The relationship between the principle of sustainable development and the human right to a clean and healthy environment in Kenya’s legal context: An appraisal

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Abstract
Kenya’s legal system is characterised by a plurality of constitutional norms that are relevant for governing the relationship between the environment and the people. Key among these are the principle of sustainable development (SD) and the human right to a clean and healthy environment (HRHE). Both norms were constitutionalised in 2010, a development that represents what scholars have termed environmental constitutionalism and sustainability constitutionalism, respectively. The constitutionalisation of the principle of SD and the HRHE is a welcome development which has the potential to fill some gaps that existed in the old constitutional arrangement. At the same time, this development is set against a backdrop of critical debates that question their effectiveness in regard to environmental protection. This article demonstrates that the two norms have developed in a manner that is responsive to the salient criticism raised against them. Moreover, courts in Kenya have construed them as complementary norms. Specifically, courts in Kenya have applied the HRHE to clarify the meaning and scope of the environmental prong of SD and construed the duty to pursue ecologically SD (a component of SD) as encompassing the obligation to protect ecological processes that support all life.

Keywords
Complementarity, duty to respect nature, ecologically sustainable development, sustainable development, the human right to a clean and healthy environment

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Introduction

The human right to a clean and healthy environment (HRHE) and the principle of sustainable development (SD) were introduced into the Kenyan constitution in 2010. The constitutionalisation of both norms was an important development in environmental law in Kenya, representing what has been termed environmental constitutionalism¹ and sustainability constitutionalism, respectively.² This development also marked a departure from the constitutional setup established under the independence constitution of 1963, whose main aim was to establish the formal structure of government and to protect civil and political rights. The lack of explicit language on environmental rights created a legal vacuum which allowed the State to engage in a variety of forms of environmental mismanagement within a legal context that lacked effective avenues for legal recourse.³ Not surprisingly, environmental protection was a prominent theme in the drafting of the current constitution.⁴ The constitutionalisation of the principle of SD and the HRHE is therefore a welcome development which has the potential to fill some gaps that existed in the old constitutional arrangement thereby improving environmental protection.

Following the constitutionalisation of the principle of SD and the HRHE, courts in Kenya have construed both as the basis for similar environmental obligations.⁵ The approach taken by courts suggests that the norms are interlinked. This approach also mirrors the relevant broader discourse that posits that the relationship between the HRHE and the principle of SD is complementary. The broad argument in this respect is that the role of human rights within the SD framework is to safeguard the social and environmental pillars of SD.⁶ As evidence of this mutuality, Agenda 2030 declares that SD is underpinned by human rights⁷ and each of the 17 Sustainable Development Goals correspond to specific human rights.⁸ Particularly in relation to environmental protection, the mutuality between the two norms is affirmed by the argument meaningful development can only be achieved by ‘consideration for environmental protection as it is the environment that ultimately provides the means for human survival and development’.⁹

The advent of environmental constitutionalism and sustainability constitutionalism in Kenya is nonetheless set against a background of ongoing critical debates that question the effectiveness of the two norms in regard to their supposed environmental protection function. Commentators criticise the principle of SD for facilitating the prioritisation of economic development over environmental and social

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1. J. R. May and E. Daly, *Global Environmental Constitutionalism* (Cambridge: Cambridge University Press, 2015) 105.
2. J. R. May, ‘Sustainability Constitutionalism’ (2017) 86 *University of Missouri-Kansas City Law Review* 855. See also, J. May and E. Daly, ‘Six Trends in Global Environmental Constitutionalism’ in J. Sohnle (ed.), *Environmental Constitutionalism: What Impact on Legal Systems?* (Bern: Peter Lang, 2018) 45.
3. See e.g., *Maathai v Kenya Times Media Trust Ltd* [1989] eKLR (High Court). *Maathai & 2 others v City Council of Nairobi & 2 others* (1994) 1 KLR (E&L) eKLR (High Court).
4. Three main drafts – the Bomas Draft, the Wako Draft and the Committee of Experts Harmonised Draft – were considered in the constitutional making process before the adoption of the current constitution in 2010. All of them included expansive provisions relating to environmental protection. These drafts can be viewed. Available at: https://www.laibuta.com/kenya-constitutions/ (last accessed 15 April 2020).
5. See an analysis of cases in which both norms have been construed as the basis of the duty to carry of an EIA in the fifth section.
6. See e.g., L. S. Horn, ‘Reframing Human Rights in Sustainable Development’ (2013) 6 *Journal of the Australasian Law Teachers Association* 1. L. Hajjar Leib, *Human Rights and the Environment: Philosophical, Theoretical and Legal Perspectives* (Leiden, Netherlands: Brill, 2011) 109-153.
7. United Nations General Assembly, *Transforming Our World: The 2030 Agenda for Sustainable Development* (2015, A/RES/70/1), paras 10, 19 and 35.https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf (last accessed 21 June 2020).
8. The Danish Institute of Human Rights, ‘The Human Rights Guide to the Sustainable Development Goals’. Available at: https://sdg.humanrights.dk/en (last accessed 21 June 2020).
9. O. Awolowo, ‘Environmental Rights and Sustainable Development in Nigeria’ (2017) 10 *OIDA International Journal of Sustainable Development* 17, 21.
concerns.\textsuperscript{10} By contrast, detractors of the HRHE fault the human rights approach to environmental protection for giving weight to the entitlement to a clean and healthy environment while downplaying the need for commensurate duties to care for nature.\textsuperscript{11} In reference to relevant critical debates, this article explores how the principle of SD and the HRHE have taken shape in Kenya’s legal context. This analysis will show that not only have they evolved in a manner that is responsive to some of the salient criticism directed against them, the principle of SD and the HRHE are complementary. Specifically, the HRHE clarifies the meaning and scope of the environmental pillar of SD while the enforcement of the obligation to pursue ecologically SD (a component of SD) enhances both environmental and human well-being.

This article is structured as follows: the second section briefly recapitulates salient critical debates on the limitations of the principle of SD and the HRHE. In the light of points of critique identified in the second section, the third and fourth sections analyse how the principle of SD and the HRHE have taken shape in Kenya’s post-2010 legal context. The fifth section draws on relevant case law to show how the approach taken by courts in Kenya affirms their complementarity thereby enhancing environmental and human well-being. The sixth section concludes this article.

\textbf{Critical debates on the principle of SD and the HRHE}

This section provides a brief overview of salient critical debates relating to the principle of SD and the HRHE. The overview is intended to set the background for asking the question whether the constitutiona-lisation of the principle of SD and the HRHE has in any way contributed to alleviating the limitations of two norms that have been identified in literature particularly in regard to their ability to facilitate environmental protection.

The concept of SD is essentially a framework principle to enable governments to meet human development goals through an approach that balances between economic, environmental and social concerns.\textsuperscript{12} By including three objectives under the framework, the World Commission on Environment and Development hoped that nations would be able to work towards the eradication of poverty while maintaining acceptable levels of environmental protection.\textsuperscript{13} The principle was received well by nations around the world because it had succeeded in bringing together important governance priorities under a single umbrella concept.\textsuperscript{14} The prospect of tackling poverty without destroying the ecological capital upon which human progress and survival depend was a cause for optimism. However, writing not long after the conclusion of the Rio Earth Summit in 1992, Wirth observed that:

\begin{quote}
[t]here appears to be little or no empirical evidence to demonstrate that the needs of both current and future generations, however modest they may be, can be met through economic growth while concurrently satisfying the constraint of preserving environmental capacities.\textsuperscript{15}
\end{quote}

\textsuperscript{10} S. Adelman, ‘The Sustainable Development Goals, Anthropocentrism and Neoliberalism’ in D. French and L. J. Kotzé (eds), 
\textit{Sustainable Development Goals Law, Theory and Implementation} (Cheltenham, UK: Edward Elgar Publishing, 2017) 15.
\textsuperscript{11} A. Grear, \textit{It’s Wrongheaded to Protect Nature With Human-style Rights} (Aeon, 2019). https://aeon.co/ideas/its-wrongheaded-to-protect-nature-with-human-style-rights (last accessed 15 April 2020).
\textsuperscript{12} United Nations, \textit{Report of the World Commission on Environment and Development: Our Common Future} (UN Documents, United Nations, 1987).
\textsuperscript{13} J. E. Viñuales, ‘The Rise and Fall of Sustainable Development’ (2013) 22 \textit{Review of European, Comparative & International Environmental Law} 3.
\textsuperscript{14} Ibid.
\textsuperscript{15} D. A. Wirth, ‘The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa’ (1994) 29 \textit{Georgia Law Review} 599.
As Wirth suggests, despite its professed noble goal of integrating competing yet urgent policy goals, a balanced execution has remained a critical challenge for achieving SD. A review of critical literature reveals that considerable pessimism has progressively crept in on the prospects of principle of SD to deliver on its professed goal.16 In Bosseleman’s view, one of the factors that has contributed to the outcome identified by Wirth is the concept’s failure to commit to an overriding policy objective.17 Bosselmann explains that its open-textured nature has made it amenable to being used to rationalise destructive practices and to espouse seemingly rational positions while avoiding the difficult task of defining what should be prioritised.18 Bosseleman further argues that in failing to commit to an overriding priority, the principle of SD became a crucible for neoliberal ideology, which thrives on ‘the myth of unlimited resources, the myth of human superiority, and the myth of environment as commodity’ while ignoring the need for strong ecological considerations.19 Along the same line, Adelman decries the lack of a clearly defined priority for turning the principle of SD to a useful trope for governments and corporations to ‘greenwash’ environmentally destructive and unsustainable practices.20 Echoing these sentiments, Lövbrand and others criticise the failure to assert an overarching policy objective as having made SD susceptible to and even a tool for rationalising human’s unrestricted claim to exploit environmental resources for economic development and well-being without regard to the well-being of non-human life and ecosystems.21 Lövbrand’s sentiments follow Adelman’s argument that SD enables ‘extractive industrialisation’, a phrase that Adelman has used to refer to the type of industrialisation that thrives on the failure to acknowledge that biophysical factors place limitations on human activities and growth.22

Environmental and natural resources governance is a typical context in which the friction between economic, environmental and social concerns can manifest. In this context, SD’s promise of a harmonious balance between its three pillars is not always a reality. For example, the lure of economic development and accumulation of wealth from fossil fuel extraction partially explains why practices such as fracking and other extreme forms of energy extraction are tolerated despite increasing knowledge about their long-term serious consequences on the environment and human well-being.23 Considering the logic of SD as highlighted above, such developments should not come as a surprise. As one commentator argues, the best the concept can do is to allow administrators to make ‘context-based assessments’, 24 serving only as a ‘guide-post to structure a dynamic, but inevitably ad hoc, decision making process’.25 Context-based assessments are not bad in themselves considering that administrators are often called upon to make decisions despite scientific and other uncertainties concerning the potential harmful consequences of specific projects. The problem, it seems, is that context-based assessments allow a great latitude of discretion to environmental administrators which creates the risk of arbitrary decision-making and of abuse of administrative powers.

16. See Viñuales, above n. 13.
17. K. Bosseleman, ‘Losing the Forest for the Trees: Environmental Reductionism in the Law’ (2010) 2 Sustainability 2424.
18. Ibid.
19. K. Bosseleman, ‘Grounding the Rule of Law’ in C. Bugge and C. Voigt (eds), A Rule of Law for Nature: New Dimensions and Ideas in Environmental Law (2013) 75, 85–86.
20. See Adelman, above n. 10 at 22–23.
21. See e.g., E. Lövbrand, J. Stripple and B. Wiman, ‘Earth System Governmentality: Reflections on Science in the Anthropocene’ (2009) 19 Global Environmental Change 7.
22. See Adelman, above n. 10 at 15.
23. See e.g., how expansion of the fossil fuel economy risks human rights in, D. Short and others, ‘Extreme Energy, ‘Fracking’ and Human Rights: A New Field for Human Rights Impact Assessments?’ (2015) 19 The International Journal of Human Rights 697. See also, T. Lindgren, ‘Ecocide, Genocide and the Disregard of Alternative Life-systems’ (2018) 22 The International Journal of Human Rights 525.
24. B. Pardy, ‘Towards an Environmental Rule of Law’ (2014) 17 Asia Pacific Journal of Environmental Law 163, 165.
25. D. Tarlock, ‘Is There a There There in Environmental Law?’ (2004) 19 Journal of Land Use and Environmental Law 213.
In the light of the shortcomings of the principle of SD, Dupuy and Viñuales argue that ‘fresh thinking is required to move beyond the (transitory) answers provided by the broad concept of SD’, noting that ‘this is perhaps the most important intellectual frontier in contemporary international law’. Some commentators advocate for a turn to real sustainability through embracing ecologically SD. Bosselmann argues that ecologically SD is ‘the kind of development that provides real improvements in the quality of human life and at the same time conserves the vitality and diversity of the Earth’. Based on this definition, ecologically SD can be understood as the idea that real sustainability is achieved by prioritising the conservation of ecological processes that support life and society as whole. As a corollary, real sustainability also demands that negative impacts on the social and environmental well-being that may arise in the pursuit of development are not downplayed.

One could argue that the indictment against the principle of SD overlooks the cases which show that governments have relied on its logic to successfully strike a balance between its three objectives. This argument finds support in cases which illustrate that environmental and resource governance underpinned by the logic of SD has not always brought about environment degradation as a matter of course. For example, solar energy can spur economic development and improve social welfare with minimal impacts to the environment when compared to the use of other sources of energy such as fossil fuels. Other examples, however, appear to confirm what detractors see as the weakness of principle of SD. In Kenya, for example, oil production has commenced in the Northern part of Kenya despite the lack of sufficient baseline data on surface and ground water, air, marine species and terrestrial animals that would have enabled comprehensive assessment of the potential environmental impacts of both offshore and onshore oil production projects. This development exemplifies the criticism that under the framework of SD negative impacts on the environment and human well-being can be relegated to the back banner in favour of economic development. Overall, given the possibility that SD can inspire either positive or negative outcomes, a reasonable assessment of its successes or failures can only be gained through a particularised examination of how the principle works or could work in a specific legal context.

Turning now to the HRHE, its constitutionalisation has largely been received positively due to evidence that links its constitutionalisation to the development of better national environmental standards and better environmental outcomes. Despite the promising prospects of the HRHE, commentators have identified several limitations associated with the use of the human rights approach to environmental protection. A review of literature reveals that one of the main obstacles relating to the use of the HRHE has to do with the nature of the right as an environmental norm. On this point, Bosselmann argues that the term ‘environment’ is an encumbered notion that denotes an ‘economically charged’ idea of the environment as no more than resources that are meant to be exploited, managed and conserved for its instrumental value to humans. Kotzé and French have further argue that the term environment ‘has traditionally included – yet separated out – distinctive aspects such as wildlife conservation, pollution control and waste management often in a

26. P. M. Dupuy and J. E. Viñuales, *International Environmental Law*, 2nd edn (Cambridge: Cambridge University Press, 2018) 24.
27. 1980 World Conservation Strategy (IUCN, UNEP, WWF). Available at: http://data.iucn.org/dbtw-wpd/edocs/WCS-004.pdf (last accessed 15 April 2020).
28. P. Bridgewater, R. E. Kim and K. Bosselmann, ‘Ecological Integrity: A Relevant Concept for International Environmental Law in the Anthropocene?’ (2014) 25 *Yearbook of International Environmental Law* 61, 72–74.
29. See e.g., V. Masson and others, ‘Solar Panels Reduce Both Global Warming and Urban Heat Island’ (2014) 2 *Frontiers in Environmental Science* 14.
30. I. K. Okuthe, ‘Environmental and Social Challenges of Oil and Gas Exploration in Kenya’ (2015) 17 *International Journal of Innovation and Scientific Research* 164.
31. D. R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (Vancouver, Canada: UBC Press, 2011) 233-277.
32. See Bosselmann, above n. 17.
haphazard way that ignores not only ecological complexity but also important social (human) relations and their interactions. This reductionist approach, as several commentators have argued, reinforces destructive ontological assumptions about the superiority of humans in relation to non-human elements of nature. De Lucia summarises the assumptions as being the idea that nature and human beings are radically separate entities, that humans are masters over nature clothed with the authority and know-how to exert mastery over nature in order to improve, control and perfect it with ultimate goal of making it more exploitable. Further building on these critiques, Conor argues that one of the limitations of the human rights approach to environmental protection is that it centralised human concerns in the governance agenda to the detriment of non-human elements of nature. In centralising human being, this approach fails to accord with the reality of the interconnectedness of nature as an integrated whole, with humans being only part thereof.

In response to the challenge associated to using environmental human rights, scholars have been advocating for a shift towards developing environmental norms that acknowledge the need to respect non-human life. Seamon argues, for example, that one of the ways to accommodate the imperative to respect nature is to rethink the way the term environment is employed. Instead of invoking the term to mean exploitable natural resources, Seamon argues in favour of the interposition of ethics that admit that humans are part of an interconnected living order, and protecting this order is essentially protecting human beings. Along the same line, Grear calls for a recognition of the ‘ethico-juridical significance to the material situations of countless human beings, non-human animals and living eco-systems placed in unprecedented danger by the irresponsible pursuit of profit and by its associated ecological legacies’. Grear’s argument is essentially a call for an approach that recognises the need to pair the entitlement to a clean environment with duties to care for elements of nature and ecosystems as whole. Other that being ‘mere moral duties or as obligations imposed by environmental laws’, such responsibilities must ‘incorporate a conception of duty related to the notion of ecological limitations’.

As with the principle of SD, it would be ill-advised to treat the criticism against environmental human rights as a given in every legal context. Legal systems do not follow a uniform approach in formulating or applying environmental human rights. Several constitutions around the globe already pair the HRHE with commensurate obligations to prevent pollution and degradation while others contain skeletal provisions.
proclaiming only that citizens are entitled to a righty to a healthy environment. Thus, whether the now constitutionalised HRHE in Kenya embodies ecological sensitivity as proposed by Grear depends on how it is framed and applied in the Kenyan context. With this in mind, the third and fourth sections examine how relevant legal developments have shaped the principle of SD and the HRHE in Kenya’s legal system.

**The principle of SD in Kenya’s legal system**

The Environmental Management and Co-ordination Act (EMCA) defines SD as ‘development that meets the needs of the present generation without compromising the ability of future generations to meet their needs by maintaining the carrying capacity of the supporting ecosystems’. This definition is elaborated in section 5 of the EMCA, which includes several environmental principles under the ambit of SD. The principles included in section 5 are public participation, the principle of international cooperation in the management of environmental resources, the principles of intergenerational and intragenerational equity; the polluter-pays principle, the precautionary principle and relevant cultural and social principles traditionally applied by any community as long as those principles are not contrary to justice and morality or inconsistent with any written law.

This definition reflects but also expands the popular definition formulated in the 1987 report published by the World Commission on Environment and Development (Brundtland Report). The Brundtland Report defined SD as development that ‘meets the needs of the present without compromising the ability of future generations to meet their own needs’. Notably, the EMCA definition encompasses a duty to preserve the carrying capacity of ecosystems in addition to including within it the principles of environmental law listed above. The concept of carrying capacity of ecosystems generally refers to the need to place external boundaries of growth or development in order to maintain ecosystems’ integrity by preventing irreversible degradation.

The principle of SD enjoys an elevated juridical position in Kenya’s legal system as one of the key national value and principle of governance listed in Article 10 of the Constitution. Article 10 provides that:

> The national values and principles of governance include: (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; (c) good governance, integrity, transparency and accountability; And (d) sustainable development.

As with other national values and principles of governance, SD binds ‘all State organs, State officers, public officers and all persons whenever any of them whenever any of them (a) applies or interprets this Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions’. While there is no question that human rights are justiciable, the question whether other Article 10

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42. See generally, Boyd, above n. 31.
43. The EMCA (Act No. 8 of 1999), section 2.
44. Ibid, section 5.
45. See commentary on its evolution in S. Adelman, ‘Justice, Development and Sustainability in the Anthropocene’ in *Research Handbook on Law, Environment and the Global South* (Cheltenham, UK: Edward Elgar Publishing, 2019) 14. Further commentary on the term’s conceptual evolution in Bosseleman, above n. 41 at 46–56.
46. For a general discussion on the concept, see e.g., P. Del Monte-Luna and others, ‘The Carrying Capacity of Ecosystems’ (2004) 13 *Global Ecology and Biology* 485. V. I. Danilov-Danil’yan, K. S. Losev and I. E. Reyf, *Sustainable Development in Relation to the Carrying Capacity of the Biosphere* (Sustainable Development and the Limitation of Growth: Future Prospects for World Civilization, Berlin, Germany: Springer, 2009) 187–195.
47. Constitution of Kenya, Art. 10(2).
48. Ibid, Art. 10.
principles are also justiciable has required clarification from the courts. In *Mui Basin v Ministry of Energy*, for example, the principle of public participation, one of the Values and Principles of Governance under Article 10 was construed as a justiciable norm that binds the state to ensure the participation of the public in environmental decisions-making and that justifies the nullification of state action that violates the principle.49 This same logic can be extended to the principle of SD to argue that it is both a source of obligations for the state and an objective standard for evaluating the constitutionality of state action in respect to the environment. This position affirms the argument advanced by Kotzé that as a constitutionalised principle, SD is now among one of the few norms that overrides normal laws, embodies the core ethical values of the Kenyan society at an elevated juridical level, and an expression of popular sovereignty.50

As a constitutional principle, SD serves as a guiding principle that shapes the content of environmental law specifically by inspiring ‘the creation of the types of environmental laws that can advance substantive environmental interests’.51 There is evidence that suggests that the principle of SD has influenced the substantive scope and content of environmental laws in Kenya. For example, the preamble of the Forest Conservation and Management Act describes the Act as one intended to, among other objects, ‘provide for the development and sustainable management, including conservation and rational utilisation of all forest resources for the socio-economic development of the country and for connected purposes’.52 This language reinforces the principle’s purpose as contemplated in the Brundtland Report in that it envisions a forest conservation and management regime that strives to achieve a balance between environmental protection, social concerns and economic development. By being rooted on the principle of SD, the statute provides a framework for the conservation and management of forests in a manner that ensures that the economic exploitation of forests does not endanger the well-being of forest ecosystems and the well-being of humans whose survival depends on functioning forest ecosystems.

In terms of section 3 of the EMCA, the principle of SD serves as a framework for guiding courts whenever they are called upon to make a determination as to whether the HRHE has been violated or is at risk of being violated.53 As stated above, the definition of the principle of SD found in the EMCA is expansive and includes several principles of environmental law.54 This provision situates the HRHE within the ambit of SD and in doing so affirms that the protection of human well-being, the overriding purpose of the HRHE, is embedded within SD as a policy objective.

The principle of SD encompasses a constitutional duty to pursue ecologically SD as an obligation for both the state and private actors. In terms of Article 69(2) of the Constitution, ‘Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources’.55 The recognition of the obligation to pursue ecologically SD as a duty for the state and private actors is evidence that Kenya’s legal system recognises that ecological considerations are constrains on the conduct of individual actors just as much as they are on the conduct of the state. The framing of the principle of SD to include the obligation to pursue ecologically SD is further evidence that the principle of SD in Kenya is more than just a framework

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49. *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others*, Constitutional Petition 305 of 2012 [2015] eKLR (The High Court).
50. L. J. Kotzé, ‘Sustainable Development and the Rule of Law for Nature: A Constitutional Reading’ in H. C. Bugge and C. Voigt (eds), *Rule of Law for Nature: Basic Issues and New Developments in Environmental Law* (Cambridge: Cambridge University Press, 2013) 130, 143.
51. Ibid at 135–136.
52. The Forest Conservation and Management Act, 2016.
53. The EMCA, sections 3(3) and 3(5).
54. Ibid, section 3(5)(a–f).
55. Constitution of Kenya, Art. 69(2).
that identifies important policy priorities but one that has normative implications in shaping the conduct of the state and private actors. For example, the obligation to pursue ecologically SD has been construed as the basis for imposing environmental protection duties such as the duty to carry out an environmental impact assessment (EIA).\textsuperscript{56} In context of the broader critical debates relating to SD, the recognition of the duty to pursue ecologically SD is responsive to the call for an approach that ensures that development is carried out in a manner that does not disrupt or destroy biological processes that support all life.

**The HRHE in Kenya’s legal system**

Article 10(2)(b) of the Constitution lists human rights as one of the national values and principles of governance. Since the HRHE is among the human rights recognised in the Constitution, it also qualifies as one of the national values and principles of governance. As with the principle of SD and other principles recognised in Article 10, the HRHE binds all state organs, state officers, public officers and all persons whenever they are involved in applying or interpreting the constitution and legislation, enacting legislation or when making and implementing public policy.\textsuperscript{57} The right, therefore, embodies the standards that should guide the legislature when enacting environmental legislation, the judiciary when it applies or interprets the constitution and relevant environmental laws and the executive when it makes and implements environmental policy.

The HRHE is also a stand-alone right in the Bill of Rights, which proclaims an entitlement for everyone to enjoy a clean and healthy environment. Article 42 expresses the right in the following terms:

> Every person has the right to a clean and healthy environment, which includes the right: (a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and, (b) to have obligations relating to the environment fulfilled under Article 70.\textsuperscript{58}

This entitlement prong of the right is further expanded by the provisions of the EMCA, which states that the HRHE entitles any person in Kenya the right of access ‘to the various public elements or segments of the environment for recreational, educational, health, spiritual and cultural purposes’.\textsuperscript{59}

In addition to being legal norms in the strict meaning of the term, human rights usually embody overriding objectives or human interests that may not be articulated in the text of the constitution.\textsuperscript{60} The HRHE in particular embodies the overall objective of providing protection of human well-being from the consequences of environmental mismanagement, damage and deterioration.\textsuperscript{61} This goal can be accomplished

\textsuperscript{56}. Trusted Society of Human Rights Alliance v James Kimuthia & another Interested Party: National Environment Management Authority & 2 others [2019] eKLR (Environment and Land Court), para. 25. In this case, the requirement that a proponent of a project should carry out an EIA and submit a report of such an assessment to NEMA has been pegged on the duty to pursue ecologically sustainable development.

\textsuperscript{57}. Constitution of Kenya, Art. 10(1).

\textsuperscript{58}. Ibid, Art. 43.

\textsuperscript{59}. The EMCA, section 3(2).

\textsuperscript{60}. Substantial efforts have been dedicated to this endeavour particularly in respect to identifying the objective of civil and political rights through works such as: J. Griffin, On Human Rights (Oxford: Oxford University Press 2008) 33, arguing that human rights exist for the protection of moral agency; J. Rawls, The Law of Peoples (Cambridge, US: Harvard University Press, 1999), 78-81, arguing that the objective of human rights is to limit the sovereignty of the State in order to protect citizens from abuse of power or from the consequences of the State’s dereliction of the duty to protect its citizens, and so on.

\textsuperscript{61}. A. Kiss and D. Shelton, Guide to International Environmental Law (Leiden, Netherlands: Brill Nijhoff, 2007) 238. See also, R. Mwanza, ‘Harnessing the Transformative Potential of the Constitutional Human Right to a Clean and Healthy Environment in the
through adherence to negative and positive obligations directed primarily to the State. The construction of human rights as a source of negative obligations is based on the traditional conception of human rights as vertical constraints on the state vis-à-vis its citizens. The negative dimension in the form of prohibitions directed to the State against taking measures that undermines human well-being in the environmental context. For example, courts can disallow a decision made by a public authority to commission an infrastructure project on the basis that doing so constitutes a violation of the HRHE.62

The doctrine of horizontal application can also be relied to extend negative human rights obligations to private actors. This position finds support in Article 20(1) of the Constitution which provides that ‘[t]he Bill of Rights applies to all law and binds all State organs and all people’. Emerging jurisprudence from courts in Kenya has given meaning to horizontal applicability of human rights while setting the parameters that govern its application. As a general principle, horizontal application of human rights is allowed but only subject to the condition that a petitioner seeking a remedy on the basis of horizontal application is unable to find a remedy through alternative mechanisms as a result of gaps in law.63

The negative dimension of the HRHE goes hand in hand with positive obligations. The basis of the positive dimension of the right is Article 21 of the Constitution, which imposes a duty on the state to observe, respect, protect, promote and fulfil the human rights and fundamental freedoms found in the Bill of Rights. Obligations spelt out in Article 69 of the Constitution64 (dealing with the duties of the state vis-à-vis the environment) and 70 (dealing with the obligation to provide remedies) delineate the scope of the affirmative measures that the State should take to fulfil its duty to observe, respect, protect, promote and fulfil the HRHE. Over and above the obligations listed in Articles 69 and 70, courts in Kenya have in some cases adopted a purposive approach to interpreting the right by construing it as a source of additional obligations. In Njenga v Council of Governors, for example, the Environment and Land Court reasoned that the HRHE encompassed a duty on the state to provide clean, accessible and sufficient sanitary facilities to the members of the public.65

The development relating to the HRHE in Kenya’s legal system have to an extent alleviated the criticism that environmental human rights centralise human well-being and relegate the need to protect nature. As the discussion above shows, the HRHE is formulated in an expansive way to include obligations that go together with the entitlement to a clean and healthy environment. Three obligations listed in Article 69(1) in particular can be described as ecocentric in nature because they aim to secure protection of elements of the environment as such. These included the obligation to maintain 10 per cent tree cover, protect biological diversity and eliminate processes that are likely to endanger the environment. These obligations can be understood as a step in the direction envisioned in Grear’s notion of eco-humane justice and Bosselmann’s idea of environmental responsibilities that embody the concept of ecological limitations highlighted in the second section.

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62. See e.g., Peter K. Waweru v Republic [2006] eKLR (High Court), discussed in the fifth section.
63. See e.g., Rose Wangui Mambo and 2 others v Limuru Country Club and 17 others [2014] eKLR (High Court). Saitrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others [2014] eKLR (High Court). Isaac Ngugi v Nairobi Hospital and 3 others [2013] eKLR (High Court).
64. The obligations include the duties to (a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; (b) work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; (c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; (d) encourage public participation in the management, protection and conservation of the environment; (e) protect genetic resources and biological diversity; (f) establish systems of environmental impact assessment, environmental audit and monitoring of the environment; (g) eliminate processes and activities that are likely to endanger the environment; and (h) utilise the environment and natural resources for the benefit of the people of Kenya.
65. Adrian Kamotho Njenga v Council of Governors & 3 others [2020] eKLR (Environment and Lands Court).
Exploring the interlinkages

That foregoing analysis shows that legal developments in Kenya have been responsive to the criticism directed against SD and environmental human rights. The analysis also demonstrates that the two norms are interlinked. One of the ways in which the interlinkage between the principle of SD and the HRHE is manifest is through their similar normative status as ‘Values and Principles of Governance’ recognised under Article 10. As a function of their status as constitutional norms, they are superior to ordinary laws. In this position, they shape the scope and content of environmental legislation and other relevant ordinary laws and serve as objective standards for evaluating the constitutionality of state action in respect to the environment. Since Article 10 norms are binding on all organs and officials of the state, they can also be relied as a basis for precluding the state from taking any measures, making any law, developing policy or engaging in conduct that violates both norms. As values and principles of governance, they provide a forceful legal basis for challenging laws, policies and conduct that is unsustainable (meaning measures that prioritise economic development at the expense of environmental and social concerns) and insensitive to ecological limits by the state or private actors. This potential can be harnessed to craft laws that are responsive to the need for real sustainability as advocated for in critical debates highlighted in the second section.

Despite the similarity that stems from their being Values and Principles of Governance, there is a difference in normative status, albeit in theory. In contrast to the principle of SD, the HRHE is a standalone human right within the Bill of Rights. This conceptual distinction is important because it implies that the human right is a ‘trump’ in terms of the meaning famously associated with Dworkin. Dworkin argued that in a political context in which the background justification for law and policy is collective welfare, interests that are protected by rights trump collective goals. Since the principle of SD is not part of the Bill of Rights, its constitutionisation does not confer on it the status of a trump. In contrast to the HRHE which commits to the overriding objective of protecting human well-being in the environmental context, the principle of SD is designed to facilitate trade-offs between economic development, social development and environmental protection in line with context-based-assessments by policymakers. One could then argue that the protection of human well-being in the environmental context overrides competing collective goals such as the need to attain economic growth of the entire nation as a whole.

As the analysis in the third section has revealed, the principle of SD embodies the obligation to pursue ecologically SD while the obligations of the HRHE are defined in Article 69. This distinction notwithstanding, the HRHE and the principle of SD share the common goal of enhancing environmental protection, though adopting differing approaches. On the one hand, the HRHE’s relevance to environmental protection is through the commitment to an overriding objective to protect human well-being from the negative consequences of environmental damage. On the other hand, the principle of SD’s relevance to environmental protection is evidenced by the inclusion of environmental protection as one of its three pillars.

The shared goal of environmental protection is a probable explanation for why courts have construed both norms as the basis for similar environmental norms. This approach has been followed in *Kasinga v Kirui & 5 Others*, with the Court determining that failure to comply with the procedure for issuance of an EIA license raises a presumption of violation of HRHE. Similarly, failure to comply with EIA procedures was deemed to be contrary to the principle of SD in the *Adega & 2 others v Kibos Sugar*. In the same vein, the requirement that a proponent of a project should carry out an EIA was pegged on the duty to pursue

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66. R. Dworkin, *Taking Rights Seriously* (Cambridge, US: Harvard University Press, 1977) 152-169.
67. *Ken Kasinga v Daniel Kiplagat Kirui & 5 Others* [2014] eKLR (Environment and Land Court).
68. *Benson Ambuti Adega & 2 others v Kibos Sugar and Allied Industries Limited & 4 others* (Kenya Union of Sugar Plantation and Allied Workers (Interested Party) [2019] eKLR (Environment and Land Court).
ecologically SD in *Trusted Society v Kinuthia*.\(^6^9\) Despite the conceptual differences between them, the application of the two norms as a basis for similar environmental obligations is evidence of their ability to provide constitutional checks against ecologically unsustainable practices in the interest of promoting environment protection and safeguard human well-being.

Perhaps the most consequential interlinkage is manifest by the complementarity that exists between the two norms. The complementarity is brought to light mainly through the courts’ treatment of the HRHE as one of the means for achieving SD as a policy objective. Specifically, courts have clarified that adherence to environmental obligations is a precondition to development activities. In so doing, the HRHE has brought clarity as to the scope and content of the environmental prong of SD. For example, the case of *Luo Council of Elders v Bomet*, the Environment and Land Court stated that the

> import of Article 42 and Article 69 of the constitution in regard to development projects is that such developments have to be sustainable in terms of environmental protection and conservation and have to take account of the interests of present and future generations.\(^7^0\)

Further in relation to complementarity, the courts have construed the principle of SD as basis for disallowing activities that pose danger to the environment and human health. In *Peter K. Waweru v Republic*, the High Court dealt with, *inter alia*, whether the high cost of sanitation facilities excused business owners operating in the Kiresian township from criminal responsibility for the release of untreated effluent from their business premises into the township’s environment. In pronouncing the role of SD in relation to development activities, the High Court stated that:

> The Government . . . through the relevant ministries (and agencies) is under obligation under the law to approve SD and nothing more, which is development that meets the needs of the present generation without compromising the ability of future generations to meet their needs. To this end no further development . . . should be undertaken without satisfying all the environmental and health requirements.\(^7^1\)

While the court did not explicitly invoke the HRHE in the case, its decisions affirm that the goal of the HRHE, which is to protect human well-being from the consequences of environmental damage, degradation and mismanagement, must be accommodated within the framework of SD. More specifically, this case shows that concern for human well-being can be the basis to delay development activities to allow developers and public authorities to comply with environmental and health safeguards. This reasoning hearkens to the position advocated for the debates highlighted in the second section, that protection of human well-being in the context of development is an indispensable component of true sustainability.

Courts have also construed the environmental prong of SD in an ecocentric manner. The *Waweru v Republic* case cited above exemplifies this approach. In this case, the court relied on duty to pursue ecologically SD as the basis for prohibiting the continued release of untreated effluent by businesses owners in Kiserian township. The court stated that the duty to pursue ecologically SD entailed the obligation not to ‘interfere with the sustenance, viability and the quality of the water table and the quality of the river waters’.\(^7^2\) It is noteworthy that the order prohibiting the continued release of untreated effluent was based not only on the need to prevent further pollution but, importantly, on the reasoning that pollution of water

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\(^6^9\) *Trusted Society of Human Rights Alliance v James Kinuthia & another Interested Party; National Environment Management Authority & 2 others*, para. 25.

\(^7^0\) *Luo Council of Elders & 8 others v County Government of Bomet & 24 others* [2018] eKLR (Environment and Land Court), para. 89.

\(^7^1\) *Peter K. Waweru v Republic* [2006] eKLR (High Court).

\(^7^2\) Ibid.
sources located in the proximity of the town threatened the viability of the water ecosystem as a whole. In making this finding, the court gave credence to the argument that ecologically SD demands restriction of ‘social-economical activities that obstruct natural cycles, structures and functions while promoting ecological resilience’. It affirmed that survival of human beings depends not only on the availability of clean water as an isolated public good but on the factors upon which their well-being depends. Given that all life depends on well-functioning hydrological systems, this reasoning has shown that the ecocentrism contemplated under the principle of SD is not necessarily misanthropic because it benefits human beings who depend on different natural systems and biological process for survival.

The case of Rwanyange v Tana Water further exemplifies how environmental and human well-being considerations can be embedded in the SD, thus satisfying the normative demands of the HRHE to protect human well-being in the environmental context. In this case, the court dealt with the question whether a sewerage construction project which was part of a town’s development plan could proceed. This case sought to balance the needs of development of a township with the need to protect human life and health from the consequences of environmental degradation that arose for the implementation of the development plan. The court held that despite the desirability of a sewerage in line with the need to provide adequate sanitation, the failure to conduct a proper EIA endangered the lives of the residents of the town. Without a proper EIA, the court observed that it was not possible for authorities to determine the risks of the sewerage plant posed to human health and life. Lack of information on human and environmental risks would compromise the ability of authorities and those who are likely to be affected to take preventive measure to avoid harm. In order to accommodate the need to protect the life and health of both humans and plants, public authorities were mandated to carry out an EIA according to the standards prescribed by applicable law.

This case demonstrates two important points. First, even though the development envisioned by the authorities is a desirable component of SD, the court gave credence to the logic that real sustainability entails respect not only for environmental considerations but also for human well-being in the environmental context. Moreover, while the protection of human well-being in the environmental context is decidedly an anthropocentric goal, the human who is the beneficiary of the right is an environmentally embedded entity whose well-being is unfathomable apart from a healthy environment and clean environment. By advancing this type of ethos, the HRHE clarifies what is entailed in the environmental prong of SD.

The Save Lamu case is a more recent of the application of the duty to pursue ecologically SD. The appellants challenged the issuance of an environmental and social impacts assessment (ESIA) license to a proponent of a coal-fired power plant that was to be located in the coastal Lamu County. The coal plant was part of Kenya’s efforts to increase its energy capacity to achieve its development and industrialisation goals in accordance with the ‘Kenya Vision 2030’ initiative. It was also meant to contribute to a much bigger development project known as the Lamu Port, South Sudan, Ethiopia Transport Corridor Project (The Corridor Project). The Corridor Project is an ongoing massive infrastructure project that seeks to connect Kenya, Ethiopia and South Sudan, with a long-term goal of ultimately establishing connections to ports in Cameroon and the Central African Republic. The planned coal project was to be located near one of the 32 deep-sea berths that were planned for construction as part of the Corridor Project.

73. L. J. Kotzé, ‘Human Rights and the Environment in the Anthropocene’ (2014) 1 The Anthropocene Review 252, 259.
74. Rwanyange Resident Self Help Group v Tana Water Services Board & 2 others [2019] eKLR (Environment and Land Court).
75. Ibid, para. 37.
76. Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another, Tribunal Appeal No. Net 196 of 2016 [2019] eKLR.
77. LAPSET Corridor Development Authority, Brief on LAPSET Corridor Project (2016), http://vision2030.go.ke/inc/uploads/2018/05/LAPSET-Project-Report-July-2016.pdf (last accessed 21 June 2020).
No doubt, the proposed coal processing plant is a quintessential scenario in which the friction between economic development, social issues and environmental concerns could manifest. As such, the Save Lamu case is a test case of the prospects that the obligation to pursue ecologically SD holds in practice. In this case, the National Environmental Tribunal (Tribunal) invalidated the ESIA license on two main grounds: lack of public participation and insufficiency of the proposed mitigation measures to address anticipated negative impacts on the environment and human well-being. While noting that some negative environmental impacts from the pursuit of development are unavoidable, the Tribunal found that the proponent of the project was nonetheless under a duty to put in place sufficient mitigation measures. The Tribunal further noted that the goal of the EIA process was to enable the country to attain SD and that failure to follow the EIA raises a rebuttable presumption that the HRHE has been violated. In embedding both environmental and human well-being considerations under the ambit of SD, the Tribunal’s reasoning exemplified real sustainability as contemplated by the detractors of SD.

Conclusion

The foregoing analysis is an appraisal of the relationship between the principle of SD and the HRHE in Kenya’s legal system against the background of critical debates that question the effectiveness of both norms. The analysis has shown that the principle of SD and the HRHE in Kenya’s legal system have taken shape in a manner that alleviates some of the concerns raised in relevant critical debates. Specifically, the principle of SD in Kenya is formulated as a norm that encompasses an obligation to pursue ecologically SD while the HRHE includes both the entitlement to a healthy environment and specific duties to respect the environment. The examination of the principle of SD alongside the HRHE was prompted by the author’s initial observation that courts in Kenya had construed the two norms as the legal basis for similar environmental obligations. This approach suggested that the principle of SD and the HRHE are interlinked. The notion that the principle of SD and the HRHE are interlinked finds support in the approach taken by courts in Kenya when settling legal controversies that require balancing between economic and environmental concerns. Courts in Kenya have relied on the HRHE to clarify that the principle of SD encompasses the duty to protection of human well-being from the negative environmental consequences of economic activities. Moreover, courts have construed the obligation to pursue ecologically SD as a basis for disallowing economic activities that endanger biological processes that support human well-being and all life.

Declaration of conflicting interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) disclosed receipt of the following financial support for the research, authorship, and/or publication of this article: The authors received - financial support from the Finnish Cultural Foundation (Grant Number: 00190717 Central Fund).

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78. Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another, Appeal No. 3 of 2018 [2019] eKLR (National Environmental Tribunal), para. 92.
79. Ibid, paras 16 and 74.