview with Joyce Imende, Compliance Officer, NEMA, 'The Polluter Pays Principle in Kenya's Extractive Industry' (Nairobi, August 2018).

28 Focus Group Discussions with EGP Project Technical Committee, 'The Polluter Pays Principle in Kenya's Extractive Industry' (Naivasha, 28 March 2018).

Table: PPP Tools: Some Penalties as Proscribed in various Regulations for Breaches in established Standards for Environmental Management (Waste Management, Noise and Vibration Standards, Air Quality and Water Quality

Standards and Charges	Acts and Regulations	The standards and charges set	Applicable Penalty Fees
1. Waste Management Standards	The Environmental Management and Co-Ordination (Waste Management) Regulations 2006	Provide standards for the transportation and disposal of industrial waste, toxic waste, pesticides, biomedical waste, and radioactive waste. A license is required for producing and transporting these types of waste. A waste disposal site should be licensed and operate in an environmentally sound manner	Upon conviction, to imprisonment for a term of not more than eighteen months or to a fine of not more than three hundred and fifty thousand shillings (3500 USD) or to both such fine and imprisonment
2. Noise and Vibration Standards	Environmental Management and Coordination (<i>Noise and Excessive Vibration Pollution</i>) (<i>Control</i>) Regulations, 2009	Provides maximum permissible noise levels for construction sites, maximum permissible noise levels for mines and quarries. It also provides for application for licenses to emit noise and vibrations in excess of permissible levels and associated fee	A fine not exceeding more than three hundred and fifty thousand shillings (3500 USD) or to imprisonment for a term not exceeding eighteen months or to both.
3. Water Quality Standards	Water Quality Regulations of 2006	Water quality standards for discharging effluents into the external environment and abstraction of water resources for different categories of water users	Any person who contravenes any of these Regulations commits an offence and shall be liable on conviction to a fine not exceeding five hundred thousand shillings (5000 USD) .
4. Air Quality Standards	Air Quality Regulations of 2014	Emission limits for various areas and facilities have been set, with a total of 12 Ambient Air Quality Tolerance Limits for Industrial, Residential and Controlled areas.	A penalty of ten thousand Kenya shillings (100 USD) for every parameter not being complied with, per day, until such person demonstrates full compliance with the relevant standard related to such parameter.

Source: Study Findings

As demonstrated in Table 1 above, these penalties are rather low, as they range from a paltry 350,000 KES (equivalent to 3500 USD) to 500,000 KES (equivalent to 5000 USD) which in the view of many respondents is not a sufficient disincentive for firms or individuals not to pollute. It is noteworthy to add here that the law does proscribe the penalties in both financial terms and jail sentence, which is a blend of both 'command and control'.²⁹ Although the financial amounts stipulated across the various standards are low, especially for a large conglomerate operating in Kenya within the extractives sector, the additional threat of a jail-term for the directors of the companies is considered to be a more significant threat that would realize enforcement of the required environmental standards of the law.³⁰ The overall implication of this situation is that, without the additional 'sting' of a jail term, the low amounts of the stipulated fines, fees and penalties for non-adherence to the set environmental standards demonstrate a weakening PPP culture in Kenya's legal framework.³¹

On their own, the fines, fees, and the financial penalties tied to the environmental standards encapsulated in the myriad of regulations enacted to breathe life into Kenya's EMCA Act (Amended) 2015 are not considered to be effective for environmental management in the extractive sector. Only the use of restoration orders embedded in the EMCA (Amended) 2015 whereby the law envisages the convicted polluter to subsequently fully meet the costs of the environmental restoration provides an array of hope for realizing the PPP's ideals.

However, the article finds that restoration orders have not been fully utilized in Kenya, and the lack of strong enforcement due to a variety of factors³² has impacted the success levels of their application. In EMCA's (Amended) 2015 Section 146 (1), (2), (4) and (5), the

court has the powers to request the forfeiture of the polluting 'substance, motor vehicle, equipment and appliance or other things for disposal, as well as ordering the costs of disposal to be borne by the convicted person, and that the person further meets the restoration costs to the environment through the restoration orders'.³³ Many companies operating in Kenya fear such restoration orders as if effectively enforced by the regulatory authorities, would result in expensive ventures whereby potentially polluting companies would be considerably impacted financially.

This article finds that the proper use of restoration orders would enhance the full realization of the PPP in Kenya, through the existing legal avenues.

3

THE ROLE OF THE COURTS IN THE ENFORCEMENT OF ENVIRONMENTAL MATTERS

An effective regulatory function, guided by public education, strong enforcement and compliance is only one side of realizing the ideals in the polluter pays principle. The courts equally play an importance role as well. It is instructive to note here that Kenya's Constitution 2010 removed the hitherto prohibitive locus standi requirement allowing for any would-be litigant to sue on environmental matters in the interests of public good.³⁴ While this provision is without doubt transformative, as it reverses the prior jurisprudence that had been set by Kenya Times,³⁵ whereby opposition to construct Kenya's then tallest skyscraper in the middle of Nairobi's largest open space

²⁹ Omedo (n 24).

³⁰ *ibid*.

³¹ Interview with Joanne Vwamu, UNDP, 'Performance Deposit Bonds in Kenya's Extractive Industry' (United Nations Office in Nairobi, 11 May 2018).

³² Some of the factors are varied, including lack of awareness, weak enforcement capacity, long and winding court processes, and jurisprudence from the courts that is inimical to environmental justice and accountability deficits among many other factors.

³³ Environmental Management and Coordination Act 2012, s 146.

³⁴ The Constitution of Kenya 2010, art 70.

³⁵ Kenya Times v Wangari Maathai Civil Case 5403 of 1989 (High Court of Kenya at Nairobi, 11 December 1989) <<http://kenyalaw.org/caselaw/cases/view/53011>>.

Uhuru Park was dismissed by the courts due to a failure by the proponent to prove her locus standi in the matter.

Unfortunately, even with such progressive edicts in Kenya's Constitution, most of the respondents interviewed for this article felt that Kenyan courts still dispense of court cases touching on contentious environmental matters based largely on the influence of private or powerful individuals' interests.³⁶ The respondents further aver that the environmental issues in the current regulatory framework are not sufficiently covered and expose the country to environmental harm especially in the sensitive area of mine decommissioning where mine rehabilitation and restoration is an emerging area of interest.³⁷ In their view, the infusion of taxes, penalties, fees and charges within Kenya's legislations and their regulations is aimed not to realize the polluter pays principle aspirations, but rather as a source of revenue generation for cash-strapped State institutions through duplicitous and elaborate permits, license fees, fines and charges.³⁸ As a result, we find multiple related fees embedded in separate legislations, all serving to make the ease of doing business for Kenya even more difficult.³⁹

4

REVIEW OF ECONOMIC STRATEGIES FOR THE POLLUTER PAYS PRINCIPLE IN KENYA

As highlighted previously, the effective implementation of the PPP relies on four key factors, which are: (1) the rule of law; (2) effective government authority; (3) fiscal systems in place; and (4) a functional property rights administration regime. Realization of the PPP requires a creative application of economic principles which covers internalizations, incentives, initiatives and innovations. In internalization, all economic activity which impinges upon the environment should be fully accounted for in the economic pricing system of the goods and services produced by such activity. It starts with incorporation of the cost of prevention, reduction and control in planning, processing and production and is complete when the polluter takes responsibility for all the costs arising from pollution. The tools and instruments for enforcing internalization are mainly charges, taxes, fees, geared to realize burden sharing between the State and the private sector actors.

In the review of the prevalent conditions governing the application of polluter pays principle in Kenya, the article reviewed the following three main factors that affect institutionalization of the PPP:

³⁶ Omedo (n 17).

³⁷ Interview with Moses Njeru of the Kenya Chamber of Mines, 'Performance Deposit Bonds in Kenya's Extractive Industry' (Naivasha, 27 March 2018).

³⁸ Interview with Wambua Kituku of Amkeni Wakenya, 'Performance Deposit Bonds in Kenya's Extractive Industry' (United Nations Office in Nairobi, 24 August 2018).

³⁹ Ashley Stedman and Kenneth P Green, 'Annual Survey of Mining Companies: 2017' (Fraser Institute 2018) <<https://www.fraserinstitute.org/studies/annual-survey-of-mining-companies-2017>>.

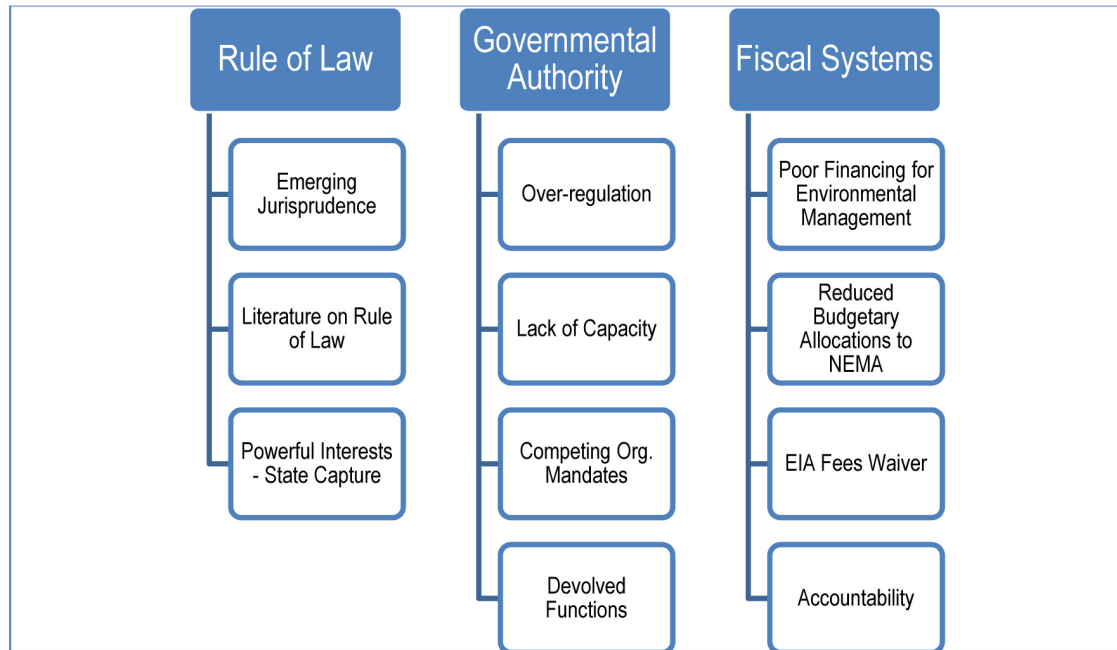


Figure 1: Diagrammatic illustration of the elements of successful application of polluter pays principle in the extractive industry (Source: Collated field-work data)

4.1. the Rule of Law and the Polluter Pays Principle Implementation

An analysis of the jurisprudence emerging from Kenya's courts on environmental matters around the extractive area presents a mixed picture. Several transcendental decisions have been taken, which affirm the sustainable development principle enshrined in Article 9 of Kenya's progressive Constitution.⁴⁰ However, the majority of the respondents interviewed for this article were of the view that many decisions taken by Kenyan courts have been motivated by the need to protect extractive companies, under the

supposed influence from powerful interests in the business and political fields. The adherence to principles of the rule of law in environmental matters requires that legal decisions are taken according to the strict interpretation of the law, and in the public interest, since the environment is an acknowledged public good.⁴¹

An analysis of Kenya's mining cycle finds an emphasis on the environmental impact assessments and the annual environmental audits as the main entry points of environmental protection. The associated environmental management plans are therefore important in ascertaining compliance by the companies

⁴⁰ The Constitution of Kenya 2010, art 9.

⁴¹ Omedo (n 14).

to good environmental practices. At this point, rule of law considerations are broad, and range from regulatory enforcement, observance of fundamental rights, order and security, absence of corruption, limited government powers, to a functional criminal justice system and civil justice.⁴² For environmental compliance and enforcement, 'rule of law' interventions are 'measured by the extent to which agents have confidence in and abide by the rules of society, including the quality of property rights, the police, and the courts'.⁴³ Generally, in terms of rule of law tenets, a project on governance by the World Bank and Transparency International shows that between the years 2000 and 2014, Kenya had negative scores indicating poor governance as far as the rule of law is concerned.

A review of the jurisprudence in Kenya emanating from environmental case law touching on the impartiality and quality of the rulings particularly those that are related to the implementation of the polluter pays principle was undertaken:

In *Rodgers Muema Nzioka*, the plaintiffs sought an injunction to restrain a mining company from carrying out acts of titanium mining in Kwale District. On the grounds that they were not adequately compensated for their lands; they were also concerned about various environmental health problems that would be caused by mining activities, hence desirous that their environmental health be first secured as enshrined in the law. The defendant, *Tiomin Kenya Limited* argued that there was no evidence thus far that there were ill effects from the expected mining of titanium. The court granted the injunction. Relying on the polluter pays principle and sustainable development as provided for in the Environmental Management and Coordination act of 1999 and section 3 (1), (3) and (5) of the same Act.⁴⁴

Friends of Lake Turkana Trust arose out of a memorandum of understanding which the Government of Kenya entered into with the Government of Ethiopia for the purchase of electricity from the Gibe III dam as well as the grid connection between Ethiopia and Kenya. The Gibe III dam is being built on River Omo which flows from Ethiopia into Lake Turkana in Kenya. The petitioner's case was that the Government of Kenya had violated the constitutional rights of the communities around Lake Turkana by executing the said memorandum of understanding with Ethiopia whose long-term effect would endanger the environment around Lake Turkana without having conducted an environmental impact assessment. The government's response was that it had no control over the construction of the Gibe III dam which was being undertaken by the Government of Ethiopia within the territory of Ethiopia which is outside the jurisdiction of the court. The government argued that although the construction of the Gibe III dam could pose environmental challenges for Lake Turkana, 'the court was not the proper forum for their resolution as it had no jurisdiction to rule on the actions of' the Government of Ethiopia.⁴⁵

The court held that the parties before it were all Kenyan entities and that the subject matter concerned the alleged violation of the petitioners fundamental rights under the Constitution of Kenya. The court held that the alleged violations arose in a trans-boundary context and did 'not, on its own, operate to limit access to the court's jurisdiction'. The court granted the Petitioner 'an order of mandamus directed at the Government of Kenya' to make available information on the power purchase agreements it had 'entered into with the Government of Ethiopia'. The court also made an order directing the government of Kenya to 'take steps to ensure that natural resources around Lake Turkana are sustainably managed, utilized and conserved in any engagement' it enters with the Government of

42 'WJP Rule of Law Index® 2016 Report' (World Justice Project 2016) <https://worldjusticeproject.org/sites/default/files/documents/RoLI_Final-Digital_0.pdf>.

43 *Principles Of Environmental Compliance and Enforcement, A Handbook* (2009) <http://www.themisnetwork.eu/uploads/documents/Tools/ince_principles_handbook_eng.pdf> 11,12.

44 *Rodgers Muema Nzioka v Tiomin Kenya Ltd Civil Case No 97 of 2001* (High Court of Kenya at Mombasa, 2001).

45 *Friends of Lake Turkana Trust v The AG & Others Nairobi ELC Suit No 825 of 2012* (2014), para 37.

Ethiopia. As concerns the obligation to undertake an environmental impact assessment study of the project, the court stated that this would involve the Government of Ethiopia and 'Kenyan courts were not the appropriate forum to determine what obligations existed in this regard'.⁴⁶

Peter Makau Musyoka and Others concerned the matter of the award of mining concessionary rights to the Mui Coal Basin Deposits with respect to prospecting for and extraction of coal deposits in the Mui Basin in Kitui County.⁴⁷ In this case, the petitioners sought among other matters to get the court to affirm that there was a breach of or the likely violation or infringement of the right to a clean and healthy environment contrary to Articles 42, 69 and 70 of the Constitution. In addition, they claimed a threat to their right to health contrary to Article 43 from the effects of the coal mining which would also lead to environmental degradation. An additional petition asked the court to declare the failure to seek and obtain an environmental impact assessment as required by Article 69 of the Constitution and section 58 of the EMCA before the grant of the concession rights to render the concession invalid.

The petitioners argued that 'it is incontrovertible that coal mining is a pollutant necessitating very careful and robust environmental regulation and management'.⁴⁸ The petitioners averred that harmful impacts of coal mining through preparation, combustion, waste storage and transport require a robust regime to meaningfully mitigate the environmental impacts. In its wisdom however, the Court disagreed with the petitioners on these points, noting that before issuing conservatory orders, harm or threatened harm must first be proved by the petitioners, and hence the claim was yet to ripen since the petitioners did not provide sufficient material to trigger invocation of the precautionary principle and

stop the ongoing exploration. The court made this ruling, noting well that an environment impact assessment was still being undertaken, yet an environmental impact assessment was supposed to precede any actual exploration. The court therefore dismissed the injunctions, and active exploration of coal in the Mui basin is currently ongoing.⁴⁹

Save Lamu concerned a proposal to establish a coal power plant in Lamu County to raise over 1050 MW of electricity.⁵⁰ The community representatives then decided to sue the National Environmental Management Authority (as the 1st Respondent) and Amu Power Company, the company that had successfully won the bid to put up this facility. It is important to note here that this project was one of the main Vision 2030 Blue Print projects envisioned by the Government to deal with the rising energy deficits in Kenya.⁵¹ The grounds for the appeal as advanced by Save Lamu included allegations of poor analysis of alternatives and economic justification for the proposed coal power project, insufficient scoping process without proper public participation as well as contentions that continued activities in an economically sensitive area would lead to adverse effects on the marine environment through the discharge of thermal effluents through the use of a poor and outdated cooling system. Additionally, other grounds included allegations of a flawed environmental impact assessment report characterised by 'omissions, inconsistencies and misrepresentations',⁵² and the alleged failure to include mitigation measures for addressing coal pollution in the environmental impact assessment among other reasons, basically questioning the viability of the project.

In its ruling, the Tribunal noted that as long as proper and sound ESIA's are conducted, coal energy remained a lawful means of energy in Kenya and could realize Kenya's sustainable development aspirations. On the

⁴⁶ *ibid* para 137.

⁴⁷ *Peter Makau Musyoka & others (Suing on their own behalf and on behalf of the Mui Coal Basin Local Community) v Permanent Secretary Ministry of Energy & others* [2014] eKLR, Constitutional Petition 305 of 2012, High Court of Kenya, para 37.

⁴⁸ *ibid*.

⁴⁹ *ibid* para 37.

⁵⁰ *Save Lamu & others v National Environmental Management Authority (NEMA) & another* [2019] eKLR, National Environmental Tribunal, 26th June 2019, para 4.

⁵¹ Government of Kenya, 'Second Medium-Term Plan 2013-2017' Kenya Vision 2030.

⁵² *ibid* para 4.

process of obtaining the environmental impact assessment, the court deliberated extensively on the adequacy of the public participation in the environmental impact assessment process, and found that 'wide public participation was undertaken during the scoping stage of the environmental impact assessment process'.⁵³ The court however found that these meetings were only of introductory nature value, and that even the experts undertaking the environmental impact assessment were awaiting more specialist studies especially of the coal plants to the marine environment. The courts found the project proponent to have relied only on the 'information obtained prior to the environmental impact assessment study as the basis for justifying the environmental impact assessment study',⁵⁴ and that widespread public consultation on the foreseen impacts of the plant did not occur as expected by Section 17 of the Environmental Impact Assessment Regulation.

To the acclaim of many environmental crusaders, the finding by the court that 'lack of accurate information cannot be a basis for proper and effective public participation',⁵⁵ as well as a clear breach of the subsidiarity principle, led to the declaration that public participation in Phase II of the environmental impact assessment study 'was non-existent and in violation of the law'. The environmental regulator was also found to have bungled Phase III, by allowing the proponent to undertake public consultations, not following the guidance on the 30-day public submissions of the memoranda period by advertising in the 4 newspapers on different dates, thereby confusing the public on when the 30 days period would lapse, holding a premature public hearing within the 30-day period, and basically deliberately subjecting the public to conflicting dates and timelines. In the court's view, this was a ploy to hurry the process and lock out members of the public from the process. The court makes the following submission on the public participation failure in this case:

In our view, public participation in an environmental impact assessment study process is the oxygen by which the environmental impact assessment study and the report are given life. In the absence of public participation, the environmental impact assessment study process is a still-born and deprived of life, no matter how voluminous or impressive the presentation and literal content of the environmental impact assessment study report is. In this case, the report was extremely bulky and purported to capture a lot of information. By all accounts, it was an impressive piece of literal work but devoid of public consultation content, in the manner prescribed by the law, thus rendering it ineffective and at best only of academic value.⁵⁶

In the end, the Court annulled the Environmental Impact Assessment License NEMA/ESIA/PSL/3798 issued to Amu Power Company and ordered for a repeat of the environmental impact assessment following the requirement of the environmental impact assessment regulations. NEMA was ordered to fully comply with the regulations during this second fresh environmental impact assessment process.⁵⁷

As demonstrated in the first three cases above, there is clearly a pattern, where courts are timid in upholding the progressive environmental protection edicts available within Kenya's environmental protection laws, regulations and policies. This finding is consistent with that of many stakeholders interviewed for this article. The fourth case (Save Lamu Case) is however a clear win for the principle of Sustainable Development as enshrined in Kenya's law. The court applied fully the available laws, and strictly interpreted them,

⁵³ *ibid* para 43.

⁵⁴ *Save Lamu & others (n 50)* para 45.

⁵⁵ *ibid* para 47.

⁵⁶ *ibid* para 73.

⁵⁷ Tribunal Appeal Net 196 of 2016, Para 153.

including the regulations, and made some transcendental decisions in terms of how environmental impact assessments need to be undertaken, and the thresholds for public participation that would guarantee sustainable extraction. It even referred to the Climate Change Act of 2016, which had not been properly integrated in the flawed environmental impact assessment exercise.

Nevertheless, many respondents interviewed for this article feel that many court decisions on environmental or community matters around extractives continue to be influenced by powerful interests in business and politics, and the subjective bias to facilitate mineral exploitation at the expense of the environment.⁵⁸ The respondents also noted that over 90 per cent of extractive resource industry players operating in Kenya do not abide by existing environmental standards and would easily shirk on their responsibilities to protect the environment if enforcement and compliance is not done by the regulating authority.⁵⁹ The reasons provided for this are wide, including laxity in enforcing compliance by regulators, negligence, weak monitoring, political interference in the sector and a pervasive culture of impunity due to corruption induced aura of invincibility.⁶⁰

4.2. Governmental Authority for the Polluter Pays Principle Implementation

A strong regulator, operating within a clear regulatory regime is a vital indicator of sufficient governmental authority required for a well-functioning PPP regime. A strong regulator ensures that adequate coherent legal frameworks are in place and are used to protect the environment. The findings of this article posit that in Kenya, over-regulation characterized by numerous sectoral laws motivated purely by demands on State

Agencies, Ministries and Departments to increase their revenue generation complicates governmental authority required for the effective enforcement of environmental protection within the extractive industry.⁶¹ Most of the key informants interviewed noted that even with these numerous laws, regulations and policies in place, government institutions were ineffective in monitoring environmental compliance by extractive resource industries in Kenya.⁶² Reasons provided for this were many, especially the lack of capacity due to inadequate staffing, politically motivated decisions, weak technical know-how, turf wars between government agencies, and a general poor monitoring and evaluation culture.⁶³ Others include a lack of clear redress mechanisms in Kenyan courts due to a weakening jurisprudence in environmental matters in Kenya.⁶⁴ This is despite acknowledgement by the respondents that Kenya has a progressive Constitution that enshrines various principles of international environment governance including the polluter pays principle.

Another critical challenge to governmental authority in enforcing adherence to the relevant environmental protection requirements in Kenya's law is the finding that law-making in Kenya is motivated by the demands on State Agencies, Ministries and Departments to raise revenue.⁶⁵ The numerous regulations and laws, some clearly in competition, are interlaced with requirements for licenses, permits, fees, charges and costs. For instance, effluent discharge fees are payable to both the Water Regulatory Authority⁶⁶ and the Environmental Regulatory Authority and with varying discharge standards.⁶⁷ Similarly, both the Wildlife Protection Agency (the Kenya Wildlife Service), Ministry of Mining, and the Environmental Management Authority (NEMA) all require extractive resource investors to deposit environmental protection bonds before the commencement of mining practices

58 Omedo (n 36).

59 Omedo (n14).

60 Omedo (n 24).

61 Omedo (n 14).

62 *ibid.*

63 Omedo (n 28).

64 *ibid.*

65 Omedo (n 36).

66 Water Resources Management Rules 2007.

67 Water Quality Regulations 2006 (Legal notice No. 121).

(exploration and extraction). There is therefore a need for urgent coordination of all these institutions, especially to reduce the pervasive feeling that all these increase the cost of doing business in Kenya, further jeopardizing the effective application of the polluter pays principle for environmental management.⁶⁸

In some instances, government agencies have taken each other to court as a result of overlapping mandates and turf wars which make enforcement of existing legal provisions for environmental management difficult. A good example is the case which pitted the Kenya Forest Service & 2 Others against the National Environmental Management Authority.⁶⁹ In this case, NEMA took the Kenya Forest Services to court for harvesting trees in Mt. Kenya and Aberdares forest ecosystem without conducting an environmental impact assessment as required by the law.⁷⁰ Other government departments, especially County Governments, have publicly clashed with NEMA in relation to the environmental impact assessments and environmental audits that have been done on projects which have been later found to be harmful to the communities and the environment.

In a surprising move, the Attorney General in 2016 moved to court to sue the National Environment Tribunal for stopping the construction of Kenya's signature Standard Gauge Railway infrastructure project through the Nairobi National Park, one of the only wildlife sanctuaries that is found on the outskirts of Nairobi, Kenya's capital city. The cases where NEMA has been taken to court for what stakeholders decry to be irregular issuance of environmental impact assessment certificates especially for major infrastructure projects fronted by the Government such as the

Standard Gauge Railway project,⁷¹ the coal mining project in Mui Basin in Kitui County, the approval of an environmental impact and social assessment for a coal project in Lamu County, as well as the off-shore prospecting for oil and gas within the Indian Ocean are sufficient evidence that the governmental authority on environmental management, may be greatly disempowered.

The application of the polluter pays principle in environmental management in Kenya is endangered by the views of many stakeholders interviewed in the study. They noted that Kenya's mining sector is over-regulated, and by extension already overly expensive.⁷² In fact, the Fraser Institute's Annual Mining Investment Attractiveness Index ranks Kenya second last in the bottom 10 countries, ranked 90 out of 91 countries behind Argentina and alongside Mendoza, Chebut, Mozambique, Bolivia, Venezuela, Romania, China and Nicaragua.⁷³ It is instrumental to note that most of these countries in the bottom 10 have featured prominently within countries with a significant rule of law and democratic accountability deficits.

Effective implementation of the polluter pays principle in Kenya's rubric of environmental and mining laws will rely on consistent, clear and unambiguous legal provisions entrenched in the law.⁷⁴ This article cites the arbitrary decision to abolish environmental impact assessment fees by the Executive through a Presidential Executive Order in 2016 after a series of meetings with private sector partners, even before amending the EMCA statutes which provide the legal basis for the fees as a clear evidence of an authority in disarray. Once the fiat to waive the environmental impact assessment fees was issued by Presidential decree, the

68 Interview with Gregory Kituku, Ministry of Mining, 'The Polluter Pays Principle in Kenya's Extractive Industry' (Naivasha, 28 March 2018).

69 High Court Petition No. 221 (2011).

70 Munene Kamau, 'Nema and KFS Locked in Legal Tussle Over Tree Harvesting in Forest' (Standard Digital 2011) <<https://www.standardmedia.co.ke/article/2000044140/nema-and-kfs-locked-in-legal-tussle-over-tree-harvesting-in-forest>>.

71 Republic v The National Environmental Tribunal and others Miscellaneous Application 82 of 2016 (High Court of Kenya at Nairobi, 2016) <kenyalaw.org/caselaw/cases/view/123610>.

72 Philip Otieno, Interview with Kabaka Mukonyi, Kenya Wildlife Service, 'The Polluter Pays Principle in Kenya's Extractive Industry' (Kwale, 9 March 2018).

73 Ashley Stedman and Kenneth P. Green, 'Annual Survey of Mining Companies: 2017' (Fraser Institute 2018) <<https://www.fraserinstitute.org/studies/annual-survey-of-mining-companies-2017>>.

74 Omedo (n 21).

Environmental Management Authority was tasked to regularize this through supporting amendments to the environmental impact assessment regulations and the EMCA. This is yet to be done, three years later!

4.3. Fiscal Systems for Polluter Pays Principle Implementation

Fiscal systems are instruments that are used by the state to raise revenues, direct expenditures and broadly aim at advancing the social welfare of its citizens. Such instruments may include taxes, subsidies, and budgetary allocations. A review of the various fiscal instruments in relation to environmental protection in the mining industry considering polluter pays principle application in Kenya presents interesting results.

The Government budget is one of the most important economic policy instruments for implementing environmental protection initiatives. It is through the government budgets that funds for environmental

protection are allocated, incentives (both good and perverse) such as subsidies and tax relaxation and tightening are set forth all of which have effects on environmental protection. The budget allocations to NEMA also support the regulator's day to day activities, which includes the inspections and enforcement work. The budget is normally ratified through the passage of annual finance laws.

Without a strong polluter pays principle regime, where investors operating in Kenya will be required to internalize the costs for their pollution, the government will have to fund the environmental protection costs fully. This is through the annual budget policy statements. An analysis of the funds allocated to NEMA over the years shows that the Government has been reducing its allocations to the environmental regulator.⁷⁵ This was not such a major challenge previously, since NEMA was collecting significant resources in terms of environmental impact assessment fees, which had at one point even outpaced the government allocation from exchequer funds through the national budget allocation.

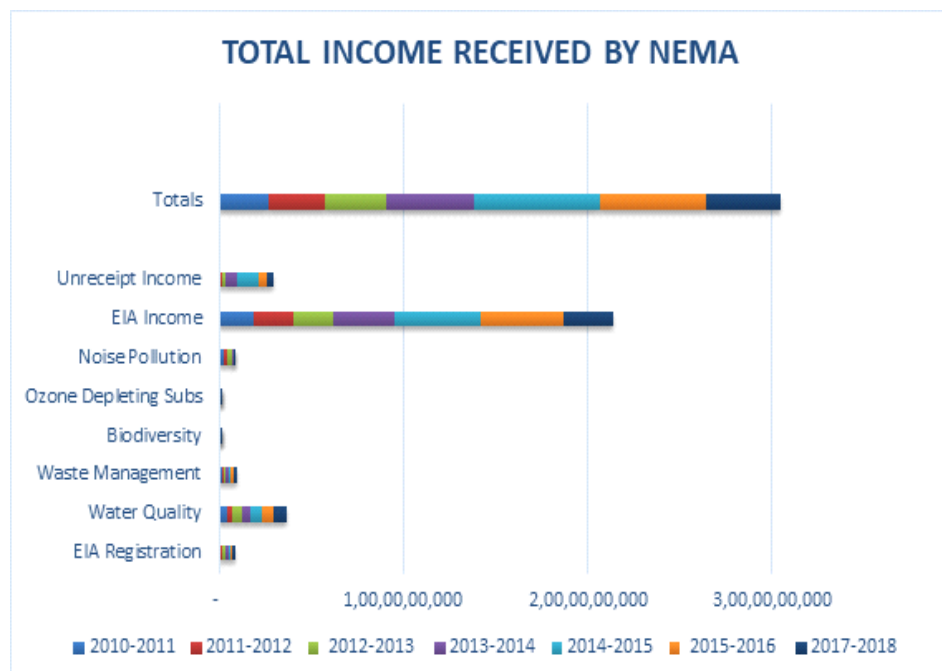


Figure 2: Total income received by NEMA (Source: Collated and analysed data from field work)

⁷⁵ Omedo (n 24).

However, the decision by the Executive to waive the environmental impact assessment fees has impacted on the funding situation for the regulator, as the funds from environmental impact assessment fees have fallen by more than a half. As these collected fees are falling, government allocations have increased from 400,000,000 KES (approximately 400,000 USD) in the 2016/2017 Financial Year to 900,000,000 KES (approximately 900,000 USD) in the 2017/2018 Financial Year. The budget for 2018/2019 increases the allocation to NEMA from 900,000,000 KES (approximately 900,000 USD) to 1,200,000,000 KES (approximately 1,200,000 USD) implying a cumulative 60 per cent increment of NEMA's budget in a three-year period to compensate for lost revenues.⁷⁶ This has however attracted hue and cry from many stakeholders including Parliamentarians, who term the move as a case of the taxpayer being forced by the government to subsidize the private sector, a clear indication that the environment is not conducive for the polluter pays principle in Kenya.

While government efforts to increase budgetary allocation to NEMA is laudable, the challenge associated with delayed release of exchequer funds to government institutions, continues to plague operations at NEMA. Previously, NEMA had immediate and direct access to the funds collected from the environmental impact assessment fees. Delayed disbursements from government, the quality of inspection by the environmental regulator is bound to suffer, therefore impacting the environment negatively. Financial data from NEMA covering 2010 to 2017 indicates that the largest revenue earner to the regulator was fees levied by NEMA on environmental impact assessments, followed by water quality and waste management fees. The environmental impact assessment incomes however dwarf all these other incomes by a factor of 7, implying that environmental impact assessment fees were the oxygen that drove the regulators expansive environmental management agenda. The environmental impact assessment fees waiver decision therefore drastically suffocated the regulator.

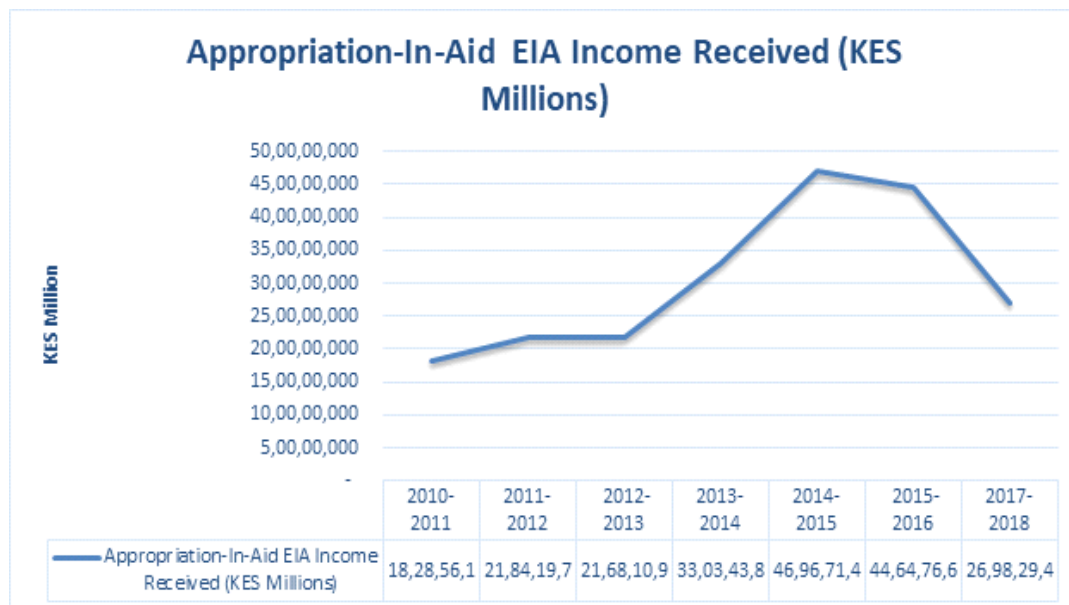


Figure 3: Incomes to NEMA have fallen drastically after the decision by the Executive to abolish the environmental impact assessment fees (Source: Collated and analysed data from field work)

⁷⁶ Edwin Mutai, 'Burden of Sustaining NEMA, Building Agency Shifts to Taxpayers', Daily Nation (2018) <<https://www.nation.co.ke/business/Sh1-3bn-taxpayers-burden-to-keep-Nema-running-/996-4548078-tnv6y2/index.html>>.

As a result, Kenya's environmental regulator is now completely cash-strapped, as the fall in revenues has impacted negatively on the normal day-to-day operations of the vital institution. The budgetary allocation from the Treasury to NEMA is now mostly committed to funding the recurrent budget of the institution, and in some cases staff at NEMA have gone for close to three months without salaries.⁷⁷ With a staff complement comprising of around 400 nationally, and around 150 environmental inspectors expected to cover all the 47 Counties in Kenya, a fall in revenues to such magnitudes implies that even resources for normal enforcement are unavailable. In the current Financial Year 2018/2019, the compliance and enforcement has received a paltry 60,000,000 KES (approximately 60,000 USD) with 20,000,000 KES (20,000 USD) expected to be utilized at the national Headquarter level and the remaining 40,000,000 KES (40,000 USD) to be shared across the 47 County NEMA Offices.⁷⁸ The national compliance and enforcement areas cover all of Kenya's Multi-Lateral Environmental Agreements (MEAS), high risk inspections and general control audits, which are critical for Kenya's environmental management regime, including the extractive sector management plans. These now lack adequate resources for implementation.

5 CONCLUSIONS AND RECOMMENDATIONS

A weakening polluter pays principle regime in Kenya portends only grave impacts for environmental management. In the prevailing circumstances, the government is fully subsidizing environmental management, with the private sector not being encouraged to internalize environmental costs within their production cycles. The environmental regulator

(NEMA) now relies heavily on the over-stretched public finance system. As a result, it is adopting a reactive strategy where environmental monitoring visits are few and not as robust as would be required. For costly mine decommissioning, involving complex environmental rehabilitation and restoration, the use of public finances will be an intricate balancing act that is unsustainable both in the short and long term.

From the findings of this article on the application of the polluter pays principle in Kenya, three main conclusions and recommendations are drawn in relation to the extractive resource industry.

These are:

- (1) There is a continued struggle between business (profit maximization) and environmental protection interests, with the environment subsidizing the business interests due to a weakening regulatory regime. The noble objectives enshrined under the polluter pays principle in Kenya's framework legislation will remain a mirage, unless Kenya adopts a robust sustainability driven approach to boosting investment in the extractive industry. This will be realized if all extractive companies operating in Kenya are made to internalize the costs associated with their pollution, through strengthening of the polluter pays principle.
- (2) The fall in revenues for the regulator due to the waiver of the environmental impact assessment fees by the Executive in 2016, the inadequate budgetary allocation and the slow release of funds by the national treasury mean that the regulator cannot effectively enforce involuntary compliance. The cash strapped regulator is left to watch as the weakening environmental management culture manifests in the drop in the quantity and quality of environmental impact assessment reports filed by investors. This implies that, without a monetary incentive or charge, many private firms are altogether shirking on their legal requirement to file the environmental impact assessment reports, a further demonstration that the weakening

⁷⁷ Omedo (n 25).

⁷⁸ Omedo (n 24).

of the polluter pays principle invariably leads to reduced environmental compliance by investors.

- (3) The numerous pieces of legislations and regulations seeking to implement the polluter pays principle such as penalties, effluent discharge fees, water license fees, product taxes, solid waste disposal fees, performance bonds, user fees among others seems to be motivated more by the need by Government Agencies to raise revenue, rather than the need to protect the environment. It is important for a proper re-think of Kenya's regulatory framework for the polluter pays principle to support sustainable financing of Kenya's environmental management strategies.

ARTICLE

CONSERVATION—A CONTESTED STORY: THE STATE AND THE KADAR ADIVASIS,* INDIA

Divya Kalathingal**

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* In this paper, both the terms 'Adivasi' and 'tribe' are used interchangeably. This is mainly because tribes of Kerala in general and Kadar in particular refer themselves as Adivasis. Tribe is the formal and administrative usage according to the State records. As the State is also an important part of this study, the term tribe is also used. The term Adivasi is used to refer to the original inhabitants, whereas the term tribe is considered as an administrative term. Adivasi is the synonym used for 'Indigenous People'.

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1

INTRODUCTION

India is considered as one of the ten richest forest countries in the world with forestry claiming a long history within the country. In this paper, the history of Indian forestry has been divided into three phases. The first phase is described under the larger frame of forest Management. Management of forests and its resources has always been an important concern for the colonial and post-colonial States because of its enormous economic value. It is due to this economic concern that the idea of 'scientific forestry' became popular and the State started implementing its monotonous programmes and policies for forest protection. The notion of scientific forestry indicates the replacement of natural forest with high value timber trees, and results in habitat loss of wildlife and curtailed the resource ownership rights of indigenous people. In this context, the centralised State planning and scientific forestry are connected to each other and are mutually supplementing. The meaning of forest has been reduced into a commodity and has been largely influenced by the evolution of forestry science in Germany. The ramifications of this change on meaning had impacted various ecologically significant locations in India and Western Ghat in Southern India can be identified as one such location. As a result of the monocropping experience, a portion of the high rainfall areas of Western Ghats has turned into a man-made desert.¹

In the Post-Independent era, the Indian State, which pursued the same British forest management system, established scientific management and hence, the alienation of local communities from resources continued. Since the 1970s, an array of remarkable movements by the tribal and local people have emerged across the country against the devastation of forest resources. Indira Gandhi, the prime minister of

India in the second half of the 1960s and in the 1970s, played a crucial role in shaping India's environmental politics.² Her personal interest in conservation along with the lobbying of both national and international conservation groups resulted in the creation of single-headed government departments which later turned dictatorial in nature.³ The project tiger which was initiated in India in 1973 consisted of the large networks of tiger reserves. This project was largely praised by the international conservation circle, however the reserves were established against the interests of the poor peasants.⁴ During the same period, the Wildlife Protection Act, 1972 (WLPA) was enacted and protected areas such as tiger reserves and wildlife sanctuaries began to be declared. Maintenance of pristine wilderness and absence of human interventions are the basic principles behind the protected area approach and this resulted in the total ban of humans from the core areas.⁵

These forest conservation efforts were based on the framework of deep ecology and could be considered as the second phase of the Indian forestry. Deep ecology conceived the significance of

forest by emphasising its inherent value and thus making a clear separation between nature and culture. It is noteworthy that the concept of national parks is American by origin. The Yellowstone National Park of America, established in 1872, was first of its kind in the world to protect wilderness and this idea was exported across the globe.⁶ Through this paradigm,

2 Mahesh Rangarajan, 'The Politics of Ecology: The Debates on Wildlife and People in India, 1970-1975' in Vasant K. Saberwal and Mahesh Rangarajan (eds), *Battles over Nature: Science and the Politics of Conservation* (Orient Blackswan 2003) 194.

3 *ibid.*

4 Ramachandran Guha, 'Radical American Environmentalism and Wilderness Preservation: A Third World Critique' [1989] *Environmental Ethics* 71.

5 Ramachandran Guha, 'The Authoritarian Biologist and the Arrogance of Anti-Humanism: Wildlife Conservation in the Third World' in Saberwal and Rangarajan (eds) (n 3) 152.

6 Roderick Nash, 'The American Invention of National Parks' [1970] 22 *American Quarterly* 726.

1 Madhav Gadgil and Ramachandra Guha, *The Use and Abuse of Nature* (Oxford University Press 2000) 159.

they tried to reestablish a situation which was believed to be present before the advent of civilisation and was basically free from human interventions. Given this, the idea of deep ecology must be scrutinised from a third world perspective.⁷ Guha raises some fundamental questions regarding the creation of an artificial dichotomy between anthropocentrism and biocentrism, issues of universalizing and spreading this idea to other countries (with different cultures and histories), the preservation of wilderness and the tendency to undermine other environmental issues etc. He further calls deep ecology as conservation imperialism.⁸ Management of protected areas alienated local communities from accessing the resources and hence, violated their fundamental rights.⁹ These strategies were, in fact, shortsighted and resulted in the cultural breakdown and integration of tribal community members into an industrial economy.

By the late 1980s and 1990s, the State began to reform its conservation programmes by bringing in more participatory initiatives, but it was not a complete shift from the existing conservation philosophy. The rights of the local people on the resources and the customary rights of the tribal people also remained unrecognised in these programmes. Rather than increasing local involvement or generating local support for conservation, eco development visualised by the State aims to reduce local dependency on forest resources by providing various alternative employments.¹⁰ The schemes under the National Forest Policy (1988) were critiqued that they 'lacked the necessary legal foothold and democratic vision, and their implementers lacked the intention to relinquish power, they did not fully address many critical issues such as tenure security,

access and rights to resources, and community rights to decision making'.¹¹

The most recent step in the history of Indian forestry is the enactment of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006, popularly known as 'Forest Rights Act' (FRA). The enactment of this act can be considered as the beginning of the third phase called forest governance. Unlike the forest management and deep ecology based forest conservation practices initiated in the past, it is based on the concept of democratising forest governance by giving rights to the people in regards to resources that have been historically denied. It recognises ownership rights of the people to manage, conserve and protect their own forest areas through Gram Sabha.¹² This central act gives strong legitimacy to the rights of the Adivasis on the resources and democratisation of forest governance. The basic philosophy of the legislation was based on coexistence and it attempted to reinstate and recognise the rights of the Adivasis in protected areas that were restricted after the implementation of the WLP and formation of protected areas. This can also be considered as shredding of some of the powers of the State to recognise people's rights over forest.

In spite of the fact that the FRA offered various provisions for the Adivasis and to a great extent recognised their community and customary rights, this paper argues that in a broader sense both the colonial and postcolonial States in India failed to acknowledge the cultural institutions of the local communities. Cultural institutions of the community and the conservation initiatives of the State meet at certain

7 Guha (n 5).

8 Guha (n 6) 154.

9 Ashish Kothari, 'Is Joint Management of Protected Areas Desirable and Possible' in Ashish Kothari, Neena Singh and Saloni Suri (eds), *People and Protected Areas: Towards Participatory Conservation in India* (Sage Publications 1996) 18.

10 Vasant K Saberwal, 'Conservation by State Fiat' in Saberwal and Rangarajan (eds) (n 3) 255.

11 Neema Pathak Broome and others., 'Changing Paradigms in Wildlife Conservation in India' in Sharachandra Lele and Ajit Menon (eds), *Democratizing Forest Governance in India* (Oxford University Press 2014) 181.

12 Under the 73rd Amendment of the Constitution of India, 'Gram Sabha' means a body consisting of persons registered in the electoral rolls relating to a village comprised within the area of Panchayat at the village. This is the ideal forum for people to participate directly in governance and development.

historical junctures and in some specific occasions, influence each other, contributing to the larger agenda of conservation.¹³ Hence, the main aim of this paper is to look at this interface and conceptualise it by referring to Kadar Adivasi community in Kerala, India. They are the food gathering, seasonally nomadic and forest dwelling community endemic to the Anamalai hills of southern Western Ghats.¹⁴ Collecting jungle products and hunting were their two primary means of livelihood for them. Food gathering is an ecologically viable subsistence activity as far the activities of the Kadar are concerned.¹⁵ Though the community can claim a long history of conserving, managing and governing the forest resources, this has never been recognised by the State and other mainstream actors of forest governance. In this context, this paper makes an attempt to critically understand the policy measures and other initiatives in reference to conservation in the study areas and their impact on the Kadar community has been analyzed.

2 THEORETICAL FRAMEWORK AND METHODOLOGY

Cultural institutions and social interface are the two conceptual axes through which the paper has been theoretically framed. Cultural institutions function as a mechanism to protect natural resources. The study brings out this theoretical framework to understand the informal institutions among Kadar. This study has been largely inspired from North's understanding of institutions as 'humanly devised constraints' and Colding and Folke's further addition to it as taboos as informal institutions.¹⁶ 'Taboos have been identified as being an important cultural institution among the Kadar communities, contributing to the conservation of the forest and its wildlife'.¹⁷ Four different kinds of taboos have been identified among Kadar, namely: Habitat Taboo, Segment Taboo, Method Taboo, and Specific Species Taboo.

13 Communities establish informal institutions in a collective fashion as a response to their collective needs and requirements through the evolution of community life. These institutions are not stagnant but making internal changes according to the new demands, sustaining with them without making fundamental compromises in their core values and principles and still prevalent and functional among the communities. See section 2 for a detailed discussion.

14 'The life of the Kadar is based wholly on the resources of the forest. The Kadar are nature-spirit worshippers and their socioeconomic life relates to each and every woodland grove on the Anamalai slopes. All the mountains and hills in this area have been named by Kadar. Karimala Gopuram (literally, black mountain), the highest mountain in the Vazhachal Forest Division, is the central place of their worship. The Kadar compare themselves with the elephant and the guar (Indian bison) in order to describe their nomadic nature. By comparing themselves with the elephants, the Kadar give us an insight into their relationship with their landscape and their own nomadic nature in the forest. By not settling in a particular region, they make their livelihood from their entire habitat, and in doing so, their activities put no pressure on the resources of a specific area'. Divya Kalathingal, *Ecocultural Ethics: Critical Essays* (Lexington Books 2017) 152.

15 M S Mahendrakumar 'Ecocultural Adaptation of the Kadars of Kerala' (2005) 3(2) *Studies of Adivasis and Tribals* 99.

16 Kalathingal (n 15)155 .

17 *ibid*.

the cultural institutions of the Kadar community and Forest Department (one of the important state actors) is the core of the analysis of this paper. Through the enactment of various conservation policies and acts, the social taboo as a strong cultural institution among Kadar have either been subjected to change or neglected, where as previously it would have acted as an important everyday practice that ensures conservation and livelihood for them. Hence, this paper specially looks at how the legislation as a modern institution and the cultural institutions of the Kadar work through the conceptual frame of interface. On a whole, this study brings out the various dimensions of interfaces between cultural institutions of Kadar and the State in the context of conservation.

Kadar Adivasis in the areas of Vazhachal and Parambikulam have some stark differences from other tribal populations in Kerala. Kadar are highly dependent on the forest for their livelihood and they have access to a larger area of forest. Unlike other tribal regions of Kerala, their area is not as mixed with that of the non-Adivasi population. Hence, every day conflict between Adivasis and non-Adivasis, which is very visible in other tribal areas, is absent here. They live in a continuous stretch of forest where their everyday conflict is more directed towards various state mechanisms. Both the State's development projects and conservation initiatives at different points have impacted them in various ways. There have been evictions and subsequent migrations in the Kadar inhabitant areas. Large scale migration of Kadar from Parambikulam to Vazhachal started after the demolition of the tramway line and during the construction of Parambikulam dams as part of Parambikulam –Aliyar Inter Basin River Linking Project (PAP).¹⁸ Out of the four total Kadar populated

areas, both Parambikulam and Vazhachal have the largest population. Therefore, two forest areas with different forest status have been taken in the study for an easy comparison. Vazhachal is a place where various participatory conservation programmes are undergoing. It is also the site for the proposed Athirappilly Hydro Electric Project, which is just 400 metres away from the Vazhachal Kadar hamlet. Kadar tribe has been protesting against the proposed dam project during the last 20 years. Kadar community is one of the Particularly Vulnerable Tribal Groups¹⁹ of Kerala with a population of 1,805²⁰ and makes up just 0.03% of the total tribal population of Kerala.

This study has been conducted in two forest divisions of Kerala, namely Vazhachal (Thrissur district) and Parambikulam (Palakkad district). The tract of Vazhachal selected for the study falls between 10° 14" and 10° 23" North latitudes and 76° 25" and 76° 54" East longitudes. The total extent of the forests coming under this Division is 41394.398 ha (413.94 km²) which includes natural forests and plantations. Variation of altitude of this region is 200m to 1300 metres.²¹ The total extent of Parambikulam tiger conservation landscape within Kerala is 3225.73Km². It was declared as tiger reserve during 2009 with total area of 643.66 Sq Km, which includes a core area of 390.89Km² and 252.77Km² a buffer zone. The location of the area is, longitude 76° 35'- 76° 50'E and latitude 10° 20'-10° 26'N.²²

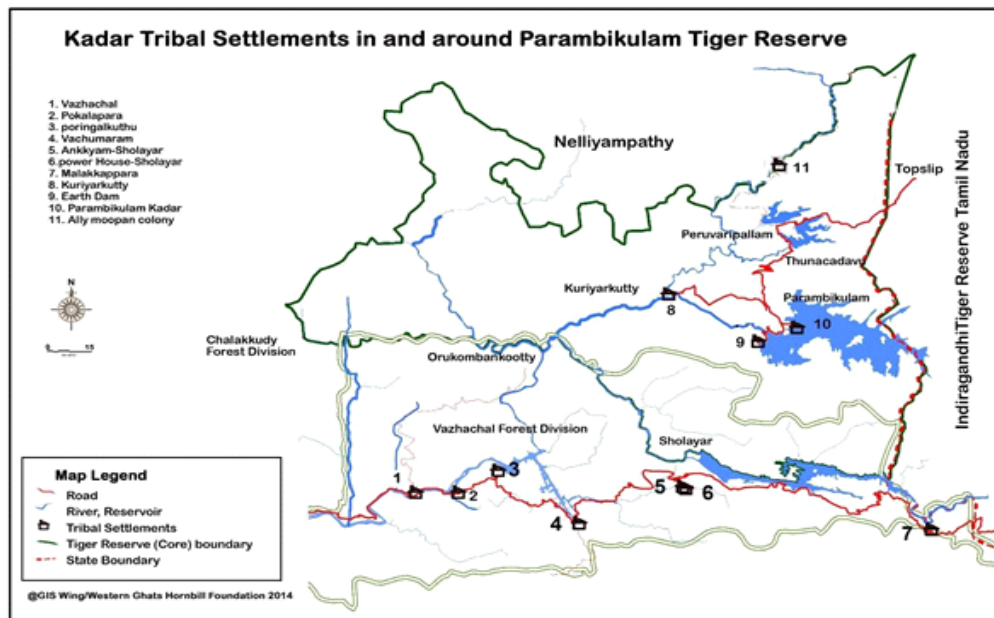
18 K Divya, 'Development Experience of Adivasis: Case Studies from Kerala' (2016) 2 Indian Journal of Sustainable Development 29.

19 A section of the Scheduled Adivasis who are even more backward than others has been historically classified as Primitive Tribal Groups (PTGs) since 1973. The criteria used for identification of PTGs are: pre-agricultural level of technology, remote isolated enclaves, and the smallness of number, stagnating or diminishing population and low levels of literacy. The term 'Primitive' has been changed and now it is known as Particularly Vulnerable Tribal Groups (The draft National Tribal Policy 2006).

20 See the survey of Kerala Institute of Local Administration (2008).

21 Biodiversity conservation plan for Vazhachal High Value biodiversity area (2010-2020), (KFRI 2010).

22 1st Tiger Conservation Plan for Core and Buffer, 2011-12 to 2020-21 (Kerala Forests and Wildlife Department 2011).



(Map not to scale)

Map prepared by : Western Ghats Hornbill Foundation 2014.

The design drawn for doing the research is ethnography. In this study, the researcher tries to describe and interpret the shared values and beliefs of Kadar pertaining to conservation. This paper gives detailed description through in-depth understanding of the invisible systems among Kadar. The research has incorporated the views of the participants (emic) as well as the views of the researcher (etic). This study design gives the researcher the freedom to understand the subject more closely through different methods. Participant observation, oral history method, focus group discussions and in-depth interviews were the major methods used to collect data from the participants. Field study was conducted during the period of 1st August 2013 to 30th October 2013. Secondary data was also used in this study. Various policies and acts of both central and State origin on conservation since colonial period to the recent time (1894 to 2011) have been analysed. The timeline set up in the paper concludes with the year 2006 because no other major legislations or policies on conservation have been enacted by the State since then. Besides, various documents available from forest department,

such as forest working plans, management plans, forest administrative reports, reports of different forest management programmes etc. have been examined as part of the analysis.

3 THE ACTS/POLICY AT CENTRAL LEVEL AND THE LIVES OF KADAR

This section mainly analyses four aspects: how the acts and policies perceive a) the rights of the Adivasis over resources; b) loss of natural forest due to plantations in their area; c) livelihood shifts; and d) development projects in the area. It gives a larger picture on how the resource dependent population were included both conceptually and practically in the act of protecting forests. The period considered in this analysis is from the first National Forest Policy 1892 to the Kerala Tourism Policy 2012.

3.1 The Forest Tramway

The main intention behind the formation of the first forest Policy Resolutions 1892 in British India was to serve the agricultural interests of the colonial state. The policy relegates the entire forest into four categories. A first class forest must be preserved for the protection of cultivated lands in the plains and also for protection from the wild animals. Timber was mainly extracted from the second class forests for commercial undertakings such as railways. The third class forest was the minor forest which supplied fuel, fodder and space for grazing for local consumption and was managed in the interest of the local people. A fourth category was 'pastures and grazing grounds,' where the local communities got higher priority than the conservation practices of forest department. In the third and the fourth class forests, rights were recorded and regulated and the forests were managed in the interest of the local community. This policy made considerable changes in the Kadar inhabiting areas of Parambikulam.

The year 1894 was characterised by two noteworthy developments in Cochin.²³ One was the opening of the rich teak forest in Parambikulam by replacing the natural forest and the other was the conception of forest tramway by the then conservator Mr. Kolhoff. Hence it is obvious that the Parambikulam forest area was classified as second class forest under the policy which mainly meant being a source to increase State revenue and the rights of the users were given less importance. This has laid foundation to the development of scientific forestry in this area.²⁴

By 1907, the tramway became operational and it was extended till Chalakudy, the nearest town.²⁵ The

tramway served as the 40 kilometres long railway through forest to transport timber from the Parambikulam forest. In the same year, the Cochin Forest Steam Tramway Act 1907 was enacted to manage the forest tramway and to regulate the conduct and procedure of the forest tramway officers. The act did not have any single mention of the hill men/inhabitants/users of the area and their rights. The only context where the act mentions human beings is the context of punitive fine for the owners of the trespassed cattle into the forest area. The colonial regime considered forest as an indefinite source of timber extraction and revenue generation. The opening of forest tramway line for the transportation of timber forest was a factor that contributed to significant changes in the Kadar economy.²⁶ Kadar was a scattered community residing in different parts of the forest along the bank of the Chalakudy river till the establishment of tramway. With the construction of the tramway the community became the main labour force which led to greater changes in their economy and culture.²⁷ Eventually, the tramway, emblematic of modern scientific development, limited Kadar Adivasi communities' habitation area to a specific location called Kuriarkutty.

3.2 When 'Scientific Forestry' Turns a Villain

After independence, the princely states were merged into the Indian Union and full autonomy was conferred on the Indian State and the entire forest resources came under its control. It is difficult to observe a large level shift in the nature of the policy when it moved from colonial rule to independent India in terms of natural forest protection and protection of the rights of the local people.

23 Before the formation of the state of Kerala, the region was ruled under three Kingdoms, namely Travancore, Cochin and Malabar. Parambikulam area was under the Cochin Kingdom.

24 Detailed discussion of scientific forestry will be covered in the upcoming section.

25 Mammen Chundamannil, *History of Forest Management in Kerala* (KFRI Research Report 89 1993) 28.

26 U R Ehrenfels, *Kadar of Cochin* (University of Madras Press 1952).

27 Divya (n 19) 29.

Under the National Forest Policy, 1952 (NFP), forests were classified into four categories— Protection Forests, National Forests, Village Forests, and Tree Lands. This policy emphasised, for larger national interest, that the regulation of the rights and restrictions of local communities on forest had to be valued as a prime requisite of scientific forest management. The policy took a strong position against grazing and shifting cultivation by stating that it was incompatible with scientific forestry. The Second Five Year Plan (1956-1961) had recommended the government to revise policy for developing wood based industry. As suggested by the NFP for forest regeneration, Teak Plantation Division Parambikulam was formed in 1960. This was the first Special Plantation Division to artificially regenerate 6070 hectares of forests in the Parambikulam area, which had been over exploited in the past due to the functioning of the tramway. Between 1961 and 1967, 6500 hectares of plantation was cultivated in Parambikulam. The NFP 1952 made a long lasting impact on the Kadar community through the introduction of exotic species, mainly teak, in their area. Kadar lost a large area of natural forest on which they used to depend for livelihood for generations. ‘Other than mono culturing of crops, this also resulted in increased atmospheric temperature even in the interior forests of the tiger reserve. Replacement of natural forests with exotic plants resulted in soil erosion and drying up of river in early summer’.²⁸ Kadar also observed that the conversion of natural forest resulted in habitat loss for many endangered bird species like Hornbills. As Baviskar observed, the policy has served the interest of State, industry and rich peasantry instead of serving the national interests (1995). In this process, the rights of the local people and Adivasis were side-lined.

As part of the State’s project of implementing ‘scientific forestry’, which was inspired by the NFP, a large area of natural forest was converted into plantation in the Parambikulam and Vazhachal forest divisions. Once

the clear felling was completed, these areas were given to the people from plains for tapioca cultivation. Then the taungya cultivators planted tapioca in between the teak saplings to protect the teak saplings from any harm. This system of taungya cultivation was prevalent globally in the initial phase of plantation forestry. Clear felling and selection felling were the two important initiatives of the State that led to the loss of most of the important forest areas of Kadar from where they used to collect Non Timber Forest Produces (NTFPs). Since the evergreen forests are very fragile in nature, loss of individual trees also destroyed other small plants that grow around them. In brief, the State project of scientific forestry became very hegemonic in nature.²⁹

Social forestry made impacts on the lives of the Kadar at multiple levels which are outlined below. The plantation work in the protected area opened the door for the outsiders to settle down in the Kadar inhabitation areas. As a result, the Parambikulam Kadar hamlet is currently a mixed hamlet of Adivasis and other settlers. The participants of the study also complained that many settlers got job as watchers in the forest department by claiming that they belong to the Kadar community. It is also important to notice the disparity in the usage of timber by the State and the Kadar. Kadar do not usually use the high value timber for their domestic use. Instead they prefer to use bamboo and reed for house construction. On the contrary, the State is extensively extracting timber from these areas.

Poaching in the area has a strong historical connection with taungya cultivation in 1960s. Creation of the plantation was one of the important management programmes of forest department. The quick and easy way adopted for the creation of the plantation was taungya cultivation where the cultivators used to stay back and protect the teak. In this case, they used to cultivate tapioca till the teak saplings grow. Participants

²⁸ FGD in Kuriarkutty Kadar hamlet (Parambikulam Tiger Reserve 27 September 2013).

²⁹ James C Scott, *Seeing like a State: How Certain Schemes to Improve the Human Condition Have Failed* (Yale University 1998) 19.

of the interview stressed the fact that most of the taungya cultivators returned to the same area and started smuggling timber and poaching wild animals. So Kadar as well as the forest resources suffered from multiple negative impacts of the programme. Other than the State functionaries, the State introduced group had also started dominating the cultural institutions of Kadar through wildlife poaching. This went against the basic beliefs of Kadar on coexistence and the habitat protection of other animals.

Taungya cultivation and the related concerns also highlight the importance and relevance of the cultural institutions of Kadar. These cultivators were coming to a place which had been conserved for hundreds of years by the Kadar with the help of their cultural institutions. But the cultivators didn't possess any such cultural or institutional capital. As no taboos prevented them and no headmen controlled them, they did not feel anything wrong in poaching and smuggling. As the cultivation was a State sponsored programme, one can easily find the visionary inadequacy of that programme as the State failed to anticipate the possibility of taungya cultivators turning to poachers and smugglers. The State miserably failed to prevent the illegal activities by the plainsmen.

3.3 When Protection Turns into Curbing of Rights

The Wildlife Protection Act 1972 (WLPA) brought a different imagination to the entire forest conservation practice. The philosophical foundation of the formation of protected areas was wilderness creation and evacuation of humans from the forest for the protection of forest and wildlife. In 1986, after the reorganisation of the wild life wing, collection of minor forest produce (MFP) from sanctuaries and national parks was prohibited by a government order from the chief conservator of forests. The declaration of protected areas led to the massive constitution of sanctuaries and total ban on human beings in the core areas of national parks.³⁰

The WLPA is the ever-enacted legislation for the protection of wildlife in Indian forests which mandates strict regulations, banning and punishment for poaching of wildlife. The act did not offer any relaxation for the traditional hunting practices of the Adivasis. It was adopted with a presumption that all local/ tribal people would destroy the natural resources and wildlife and they would not be able to coexist with each other. It has affected the lives of Kadar in four major ways: 1) traditional hunting rights; 2) mobility/alienation; 3) collection of NTFPs; and 4) dietary needs.

In the reserved forest area, people are banned from collection of wild animals, even if it is a left over by the carnivores. They are not, however, restricted from the collection of NTFPs or roam in the forest. In that sense, their habitat is not controlled by the act. The habitat of the Kadar is considered to be very large and extending beyond their immediate living spaces. They have their traditional boundary system and trails to be followed during the collection of resources.³¹ It becomes an issue only if they are moving to forest areas near to the protected forest. This has resulted in a change in their food habits. They have lost their food diversity and their food habits have become limited to items such as rationed rice, cereals provided through government schemes etc. The habit of sharing hunted meat could be seen as an indication of the strength of the complex mutuality existed among the people. The banning of such traditional practices had also affected the feeling of togetherness among them. The following narrative of an informant clearly indicates the adverse impact of the declaration of tiger reserve in Parambikulam on Kadar community. He states: 'mobility and collection from the Parambikulam area becomes problematic after the declaration of tiger reserve'.³²

While legislations such as the WLPA mostly affects the dietary needs of forest dwelling communities in the reserved forest, in protected areas it produces

³⁰ Guha (n 6) 140.

³¹ Kalathingal (n 15) 156.

³² Interview with the head man, Poringalkkuthu Kadar Hamlet (Vazhachal FD, 18 August 2013).

multiple impacts. It restricts the movement of a person in the forest and thus restricts the expansion of his knowledge on resources. When the status of the forest shifts to higher orders, the restrictions are increased and people are increasingly alienated from the resources. These purposeful attempts to alienate people from the resources are conveniently masking the contribution of the community in resource conservation of that particular area. The act of a community using the minimum product from the forest for their basic living is considered a crime. Hence the WLPA does not attempt to understand and respect the cultural institutions of Kadar which works as a code of conduct among the community. The instrumental rationality of the act totally ignores the taboos of Kadar which had substantial roles in the conservation. For example, the habitat taboo which valued the ecological significance of Karimala Gopuram becomes irrelevant as per the WLPA as the act totally prevents the entry of Kadar to forest.³³ Once the entry to forest is restricted to people, they are being externalised and taboos

become meaningless. Habitat taboo is the regulation of access to and use of resources from a particular habitat in time and space which leads to the protection of the entire habitat.³⁴

Parambikulam area was upgraded from a wildlife sanctuary to a tiger reserve in 2009. After that, there was a proposal to relocate Kuriarkutty Kadar hamlet from the core area. There was a mixed response to this proposal from the tribal hamlet. Forest Department suggested forest areas in Vazhachal Forest Division, some areas in Palakkad plains and Tamil Nadu for relocation. Finally, the lack of consensus from the hamlet itself rejected the plan of relocation. Kadar used to roam in the forest areas of Parambikulam and Vazhachal and their roaming is now limited to the Chalakudy river basin. Within the geographical boundary, they have some invisible boundary system, beyond which they usually prefer not to explore, since their understanding of this terrain is limited as well. This habitat taboo, one of the significant informal cultural institutions as far as the conservation of the area is concerned is completely ignored by the Forest Department. Here the department even prefers areas in the plains for relocation, which is in direct conflict with the basic interests of Kadar. Though the Kadar relocation plan was abandoned, the State and its machinery could successfully create an imagination that the Kadar are the ones to be evicted and the plan was abandoned due to some technical difficulties.

3.4 Detrimental Initiatives of Sedentarisation³⁵

The Forest Conservation Act 1980 prescribes strong conservation measures for the forest resources. The

33 'Karimala Gopuram, is the highest mountain in the Vazhachal forest division and the central place of their worship and it's a major resource- gathering areas for gather. They believe that their origins have arisen from Karimala Gopuram. Here the ecosystem works as an important agent of formation of human behaviour and this is ultimately leading to the protection of the same. Culture is not an inseparable one from the nature. In this way all Taboos lost the significance as Taboos work in the environment. They believe that there is existence of spirits in water and forest and which brings a strong sense of code of conduct to be followed in the forest. There has been an invisible boundary system exists within the community for resource collection. These traditional boundaries invisible boundaries are separated by hills, streams or rivers. These traditional boundaries are restricting the communities from extracting resources from other areas. Their ancestors used to introduce the forest routes (traditional trails) to the younger generations. As they are mainly rainforest collectors, even in the dark green forest of Anamalais, they could easily find out their ways. Here, Thurston's (1909) comments should be genuinely appreciated, 'Kadar are the Kings of Anamalais'. The Habitat Taboo develops and practices in the entire area, it also leads to the protection of the entire habitat, including Kadar and wildlife. The concept of the boundary system still exists among Kadar and continued to be unaltered'. Kalathingal (n 15) 155.

34 Johan Colding and Carl Folke, 'Social Taboos: 'Invisible' Systems of Local Resource Management and Biological Conservation' [2001] *Ecological Applications* 584.

35 It is the term quoted by James Scott to describe the efforts of the state to settle people in order to make the ruling easy in the book, *Seeing like a State: How Certain Schemes to Improve the Human Condition Have Failed* (Yale University 1998) 2.

act also requires approval from the central government for any sort of clearance of forest/de-reserve/ converting for non-forest purposes. According to the Forest Conservation Rules 1981, the committee set up under the act will supervise the concerned State's responsibility to ensure afforestation. This act demands the detailed description of the area to be diverted. According to the act, the displacement details and rehabilitation plan (especially related to SC/ST population) due to the forest diversion needs to be produced. Even after the enactment of the act, the selection felling could not be fully stopped. It has been banned in Kerala since 1987 due to the intense lobbying from conservation groups in the state. The act actively discourages the participation of individuals and communities in forest plantation and protection.³⁶ In the State's view, the historically existing intertwined relationship between forest (broadly nature) and people has to be disintegrated in order to execute their idea of sedentarisation. This is profoundly clear in the Forest Conservation Rules, discussed above. Furthermore, the State has always appeared to be the enemy of 'people who move around', and therefore, permanently settled down, the mobile people become an enduring project of the State.³⁷ Imposition of governmental power is effective only when the population has settled down in specific geographic locations. This political agenda has been laid out by the State in a systematic manner in the FC rules enacted in 1981. The following experience of the Kadar community shows how the political agenda of sedentarisation executed through forest conservation rules made an impact on the nomadic Adivasi community in Kerala.

Kadar is a semi nomadic community and used to live in different forest areas of Vazhachal and Parambukulam. As mentioned in the methodology section, all the eight hamlets, which we see now in the Vazhachal forest division, are the migrated Kadar from

Parambukulam due to eviction which has taken place since 1950. These eight hamlets are distributed in the 65 kilometres forest area. Three important routes of migration in different times have been identified from Parambukulam to Vazhachal.³⁸ Then, they started living in different parts of the Vazhachal forest and along the banks of Chalakudy river and other streams for almost thirty years. Since 1980s, Kadar of the Vazhachal started settling down on both sides of the Anamalai road. It can be assumed that the forest conservation act has forced the Kadar to settle down in new areas of the Vazhachal forests.

3.5 Bringing Participation in Forest Conservation

The National Forest Policy 1988 advocated support for the rural and tribal requirements of fuel, fodder and minor produces. In principle, it gives the tribal population the rights to collect of MFPs, to create protocols for resource conservation and livelihood protection and to safeguard the customary rights of people. However, their traditional practices like shifting cultivation came to be regarded as a destructive practice. In 2009, Kerala government formulated the guidelines for Participatory Forest Management based on the National Forest Policy 1988 and the guidelines of 1990. Participatory forest management functions through units called Vana Samrakshana Samithis (Forest Protection Councils), which comprises of a general body and an executive committee. Preparation of micro plans is one of the important steps envisaged by the guidelines for ensuring the participation. Development of appropriate participatory approaches to forest management was one of the objectives of PFM. Vana Samrakshana Samithis (hereafter VSSs) are termed as Eco Development Committees (EDC) in the protected areas. There are five Adivasi VSSs in the Vazhachal forest division (registered in 2002) and six

36 Madhav Gadgil and Ramachandra Guha, *The Use and Abuse of Nature* (Oxford University Press 2000)112.

37 Scott (n 30) 1.

38 Divya (n 19) 29.

Eco Development Committees (EDCs) in the Parambikulam Tiger Reserve. This section attempts to analyse the gap between theory and practice of PFM which was envisaged under the plan and the level of interfaces that have been taking place in different phases of the implementation.

Micro plan is the basic planning element of VSS under which the activities are implemented through the PFM. Kadar follows an 'invisible' boundary system in the case of resource usage. Kadar have their own habitat for forest produce collection. However, VSS has their own management areas for fire protection and there they do not consider the traditional resource uses of the areas. When the VSS officials make resource maps of the area with the help of the community, they also mark resource utilisation area out of the jurisdiction of the respective forest ranges, but no effort has been made for the protection of the already existing system. Here it can be seen that the micro plan is prepared from pre-set plans which attempt to fit the existing practices into it for practical convenience. There had been instances where Kadar's sacred worship areas were not considered in the micro plans. Kadar have been protecting resources inside the areas of their traditional boundary through their cultural institutions, and these aspects were completely neglected in the micro plan. Thus, habitat taboo system of the community was completely disregarded here. This is a very clear example of how modern State institutions come into conflict with the cultural institutions of Kadar. In other words, contrary to what the objective proposes, policy neglects the customary practices of the communities.

Planting of endangered species in the forest areas was claimed to be an important activity under VSS in the Vazhachal Forest Division. However, *canarium strictum*, one of the endangered species, was never considered for planting though its numbers were reducing in this area. The selection of species was also carried out directly by the department. This non-recognition of local knowledge on species selection is even contrary to the basic vision of PFM. Even though the planting in the forest was considered as an important step in forest regeneration, Kadar were only involved at the last phase. From these experiences, it can be deduced that the forest department considers Kadar only as an easily available local labour force to satisfy their goals. Participants of the study also highlighted that perennial streams started drying up

during summer due to the replacement of natural forests and that these natural streams can only be rejuvenated by the planting of some local specific trees.

The concept of participation is impossible when the State prefers a top-bottom approach, unless the community is already empowered and is able to assert their right to participation. Thus, this participatory programme which was intended to empower the community functioned as yet another agent of oppression. True participation is only possible between equal actors. For this to happen, participation must take place outside the institutional development agenda and within the social, political and cultural context of grassroots struggle.³⁹ Power has been working as the centre of the development paradigm. The examples from the above mentioned work shows that participation is simply not possible without sharing the power. Otherwise empowerment will just remain as the management of power by the powerful actors. Approaches to participation should aim at deep social transformation.⁴⁰ The level of assertion that is shown by the participants of some hamlets in Vazhachal is completely non-existent in other areas, especially in the tiger reserve area. In the protected area, officials have a strong control on the VSS members because Kadar do not have an alternate option for livelihood other than tourism.

Participatory Hornbill Conservation and Monitoring programmes with the involvement of Kadar tribe is also a noteworthy initiative. After identifying that the habitat loss has resulted in the vulnerability of hornbills, this programme was initiated by an individual researcher with the collaboration of the Kerala Forest Department by selecting the tribal guards for regular monitoring of nests and nesting old growth trees of the rainforests.⁴¹ They were also

39 Pablo Alejandro Leal, 'Participation: the Ascendancy of a Buzzword in the Neo-liberal Era'(2007) *Development in Practice* 17.

40 *ibid*.

41 KH Amitha Bachan and others, 'Participatory Conservation and Monitoring of Great Hornbills and Malabar Pied Hornbills with the Involvement of Endemic Kadar Tribe in the Anamalai Hills of Southern Western Ghats, India' (2011) 24 *The Raffles Bulletin of Zoology* 37.

trained to use the scientific equipment for the survey. Involving the Kadar in the conservation of the endangered flagship bird of the state while ensuring the livelihood of the people, i.e., supporting their traditional practices in forest dwelling, has been recognised as a good example of participatory conservation and monitoring process. The programme indirectly supported the full Kadar family by involving the women in the process. This participatory programme was completely visualized on the basis of traditional trails of Kadar. This endeavor does not give space for conflict with the kind of traditional activities they are involved in. This is a successful story where the status of Kadar turned to protectors of hornbills from 'hunters'.

3.6 Ecotourism as a Form of 'Monoculturing'

Ecotourism is operationalized through the VSS involving local people/Adivasis. Both the study areas covered here are well known ecotourism spots. Kadar of the Vazhachal hamlet in the Vazhachal forest division and Kadar of Parambikulam tiger reserve are involved in ecotourism activities of the forest department. Ecotourism in the forest areas has been evaluated as a sustainable livelihood option for the tribal people by the Forest Department. But the fact is that, in the reserved forests, ecotourism based livelihood is just optional, while in the protected area, people are forced to take up this mode of livelihood. Ecotourism comes to the protected area where the rights of the people on resources are already denied. In the areas where ecotourism initiatives operate, the power of the officials is really high, especially in protected areas, where there is no other option for the community to work.

Violation of several rights can be observed in the ecotourism spot of the reserved forest, where the Forest Department is allowing maximum leniency for tourists and minimum recognition for the rights of the Kadar. Kadar hamlet is located on the side of Vazhachal waterfalls, a well-known tourism spot and people of this hamlet are involved in the tourism management activities through VSS. This is the only tribal hamlet of the Vazhachal forest division that provides regular employment through VSS. As one side of the hamlet is a road and the other side of the

hamlet is a trek-path for tourists to enjoy waterfalls, tourists constantly move around the hamlet and no kind of privacy is available for the tribal people. Though the river is in their doorstep, Kadar cannot make use of any of the facilities the river provides unless the tourists were to leave, as tourists also daily pass over the hamlet to reach the main road. The author also overheard some comments by the tourists such as 'where do the Adivasis live here'. This question is arising from the preconceived notion that Adivasis live in a pre-modern style by wearing leaves and speaking sign language. In this area, the Kadar and wildlife are equally affected by the tourism. The Kadar and the tourists have conflict of interest in using the resources. The Anamalai road entirely goes through the forest areas of Vazhachal and frequent tourist vehicles in this road disturb the movement of Kadar women in other hamlets that situated upstream to Vazhachal. The fear element that was expressed by the participants shows the threats to the security of women due to tourism. As far as Vazhachal VSS is concerned, everyday work related issues are higher due to the tourism management.

Since tourism is strictly managed in the tiger reserve, the immediate or direct conflict with the tourists are comparatively low. The physical harm from the part of tourists is almost absent; rather, the concept of ecotourism as such has disturbed the already prevailing practices of the area such as fishing and resource collection. Irrespective of the protection status of the area, what ecotourism does is to transfer resources from a certain category of people to another category. Even though the people of the protected area are near to their important resource area and worshipping place, Karimala, their direct livelihood dependency in this forest area is impossible. Ecotourism is generally praised as sustainable livelihood for the tribal people, but this sustainable livelihood is established by the total/partial banning of the already existing livelihood patterns through various coercive legal mechanisms. Ecotourism is an area of development intervention where there is no conflict between different governmental departments. It's also important to note that the policy has impacted the gender relations in the community. Gender concerns are unevenly incorporated into the policies aimed at the management of natural resources. In the protected area, labour is majorly for men as watchers and tourist

guides, whereas women's role in access and control over resources are hugely curtailed and their contribution to economy has become nil.⁴²

Ecotourism projects are mostly planned without local consent and support.⁴³ They often threaten local cultures, economies and natural resource bases. It is also a tactic of the consumptive tourism industry by greening it. It is highly consumer centered and oriented towards the urban middle class. Diverse local, social and economic activities have been replaced by ecotourism as some kind of 'monoculturing'.⁴⁴ The data from the field also supports these observations that various livelihood options of the Kadar have been replaced by the ecotourism work. These ecotourism activities are also unidirectionally decided by the government without having any kind of consultation. Kadar tourist watchers accompany the tourist groups to different destinations of the protected area. These kinds of trekking are planned with an intention to see wildlife. Traditionally, Kadar have the belief that they are not supposed to see any wildlife when they go to forest, but their current job roles goes completely against this concept. Besides, ecotourism projects demand the Kadar to use new and easy pathways to the forest and they are supposed to give up the traditional paths they used earlier. If the pre-ecotourism relationship of Kadar with forest respected the forest, the ecotourism projects prioritises the convenience of tourists, not of the forest. On the one hand, the State is alienating Kadar from their resources and thereby they lose access and control over resources. On the other hand, Kadar is forced to be a part of State initiatives though it is against their own belief systems and cultural institutions.

3. 7 Gram Sabha and the Right of Forest Governance

The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006

(FRA) is regarded as a historical legislation for recognising the forest rights of the tribal people. This act is considered as the first inclusive mechanism for considering the rights of the Adivasis. It recognises the conservation of traditional resource use areas of tribal people and envisages the coexistence of people and wildlife by the recognition of their rights in the protected areas. The act ensures a bottom-up approach from the claiming process onwards. The FRA talks about the customary rights of the people, rights on minor forest produces, water bodies and, very significantly, habitat rights in the case of particularly vulnerable tribal groups. Indeed, this is a remarkable effort to deepen the democratic process in forest governance and that has been captured in the following observation:

Spatial decentralisation, devolution of actual power to lower tiers, and the functioning of all tiers and all arms (political, executive, and judicial) in ways that are democratic, transparent and accountable. It means the turning of institutions of governance to the socio-ecological context in ways that enable the participation of the weakest and the feasibility of addressing environmental sustainability and justice goals.⁴⁵

The case against Vedanta, a multinational metals and mining company, is an example of how the judiciary acted as a facilitator of the democratisation of forest governance. The supreme court judgment (*Orissa Mining Corporation Ltd v Ministry of Environment & Forest* on 18 April, 2013, writ petition (civil) No. 180 OF 2011) in favour of the Dongria Kondh tribal community of Odisha against the Vedanta was a historical intervention of the court. In this case, the court directed the concerned Grama Sabhas to take a decision by considering all their claims in reference to various rights (cultural, community and individual)

⁴² Divya (n 19) 29.

⁴³ Anita Pleumarom, 'The Politics of Tourism, Poverty Reduction and Sustainable Development' (2012) 17 *Environment and Development Series* 25.

⁴⁴ *ibid* 41.

⁴⁵ Sharachchandra Lele and Ajit Menon, 'Introduction' in Sharachchandra Lele and Ajit Menon (eds), *Democratizing Forest Governance in India* (Oxford University Press 2014) 11.

offered under the provisions of the Forest Rights Act 2006.

However, there have been continuous attempts from various State machineries to dilute the sections of the act since its inception. A few more examples are worth mentioning here. For instance, on 23rd March 2017, the National Tiger Conservation Authority (NTCA) under the Ministry of Environment, Forest and Climate Change (MoEFCC) brought a letter⁴⁶ saying no rights shall be conferred under Critical Tiger Habitat (CTH) in the absence of proper guidelines for demarcating Critical Wildlife Habitat (CWH).⁴⁷ Unlike any other act, the FRA recognises the rights of the Adivasis in the protected areas which were taken away after the implementation of WLPA1972. And in a letter dated 4th July 2017, National Commission for Scheduled Tribe (NCST) convinced with the arguments of NTCA of not settling the rights in CTH and relocation of Adivasis from CTH.⁴⁸ In addition to that, NCST recommended to use the Compensatory Afforestation Fund Management and Planning Authority (CAMP) to increase the relocation fund from 10 lakh to 20 lakh. Both these moves, contrary to the guidelines of the MoTA, emphasised that the rights of the forest dwellers has to be recognised even if the critical wildlife habitats have not been declared in national parks and sanctuaries.⁴⁹

In an another letter issued by MoEFCC on 2nd February 2019 to all the state departments neglected

the forest rights act provisions including the consent of Grama Sabha in the first stage of the forest clearance. This letter was challenged by the MoTA and sent orders to the states saying that the MoEFCC letter should not be followed by violating the FRA. In the same letter of MoTA, they clarified that no agency can violate provisions of FRA.⁵⁰ In a recent order by the supreme court of India declared on 13th February 2019, directed the state government to evict 10 lakh Adivasis from the forests and by which whose individual claims have been rejected by the court. The petitioners who wanted to evict the tribal people and traditional forest dwellers were retired forest officials and NGOs work for wildlife protection. Due to the conscious silence of the present BJP government in the court and absence of putting proper defense in the court on behalf of Adivasis, it resulted in such a problematic court order. Later, under the pressure of nationwide protests and voice from the Adivasi organisations and opposition parties, the central government approached the court and argued that rejection were all illegal.⁵¹ In light of this, the supreme court put the order on hold and asked 17 states to submit the affidavit.

Amidst all the attempts by the State to dilute the provisions of the act and bypass it for the development projects, the Kadar are using this piece of legislation to protect the forest through their Grama Sabhas. Individual rights of the Kadar on both the areas are settled under the FRA. Community Forest Resource (CFR) rights were conferred to the Kadar of the Vazhachal forest division, under which section 3(1) (c), (d), (e), (i), and (k) are recognized. It gives rights over resources such as water bodies, and minor forest produces and protection of intellectual property rights.

46 F.No.1-7/93-PT(Vol.I), dated 28th March, 2017. Conferring rights under FRA, 2006 in Critical Tiger Habitats Reg.

47 CWH is a provision under FRA and CTH is a provision under WLPA.

48 Proceedings of the meeting held on 4.7.2017 under the chairmanship of secretary, National commission for scheduled Tribes regarding press clipping under the caption 'no forest rights for tribals in critical tiger habitats' <https://ncst.nic.in/sites/default/files/copy_of_minutes_of_meeting/912.pdf>.

49 No. 23011/32/2010-FRA [Vol.II (Pt.)], dated 12th July, 2012, Implementation of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 - Guidelines regarding. <<https://forestrights.nic.in/pdf/Guidelines.pdf>>.

50 F.No.23011/23/2010-FRA on the subject 'Compliance of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 – reg'. <<https://tribal.nic.in/fra/data/ComplianceoftheStribesandOtherTraditionalForestDwellersAct2006regarding05042019.pdf>>.

51 Explainer: Millions Face Possible Eviction – What is the Supreme Court Forest Rights Case About? (The Forest Rights Act) <<https://forestrightsact.com/2019/07/23/explainer-millions-face-possible-eviction-what-is-the-supreme-court-forest-rights-case-about/>>.

Vazhachal is the first area where the community forest rights have been implemented in the state. Total CFR area declared under the FRA in Vazhachal area is for 40000 hectare.⁵² Through the formation of the CFR management committee, a large forest area can be governed through the Gram Sabha. But in protected area, CFR claims are still pending with the sub-divisional level committee and the forest department does not show any interest for the passing of claims and conferring of traditional rights. Through the recognition of community forest resource rights, the Kadar have obtained a legal recognition for their resource dependency and economy. The Kadar have used the act as a governance mechanism of their forest area in many instances. There is a proposed dam project in the area, which is just 400 metres away from the Vazhachal hamlet. The Kadar have consistently stood against the dam project for the last 20 years and the project was stalled by their legal intervention. In 2015, Vazhachal Grama Sabha passed a resolution against the dam and other development projects in their area and submitted a copy of the resolution to the High Court of Kerala.⁵³ There are a total of nine Grama Sabhas in the Vazhachal forest division. In support of the Vazhachal Gram Sabha, all other eight Gram Sabhas also passed resolutions against the proposed dam.

On 4th November 2018, the Vazhachal Grama Sabha took some important decisions regarding their work and forest protection.⁵⁴ In the meeting, they discussed the need of getting high wage for the Adivasis when they work at the forest depot which otherwise goes to the non-Adivasis. High wage is paid for the work such as loading and unloading of the first quality wood. Generally, Adivasis only get chance to get involved in the loading work of low quality wood and hence they get low wages. Later on, the trade unions have admitted their demands to ensure the high wage labour for the Adivasis. Secondly, they had asked the forest department to appoint only Adivasis as forest watchers

in the CFR areas of Vazhachal. Initially, in two of the general panchayat wards, the forest department used to appoint non Adivasis, hence Adivasis of two hamlets never used to get the chance to work as forest watchers. The forest department has agreed to their decision. Thirdly, there was a proposal to widen the road in the Charpa area of Vazhachal by cutting the trees from both sides. Grama Sabha passed a resolution against it and sent it to the officials such as District collector, Divisional Forest Officer and Tribal Development Officer. Following this, the road widening project to public works department was cancelled by the forest department and limited to just maintenance.

During the Kerala floods of 2018, Anakkayam Kadar hamlet was washed away due to debris and consequently, they now live in temporary shelters. Even the Vazhachal Gram Sabha discussed this matter in their own Gram Sabha to find out the possible areas for relocation. Kadar are successfully using this piece of legislation for the governance of their CFR area. Geetha, the Vazhachal hamlet head woman says that 'forest rights act is the only way to attain the self-governance in our area'.

4

INCLUSIVITY OF THE ACTS/POLICY AT THE STATE LEVEL AND THE LIVES OF KADAR

In this section, the state level policies and acts are discussed.

4.1 Kerala Forest Act, 1961

The Kerala Forest Act 1961 was enacted with the intention of protecting and managing forests in the state of Kerala. Forest Settlement Rules 1965 came under this and discussed issues related to claims and settlement of the local community and the duty of the settlement officer. The act states that the customary rights or the rights enjoyed by any forests tribe in the forest should be given special attention and brought up to the forest settlement officer. No clearance was

⁵² See the FRA Document of the 'Title to community forest resources' (n.d.).

⁵³ See the Minutes of the Vazhachal Gram Sabha meeting (03 August 2015).

⁵⁴ See the Minutes of the Vazhachal Gram Sabha meeting (04 November 2018).

allowed for cultivation, forest produce collection etc. The Kerala Forest Produce Transit Rule 1975 elaborates more about the technical issues related to the exploitation and transportation of timber from forests. When I interviewed a former director of the Kerala Forest Research Institute, he said:

Kerala Forest Act is a virtual copy of the Indian Forest Act 1927. Adivasis were allowed to collect the non-traded items or the item which was not in demand for the mainstream economy; thereby some of the local needs were indirectly satisfied. The contribution of the Adivasis made insignificant by the colonial rule by non-recognition of their rights.⁵⁵

No rights of the Adivasis on timber or forest resources are discussed in the act. Timber extraction and management are limited as a matter controlled by the state and contractors only. As far as Kadar are concerned, the Kerala Forest Act did not impact their rights even though their rights were not conferred in it.

4.2 Kerala Hillmen Settlement Rules, 1964

Kerala Government set up a rule for the protection, advancement, treatment and management of the Hill Adivasis under Section 76 of the Kerala Forest Act 1961. This rule aims to preserve the forests for the protection and advancement of the Hillmen. This rule was not different from the Travancore Hillmen Rules, 1911. According to the hill men settlement rule, headman selection was considered as a main step. On the one hand, it gives protection against land alienation, indebtedness and encroachment of tribal land etc. On the other hand, it restricts the mobility of Hillmen from their own settlements. Even though Hillmen was granted the licenses for cultivation, they

were granted no power to claim the land. According to this rule, the forest department had the authority on both the resources and the Adivasis. This has also been a unique rule which gave power to Hillmen to use timber for domestic and agricultural purposes and usage of bamboo and cane with government permission. Besides this, it allowed the Hillmen hunting rights for about six months in a year except some animals prohibited explicitly. The Hillmen's fishing rights were also recognized under these rules. It was also allowed to keep guns in the custody of the headman for protection. Some conditions were also set with the traders/middlemen for the protection of the Hillmen. Other minor produces were supposed to be delivered to the department, but the Kerala Hillmen Rules 1964 was struck down and declared void and illegal by the High Court of Kerala against a petition filed by Eacheran Ittiathi, a Malay Araya Adivasi, challenging the constitutional competence of the state legislature in framing such rules at the state level.⁵⁶ In the writ filed by the petitioner, it is argued that, 'rules are beyond the competence of the state legislature and the state Government as the rules deal with a subject which is not included either in the state List or in the Concurrent List of Schedule VII of the Constitution'.⁵⁷ He also contends that 'the subject falls within the Fifth Schedule of the Constitution'.⁵⁸ Referring to article 244, article 338, 339, 342 in the judgement, the court concluded that legislation regarding the welfare, protection, advancement, etc. of scheduled tribes is specially provided for and power is vested in the president and in the parliament to deal with those matters on which state legislature has no power to legislate.

This has been the only legislation ever enacted in the history of the state of Kerala for recognising the tribal agriculture, headmen system and hunting. Even after considering all the limitations of the rule, this was still a unique piece of forest legislation which discusses the rights of the tribal people to hunt and cultivate.

⁵⁵ Interview (over phone) with Dr CTS Nair, Director (Ex), KFRI (09 March 2014).

⁵⁶ Eacheran Ittiathi v State of Kerala [1966] CDJ 1969 Ker HC 254 Ind 3373.

⁵⁷ *ibid* 1.

⁵⁸ *ibid*.

After the striking down of this rule, such initiatives have not been made either by the state government or by the central government. This would have been an effective legislation for the Kadar, had it been in effect.

5 CONCLUSION

This paper attempted to analyse some of the important policies and laws which are meant for forest conservation and how they impacted a particular Adivasi community living in the Southern part of the Western Ghats in Kerala. The analysis based on the interfaces between the cultural institutions of the Kadar and the modern legislations of the State unravels the fact that modern institutions have over ruled the community's forest governance mechanism – termed as cultural institutions – in most of the cases. It is clear that both philosophically and methodologically there have been attempts to exclude the local communities, especially the Adivasi communities within the purview of the conservation. The mostly praised shift in forest protection, which was in 1988, also did not hand over the forest governance to the Adivasis and the concept, 'participation' has been hugely critiqued. On the contrary, the participatory programme has further distanced the people from the natural resources through initiatives such as ecotourism. There has been reluctance and apathy on the part of the forest department in recognising the rights of the Adivasis in the protected areas even after a decade of the enactment of the FRA. At the same time, this paper does not intend to create a dichotomy between modern and traditional in a strict fashion; rather it highlighted the complex coexistence of both and attempted to bring out this through the conceptual vantage point of interface. Therefore, this paper argues that the existing policy and institutional arrangements need to be restructured and reformed in constructive ways to improve forest governance in a more democratic way.

ARTICLE

EVOLUTION OF FOREST LAW AND REGULATION IN ZAMBIA FROM 1973 TO 2015: ANALYSIS OF THE GAP BETWEEN TEXT AND CONTEXT

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1

INTRODUCTION

The major drivers of forest loss in Zambia are well documented as agricultural expansion, charcoal production, fuelwood collection, wood harvesting, human settlements, fires, urbanization and urban expansion, industrialization and livestock grazing.¹ But these factors are symptoms of the key underlying drivers which are; high levels of poverty, low employment opportunities, brick-making, tobacco curing, insecure forest and land tenure (who owns and controls the land), low institutional capacity of the Forestry Department (FD) as a result of poor funding, low staffing levels, lack of reliable transport for monitoring, and lack of synergy among policies and legislation.² That these trends are still on the rise despite an ostensibly good and progressive legal/regulatory framework,³ justifies the need for an empirical examination of the effectiveness, responsiveness and coherence of Forestry law and regulation in Zambia. As argued that law and regulation perpetuate a historical regulatory culture of the state, examining it can only be sufficient by analyzing the pattern of its evolution.

Therefore, the paper undertakes a critical analysis of the interrelationships among three factors used to assess the efficiency of a regulatory system – effectiveness, responsiveness and coherence. The paper builds on the field of empirical legal inquiry in which the practical aspect of the law is critically assessed in the real world against societal values outside of statutes

and regulatory instruments.⁴ This also explains the volume of non-legal literature reviewed and document analysis undertaken from the materials written by, and consultations with, technical experts in the forestry sector.

The paper starts by examining the letter and spirit of the Forests Act 1973 and the social context which was targeted by the legal text and regulatory machinery. The paper then proceeds to look at the Forests Act of 1999, legislation that was never implemented. But the analysis of this defunct statute will be based on its history and the future it was espoused to influence. At the end, the paper discusses the Forests Act of 2015 and analyzes the current regulatory trilemma which the law brings to the fore mirrored against societal reality. The paper concludes that it is very unlikely that current trends of forest degradation and deforestation in Zambia can be decelerated without attention to the regulatory trilemma in the law; effectiveness, responsiveness and coherence of text to context. In particular, the lack of attention to the regulatory trilemma is itself symptomatic of the blindside of the legacy of Command-and-Control (CAC) regulation - a regulatory culture the state has, firstly, inherited from its colonial past,⁵ and secondly, jealously guarded in protecting and enforcing national values of forestry. But whether this regulatory culture is good or bad is not part of the argument within the scope of this paper. The gist of the paper is to analyze the effects of this regulatory culture on the effectiveness, responsiveness and coherence of the law in relation to the socioeconomic context in which the law is being enforced.

1 Royd Vinya and others, *Preliminary Study on the Drivers of Deforestation and Potential for REDD+ in Zambia: A Consultancy Report Prepared for the Forestry Department and FAO under the National REDD+ Program in the Ministry of Lands and Natural Resources* (FAO 2012) iv.

2 *ibid* iv.

3 That is, the Forests Act No. 4 of 2015 and its related Statutory Instruments.

4 Hazel Genn and others, *Law in the Real World: Improving our Understanding of How Law Works*. Final Report and Recommendations (The Nuffield Foundation 2006) iii.

5 Mwelwa C Musambachime, 'Colonialism and the Environment in Zambia, 1890 -1964' in Samuel N Chipungu (ed), *Guardians in Their Time: Experiences of Zambians under Colonial Rule, 1890-1964* (MacMillan Press 1992) 9-10.

2 THE FORESTS ACT NO 39 OF 1973

Law and policy both reflect the societal values, norms and culture of the law and policy-makers.⁶ This is clear throughout the evolution of forest law and regulation in Zambia from the Forests Act 1973 to the Forests Act 2015. While policy has been used to define and elaborate these values, statutory law, reinforced by secondary statutory instruments, has been used to enforce and protect the values. In the midst of elaborating, enforcing and protecting the country's forestry values, attention to the elements of effectiveness, coherence and responsiveness of the legal/regulatory mechanisms used in enforcing and protecting the same values has been lost.

After independence in 1964, the Government of the First Republic of Zambia did everything within its powers to assert national sovereignty and authority over land and natural resources.⁷ Given that the control of natural resources begins with authority over land, as enacted in sections ten and nineteen of the Forests Act 1973, the Presidential stewardship principle has become the foundation of natural resource management in Zambia.⁸ The principle has always permeated forest management from the Forests Act 1973 to the Forests Acts 2015. If all land is vested in the President, all trees that stand on state land, all produce derived from forest, namely national and local forests, must be vested in the President on behalf of the Republic.⁹ Chungu rightly observes that this took away opportunities for private ownership rights of

trees even where title to land was held.¹⁰ As such, doors for private forest management were de facto closed. From a regulatory ethos, the Presidential stewardship principle lays the foundation for CAC approach to forest regulation.

Through the Forests Act 1973, the state had assumed the unilateral power to command (through legal rules) and the responsibility to control (through administrative procedures of statutory bodies) the entire forestry sector in the country. Regulatory ethos often sees this as a linear progressive approach that proceeds from policy formulation to implementation, rule-making to enforcement, and hence the term Direct Regulation.¹¹ An inevitable part of such control involves land on which the forests stand. As such, the Government of the Republic of Zambia (GRZ) established a sub-category of landholding in government reserve land for the protection of public natural resources like trees in national and local forests, wildlife in national Parks and game management areas.¹² Essentially, forest law after independence in Zambia was not tailored to solve any set of forestry-related problems. It was rather one of the strategic state mechanisms for asserting national sovereignty over natural resources. The motivation to assert national authority and sovereignty over natural resources is discernable in the repeal of the colonial Forests Act Cap 311 of the Laws of Northern Rhodesia (Zambia before independence).

The Forests Act of 1973 was focused on protecting forest catchment areas through the establishment of national and local forests, to conserve and protect forests and trees as sources of timber, and thereby, to regulate timber extraction through licensing as a key regulatory technique.¹³ The foregoing purposes constituted, in Chungu's words, a conservationist and protectionist spirit.¹⁴ But while the basis of being

6 Stuart Bell and others, *Environmental Law* (8th edn, Oxford University Press 2013) 12.

7 Paul Chungu, *Evolution of Environmental Law in Zambia: 'A Paper Presented at the Judges' Seminar on Environmental Law'* Siavonga, December 2005, 3.

8 The President may, by purchase or compulsory acquisition under the Lands Acquisition Act, acquire any land for the purposes of National Forest, if he considers it necessary or desirable in the public interest so to do.

9 The Forests Act 1973, s 3.

10 Chungu (n 7) 10.

11 Bell and others (n 6) 229.

12 Chungu (n 7) 4.

13 The Forests Act 1973, preamble.

14 Chungu (n 7) 8.

conservationist were somewhat clear, the protectionist's spirit was not clear. What were the forests being protected from? While problems in the forestry sector could have probably been anticipated in the future, the legal regulatory system itself was not designed to prevent foreseeable or unforeseeable problems in the future?

Zambia's problems in the forestry sector began to emerge in the 1980s following the economic depression of the 1970s.¹⁵ It is reported that forest reserves suffered the greatest loss of the time – from an estimated 7.6 million to 7.3 million hectares,¹⁶ attributed to human encroachments and over-exploitation of forest resources.¹⁷ The two problems could explain themselves in that; encroachments are purely community problems while over-exploitation is a government-related problem created by attempts to use forest resources (especially timber) to cushion the effects of a declining economy. This fact could not have been appreciated and documented in the 1970s but it could not be ignored later in the 1990s when forests played a crucial role in the country's economic recovery program.¹⁸

Given the fact that the state demarcated forests as national and local forests,¹⁹ or any other form of forest protection that government would deem necessary to prescribe at the time, the scope of forest protection was, by default, limited to the 'demarcated' forest area defined by the law. Outside of the boundaries of demarcated forests was a 'coupe', defined as 'any site or area for felling or taking of forest produce, whether the boundaries thereof are demarcated on the ground or not'.²⁰ As a general principle, the law does not protect what it has not defined or what has not been captured within its precise boundaries.²¹ Therefore, it

is inferable within the spirit of the Forests Act of 1973 that the coupe were not legally protected areas. No license under Part VII, no permit or any form of regulatory authorization such as timber marking were required for felling, cutting and/or removing forest produce from the coupe under the law. Hence the coupe system became de facto open access areas which began to suffer the tragedy of the commons during the economic recession of the 1970s.²² This should explain the subsequent problem of encroachments in the 'demarcated' forests (protected areas) as communities, driven by their pressing socioeconomic needs, shifted their focus from their depleted forests in the coupe system in to the protected forests.

Given that 88 per cent of the legally 'demarcated forests' under GRZ protection was on traditional land at the time,²³ it also meant that these forests were located in local community areas. This fact is implicit from section sixty seven of the Act albeit local communities were fenced off from the same demarcated or protected forests.²⁴ According to the thinking of section sixty seven, the only role these communities could play in forest management was to respond to forest emergencies such as forest fires.²⁵ This was a legally positive obligation rather than a community discretion to help through participation. Understandably however, the assumptions of the policy and law-makers then could have been informed by a belief that the traditional systems were well-placed and strong enough to deal with regulation of forest resources under the coupe system. But the problem of deforestation and forest degradation later on proved that this assumption was wrong. It also exposed the weaknesses of the classical regulatory orthodoxy of CAC which is based on the deterrence theory that assumes an adversarial and antagonistic relationship between state regulators and those targeted by the regulations.²⁶

15 *ibid* 8-9.

16 *ibid* 9.

17 *ibid* 9.

18 Patrick W Matakala, ILUA II Technical Report Series 2016: ZFAP Preparatory Review (FAO, Ministry for Foreign Affairs of Finland, and the Forestry Department, 2016) 6.

19 The Forests Act 1973, s 2.

20 *ibid* s 2.

21 Sir Robert Jennings, foreword in Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (3rd edn, Cambridge University Press 2012) xxvii.

22 Matakala (n 18) 22.

23 Chungu (n 7) 10.

24 The Forests Act 1973, s 67.

25 *ibid*.

26 Christine Parker and John Braithwaite, 'Regulation' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press 2003) 129.

The tragedy of the communal commons under the coupe system was also a reflection of the effects of the thinking of the time. Seeing no link between environment and development in the 1970s, most African governments saw environmental problems as issues of developed countries and not challenges of developing countries.²⁷ With a biased focus on industrialization at the expense of environmental protection, Zambia was slowly falling into two self-dug pits; firstly, a development crisis caused by over-borrowing to finance industrial development which also culminated in an economic decline due to a rapid fall in copper prices; and secondly, an environmental crisis which the government did not see or simply chose to ignore.²⁸ While the lack of forest regulation in the coupe system compounded the environmental crisis, the legal/regulatory mechanism in the sector was neither designed to address nor to respond to current, foreseeable and/or unforeseeable problems in the sector.

How effective, therefore, was the Forests Act 1973? Firstly, from the perspective of effectiveness, the law was inept and blunt in the face of problems it was never designed to solve or respond to. As such, the regulatory infrastructure crumbled in the face of unforeseen complex societal realities. Secondly, in terms of coherence, the law was viewed to be inconsistent with the land tenure system.²⁹ While state land is reported to have constituted only 6 per cent of the entire land at the time, 88 per cent of all government legally demarcated forests stood on customary land under traditional rulers.³⁰ This created a conflict of jurisdiction between the FD and traditional rulers.³¹ Consequently, it was easy for the local communities to violate the law willy-nilly because traditional authorities and their communities were either not aware of the

law, having been excluded from the formulation of the law in question,³² or because the law itself was the cause of jurisdictional conflict over land and forest estate. Thirdly, from the perspective of responsiveness, how does a regulatory system respond to complex socio-economic realities to which the law was never designed to respond in the first place? In addition, the FD as the sole GRZ regulator hasn't had both financial and technical capacity to undertake such highly skilled assessments as monitoring the communities' responsiveness to the law. This institutional incapacity has remained a fundamental issue to date. Essentially, the Forests Act 1973 became ineffective because of its unresponsiveness.

Ultimately, much of the ineffectiveness of the Forests Act 1973 and its dominant CAC regulation were attributed to a combination of regulatory factors; (i) reliance on inappropriate regulatory instruments leading to what is known as instrument failure,³³ (ii) lack of sufficient information about the problems being regulated leading to what is known as information failure,³⁴ (iii) poor enforcement on the part of the regulators leading to what is known as implementation failure,³⁵ and (iv) motivation failure – meaning, those being regulated are not motivated enough to comply with the rules.³⁶ Logic then posits that motivation failure is determined by the extents to which people view the coherence of the law to their societal needs. It then follows that motivation failure occurs when the targeted population sees no rationality in complying with the rules. Put together, these factors define regulatory failure in general but separated, they depict the major demerits of CAC in particular. Hence, the regulatory system attempted to respond in 1999 as follows:

27 Bertha Osei-Hweidie, 'Environmental Protection and Economic Development in Zambia' (1996) 11(2) *Journal of Social Development in Africa* 57, 58.

28 *ibid* 58.

29 Chungu (n 7) 10.

30 *ibid*.

31 *ibid*.

32 *ibid*.

33 Julia Black, 'Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a Post-Regulatory World' [2001] *Current Legal Problems* 103, 104-7.

34 *ibid* 105.

35 *ibid* 105-106.

36 *ibid* 106-107.

3

THE FORESTS ACT NO 7 OF 1999

The turning point in the management of forests in Zambia started with ideas laid down in the Zambia Forestry Action Plan (ZFAP) 1998 to 2018; a twenty year action plan meant to overhaul forest management in the country.³⁷ The ideas of the ZFAP were progressively developed into objectives of the Zambia National Forestry Policy of 1998 and subsequently coined into the object of the Forests Act No.7 of 1999.³⁸ Essentially, the Forests Act 1999 was a brain child of the ZFAP as well as conceived to be a national strategy for fulfilling international obligations under the UNCBD.³⁹ Therefore, other than national issues to which the Forests Act 1973 became inept, there was an array of growing international pressure to which natural resource law in Zambia needed to respond. Bertha Osei-Hweidie alluded to this as one of the influences that contributed to the development of national environmental law and policy in Zambia.⁴⁰

Maintaining a strong reliance on CAC regulation, the Forests Act 1999 was enacted to:

establish the Zambia Forestry Commission and define its functions; to provide for the establishment of National Forests, Local Forests and joint forest management areas; to provide for the participation of local communities, traditional institutions, non-governmental organizations and other stakeholders in sustainable forest management; to provide for the conservation and use of forests and trees for the sustainable management of forest ecosystems and biological diversity; to provide for the

implementation of the Convention on International Trade in Endangered Species of Wild Flora and Fauna, the Convention on Wetlands of International Importance Especially as Water Fowl Habitat, the Convention on Biological Diversity and the Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa; to repeal the Forests Act, 1973; and to provide for matters connected with or incidental to the foregoing.⁴¹

From its preamble, the Act clearly sought to; firstly, deal with the debilitating institutional, technical and financial challenges of the FD by upgrading the FD into a semi-autonomous Forestry Commission. The inherent idea in this provision was informed by the fact that forestry problems in the country could not be addressed without first strengthening the position, capacity and autonomy of the regulatory authority.⁴² Factors compounding forest loss and degradation from the 1970s to 1999 presented more than enough evidence to justify this approach.

Secondly, to broaden the legal scope of forest management from the narrow coverage of ‘demarcated forests’ in the Act of 1973 to a broader coverage which would include the establishment of Joint Forest Management (JFM) areas, participation of local communities, traditional institutions, non-governmental organizations and the involvement of other stakeholders in Sustainable Forest Management (SFM). While maintaining a hegemony on the Command side (through statutory rules), drafters of this law were indirectly leading the GRZ to loosen up on the Control side (regulatory aspects) of the CAC approach. Forest management in the Act of 1999 would also cover such ecologically sensitive areas as Protected Flora,⁴³ and forests in local communities.⁴⁴

37 Matakala (n 18) i.

38 *ibid* 1.

39 *ibid* 1.

40 Osei-Hweidie (n 27) 58.

41 The Forests Act No.7 of 1999, preamble.

42 Matakala (n 18) 7-8.

43 The Forests Act 1999, Part VII.

44 *ibid* s 2.

This automatically translated into an expanded scope of forest management for the semi-autonomous Forestry Commission.

Thirdly, it provided for the conservation and use of forests and trees for the sustainable management of ecosystems and biological diversity. This was built on an implicit recognition of forests and their value not just in terms of instrumental utility as sources of timber but as natural habitats for a wide range of biodiversity and for maintaining healthy ecosystems. For the first time in Zambia's forestry law, the concept of sustainable development was introduced.

Fourthly, the law was also meant to be a national mechanism for fulfilling international obligations of environmental law and domesticate internationally recognized principles of environmental law such as public participation and sustainable development through the implementation of the Convention on Wetlands of International Importance Especially as Water Fowl Habitat, the CBD and the Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa. This signified an integrated approach to forests and environmental management owing to the interconnected and multi-faceted nature of forests and environmental issues like loss of biodiversity. As such, the Act was attempting to raise the profile of environmental management in general and forest protection in particular to an international level.

Fifth, the law was to demonstrate regulatory responsiveness following the ineffectiveness, irresponsiveness and incoherence of the Forests Act 1973. Hence, the need to repeal the former. But above all, the Forests Act 1999 sought to address two broad categories of problems; (i) the institutional and administrative challenges of the regulator, the FD in particular, and in the forestry sector in general, and (ii) the escalation of forest degradation and deforestation trends in the country.

As legal drafting custom dictates in Zambia, the Forests Act 1999 was to provide for matters incidental to or connected with the foregoing. The importance of the phrase 'matters incidental to and/or connected with the foregoing' cannot be underplayed in regulatory ethos. It points to the regulatory space that needs to

be occupied by different administrative procedures, regulatory mechanisms and enforcement techniques that need to be undertaken pragmatically in order to fulfil the object of the law. In essence, what needs to be practically done to implement the theoretical aspirations of the law so the law does not remain a white elephant on paper? This is the meaning of regulation from an empirical perspective.⁴⁵ The administrative procedures, the regulatory techniques and approaches used to reach the targeted population all constitute the regulatory infrastructure that the law establishes. All this must fit into 'matters incidental to or connected with' the spirit and the letter of the law.

The Act was conceived as a brain child of the ZFAP 1998-2018 and formed in the womb of the 1998 National Forestry Policy.⁴⁶ This demonstrates the Zambian approach of elaborating the values and norms of the state through policy and use legislation to enforce and protect the values. But the law never came into force. Why, then, even discuss a law that never came into force? That the roots of the Forests Act 2015 are founded in the Forests Act 1999, it would be incomplete to discuss the evolution of forest law and regulation in Zambia without reference to the defunct Forest Act 1999. Discussing it therefore, serves to highlight the thinking of the policy and law-makers of the time, to signify the problems the law sort to address at the time, and to explicate the future the law espoused. But inadequate flow of financial resources to the FD was very symptomatic of all the problems that culminated into failure to enforce the Act. This factor partly explained the technical and capacity debilitation in the department.⁴⁷ There was a sheer lack of multi-sectoral coordination for the implementation of forestry programs outlined in the ZFAP,⁴⁸ and the political inertia towards the idea of overhauling the sector was simply insurmountable according to a renowned Forestry expert in Zambia, Prof. Patrick Matakala.⁴⁹

45 Genn and others (n 4) iii.

46 Matakala (n 18) 4.

47 *ibid* 4.

48 *ibid* 4.

49 *ibid* 8.

Failure to enforce the Forests Act 1999 created a legal conundrum from 1999 to 2015. The country was forced to fall back on the repealed Act of 1973 to regulate the forestry sector whose problems had doubled since the 1980s. This was problematic in two ways: Firstly, the trends of forest degradation and deforestation in the country had tremendously increased, and secondly, the institutional, administrative and technical capacity challenges in the FD worsened. The Forests Act of 1973 was never designed to address any problem of this sort. How, then, could it be relied upon to regulate the troubled forestry sector beyond 1999? It is during this time that Zambia began to make global headlines for recording one of the highest deforestation rates in the world. The reason was primarily because the entire forest estate in the country became a de facto unregulated open access area.⁵⁰

Failure to implement the 1999 Act impeded the much needed flow of financial resources to the sector as donors and major forestry funders lost confidence in the whole system. A case in point; on 26th of January 2006, the Finnish Embassy announced a decision of the Finnish government to withhold funding meant to operationalize the Forestry Commission until the GRZ ironed out issues of the law.⁵¹ Implicit in the rationale of the Finnish Government was the observation that the ineffectiveness, irresponsiveness and the incoherence of the law was underpinning forest loss and degradation in the country. The Finnish Government's withdrawal of funding further compounded the FD's institutional and technical debilitation from which the department still grapples to recover to this day. Professor Patrick Matakala observes, in particular, that the failure to operationalize the semi-autonomous Forestry Commission as proposed in the Forests Act 1999 left the department with a demotivated cadre of staff (most of whom left) and shunned by the sector's traditional funders.⁵²

4 THE FORESTS ACT NO 4 OF 2015

In general, the Forests Act 2015 is an off-shoot of the defunct Forests Act 1999. With a change of government in 2011, new energy was generated to reinvigorate the legal and policy reforms in the forestry sector. The Forests Act of 1999 was revised and sent back to Parliament as Forestry Bill of 2012. For three years, the Bill was politically contested mainly because of the financial implications the semi-autonomy Forest Commission would bring to the fore.⁵³ To a large extent, however, the Act of 1999 was left intact other than the deletion of provisions establishing the semi-autonomous Forestry Commission. Ironically, the functions stipulated for the Forest Commission were also left intact while the Forest Commission itself was deleted. This meant that the FD was to take over the statutory functions of the Forestry Commission. Ultimately, all contested issues emanating from the Forests Act 1999 narrowed down to a latent desire for maintaining the hegemony of CAC in what was eventually enacted as the Forests Act 2015.

4.1 The Spirit of the Law

An Act to provide for the establishment and declaration of National Forests, Local Forests, Joint Forest Management (JFM) areas, botanical reserves, private forests and community forests; provide for the participation of local communities, local authorities, traditional institutions, non-governmental organizations and other stakeholders in SFM; provide for the conservation and use of forests and

50 *ibid* 31.

51 Lusaka Times, 'Finland Withholds Forestry Commission Funds Because Of Bad Laws' *Lusaka Times* (26 January 2006) <<http://www.lusakatimes.com/2009/01/26/finland-withholds-forestry-commission-funds-because-of-bad-law/>>.

52 Matakala (n 18) 20.

53 *ibid* 14-15.

trees for the sustainable management of forest ecosystems and biological diversity; establish the Forest Development Fund; provide for the implementation of the UNFCCC, CITES, the Convention on Wetlands of International Importance, especially as Water Fowl Habitat, the UNCBD in those Countries experiencing Serious Drought and/or Desertification, particularly in Africa and any other relevant international agreement to which Zambia is a party; repeal and replace the Forests Act 1999; and provide for matters connected with, or incidental to, the foregoing.

Of particular significance to the expanded scope of forest management are two new entrants into the system;

Firstly, the introduction of private forests is an open door for the participation of the private sector in forestry. While this door was only slightly open in the Act of 1999 through the recognition of rights, title and interests over land and trees, the business side of it was disincentivized through the extension of CAC regulation to felling, cutting and selling of forest produce derived from private ownership using licenses.⁵⁴ In the Forests Act of 2015, the door for private forestry is completely open from production to trading. Forest produce from a registered private forest may be exempted from felling, cutting and selling licenses.⁵⁵ But why 'may it be' rather than 'shall it be' exempted? This discretionary legal language depicts the lingering effects of CAC regulation on forestry in general. In particular, it shows the stretch of the government arm on controlling forestry business even on private land. In addition, the opportunity for deregulation of private forestry is significantly widened

in the principle of Presidential stewardship. Section three excludes private forests from all the other demarcated forests whose ownership of trees and forest produce vests in the President. Ownership of a tree and all forest produce derived from a registered private forest is vested in the owner. This should be the right that protects the owner when felling, cutting and/or selling forest produce their private forest.

Secondly, the introduction of Community Forest Management (CFM) is informed by a recognition of how important local communities are both to the degradation and sustainable management of forests. Designers of this Act, particularly of the Act of 1999, were cognizant of the fact that lessons of neglecting local communities out of forest management in 1973 were too huge to be repeated. Equally important is the fact that the conflict of jurisdiction over land and forests between the FD and traditional Chiefs was so daunting that it needed a legally supported solution.⁵⁶ A specific Statutory Instrument (S.I) regulating CFM was issued in 2018 and basically established three things; (i) rights and obligations of the communities to engage in CFM, (ii) the procedural mechanism for the communities to embark on in seeking these rights, and (iii) the community institutional framework required for engaging in CFM. With the rights granted under the S.I, communities receive the power and duty to manage demarcated forests in their communal localities,⁵⁷ and acquired the authority to restrict access to those forests.⁵⁸

A Community Forest Management Group (CFMG) is required to be established and recognized for this purpose, then designated as a community legal entity in the chain of power from the Director of Forestry to the local community.⁵⁹ The CFMG is also required to assist the Director of Forestry to control restricted activities within an established community forest area.⁶⁰ But why must the community, through the

⁵⁴ The Forests Act 1999, s 38 (2).

⁵⁵ The Forests Act 2015, s 27 (3).

⁵⁶ Government of the Republic of Zambia, Report of the Auditor General on Sustainable Forest Management 2012-2015, vi.

⁵⁷ The Forests (Community Forest Management Regulations) S.I No. 11 of 2018, regulation 5.

⁵⁸ *ibid* regulation 9 (3) a.

⁵⁹ *ibid* regulation 5.

⁶⁰ *ibid* regulation 16 (1).

CFMG, help the Director of Forestry rather than the Director help the community? This exposes the latent regulatory culture that runs through the genetics or the spirit of the law and regulation while the letter of the law is ostensibly inclined towards deregulation. Essentially, the CFM regulations are simply giving the communities the right to undertake forest management for, and on, behalf of the Director of Forestry. The Presidential stewardship principle is hereby delegated to the Director of Forestry which merely devolves the very essence of CAC regulation. This also explains the huge amount of power and duty the Director possesses in granting and/or revoking community rights throughout the regulations.

Providing for the participation of local communities, local authorities, traditional institutions, non-governmental organizations and other stakeholders in SFM brings three lessons to the fore:

Firstly, that the complexity of forest degradation and deforestation in the country depicts national socioeconomic development challenges of the many poor and jobless Zambians.⁶¹ This means that no single national institution or regulatory body, by itself or on its own, can claim to be adequately positioned to manage drivers of deforestation in the forestry sector. Behind this provision, policy and law-makers do concede the fact that the FD is too inadequate to manage the entire forest estate in the country. Each of the institutions, organizations, authorities and stakeholders the law seeks to bring into forest management have a specific influence on the drivers of deforestation in the country either positively or negatively, directly or indirectly, just as they have a specific role to play in national development.

Secondly, and from a regulatory ethos, the multi-stakeholder approach in the Forests Act 2015 is a cardinal part of deregulation - otherwise referred to as 'regulation in many rooms'.⁶² This is justified by the

complexity of socioeconomic challenges that development in Zambia brings to the fore. Complexity here refers to four particular scenarios of regulatory failure as outlined by Julia Black; (i) the complex nature of the interactions between state actors and the socioeconomic needs of the targeted populations,⁶³ (ii) the asymmetries of information in practical reality given that, either all of these socioeconomic complexities are unknown or may only be imperfectly understood as different motivations ostensibly drive people into the forests,⁶⁴ (iii) the fragmentation of knowledge between state regulators and the targeted populations raises doubts as to how much the regulators can claim to understand the huge forestry estate they are mandated to regulate on their own? Case in point; it is reported that the FD rarely gets accurate and correct information about the harvesting practices of the licensed concessionaries in the forests due to lack of field staff on the ground;⁶⁵ and (iv) fragmentation in the exercise of power and control is a challenge on its own.⁶⁶ In a multi-party democracy characterized by regional voting patterns across different ethnic groupings, the GRZ cannot claim to have a monopoly on the exercise of regulatory power and social control everywhere in the country. Consequently, the motivation for people to comply with government CAC regulation is low and ultimately leads to motivation failure. It is this vacuum of motivational failure that other organizations, institutions, authorities and stakeholders should occupy in forest management.

Thirdly, while the Forests Act 1973 narrowly used 'law' as the sole font of regulation, the multi-stakeholder approach in the Forests Act 2015 broadens the view of regulation beyond law. This illustrates the technical conception of the term 'regulation' which means; the use of a diversity of mechanisms, including rules, to influence and control the flow of activities on the ground.⁶⁷ As such, the multi-stakeholder approach is a direct result of the failures of CAC regulation whose

⁶¹ Interview with Mr. Lishomwa Mulongwe, Chief Forestry Research Officer in the Forestry Department, Kitwe (Zambia, 7 August 2019).

⁶² Black (n 33) 103-4.

⁶³ *ibid* 107.

⁶⁴ *ibid* 107.

⁶⁵ Government of the Republic of Zambia (n 56) v.

⁶⁶ Black (n 33) 107.

⁶⁷ Bell and others (n 6) 229.

common caricature manifests in poorly targeted rules, rigidity and ossification, under or over-enforcement, all of which ultimately lead to unintended consequences.⁶⁸ Given its inherent rigidity, CAC regulation is often unresponsive which makes it blunt in the face of emerging issues unforeseen by the drafters. To avert this danger, the GRZ has loosened its grip on the control aspect (through multi-stakeholder approach) while maintaining a tight grip on the command aspect (use of statutory rules) of CAC regulation. Therefore, the Forests Act 2015 was well designed to be responsive to the escalating forest loss and to be coherent to the socioeconomic needs of the Zambian people at the same time. But has the responsiveness and coherence of the law translated into effectiveness?

Given the overpowering nature of CAC, the effectiveness of the Forests Act largely depends on its enforcement by the regulator, the FD, which is in dire need of financial resources to undertake all its statutory functions. The law provides for the establishment of the Forest Development Fund as one of the mechanisms to address lack of sustained financial flows from the government and cooperating partners into the department. Much of the department's technical, resource and administrative incapacities are attributable to this factor. Ironically, there is a lot of money generated from forests in Zambia especially through timber harvests and non-timber forest produce like honey, devil's claw, caterpillars and charcoal production and trade.⁶⁹ This is what counts towards the 5.2 per cent contribution of forestry in general to the country's GDP.⁷⁰ But many of these forestry activities are illegal and not monitored because the FD

fails to capture them, to account for the financial flows deriving from such activities and to evaluate their impact on both the economy and forest resources. This narrows down to the inadequate capacity of the FD.

The Forests Act 1999 attempted to address this matter by first, transforming the FD into a Commission and secondly, by giving the Commission significant amount of autonomy to run its own affairs, plan, manage, and decide its own financial matters including revenue collection. Contrary, the thinking of the Forests Act 2015 is reflected in the idea that the department can and should solve much of its financial problems through the Forest Development Fund. Principally, monies into this fund should come from voluntary contributions by any well-wishers,⁷¹ grants from any source within and without the country as the Minister may approve,⁷² and from interest arising out of any investment of the fund.⁷³

Imperative, however, is whether, in its current state, the department is able to command enough confidence and trust from within and without the country to attract this money through the outlined sources? The Auditor General's report on SFM from 2012 to 2015 gives a glimpse into this matter. The report concludes, *inter alia*, 'there is inadequate investments in forest plantations due to lack of funding and delayed funding as a result, important activities such as planting and weeding were done at the wrong time or not done at all'.⁷⁴ Reference to forest plantations in this report is crucial because it is one of the major prescribed uses of the money in the Forest Development Fund.⁷⁵ But currently, the department is still grappling with

68 Black (n 33) 105.

69 The author draws authority for this assertion from his experiences as Zambia National Farmers' Union (ZNFU) Manager for Environment and Forestry, his current positions as UNFAO National Consultant in Community-based Forest Enterprises and from his Research works at the Center for Environmental Research and Education (CERED).

70 Government of the Republic of Zambia, National Forestry Policy of 2014, 6.

71 The Forests Act 2015, s 70 (2) b.

72 *ibid* s 70 (2) c.

73 *ibid*, s 70 (2) d.

74 Government of the Republic Zambia (n 56) v.

75 Forests Act 2015, s 70 (3).

poor financial resources because its traditional funders and cooperating partners lost confidence in the sector following the failed implementation of the Forests Act 1999,⁷⁶ the piece of legislation which was designed to address the institutional and administrative challenges of the department. The failure to enforce the Forests Act 1999 means the FD in the Forests Act 2015 continues to grapple with its statutory functions.

4.2 Function of the Forestry Department and its Director

Given the strength of CAC used throughout all the three forest legislations from 1973 to 2015, the success of controlling forest degradation and combating deforestation in Zambia depends more on the ability of the FD (the control) to undertake its statutory functions prescribed in section five than on legal text on paper (the command). It is not surprising that the functions of the FD in section five are a 'copy-and-paste' of the functions of the Forestry Commission promulgated in the Act of 1999 as the one is birthed out of the other. The department also has some additional mandates in the Act of 2015 which were not explicit in the 1999 Act. The institutional, administrative and framework of the Commission in the Act of 1999 was to be larger and more autonomous than a department operating under a Permanent Secretary in a Ministry. But the very functions which the Commission should have undertaken under a semi-autonomous structure have been lumped on a department that runs on limited financial resources and technical capacity with limited autonomy in the Act of 2015. How does the incapacitated FD manage to double its scope of work under the new mandate when it has always been challenged to undertake a narrower scope of work even before Act of 1999?

Further, the role of the Director of Forestry does not reflect feasible reality. In practice, the Director of Forestry must operate under the supervision of the Permanent Secretary in the Ministry as required and guided by the operational rules of the ministry. This is part of the bottlenecks which the Forests Act of 1999 sort to bypass through its proposed institutional reforms from a department to a Forestry Commission. In theory however, the Forests Act of 2015 elevates the Director not only as head of the Forestry Department but mandates him/her with huge responsibility, duty and power to administer the Act in its entirety.⁷⁷ This magnitude of authority is only comparable to that of a Director General of any other statutory body in Zambia. In undertaking this duty, the Director of Forestry does not have any other legal entity or persons (like the Permanent Secretary) in between him/her and the Minister within the chain of legal mandate and power. It is discernable that the ideal functions of the Director of Forestry were those functions initially intended for the Director General of the Forestry Commission in the repealed Act 1999. Ultimately, the underwhelming functionality of the FD as well as the practical reality of the institutional framework within which the Director of Forestry operates on a daily basis have a huge bearing on the enforcement of the law.

4.3 Enforcement Gaps

Though undertaken just before the enactment of the Forests Act of 2015, the Auditor General's report of SFM highlights a set of six problems in the sector.⁷⁸ Only one of the six problems has been addressed through the CFM Regulations of 2018. Meanwhile, all the six problems highlighted in the report have remained significant enforcement issues even after the enactment of the Forests Act of 2015. The whole

76 Matakala (n 18) 26.

77 The Forests Act 2015, s 4 (2).

78 Government of the Republic of Zambia (n 56) v-vi.

section, five prescribing the functions of the FD, suffers huge enforcement gaps as long as the department and its crippling challenges remain unresolved. The department's mandate has been expanded without correspondingly expanding its institutional, financial, technical and human resource capacity. Allegorically, this is like a disabled person who fails to carry a 10kg bag because of his disability. But he is given an additional 25kg bag to lift without first treating the disability.

The failure to control, manage, conserve and administer National and Local Forests and botanical reserves as stipulated in paragraph b of subsection two, section five, in particular, is fundamental in explaining the current state of forest loss in Zambia. Lack of Honorary forest officers as prescribed in section six compounds the inadequacy of staffing in the FD. But it boils down to the fact that there is no money to pay them. Without this cadre of field staff, the vast forest estate in the whole country remains a de facto open access area.⁷⁹ Forest certification is still a challenge in promoting SFM because the FD cannot yet enforce provisions of section nine, particularly, paragraph c of subsection one. Forest certification comes with prior processes that need to be in place beforehand; there must be a certification criteria upon which the definition of sustainability shall be based,⁸⁰ and a set of sustainability indicators and standards for certification.⁸¹ These processes cannot happen in a vacuum but through participatory stakeholder engagement processes that require money. The FD is not in any financial position to drive such processes.

Failure to enforce section twenty-five pertaining to the prohibition of certain activities in botanical reserves explains the encroachments and indiscriminate cutting, felling and excavations, fires and openings which the paragraphs of subsection one are trying to control. This is coupled with the failure to enforce part VI (Regulation of Forest Produce) in general and section forty nine in particular. An important part of regulating

forest produce is timber marking prescribed in Part VII. There is a lot unmarked, thus illegal, timber felled and conveyed from protected forests on our roads day and night as the FD cannot be found everywhere all the time.⁸²

Part IX details the regulatory actions that a forestry officer is mandated to undertake for the purpose of the Act. While in theory, the law hereby gives authorized officers power to enforce the law, there is a huge shortage of such officers on the ground in reality. Section seventy four, subsection one and paragraph c for instance, enacts that an authorized forest officer may require any person found in the forest area who has in that person's possession forest produce to give an account of the manner in which the person came in possession of the forest produce... This provision explicitly requires forest officers to take physical patrols of the vast forest estates in the country. But the reality is that the said forest officers are, firstly, very few and secondly, have no transport to patrol the massive forest areas under their jurisdictions.

Essentially, all the enforcement actions prescribed under Part IX are hands-on in nature. They require transport for the forest officers to be physically on the ground. But because of the dominant CAC regulatory infrastructure around which the Act is built, it becomes impractical to enforce the law (the command) when the state regulatory body (the control) is itself incapacitated to carry out its functions. In the final analysis, the Act has an inbuilt ability to be responsive to the escalating forest loss as well as being coherent to the multiple socioeconomic needs of the many poor and jobless Zambians. The design of its rules, the extent to which it provides for indirect regulation and the recognition of stakeholders' rights signify its coherence. The Act is also designed with an inbuilt ability to be responsive to, especially, the growing socioeconomic needs of the Zambian society and unforeseen emerging issues. The discretionary room in the section

⁷⁹ Matakala (n 62) 31.

⁸⁰ The Forests Act 2015, s 9(1) a.

⁸¹ *ibid* s 9(1) b.

⁸² Government of the Republic of Zambia (n 56) v.

five functions of the FD are deregulatory in nature allowing for a wide scope of responsiveness to different issues of the past, present and of the future to promote sustainable forest management. Therefore, the Act of 2015 is, in theory, coherent and its ability for responsiveness is discernable. In practice however, the Act can hardly be effective given the incapacities of its main implementing agency - the FD. In sum, the debilitating capacity of the FD makes the whole law ineffective because there is still a huge gap between what the law says in theory (legal text) and what transpires in real life (social context).

5 CONCLUSION

The Forests Act 1973 was the first post-independence national legislation to regulate forestry in Zambia. Other than to simply assert national sovereignty and authority over the forest estate, the Act was not conceived as an instrument for solving any set of forestry-related problems in the present or in the future. The Government of the First Republic of Zambia simply used the Act as legislative instrument to assert its national value on the forest estate, a value which was then expressed through a post-independence culture of Command and Control. As such, the legislation failed to be responsive to the emerging problems of the 1980s. It was also deemed incoherent to the growing socioeconomic needs of the many poor and jobless Zambians particularly because it was not designed for such. The Act failed to respond to three broad set of problems; (i) the escalating forest loss through deforestation and forest loss, (ii) the increasing poor capacity of the Forests Department and (iii) the jurisdictional conflict over land and forests between the FD and traditional chiefs under customary land.

The Forests Act 1999 was seen as a very progressive legislation that would overhaul forest management in Zambia by responding to the three forgoing problems. The need to respond to the aforementioned forestry problems and the desire to make the regulatory system coherent to the many

Zambians were too huge to be ignored. Therefore, key elements of the Act were the alterations of the command (rules) and a reduction in the extents of the control (regulatory approach) aspects of the Command-and-Control regulation from the 1973 legislation. Establishment of a semi-autonomous Forest Commission was the ‘elephant in the room’ where the deregulatory control aspects were concerned. But the financial implications which the idea of a semi-autonomous Forest Commission brought to the fore veiled was used as an astute defense of the hegemony on traditional values. Generally, the foundational spirit of the Forests Act 1999 were an implicit challenge to the dominant culture of command-and-control. Consequently, the Act never came into force but was later edited and resuscitated into a different statute in order to restore the fundamental state culture on the one hand, but exhibiting some elements of changing values on the other hand. The resuscitated form of the Act of 1999 became the Forests Act 2015.

By repealing the Act of 1999, the Forests Act of 2015 would have logically been expected to continue addressing the three, broad set of problems which the former sought to address. If the department was already technically challenged in terms of capacity to undertake the scope of the 1999 Act, what guarantee is there that the department will manage to undertake an expanded scope of work in the Forests Act 2015 while carrying forward the department’s old institutional, administrative, technical, financial and capacity challenges? The Forests Act 2015 not only repeals the Act of 1999, it provides for the continuation of the technical staff and administrative machinery of the FD.⁸³ Inevitably, all the capacity challenges of the department are thereby carried forward in an effort to maintain a hegemony of the foundational culture of Command-and-Control.

In summary, government’s underpinning idea for natural resource management in Zambia has always been defined by a need to assert authority and

⁸³ The Forests Act 2015, s 107.

sovereignty over land and everything that stands on the land. Government's value of forestry derives from this idea, and it is also seen in the way the sector has been managed through a culture of commanding and controlling the sector from 1973 to 2015. Statutory law is nothing but an instrument through which the GRZ projects its culture of protecting and enforcing its overt and/or covert values. This paper was not set to argue whether this culture is good or bad, or whether it is appropriate or not. The paper was set to analyze the blind spot of a culture of Command and Control. It is in this cultural blind spot that regulatory gaps occur particularly because; in its attempts to preserve a hegemony on its traditional values, the regulatory culture fails to discern the dynamics of changing times. In the process, the regulatory machinery becomes irresponsible to the very mischief it was meant to cure, incoherent to the values of the same society which drives deforestation and forest degradation. Empirically speaking, the legal/regulatory machinery is rendered ineffective in practice.

ARTICLE

TITLE SECTORAL COORDINATION IN KENYA'S MUNICIPAL SOLID WASTE MANAGEMENT: A HORIZONTAL ASSESSMENT

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1

INTRODUCTION

Like most African countries, Kenya is faced with an intractable municipal solid waste problem, evidenced by growing rates of waste generation and challenges of effective collection, treatment and disposal of the same.¹ In Nairobi City for instance, waste generation is estimated to have risen from 1530MT per day in 2002² to 2600MT in 2015,³ with close to 50 per cent of the waste left uncollected by local authorities. Out of the waste collected in Nairobi, only an estimated 33 percent is tipped at the official (Dandora) dumpsite in the eastern outskirts of the city, while the rest is disposed in hundreds of illegal dumpsites across the city.⁴ Even though 95 per cent of solid waste collected in Nairobi is deemed to be re-useable, only about 5-10 per cent is recycled or composited, predominantly by informal waste actors.⁵

It is estimated that only 40 per cent of urban residents access waste collection services currently provided largely by County authorities, despite the fact that private sector and community groups, especially in the major cities of Nairobi, Mombasa and Kisumu, require these services.⁶ However, coverage in poor neighbourhoods

is rather low and collection fees considered unaffordable for most, yet 40 per cent of the urban population resides in such areas.⁷ Environmental and health impacts resulting from poor municipal solid waste management (MSWM) are indeed profound as a recent study reveals that 28 per cent and 14 per cent of households in Nairobi and Mombasa respectively reported health problems associated with poor waste management.⁸

Weak organisational capacities (financial, personnel, technological) of institutions responsible for regulation and service provision is considered a major cause of poor performance of MSWM systems in urban areas in Kenya.⁹ Lack of a clear decentralised framework for MSWM undermines the efficacy of county authorities in discharging their mandates at the local level.¹⁰ Political interference and low prioritisation of MSWM in county budget-making processes undermine capacities of County governments to discharge their

1 UNEP, *Africa Waste Management Outlook* (UNEP 2018) 9.

2 UNEP, *Kenya: Atlas of Our Changing Environment* (UNEP 2009) 156.

3 NEMA, *National Solid Waste Management Strategy* (NEMA 2015).

4 Ministry of Environment & Natural Resources & UNDP, *Nationally Appropriate Mitigation Action on A Circular Economy Solid Waste Management Approach for Urban Areas in Kenya* (Ministry of Environment & Natural Resources 2016).

5 Nairobi City County Government, 'County Annual Development Plan (CADP) 2018/2019' (Nairobi City County, 2017) 55.

6 Ministry of Environment and Forestry, 'National Sustainable Waste Management Policy- Revised Draft, 24 April 2019' <http://www.environment.go.ke/wp-content/uploads/2019/04/Revised_National_Waste_Policy_2019.pdf>.

7 Sam Waweru and Edwin Kanda, 'Municipal Solid Waste Management in Kenya: A Comparison of Middle Income and Slum Areas' (International Conference on Disaster Risk Reduction & Conflict Resolution Proceedings, Masinde Muliro University, Jul 2012) 188; the authors report that slum residents in Nairobi's Kibera slum pay for waste collection services double what their neighbours in middle income estates pay.

8 Blessing Mberu and Mwangi Chege, 'Improving Solid Waste Management Practices to Reduce Health Risks in Nairobi and Mombasa' (Urban Africa Risk Knowledge Briefing No 11 June 2018). <<https://www.alnap.org/system/files/content/resource/files/main/G04296.pdf>>.

9 See Lesley Sibanda, Nelson Obange and Frankline Awuor, 'Challenges of Solid Waste Management in Kisumu, Kenya' (2017) 28 Urban Forum 387-402; Leah Oyake-Ombis 'Awareness on Environmentally Sound Solid Waste Management by Communities and Municipalities in Kenya' (2017), A study report for Ministry of Environment and Natural Resources, UNDP and GEF <https://www.ke.undp.org/content/dam/kenya/docs/energy_and_environment/Awareness%20on%20environmentally%20Sound%20Solid%20Waste%20Management.pdf>.

10 Tilahun Haregu, Abdhalah Ziraba and Blessing Mberu, 'Integration of Solid Waste Management Policies in Kenya: Analysis of Coherence, Gaps and Overlaps (2016) 8 Urban Africa Risk Knowledge Working Paper 3, 14.

mandates.¹¹ A recent study also found that lack of coordinated approach to policymaking as well as persistent overlaps between various laws governing wastes creates fragmentation which undermines effective MSWM in Nairobi and other urban areas.¹² The point of departure for this paper is the need to interrogate deeper the persistence of regulatory fragmentation in the MSWM and its implication of integrated and sustainable management of solid waste in urban areas of Kenya.

The problem of regulatory fragmentation and its adverse impacts on environmental sustainability is widely acknowledged.¹³ Regulatory fragmentation is said to occur when different segments of regulation are not encompassed into a broader vision for effective environmental management,¹⁴ such that regulatory strategies and instruments which address diverse environmental medium (air, water, and land), are pursued separately.¹⁵ Invariably, this leads to shift

rather than minimisation of pollution across such environmental media.¹⁶ Sectoral coordination is viewed as an antidote to regulatory fragmentation in that it uses instruments and mechanisms that induce voluntary or forced alignment of tasks and efforts of organisations within public sector, leading to greater coherence and reducing redundancies.¹⁷

In promoting sustainability, sectoral coordination is viewed as a means of incorporating environmental concerns into other policy domains, a term referred to as environmental integration.¹⁸ Environmental integration can be pursued between levels of government (vertical environmental integration) and across the same tier of government (horizontal environmental integration).¹⁹

In 1999, Kenya adopted the Environmental Management and Coordination Act (EMCA)²⁰ as the framework law which established the institutional and legal machinery for management of the environment and created a basis for coordination of sectoral environmental laws and initiatives.²¹ EMCA and its subsidiary legislation – the Environment Management and Coordination (Waste Management) Regulations,

11 Phyllis Muiruri, 'Assessment of Strategic Solid Waste Management: A Case of Selected Markets in Kiambu County' (MBA thesis, United States International University Africa, 2017) 63.

12 Haregu, Ziraba and Mberu (n 10) 1-14.

13 The United Nations, 'Report of the World Commission on Environment and Development: Our Common Future' 1987 at Chapter 12, para 11 <www.un-documents.net/our-common-future.pdf>; see also United Nations, 'Gaps in International Environmental Law and Environment-related Instruments: Towards A Global Pact for the Environment' - Report of the Secretary General, 30 November 2018 <<https://wedocs.unep.org/bitstream/handle/20.500.11822/27070/SGGaps.pdf?sequence=3&isAllowed=y>>.

14 Emmanuel Mathieu and others, 'Regulatory Agencies and Multi-actor Regulatory Governance: A Method to Study Regulatory Fragmentation, Specialisation, Coordination and Centralisation' (EPGA Study Group on Governance of Public Sector Organisations Conference, Bucharest September 2011) 11.

15 Barry Rabe and Janet Zimmerman, 'Beyond Environmental Regulatory Fragmentation: Signs of Integration in the Case of the Great Lakes Basin' (1995) 8 Governance: An International Journal of Policy and Administration 59.

16 John Gibson 'Integration of Pollution Control' (1991) 18 Journal of Law and Society 18-19.

17 Mathieu and others (n 14) 6.

18 Karl Hogl and Ralf Nordbeck, 'The Challenge of Coordination: Bridging Horizontal and Vertical Boundaries' in Karl Hogl and others (eds), *Environmental Governance: The Challenge of Legitimacy and Effectiveness* (Edward Elgar 2012) 112.

19 William Lafferty and Eivind Hovden, 'Environmental Policy Integration: Towards an Analytical Framework' (2003) 12 Environmental Politics 14-17.

20 Cap 387 of Laws of Kenya.

21 Anne Angwenyi, 'An Overview of the Environmental Management and Coordination Act'; Charles Okidi, Patricia Kameri-Mbote and Migai Akech (eds), *Environmental Governance in Kenya: Implementing the Framework Law* (East African Educational Publishers 2008); the author notes that Prior to EMCA, Kenya's environmental management legal framework was also characterised by incoherence and disjointed implementation of at least 77 sectoral laws of colonial origin.

2006²² currently provide the preeminent legal framework for MSWM at national level. EMCA created the National Environment Management Authority (NEMA) as the primary enforcement agency with the mandate to coordinate sectoral lead agencies and to promote integration of environmental considerations in policymaking and implementation.²³ NEMA is also the primate MSWM regulator at the national level as well.

The Constitution of Kenya 2010 devolved waste management functions to counties, thus empowering new county governments to make laws and policies on MSWM; something which hitherto was the preserve of central government.²⁴ This also ushered a new era of inter-governmental relations, characterised by constitutional distinctiveness of the two levels of government within a framework of cooperative governance. Thus two levels of sectoral coordination in MSWM now operate concurrently, with both NEMA and county governments as the central actors increasing the risk of persistence of fragmentation.

This paper therefore seeks to analyse sectoral coordination in MSWM and its implication for achieving horizontal environmental integration, an area that has hitherto attracted limited academic interest. The paper contends that even though NEMA and county governments are invested with significant authority and power to pursue sectoral coordination in MSWM, this has not translated into effective horizontal environmental integration of the sector and has consequently undermined integrated and sustainable approaches to addressing the waste problem in urban areas. Using findings from a survey study conducted as part of a doctoral research²⁵

targeting firms registered as workplaces²⁶ in the Nairobi metropolitan area, this paper explores the reasons why horizontal environmental integration has yet to be achieved. Intergovernmental coordination between national and county governments and therefore vertical environmental integration in MSWM is a rather broad, nonetheless related, area of inquiry with intricate co-ordinational issues and arguments that cannot be tackled adequately in this paper without distending its scope. Thus, the findings contained in this paper are limited to intra-governmental co-ordinational issues at the respective levels of governance in Kenya

2 CONCEPT OF HORIZONTAL ENVIRONMENTAL INTEGRATION AND ITS IMPLICATION FOR SECTORAL COORDINATION IN MSWM

The UN Conference on Environment and Development held in Rio de Janeiro (Rio Conference) in 1992 adopted the principle of integration that exhorted states to ensure environmental protection considerations were integral to the development process for the realisation of sustainable development.²⁷ Subsequently, the concept of environmental integration emerged which entails the incorporation of environmental considerations into cognitive systems, policies and institutions with the aim of resolving and preventing environmental problems.²⁸ Though empirical link between

22 See also (EMCA Waste Regulations, 2006), Legal Notice 121 of 2006.

23 Cap 387, S.9.

24 Constitution of Kenya, 2010 Fourth Schedule Part2, para2 & 3.

25 The study was conducted between August and October 2018 targeting a sample of 295 respondents from registered workplaces in Nairobi, Kajiado, Kiambu and Machakos Counties. It also included 38 key informant interviewees purposively drawn from NEMA, county governments, regulated entities and independent experts.

26 Occupational Safety and Health Act No.15 of 2007 (2012 edition): OSHA imposes obligations on registered workplaces to ensure proper waste management practices, making them subject to multiple legal regime and oversight by multiple institutions.

27 United Nations, 'Rio Declaration on the Environment and Development' 31 ILM 874 (1992), Principle 4.

28 Ton Buhrs, 'Challenging Contexts- Addressing Obstacles to Environmental Integration' (NZPSA Conference, Massey University, November- December 2015) <<https://www.researchgate.net/publication/298305299>>.

implementation of environmental integration and improvements of environmental quality is difficult to demonstrate due to research complexities involved, intermediate outcomes of improved coordination among sectoral agencies and policies as well as enhanced internalisation of environmental costs by key actors have been observed.²⁹

Horizontal environmental integration (HEI) is a level of environmental integration which targets sectors and government actors at a particular level of government. HEI is also seen as a substantive enterprise, that involves balancing of economic, social and environmental interests and policies in order to minimise trade-offs and maximise on synergies.³⁰ HEI is pursued through the use of strategic instruments (such as environmental assessments, sustainable development strategies, green budgeting & procurement) as well as coordinating structures (central coordinating agency, inter-ministerial and multi-sectoral committees).³¹ With regard to instruments, new forms of market-based and voluntary instruments which promote sectoral coordination are preferred over the command and control types.³² HEI promotes deliberative approaches involving a wide range of stakeholders in the negotiation process which encourages experimentation around means to resolve normative conflicts in environmental management.³³

MSWM presents an optimal regulatory setting for analysing HEI and sectoral coordination for various reasons. First, MSWM embodies environmental, economic and social dimensions, thus necessitating an integrated approach to its regulation.³⁴ Secondly, MSWM is characterised by institutional complexity since management of wastes typically brings together different sets of regulators to manage different aspects of the process.³⁵ For instance, there will be different regulatory authorities handling waste planning, approvals, operational management (collection, treatment & disposal), supervision, and reporting. In the Kenyan context, the Constitution,³⁶ and County Government Act³⁷ vests in county governments the power of control of pollution and other public nuisances (including those from solid wastes) EMCA vests regulatory powers in NEMA for licensing of waste transporters, incinerators and dumpsites. Other sectoral laws such as the Public Health Act,³⁸ the Physical and Land Use Planning Act,³⁹ Occupational Safety and Health Act⁴⁰ designate important regulatory functions in respective departments established by

29 Hens Runhaar, Peter Driessen and Caroline Uittenbroek, 'Towards A Systematic Framework for the Analysis of Environmental Policy Integration' (2014) 24 *Environmental Policy and Governance* 237; authors consider these outcomes as rather modest achievements of integration.

30 Reinhard Steurer and Gerald Berger, 'Horizontal Policy Integration: Concepts, Administrative Barriers and Selected Practices' (2010) *Institute of Forest, Environmental and Natural Resource Policy, Discussion Paper 4/2010*, <https://boku.ac.at/fileadmin/data/H03000/H73000/H73200/InFER_Discussion_Papers/InFER_DP_10_4_Horizontal_Policy_Integration.pdf>.

31 *ibid* 8-12.

32 Rabe and Zimmerman (n 15) 63.

33 Tony Gore, 'The Role of Policy Champions and Learning in Implementing Horizontal Environmental Policy Integration: Comparative Insights from European Structural Fund Programmers in the UK' (2014) 4 *Administrative Sciences* 308.

34 Jing Ma and Keith W Hipel, 'Exploring Social Dimensions of Municipal Solid Waste Management Around the Globe- A Systematic Literature Review' (2016) 56 *Waste Management* 3-4.

35 Matthew Watson, Harriet Bulkeley and Ray Hudson, 'Unpicking Environmental Policy Integration with Tales from Waste Management' (2008) 26(3) *Environment and Planning C: Government and Policy* 481-498.

36 Part 2 clause 3 of Fourth Schedule to the Constitution of Kenya (2010).

37 Act No 17 of 2012 (Revised edition 2017) which provides institutional anchorage for County functions relating to planning, coordination, decentralisation and service delivery for MSWM.

38 Cap 242 (2012 edition); this Act empowers the Department of Public Health (now at the County level) to regulate waste as nuisance to prevent health problems.

39 Act No 13 of 2019, which repeals Cap 286 (Revised Edition 2012)- hereinafter referred to as 'PLPA'; it vests in Director of Physical Planning and County Director for Physical Planning at both national and county levels, regulatory powers in respect to land-use and development control approvals which are connected to MSWM.

40 Act No 5 of 2007 (Revised Edition 2012) empowers the Director of Occupational Safety and Health Act to enforce waste management requirements in registered workplaces.

these laws. Effective sectoral coordination is thus necessary for realisation of HEI in this sector.

The view of waste as an economic resource with extractable value has emerged as the dominant paradigm, overshadowing the hitherto view of waste as a nuisance to be disposed (waste disposal paradigm).⁴¹ To maximise on waste resource paradigm, priority in MSWM operations is afforded to waste re-use, recycling and recovery over disposal in what is known as the waste hierarchy approach.⁴² This approach introduces new players (recycling, composting and energy actors) in the waste management sector, which hitherto was dominated by local authorities and environmental regulators (as per the waste disposal paradigm) thus creating fresh imperative for sectoral coordination.

Lastly, both national government and county governments have a shared role in defining the regulatory framework for MSWM, with national legislation outlining the environmental standards rules for procurement and financing of MSWM operations while local governments promulgate rules that guide households and other institutions on proper waste management and disposal.⁴³ In discharging these roles, both levels of government will require cooperation of various sectors at the respective levels hence underlining the need for sectoral coordination.

3

CURRENT STATUS AND CHALLENGES OF SECTORAL COORDINATION IN MSWM

3.1 Normative Anchorage for Sectoral Coordination and HEI

Sectoral coordination is anchored in the obligations arising from the constitutional right to clean and healthy environment.⁴⁴ It is a composite and judicially-enforceable entitlement, which includes a right to have the environment protected for the benefit of present and future generations through legislative and other measures, contemplated in provisions outlining environmental duties of the State and non-state actors.⁴⁵ One such obligation is the duty imposed on every person to cooperate with State organs and other persons in protection and conservation of the environment to ensure ecologically sustainable development.⁴⁶ It has been pointed out that the use of the term 'person' in this context means that the obligation to cooperate is not limited to natural persons but also extends to body of persons whether unincorporated or incorporated, including state agencies.⁴⁷ Thus, the obligation to cooperate lays foundation for cooperative environmental governance, upon which sectoral coordination is made feasible.⁴⁸ The EMCA has similar provisions upholding the right

41 Watson, Bulkeley & Hudson (n 35) 481-498.

42 *ibid*.

43 Silpa Kaza and others, 'What A Waste 2.0: A Global Snapshot of Solid Waste Management to 2050' (World Bank Group 2018) 89.

44 Constitution of Kenya, Art 42.

45 These duties are listed under Article 69 and extend to non-state actors as well.

46 Constitution of Kenya 2010, Art 69 (2).

47 Robert Kibugi, 'Governing Land Use in Kenya: From Sectoral Fragmentation to Sustainable Integration of Law and Policy' (Doctor of Law Thesis, University of Ottawa, 2011) 89.

48 See Robert Kibugi, 'Development and Balancing of Interest in Kenya' in Michael Faure and Willemien du Plessis (eds), *The Balancing of Interests in Environmental Law in Africa* (Pretoria University Law Press 2011) 171-174.

to clean and healthy environment and principles of sustainable development.⁴⁹

Anchorage for sectoral coordination also stems from the constitutional enshrinement of sustainable development as a principle of governance⁵⁰ and therefore binding upon the State in development, implementation and interpretation of legal and policy frameworks and actions.⁵¹ This principle is adjudged to impose positive obligations on public authorities to take measures to protect the environment, including adopting policy and legislative frameworks as well as coordination mechanisms to ensure sustainable management of resources.⁵² Application of the principle within the context of natural resources management requires balancing of various interests (public, private, international) to safeguard the public interest, in line with the transformative nature of the Constitution of Kenya.⁵³

There is widespread awareness on the existence of the right to clean and healthy environment, considering that a large majority (87 per cent) respondents in survey

agreed that the right was engraved in the Constitution. There is also near-universal agreement (97 per cent) among survey respondents that citizens have a legal right to clean and healthy environment free from solid wastes. The reported perceptions are indeed consistent with emerging jurisprudence on this matter as expressed in the case *ACRAG & 3 others v Municipal Council of Naivasha*⁵⁴ where the Court held that poor waste management and the attendant risks to human and environmental health constitute an infringement of the constitutional right to clean and healthy environment.

A majority (79 per cent) of respondents also agreed that both state and non-state actors have a duty to promote this right. A lower majority (49 per cent and 55 per cent respectively), however, agreed with the proposition that national and county authorities take seriously their respective duties to promote the right. Whereas a majority (60 per cent) are aware of constitutional enshrinement of sustainable development, few (30 per cent) agree that the principle is taken seriously in Kenya. Indeed, Kenya is ranked 123 out of 180 countries surveyed in the 2016 Yale's World Environment Performance Index (EPI).⁵⁵ Thus, the perception that duty bearers are not doing enough to promote environmental rights and sustainable development has empirical backing.

Adverse ratings of authorities on promotion of sustainability and right to clean and healthy environment may undermine credibility and consequently the willingness of other stakeholders to effectively cooperate and engage with them in MSWM for effective horizontal environmental integration. Several factors may explain the adverse perceptions on the actual implementation of right to clean and healthy

49 EMCA Cap 387, Sec 3.

50 CoK (2010) Art 10 (2) (e); other principles include public participation, human rights, transparency, accountability, good governance, integrity, rule of law, devolution of power, inclusiveness, patriotism, national unity, social justice and equity.

51 In the *Center Trust & Others v the AG* (2012) eKLR (also cited as Petition No 243 of 2011), the High Court held that Article 10 Principles were not simply hortatory in their effect but that policymakers and legislators were duty-bound to consider them when discharging their respective mandates.

52 *Abdalla Rhova Hiribae & 3 others v Attorney General & 7 others* (2013) eKLR also cited as High Court (Nairobi) Civil Case No 14 of 2010.

53 See *Communication Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others* (2014) eKLR also cited as Petition No 14, 14A, 14B & 14C of 2014 (Consolidated) Supreme Court of Kenya, para 366-391; The Supreme Court of Kenya extensively discussed the substance of sustainable development as one of the Article 10 values and its application in managing electromagnetic spectrum for radio and television broadcast as a natural resource. The Court held that public participation was critical for realisation of sustainable development by safeguarding public institutions from private capture when making public policy decisions.

54 (2017) eKLR also cited as Petition No 50 of 2012, ELC (Nakuru).

55 See A Hsu and others, *Environmental Performance Index* (Yale University 2016) <http://epi2016.yale.edu/sites/default/files/2016EPI_Full_Report_opt.pdf>; the EPI ranks countries' performance on high priority environmental issues related to protection of human health and ecosystems, using a framework of more than 20 indicators.

environment and the principle of sustainable development.

First, constraints in institutional capacity of national authorities as well as county governments (that are addressed in the next sections of this article) largely explain why the environmental right and duty as well as sustainable development are not effectively promoted in Kenya.

Secondly, there appears to be waning political will for promotion of sustainability generally and in waste management specifically at both national and county government levels. In the survey, 39 per cent of respondents agreed with the proposition that the President is committed to addressing MSWM challenges, hence pointing to low perceptions on the existence of political will on this matter. At the County level, 49 per cent and 16 per cent of respondents felt that County governors and Members of County Assembly in the target counties were respectively committed to addressing problems in the MSWM sector. In the four target counties, only Nairobi has enacted a solid waste management law. Thus, the slow pace of legislative development demonstrates limited political will towards addressing MSWM issues. Political will and enabling leadership are key factors for the promotion of environmental integration.⁵⁶ Since environmental integration is anchored in a political system, political will must be harnessed, organised and maintained to realise success.⁵⁷ For instance, it has been observed that when the UK's Labour Party took over power in the 1990s on a broad social reform platform (which included a progressive green agenda), it facilitated extensive cross-sectoral coordination hitherto witnessed under the mantra of 'joined-up government'.⁵⁸

Thirdly, there is limited adoption and support for the waste hierarchy approach in MSWM normative framework which is not only critical for realisation of sustainability, but also imposes imperatives for sectoral coordination.⁵⁹ Under the Basel Convention,⁶⁰ Stockholm Convention on Persistent Organic Pollutants⁶¹ and UN Sustainable Development Goals,⁶² Kenya is under obligation to embrace the waste hierarchy.

The waste hierarchy approach prioritises recovery of resource value from wastes over disposal and therefore to segregation of wastes is considered as the first step towards facilitating such recovery. There is relatively high level of awareness on the existence of the legal duty to segregate wastes at the firm level (81 per cent) but in contrast relatively lower level of satisfaction with actual segregation of waste (55 per cent). Thus, high levels of awareness of this duty does not translate into commensurate perceptions of compliance hence plausible gaps in enforcement. The study revealed high levels of satisfaction by respondents with collection (83 per cent) and transportation of wastes (71 per cent), but lower levels were recorded in recycling (28 per cent) and sound management of dumpsites (26 per cent). In addition, only a minority feel that County governments are doing enough to promote recycling (14 per cent) and composting (18 per cent).

These perceptions underline the preponderance of the waste disposal paradigm, in which authorities pay more

⁵⁹ *ibid.*

⁶⁰ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 22 March 1989, 1673 UNTS 57, Art 4 (2).

⁶¹ Stockholm Convention on Persistent Organic Pollutants, Stockholm, 23 May 2001, 2256 UNTS 119, Part V of Annex C of the Convention on 'General guidance on best available techniques and best environmental practices'.

⁶² Sustainable Development Goals and Targets, in UN General Assembly Resolution 70/1, Transforming our World: The 2030 Agenda for Sustainable Development, UN Doc. A/RES/70/1 (2015), Goal 12 on Sustainable Consumption and Production Patterns and Target 12.5 which that by 2030, states will achieve substantial reductions of waste generated through prevention, reduction, recycling and use.

⁵⁶ Andrew Jordan and Andrea Lenschow, 'Environmental Policy Integration: A State of the Art Review' (2010) 20 *Environmental Policy and Governance* 150-152.

⁵⁷ *ibid.* 150.

⁵⁸ Watson, Bulkeley and Hudson (n 35) 484-5.

attention and investment in collection and tipping of waste in dumpsites, rather than facilitate efficient value recovery. Dissatisfaction by firms with recycling is also consistent with the actual low waste recycling rates prevailing in Nairobi and this perhaps signifies limited support for the critical recycling and re-use elements of the waste hierarchy in the target sites. The upshot is that with an under-developed potential for recycling and recovery, there is limited impulsion towards sectoral coordination of economic actors associated with the waste hierarchy approach to MSWM.

These perceptions and the prevailing reality may be attributed to the fact that, EMCA and other key laws on MSWM do not have clear expressions of the provisions of the waste hierarchy. The EMCA Waste Regulations of 2006 requires waste actors to embrace clean production technology in order to minimise waste generation.⁶³ The regulation however scarcely provides for other equally important components of the waste hierarchy—re-use, recycling and recovery.

Additionally, waste authorities in Nairobi do not have a structured means/mode/manner of engaging with waste actors over policy and operational issues. Even though these actors have organised themselves into a waste management association, contacts with the County authorities besides licensing are minimal and often characterised by incessant litigation.⁶⁴ Informal waste actors and pickers who largely prop the recycling industries of Nairobi are side lined from the policy-making processes. Moreover, the County authorities have not put in place necessary incentives for promoting waste value recovery. Instead, disincentives persist, such

as taxation of waste materials recovered from primary production processes for re-use in making secondary materials⁶⁵ as well as prohibitions in composting domestic waste at household level.⁶⁶

3.2 Efficacy of NEMA and County Governments in Sectoral Coordination

NEMA is established as a national regulatory agency under the direct control of the National government, rather than an independent regulator.⁶⁷ Regulatory functions of NEMA in MSWM include issuing licenses to waste transporters, operators of waste sites and plants involved in treatment, re-use and recycling.⁶⁸ EMCA also empowers NEMA to halt waste management operations by obtaining a court order against the licensee accused of breaches.⁶⁹ To complement its regulatory authority, NEMA is vested with broad enforcement powers in appointing environmental inspectors to monitor compliance with environmental standards, activities of sector-specific inspectorates and undertake environmental audits.⁷⁰ NEMA has general oversight powers over waste authorities designated as lead agencies, which include taking over neglected functions and performing them at the expense of a particular authority.⁷¹

⁶³ The Environmental Management and Coordination (Waste Management) Regulations, 2006 (EMCA Waste Regulations of 2006); Regulation 5.

⁶⁴ Interview with Edwin Murimi, Assistant Director, Environment Department (Solid Waste Management Section) Nairobi City County Government (Nairobi, 20 September 2018).

⁶⁵ Interview with Georgina Wachuka, Policy Officer, Kenya Manufacturers Association (Nairobi, 21 September 2018); Ms Wachuka opined that plastic manufacturers were most affected by the form of 'double taxation' because their manufacturing processes invariably result in defects which have to be utilised in production of secondary material.

⁶⁶ Interview with Agatha Kagia, Coordinator, Runda Residents Association (Nairobi, 26 September 2018); Ms Kagia explained that such prohibitions deny households the opportunity to produce compost for beautification of their neighbourhoods.

⁶⁷ EMCA, Sec 7 & 10; The President appoints the Chairperson of the Board of NEMA, while the Cabinet Secretary for Environment appoints the Director-General and other members. Principal Secretaries for environment and finance as well as the Attorney General are ex-officio members.

⁶⁸ Sec 88, EMCA.

⁶⁹ Sec 90, EMCA.

⁷⁰ EMCA Sec 117; inspectors can exercise police powers of entry, search, seizure and arrests under warrants; order closure of deleterious activities; issue notice of improvement and; conduct prosecutions subject to directions of Office of Director of Public Prosecutions.

⁷¹ EMCA Sec 12.

NEMA is vested with a general duty to coordinate environmental management activities carried out by lead agencies and this provides statutory basis for exercise of sectoral coordination vis-à-vis lead agencies including waste management authorities.⁷² In addition, NEMA is mandated to render technical support and promoting cooperation among lead agencies, particular on environmental education, public awareness and participation.⁷³

There is evidence to suggest that NEMA enjoys near-universal recognition of its primacy in environmental protection and promotion of sustainable development, with 86 per cent of surveyed firms agreeing with that proposition. However, NEMA's rating on other key regulatory and enforcement functions appear to decline as evidenced by the survey results below:

Issue/Proposition	Level of agreement (%)
NEMA adequately plays its role in environmental protection in Kenya	54
Under extreme circumstances, NEMA shuts down establishments that do not observe sound waste management practices	54
NEMA plays a critical role in MSWM in my county	46
NEMA officers inspect our neighbourhoods to ensure we collect and store solid waste in an environmentally-safe manner	42
NEMA officers routinely arrest and prosecute those who illegally dump or mishandle solid waste in my neighbourhood	36
NEMA officers routinely educate residents on how to manage waste in an environmentally-safe manner	36

Table 1: *Assessment of NEMA on MSWM*

NEMA's poor rating from the survey is consistent with findings from other studies⁷⁴ that focused on its actual performance, and several factors may explain the prevailing state of affairs with implications for sectoral coordination in MSWM. First, NEMA has in recent years faced funding constraints which coincided with

the decision by National government to substantially reduce fees levied for environmental impact assessment (EIA) licenses. A review of audited financial reports of NEMA indicates that between the financial years 2014/5 and 2016/7, income derived from EIA licenses on average constituted 71 per cent of NEMA's total revenue.⁷⁵ In FY2015/6 NEMA earned

⁷² EMCA, Sec 9 (2) (a).

⁷³ *ibid* Sec 9 (2) (m) & (o).

⁷⁴ Benson Ochieng, 'Institutional Arrangements for Environmental Management in Kenya' in Okidi and others (eds), (n 21) 203; Evanson Kamau, 'Pollution Control in Developing Countries with a Case Study on Kenya: A Need for Consistent and Stable Regimes' (2011) 9 *Revista Internacional de Direito e Cidadania* 29-42.

⁷⁵ See Office of Auditor- General, 'Report of the auditor-general on the financial statements of national environment management authority for the year ended 20 June 2016' <<http://oagkenya.go.ke/Audit-Reports?path=State%20Corporations>>.

Ksh524,803,000/= from EIA license fees before dropping to Ksh269,829,000/= in FY2016/7 after the fees were drastically reduced, representing a 38 per cent drop in overall revenue. Thus, funding constraints mean that NEMA is not able to employ and retain sufficient staff to discharge their mandates. It was observed that due to shortfalls in technical staff, NEMA was unable to participate in most coordination mechanisms convened to address environmental challenges at any given time.⁷⁶

Secondly reduction in revenue base means that NEMA is not able to adequately discharge its functions unless with external funding from development partners. A review of NEMA's official audit reports from FY 2013/4 to 2017/8 show that external funding to NEMA comprises on average 27 per cent of the annual total grants the agency receives.⁷⁷ In the various audit reports, donor funding is captured as development funding whereas, government grants go to recurrent expenditure. Thus, NEMA totally depends on donor funding for its programming. This predisposes NEMA to capture by foreign donors, further weakening its independence and therefore regulatory capacity. Under such circumstances, NEMA staff invariably participated more in donor-funded coordination mechanisms on MSWM, than in other cases where no funding was provided.⁷⁸

Thirdly, the relationship between NEMA and ministries of National government as lead agencies is rather problematic. The Ministry of Environment & Forestry is designated by law as a lead agency,⁷⁹ but also provides policy oversight and support (as part of its constitutional role) to NEMA, among other

agencies under its ministerial ambit. Within the context of MSWM, the Ministry recently took over regulatory functions pertaining to hazardous wastes under the various international treaties⁸⁰ and therefore its activities fall under the coordination ambit of NEMA. Because NEMA is not an independent regulatory agency, it plays subordinate role to the Ministry and lacks muscle to exercise its power over the Ministry as a lead agency. It is doubtful that NEMA can feasibly exercise powers over the Ministry of Environment (or any other ministry for that matter) as a lead agency with success, unless the definition of the term is amended to exclude ministries of National government.

Fifth, the institutional design of NEMA and the control of the selection and appointment process by the President and Cabinet Secretary predisposes the agency to complete control by the National government.⁸¹ This makes NEMA vulnerable to politicisation and political interference in its decisions, thus undermining its sectoral coordination role. The case of *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another*⁸² is instructive. This appeal was filed by an NGO and group of residents of Lamu at the National Environment Tribunal against the decision by NEMA to grant Amu Power Company Ltd an EIA license for establishing a coal-fired power plant, on grounds that, among others/ inter alia, there was no adequate public participation. In upholding the appeal, the Tribunal was critical of NEMA's role and conduct in the whole process of EIA licensing, particularly the manner in which the Authority disregarded comments from lead agencies and allowing the project proponent to 'run the show,' as it were.⁸³ Thus, this case illustrates that

76 Interview with Maureen Njeri, Head of Waste Management Section, NEMA headquarters (Nairobi, 11 August 2018) and Veronica Maina, Officer –in-Charge, Waste Management Section, Nairobi County NEMA offices (Nairobi, 18 September 2018).

77 See Office of Auditor- General (n75).

78 Key informant interview with Maureen Njeri (n76) who observed that staff took part in several coordination meetings held to discuss SWM issues in the emerging extractives sector, funded by the World Bank.

79 EMCA S.2 which defines lead agencies to include government ministries empowered by law to control or management any element of natural resources or environment.

80 Interview with Dr Ayub Macharia, Director, Ministry of Environment and Forestry (Nairobi, 29 November 2018).

81 EMCA S.10; The Chairperson of the Board is appointed by the President while other members of the Board who are not ex-officio (including the Director General) are appointed by the Cabinet Secretary.

82 (2019) eKLR; also cited as Tribunal Appeal No. NET 196 of 2016.

83 The project proponent, Amy Power Company is partly owned by Centum Investment Group, a holding company associated with some powerful business leaders close to the political establishment. The government was also heavily vested in the success of this project as part of its ambitions to expand power generation capacity.

when political pressure is applied on NEMA, the agency can easily shirk its sectoral coordination obligations for expediency, by subverting or disregarding the mandatory consultative approach required under the EIA process.

At the County level, County governments are mandated to regulate and deliver services on solid waste within the context of controlling public nuisances and promoting public health.⁸⁴ County governments also

exercise strategic oversight roles on MSWM through land-use regulation and development control regulation, which determine the siting of related facilities and infrastructure.⁸⁵ County governments have power to regulate waste generators operating within their jurisdictions by overseeing agricultural facilities (e.g. livestock yards & abattoirs), public amenities, transport facilities, markets and public housing.⁸⁶

Issue/proposition	Level of agreement (%)
County Govt considers compliance with waste management regulations of my business establishment before issuing us with an annual business/trading license	43
County Govt ensures timely collection of wastes in my neighbourhood	37
County Govt in extreme cases shuts down commercial and industrial establishments that do not observe sound MSWM practices and relevant law	33
County Govt under extreme circumstances issues notice of closure to establishments that fail to observe sound waste management practices	32
County Govt officers routinely inspect our neighbourhood to ensure residents collect and store solid waste in an environmentally- safe manner	30
County Govt allows participation of residents/community associations in waste management decision-making	26
County Govt officers routinely arrest those who illegally dump wastes in my neighbourhood	24
County Govt manages public dumpsites in an environmentally-safe manner	17
County Govt officers educate residents on how to manage waste in an environmentally-safe manner	17

Table 2: Performance of County governments in MSWM

⁸⁴ Constitution of Kenya, 2010, Fourth Schedule, Part 2 Sec 2 (g) & 3 as read with Public Health Act, cap 287.

⁸⁵ *ibid* Part 2 Sec 8 as read with Physical and Land Use Planning Act.

⁸⁶ *ibid* Part 2 Secs 1, 4, 5,7 & 8.

In all the four Counties targeted by this survey, functional waste departments had been established under the respective environment ministry except one.⁸⁷ In all the target Counties, the respective waste departments had taken over all aspects of waste operations except licensing of transporters and operators, which was still under NEMA. Except Nairobi, all other three Counties were yet to adopt solid waste laws and hence were relying on the bylaws that had been enacted by the defunct local authorities in the pre-2010 constitutional dispensation. However, survey respondents rated rather poorly, the performance of the County governments in discharge of key MSWM functions as shown below:

The upshot is that these perceptions point to weak regulatory and operational capacity of County governments in discharging their MSWM responsibilities. With such poor perceptions, Counties credibility and therefore ability to convene stakeholders at the county level for coordination on MSWM issues is effectively undermined. This also undermines effective consideration of other sectoral perspectives in regulation of waste activities at the County level.

Several issues explain the prevailing state of affairs, with implications for sectoral coordination. First, Counties are not allocating sufficient funds to MSWM functions. In its integrated development plan for 2014-2017, Nairobi City County for instance, projected to spend Ksh5 billion for MSWM services for the FY2013/4- 2016/7.⁸⁸ However, during the same period, the City County spent at total of Ksh2.9 Billion on MSWM services, hence 42 per cent of the projected costs were not funded.⁸⁹ Without adequate funding, City officials lamented challenges in procurement of adequate equipment, servicing of waste collection contracts and poor management of dumpsites.⁹⁰ Given these constraints, it is unlikely

that the County officials will prioritise expenditures for sectoral coordination functions over service delivery.

Secondly, lack of clarity in the division of regulatory responsibilities between National and county governments continues to hamper the ability of County governments to assert their full authority on MSWM. The bone of contention in this regard is the power to license key waste actors (transporters, facilities and traders). In the case *Waste and Environment Management Association of Kenya (WEMAK) v Nairobi City County & NEMA*⁹¹ an association of waste collectors sought the annulment of provisions of the Nairobi City County Solid Waste Management Act, 2015 on various grounds among them that the impugned Act purported to confer upon the respondent County government the power to license waste operators and incinerators, contrary to provisions of EMCA. The judge declined to suspend the Nairobi waste law and observed that a cursory reading of the Fourth Schedule to CoK 2010 indicates that regulation of waste management was a devolved function.

Even though the National Solid Waste Management Strategy (2015) acknowledged the need for reconceptualisation of the role of the NEMA vis-à-vis those of County governments in MSWM, it did not go far enough to resolve the ambiguity.⁹² Due to this persistent ambiguity, County officials are unable to exercise much authority over waste actors licensed by NEMA, accusing the Agency of not sharing licensing information with counties to facilitate effective monitoring and enforcement against these actors.⁹³ In view of these, the prospects of County governments convening actors licensed by National government for sectoral coordination purposes appears rather unfeasible.

⁸⁷ In Machakos, the waste department was domiciled at the time of the study in the devolution and public services ministry.

⁸⁸ Nairobi City County, *Nairobi County Integrated Development Plan 2014* (Nairobi City County, 2014) 174.

⁸⁹ Kenya National Bureau of Statistics, *Economic Survey 2018* (KNBS, 2018) 145.

⁹⁰ Key informant interview with Edwin Murimi (n 64) Nairobi City County Government.

⁹¹ (2016) eKLR also cited as Petition No 118 of 2016, High Court at Nairobi (Milimani Law Courts).

⁹² NEMA (2015) supra pp 48-49; Rather, the Strategy recommends that NEMA retains policy, supervision, enforcement and capacity building roles in SWM whereas County governments take up waste planning, collection, disposal, awareness creation, enforcement and promotion of partnerships.

⁹³ Key informant interview with Marcelline Odhiambo, Public Health Officer, Public Health Department (Nairobi City County Government, 11 August 2018).

Thirdly, Counties that were targeted by the study had fused within the respective waste departments, both regulatory and operational functions.⁹⁴ This appears to create a conflict of interest in that the department may abuse its licensing powers by either excluding competitors from the private sectors from lucrative waste management services or permitting non-compliant County equipment or facilities to operate in disregard of standard regulatory requirements, hence undermining the quality of waste services rendered to residents. The South African Competition Tribunal made a similar observation in the case *Dumpit Waste Removal v The City of Johannesburg & Pikitup Johannesburg Ltd*⁹⁵ and held that where a local (waste) authority had statutory mandate to license its own entities to compete with independent companies in provision of waste services, this might be viewed as flouting basic requirements of fairness as provided for in the Constitution and administrative law. Therefore, unless the licensing and operational functions of waste authorities are decoupled, private sector may find it difficult to effectively engage with County government on coordination initiatives.

Fourth, corruption and impunity are prevalent in the target Counties and this undermines the capacity of waste authorities to discharge their respective mandates effectively. In Kajiado County, an official cited a case where a private waste collector colluded with local officials in re-dumping collected wastes in neighbourhoods in order to inflate the number of collection trips hence payments.⁹⁶ In Nairobi City County, cartels are deemed to hold a tight stranglehold on lucrative waste management procurement processes

and in the running of Nairobi's only authorised dumpsite (Dandora).⁹⁷ Corruption and impunity thus, fundamentally undermines credibility of County authorities to effectively coordinate other sectors and therefore ability to handle trade-offs necessary for balancing environmental and economic considerations hence undermining environment integration.

3.3 Effectiveness of Sectoral Coordination Mechanisms at National and County Levels

Under EMCA, NEMA is required to establish the Technical Advisory Committee (TAC) to review EIA reports and advise the Authority accordingly.⁹⁸ By bringing together representatives from different sectors, TAC represents a sectoral coordination mechanism. However, funding challenges have impeded the holding of regular TAC meetings.⁹⁹

Under the various sectoral laws, NEMA has been incorporated in decision-making structures of sectoral agencies and this provides opportunity for promotion of sectoral coordination. Under OSHA for instance, NEMA is a member of the National Council for Occupational Safety and Health (NACOSH), which is multi-sectoral in its composition and is responsible for policy formulation and general oversight.¹⁰⁰ NEMA representatives regularly attend the meetings of NACOSH and this places the Authority in a prime position to influence the work of the Directorate of Occupational Safety and Health (DOSHS) in regards to occupational hygiene and environmental protection at the workplace.¹⁰¹

94 Despite NEMA exercising licencing powers over waste actors, county governments continue issuing business/trading licences to same actors. The County government also issues permits for disposing wastes at its official dumpsites.

95 (2004) ZACT 1 also cited as Case Number 21/IR/Apr02.

96 Key informant interview with John Kanini, Director of Environment, Kajiado County Government (Kajiado, 09 October 2018).

97 Key informant interview, Nimrod Masaka, Ag. Director, Urban Planning Department, Nairobi City County Government (Nairobi, 10 September 2018).

98 *ibid* Sec 61.

99 Key informant interview with Maureen Njeri (n 76) of NEMA HQ.

100 OSHA Sec 27.

101 Key informant interview, Kenneth Njuguna, Head of Hygiene Division, Department of Occupational Safety and Health (DOSHS) (Nairobi, 11 August 2018).

Under Physical and Land Use Planning Act, NEMA is also represented in the National Physical Liaison Committee, which plays policy advisory role as well as entertaining appeals against decisions made by national planning authority. This includes environmental impacts of strategic projects including MSWM facilities.¹⁰² However, this structure is relatively new and yet to be operationalised.

NEMA is further mandated to coordinate with lead agencies on environmental protection programmes including MSWM.¹⁰³ However, no formal structures exists to facilitate coordination in a systematic and structured manner. The 2014 amendments to EMCA abolished the National Environment Council (NEC) and the Standards and Enforcement Review Committee (SERC), which served as key sectoral coordination structures in the environment sector. The NEC served as the policymaking and coordination organ with broad stakeholder representation in which NEMA served as the secretariat.¹⁰⁴ The SERC hitherto was chaired by the Permanent Secretary in the environment ministry and comprised of NEMA (as secretary) and other lead agencies.¹⁰⁵ Through the SERC, NEMA would exercise a mandatory convening power over lead agencies in relation to standard-setting and norm development in the environment sector. Thus currently, NEMA interacts with sectoral agencies mostly on ad hoc basis, in response to emergent environmental crises or in donor funded initiatives.¹⁰⁶

There is a strong perception among stakeholders that NEMA is too preoccupied with its enforcement roles

and much less on sectoral coordination.¹⁰⁷ The Court had occasion to scrutinise NEMA's sectoral coordination role in MSWM in the case *Osano & another v Municipal Council of Nakuru*¹⁰⁸ where local residents had accused NEMA of neglecting its regulatory duties, precipitating a waste dumpsite crisis in Nakuru town. NEMA defended itself by contending that it had taken all steps to address the waste crisis including prosecuting the offending local authority. The Court found NEMA to have neglected its statutory duties and thus duly noted:

Though NEMA must be commended for discharging its investigative and prosecutorial powers in this case, it needed to do much more pursuant to its functions under section 9 of EMCA. It ought to have exercised its co-ordination, advisory and technical support functions with a view to ensuring the citizens' right to a clean and healthy environment is safeguarded. Success of NEMA will ultimately be seen more in a clean and healthy environment for Kenyans than in anything else.¹⁰⁹

This holding underlines the need for NEMA to strike a balance between use of coercive powers to elicit compliance, with leveraging on its sectoral coordination role to ensure lead agencies have capacity and inclination to address waste management issues.

At the County level, sectoral coordination is expected to take place between and among County departments vested with operational and regulatory responsibilities in MSWM and with non-state actors. These departments include, the Department of environment

¹⁰² *ibid* Sec 75.

¹⁰³ EMCA, Sec 9 (2) (a).

¹⁰⁴ This was initially provided under EMCA, Act No 8 of 1999 under Part III (now repealed).

¹⁰⁵ *ibid*, Sec 70 -1 (now repealed).

¹⁰⁶ Key informant interview, Maureen Njeri, NEMA HQ (n 76) and Kenneth Njuguna (n 101) DOSH; Both NEMA and DOSH have in the past established ad hoc task groups to carryout joint investigations (e.g. on the suspected case of lead poisoning at an informal settlement known as Owino Ouru in Mombasa County in 2014) and both are currently involved in a donor-funded task group on developing regulatory framework for occupational safety and health in the extractives sector.

¹⁰⁷ Interview with Koyier Barreh, Planning and EIA Expert (Nairobi, 10 September 2019).

¹⁰⁸ (2018) eKLR also cited as Petition No 53 of 2012, ELC at Nakuru.

¹⁰⁹ *ibid* para 73.

which is responsible for licensing and operational aspects of MSWM; Department of physical planning responsible for approving land use (including citing of waste facilities) and building approvals; Department of public health which enforces the law on wastes (as nuisances) and participates in building approvals; Department of trade/public administration renders business/trading licenses to business.

In the four target counties, the study established strong coordination and collaboration between public health and physical planning departments ostensibly due to their shared mandate of rendering building approvals. On the other hand, there is strong collaboration and coordination between the departments of environment and trade/public administration. In all Counties, the departments of health and physical planning complained of being left-out in key decision-making processes led by the environment department e.g. the process of development of solid waste legislations and licensing of operators. Thus, inter-departmental coordination at the County level is rather problematic. This is attributed to a persistent culture of working in silos, which is common in bureaucracies; limited incentives (under staff performance management) for inter departmental collaboration and; budgeting frameworks which underemphasise cross-department initiatives.

EMCA establishes the County Environmental Committee (CEC) responsible for environmental management and formulation of a county strategic environmental action plan, to which MSWM matters are integral.¹¹⁰ The Committee is constituted by the Governor and chaired by the County Executive Committee Member (CECM) responsible for environment. It draws its membership from key ministries, regional development authorities operating within the county, NEMA and non-state actors (private sector, NGOs and farmers/livestock representatives).

The presence of NEMA in the CEC provides a vertical informational link between county actors and national institutions. The CEC plays an important sectoral coordination role and therefore environmental integration at the county-level, including on MSWM matters.

In the study counties, Machakos and Kajiado had established County Environment Committees, whereas in Nairobi and Kiambu, the respective County governors were yet to appoint nominees to the Committees. The Kajiado CEC was appointed in February 2015 as a pioneer in Kenya. The Kajiado CEC formulated the inaugural County Environment Action Plan (CEAP) and took part in the development of the first generation County Integrated Development Plan (CIDP). Following the election of a new Governor in Kajiado in 2017, the CEC was reconstituted following departure of some key county officials.¹¹¹ The Machakos CEC was appointed in September 2018 but is yet to formally meet, after the appointment process was found to have been defective in the same manner as the Kajiado one. This points to weaknesses in the appointment process. The reasons for delays in the appointment of CECs in Kiambu and Nairobi were attributed to political considerations.¹¹²

Consistent with the foregoing, the survey respondents gave a rather poor assessment of CECs with 28 per cent aware that the respective County government had established a CEC and; 26 per cent agreed CECs were active and visible in the respective counties. The perceived poor performance of CECs can be attributed to various factors. First, CECs face budgetary

¹¹⁰ *ibid* Sec 29 & 30.

¹¹¹ According to John Kanini (n 96) of Kajiado County Government, the selection of members gazetted by the Governor were found to have violated the law and hence the Department of Environment has advised the same be reviewed.

¹¹² Interview with Stephen Kimutu, County Director, NEMA, Kiambu County (Kiambu Town, 29 August 2018) and Patrick Kimeu, Senior Administrative Officer, Department of Environment and Natural Resources, Machakos County Government (Machakos Town, 10 August 2018); the key informant observed that the respective Governors were not happy with the initial list of nominees presented to them for appointment and hence the delays.¹

constraints due to limited financial allocations by County governments for their operations. Secondly, there is no clarity regarding the proper institutional home of the CEC. Because CECs are creatures of EMCA, County government officials feel that the committees should be domiciled in and funded by NEMA. Yet, NEMA argues that CECs are appointed by respective County governors and comprise largely county officials and hence should be treated as county structures. This persistent ambiguity has also contributed to limited financial allocations to the functions of CECs.

Fourthly, CECs largely operate at the County headquarter- level and are yet to be decentralised to the sub-county level, where implementation of environmental activities takes place. This diminishes their outreach and visibility. Lastly, the CECs are dominated by county officials and therefore may lack independence in the discharge of their oversight role. Related to this, County Governors continue to bungle the appointment process by trying to ensure the CECs are dominated by their political supporters and this undermines the legitimacy of these structures.

3.4 Application of Instruments that Promote Sectoral Coordination

Environmental impact assessments (EIA) are perhaps the best known tools for environmental integration.¹¹³ Developers of projects specified in EMCA that are likely to have significant impacts on the environment are required to undertake prior an environmental impact assessment (EIA) study and acquire a license from NEMA.¹¹⁴ Among some of the issues to be considered in the EIA study include waste generated

by the proposed project.¹¹⁵ Having been issued with EIA license, the project operator (licensee) is required to undertake environmental audits (EA) periodically, and submit to NEMA an audit report on compliance with approved environment management plan (EMP) and indicating measures undertaken to mitigate any unforeseen but undesirable effects.¹¹⁶ NEMA is required to ensure lead agencies with particular interest in a proposed project to review the EIA study report and submit comments, thus facilitating sectoral coordination in this regard. Mandatory consultations by NEMA with the public over EIA reports also play a sectoral coordination role.

The survey respondents' ratings of the EIA process was very positive with 72 per cent of respondents whose establishments are subject to EIA requirements reporting that the environmental management plans developed pursuant to EIA license requirements adequately prioritise MSWM issues. 80 per cent of the respondents acknowledged that their establishments focus on MSWM issues when conducting respective environmental audits (EA) while 68 per cent felt that NEMA prioritises MSWM issues in approving EAs carried out by respective establishments. These approval ratings for the EIA and EA processes may be construed as satisfaction with the suitability of EIA and EA tools in MSWM regulation.

Residents associations were, however, critical of EIA approvals rendered for projects within the target Counties. They felt that the NEMA issued EIA licenses without putting taking into account the views of the communities, thereby making decisions that imperil the environment.¹¹⁷ This effectively undermines the credibility of EIA as a tool for environmental integration. Inadequate consultation of stakeholders affected by an EIA decision invariably leads to unwarranted litigation. This speaks further to the need

¹¹³ Hens Runhaar and Peter Driessen, 'Sustainable Urban Development and the Challenge of Policy Integration: An Assessment of Planning Tools for Integrating Spatial and Environmental Planning in the Netherlands' (2009) 36 *Environment and Planning B: Planning and Design* 418.

¹¹⁴ *ibid* Sec 58.

¹¹⁵ Regulation 18 (f) of the Environmental (Impact Assessment and Audit) Regulations, 2003.

¹¹⁶ Sec 68 of EMCA; waste management actions are to be included in the assessed measures and impacts thereof.

¹¹⁷ Interviews with Ms Kagia of Runda Residents Association (n 66) and John Mutinda, Chairman Environment committee of Syokimau Residents Association (Nairobi, 18 November 2018).

for NEMA to enhance its capacity in facilitation and promotion of public participation and stakeholder consultation.

Environmental planning is also another important tool for horizontal environmental integration.¹¹⁸ NEMA has the mandate to formulate a National Environmental Action Plan (NEAP) every 6 years for approval by the Cabinet Secretary.¹¹⁹ The process of formulation of NEAP involves various stakeholders including lead agencies and non-state actors at the national level. Of note, the plan proposes guidelines for integration of standards of environmental protection into development planning and is binding to all persons and public authorities.¹²⁰

Since 1994 and up to 2013, the Government prepared and adopted NEAPs on a 6-year basis. Since the adoption of the Constitution 2010, however, the Government has not adopted the NEAP which is suggestive of a low prioritisation of this tool. Notably, the last NEAP (2009-2013) had a section dedicated to MSWM and contained such useful interventions as promotion of cost-effective and appropriate waste management technologies, research and development of recycled products.¹²¹ The survey revealed that NEMA was in the process of developing a new NEAP and had been involving private sector organisations and residents associations in the process. NEAP had incorporated MSWM issues and this could form a good basis for national solid waste planning. The extent to which NEAP influences government budgeting and programming is, however, unclear. The current Medium-Term Expenditure Framework (MTEF), which is a strategic budgeting document, contains no mention of the NEAP.

EMCA mandates the respective County Environment Committees (CEC) to develop a county environment action plan (CEAP) for consideration and adoption by the respective County Assembly.¹²² NEMA has a role in the development of CEAP and is required to ensure its alignment to the NEAP. Public participation and institutional consultations are a requirement in the development of both NEAP and CEAP. In terms of contents, the CEAP borrows largely from NEAP, only that it lacks a provision binding CEAP vis-à-vis other persons and public authorities at the county level. MSWM issues facing a county and actions required to address the same are part of the CEAP as well.

All the counties targeted by this study had developed a CEAP during the first tenure of devolved governments (2013-2017). In the absence of duly appointed CECs, the CEAP process was largely undertaken by technocrats in the respective environment departments of the target Counties. These plans were never submitted to the respective County Assemblies for deliberation and adoption and therefore remain as just policy drafts. The CEAPs are not referenced in the integrated development plans of the respective Counties and there is no indication whatsoever that they inform the budget processes.¹²³ Therefore, there was limited stakeholder engagement and therefore it is doubtful if the first-generation CEAPs played a meaningful sectoral coordination role, which is vital for environmental integration. The influence of CEAP in the design and implementation of development projects in the respective counties therefore remains unclear.

118 Runhaar & Driessen (n 113); Høgl & Norbeck (n 18).
119 Sec 37, EMCA.

120 Sec 38 (1), EMCA.

121 Government of Kenya & NEMA, *National Environment Action Plan Framework: 2009-2013* (NEMA, 2009) 11-12.

122 Sec 40, EMCA.

123 Of the 4 CIDPs reviewed, only Kajiado CIDP (2018-2022) mentioned the formulation of a CEAP as a priority under implementation of initiatives under Environment Management Improvement.

3.5 Prospects for Improved Sectoral Coordination

The study has underscored the entrenchment of the principle of sustainable development and right to clean and healthy environment in the Constitution as providing a foundation for implementation of the concept of environmental integration in MSWM. However, the legislative framework, particularly the EMCA framework, do not adequately entrench norms supportive of the waste hierarchy and circular economy. Without imposing clear obligations on waste actors in relation to waste re-use, recycling and recovery, the EMCA framework misses an opportunity for providing a framework for sectoral coordination of these actors.

The Ministry of Environment in the National Government is spearheading efforts towards enactment of a consolidated national law on solid waste management—the Sustainable Waste Management Bill of 2019. The draft law has incorporated environmental protection rights and obligations as well as waste hierarchy approach in its framework.¹²⁴ If enacted, the Bill would contribute significantly at a normative level to environmental integration in the sector. The Ministry has also developed a draft national solid waste management policy¹²⁵ which would complement the implementation of the national solid waste law upon enactment. At the County level, the Council of Governors has developed model county solid waste management law and policy¹²⁶ as legislative guides to assist Counties formulate appropriate frameworks anchored in the waste hierarchy and circular economy concepts.

There is a need for environmental interest groups to advocate for the enactment of these laws and policies at both national and county level. There is also a need for NEMA and County governments to collaborate in the development and implementation of comprehensive waste education programmes, which will aim to build support for the implementation of waste hierarchy. An informed citizenry is more likely to demand for action from political leaders and thus, promote political will necessary to ensure sectoral coordination and resolution of MSWM problems.

With EMCA and the subsidiary Waste Regulations (2006) as the current preeminent MSWM legal framework, NEMA therefore continues to occupy a central place in regulation of wastes at both national and county levels. NEMA's continuing role as coordinator of sectoral agencies places the regulator in a leveraged position to influence effectively environmental integration in the MSWM. To empower NEMA to discharge its obligations effectively, there is need to reconsider the decision on the drastic reduction of EIA license fees and reverse the same in order to increase the Authority's revenue base. Secondly, there is a need to strengthen the Technical Advisory Committee for effective sectoral coordination within the context of the EIA process. To secure the independence of NEMA, there is need to reconceptualise the Authority as a shared institution between the National and County governments and ensure both levels of government are represented in the governance structure of NEMA.

The adoption and operationalisation of devolved system of governance has had positive impact on environmental management generally. County governments are now vested with substantial environmental management responsibilities and resources as compared to the defunct local authorities' predecessors. Despite a clear role in MSWM, county authorities were rated poorly by respondents in most aspects of MSWM regulation. There is need for County governments to consider increasing funding levels for MSWM activities in a manner which promotes the waste hierarchy approach for sustainability. There is also need to ensure clarity between sharing of regulatory responsibilities in MSWM between National and County governments, through amendment of NEMA or an advisory opinion at the Supreme Court.

124 Sustainable Waste Management Bill, Sec 4 & 5.

125 Ministry of Environment and Forestry, *National Sustainable Waste Management Policy: Revised Draft*, (Ministry of Environment and Forestry, April 2019) <http://www.environment.go.ke/wp-content/uploads/2019/04/Revised_National_Waste_Policy_2019.pdf>.

126 On file with the author.

Counties should also consider strengthening intra-county departmental coordination, through improved funding for these initiatives. The County should also put in place incentives for promoting inter-departmental cooperation such as embedding in the performance management framework, rewards targeting heads of departments who foster such collaboration. Accordingly, departmental budgets should also contain provisions to support inter-departmental collaborative initiatives. The County environmental committees (CECs) should be strengthened through proper financing, streamlining procedures for appointment of members and further decentralisation at the sub-county levels.

More research is required to assess the prospects of enhancing sectoral coordination through such tools and processes as strategic environmental assessments, regulatory impact assessments, green budgeting and procurement at both county and national levels.

The study analysed the potential for utilisation of regulatory tools for promoting sectoral coordination such as the environmental assessments and planning processes that have strong linkages with MSWM. NEMA and environmental interest groups should promote stakeholder engagement and public participation in the EIA process to increase its legitimacy and fulfil its potential for sectoral coordination. The National government should strengthen the NEAP process by enhancing stakeholder engagement and regular publication of the plan. At the County level, Governors should ensure adoption of CEAPs and support the subsequent implementation processes.

4 CONCLUSIONS

This paper has reviewed the framework for sectoral coordination and horizontal environmental integration in Kenya's MSWM sector. Key gaps in the normative framework, capacity of NEMA and County governments as well as shortcomings in sectoral coordination instruments undermine the potential for sectoral coordination at both levels of government. This in turn weakens effective operationalisation of horizontal integration in MSWM, thus diminishing the realisation of integrated and sustainable MSWM system. However, there is opportunity for addressing the gaps within ongoing environmental sector reforms.

ARTICLE

MITIGATING THE EFFECTS OF ENVIRONMENTAL DEGRADATION IN THE OIL INDUSTRY: AN ASSESSMENT OF GOVERNMENT COMPENSATION SCHEME IN NIGERIA

Osamuyimen Enabulele

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1

INTRODUCTION

Nigeria's oil and gas production primarily takes place in the Niger Delta Region (NDR) but this region's communities hardly benefit from the huge oil income.¹ However, these communities continue to bear the persistent large-scale negative environmental and socio-economic impacts of oil production² while they are also being deprived of their traditional means of livelihood such as fishing and farming.³ These adverse social, economic and environmental impacts and the underdevelopment of the NDR have allegedly led to the indigenes' perennial protests over marginalisation.⁴ In addressing the alleged marginalisation and negative

impacts of oil operations on the NDR communities, the Nigerian government established the Niger Delta Development Commission (NDDC) in 2000 as a form of government compensation scheme. Yet, no empirical studies have examined this institution as a compensation scheme.

Thus, this paper seeks to problematise the NDDC as a government compensation scheme (GCS)⁵ aimed at mitigating the impacts of environmental degradation on the NDR. More specifically, the paper will assess the extent this GCS has performed its mandate and been constrained. To address the research problem, this paper adopts a mixed method (qualitative and quantitative) approach.⁶ It draws on survey and interviews to provide quantitative and qualitative empirical evidence respectively to gain insight into the extent the functions of the NDDC fits with the GCS. Following the empirical findings, the paper concludes that the GCS methodology focusing on environmental remediation potentially offers a better succour to the Niger Delta people than human capital and infrastructural development focuses would offer.

The reminder of this paper is organised as follows. Section 2 conceptualises GCS as a tool for environmental management, while section 3 discusses

1 Lawrence A Atsegbua, Vincent Akpotaire and Folarin Dimowo, *Environmental Law in Nigeria, Theory and Practice* (2nd edn, Ambik Press 2010) 94-95.

2 Yinka Omorogbe, 'Regulation of Oil Industry Pollution in Nigeria' in Epiphany Azinge (ed), *New Frontiers in Law* (Oliz Publishers 1993) 148; Osamuyimen Enabulele, Mahdi Zahra and Franklin N Ngwu, 'Addressing Climate Change Due to Emission of Greenhouse Gases Associated with the Oil and Gas Industry: Market-Based Regulation to the Rescue' in Maria A Gonzalez-Perez and Liam Leonard (eds), *Climate Change and the 2030 Corporate Agenda for Sustainable Development* (Emerald Group Publishing Limited 2016) 56.

3 Legborsi S Pyagbara, 'The Adverse Impacts of Oil Pollution on the Environment and Wellbeing of a Local Indigenous Community: The Experience of the Ogoni People of Nigeria' (International Expert Group Meeting on Indigenous People and Protection of Environment, Khabarovsk, Russian, August 2007) 9; Ikenna V Ejiba, Simeon C Onya and Oluwadamilola K Adams, 'Impact of Oil Pollution on Livelihood: Evidence from the Niger Delta Region of Nigeria' (2016) 12(5) *Journal of Scientific Research & Reports* 1, 4; and Z A Elum, K Mopipi and A Henri-Ukoha, 'Oil Exploitation and its Socioeconomic Effects on the Niger Delta Region of Nigeria' (2016) 23(13) *Environmental Science and Pollution Research* 12889.

4 Nelson E Ojukwu-Ogba, 'Legal and Regulatory Instruments on Environmental Pollution in Nigeria: Much Talk, Less Teeth' (2006) 8 *International Energy Law and Taxation Review* 201.

5 Government compensation scheme have been known as various names such as administrative compensation scheme, state compensation scheme or state compensation programme.

6 The fieldwork was mainly conducted in five States in the NDR (Akwa – Ibom, Bayelsa, Delta, Edo and Rivers) and others conducted in Lagos State where the headquarters of most oil companies and regulatory bodies are located. Survey and interview participants were drawn from different stakeholder groups such as members of oil-producing communities, oil companies, regulatory bodies, legal practitioners, accounting professionals and interventionist agency. While 350 questionnaires were administered and 281 were both returned and usable for analysis, 25 semi-structured interviews were also conducted.

the relevant provisions of NDDC Act⁷ in relations to the GCS. Next, section 4 presents the empirical findings followed by the discussion of empirical findings in section 5. Finally, section 6 concludes the paper and offers some recommendations.

2

CONCEPTUALISING GOVERNMENT COMPENSATION SCHEME

The foundation of government compensation scheme (GCS) lies on the inadequacies in effectively compensating victims of crimes.⁸ It is on this logical premise that the offender's interest should not be placed before the victim's interest.⁹ In resonance, Floyd argued that:

We are dedicated to insuring that due process is accorded to all persons accused of crime; and we are also concerned with rehabilitating the criminal - and justly so! But we need also to concern ourselves as energetically with the plight of the victim and his rehabilitation.¹⁰

The above resonates with a situation where plenty resources are channelled towards the rehabilitation of convicts and less attention accorded the welfare of the victims. Given the illogicality of such stance by public scrutiny, the State is motivated to intervene through establishing compensatory schemes.¹¹ Government's adoption of compensation schemes is driven by restitution, due duty of care owed to its citizens and social welfare.¹² Thus, GCSs are part of a government's interventionist action plans to offer mutual protection and security on the basis of social welfare.¹³ In principle therefore, it can be argued that the GCS is usually anchored on the general principle of risk distribution with a fault or non-fault system as its base.¹⁴

However, the GCS should be clearly distinguished from compensatory damages, which are money awarded to a plaintiff to compensate for damages, injury or another incurred loss. Compensatory damages are awarded in civil cases where loss has occurred because of negligence or unlawful conduct of another party through the torts system.¹⁵ In contrast, the GCS serves as a substitute and/or complements to the tort system.¹⁶ Notwithstanding that the GCS was ideologically framed to provide respite to crime victims, its adoption has been extended to other deprived and victimised people across different facets of the society. For instance, the

7 The Niger Delta Development Commission (Establishment etc) Act. No. 6 LFN 2000 [hereafter NDDC Act].

8 Olanrewaju Fagbohun, *The Law of Oil Pollution and Environmental Restoration: A Comparative Review* (Odade Publishers, 2010) 204; and Peter Cane, *Atiyah's Accidents, Compensation and the Law* (7th edn, Cambridge University Press 2006) 304.

9 Her Majesty Stationary Office, *Penal Practice in a Changing Society: Aspects of Future Development Aspects of Future Development* (England and Wales) (CMND 645, Her Majesty Stationary Office 1959) 7.

10 Glenn Floyd, 'Compensation to Victims of Violent crime' (1970) 6(2) *Tulsa Law Review* 100.

11 Fagbohun (n 8) 204.

12 Floyd (n 10) 110-115; and Andrew Ashworth, 'Punishment and Compensation: Victims, Offenders and the State' (1986) 6 *Oxford Journal Legal Studies* 86.

13 Fagbohun (n 8) 204.

14 *ibid*.

15 Donald Harris, David Campbell and Roger Halson, *Remedies in Contract and Tort* (2nd edn, Cambridge University Press 2002) 21; Mark Lunney, and Ken Oliphant, *Tort Law: Text and Materials* (5th edn, Oxford University Press 2008) 847; Ekhaton noted that in Nigeria there is heavy reliance on the principles of tort in getting compensation. See, Eghosa O Ekhaton 'Public Regulation of the Oil and Gas Industry in Nigeria: An Evaluation' (2016) 21 *Annual Survey of International & Comparative Law* 43, 77.

16 Albert C Lin, 'Beyond Tort: Compensating Victims of Environmental Toxic Injury' [2015] *Southern California Law Review* 1439, 1443; Clifford Fisher, 'The Role of Causation in Science as Law and Proposed Changes in the Current Common Law Toxic Tort System' (2001) 9 *Buffalo Environmental Law Journal* 35.

GCS has been extended to healthcare,¹⁷ agriculture,¹⁸ and indeed as a response to environmental pollution.¹⁹

Moreover, over the years, GCSs have been established in different jurisdiction to recompense environmentally victimised people as an alternative means of recompensing those people.²⁰ According to Lin, GCSs are advantageous in bringing respite to environmentally victimised people in the sense that: (i) they typically employ specialised or expert decision makers, who can conduct their own studies and consider a broad range of information; (ii) provide more continuous oversight and distribute compensation more fairly among a class of victims; and (iii) administrative systems are in theory, more politically accountable than other means of recompensing victims such as litigation.²¹ It is thus deducible that the GCS is a choice option in recompensing environmentally victimised people due to its organised structure.

An application of GCS in the NDR is of paramount importance given the pervasive environmental degradation caused by oil operations and the attendant social, economic and developmental dislocations it creates for the Niger Delta people. Environmental degradation impacts on ecosystems and social systems.²² It subsequently harms the 'characteristic aspects of the landscape' and impairs the 'lifestyle of indigenous communities'.²³ As such, the victims of oil pollution may be humans, the environment (including fauna and flora) or both.²⁴ This dual impact makes the GCS suitable for recompensing the affected. It is therefore necessary for the design of compensatory schemes to encompass solutions addressing these two components. However, Bowman argues that compensation schemes established in most jurisdictions as responses to environmental pollution fail to recognise harm to the environment.²⁵ Instead,

17 Marie Bismark and others, 'Accountability Sought by Patients Following Adverse Events from Medical Care: The New Zealand experience' (2006) 17 Canadian Medical Association Journal 889.

18 Patience Elabor-Idemudia, 'Nigeria: Agricultural Exports and Compensatory Schemes-rural Women's Production Resources and Quality of Life' in Pamela Sparr (ed), *Mortgaging Women's Lives: Feminist Critiques of Structural Adjustment* (Zed Press 1994) 134-154.

19 See, Japan's administrative compensation program which was established by virtue of the Kôgai Kenkô Higai Hoshô Hô [Pollution-Related Health Damage Compensation Law], Law No. 111 of 1973; Alice Stewart, 'Japan's 1987 Amendment to the 1973 Pollution-Related Health Damage Compensation Law: Tort Reform and Administrative Compensation in Comparative Perspective' (1988) 29 Harvard International Law Journal 475; Rabin L. Robert, 'Some Thoughts on the Efficacy of a Mass Toxics Administrative Compensation Scheme' (1993) 52 Maryland Law Review 951; and Lin (n 16) 1494-1500.

20 In Canada compensation schemes are structured to recompense aboriginal communities. See, Robert Mainville, *An Overview of Aboriginal and Treaty Rights and Compensation for their Breach* (Purich 2001) 128.

21 Lin (n 16) 1464-1470.

22 Paul Wapner, 'Environmental Ethics and Global Governance: Engaging the International Liberal Tradition' (1997) 3(2) *Global Governance* 213. Lee underscored that 'social welfare needs of residents in environmentally polluted communities are a multi-dimensional, long-term issue. [Tackling it holistically will do a lot] ...to bring about sustainable development'. Tsuey-Ping Lee, 'A Welfare Approach to Mitigating Environmental Injustice: Exploring Needs of Pollution Victims' (2009) 29 <<http://www.umdcipe.org/conferences/epckdi/2.pdf>>.

23 Michael M O'Hear, 'Sentencing the Green-Collar Offender: Punishment, Culpability and Environmental Crime' (2004) 95(1) *The Journal of Criminal Law and Criminology* 133, 163.

24 Ambrose OO Ekpu, 'Compensation for Oil Pollution Damage: The Need for Equity' (20th International Conference of the Society of Petroleum Engineers 1996) 242, 255; and Osamuyimen Enabulele, 'Oil Pollution and the Polluter Pays Principle: The Nigerian Experience' (PhD thesis, Glasgow Caledonian University 2018) 41.

25 Michael Bowman, 'The Definition and Valuation of Environmental Harm: An Overview' in Michael Bowman and Alan Boyle (eds), *Environmental Damage in International and Comparative Law: Problems of Definition and Valuation* (Oxford University Press 2002) 12-13; and O'Hear (n 23) 163.

those schemes have been ‘concerned with the infringement of established human interests relating to the person or property caused through the medium of the environment’.²⁶ By implication, most jurisdictions’ GCSs established as responses to environmental degradation pay little or no attention to environmental remediation, but focus on resolving human claims. This attitude towards the environment apparently resonates with the traditional perception that the environment is a free resource ripe for plunder,²⁷ which negates concern for future generations.

GCS can be designed to provide ex ante and ex post compensation.²⁸ This implies that it can be designed to address the needs of current and future victims of environmental degradation. It has been argued that to aid a large group of people to recover from severe environmental degradation, it is crucial to map out a long-term package to cater for their multiple needs, taking into consideration their peculiar characteristics.²⁹ GCSs are essential in this context as they are usually designed to bring succour to a large populace, which make them efficient schemes for addressing such environmental challenges.³⁰ However, the GCS has been criticised for its high administration costs when compensable harms are broad.³¹ Its administration varies across jurisdictions.

By nature, GCSs are administrative and funded by the government on a welfare basis,³² but in some jurisdictions they are designed to levy polluting

companies for funding.³³ Such funding arrangement echoes the polluter pays principle (PPP) where the polluter is responsible for the prevention and compensation of victims.³⁴ It also has the potential to serve as a deterrent to other operators in the same line of business in that operators fund the compensation scheme. However, the operators may ultimately transfer the costs of such levies to the consumers,³⁵ thereby distorting the deterrent effect of the GCS.³⁶ Another downside is that the operators may perceive their contribution to the compensation funds as a leeway to

³³ *ibid*; and Farber (n 28) 1607.

³⁴ The PPP essentially creates a strict regime of standard setting for pollution prevention, an obligation for polluters to clean-up and remediate the environment as well as compensate victims of environmental pollution. The main goals of the principle are cost allocation and internalisation while its functions are economic integration, redistribution, preventive as well as curative functions. The principle has been interpreted among others to be a principle of efficiency, equity or fairness, potentially produces pedagogical and deterrent effects as well as promotes international harmonization of national environmental policies. See Hakeem Ijaiya, ‘The Principle of Sustainable Development: An Appraisal of the Polluter Pays Principle in the Nigerian Oil and Gas Industry’ (2013) 4 (1) *Malaysia Lega Network Series* 1, 12-13; Margaret R Grossman, ‘Agriculture and the Polluter Pays Principle: An Introduction’ (2006) 59 (1) *Oklahoma Law Review* 1; Nicolas de Sadeleer, *Environmental Principles, from Political Slogans to Legal Rules* (Oxford University Press 2002) 21-60; Mizan R Khan, ‘Polluter-Pays-Principle: The Cardinal Instrument for Addressing Climate Change’ (2015) 4(3) *Laws* 638; Edwin Woerdman, Alessandra Arcuri and Stefano Clo, ‘Emissions Trading and the Polluter-Pays Principle: Do Polluters Pay Under Grandfathering?’ (2008) 4(2) *Review of Law & Economics* 565; Hans C Bugge, ‘The Principles of Polluter Pays in Economics and Law’ in Erling Eide and Roger Van Der Bergh (eds), *Law and Economics of the Environment* (Juridisk Forlag 1996) 53-90; Sanford E Gaines, ‘Polluter-pays Principle: From Economic Equity to Environmental Ethos’ (1991) 26 *Texas International Law Journal* 463; and Enabulele (n 24) 63-77.

³⁵ Hall (n 30) 114; and Farber (n 28) 1607.

³⁶ Hall (n 30) 141; and Farber (n 28) 1635-1639.

²⁶ Bowman *ibid* and O’Hear *ibid*.

²⁷ Bowman *ibid* 13.

²⁸ Lin (n 16) 1486; and Daniel A Farber, ‘Basic Compensation for Victims of Climate change’ (2007) 155(6) *University of Pennsylvania Law Review* 1605, 1635-1639.

²⁹ Lee (n 22) 29.

³⁰ Matthew Hall, ‘Criminal Redress in Cases of Environmental Victimisation: A Defence’ (2016) 49 (2) *Revue Criminologie* 141.

³¹ Farber (n 28) 1646.

³² Matthew Hall, *Victims of Environmental Harm: Rights, Recognition and Redress under National and International Law* (Routledge 2013) 114.

pollute, hence validating the ideology that pollution can continue as long as compensation is paid. Also, how the compensation funds are utilised is as important as the creation of the funds. It has been suggested that the compensation funds are best utilised by tying them to adaptation projects to prevent diverting them towards paying financial compensation to victims.³⁷ This suggests that victims must have other means of seeking redress involving financial compensation. Polluters must not commit to indiscriminate pollution because of contribution to the funding scheme. Farber has argued that the existence of GCS should not preclude the utilisation of measures to prevent environmental pollution.³⁸ This suggests that irrespective of the existence of compensation schemes, pollution prevention should be the watchword. Operators should adhere to regulatory requirements while regulatory bodies are to continue to monitor operators to ensure that preventive measures are met.

3 NIGER DELTA DEVELOPMENT COMMISSION

Both the Nigerian governments and other stakeholders recognise how oil operations have significantly affected the environment and means of livelihood in the NDR.³⁹ Hence, the government's initiation of compensation schemes from time to time to ameliorate the people's plight. In most instances, compensation schemes constitute an integral part of government's action programme for the overall purpose of social welfare or redistribution schemes.⁴⁰ In principle, it is apparent that GCS in relation to the NDR is implemented on the premise that the government is a

polluter. It has been argued that the government could be considered a polluter where '...regulatory authority performs the dual functions of an operational and a regulatory authority [and/ or] ...when the government enters a joint venture agreement with the operator and subsequently pollution arises from the joint venture operations'.⁴¹ Hence, the government becomes partly liable for pollution caused by the activity of the joint ventures. Currently the principal compensation scheme operational in the NDR is through the Niger Delta Development Commission (NDDC).

NDDC was established through an act of Parliament⁴² in response to longstanding demands by the NDR States for a more equitable distribution of wealth generated from their region and to address both environmental and other social-economic problems in the NDR.⁴³ Prior to the NDDC, interventionist mandates were delivered, albeit unsuccessfully, by various statutory bodies or interventionist agencies such as the Niger Delta Development Board, Niger Delta Basin Development Authority, and Oil Mineral Producing Area Development Commission (OMPADEC). An NDDC Act repealed the OMPADEC Decree 1998 as the agency created by the latter failed in tackling the oil-driven environmental crises in the NDR.⁴⁴

The function of the NDDC includes inter alia: formulation of policies and guidelines for the development of the NDR;⁴⁵ to conceive, plan and implement, in accordance with set rules and regulations, projects and programmes for the sustainable development of the NDR in the field of transportation including roads, jetties and waterways, health, education, employment, industrialization, agriculture and fisheries, housing and urban development, water supply, electricity and telecommunications;⁴⁶ and tackling ecological and environmental problems that

³⁷ Farber (n 28) 1646.

³⁸ *ibid.*

³⁹ Pyagbara (n 3) 9; Ejiba and others (n 3) 4 and Elum and others (n 3) 12889.

⁴⁰ Fagbohun (n 8) 218.

⁴¹ See, Enabulele (n 24) 42.

⁴² NDDC Act, section 1 (1).

⁴³ Amnesty International, Nigeria: Are Human Rights in the Pipelines? (Amnesty International 9 November 2004) 11 < <https://www.amnesty.org/download/Documents/88000/afr440202004en.pdf>>.

⁴⁴ See, the preamble to the NDDC Act.

⁴⁵ NDDC Act, section 7(1)(a).

⁴⁶ NDDC Act, Sec 7(1)(b).

arise from oil exploration in the NDR.⁴⁷ These functions can be loosely classified into three categories of: infrastructural development, human capital development and environmental protection.

However, the above formulation is not set in stone – it is fluid. For instance, provision of roads is basically infrastructural development, but human capital development can also be achieved through the process. This is because road infrastructure facilitates accessibility of the communities and job creation. Other government ministries, departments and agencies in Nigeria undertake functions like the NDDC's. For instance, the Federal Ministries of Works and Health deliver infrastructural development and health service across Nigeria (including the NDR). Irrespective of the mandates of those ministries or department to deliver those social and developmental services, the NDDC undertakes similar functions.⁴⁸ In that regard, the NDDC functions as a vehicle for government compensation. But the NDDC must be harnessed as an integrated approach to bring respite to the NDR people negatively impacted by oil operations by touching every facet of their wellbeing. This resonates with the underpinnings of GCSs as instruments or action plans aimed at succouring a large group of people and helping them to recover from severe environmental degradation by implementing a systematically structured long-term package to meet their multiple needs with peculiar characteristics.⁴⁹ As earlier mentioned, the NDDC's functions loosely classified into infrastructural development, human capital development and environmental protection appear to represent a systematically structured package to address diverse needs in the NDR. Whether NDDC judiciously discharges these responsibilities to the NDR people is a different issue altogether. As such, this paper problematises the NDDC as a government compensation scheme (GCS) to gain insight into the extent it has mitigated the impacts of environmental

degradation on the NDR. A systematic analysis of the empirics is done in connection with the broad functions of infrastructural development, human capital development, and environmental protection.

4

ANALYSIS OF EMPIRICAL FINDINGS

This section analyses the field-based empirical data from survey and interviews of various stakeholders to provide insight into the extent the NDDC discharges its GCS remits and its performance limiting factors. These findings are thematically organised according to the three broad functions of NDDC (infrastructural development, human capital development, and environmental protection) discussed earlier and the performance limiting factors that systematically emerged from the in-depth scrutiny of the qualitative empirical data.

4.1 Broad Functions of the NDDC

4.1.1 *Infrastructural Development*

NDDC was designed to provide infrastructural projects for the NDR to bridge the region's infrastructural deficits compared to other parts of Nigeria and to give the region access to modern facilities as dividends of hosting oil operations. Our empirical survey evidence shows that members of the oil-producing communities are largely positive on NDDC's effort at addressing infrastructural deficiencies in the region (see figure 1). As shown in figure 1, 63 per cent, 10 per cent and 27 per cent respondents respectively are in agreement, undecided, and in disagreement over NDDC's success at achieving infrastructural development in the Niger Delta.

Similarly, the interviewees were positive about NDDC's performance in the area of infrastructural development. For instance, Community stakeholder 1 said: 'I think the NDDC is visible in my community. The primary school that we have in the community is being built by the NDDC. There is a one-kilometre

⁴⁷ NDDC Act, Sec 7(1)(h).

⁴⁸ See, Sec 7 of the NDDC Act.

⁴⁹ Lee (n 22) 29.

Figure 1: To what extent would you agree that the NDDC has addressed infrastructural deficiencies?

	Frequency	Percent
Strongly agree	114	40.6
Agree	62	22.1
Undecided	28	10.0
Strongly	24	8.5
Strongly disagree	53	18.9
Total	281	100.0

road that was also done by the NDDC in the community and probably a water scheme'.⁵⁰ Both the survey and interview results suggest that NDDC's infrastructural development interventionist actions have been successful in bridging the infrastructural gap in the NDR. This result corroborates Ojukwu-Ogba who found that the NDDC has performed relatively well in its equitable distribution of meaningful projects across the oil-producing communities of the NDR, gauged by the delivery of its objectives in concrete terms.⁵¹

4.1.2 Human Capital Development

NDDC was also designed to fast-track human capital development in the NDR in a bid to curb unemployment. Elicited responses demonstrate that majority of members of oil-producing communities are of the opinion that the NDDC has improved human capital development in their communities (see figure 2). Their responses show that 74 per cent agreed, 8 per cent were undecided, while 17 per cent disagreed over improved human capital development in their communities.

Figure 2: To what extent would you agree that the NDDC has improved human capital development?

	Frequency	Percent
Strongly agree	138	49.1
Agree	72	25.6
Undecided	23	8.2
Disagree	21	7.5
Strongly disagree	27	9.6
Total	281	100.0

⁵⁰ Interview with Community stakeholder 1, Community Public Relations Officer, Edo State (Edo State, 02 February 2015).

⁵¹ Nelson E Ojukwu-Ogba, 'Legislating Development in Nigeria's Oil Producing Region: The NDDC Act Seven Years On' (2009) *African Journal of International and Comparative Law* 136, 144.

The above position was supported by Community stakeholder 5 who stated that:

The NDDC is trying, I must be sincere, [the] government established NDDC to look into the plight of Niger Delta Region and as a result they have empowered our youths. They have provided scholarships to many students and have aided youths in skill acquisition. For instance, some women were trained in hairdressing...⁵²

The above narrative suggests that the NDDC to a large extent has been able to enhance the capacity of the people of the NDR to earn a living. Hence, human capital development as supported by the NDDC aims to boost the living standards of the people. This finding seems to contradict some previous studies that argue that the NDDC has not made any significant progress in improving the living conditions of the Niger Delta people.⁵³ There have been instances where communities applauded the provision of skill acquisition equipment, supply of books and science equipment which, according to Imobighe, are mostly provided with little or no consideration for their end use or sustenance.⁵⁴ From observation, standards of living in most of the communities in the NDR are still

very low despite claims by the NDDC that things are improving, and available statistics attest to this. For instance, data provided by Amnesty International indicates that the Niger Delta people are among the most deprived oil-producing communities in the world and about 70 per cent of the populace live on less than US\$1 a day – the standard economic measure of absolute poverty.⁵⁵

4.1.3 Environmental Protection

The NDDC Act specifically provides that the NDDC should 'tackle ecological and environmental problems that arise from the exploration of oil mineral in the Niger-Delta area...' ⁵⁶ One of the major visible environmental problems arising from oil operations in the NDR is oil spill, which requires clean-up and remediation. While stakeholders consider the two prior themes as areas the NDDC has positively performed and delivered benefits to the Niger Delta people, the NDDC has achieved underwhelming performance in environmental protection. The results in figure 3 shows that 83 per cent respondents consider the NDDC as performing poorly in addressing environmental degradation problems, while 16 per cent and 1 per cent respondents are positive and neutral respectively.

Figure 3: To what extent would you agree that the NDDC has addressed environmental degradation?

	Frequency	Percent
Strongly agree	32	11.4
Agree	12	4.3
Undecided	3	1.1
Disagree	158	56.2
Strongly disagree	76	27.0
Total	281	100.0

⁵² Interview with Community stakeholder 5, Community Member, Rivers State (Rivers State, 10 February 2015).

⁵³ Thomas A Imobighe, 'Conflict in the Niger Delta: A Unique Case or a Model for Future Conflicts in other Oil-Producing Countries?' in Rudolf Traub-Merz and Douglas Yakes (eds), *Oil policy in the Gulf of Guinea, Security and Conflict, Economic Growth, Social Development* (Friedrich-Ebert-Stiftung, 2004) 108 and Akinwale A Ayofe and Evans Osabuohien, 'Re-Engineering the NDDC's Master Plan: An Analytical Approach' (2009) 11(2) *Journal of Sustainable Development in Africa* 142, 155.

⁵⁴ Imobighe *ibid* 108.

⁵⁵ Amnesty International, 'Nigeria Ten Years On: Injustice and Violence Haunt the Oil Delta' (3 November 2005) para. 1.1 <<https://www.amnesty.org/download/Documents/80000/afr440222005en.pdf>>.

⁵⁶ Sec 7(1)(h) of NDDC Act.

Interviewees were equally dissatisfied with NDDC's actions in discharging its environmental protection function. Even an interviewed NDDC personnel 1 had concerns with the NDDC's disposition to environmental protection stating that: 'I will say from my own perspective that we have not met the full objective of environmental protection'.⁵⁷ The above account appears to demonstrate that environmental protection has not received the deserved attention from NDDC. Given that environmental degradation underlies most of the problems in the NDR, one would expect the NDDC to channel more resources towards environmental remediation and restoration. Yet this is not the case as confirmed by its insider member, suggesting that the compensation scheme undermines environmental concerns which primarily drive the perennial agitations and socio-economic dislocations in the Niger Delta. Whilst there are constraints on the agency's performance, our findings agree with previous studies that the NDDC has not made meaningful progress in improving the environmental conditions of the NDR since its establishment.⁵⁸

4.2 Performance Limiting Factors

An establishment of GCS is driven by the need to address issues of restitution, duty of care and social welfare.⁵⁹ The NDDC's activities align the NDDC with the GCS ideals being a government's structured action plan to develop the Niger Delta. However, several constraints have been identified as limiting the desired performance of this interventionist instrument. This

section presents empirical evidence of factors constraining NDDC's performance as a GCS.

4.2.1 Poor Funding

No compensation scheme can be successfully implemented without adequate funding. Theoretically, the NDDC is adequately funded.⁶⁰ Its funds are contributed as follows: (a) the federal government, whose quota is the equivalent of fifteen per cent of the total monthly statutory allocations due to member States within the NDR;⁶¹ (b) fifty per cent of monies due to states within the NDR from the ecological fund;⁶² (c) three per cent of the total annual budget of oil-producing companies operating within the NDR.⁶³ Other sources of funding are grants, loans, gifts deposited with the NDDC by any institution be they local, international or raised by the NDDC themselves, and proceeds from all other assets that may, from time to time, accrue to the NDDC.⁶⁴

Whilst the above suggests that NDDC is well funded to have enough resources for its adaption projects in the Niger Delta, our empirical evidence suggests otherwise as the discrepancy relates to the actual remittances the monies due the agency. For example,

⁵⁷ Interview with NDDC personnel 1, Senior Staff, Niger Delta Development Commission (Port Harcourt, 18 February 2015).

⁵⁸ Sylvester O Nliam, 'Is the Precautionary Principle Brought Home in the Nigerian Petroleum Industry? Comparative Perspectives between Nigeria and the UK' (PhD thesis, University of Aberdeen 2011) 250.

⁵⁹ Floyd (n 10) 110-115.

⁶⁰ Ojukwu-Ogba (n 51) 142; and Ayofe and Osabuohien (n 53) 148-149.

⁶¹ NDDC Act, Sec 14 (2) (a).

⁶² NDDC Act, Sec 14 (2) (c).

⁶³ NDDC Act, Sec 14 (2) (b). Oil companies claimed that they have made huge financial contributions to the NDDC. For instance, Shell its 2016 Sustainability Report claimed that '[i]n 2016, the SPDC JV and SNEPCO contributed \$106.8 million (Shell share \$48.5 million) to the NDDC. Over the last five years Shell Companies in Nigeria's contribution to the NDDC totalled more than \$800 million (Shell share around \$340 million)'. See, Shell, Sustainability Report 2016, Our Activities in Nigeria, <<http://reports.shell.com/sustainability-report/2016/managing-operations/our-activities-in-nigeria.html>>. Also, ExxonMobil claims that since the inception of the NDDC it has contributed a total of N160 billion. See, ExxonMobil, 'Mobil Pays N160 billion to NDDC in 14 Years' (30 August 2015) <<http://motoringworldng.com/mobil-pays-n160-billion-to-nddc-in-14-years/>>.

⁶⁴ See, NDDC Act, Sec 14 (2) (d) and (e).

NDDC personnel 1 said that '[o]ne thing is what the law says, another is the implementation. ...but the simple logic there is that the money required to implement is not forthcoming. If that money is not in place, it will be more theoretical than being practical'.⁶⁵ NDDC personnel 2 corroborated the above claims by stating that '...there are a lot of projects that the commission needs to embark upon, but funds are simply not there... We have so many contactors who are still being owed, not because the commission does not consider it necessary to pay them but funds'.⁶⁶ With this evidence, it is obvious the NDDC cannot effectively discharge its functions.

4.2.2 Corruption and Lack of Autonomy

Corruption is endemic across all sectors in Nigeria. Interviewees link the poor performance of NDDC to corruption. For instance, Community stakeholder 2 said that:

NDDC is a conduit pipe. It is a very corrupt agency. The government just set it up to enrich their cronies. NDDC has not lived up to its billing because the volume of jobs [the] NDDC has done is not commensurate in any way with the money they have gotten. Few projects executed lack quality because they are not awarded to professionals.⁶⁷

This view was echoed by Community stakeholder 3 who stated that the '[creation of the] NDDC was only a conduit which top officials use in embezzling money in the name of developing host communities. Roads constructed by NDDC are even worse than access roads in the community constructed by the oil companies'.⁶⁸

The implication of the above narratives is that the NDDC has become a medium for some individuals to siphon money, as contracts are awarded to them and payment made but projects are not executed. In circumstances where they are executed, they are substandard. Mboho and Inyang have argued that all efforts by the government through statutory bodies have been abject failures due to corruption, maladministration and insincerity on the part of the Federal Government.⁶⁹

NDDC's autonomy is lacking, like in other parts of the Nigerian oil industry, due to political interferences by the government because of state corruption.⁷⁰ The issue of lack of autonomy has contributed to the ineffective administration of the NDDC as a vehicle for the actualisation of GCS in the NDR. According to NDDC personnel 1, '...interference from the political class equally hampers the deliverables of our activities'.⁷¹ The above suggests that without independence in decision-making and project initiations, the NDDC cannot fast-track the overall development process in the NDR, which is consistent with Nliam's argument that the autonomy of the NDDC is threatened by external influences.⁷²

4.2.3 Inconsistent Coordination in Project Implementation

Furthermore, concerns were raised that there were inconsistencies in the implementation of projects by

⁶⁵ Personal Interview (n 57).

⁶⁶ Interview with NDDC personnel 2, Senior Staff, Niger Delta Development Commission, (Port Harcourt, 12 February 2015).

⁶⁷ Interview with Community stakeholder 2, Community Leader, Rivers State (Rivers State, 10 February 2015).

⁶⁸ Interview with Community stakeholder 3, Community Leader, Rivers State (Rivers State, 26 February 2015).

⁶⁹ Kingdom S Mboho and A I Inyang 'Institutional Failures and Poverty in the Niger Delta Region: A Critical Appraisal of NDDC Projects in Ikot Abasi, Akwa Ibom State, Nigeria' (2001) 2 (1) *International Journal of Economic Development Research and Investment* 26, 27; and Kaniye SA Ebeku, 'Niger Delta Oil, Development of the Niger Delta and the New Development Initiative: Some Reflections from a Socio-Legal Perspective' (2008) 43(4) *Journal of Asian and African Studies* 399, 421. It has been alleged that NDDC's lack of transparency is responsible for the reluctance of oil companies to pay their yearly counterpart funding. See, Amnesty International (n 43) 7.

⁷⁰ See, George S Akpan, 'The Failure of Environmental Governance and Implications for Foreign Investors and Host States - A Study of the Niger Delta Region of Nigeria' [2006] *International Energy Law & Taxation Review* 1, 7.

⁷¹ Personal Interview (n 57).

⁷² Nliam (n 58) 251.

NDDC staff. For example, NDDC personnel 1 said that:

[It is] ...because of the way the commission is being run, maybe because of the issue of continuity in government. ...the way it is structured which is evident when a new regime comes on board. Sometimes they seem to deviate from the existing programmes, so we are not synchronising our activities together. New board comes, new projects [are initiated]. It leads to abandonment of existing projects and programmes. So, this actually hampers our total objectives.⁷³

The implication is that when there is a change in the management of the NDDC, there is the tendency for projects initiated by the previous administration to be terminated. This is because the new administration initiates new projects. This results in situations where there are abandoned and uncompleted NDDC projects dotted around States within the NDR. The NDDC only identified the alienation with other development stakeholders in the NDR in its report.⁷⁴ However, interview narratives suggested that the problem of effective coordination also occurs within the governing board of the NDDC. This clearly impedes the effective establishment of GCS for recompensing victims of environmental degradation, due to its organised structure.⁷⁵ It shows that in practice the NDDC has experienced challenges as regards to its organisational structure to ensure the efficient implementation of its mandate.

4.2.4 Community Involvement/ Local Participation

The Niger Delta Regional Development Master Plan (NDRDMP)⁷⁶ identifies public participation as an avenue for effectively protecting the natural environment.⁷⁷ Concerns were raised that members of oil-producing communities do not play a primary role from conception to actualisation of projects executed in their community by the NDDC. Commenting on this issue, Community stakeholder 4 said 'they (NDDC) do not consult us when they want to execute most projects. At most what they do is to acquire land from us then they build whatever in their view suits us'.⁷⁸ The implication is that initiatives for the development of the community are devoid of informal institutions innate in the community.⁷⁹ This situation reduces the robustness of the design and implementation of development initiatives. A feature which is lacking, as members of oil-producing communities are not integrated in the process; and hence the absence in consulting and integrating their wealth of indigenous knowledge which is of incalculable

⁷³ Personal Interview (n 57).

⁷⁴ NDDC, '3rd Quarter Activities of the Commission for the Period July-September 2016' 16 <<https://pdfslide.net/documents/this-report-covers-the-nddc-niger-delta-development-nddcgovng1pdfdelta.html>>.

⁷⁵ See, Lin, (n 16) 1464-1470.

⁷⁶ The NDDC prepared the NDRDMP in 2004. The implementation of the NDRDMP was designed for a 15year period. This is in three phases of 5years each – first phase 2006-2010; second phase 2011-2015; and the last phase 2016-2020. See, NDDC, Niger Delta Regional Development Master Plan (2004) <<https://www.nddc.gov.ng/downloads/3/eBooks>>.

⁷⁷ *ibid* 38-39.

⁷⁸ Interview with Community stakeholder 4, Community Member, Bayelsa State (Bayelsa State, 01 February 2015).

⁷⁹ Informal institutions are norms, mores, customs and traditions prevalent in a society. See, Enabulele (n 24) 132-135; Oliver E Williamson, 'The New Institutional Economics: Taking Stock, Looking Ahead' (2000) 38 (3) *Journal of Economic Literature* 595, 596; Douglass North, *Understanding the Process of Economic Change* (Princeton University Press 2005) 50; and Valentin Seidler, 'The Role of Informal Institutions in Building the Institutional Framework of an African State: The Case of the Kanuri in Nigeria' (2011) <http://homepage.univie.ac.at/valentin.seidler/wp-content/uploads/2014/02/working-paper-2011_The-Role-of-informal-institutions-Stanford.pdf>.

value.⁸⁰ A further consequence of the above, is the fact that the members of the affected communities are inadvertently provided with the opportunity to withhold ownership of the implementation process of the development initiative, as well as the outcome of the latter. In any case, the development initiatives often fail because of the lack of community involvement /participation. This finding is consistent with previous studies which argued that a lack of community participation in design, handling and implementation is responsible for the failure of most strategies initiated in the NDR to alleviate the plight of the people.⁸¹

4.2.5 Youth Restiveness

Another challenge is the problem of youth restiveness in the NDR.⁸² For example, NDDC personnel 1 said ‘...of course the problem of youth restiveness in host communities... They are actually limiting [us], because sometimes when a contractor goes to site to do his job they place so much demand on that contractor [to the extent] that he is not able to meet up’.⁸³ Similarly, NDDC personnel 2 said that:

One of our major challenges is that of youth restiveness which threatens security in the region. We have also become victims of this restiveness. Most times when we take the projects to these communities [in some instances] we have been attacked. ...we have been beaten up, seriously manhandled in the course of trying to give them the projects.⁸⁴

The above narratives suggest that the endemic nature of youth restiveness in the NDR impedes the smooth execution of projects, because they make overbearing demands before projects can be executed in their locality. It reveals a high level of insecurity in the NDR and impacts on staff of NDDC whose task is to bring needed developments to the region. The NDDC have recognised this and have stated that youth restiveness significantly contributes to the security challenges faced in NDR.⁸⁵ This perennial issue has created an entitlement mentality amongst the youth, which further aggravates the tumultuous situation in the NDR. Indeed, such youth restiveness hampers the NDDC from effectively delivering its mandate in the NDR.⁸⁶

80 For the benefit of indigenous knowledge see, Emma Crewe and Richard Axelby, *Anthropology and Development: Culture, Morality and Politics in a Globalised World* (Cambridge University Press 2013) 149; National Research Council, *Responding to Oil Spills in the US Arctic Marine Environment* (National Academies Press 2014); and Enabulele (n 24) 142-143.

81 Mboho and Inyang (n 69) 34; Oyewole M Bello and Michael A Olukolajo, ‘Adequate Compensation as a Tool for Conflict Resolution in Oil Polluted Wetlands of Niger Delta Region of Nigeria’ (2016) 4(2) *Covenant University Journal of Politics & International Affairs* 34, 44; Kaniye SA Ebeku, ‘Critical Appraisal of Nigeria’s Niger Delta Development Commission Act 2000’ (2003) *International Energy Law and Taxation Review* 203; and Kaniye SA Ebeku, ‘Legal Aspects of Environmental Issues and Equity Considerations in the Exploitation of Oil in Nigeria’s Niger Delta’ (PhD thesis, University of Kent at Canterbury 2002) 444.

82 Lemmy Owugah, ‘Local Resistance and the State’ (Oil Watch African General Assembly, Port Harcourt, February 1999) cited in Ibaba S Ibaba, ‘Alienation and Militancy in the Niger Delta: Hostage Taking and the Dilemma of the Nigerian State’ (2009) 8(2) *African Journal on Conflict Resolution* 11, 12-13.

83 Personal Interview (n 57).

84 Personal Interview (n 66).

85 NDDC (n 74) 16; Generally, on youth restiveness and security challenges in the NDR, see, Augustine Ikelegbe, ‘The Economy of Conflict in the Oil Rich Niger Delta Region of Nigeria’ (2005) 14(2) *Nordic Journal of African Studies* 208; and Jeremiah O Arowosegbe, ‘Violence and National Development in Nigeria: The Political Economy of Youth Restiveness in the Niger Delta’ (2009) 36(122) *Review of African Political Economy* 575-594.

86 See, Samson I Omofonmwan and Lucky O Odia, ‘Oil Exploitation and Conflict in the Niger-Delta Region of Nigeria’ (2009) 26 (1) *Journal of Human Ecology* 25; Human Rights Watch, ‘The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria’s Oil Producing Communities’ (Human Rights Watch 1999) 3 <<https://www.hrw.org/reports/1999/nigeria/nigeria-0199.pdf>>; Enabulele (n 24) 220-221; and Joe Romm, ‘Dirty Money: Big Oil and Corporate Polluters Spent Over \$500 Million to Kill Climate Bill, Push Offshore Drilling’ (2010) <<https://archive.thinkprogress.org/dirty-money-big-oil-and-corporate-polluters-spent-over-500-million-to-kill-climate-bill-push-d7491209e04d/>>.

5

DISCUSSION OF FINDINGS

Our empirical findings suggest that the NDDC is favourably biased towards the pursuit of infrastructural and human capital development compared to environmental protection. Not given due attention to environmental protection generates negative consequences. For example, the agitations in the NDR have had a strong link with the region's environmental degradation. Our finding concerning NDDC's greater attention to its other responsibilities and less to environmental protection corroborates prior studies.⁸⁷ This raises the concern on whether NDDC cherry-picks the responsibility it obliges itself to discharge. For example, between July-September 2016, NDDC executed 8,588 projects of which none related to environmental protection/pollution.⁸⁸ This gives the impression that the NDDC's mandate does not cover environmental protection but only human and infrastructural development. Our concern thus reflects Bowman's view that GCSs established in most jurisdictions as responses to environmental pollution have not actually involved recognition of harm to the environment.⁸⁹

Although the NDDC apparently compensate the NDR by focusing on projects that will benefit collectively rather than financial compensation to individual members of the communities, Adewale argued that compensation could take the form of cash or in kind.⁹⁰ GCSs in some instances are designed to recompense victims financially,⁹¹ but a critical analysis of the

functions of the NDDC shows that it is not designed to pay financial compensation to victims. This evidence is consistent with Farber's argument that the best way to utilise compensation funds is by tying them to adaptation projects.⁹² The Nigerian government's approach is advantageous as the people collectively benefit from the scheme. This is commendable being consistent with the features of GCS such as the focus to bringing relief to a large population⁹³ and meeting the needs of current and future environmental degradation victims.⁹⁴ However, studies have evidenced defects in the ability of the NDDC as a GCS.⁹⁵

Despite the important broad functions of the NDDC, inadequate funding apparently accounts for one of the key factors undermining its overall performance. Its funds primarily come from contributory funding by the government and oil companies. As the NDDC's contributory funding formula is statutorily enshrined, it ensures the agency's access to sustainable funding. Its access to the contributory funds in reality is hampered by the government's failure to pay its counterpart obligatory funding as the majority equity partner with the oil companies. The government's inadequate funding of statutory agencies in Nigeria has been symptomatic, and particularly acute in the oil industry's regulatory institutions responsible for administering the command-and-control regulation.⁹⁶ At a point, the House of Representative Committee on the NDDC had to appeal to the Federal Government to pay all outstanding debts owed the NDDC.⁹⁷ Despite the poor funding compliance by the government, the scheme is consistent with the funding arrangement of GCSs, where the government is responsible on a welfare basis⁹⁸ but also levies companies responsible for the pollution.⁹⁹ Levying oil-companies as provided by the

87 Nliam (n 58) 250.

88 NDDC (n 74) 16.

89 Bowman (n 25) 12-13; and O'Hear (n 23) 163.

90 Ombolaji Adewale, 'Oil Spill Compensation Claims in Nigeria: Principles, Guidelines and Criteria' [1989] *Journal of African Law* 91, 103.

91 Farber (n 28) 1646.

92 *ibid.*

93 Hall (n 30) 141.

94 Lin (n 16) 1486 and Farber (n 28) 1635-1639.

95 Imobighe (n 53) 108 and Nliam (n 58) 250.

96 See, Enabulele (n 24) 221-3.

97 Chukwudi Akasike, 'Pay Debts Owed NDDC, Reps Committee Urges FG' (December 17, 2017) <<https://punch.ng.com/pay-debts-owed-nddc-reps-committee-urges-fg/>>.

98 Hall (n 32) 114.

99 *ibid* and Farber (n 28) 1607.

NDDC Act¹⁰⁰ is a typical instance where the PPP¹⁰¹ is reflected in Nigerian legal instruments. However available records indicate that oil-related environmental pollution remains unabated.¹⁰² Farber cautioned that the existence of GCS should not be a basis to flout pollution preventive measures.¹⁰³

Our empirical analysis shows the NDDC's interventionist efficiency in bridging the infrastructural gap in the NDR. This is commendable as it signals government's desire for restitution, implementation of its duty of care and the promotion of social welfare in the NDR, which are the ideals on which GCSs are anchored.¹⁰⁴ However, our findings contradict prior studies that argue that the NDDC has not made any significant progress in improving the living conditions of the Niger Delta people.¹⁰⁵ NDDC's performance may be uncelebrated and dwarfed when compared with the stream of revenues it has received since inception. Given the evidence that the Commission has to make do with its available resources following funding shortfall from the government, it would appear that the NDDC's development of the NDR depended more on its administrative commitment and effectiveness rather than on the quantity of funds at its disposal.¹⁰⁶

In addition to funding constraint, the NDDC is limited by lack of autonomy. Its lack of autonomy is difficult

to address as it has a statutory basis. The NDDC Act provides that the NDDC '...shall be subject to the direction, control or supervision in the performance of its functions under this Act by the President, Commander-in-Chief of the Armed Forces of the Federal Republic of Nigeria'.¹⁰⁷ This provision is an example of the militarised system of government which Nigeria experienced before the inception of democracy in 1999 (a year before the enactment of the NDDC Act). The implication is that any project embarked upon by the NDDC must be approved by the president, regardless of its importance and/or expediency.¹⁰⁸ It has been highlighted that GCSs formed part of interventionist action plans of government to provide collective protection and security rooted in social welfare.¹⁰⁹ Reflecting on the above, if the intention of the draftsmen is to generously fast-track the development of the NDR, does a Commission with a governing board and operational mandate need the consent of the president before it can perform its functions? A statutory issue of this manner can only be resolved through an amendment of this provision of the NDDC Act to give the NDDC full powers to execute projects independently. Hence, the amendment of the NDDC Act is long overdue. Legal instruments, whether national or international, can only be useful to the extent they are designed to reflect the substance of what they intended to address. As the social, economic and environmental spaces in

100 NDDC Act, Sec 14 (2) (b).

101 See, de Sadeleer (n 34) 21-60; Khan (n 34) 638; Enabulele (n 24) 63-77.

102 Enabulele (n 24) 2; See, Caroline Duffield, 'Nigeria: "World Oil Pollution Capital" BBC News (15 June 2010) <<https://www.bbc.co.uk/news/10313107>>; Enabulele and others (n 2) 56; 'Initiative to Reduce Global Gas Flaring' (The World Bank, 22 September 2014) <<http://www.worldbank.org/en/news/feature/2014/09/22/initiative-to-reduce-global-gas-flaring>>; and US Energy Information Administration, 'Country Analysis Brief: Nigeria' (2016) <http://www.eia.gov/beta/international/analysis_includes/countries_long/Nigeria/niger>.

103 Farber (n 28) 1646.

104 Floyd (n 10) 110-115.

105 Imobighe (n 53) 108.

106 Emeka Chianu, 'NDDC – Another Shot at Infrastructural Development of Nigeria's Oil Producing Areas' [2001] International Energy Law and Taxation Review 214.

107 NDDC Act, Sec 7 (3).

108 In a situation like this where the current the Nigerian president, President Muhammadu Buhari is reported to have said he would not compensate those who voted 5 per cent for him in the same way with those who voted 97 per cent for him in the 2015 general election. It is on record that a chunk of the NDR fall into the category of States that voted 5 per cent for the president, so it can be argued on the basis of this section that the president can deprive the Niger Delta people of development under the NDDC Act. See, Sunday Agbo, Phil Okose and Damian Duruiheoma 'Buhari Election Promises to South East ... 28 Months After' Orient Daily (18 November 2017) <<https://orientdailynews.com/politics/buhari-election-promises-south-east/>>.

109 Fagbohun (n 8) 204.

which all human and ecological interactions take place are dynamic rather than static, a good legal system must make allowance for resilience in accommodating the needful changes premised on substantive reality.

6

CONCLUDING REMARKS

This paper has argued that GCS is a potential tool for the management of environmental degradation. It identified that GCS were originally designed for victims of crime¹¹⁰ and that it can be utilised to bring respite to victims of environmental pollution. It established that GCS is operational in Nigeria through the NDDC, is used in tackling environmental degradation, as well as to address the socio-economic discrepancies in the NDR due to operations in the oil industry. Reflecting on the extent of environmental degradation in the NDR due to pollution emanating from the oil industry, there is no doubt as to the significance and requirement for policies and strategies to advance higher environmental protection. Apart from the NDDC's operations tilting more towards human capital and infrastructural development to the detriment of environmental remediation, there are other challenges bedevilling the Nigerian model of GCS. Therefore, the potential effectiveness of the NDDC as a statutory body to administer the GCS in Nigeria need to be examined,

as the aims of adequate provision of respite to victims in the NDR, become of ever more increasing concern. The implication of ineffective implementation of GCS or any other strategy to mitigate the effects of activities of the Nigerian oil industry is that achieving the United Nations' 2015 sustainable development goals¹¹¹ may remain elusive in the NDR.

110 *ibid* 218.

111 The principle of sustainable development is subsumed in the United Nations time-bound strategies for combating poverty, hunger, illiteracy, gender inequality, disease and environmental degradation, what the development now refers to as the Millennium Development Goals (MDGs). UNDP, *Energizing the Millennium Development Goals: A Guide to Energy's role in Reducing Poverty* (UNDP 2005) 1. Also, the UN in 2015 sets out 17 Sustainable Development Goals (SDGs). See United Nations, 'Sustainable Development Goals' <<https://sustainabledevelopment.un.org/sdgs>>. For a discusses on sustainable development see, World Commission on Environment and Development, *Our Common Future* (Oxford University Press 1987) 27; Stephen Tromans, 'High Talk and Low Cunning: Putting Environmental Principles into Legal Practice' (1995) *Journal of Planning & Environment Law* 779, 791-796; Ifeanyichukwu A Aniyie and Osamuyimen Enabulele, 'Overview of Energy Consumption and Sustainable Development Relationship' (2013) 14(1) *University of Benin Law Journal* 112-115; Enabulele (n 24) 57-63; and Michael Jacobs, 'Sustainable Development as a Contested Concept' in Andrew Dobson (ed), *Fairness and Futurity, Essay on Environmental Sustainability and Social Justice* (Oxford University Press 1999) 31.

BOOK REVIEW

ERKKI J HOLLO, ED., *WATER RESOURCE MANAGEMENT AND THE LAW* (EDWARD ELGAR 2017)

Reviewed by: Amrithnath SB, Assistant Professor, Faculty of Law, University of Delhi

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This book can be purchased directly online here

Erkki J. Hollo, ed., *Water Resource Management and the Law* (Edward Elgar 2017)

Water scarcity resulting either due to pollution and over-extraction of water resources has become a major global-scale environmental issue. It is the result of several inter-related factors such as population growth, economic development and changing consumption patterns. The global demand for water may continue to grow in response to the economic development and growing population. It is in this regard that there is a need to ensure water security and management in present times. This edited volume through its four parts discusses the pertinent issue of water management and the laws governing the same. The first part deals with the role of public and private law in water allocation while the second part elaborates on different models of water allocation. An evaluation of transboundary water management is considered next and the final part deliberates on water allocation in the context of environmental destruction. The entire volume elaborates on the existing scenario of water management around the world and the regulatory structures dealing with it.

Erkki J. Hollo, the editor, introduces the readers to concepts and traditions of water management law to give an understanding on use of water as a resource and its regulation. The development of water law is presented through the origin of western water law touching upon Roman law, French law, Common law, Germanic law and Scandinavian law. This discussion gives a conceptual clarity to the reader on the development of regulation of water resources and its significance to address water scarcity. Based on different approaches, the author classifies the categories of water management projects into two, growth oriented and adaptive water management. He also recognizes the importance of soft law instruments as far as the regulation of international water is concerned.

Douglas Fisher elaborates on the common law regulation of water resource and the modes of access to use. He categorizes the modes on the basis of practice and custom, rules-based systems and administration-based systems. The chapter gives an insight into the development of doctrines associated with the regulation of access and use of water. Instances of conflicts between public water supply projects and riparian or property right holders and case studies on

these issues present a picture of challenges on the implementation of common law rules. Ed Couzens and Meda Couzens emphasize upon the lack of constitutional validation of water rights in majority of south African states (out of 16 only three have) and its shortcomings. The authors identify the limited approaches taken by these countries towards regulation of water for access and use which resulted in poor management of water resources.

Pekka Vihervouri elucidates the experience of community level or village-level ownership, private property and state ownership from the Finnish perspective to highlight a sustainable system prevailing in the world. The author explains that in such places, permit systems play a major role in regulating access based on land use patterns. Under the Finnish water law, a permit in practice reflects balancing of interests, rights and expectations along with compensation for losses caused. Maria Onestini provides an overview of Argentine water rights in various statutes and the cases related to water management which promotes water rights in the garb of the right to healthy environment. Ezekiel Nyangeri Nyanchaga analyses the struggle for water rights between natives and European settlers in Kenya. He chronicles the conflict that led to several commissions being appointed to study the issue which resulted in legislation prescribing licenses for water rights. It presents a significant narrative of the conflict between indigenous people and exploiters which is still prominent in many places around the world. Hence the first part of the volume in toto gives an idea about various systems of allocation and rights over water at different parts of the world. It also elaborates on the shortcomings and challenges faced by each of these systems.

The second part discusses models of water allocation to the relevant users and related issues. Liping Dai, Marleen van Rijswijk and Bram Schmidt offer an analysis of the legal instruments dealing with water allocation ranging from international law to regional instruments like EU law to a specific location in Indonesia. The authors advocate for a sustainable and equitable water allocation mechanism after evaluating the legal instruments on the basis of values and principles, stakeholder involvement, regulatory framework and enforcement and conflict resolution. Sharon Mascher and Deborah Curran examine the role of private property regime in water allocation focusing

on Australia and Canada, and the need to balance water security and incentivizing efficiency. They also analyze the conceptualization of private property rights on water in the context of exclusivity, duration, security and transferability. Antti Belinskij advocates for the recovery of costs for water uses and suggests that water must be treated as an economic commodity to avoid its wasteful use. The author proposes that by following the EU Water Framework Directive, costs of water use can be divided into financial, environmental and resource costs for the purposes of recovery. He also advocates that recovery of costs must be on the basis of polluter pays principle. The second part of the volume gives an overview of various models of water allocation implemented through legal instruments internationally. It also suggests ways to control water usage and the means to recover the costs associated with water consumption.

The third part deliberates on transboundary water management. Tuomas Kuokkanen evaluates how international law regulates protection and utilization of water. For this, he distinguishes water on the basis of four dimensions; spatial, subjective, temporal and material. He suggests that legal issues relating to utilization and protection of water must be treated differently. He provides an example of hydroelectric power coming under energy law and water protection being dealt with under environmental law. He points out that while dealing with water issues, these multiple dimensions should be taken into account and priority is to be accorded to respective dimensions based on the corresponding issues. Nigel Bankes considers the Columbia River Treaty Between USA and Canada and the changes, including effects of climate change, which occurred in the basin that might impact the treaty. He has also suggested possible alternatives and amendments to the treaty. Itzhak E Kornfeld examines the inter-state dispute of *Kansas v. Colorado* in order to discuss state sovereignty and equitable water allocation. He refers to one of the most important decisions in *Nebraska v. Wyoming* where Justice William O. Douglas discussed apportionment doctrine, which even though relevant today, is not applied in its true spirit by international tribunals in water issues. The author suggests the potential elements which are to be considered by the international courts and tribunals in the future. These elements include consideration of entire river basin instead of only assessing water from a given river, evaluating the

basin's climate, the extent of state's dependence and examining the conservation methods adopted by the states. The third part of the volume provides an overall understanding of water management by sovereign states within a country and between countries. It suggests an integrated approach to be undertaken by states in a mutually agreed manner.

The fourth and final part discusses water allocation under the threat of environmental destruction. Moritz Reese evaluates the regulatory challenges to climate change adaptation in water management. The author identifies the key requirements of climate sensitive water governance and suggests that water management should be based on impact of climatic developments on water quality and quantity. The author also recommends legal foundations for fair management and effective adaptation on climate change. Liping Dai analyses the water quality management framework in China and the different approaches undertaken. In that regard she analyses various laws from which water management framework can be identified such as constitutional law, natural resources law and also law relating to prevention of pollution and environmental management. One of the approaches followed in China needs to be highlighted as it gives binding targets for officials to achieve, based on which they are both liable for failure and rewarded for better performance. Tiina Paloniitty considers the practical effects of EU regulatory framework on agricultural run-off. The author recognises that agricultural run-off and farming practices causing land based water pollution do not fall under the scope of environmental protection laws and that it should be considered separately under a comprehensive law. Hennie Coetzee and Louis J Kotzé analyse the regulatory issues related to shale gas development in South Africa. They identify that there is no 'single' law which takes in to account the various water aspects during shale gas development. In that regard the author advocates the need to have an integrated law which would consider international practices as well as unique natural and socio-economic conditions in South Africa. This part of the volume gives an idea as to how water management must be finetuned to meet the needs of the future taking into account the climate variables. It also advocates for allocation of water and the regulation of it while keeping a balance between developmental needs and climate change effects.

The book provides an analysis of water allocation rights, its development and also the variations under public law and private law. Since watercourses are inter-territorial in nature, an attempt to evaluate cross-jurisdictional issues is also done through the chapters. The importance of having location specific resolutions instead of a uniform approach is another highlight of the book. Various water management strategies undertaken at different places are presented through case studies to give an understanding of practical solutions. The book is to be considered as a scholarly work on water management law which will be useful for anyone interested in the conservation of water as well as proper management and allocation of water.

Even though the book gives the reader a fair idea on importance of water management in different contexts, there several other issues for further and future research. For instance, it does not discuss the regulation of groundwater and its management considering the importance of groundwater as a global water resource. Another aspect which could have been included is a discussion regarding the usage and regulation of desalinated seawater in Gulf countries as a resource. It is significant in present times when cheaper solutions for desalination are being introduced in some of the underdeveloped countries in order to meet the water scarcity crisis.

BOOK REVIEW

JOHN STUDLEY, *INDIGENOUS SACRED NATURAL SITES AND SPIRITUAL GOVERNANCE: THE LEGAL CASE FOR JURISTIC PERSONHOOD* (ROUTLEDGE FOCUS 2019)

Reviewed by: Roopa Madhav, PhD Scholar, SOAS, University of London

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available at <http://www.lead-journal.org/content/b1602.pdf>

This book can be purchased directly online [here](#)

John Studley, *Indigenous Sacred Natural Sites And Spiritual Governance: The Legal Case for Juristic Personhood* (Routledge Focus 2019)

Environmental governance (or more broadly the discourse around law and governance) rarely dips into the world of spirituality. This book is a unique contribution set to enrich the governance discourse, informed primarily by a non-spiritual, secular approach. The rationale for the initial work, as the author notes, emanates from a personal epiphany while carrying out research in Tibet, but the impetus for this book is the need to rethink mainstream governance frameworks (particularly, the IUCN governance framework) that make assumptions of a 'spiritless' governance of sacred natural sites (SNS).

Spiritual governance of SNS is a distinct practice that protects critical biodiversity outside formal state protected areas. Protection of SNS is vital as it is a good indicator of the critical link between bio-diversity and cultural survival. As the author notes, 'SNS are nodes in a much larger ecological network and an integral part of the social fabric that permeates the whole landscape or territory'¹ In terms of scale and geographical spread, SNS are globally distributed and may aggregate to at least 8 per cent of the world's land surface.² SNS is also being classified as 'sacred commons' or 'spiritual commons'. 'As spiritual commons, SNS is meaningful due to the ritual practices that are performed and the relational ontology the local people have with the site, the resident numina and the pluriverse'.³

The author explores critical ideas of spirituality that predate modern environmental governance debate and demonstrates through a case study of SNS in Tibet, the need to embrace a more pluriversal approach. The book takes on more significance in the light of recent court rulings and legislation granting juristic

personhood to indigenous homelands, mountains and rivers in New Zealand, India, Ecuador and Colombia. The primary argument put forth by the author, an ethno- forestry researcher, in this slim volume is that SNS and their resident 'spirits of place' need recognition as juristic persons, in turn providing a space within mainstream law and governance frameworks.

In building his arguments, the author explains the conceptual basis for non-anthropocentric approaches to nature in Chapters 2 and 3. It provides an important insight into the philosophies, practices and spiritual ecologies that inform and underpin the rights of nature. While mapping this, the author places a useful cautionary note that to fully understand the governance regimes of another society, it must be located and understood within the local culture. It lays the foundation for the rest of the chapters, where the author brings to bear the need for a polycentric legal and governance framework. As he notes, this approach is not entirely new; most polycentric legal orders are contractual in nature and the 'adoption of polycentric post statist governance is particularly evident within the EU and environmental regulation since the 1980s'.⁴

SNS, predicated on profound cultural values and dedicated efforts by local/indigenous people,⁵ are exemplars of a different world view to nature. Legal systems, based primarily on Western conceptions, do not accord legal personhood to natural spiritual entities. The author in Chapters 4, 5 and 6 examines legal cases and legislation that are now reversing this approach and granting 'juristic personhood'⁶ to rivers, mountains and forests.⁷ The post-anthropocentric approaches are not without their set of challenges and the author explores these in the three chapters. A quibble about the editing and the flow of the three chapters is in order here - the three chapters could have been merged for better reading and more cohesive

1 Pg 7.

2 Pg 7.

3 Pg 15.

4 Pg 16.

5 Pg 2.

6 'The concept of juristic personhood refers generally to a legal subject that is not a human being but one which society has decided to recognize as a subject of certain rights, protections, privileges, responsibilities and liabilities'. Pg 7.

7 Pg 7.

argumentation. Be that as it may, an important point made in these chapters needs highlighting. He notes that ‘the eco centric “rights” approach does not appear to resonate well with the worldview of the local people who protect most enspirited SNS’.⁸ The concept of ‘rights’, he further notes, is a ‘construction from outside an indigenous animistic context’.⁹ This observation leads me to my next concern with the line of argumentation adopted in the book.

While the author brings up the idea of spiritual governance juxtaposed against a mainstream idea of governance and law, it is somewhat baffling that the line of argumentation of the next few chapters is to find a foot hold and recognition within mainstream legal framework. The author notes: ‘It appears as if Indigenous legal practices by definition will have to remain subordinate to the knowledge-and power systems of “western jurisprudence”’. However, even through this lens, juristic personhood may offer ways for Indigenous people to engage with the dominant legal system’.¹⁰ Can we argue for spiritual governance to be understood within its own framework and lessons drawn from it to strengthen mainstream governance as opposed to co-opting it into the mainstream legal order only to be misinterpreted and codified in a format that leaves much to be desired. This is not dissimilar to the struggle that one faces with official customary law and living customary law, the latter requiring a different understanding and approach and not necessarily within a western positivist framing. Acknowledging the difficulties of subservience to the formal legal paradigm, would it be possible to argue cogently for a parallel universe to co-exist on its own merit.

Chapter 7 contains a detailed case study carried out by the author in Tibet, which provides deep insights into the behavioural context for the ritual protection of SNS. In his concluding thoughts and arguments, Chapters 8 and 9, the author argues for a rethink of the IUCN framework to provide recognition to

enspirited SNS and grant juristic personhood; as designated protected areas they can get standing in law. Simultaneously the author also argues that the strength in adopting a polycentric worldview is that it creates ‘space for acceptance of multiple worlds, invoking alternative epistemologies (ways of knowing) and ontologies (ways of being) in different worlds’.¹¹ This perhaps is the beginning of another book that explores the possibilities of an alternative legal paradigm.

The book straddles many worlds – law, governance, policy, ethnography and popular discourse – thus being available to a wide range of audiences. It is also a critical contribution to starting a conversation on the links between spirituality, ecology and bio-diversity conservation, to strengthen a-spiritual governance frameworks. In essence, it provides a basis for thinking about the post-anthropocentric approaches to nature, conservation, and governance.

8 Pg 15.

9 *ibid.*

10 Pg 82.

11 Pg 84.

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