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**KENYA NATIONAL COMMISSION ON HUMAN RIGHTS (KNCHR)**

**SUBMISSION TO:**

**Special Rapporteur on the promotion and protection of human rights   
in the context of climate change**

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**ON:**

**“Enhancing climate change legislation, support for climate change litigation and advancement of the principle of intergeneration justice”**

**25TH MAY 2023**

**Introduction**

The Kenya National Commission on Human Rights is a National Human Rights Institution established under Article 59 of the Constitution and made operational by the Kenya National Commission on Human Rights Act 2011 (revised 2012).

The Commission has a broad mandate to promote the respect and a culture of human rights in the Republic of Kenya. The Commission has the mandate of ensuring compliance with obligations under treaties and convention relating to human rights. The Commission pursues its mandate through various strategies including advocacy, lobbying, public education and training, outreach, public interest litigation, alternative dispute resolution, receiving complaints, investigations and issuing advisories.

**Enhancing Climate Change Legislation:**

1. **Can you provide examples of climate change legislation that incorporates human rights elements, or a reference to obligations relating to loss and damage?**

***Right to access to justice***

*Section 23 of the Climate Change Act, 2016 provides that a person may apply to the Environment and Land Court alleging that a person has acted in a manner that has or is likely to adversely affect efforts towards mitigation and adaptation to the effects of climate change. Where such an application has been made, the court may give an order that it considers appropriate to; prevent, stop or discontinue an act or omission that is harmful to the environment, compel a public officer to take measures to prevent or discontinue an act or omission that is harmful to the environment; or provide compensation to a victim of a violation relating to climate change duties. One need not demonstrate loss or injury in order to make such an application.*

***Right to access to information***

*Section 24 of the Climate Change Act provides for the right to access to information in that it provides that public entities at each level of government have the responsibility at all times when developing strategies, laws and policies relating to climate change, undertake public awareness and conduct public consultations. The Act also provides that the Climate Change Council shall provide regulations as to how to publish regulations on design and procedure to ensure efficacy of public consultations to ensure that they make an impact on the threshold of decision making on climate change at all levels of government .The Climate Change Council may however decline to give access to information where the request is considered unreasonable in the circumstances, the information requested is at a deliberative stage within the Council or Directorate, the prescribed fee is not paid or the applicant fails to satisfy any confidentiality requirements of the council.*

***Right to a clean and healthy environment***

*Section 3 of the Environmental Management and Coordination Act provides for the right to a clean and healthy environment. The Act allows that in the instance where this right has been contravened that person may apply to the High court for redress.*

***Loss and damage***

*Section 8 of the Climate Change Act provides for the Climate Change Fund which is a financing mechanism for Fund priority climate change actions and interventions approved by the Council. Part of the purpose of the fund is to provide grants for persons involved in putting in place measures to mitigate against the adverse effects of climate change. The fund is also available for grant for climate change research and innovation in the fields of, industrial research, technological research, policy formulation, scientific research and academic research. The fund has been utilized in the counties of Isiolo, Makueni and Wajir and there has been reported a 100% increase in access to water in households and livestock.[[1]](#footnote-1)*

1. **How do you think climate change legislation should frame a connection to human rights obligations?**

*The irony of the effects of climate change is that those least responsible for it are the ones most affected by the impacts. These are the marginalized and most vulnerable communities. In order to fulfill the human rights of these communities, climate change legislation should be designed in a manner that ensures their participation in decision-making in programs and policies.*

*Climate change legislations need to restrict both public and private actors from causing environmental harm that adversely affects human rights. However, in the event that these measures are not sufficient to prevent harm from occurring, there is need to provide for adequate remedies to remedy such environmental harm.[[2]](#footnote-2) Such legislation must also provide a system for assessing the potential environmental impacts of an activity such as a mandatory environmental impact assessment test, such legislation must ensure that those affected receive information about the activities and allow them to participate in the decision-making.[[3]](#footnote-3) Climate change efforts should be alive to the plight of indigenous communities and secure their participation.*

1. **How do you think climate change legislation should engage the concept of loss and damage?**

*Engaging the concept of loss and damage in climate change legislation is crucial for addressing the adverse impacts of climate change and ensuring justice for vulnerable communities. This can be done through; Recognizing loss and damage in the climate change legislations through definition and acknowledgement that certain environmental harm cannot be corrected through compensation alone. Furthermore, there is need to conduct assessments prior, during and after conclusion of development projects, to assess the environmental impacts the project may have such as loss and damage and ensure structural barriers in access to justice for the vulnerable are addressed.*

1. **Should climate change legislation that incorporates loss and damage be different for major greenhouse gas emitting countries to those that are mostly affected by climate change? What would this difference look like?**

*Climate change is a global problem, but it is experienced differently depending on geo locations, as such climate change legislation may indeed differ through the roles and the responsibilities that countries have for addressing climate change. For instance, countries that are mostly affected by climate change should have legislations that prioritize measures to enhance resilience and support adaptation while countries that are major GHG emitters should prioritize reduction of GHG emissions.*

**Supporting Climate Change Litigation:**

1. **How are human rights considerations being incorporated into climate change litigation?**

*In Kenya, there has been a rise in climate change litigation; human rights have been incorporated into climate change litigation in order to hold various entities* *accountable for* *environmental harm that leads to climate change.[[4]](#footnote-4) This can be illustrated in the* ***Save Lamu and 5 others v National Environmental Management Authority and another (2019) eKLR*** case.

*In this case, Save Lamu, along with several other community organizations, contested the issuance of an Environmental Impact license on the grounds that, among other things, the Environmental Impact Assessment (EIA) process did not sufficiently involve the public. It was noted that providing affected individuals with access to information is crucial for their meaningful participation and inspires them to engage in informed decision-making as it aims to address the concerns of the community and various stakeholders. The National Environment Tribunal (NET) which decided this case ordered a new EIA study.*

*The Petitioners successfully argued that their environmental rights (including the right to information) were being violated.*

1. **Are there issues with making the link between human rights and climate change litigation?**

*NO*

1. **What do you think are the major barriers to initiating climate change litigation?**

*Individual or state approach to caring for the environment could be a major barrier. ecocentrism, appreciating nature for its own sake, and anthropocentrism, valuing nature for the material or physical benefits it may offer humans. [[5]](#footnote-5)*

*Other barriers include the requirement for locus standi in certain jurisdictions, the complexity and technical nature of litigation which may necessitate scientific evidence in climate change related litigation; low levels of awareness on human rights and available redress mechanisms and costs involved in litigation include expenses incurred in securing legal representation and expert testimony.*

***Legal waivers in settlement agreements****; Litigation can be expensive and time consuming in some instances, however, civil society groups support these vulnerable communities by helping them institute claims in a court of law. These claims however end up settlement agreements where the corporations involved enter into agreements with the victims. These agreements provide compensation to victims in exchange for waiving their right to file future claims in a court of law. Right-holders accept legal waivers as they provide quick resolution of grievances, mainly in the form of monetary compensation that is temporary and fails to address the bigger issue of climate change.[[6]](#footnote-6)*

1. **Are the barriers different in different parts of the world? What are they?**

*The barriers vary in different parts of the world. One of them is that often, courts require one to establish whether they have a legal standing in the climate change claim. This can often be difficult to establish in such a case where the effects of climate change often diffuse and affect the society as a whole. In addition, establishing direct link between specific GHG emissions and specific climate change impacts can be complex as such holding those responsible becomes difficult.*

1. **Is the judiciary in your country well equipped to understand the connection between human rights and climate change?**

*The Constitution entrenches the right to a clean and healthy environment as part of the fundamental human rights to which every Kenyan is entitled. Its inclusion in the Bill of Rights and an express provision that anyone can approach the Courts for a remedy whenever such a person is of the view that the right to a clean and healthy environment has been breached or is likely to be breached. Such a person need not demonstrate the harm he/she has suffered.[[7]](#footnote-7) Furthermore, Section 3 of the Environment and Land Court Act establishes the Environment and Land Court, which is specifically established to hear cases on Environment and Land Disputes.*

*The Judges and Judicial officers constantly undergo capacity building on emerging issues. There are specialized courts to handle land and environment related cases.[[8]](#footnote-8)*

1. **How could this be improved?**

*Despite being legally equipped, the litigation process is relatively slow and financial challenges may arise.[[9]](#footnote-9) Increasing finance for the judicial process of climate litigation for the vulnerable litigants may be useful in ensuring that the judiciary handles the case in an expeditious manner.*

1. **Are there particular issues with getting access to the courts?**

*Litigation is expensive and time consuming;**the people most affected by the impacts of climate change are usually low income and marginalized communities as such financial constraints is a great impediment to climate litigation. Such vulnerable and marginalized people often have low levels of awareness on their rights and the existing remedies. The Courts are not physically present in all sub-counties thus making access a challenge.*

**Advancement of the principle of intergenerational justice**

1. **What examples do you have of how intergenerational justice, as it applies to climate change and human rights, has been incorporated into international law, national constitutions or domestic law?**

*As per Environmental Management and Coordination Act, intergenerational justice means that the present generation should make sure that when exercising its rights to beneficial use of the environment, the environment's health, diversity, and productivity are preserved or improved in order to benefit future generations.[[10]](#footnote-10)The Environment and Land Court Act which is an act that establishes the Environment and Land Court with the jurisdiction to hear and determine disputes concerning the land and environment, includes the principle of intergenerational equity as one of its guiding principles.[[11]](#footnote-11)*

*The Kenyan Constitution also provides the need to sustain the environment for the future generations.[[12]](#footnote-12)*

1. **How would you best define intergenerational justice in the context of climate change and human rights?**

*It refers to the ethical and moral principle/obligation that present generations have a responsibility to ensure that future generations can enjoy a sustainable and equitable world. It recognizes that actions taken today to address climate change will have long-term implications for the well-being and rights of future generations. It emphasizes the duty to mitigate greenhouse gas emissions, protect the environment, and preserve natural resources to prevent harm and secure a liveable planet for future generations. It encompasses the rights of future generations to a clean and healthy environment, access to resources, and the ability to pursue their own development without being unduly burdened by the consequences of climate change caused by present generations.*

1. **Has the concept of intergenerational justice been incorporated into climate change litigation?**

*The concept has been integrated in Climate litigation in Kenya for instance ,in* ***Isaiah Luyara Odando & another v National Management Environmental Authority & 2 others; County Government of Nairobi & 5 others (Interested Parties) [2021] eKLR*** *where the Plaintiffs who were residents of Nairobi instituted a claim against the Respondents for air pollution by releasing toxic substances thereby violating their environmental rights provided for under the Constitution. The Court while making reference to the principle of intergenerational justice granted them compensation, and ordered the relevant authorities to take necessary measures to ensure that there was no more air pollution and river pollution.*

1. **What options are available for enshrining the principle of intergenerational justice in international law?**

*This can be done through the adoption of a UNGA declarations granting rights to Present and Future Generations. In addition to this, noting that current international trade agreements do not create basic requirements to protect the climate for current and future generations, it is necessary to mobilize the international trade system to pursue climate-friendly policies in future rounds of international trade negotiations.*

*Interpretation through general comments and jurisprudence of international human rights mechanisms*

1. **How can States incorporate the concept of intergenerational justice in their national constitutions and legislation? What are some good practices in that respect?**

*States can create legislations that place a higher priority on environmental preservation and enhancement. Through creating a new tort of “ecological degradation” that deems it unreasonable to contribute to significant ecological despoliation and destruction. By protecting the environment, they will be ensuring that the environment is protected for the benefit of the present and future generations.[[13]](#footnote-13) By ensuring the polluter-pays principle is adopted and applied to discourage pollution and making it a national obligation on all state organs and persons.[[14]](#footnote-14)*

1. **Can you share some good practices that allow youth to be represented in courts and to have their views and concerns properly expressed in the judicial process?**

*Demystification of court processes – the Judiciary in Kenya has been engaging the public and creating awareness on its role.*

*The clear provision that a party need not demonstrate any direct injury to assert the right to a clean and healthy environment through litigation*

1. National Drought Management Authority, Delivering Climate Finance at the local level to support adaptation experience of County Climate Change Funds in Kenya <https://www.iied.org/sites/default/files/pdfs/migrate/G04415.pdf> [↑](#footnote-ref-1)
2. John H Knox, Climate Change and Human Rights Law Essay(Heinonline) <https://wakespace.lib.wfu.edu/bitstream/handle/10339/26081/Knox%20Climate%20Change%20and%20Human%20Rights%20Law%20Essay.pdf> [↑](#footnote-ref-2)
3. Ibid [↑](#footnote-ref-3)
4. Elsa De Wight,Norton Rose Fulbright,Climate Change Litigation Update(February 2020)< <https://www.nortonrosefulbright.com/en/knowledge/publications/56ccc2b1/climate-change-litigation-update>> [↑](#footnote-ref-4)
5. S.Gagnon ,Ecocentric and Anthropocentric Attitude toward the Environment (1994)

   < <https://www.sciencedirect.com/science/article/abs/pii/S0272494405801689>> [↑](#footnote-ref-5)
6. Justin Jos ,University of New South Wales,Legal Waivers in Settlement Agreements :Implications to access to remedies in Business and Human Rights [https://www.tandfonline.com/doi/full/10.1080/14754835.2022.2120765](https://www.tandfonline.com/doi/full/10.1080/14754835.2022.2120765%20)  [↑](#footnote-ref-6)
7. The Constitution of Kenya 2010, Articles 22, 42 and 70 [↑](#footnote-ref-7)
8. The Environment and Land Court established under Article 162(2) of the Constitution [↑](#footnote-ref-8)
9. Rose Birgen, Reflections on the Lamu Coal Plant case < <https://naturaljustice.org/reflections-of-the-lamu-coal-plant-case/#:~:text=In%20the%20subsequent%20hearings%2C%20Save,challenges%20and%20other%20unavoidable%20circumstances> > published on 25th July 2019 ,accessed on 12th May 2023 [↑](#footnote-ref-9)
10. Environmental Management and Coordination Act 2012, Section 2 [↑](#footnote-ref-10)
11. Environment and Land Court Act 2011, Section 18 [↑](#footnote-ref-11)
12. The Preamble to the Constitution of Kenya 2010 and the National Values and Principles of Governance under Article 10 of the Constitution. [↑](#footnote-ref-12)
13. Burns H.Weston,Tracy Bach, Recalibrating the Law of Humans with the Laws of Nature: Climate Change, Human Rights, and Intergenerational Justice < <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1443243> > [↑](#footnote-ref-13)
14. Such as the National Values and Principles of Governance under Article 10 of the Constitution of Kenya. [↑](#footnote-ref-14)