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PROMOTING AND PROTECTING HUMAN RIGHTS THROUGH IMPLEMENTATION OF THE PARIS AGREEMENT IN KENYA

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Abstract

Climate change poses a significant threat to key human rights, including the rights to life, health, food, an adequate standard of living and a clean and healthy environment. The Constitution of Kenya 2010 guarantees the human right to a clean and healthy environment and this right is currently being threatened by the adverse impacts of climate change. The 2015 Paris Agreement seeks to reduce global warming and greenhouse gas emissions as a response to climate change and, therefore, it is critically important in protecting and promoting human rights. Kenya, as a signatory to the Paris Agreement, is expected to implement its provisions. The country has undertaken impressive legal, institutional and strategic measures, earning it an exceptional rating as one of the few countries likely to meet its targets under the Paris Agreement of reducing global warming to below 2°C above preindustrial levels by 2030. However, poor political will, poor implementation of the legal framework, inadequate financing, low stakeholder engagement and corruption in climate change governance are a major restraint in the effective implementation of the Agreement. Good governance of climate change response initiatives will be a step forward towards meeting Kenya's obligation under the Paris Agreement, and consequently mitigating against the negative impact of climate change on the enjoyment of the citizens' human rights.

Key words: *climate change; human rights; Kenya; Paris Agreement*

1 Introduction

The world met in 2015 to determine remedial measures as a result of the alarming statistics on the adverse impacts of climate change.¹ Climate change effects that are of concern include threats to human health, food insecurity, displacements, and increased floods, droughts, heat waves, wildfires and tropical cyclones.² At the 2015 meeting, almost 200 nations

1 UNFCCC Climate Change 2014: Impacts, Adaptation and vulnerability' (2014), https://www.ipcc.ch/site/assets/uploads/2018/02/ar5_wgII_spm_en.pdf (accessed 22 July 2021).

2 World Meteorological Organization 'Multi-agency report highlights increasing signs

signed a historic climate change agreement committing to cut their greenhouse gas emissions, thereby slowing global warming. This came to be known as the Paris Agreement. The Agreement was adopted on 12 December 2015 and entered into force on 4 November 2016. Kenya signed the Agreement on 22 April 2016 and became party to the Agreement on 28 December 2016.

The signing of the Paris Agreement was a positive commitment by the Kenyan government towards guiding its adaptation and mitigation measures to address the adverse impacts of climate change. Effective response measures to climate change are eventually bound to improve the enjoyment of the citizens' basic rights, including the rights to life, health, food, an adequate standard of living and a clean and healthy environment.³ The measures undertaken by the Kenyan state in implementing the Paris Agreement include the enactment of effective legal, institutional and structural frameworks to address climate change, and the allocation of financial and technical resources for the set initiatives. Owing to these actions, Kenya has been rated as one of the few member states to the Paris Agreement that is highly likely to meet its set targets under the Agreement.⁴

However, poor political will, poor implementation of legal framework, inadequate financing, low stakeholder engagement and corruption in climate change governance are a major restraint in effectively implementing the Paris Agreement.⁵ The consequence of these challenges has greatly threatened the enjoyment of Kenyans' fundamental rights. Kenya loses 3 to 5 per cent of its gross domestic product (GDP) to climate change each year. Kenya's GDP for 2019 amounted to \$95,5 billion, which translates to between \$2,9 and \$4,8 billion from socio-economic losses emanating from climate change.⁶ The National Climate Change Action Plan 2018-2022 highlights the climate change adverse impacts to include high levels of multi-dimensional poverty, particularly in the arid and semi-arid lands; gender inequality; environmental degradation; a decline in the national

and impacts of climate change in atmosphere, land and oceans' (2020), <https://public.wmo.int/en/media/press-release/multi-agency-report-highlights-increasing-signs-and-impacts-of-climate-change> (accessed 22 July 2021).

3 M Burger 'Climate change and human rights' (2015), <http://columbiaclimatelaw.com/files/2016/06/Burger-and-Wentz-2015-12-Climate-Change-and-Human-Rights.pdf> (accessed 22 July 2021).

4 Climate Action Tracker 'Kenya' (2020), <https://climateactiontracker.org/countries/kenya/> (accessed 22 July 2021).

5 As above.

6 O Lmawi 'Kenyans paying heavy price due to climate change' *Business Daily* 11 March 2021, <https://www.businessdailyafrica.com/bd/opinion-analysis/ideas-debate/kenyans-paying-heavy-price-due-to-climate-change-3318626> (accessed 2 May 2021).

economy and local livelihoods that depend on rain-fed agriculture; a high level of water scarcity and mismanagement of water resources; insecure land tenure and land fragmentation; population growth and migration to urban areas; and a heavy disease burden and limited access to quality health care, particularly in rural and remote areas.⁷

Based on the unfavourable climate change effects previously noted,⁸ citizens face the threat of actualising their rights to adequate standards of living, equality and non-discrimination based on gender, a clean and healthy environment, sustainable livelihoods, clean and quality water, property and security of tenure, health and sanitation, among others. Good governance of climate change response initiatives will be a step forward towards meeting Kenya's obligation under the Paris Agreement, consequently mitigating the negative impact of climate change on the enjoyment of the citizens' basic human rights.

This chapter seeks to determine the extent to which Kenya has promoted and protected the rights of its citizens through its efforts to domesticate the provisions of the Paris Agreement. In so doing, it analyses the measures that the government has put in place to adhere to the Agreement, the challenges faced in these attempts, their impact on human rights and the recommended measures the government ought to take to promote human rights and fully integrate the provisions of the Paris Agreement in its climate change actions. The next part covers the provisions of the Paris Agreement and their role in promoting human rights. It then highlights the challenges that Kenya faces in the domestication of the Paris Agreement, following which the value of domestication of the PA as an important medium of protecting human rights in Kenya is elaborated. The chapter concludes with a summary of key issues highlighted in the main content and recommendations.

2 The relevance of the Paris Agreement in promoting human rights

Climate change is a change in global climate patterns mainly attributed to increased levels of atmospheric carbon dioxide. It affects all aspects of human rights and all spheres of existence, including poverty, economic development, population growth, sustainable development and resource management.⁹ Consequently, nearly 200 nations signed the Paris

7 Government of Kenya National Climate Change Action Plan (Kenya): 2018-2022 (2018).

8 As above.

9 Burger (n 3).

Agreement in 2015, committing to cut their greenhouse gas (GHG) emissions and slow global warming.

The Paris Agreement is instrumental in the promotion of human rights. It reaffirms the need for governments to respect and promote human rights, including the rights of indigenous peoples, gender equality and the empowerment of women, the fundamental priority of safeguarding food security, the importance of public participation and access to information, the imperatives of a just transition and creation of decent work, and the importance of securing ecosystem integrity.¹⁰

Human rights are threatened and increasingly undermined by the impacts of anthropogenic warming intensity. According to Alderman, the right to life, a precondition to all other human rights, is threatened by systemic risks from extreme weather events resulting in severe infrastructural damage to electricity, water supplies, and health and emergency services.¹¹ The increased frequency in malnutrition then results from diminished food production. The right to health is also undermined by increased risks from vector-borne diseases. Ecosystems face heightened risks of abrupt and irreversible change that undermines food and water security, and triggers new poverty traps. The right to food is threatened as food security is undermined. Rural livelihoods and incomes are harmed by insufficient access to water for drinking, irrigation and sanitation, resulting in reduced agricultural productivity.¹²

The basic human rights threatened by adverse climate change as deduced from Alderman's analysis include the rights to life, water, health, safety and security, food security, nutrition, secure livelihoods, a clean and safe environment, sanitation and suitable standards of living.

In this regard, the importance of applying a human rights-based approach in addressing climate change effects cannot be gainsaid. The Paris Agreement seems to be alive to this reality in its Preamble test, which notes the following:¹³

10 S Duyck et al 'Delivering on the Paris promises: Combating climate change while protecting rights recommendations for the negotiations of the Paris Rule Book', <https://unfccc.int/sites/default/files/903.pdf> (accessed 22 July 2021).

11 S Alderman 'Human rights in the Paris Agreement: Too little, too late?' (2018) 7 *Transnational Environmental Law* 17.

12 O Quirico & M Boumghar (eds) *Climate change and human rights: An international and comparative law perspective* (2016) 2.

13 Paris Agreement recital 12.

Acknowledging that climate change is a common concern of humankind, parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.

Article 12 of the Paris Agreement requires that measures should be taken by states to promote public participation and access to information as essential parts of climate actions. It further urges for the enhancement of climate change education, training and public awareness.¹⁴ The Agreement further promotes the right to information and to self-determination in engaging in climate change processes affecting individuals and communities. Articles 7(5) and 11(2) require public participation to be promoted in all adaptation and capacity-building efforts further buttress the right to self-determination.

Two articles of the Paris Agreement acknowledge that adaptation action and capacity building should be 'gender-responsive'.¹⁵ This is a key catalyst to the promotion of gender rights – rights to equality and non-discrimination. Article 2 of the Agreement, which emphasises that climate action must not undermine food production,¹⁶ clearly highlights the importance of promoting the right to food security. It stresses the importance of sustainable development and eradication of poverty to global measures in addressing climate change.¹⁷ Hence, it calls for the need to prioritise a bundle of rights, including the rights to suitable living standards, food, health, education and sanitation, all of which would be enjoyed with the eradication of poverty.¹⁸

The Paris Agreement contains stand-alone articles on reducing emissions resulting in deforestation and forest degradation¹⁹ and loss and damage.²⁰ These provisions together with the Preamble call for the protection of 'biodiversity', alluding to priority in protecting environmental rights that are also secured under articles 42 and 70 the Constitution of

14 Paris Agreement recital 15.

15 Arts 7(5) & 11(2) Paris Agreement.

16 Art 2(1)(b) Paris Agreement.

17 Art 2(1) Paris Agreement

18 As above.

19 Art 5 Paris Agreement.

20 Art 8 Paris Agreement.

Kenya 2010.²¹ It has been argued that although the Paris Agreement has only expressly mentioned human rights in its Preamble, human rights are integrated throughout the agreement through the principle of sustainable development.²²

However, the legal force of a recital as opposed to an operative clause may be questioned. The Preamble to a treaty may be incapable of creating rights or obligations on its own, even though it could contribute to the formation of a customary norm.²³ Because the Paris Agreement specifies no concrete measures, its direct impact on the protection of human rights in climate action remains to be established.²⁴ Consequently, it is argued that the Paris Agreement does not adequately address the magnitude of the threat posed by climate-related harm to human rights.²⁵

3 Kenya's implementation of the Paris Agreement

The frequency and magnitude of extreme climate events, such as droughts, storms and floods, leading to a loss of lives, diminished livelihoods, reduced production, and damaged infrastructure, make climate change a significant concern for Kenya,²⁶ despite the country contributing only 0,1 per cent of global GHG emissions.²⁷ The 2019 estimated climate change losses amounted to between \$2,9 and \$4,8 billion.²⁸ Climate change in the country has further led to the curtailment of the enjoyment of human rights, including the right to adequate standards of living, equality and non-discrimination based on gender, a clean and healthy environment, sustainable livelihoods, clean and quality water, property and security of tenure, health and sanitation.²⁹ Kenya signed the Paris Agreement on 22 April 2016 and became party to the Agreement on 28 December 2016.

21 Government of Kenya 'The Constitution of Kenya 2010' (2010).

22 Centre for International Governance Innovation Implementing the Paris Agreement: The relevance of human rights to climate action' (2016).'

23 B Mayer 'Human rights in the Paris Agreement' (2016) 1 *Climate Law* 109-117.

24 M Wood 'The second report on identification of customary international law' (2014).

25 Adelman (n 11) 17.

26 Government of Kenya National Climate Change Action Plan (Kenya) 2018-2022 (2018).

27 J McCarthy 'Kenya calls on rich countries to fund \$62 billion climate plan' *Global Citizen* 8 January 2021, <https://www.globalcitizen.org/en/content/kenyas-climate-plan-paris-climate-agreement/> (accessed 11 March 2021); Republic of Kenya Background report on national climate change priorities and relevant capacity development goals and initiatives in Kenya (2020); Government of Kenya; Government of Kenya UN CC: Learn Climate Change Learning Programme June 2020 (2020).

28 World Meteorological Organisation (n 2).

29 Climate Action Tracker (n 4).

As a member state, Kenya is expected to domesticate the provisions of the Agreement through legal, institutional, structural and other measures.

Kenya's national political commitment towards the implementation of the Paris Agreement is evident. President Uhuru Kenyatta has shown a certain level of commitment to supporting climate mitigation measures. At a roundtable discussion on 'Don't drop climate efforts' at the Paris Peace Forum 2018 in France, he announced Kenya's target 'to attain 100 per cent green energy sufficiency by 2020'.³⁰ This was recently reiterated in a presidential speech on the aggravation of COVID-19 on the vulnerability of Africa to climate change.³¹

An important instrument for implementing the Paris Agreement is the nationally-determined contribution (NDC) as the national climate action plan.³² Other instruments include the Mid-Century Long-Term Low Greenhouse Gas Emission Development Strategy, also known as Long-Term Strategy (LTS); and the National Adaptation Plan (NAP) which aims to identify climate risks, and implement adequate risk prevention, reduction and adaptation measures to increase climate resilience, particularly for the most vulnerable people. The Paris Rulebook is important³³ as it contains rules and guidelines on transparency, accountability, development and communication of parties' climate action plans, and review of parties' progress, individually and collectively, with a view to upgrading NDCs every five years until the long-term goals of the Paris Agreement are met.

In line with the Paris Agreement progress reporting provisions, Kenya submitted its updated NDC on 24 December 2020. The Kenyan NDC commits to 'abating GHG emissions by 32% by 2030 relative to the BAU scenario of 143 MtCO₂eq by 2030, with milestone targets at 2025'.³⁴ Kenya's Paris Agreement target is one of the few that are rated as 2°C

30 As above.

31 Presidential Press 'COVID-19 has aggravated Africa's vulnerability to climate change, says President Kenyatta' Government of Kenya 6 April 2021, <https://www.president.go.ke/2021/04/06/covid-19-has-aggravated-africas-vulnerability-to-climate-change-president-kenyatta-says/> (accessed 1 May 2021).

32 ACT Alliance 'Towards the ambitious implementation of the Paris Agreement: A toolkit for national level advocacy' (2018).

33 N Cogswell & Y Dagnet 'Why does the Paris Climate Agreement need a rulebook? Seven questions and answers' World Resource Institute 13 June 2019, <https://www.wri.org/blog/2019/06/why-does-paris-climate-agreement-need-rulebook-7-questions-and-answers> (accessed 11 March 2021).

34 Republic of Kenya 'Kenya's updated nationally determined contribution' (2020), [https://www4.unfccc.int/ndcstaging/PublishedDocuments/Kenya%2520First/Kenya%2527s%2520First%2520%2520NDC%2520\(updated%2520version\).pdf](https://www4.unfccc.int/ndcstaging/PublishedDocuments/Kenya%2520First/Kenya%2527s%2520First%2520%2520NDC%2520(updated%2520version).pdf) (accessed 15 March 2021).

compatible.³⁵ This rating indicates that Kenya's current policies are within the range of what is a fair share of global effort.

However, these plans are not yet fully consistent with the Paris Agreement.³⁶ For instance, while the Agreement requires member states to set a 2021-2030 carbon budget, Kenya has none. Although the NDC is considered an important part of Kenya's process of transforming to a low-emission society by 2050, no net-zero or other specific target is aligned to 1,5°C. While Kenya has established financial estimates for both conditional and unconditional targets, no details on actions and outcomes from international financial support are provided. The 2020 NDC mentions mitigation activities and sector plans without presenting further details or targets. Besides mitigation and adaptation co-benefits and the intention to match these to Sustainable Development Goals (SDGs), it does not mention cross-sectoral approaches and does not provide additional information on how these measures align with SDGs.³⁷ The exceptional achievement by Kenya in implementing the Paris Agreement is demonstrated in its enactment of relevant policies, laws and regulations that align with the provisions of the Paris Agreement. The Constitution of Kenya 2010³⁸ provides the basis for an elaborate legal framework. Articles 10 and 42 outline 'sustainable development' as a national value and provides for the right to a 'clean and healthy environment'.

Relevant legal frameworks enacted towards domesticating the Paris Agreement are the Climate Change Act, 2016;³⁹ the Energy Act, 2019;⁴⁰ the National Climate Change Framework Policy 2018;⁴¹ the National Policy on Climate Finance 2016;⁴² the National Disaster Risk Management Policy 2017;⁴³ and the National Policy on Gender and Development 2000. Key national plans and strategies that contribute significantly to the domestication of the Paris Agreement include the National Climate

35 Climate Action Tracker (n 4).

36 As above.

37 WWF 'NDC checklist: Kenya analysis' (2021), https://wwfint.awsassets.panda.org/downloads/ndcs_we_want_checklist___kenya.pdf (accessed 22 July 2021).

38 Constitution of Kenya 2010 (n 21).

39 Republic of Kenya The Climate Change Act 2016, <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ClimateChangeActNo1of2016.pdf> (accessed 11 March 2021).

40 Republic of Kenya Energy Act 2019, https://kplc.co.ke/img/full/o8wccHsFPaZ3_ENERGY%2520ACT%25202019.pdf (accessed 10 March 2021).

41 Republic of Kenya Sessional Paper 5 of 2016. National Climate Change Policy Framework Policy.

42 Republic of Kenya National Policy on Climate Finance 2016.

43 PreventionWeb 'Kenya: National policy for disaster management' (2009), <http://preventionweb.net/go/60199> (accessed 16 November 2021).

Change Response Strategy 2010; the National Climate Change Action Plan (2018-2022);⁴⁴ the National Adaptation Plan (2015-2030);⁴⁵ the Kenya Climate Change Knowledge Portal;⁴⁶ and the National Climate Change Learning Strategy.⁴⁷

In terms of sectoral initiatives, the county governments have mainstreamed climate change in their Integrated Development Plans and Annual Development Plans, in line with the provisions of the Paris Agreement.⁴⁸ The Ministry of Agriculture has enacted the Kenya Climate Smart Agriculture Strategy (2017-2026)⁴⁹ to enable adaptation to climate change, build the resilience of agricultural systems for enhanced food and nutritional security and improved livelihoods, while minimising emissions. It is implemented through a framework.⁵⁰ Other noteworthy initiatives are the Green Economy Strategy and Implementation Plan 2016-2030;⁵¹ the Kenya National Forest Programme (2016-2030);⁵² and the Disaster Risk Financing Strategy (2018-2022).⁵³ It is also worth noting that the Climate

44 Ministry of Environment and Forestry National Climate Change Action Plan (NCCAP) 2018-2022 (2008), <https://climatelaws.org/cclow/geographies/kenya/policies/nationalclimate-change-action-plan-2018-2022-nccap> (accessed 9 March 2021).

45 Republic of Kenya National Adaptation Plan 2015-2030 (2016), https://www4.unfccc.int/sites/NAPC/Documents%2520NAP/Kenya_NAP_Final.pdf (accessed 12 March 2021).

46 'Kenya Climate Change Knowledge portal', <https://www.kckcp.go/ke> (accessed 11 March 2021).

47 UN CC: Learn 'The journey begins towards developing Kenya's National Climate Change Learning Strategy' 22 July 2021, <https://www.uncclern.org/news/the-journey-begins-towards-developing-kenyas-national-climate-change-learning-strategy/> (accessed 15 March 2021).

48 M Chudhury et al 'Mainstreaming climate change adaptation in Kenya: Lessons from Makueni and Wajir counties' World Resources Institute Working Paper (2020), www.wri.org/publication/mainstreaming-adaptation-kenya (accessed 15 March 2021).

49 Ministry of Agriculture, Livestock and Fisheries 'Kenya climate smart agriculture implementation Framework 2017-2026' (2018), <https://www.adaptation-undp.org/resources/plansand-policies-relevance-naps-least-developedcountries-ldcs/kenya-climate-smart> (accessed 9 March 2021).

50 As above.

51 Government of Kenya Green economy strategy and implementation plan 2016-2030 (2016).

52 Republic of Kenya National Forest Programme 2016-2030 (2016), <https://kwkakenya.com/download/kenya-national-forest-programme-2016-2030/> (accessed 15 March 2021).

53 Republic of Kenya National Disaster Risk Financing 2018-2022 (2019), <https://www.treasury.go.ke/media-centre/speeches/category/176-speeches-for-mombasa-workshop-25-29-november-2019> (accessed 15 March 2021).

Change Act 2016 has established the Climate Fund which is a financing mechanism for priority climate change actions and interventions.⁵⁴

Key institutions have been established to implement the legal frameworks, strategies, plans and programmes to achieve set climate change goals, including the domestication of the provisions of the Paris Agreement. These institutions include the National Climate Change Council (chaired by the President); the Climate Change Directorate which leads on setting national climate change plans and mitigation actions; the Ministry of Environment and Forestry which is responsible for the coordination of climate change response in Kenya and national focal point for the United Nations Framework Convention on Climate Change (UNFCCC); the Ministry of Energy (MoE); the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works; and the National Environment Management Authority (NEMA) which is responsible for monitoring and enforcing compliance of public and private entities regarding climate change duties and targets.

In terms of the enforcement of the fundamental rights under the initiatives to implement the Paris Agreement, Kenya has the Environment and Land Court which hears and determines complaints related to land and environment. The Environment and Land Court is a crucial judicial entity that was created following a backlog of cases at the judiciary related to land and environment. So far, the entity has helped in resolving a number of land and environmental disputes, including the encroachment of Karura Forest, Uhuru Park, Nairobi Game Park, and cases involving development in riparian areas, which endangers Kenya's ecosystem, among others.

Despite these numerous measures, Kenya is yet to achieve the full implementation of the provisions of the Paris Agreement and, by implication, there remains the continued inhibition in the enjoyment of the basic human rights curtailed by the adverse impacts of climate change. This is due to a myriad of challenges. Contrary to the express presidential commitment to addressing climate change, the country supports projects such as the Lamu coal-fired power plant.⁵⁵ This undermines the

54 V Orindi et al *The county climate change funds in Kenya. Real practice in collaborative climate action* (2020).

55 'Power, politics and economy of the coal-fired plant in Lamu' *Daily Nation* 2018, <https://www.nation.co.ke/news/Power--politics-economy-of-coal-fired-plant-in-Lamu-/1056-4379590-112cm0xz/index.html> (accessed 15 March 2021).

country's plan to 100 per cent green energy sufficiency by 2020.⁵⁶ Climate change receives limited priority within the national political agenda. It is not part of the Vision 2030 and the Big Four Agenda.⁵⁷ The two development blueprints entail a lot of industrial development plans that have the potential of impacting climate change, for example, through increased manufacturing operations and hydrocarbon extraction that may lead to increased greenhouse gases emissions. The implementation of policies, strategies and other institutional frameworks, tools to support mainstreaming climate adaptation in Kenya has also lagged behind.⁵⁸ The Climate Change Act 2016 does not include a quantitative emission reductions target. This needs to be set in law to enhance the urgency, resource provision and actions towards meeting Paris Agreement targets.

The Ministry of Energy's Least Cost Power Development Plan (LCPDP) 2017-2037 neither prioritises climate-related issues nor considers the NDC target, notwithstanding the significant role of the Ministry in reducing GHG emissions and transitioning the country to green energy.⁵⁹ Despite submitting its updated NDC, the country is yet to develop long-term emission reduction strategies and targets. Worse still, the country plans to exploit fossil fuel resources to expand its electricity demand, as outlined in its development blueprint, Vision 2030. The introduction of taxes on clean cooking and solar energy products is also counter-productive.⁶⁰ These measures are bound to lead to increased GHG emissions and global warming contrary to its set NDC.

The transparency frameworks in the climate law are not widely applied across sectors, making it difficult to assess the progress of their actions towards meeting climate change action targets.⁶¹ Coordination between ministries, and between national and county levels, is not yet effective, thus sectoral plans and strategies do not meet national climate mitigation targets. Despite key ministries appointing climate change officers or establishing climate change funds, these entities rarely consider climate

56 Standard Media 'Kenya eyes 100 percent green energy in two years' *The Standard* 2018, <https://www.standardmedia.co.ke/amp/sci-tech/article/2001302510/kenya-eyes-100-percent-green-energy-in-two-years> (accessed 15 March 2021).

57 The Presidency 'The big four' (2019), <http://www.president.go.ke/> (accessed 1 March 2021).

58 McCarthy (n 27).

59 As above.

60 'Experts oppose tax proposal on solar and cook stoves product' *The Standard* 2020, <https://www.standardmedia.co.ke/business/article/2001374607/experts-oppose-tax-proposal-on-solarand-cookstoves-product> (accessed 7 March 2021).

61 Climate Action Tracker (n 4).

change in sectoral strategy plans.⁶² There is also inadequate communication between county and national governments as well as confusion regarding the functions and mandates of different levels of government.⁶³ Of the 47 counties in Kenya, only five (Garissa, Isiolo, Kitui, Makueni, and Wajir) have made meaningful strides towards mainstreaming climate change into county processes,⁶⁴ implying that national initiatives are not replicated at the grassroots level.

Resource constraints are significant barriers to effective climate governance and in the past impeded developing countries.⁶⁵ In this regard, Kenya is not exempt.⁶⁶ The National Climate Fund, a financing mechanism for priority climate change actions that was established by the 2016 Act, is not yet operational.⁶⁷ While the national climate change lead agency has qualified staff, its budget is insufficient to perform some statutory tasks, such as the analytical support to sector ministries.⁶⁸ The institutions responsible for mobilising climate finance are being asked to deliver resources for COVID-19.⁶⁹ This implies a shortage of Kenya's anticipated climate change financial support. Kenya has an estimated implementation cost of US \$4,4 billion per year out of which the country 'can realistically mobilise domestic resources to meet 13% of this cost, we would need our external partners to support us fund the remaining 87%', according to the President.⁷⁰

There reportedly is a low level awareness and insufficient public participation and sensitisation on climate change.⁷¹ Climate change issues are not fully integrated into the formal education system. There is inadequate capacity for policy makers on climate change mainstreaming.⁷²

62 McCarthy (n 27).

63 J Bellali et al *Multi-level climate governance in Kenya. Activating mechanisms for climate action* (2018).

64 I Nyadera 'Evolution of Kenya's political system and challenges to democracy' in A Farazmand (ed) *Global encyclopedia of public administration, public policy, and governance* (2018).

65 Constitution of Kenya 2010 (n 21).

66 Burger (n 3).

67 A Dzebo et al *Coordinating climate finance in Kenya: Technical measures or political change?* (2020).

68 Constitution of Kenya 2010 (n 21).

69 M Igoe 'DevExplains: The climate finance challenge' 2020, <https://www.google.com/amp/s/www.devex.com/news/devexplains-the-climate-finance-challenge-98235/amp> (accessed 11 March 2021).

70 Presidential Press (n 31).

71 Constitution of Kenya 2010 (n 21).

72 As above.

The Kenya Climate Change Knowledge Portal, the Climate Change Directorate's 'one-stop repository of climate change information' has not published any reports or blogs on its website since May 2019.⁷³ There is an analysis indicating that the current dissemination practices of the Kenyan government are not effectively reaching grassroots communities because of socio-economic and language barriers.⁷⁴ A lack of capacity, conflicting media priorities and inadequate funding to train and support journalists also contribute to poor coverage and publicity of climate change issues.⁷⁵

4 The challenges of implementation of the Paris Agreement and human rights

The lack of priority by the government of Kenya to integrate a human rights-based approach in the implementation of climate change measures presents a hurdle in fully implementing the provisions of the Paris Agreement which, in turn, inhibits the enjoyment of human rights. The human rights associated with the effects of climate change, as earlier elaborated, include rights to adequate standards of living; equality and non-discrimination based on gender; a clean and healthy environment; sustainable livelihoods, clean and quality water; property and security of tenure; and health and sanitation respectively.⁷⁶

The insistence of the government to go ahead with the Lamu coal plant violates the rights of community members around and beyond the proposed project site. It further contravenes the Paris Agreement obligation to reduce GHG and global warming by all state parties. According to a submission to the United Nations Universal Periodic Review Committee,

the project raises great concerns about its impact on the environment regarding toxic pollution from coal and ash, carbon emissions by the coal power plant and rising sea levels due to climate change. The bigger problem is that the NEMA granted an Environmental Impact Assessment (EIA) Licence to Amu Power/Centum Investments together with Gulf Energy to undertake the project. There was insufficient public participation in the EIA Report and only the findings were shared with the affected Community. Besides, the final report did not consider the contents of the Climate Change Act, 2016 and

73 World Meteorological Organisation (n 2).

74 As above.

75 Presidential Press (n 31).

76 Ministry of Environment and Forestry (n 44).

thus ignored Kenya's commitments to international treaties and the Paris Agreement which require a managed decline of fossil fuel production.⁷⁷

The projected impacts of the Lamu coal plants are expected to multiply exponentially by the targeted increase in oil and gas (fossil fuel) extraction in Turkana county. The exploration for more hydrocarbon resources is also on the rise.⁷⁸ As it is, the government's climate change policies, strategies and plans acknowledge the prolonged droughts, the increased intensity of floods. The increased frequency of both phenomena is a result of climate change. The government further outlines the negative impacts these have in securing the rights of people, including the right to food security, health, water, sanitation, housing and livelihoods.⁷⁹

The lack of transparency, awareness, public participation and information goes contrary to the provisions of the Paris Agreement which calls for public participation, capacity building and gender mainstreaming. This challenge translates into a violation of a number of rights, including the right to self-determination, as expressed through people's engagement in climate change processes that affect their welfare. It further violates the right of access to information. These two rights are recognised under the Constitution of Kenya in articles 35 and 174. The right to public participation is highlighted under articles 69, 118, 196 and 201 of the Constitution.⁸⁰

Human Rights Watch (HRW) reports that the adverse effects of climate change in Kenya and the failure to put in place adequate responses have led to environmental and economic development challenges, which in turn have negatively impacted people's ability to access food, water, health and security. Prolonged and more frequent droughts have caused many water sources to become arid, making every day a struggle of survival for people and their livestock. Women and girls are forced to walk extremely long distances to dig for water in dry riverbeds. Many children have become ill because their families are unable to provide them with sufficient food and clean water. This development confirms the reality that climate change disproportionately affects populations in Kenya, a feature which should be taken into consideration when addressing its effects on these populations.

77 OHCHR 'Kenya CSO report to the UPR' (2020), <https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?3Ffilename%3D7329%26file%3DEnglishTranslation> (accessed 1 May 2021).

78 National Oil Kenya 'Kenya now a proven opportunity in oil and gas exploration' (2012) *Energised Bulletin Issue* 002, https://nationaloil.co.ke/pdf/NOCK_Newsletter.pdf (accessed 21 July 2021).

79 Ministry of Environment and Forestry (n 44); Republic of Kenya (n 41).

80 Constitution of Kenya 2010 (n 21).

Human Rights Watch has urged the Kenyan government to ensure that the rights to food, security, water, health, and non-discrimination are upheld in both its national climate change strategy and response plan.⁸¹ Trocaire notes that unaddressed adverse climate change continues to pose a threat to the right to food security, access to water, gender equality (due to the disproportionate impact on women and girls, compared to men and boys), health and environmental rights.⁸²

Minority Rights Group International reports that the impact of climate change is worsening the situation of child marriage among the Maasai. The prolonged droughts are forcing many families into desperate situations of hunger and young girls, as young as 12 years, are being given away as brides in exchange for cattle. The long walk in search of water exposes young girls to the danger of sexual abuse and resulting pregnancies.⁸³ This contravenes the rights to food, education, health and sexual reproductive health, as well as freedom from torture and child labour. Early child marriages are prohibited under the Children's Act 2001.

Indigenous peoples such as the Endorois and Ogiek communities, who happen to be minorities in Kenya, have suffered because of the inability to continue with their cultural way of life based on hunting and gathering, fishing and pastoralism due to the environmental effects of climate change. The inadequate action to appropriately address climate change causes a threat to their cultural lifestyle and thus to their right to culture.⁸⁴ Climate change threatens the right to security and safety given its likelihood to aggravate existing conflicts over water, land and resources in parts of the country, where such resources already are subjected to intense competition.⁸⁵

81 Human Rights Watch 'There is no time left. Climate change, environmental threats, and human rights in Turkana county, Kenya', <https://www.hrw.org/report/2015/10/15/there-no-time-left/climate-change-environmental-threats-and-human-rights-turkana> (accessed 1 May 2021).

82 Trocaire 'Kenya climate change case', <https://www.trocaire.org/sites/default/files/resources/policy/kenya-climate-change-case-study.pdf> (accessed 1 May 2021).

83 Minority Rights Group International Kenya 'The impact of climate change is worsening the situation of child marriage among the Maasai', <https://minorityrights.org/trends2019/kenya/> (accessed 1 May 2021).

84 P Kameri-Mbote & E Nyukuri 'Climate change, law, and indigenous peoples in Kenya: Ogiek and Maasai narratives' (2017), <http://www.ielrc.org/content/a1308.pdf> (accessed 1 May 2021).

85 E Parry et al *Climate risks vulnerability and governance in Kenya: A review* (2012).

5 Conclusion

Climate change either directly or indirectly affects all human rights and all spheres of human life. This highlights the importance of the Paris Agreement which aims to reduce the adverse effects of climate change. The Paris Agreement, signed in December 2015, obligates parties, including Kenya, to implement its provisions in their national climate change responses. Kenya has made significant strides in setting up supporting legal and strategic frameworks, plans and targets that are requisite in meeting its targets of GHG emission reductions as outlined in its updated NDC submitted to the UNFCCC in the year 2020. These and other initiatives by the country have gained it a rare rating as one of the few countries that will meet the Paris Agreement target of reducing global warming below two degrees Celsius (2°C) above pre-industrial levels by 2030.

However, the initiatives undertaken by the Kenyan government still are not yet fully consistent with the Paris Agreement. This has consequently put to threat the citizens' rights to food, education, health and sexual reproductive health, housing, food security, water, gender equality, a clean and healthy environment, livelihoods, sufficient standards of living, self-determination, culture, safety and security, and access to information. It has triggered child labour, early childhood marriages and gender-based discrimination, in violation of the rights of the vulnerable.

This calls for full implementation of the Paris Agreement by the Kenyan government by addressing the gaps identified above. Hence, the following recommended actions should be implemented:

- (i) The Kenyan state should review existing strategies and planned initiatives and adopt a human rights-based approach in all climate change and justice-related actions. The guiding factor on implementation of the Paris Agreement should be duty bearer (state) and rights holders (citizens).
- (ii) Human rights, climate change and climate justice should be a cluster of reporting under Kenya's Universal Periodic Review and other human rights reporting mechanisms.
- (iii) Climate change should be declared a national disaster and accorded significant focus. While Kenya regularly declares drought-related outcomes such as hunger as national disasters, the approach simply focuses on the symptoms and not the cause, in this case adverse climate change effects. Consequently, the focus should be on declaring climate change the national disaster given that this is what causes droughts and floods.

- (iv) The institutional and systematic approach of addressing climate change in Kenya is fragmented, disjointed and, therefore, ineffective. This is exhibited by the mandate of each ministry to plan and implement its own autonomous climate change effects. The alternative is to set up a dedicated ministry to focus on the government's climate change initiatives. This would then vet, approve and oversee the other ministries' climate change actions, ensuring that they contribute to an overall climate change strategy and plan developed by the Ministry of Climate Change.
- (v) To sustainably finance climate change response actions, the government should introduce a climate change levy targeting the largest emitters of greenhouse gases. The latter would also serve as a deterrent against activities that lead to increased global warming.
- (vi) The government should reconsider its stance on giving approval to the implementation of the Lamu coal plant, as this is likely to have more negative impacts on communities living around the project and the general protection of their human rights.
- (vii) There should be increased awareness on climate change issues, including the incorporation of climate change in the academic curriculum to be taught in schools and colleges; putting in place adequate responses to climate change calamities such as droughts, floods and insect infestation, and ensuring that its interventions respond to the disproportionate impact of climate change on populations, among others.
- (viii) The government should continue with the plans for 10 per cent forestation as a national initiative in line with its Vision 2030.