

UNIVERSITY OF NAIROBI

SCHOOL OF LAW

**CORPORATE SOCIAL RESPONSIBILITY AND ITS ROLE IN THE REALIZATION
OF THE RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT IN THE MINING
SECTOR: A CASE STUDY OF COAL MINING IN KITUI COUNTY-MUI BASIN**

BY:

HILDAH NTINYARI MUTWIRI

REG. NO. G62/75251/2014

SUPERVISOR

DR. LOIS MUSIKALI

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DECLARATION

The work contained in this thesis is my original work and has not been previously been presented for an award of a degree in this university or any other institution of higher learning. The thesis contains no material previously published except where cited.

SIGNATURE: _____

DATE: _____

HILDAH NTINYARI MUTWIRI G62/75251/2014

Supervisor:

This thesis has been duly submitted with my approval as the University of Nairobi supervisor.

DR. LOIS MUSIKALI,

Senior Lecturer,

University of Nairobi,

School of Law,

SIGNATURE: _____ DATE: _____

DEDICATION

To my parents, for your unwavering and dedicated support throughout this journey. I shall forever remain grateful.

To my beloved husband, thanks for enduring this long process with me, always offering support and love.

ACKNOWLEDGMENT

Firstly, I wish to acknowledge God without whom nothing is possible for enabling me walk this journey to the end. May your Holy name be blessed forever.

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African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.

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International Covenant on Economic, Social and Cultural Rights(ECESCR),GA res.2200(XXI),21 UN GAOR Supp. (No.16) at 49, UN Doc.A/6316(1966);993 UNTS 3;6 ILM 368(1967).

ABBREVIATIONS

CSR Corporate Social Responsibility

EMCA Environmental Management and Coordination Act

NEMA Kenya National Environment Management Authority

NEMA South Africa National Environment Management Act (107 OF1998)

MPRDA Mineral and Petroleum Resources Development Act

NGO Non Governmental Organisation

EPs Equator Principles

ISO International Organisation for Standardization

WHO World Health Organisation

UNCED United Nations Conference on Environmental Development

ICCPR International Covenant on Civil and Political Rights

IEA International Energy Agency

AMD Acid Mine Drainage

DME Department of Minerals and Energy

DEAT Department of Environmental Affairs and Tourism

EMP Environmental Management Programs

EMPR Environmental Management Program Report

DMR Department of Mineral Resources

DEA Department of Environmental Affairs

ABSTRACT

This is a comprehensive study of the contribution of corporate social responsibility to the realization of the right to a clean and healthy environment. The adequacy of the current legal and regulatory framework with regard to CSR is analysed with regard to the role of corporations in ensuring citizens enjoy their right to a clean and healthy environment. There are three key principles used as indicators in this research paper. These principles are; public participation, access to information and access to justice. This study proceeds on a comparative method approach. Whereby a comparison of South Africa and Kenya has been carried out. The impacts of coal mining has been discussed especially with regard to South Africa coal mining industry which has been in existence for over 100 years. This has brought out the positive impacts of coal which are mainly economic. However, the negative impacts of coal are also enormous and this leads to coal being an unsustainable source of energy due to its detrimental effects to the environment people's health. In South Africa there are several laws governing the mining sector and the environment, key among them being the MPRDA and NEMA. In Kenya, commercially viable coal was discovered in 2010 and a contract for mining this coal has already been finalized between a Chinese Company and the Kenyan Government. However, in the backdrop of this, an analysis of the legal system in place to guard the interests of the people of Kenya and the environment is weak. A comparison of the study of South Africa and Kenya brings out the fact that coal mining is generally destructive to the environment and human health and Kenya should endeavour to put the right mechanisms in place to ensure that corporations which engage in coal mining adequately engage the interested and affected local communities by explaining about their operations and the impacts of such operations. In summary the devastating effects of coal need proper prior consent of the communities through public participation. In order to curb the devastating effects of coal, stakeholders also need to be supplied with the right information and at the right time and aggrieved parties should be in a position to access justice. It has been noted that these principles are not applied in Kenya, In addition the legal and regulatory framework in Kenya indeed does not anticipate the negative effects of coal mining and therefore does not adequately provide for the same.

Key terms: CSR, right to a clean and health environment,corporation,mining.

1.0 INTRODUCTION

The history of CSR is strongly intertwined with the emergence over the past forty years of the environment as a worldwide concern coupled with “sustainable development” which incorporates social issues alongside environmental and development ones.¹

CSR has been defined by the World Business Council for Sustainable Development as “the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large.” For an individual company, this means the integration of social (including human rights), environmental and economic concerns into that company’s values and culture. These values are then incorporated into the way in which the company goes about its business and are reflected in that company’s policies, strategies, decision-making, and operations.²

Corporations in their traditional sense are organizations created with the primary objective of producing profits or benefits from the commercialization of a certain product or service. The concept about what is and what corporate social responsibility implies has evolved for the last fifty years. Its principal foundation is in the idea of the corporation as an organization that observes ethical behavior criteria.³

Corporate Social Responsibility (CSR) is a management concept whereby companies integrate social and environmental concerns in their business operations and interactions with their

¹ Prospectors and Developers Association of Canada ‘Sustainable Development and Corporate Social Responsibility Tools, codes and standards for the mineral exploration industry’ (March 2007).

² Ibid.

³ Francesco Boeren, Oxfam International ‘Corporate Social Responsibility in the Mining Sector in Peru’ Social Capital Group, 7-8.

stakeholders. CSR is understood as being the way through which a company achieves a balance of economic, environmental and social imperatives while at the same time addressing the expectations of shareholders and stakeholders. CSR aims at aligning private enterprises to the goal of sustainable global development. The general understanding is that for an organization to be sustainable, it must be financially secure, minimize or eliminate its negative environmental impacts and act in conformity with societal expectations.⁴

The fundamental idea of CSR is that business corporations have an obligation to work towards meeting the needs of a wider array of stakeholders. CSR can also be viewed as a set of management practices that ensures the company maximizes the positive impact of its operations on society or operating in a manner that meets and even exceeds the legal, ethical, commercial and public expectations that society has of the business.⁵

The World Bank also defines CSR as “the corporations commitment to negotiate ethically and contribute to sustainable economic development working with all relevant stakeholders to improve their lives in ways that are good for the corporation, the sustainable development agenda and the society in general.”⁶

The Inter-American Development Bank (IADB) further defines CSR as “ a business vision that conceives respect for ethical values, persons, communities and environment as an integral

⁴ United Nations Industrial Development Organization ‘What is CSR?’ <www.unido.org/en/what-we-do/trade/csr/what-is-csr.html> accessed 18/02/2015.

⁵ Dima Jamali, Ramez Mirshak ‘Corporate Social Responsibility(CSR): Theory and Practice in a Developing Country Context’ (200) Journal of Business Ethics, 243.

⁶ Francesco Boeren (n3)9.

strategy that gives added value and as a consequence improves the competitive situation of the corporation.”⁷

As we can observe from these definitions, there does not exist one uniform definition for CSR nor a single criterion when it comes to determining what CSR comprises. CSR is a broad concept besides being complex and its content will vary according to each specific circumstance.⁸

Human rights and the environment are inter-related and this linkage is in need of reinforcement to promote human rights as well as a healthy environment. The survival and development of humanity rests on a healthy and safe environment. Protection of environment is an essential aspect of sustainable development.⁹

The Kenyan legal framework is wanting in addressing the right to a healthy environment of the persons whose health is most likely to be affected by the mining activities; this includes residents living in areas adjacent to the mines and those who will work in the mines.

The International Covenant on Economic, Social and Cultural Rights recognize the right to the enjoyment of the highest attainable standard of physical and mental health. The steps to be taken by parties towards the realization of this right include *inter alia*, the improvement of all aspects of environmental and industrial hygiene. This has been interpreted to require parties to ensure an adequate supply of safe and portable water and basic sanitation and to take steps to protect its population from exposure to harmful chemicals or other environmental contaminants.¹⁰

1.2 STATEMENT OF THE PROBLEM

⁷ Ibid.

⁸ Ibid10.

⁹ Centre for National Environmental Law ‘UNEP Compendium on Human Rights and the Environment: Selected International Legal Materials and Cases’ (2009) 9.

¹⁰ Ibid.

The problem that arises is whether Kenya's laws adequately provide/foresee and offer redress for the immediate and future environmental and health challenges of coal mining perpetrated by corporations in Kenya and its impact on the surrounding communities and mine workers.

Lack of effective regulation of multinational corporations in developing countries contributes in foreign investors engaging in practices that degrade the environment. As a result of increasing growth of business activities globally and scientific advance, there has been increasing awareness about harm to human health and environmental damage caused by private business activities. These problems make it necessary for business and industry to be regulated at all levels and for the principle of sustainable development to be established in both international and national environmental laws to ensure that foreign investments and other business activities lead to development that is sustainable in nature.¹¹

Studies show that every phase of coal's lifecycle presents major human health risks and contributes to ecological degradation, loss of biodiversity and climate change. In addition to release of greenhouse gases which are the primary cause of climate change, coal mining and electricity generation remit carcinogenic substances into our air, water and land; these emissions include mercury, lead, cadmium, arsenic, nitrogen oxides and inhalable airborne particulates.¹²

Research and studies have also found out that as a result of residents' proximity to coal mines; members of the mining communities are plagued by higher chronic heart, respiratory, and kidney disease mortality. It has also been discovered that the rates of birth defects are significantly

¹¹ Lal Kurukulasuriya, Nicholas A. Robinson 'Training Manual on International Environmental Law' (2007)359.

¹² Climate Council, Climate and Health Alliance 'Joint Statement on the Health Effects of Coal in Australia' (2010)2.

worse in coal mining areas for instance the Appalachia in the United States, with defects ranging from circulatory and respiratory issues to central nervous system problems.¹³

Therefore with all these statistics at hand and with Kenya anticipating coal mining in Kitui County, it is obvious that we are staring at an environmental disaster in the near future and it is the time that we put up sound legal, policy and institutional frameworks to ensure that the right to a clean and healthy environment is upheld and the anticipated environmental degradation from coal is curbed from the onset.

1.3 JUSTIFICATION OF THE STUDY

This study is justified on the basis that although there exists a legal framework governing environmental protection against degradation as a result of extraction of natural resources, there is an apparent oversight regarding the right to a clean and healthy environment and precisely with regard to persons living in the communities surrounding the coal mines as well as those who will work in the coal mines. This is the problem this paper seeks to address.

The negative impacts of coal mining are perpetrated by corporations which are involved in the business of coal mining. This study therefore seeks to find out what these corporations as legal citizens of the state are doing to mitigate their negative environmental impacts and act as responsible citizens.

In developed countries and countries which have been mining coal for decades like Australia, there is still the need for the government to acknowledge the significant human health risks associated with the whole lifecycle of coal production from mining, transportation, combustion

¹³ Rachel Saphile 'Engulfed in a toxic cloud; the effects of coal mining on human health'(2009-2012)Vol IV,No.1 Havard College Global Health Review.

and disposal of wastes. There is therefore urgent need to fund research and account for these risks in policy, planning and investment decisions.¹⁴

1.4 STATEMENT OF OBJECTIVES

The objectives of this study are;

- I. To establish the adequacy of the current legal regime in Kenya, regarding corporate social responsibility.
- II. To identify the role of corporations in ensuring that residents enjoy their right to a clean and healthy environment.
- III. To come up with suggestions to ensure that corporations practice corporate social responsibility towards upholding of the right to clean and healthy environment.

1.5 RESEARCH QUESTION

What is the contribution of corporate social responsibility towards the realization of the right to a clean and healthy environment?

1.6 HYPOTHESIS

The hypothesis of this research paper is;

- I. That the legal framework as currently constituted does not adequately address the right to a clean and healthy environment and the role of corporations to uphold the same through CSR.

1.7 THEORETICAL FRAMEWORK

¹⁴ Climate Council, Climate and Health Alliance(n 12).

This research is based on several theories. The first theory is that of Thomas Hobbes and the concept of the social contract. According to Hobbes, in the natural state, life was solitary, nasty, brutish and short. In Hobbes opinion natural law teaches us the need for self preservation; law and governance are required if we are to protect order and security.¹⁵

We therefore need to surrender our personal freedoms to the social contract in order to create an orderly society. For Hobbes, every act we perform, though ostensibly kind or altruistic, is actually self preserving. Thus when someone gives a donation to charity, it is in fact a means of enjoying their power. In his view, any account of human action, including morality must acknowledge our essential selfishness.¹⁶

As such when corporations engage in corporate social responsibility it is actually a means of enjoying their power within the community and a means of self preservation for the sake of the corporations interest of profit making. As a result of the aspect of self preservation, corporations engage in short term shaky community projects when it comes to CSR and they do not address the underlying problems caused by their activities in a particular community due to the aspect of selfishness.

The second theory that this study is based on is John Locke's theory on the concept of the social contract. Locke adopts a different position from Hobbes and argues that far from being the nightmare portrayed by Hobbes, life before the social contract was almost total bliss. One major defect was however, that in this state of nature property was inadequately protected. It was in order to rectify this flaw that man forfeited under a social contract some of his rights. Locke attaches considerable importance to man's right to property as envisaged in this quote "God

¹⁵ Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (3rd edition, Oxford University Press 2006) 17.

¹⁶ *Ibid.*

owns the earth and has given it to us to enjoy; there can therefore be no right of property. But by mixing his labour with material objects, the labourer qualifies the right to the thing he has created.”¹⁷

According to Locke’s theory, the state exists to preserve the natural rights of its citizens. When government fails in this task, citizens have the right and sometimes even the duty to withdraw their support and even to rebel. According to Locke, the social contract preserved the natural rights to life, liberty and property and the enjoyment of private rights: the pursuit of happiness engendered, in civil society, the common good. Locke’s natural right to freedom is circumscribed by the law of nature and its injunction that we should not harm each other in life, health, liberty or possessions.¹⁸

The other proponent of the social contract theory is Jean Jacques Rousseau. Rousseau conception of the social contract rests on the idea that it represents an agreement between the individual and the community by which he becomes part of, this is what Rousseau calls the general will. He contends that as an individual the subject may be selfish and decide that his personal interest should override the collective interests; but as part of the community the individual subject disregards his egotism to create the general will which is popular sovereignty. It determines what is good for the society as a whole.¹⁹

¹⁷ Ibid 19.

¹⁸ Ibid20.

¹⁹ Ibid.

The social contract is encapsulated in the following terms "Each of us puts his person and all his power in common under the supreme direction of the general will; and in a body we receive each member as an indivisible part of the whole."²⁰

The general will addresses the good of the society as a whole rather than an assembly of individual rights that place their own desires or those of particular factions, above the needs of the people at large. The indivisible and inalienable general will decides what is best for the community, should an individual descend into selfishness, he must be compelled to fall in line with the dictates of the community.²¹

The other theory that this study is based on is the theory of respect for persons advanced by Emmanuel Kant. Kant is best known for defending a version of respect for persons principle which implies that any version of business which puts money at par with people is immoral. Kant argues that the highest good is the good will and to act from a good will is to act from duty.²²

Thus it is the intention behind an action rather than its consequences that make that action good. For instance, if a merchant is honest so as to earn a good reputation, these acts of being honest are not genuinely moral. The merchant is only truly moral if he or she is honest because being honest is right and it is one's duty. Persons of good will do their duty because it is their duty and for no other reason. It is this emphasis on duty and the lack of concern with consequences that make Kant the quintessential deontologist.²³

1.8 RESEARCH METHODOLOGY

²⁰ Ibid.

²¹ Ibid 21.

²² BOWIE N E, *Business Ethics: A Kantian Perspective* (Oxford: Blackwell Publishers) 1.

²³ Ibid.

In this study the comparative method of study will be used. This thesis will study South African legal regimes and efforts put forward to ensure the realization of the right to a clean and healthy environment through corporate social responsibility. A study of Kenya will also be undertaken and a comparison of the two countries will be done.

Cruz describes comparative law as “*The systematic study of particular legal traditions and legal rules on a comparative basis*”. Therefore, to qualify as a comparative legal enterprise, comparative law requires the comparison of two or more; legal systems, legal traditions, selected legal aspects, institutions or branches of legal systems.²⁴ Hage also agrees with Cruz and states that comparative law as a legal method is the comparison of the law of different jurisdictions, legal families or legal traditions with a special interest in the similarities and differences.²⁵ Comparative law is primarily a method of study rather than a legal body of rules.²⁶ However, there is no generally accepted framework of comparison though Cruz states that most writers assume that the comparative methods which should be applied are obvious.²⁷ Glendon is of the opinion that comparative is a variety of methods for looking at law. The major aim of comparative law being to acquire knowledge.²⁸

Every investigation begins with the posing of a question or a working hypothesis “The basic methodological principle of comparative law is that of functionality . This principle stipulates that in law the only things which are comparable are those which fulfill the same function. Therefore the research question must be posed in purely functional terms – what function does the rule under scrutiny fulfill in its own society? Alternatively, which institution, legal or otherwise,

²⁴ Peter De Cruz, *Comparative Law in a Changing World* (London: Cavendish Publishing Limited, 1995)3.

²⁵ Jaap Hage, ‘Comparative Law as Method and the Method of Comparative Law’ Maastrich European Private Law Institute (May 2014) < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2441090 > Accessed on 20/09/2016.

²⁶ Peter De Cruz (n 24)5.

²⁷ Ibid.

²⁸ Glendon, Carozza et al, *Comparative Legal Traditions in a Nutshell* (192 West Publishing Co) 4.

fulfills the function under scrutiny in this particular society?²⁹Hence the comparison. According to Michaels, the basic functions of the functional method being used in comparative legal method include; “the epistemological function of understanding legal rules and institutions, the comparative function of achieving comparability, the presumptive function of emphasizing similarity, the formalizing function of system building, the evaluative function of determining better law, the universalizing function of preparing legal unification and the critical function of providing tools for the critique of law.”³⁰

Among the purposes of comparative law methodology is that it aids in legislation and law reform. It is also a means of understanding legal rules and it contributes to the systematic unification and harmonization of laws.³¹ This research paper aims at comparing the South African and the Kenyan legal systems with regard to CSR activities of the mining companies and their role towards realizing the right to a clean and healthy environment. The comparison will help ascertain similarities and differences and an analysis of solutions offered by the two systems will be done.

In addition, Hage is of the opinion that the major motivation of conducting comparative law research is to find the best possible law. This is because a study of rules in a foreign system tells us about the quality of these rules and brings out the possibility and desirability of adopting these rules or borrowing from them in our own legal system.³² This research paper aims at scrutinizing the relevant laws and regulations pertaining to CSR in South Africa and how multinationals have used the tool of CSR to contribute towards the right to a clean and healthy environment. This

²⁹ Peter De Cruz (n 24) 228.

³⁰ Ralph Michaels, ‘The Functional Method of Comparative Law’ The Oxford Handbook of Comparative Law (November 2006) <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2033&context=faculty_scholarship> accessed on 20/09/2016.

³¹ Peter De Cruz (n 24) 19.

³² Jaap Hage (n 25).

country has been specifically picked because it is a common wealth country and therefore its legal system is similar to the Kenyan legal system. The other reason for choosing South Africa is that it is in Africa and it is slightly developed than Kenya and in particular it is a country that is seasoned when it comes to mining matters. As such out of comparing the relevant legal framework and regulations in South Africa, this research paper hopes to come up with possible desirable characteristics of these rules which Kenya can adopt in preparation of coal mining activities at the Mui Basin.

Glendon is of the opinion that comparative law enables academics to understand their legal system better. This does not mean that it would not influence them from bias of thinking that their legal system is the best or the only way in which things should be done. However, comparative legal study should help academics acquire a sense of what is valuable and areas that are in need of development in their own system.³³

The common problems which arise as a result of the use of comparative legal methodology are; Linguistic problems, this is where by the researcher is comparing two legal systems whose national languages are not the same. In this case the researcher may need an interpreter and as a result very crucial information may be omitted or misinterpreted in the research. The other problem is comparability of legal systems which are not familiar with each other, this is because from such comparison the researcher will not have much to compare. The other issue is the risk of the researcher imposing his or her own legal conceptions. There is also the problem of omission of extra legal factors during research some of which corroborate the legal research thus leading to the actual findings of the research.³⁴

³³ Glendon, Carozza et al (n 28)6.

³⁴ Peter De Cruz (n 24)211.

The sources of information for this paper will mainly be;

- I. The Constitution.
- II. The Judicature Act.
- III. Legislation will also contribute to the study both in the Kenyan context and South Africa.
- IV. International instruments.
- V. Library based (secondary data), whereby the materials will be sourced from books, articles and journals already written by scholars in the subject.
- VI. Internet research; I will also look at various websites with articles, journals and reports relevant to the study.

1.9 LITERATURE REVIEW

Kurukulasuriya and Robinson, argue that all economies in the world depend on the success of businesses to manufacture commodities, process products, provide services and undertake a variety of economic activities. This is done in a country's own market for purposes of export or import or through multinationals who act as foreign investors in other countries. Therefore, businesses provide employment and are a large source of livelihood for many people across the globe. However, despite all these benefits, businesses also contribute greatly to environmental

damage through contamination of environmental media like soil, water and air and further through the depletion of natural resources.³⁵

They further argue that, as business activities widen in scope and geographical range with the opening up of markets and investment opportunities through global trade initiative, the potential for these businesses to damage the environment also increases. Laws, rules and regulations have been created specifically to control business activities in order to prevent harm to human health and the environment and to reduce historic adverse impacts. In addition to these laws and regulations, there are increasing requirements on businesses to act in a transparent manner in order to aid investment decisions and to keep the public informed on the impact of business locally and globally. This is because, while business activities make significant contributions to life and economic health in many areas, they may on the downside consume natural resources, produce goods that might pose environmental problems and contribute to unacceptable human health and environmental deficits.³⁶

Boeren states that CSR should seek to improve the public understanding and recognition that social and economic justice is crucial to build sustainable development. Emphasis should therefore be laid for businesses to be socially responsible and give comprehensive benefits at the same time respecting the rights of people affected by their activities. Therefore the mining sector should be developed respecting internationally recognized human rights. In order to realize this, the state should play a fundamental role to ensure that laws and regulations are put into place.

³⁵ Lal Kurukulasuriya, Nicholas A. Robinson (n 11)357.

³⁶ Ibid.

This enables the state to guarantee citizens' rights by establishing clear rules and sanctions for those firms and citizens that break them.³⁷

This research paper intends to find out what contributions the mining corporations can make to bridge the gap between their economic advantages to the community and their contribution to environmental damage. This will mainly be looked into through the corporate social responsibility requirement of the corporation.

According to Muigua, there is no universally accepted definition of the environment. However, the environment extends past the physical surroundings to include issues such as social and cultural conditions that influence the life of an individual or a community. Muigua further states that the environment represents the living space, quality of life and the health of human beings, including the future generations.³⁸

The right to a clean and healthy environment is envisaged in the Stockholm declaration of 1973, which explicitly states that;

“man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations”³⁹

³⁷ Francesco Boeren(n 3)1.

³⁸ Kariuki Muigua, 'Reconceptualising the Right to Clean and Healthy Environment in Kenya'(2015)-6.

³⁹ Declaration of the United Nations Conference on the Human Environment Stockholm, 16 June 1972, UN Doc.A/CONF.48/14/Rev.1.

Muigua notes that this Declaration recognized the right to a good quality environment and additionally placed a responsibility on human beings to protect and improve the environment for present and future generations.⁴⁰

Research has shown that there is a positive correlation between coal mining and poor health. Hendryx and Ahern argue that increased coal demands may increase negative health effects of coal mining activities including occupational hazards of coal mining, air pollution from burning coal, health consequences of carbon dioxide and community exposure to mining activities.⁴¹ In their 2008 study on the health effects of coal mining in West Virginia, they find that residential proximity to heavy coal production was associated with poorer health status and with higher risks for cardiopulmonary diseases, chronic lung cancer, hypertension and kidney diseases.⁴²

Their findings support those of the Climate Council which found that coal mining and burning coal for electricity emits toxic and carcinogenic substances into the air, water and land resulting into coal pollution. This pollution is linked to the development of potentially fatal diseases such as respiratory and heart diseases, cancers and other health conditions⁴³.

This study therefore seeks to scrutinize the Kenyan legal frame work to find out if it appreciates the negative environmental and health impacts of coal mining on the environment and citizens and the measures that have been put in place to address the adverse effects of coal mining on the environment and the health of citizens when coal mining starts in Kenya. This study also examines the adequacy of the legal measures already in place.

⁴⁰Kariuki Muigua, 'Reconceptualising the Right to Clean and Healthy Environment in Kenya'(2015)-6.

⁴¹ Michael Hendryx PhD and Melissa M Ahern PhD, 'Relations between health indicators and residential proximity to coal mining in West Virginia'(April 2008) American Journal of Public Health April , Vol 98, No. 4.

⁴² Ibid.

⁴³ Climate Council, Climate and Health Alliance(n 12).

From the foregoing literature, the doctrine of corporate social responsibility has not been contemplated. This research intends to fill this gap by envisaging a situation whereby corporations behave in a socially responsible manner as corporate citizens geared towards solving the negative impacts anticipated by the coal mining activities in the Mui Basin and the consequential protection of the right to a clean and healthy environment of the persons likely to be affected by the coal mining activities.

1.10 LIMITATIONS

This research limits itself to corporate social responsibility and its contribution towards the right to a clean and healthy environment with regard to mining activities in the Kitui Mui Basin.

This study will be limited to the following statutes;

- I. The Constitution of Kenya 2010.
- II. The Mining Act No.12 of 2016.
- III. The Environmental Management and Coordination Act (EMCA).
- IV. The Community Land Act No. 27 of 2016.
- V. The Access to Information Act No. 31 of 2016.

1.11 CHAPTER BREAKDOWN

CHAPTER 1-INTRODUCTION

This chapter will entail a brief explanation on the sufficiency of the current legal, policy and institutional framework with regard to corporate social responsibility and its contribution towards the upholding of the right to a clean and healthy environment. It will also cover significance and justification of the study. It will then proceed to give the hypothesis of the

research and the questions the research seeks to answer. It will also entail the methods that will be used to carry out the research in order to ensure accurate and comprehensive findings. Literature review also forms part of this chapter for the purposes of analyzing the current position of this study with reference to different writers. Finally there is the chapter break down of the entire study.

CHAPTER 2- THEORETICAL FRAMEWORK AND LITERATURE REVIEW.

This chapter will focus on theoretical framework whereby the social contract theory as discussed by Thomas Hobbes, John Locke and Jean Jacques Rousseau will be analyzed. In addition the theory proposed by Immanuel Kant will also be highlighted. This chapter will also include literature review. This is the chapter which will also come up with the normative framework of the study.

CHAPTER 3-SOUTH AFRICAN LEGAL REGIME WITH REGARD TO CORPORATE SOCIAL RESPONSIBILITY AND ITS ROLE TOWARDS REALIZATION OF THE RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT.

This chapter will dwell on South African legal regime on corporate social responsibility and the role of corporations towards ensuring the right to a clean and healthy environment is respected, with specific interest on the coal mining sector.

CHAPTER 4- KENYAN LEGAL REGIME WITH REGARD TO CORPORATE SOCIAL RESPONSIBILITY AND ITS ROLE TOWARDS REALIZATION OF THE RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT.

This chapter will focus on an in-depth scrutiny of the Kenyan laws relating to corporate social responsibility and the corporations' role towards the right to a clean and healthy environment.

CHAPTER 5-COMPARATIVE STUDY

This chapter will draw a comparative analysis between Kenya and South Africa with regard to the area of study.

CHAPTER 6 -CONCLUSION

This chapter will come up with suggestions on the way forward with regard to pollution of the environment and the health impacts resulting from such pollution which is caused by coal mining perpetrated by big corporations.

This is the final chapter; it will summarize the research findings and use them to come up with a conclusion, hence answering the questions the study had embarked on from the onset.

CHAPTER TWO-THEORETICAL FRAMEWORK AND LITERATURE REVIEW

2.0 INTRODUCTION

This chapter sets out to cover theoretical framework and literature review. The theoretical framework discusses in detail the social contract theory with reference to Thomas Donaldson's book on 'corporations and morality' among other writers. Immanuel Kant's theory of morality and duty is also discussed with a special reference to Bowie's book 'Business Ethics: A Kantian Perspective' among other writers. The second part of this chapter is literature review where this paper answers the question whether corporations should be socially responsible. Regulation of corporate social responsibility activities is also discussed. The pyramid of corporate social responsibility is also covered. The right to a clean and healthy environment is discussed. In addition CSR and sustainable development is discussed with emphasis on public participation, access to information and access to justice. Finally the normative framework is laid down.

6.2 THEORETICAL FRAMEWORK

2.2.1 THE SOCIAL CONTRACT THEORY

The dominance of the social contract in political theorization has led to interest in analyzing the role of business in society from the perspective of a social contract. The social contract concept was developed by philosophers of the 17th and 18th century including Thomas Hobbes, John Locke and Jean- Jacques Rousseau. The social contract is an implied agreement by which people agreed to create government and maintain social order. It provides the rationale behind western democracies ideology that the legitimate State authority must be derived from the consent of the governed. This research paper is based on the assumption that an implicit social agreement also

exists between business and society. It is to this inherent agreement that we can look to identify the duties and rights of business *vis-a-vis* the society.⁴⁴ In the context of CSR, an alternative possibility is not that business might act in a responsible manner because it is in its commercial interest, but because it is part of how society implicitly expects business to operate.⁴⁵

Therefore a proper analysis of CSR would involve meeting the needs of all stakeholders. This basis is described in the following key principles:

- To treat employees fairly and equitably
- To operate ethically and with integrity
- To respect basic human rights
- To sustain the environment for future generations
- To be a caring neighbour in their communities⁴⁶

The contract is considered to be an evolving document. Donaldson has attempted to analyze the social contract between the corporation and society. According to Donaldson the political social contract provides a clue for understanding the contract for business: if the political contract serves as a justification for the existence of the State, then the business contract by parity of reasoning should serve as justification for the existence of the corporation.⁴⁷

Donaldson drew a parallel analogy to traditional device in social contract theory and suggested looking at the state of nature which he called for his purpose 'state of individual production', that is, the state of affairs existing before the introduction of productive organizations. In the state of individual production, there would exist 'economically interested persons who have not yet organized themselves or been organized into productive organizations'.⁴⁸ According to him, two

⁴⁴ Thomas Donaldson, *Corporations and Morality* (New Jersey: Prentice Hall 1982) 21.

⁴⁵ Lance Moir, 'What do we Mean by Corporate Social Responsibility?' (2001) *Corporate Governance* vol 1 Issue 2, pg 16-22, 10.

⁴⁶ Business Impact (2000) *Winning with integrity: A guide to social responsibility*. London: Business in the Community < http://www.bitc.org.uk/sites/default/files/winning_with_integrity.pdf > accessed on 22/09/2016.

⁴⁷ Olufami Amao, 'Corporate Social Responsibility, Social Contract, Corporate Personhood and Human Rights Law: Understanding the Emerging Responsibilities of Modern Corporations' (2008) 33 *Australian Journal of Legal Philosophy* 121.

⁴⁸ Thomas Donaldson (n 44) 44-45.

principal classes of people stand to benefit or be harmed by the introduction of productive organizations: the consumers and the employees (i.e. society as consumers and employees).⁴⁹

It is however argued that narrowing down society to consumer and employees in analyzing the social contract would impair Donaldson's attempt as it would be difficult to account for all the ramifications of the externalities of corporation from that perspective. Most communities for example are as much affected by companies operations as consumers and employees. What are the terms of the contracts? Donaldson enumerated three broadly.⁵⁰ According to Donaldson people as consumers would hope that the introduction of productive organizations would better satisfy their interests for shelter, food, entertainment, transportation, health care, and clothing. There is therefore a promise from the standpoint of the corporation to 'enhance the satisfaction of economic interests'.⁵¹

Secondly people as workers would also expect to increase income potentials, diffuse personal liability and the adjustment of personal income allocation in a way that avoids the vicissitudes of life. However, the contract recognizes that there are major drawbacks to the introduction of productive organizations just as there were drawbacks in the political social contract (governments' tendencies to abuse its power). He noted that potential harms to customers include pollution, depletion of natural resources, destruction of personal accountability and misuse of power. In the case of employees the harms include the alienation of workers, restriction of workers control over working conditions and the dehumanization of the worker. Thus Donaldson posited that the social contract will specify that these negative consequences be minimized while the positive benefits are maximized. According to Donaldson as part of such a social contract from the standpoint of consumers, productive organizations should minimize:

- Pollution and depletion of natural resources
- Destruction of personal accountability
- The misuse of political power

And from the perspective of the worker; corporations should minimize:

⁴⁹ Ibid 133.

⁵⁰ Ibid 45.

⁵¹ Ibid.

- Worker alienation
- Lack of workers' control over working conditions
- Monotony and the dehumanization of the worker⁵²

Hence, the social contract according to Donaldson requires that productive organizations minimize evils relative to consumers and workers welfare. The question would then be how corporations make the necessary trade-offs. According to Donaldson society might believe that on balance, people as workers stand to lose from the introduction of productive organizations, and that potential alienation, loss of control, and other drawbacks make the overall condition of the worker worse than before. However, if the benefit to people as consumers fully overshadowed these drawbacks, the contract would still be expected to be enacted. However, Donaldson placed an important caveat: people make trade-offs only on the condition that it does not violate minimum standard of justice for example reducing a given class of people to inhuman existence, subsistence poverty or enslavement.⁵³

Donaldson thus posited that an inference could be drawn that a tenet of the social contract will be that productive organizations are to remain within the bounds of the general canons of justice. As such Donaldson opined that the application of the concept of justice to productive organizations appears to imply that productive organizations avoid deception or fraud, that they show respect for their workers as human beings, and that they avoid any practice that systematically worsens the situation of a given group in society.⁵⁴

Sacconi terms the social contract as a normative theory used to identify the terms of the agreement that would be acceptable from both a rational bargaining perspective and an impartial stand point that is from the point of view of any stakeholder. Sacconi argues that the social contract can be understood as a potential explanation of how negotiations of the terms of the contract may give rise to a firm with fiduciary duties towards the owners and social responsibility towards all the stakeholders. Sacconi posits the state of nature prior to the creation of the firm as a state where there was bilateral transactions among stakeholders regulated by incomplete contracts which were subject to reciprocal opportunistic behavior resulting to

⁵² Ibid (n 44)53.

⁵³ Ibid.

⁵⁴ Ibid.

prohibitive bargaining costs which would render them inefficient. At the same time parties to these transactions are totally oblivious about the negative external effects of their transactions to other agents, who although they do not participate are greatly affected. This is basically a Hobbesian scenario in which the life of economic transactions among agents is "solitary, poor, nasty, brutish and short". The stakeholders are therefore forced to come up with better engagement rules, they therefore create an association whereby all their transactions can be undertaken as per a set of agreed to rules, while at the same time the negative effects of those who do not participate in the benefits from the transactions are reduced to the minimum.⁵⁵

Sacconi is of the view that this social contract should include terms like; rejection of plans which generate negative externalities for those not participating in the venture, or if these negative externalities are essential for production the third party should be compensated so that they are rendered neutral. The second term is the company to ensure its production is up to maximum. The third term is distribution of the produced goods which is rationally acceptable to each stakeholder in a bargaining process free from force or fraud and based on an equitable status quo.⁵⁶

In business, social contract theory includes the obligations that businesses of all sizes owe to the communities in which they operate and to the world as a whole. This involves corporate philanthropy, corporate social responsibility and corporate governance.⁵⁷

The social contract theory has been advanced as a theoretical basis for explaining the emerging practice of Corporate Social Responsibility (CSR) by corporations. Since the 17th century the social contract concept has also been used to justify human rights. Business ethicists and philosophers have tried to construct and analyze the social responsibility of corporations from a social contract perspective without linking it to human rights or the political social contract.⁵⁸

⁵⁵ Lorenzo Sacconi, 'A Social Contract Account for CSR as Extended Model of Corporate Governance (Part I) Rational Bargaining and Justification' (2004) Department of Economics University of Trento <http://web.unitn.it/files/10_04_sacconi.pdf> accessed on 22/09/2016.

⁵⁶ Ibid.

⁵⁷ Jeremy Bradley 'Social Contract Theories in Business' <<http://smallbusiness.chron.com/social-contract-theories-business-59955.html>> Accessed on 22/09/2016.

⁵⁸ Thomas Donaldson (n 44) 53.

The argument of this paper is that the modern corporation has acquired a status that is akin to that of a person under the law and should be treated as such in determining its social responsibility and its responsibilities under international human rights law. Since the social contract has been very influential in the construction of State and individual responsibility, it will be necessary to examine the role of the corporation within the social contract and thus understand the position of the corporation.

The social contract concept has been very influential in the political context and the attempt here is to extend the concept to corporations in a logical way. The original understanding of the social contract postulates that society decides to move from a situation of undefined rights and incessant conflict over resources to a society under a social contract whereby individuals agree to honor the rights of others in return for guarantees that their own rights will be respected and protected. The State is the repository in which individuals vest authority to ensure that the terms of the contract are complied with. The State thus mediates between individuals and between individuals and society. It has been suggested that the idea of corporate social contract underlies the CSR concept.⁵⁹

The idea is that corporate social contract concerns a firm's indirect societal obligations and resembles the "social contract" between citizens and government traditionally discussed by philosophers who identified the reciprocal obligations of citizens and the state. Thus, business should act in a responsible manner because it is part of society and also enter into a social contract with society. From this perspective CSR is described as 'the obligation stemming from the implicit "social contract" between business and society for firms to be responsive to society's long-run needs and wants, optimizing the positive effects and minimizing the negative effects of its actions on society'.⁶⁰

Amao argues that drawing from legal theorists' discourse on the nature of the corporation and emerging jurisprudence the corporation has moved from being just an artificial person, to something similar to a natural person. This change should therefore inform the understanding of the role of the corporation under the social contract. It is contended by this writer that the

⁵⁹ Geoffrey P. Lantos, 'The Boundaries of Strategic Corporate Social Responsibility' (2001) 18 *Journal of Consumer Marketing*, 595-632.

⁶⁰ *Ibid.*

existence of the political social contract before the introduction of productive organizations or corporations has a bearing on any analysis of the social responsibility of business. The corporations entered the scene at a later stage and would thus negotiate a contract based on the existing political social contract.⁶¹

Lantos has however critiqued the social theory as being vague, as it is not in writing, varies from place to place and does not indicate to what extent the corporation should be conceived as a public as against private enterprise and the relevance of firms size to the equation. ⁶²

Wolgast has also critiqued the social contract by stating that ascribing morality to the corporation is directly linked with the conception of the corporation as an artificial person under the law. According to Wolgast, the corporation is in the class of artificial persons who act on behalf of stockholders. The concept thus facilitates the use by the same individuals of others' labour and expertise to increase the power and scope of their activities. The dilution created by the fragmentation caused by this arrangement negates the ascription of moral responsibilities as the intention of the principal and agents do not necessarily coincide.⁶³The basis of Wolgast's analysis is the legal conception of the corporation as an artificial person which may not necessarily be the case because the metaphor is just one of the many conflicting legal theories of the corporation.

The artificial person distinction also grounded Ewin's argument which concluded that: Because corporations are artificial and not "natural" people, they lack the emotional make-up necessary to the possession of virtues and vices. Their moral responsibility is exhausted by their legal personality. Corporations can have rights and duties; they can exercise the rights through their agents, and they can in the same way fulfill their duties. If necessary, they can be forced to fulfill their duties. According to Ewin, the moral personality of a corporation would be at best a Kantian sort of moral personality, one restricted to the issues of requirement, rights, and duties. It could

⁶¹ Olufami Amao(n 47)126.

⁶² Geoffrey P. Lantos(n 59).

⁶³ Elizabeth Wolgast, *Ethics of an Artificial Person: Lost Responsibility in Professions and Organizations* (Stanford: Stanford University Press 1992).

not be the richer moral life of virtues and vices that is lived by the shareholders, the executives, the shop-floor workers, the unemployed and "natural" people in general.⁶⁴

Ewin is explicit that the moral personality of corporations is severely limited and it is exhausted by its legal personality. The consequence of the artificial legal construct of the corporation according to Ewin is that corporations might be logically locked into selfishness, which would leave them with a very limited and unsatisfactory moral personality. Ewin is of the opinion that of course, it might be very imprudent for them to look as though they were entirely selfish and might, with such a poor corporate image, have detrimental effects on their trading performance, but that is not sufficient to defeat the point and solve the problem. All that shows is that an efficient firm would be subtle about its selfishness, considering what promoted its interests in the long run, and would employ a good advertising agency.⁶⁵

On the basis of this argument Ewin rejected French's differing argument that '...corporations can be full-fledged moral persons and have whatever privileges, rights duties as are in normal course of affairs, accorded to moral persons'. French's argument stemmed from his belief that if corporations are not full members of the moral society, they 'will avoid the scrutiny and control of moral sanction' and his aim was to subject them to moral sanction. French argued that for an entity to be the subject of moral obligation it needs to be an intentional actor and since corporations have internal decision-making structures then they are moral persons as a collective.⁶⁶

2.2.2 IMMANUEL KANT

According to Kantian morality, duties are distinguished into two. The first duty is that sometimes we do something so that we might get something in return, for instance we study to earn good grades. Therefore if you want good grades you ought to study. Kant referred to this kind of duty as a hypothetical imperative because it is of the form if you want x do y. The duty to study is dependent on your desire for good grades. Other duties are required per se with no ifs, ands or

⁶⁴ Robert E Ewin, 'The Moral Status of the Corporation' (1991) 10 Journal of Business Ethics 749.

⁶⁵ Ibid.

⁶⁶ Peter French, *Collective and Corporate Responsibility* (New York: Columbia University Press 1984).

but. Kant described these duties as categorical and referred to the fundamental principle of ethics as the categorical imperative. He believed that reason provided the basis for the categorical imperative, thus the categorical imperatives of morality were requirements of reason.⁶⁷

Kant argued that the supreme principle of morality is a standard of rationality and that is what he called the categorical imperative. Kant characterized the categorical imperative as an objective, rationally necessary and unconditional principle that we must always follow despite any natural desires or inclinations we may have to the contrary. Kant is of the opinion that all specific moral requirements are justified by this principle therefore all immoral actions are irrational because they violate the categorical imperative. Kant perpetuated the doctrine that a rational will must be regarded as autonomous or free in the sense of being the author of the law that binds it and therefore the fundamental principle of morality (categorical imperative) is the law of an autonomous will. This presence of self governing reason within each person offered decisive grounds for viewing each as possessed of equal worth and deserving of equal respect.⁶⁸

Although Kant spoke of the categorical imperative he formulated it in many ways and most commentators focus on three formulations;-

- Act only on maxims which you can will to be universal laws of nature.
- Always treat the humanity in a person as an end and never as a means merely.
- Act as if you were a member of an ideal kingdom of ends in which you were both subjects and sovereign at the same time.

Kant believed only human beings can follow rules of their own choosing. Human beings are the only creatures that are free and it is the fact that we are free that enables us to be rational and moral. Our free will is what gives us our dignity and unconditioned worth. Kant's ethics is therefore an ethics of duty rather than consequences. The ethical person is the one who acts from right intentions. We are able to act in this way because we have free will. The fundamental

⁶⁷ Bowie. N. E (n 22)4.

⁶⁸ Johnson R 'Kant's Moral Philosophy' (2008) < <http://plato.stanford.edu/entries/kant-moral/>> Accessed on 22/09/2016.

principle of ethics, the categorical imperative, is a requirement of reason and is binding on all rational beings. These are the essentials of Kant's ethics.⁶⁹

Kant's first formulation of the categorical imperative is "act only on that maxim by which you can at the same time will that it should become a universal law". Through this maxim, Kant is providing a test to see if any proposed action, including actions in business are moral. Kant believed that in every action we are to ask what would happen if the maxim/principle of your action were a universal law? Would a world where everyone acted on that principle be possible? The categorical imperative functions as a test to see if the principles upon which an action is based are morally permissible. The action can only be undertaken if the principle upon which the action is based passes the test of the categorical imperative.⁷⁰

Therefore a business manager who accepts Kantian morality would ask for any given decision, does the principle on which the decision is based pass the test of categorical imperative, that is, can it be willed universally without contradiction? If it can, then the decision would be morally permissible. If it cannot, the action is morally forbidden.⁷¹ The categorical imperative captures one of the key features of morality, that unless the principle of your action can be universalized, to make an exception for yourself is immoral. This therefore ensures fair play. If a principle for an action when universalized is self defeating, then the contemplated action is not ethical.⁷²

The other important formulation of Kant's categorical imperative says that "you should act as if you are a member of an ideal kingdom of ends in which you were both subject and sovereign at the same time." Organizations are composed of persons and given the nature of persons; organizational structures must treat the humanity in persons with dignity and respect. In addition, the rules that govern an organization must be rules that can be endorsed by everyone in the organization. This universal endorsement by rational persons is what enables Kant to say that everyone is both subject and sovereign with respect to the rules that govern them.⁷³

Bowie is of the opinion that a Kantian approach to the organizational design of a business firm would endorse several principles which include; first, the business firm should consider the

⁶⁹ Bowie .N. E(n 22)4.

⁷⁰ Ibid.

⁷¹ Ibid 5.

⁷² Ibid 6.

⁷³ Ibid 10.

interests of all the affected stakeholders in any decision it makes. This principle is a straightforward requirement for any moral theory that takes respect for persons seriously. Secondly, the firm should have those affected by the firm's rules and policies participate in the determination of those rules and policies before they are implemented. Since autonomy is what makes humans worthy of respect, a commitment to this principle is crucial.⁷⁴

Thirdly, it should not be the case that for all decisions, the interests of one stakeholder automatically take priority. This principle provides a kind of organizational legitimacy. It ensures that those involved in the firm receive some minimum benefits from being part of it. Fourthly, when a situation arises where it appears that the interests of one set of stakeholders must be subordinated to the interests of another set of stakeholders, that decision should not be made solely on the grounds that there is a greater number of stakeholders in one group than in another. This principle rules out utilitarianism as a criterion for decision making in a moral firm.⁷⁵

The fourth principle is that every profit making firm has a limited but genuine duty of beneficence. The justification for this principle is based on an extension of the individuals' imperfect obligation of beneficence which Kant defended in the *Metaphysics of Morals* by saying;

“That beneficence is a duty results from the facts that since our self-love cannot be separated from our need to be loved by others (to obtain help from them in the case of need) ,we thereby make ourselves an end for others...hence the happiness for others is an end which is at the same time a duty.”

According to Bowie, the strategy here is to extend this argument to the corporate level. If corporations have benefited from society they have a duty of beneficence to the society in return. Society protects corporations by providing the means for enforcing business contracts, it provides the infrastructure which allows corporations to function such as roads, sanitation facilities, police, fire protection and perhaps most importantly an educated and skilled workforce with the attitude required to perform well in a corporate setting.⁷⁶

⁷⁴ Ibid 10-11.

⁷⁵ Ibid.

⁷⁶ Ibid.

Therefore, the ultimate task of corporate leaders is to utilize their power to protect and promote human dignity and show compassion to those that are involved or affected by their operations. As such corporate power is properly exercised when the corporation takes into account the human dignity of all those affected by its operations and when it endeavors to show compassion to those it can assist with corporate resources. On the other hand, corporate power is improperly exercised when the corporation violates the human dignity of those who are involved or affected by any of the corporate operations and when it does not show compassion to those whom it has the ability to relieve their suffering.⁷⁷

The final principle is that every business firm must establish procedures designed to ensure that relations among stakeholders are governed by rules of justice. This is a procedural principle designed to ensure that whatever rules the corporation adopts conform to the basic principles of justice.⁷⁸

A Kantian views an organization as a moral community and each member of the organization stands in a moral relationship to the others. On one hand, the managers of a business firm should respect the humanity in all persons in the organization. On the other hand, each individual in a business firm, managed as a Kantian moral community should view the organization other than purely instrumentally, that is as merely a means for achieving individual goals. Organizations are created as ways of achieving common goals and shared ends. An individual who views the organization purely instrumentally is acting contrary to the 'respect for persons' principle.⁷⁹

It is a central tenet of Kant's moral philosophy that an action is only truly moral if it is morally motivated. Truly moral motives cannot be contaminated by motives of self interest. Therefore since the good acts of even the most enlightened corporations are almost always justified in part on the grounds that such actions are profitable. It appears that even the best actions of the best

⁷⁷ Errol .p.Mendes, 'The Moral Argument Against the Business Case for Corporate Social Responsibility:A Call for a New Moral and Spiritual Approach'University of Ottawa (2007)<
<http://www.ucalgary.ca/christchair/files/christchair/Mendes-detailed-paper.pdf>>Accessed on 22/09/2016.

⁷⁸Bowie.N. E(n 22)10-11.

⁷⁹ Ibid.

corporations are not truly moral.⁸⁰ In Kantian language, the act of a corporation being involved in CSR would be done in conformity with duty but not out of duty.⁸¹

Bowie is of the opinion that we might say that Kant is mistaken about requiring such purity of motive. Yet even if Kant is wrong about the necessity of pure motivation for an act being moral. He still has a lot to offer to the business ethicist. Working out the implications of the formulations of the categorical imperative provides a rich agenda for the business ethicist.⁸²

The general public judges business from a strict Kantian approach and they seem to assume that actions that enhance the bottom line are acts of self interest on the part of the corporation. However, for publicly held corporations and for partnerships, this is not the case. Public held corporations have an obligation to make a profit based on their charters of incorporation, legal obligations to shareholders and an implied contract with the public. As such the managers of such corporation have promised to strive for profits. In that case such corporations would be honoring their obligation to realize profits and its obligation of beneficence. Thus Kant's insistence that an action must be done from a truly moral motive need not undercut acts of corporate beneficence that also contribute to the bottom line.⁸³

So far all we have shown is that Kant's insistence on the purity of a moral motive has not made this theory irrelevant to business ethics, but perhaps it has a positive contribution to make to business ethics and is not simply a barrier to be overcome. Perhaps focusing on issues rather than profits, such as meaningful work for employees, a democratic workplace and non-coercive relationship with suppliers will actually enhance the bottom line.⁸⁴

Bowie states that many management theorists urge businesses to always focus on the bottom line. However, perhaps, paradoxically, profits can be enhanced if we do not focus exclusively on the bottom line. To put this in more Kantian terms, perhaps profits will be enhanced if the manager focuses in respecting the humanity in the persons of all the corporate stakeholders.

⁸⁰ Ibid12.

⁸¹ Ibid13.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Ibid.

Perhaps we should view profits as a consequence of good business practices rather than as a goal of businesses.⁸⁵

2.3 LITERATURE REVIEW

2.3.1 SHOULD CORPORATIONS BE SOCIALLY RESPONSIBLE?

To some people the idea of corporations acting in socially responsible ways would seem pointless. If the major reason for corporations is to maximize profits and shareholder value as best as they can, then it makes sense to reason that corporations will do whatever it takes to achieve this goal, perhaps even if that includes acting in socially irresponsible ways if they believe that they can get away with it. There are plenty of examples of firms that in pursuit of profits have exhibited all sorts of socially irresponsible behavior including poisoning the environment.⁸⁶

This raises an interesting question for scholars; given the incentives for maximizing profits and shareholders' value, why would a corporation act in socially responsible ways geared towards enhancement of sustainable development?

One of the major aspects which incline corporations towards responsible social behavior is intangible aspects such as the corporation's brand, image and reputation. These aspects have acquired a new dimension as they may affect the public conscience about social, environmental and economic problems that incorrect corporate policies may cause. In turn such policies are improved due to the pressure of shareholders and consumers over the corporation to improve its performance.⁸⁷ The new attitude of the public therefore translates into bigger demands for the corporation to operate according to codes and standards of responsible performance that is

⁸⁵ Ibid.

⁸⁶ John I Campbell, 'Why would corporations behave in socially responsible ways? An institutional theory of corporate social responsibility' (2007) *Academy of management review* 946.

⁸⁷ Francesco Boeren (n 3) 6.

besides the quality of the products and the services they offer. It is therefore important to always have responsible management strategies about the environment, society and other groups of interest, otherwise corporations risk consumers boycotting their products.⁸⁸

For instance, internationally there are clear expectations about the social performance of large mining transnational companies. An important percentage of these companies' shares is tied to the name and reputation of the companies. As a result many companies are extremely sensitive to the international public opinion about their activities and operations.⁸⁹

Therefore corporations are conscious to the fact that adopting corporate social responsibility policies constitutes a source of benefit for their reputation and corporate image which in turn reduces the risk of public opposition to their operations, helps maintain their clients and financial entities and it is a requirement for international competitiveness in facilitating their entry into new markets with bigger demands. All in all corporate social responsibility generates value for the company.⁹⁰

The Rio Declaration expressly puts an obligation on states to develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States are also tasked with the obligation of cooperating in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.⁹¹

The major areas of concern in CSR are; environmental management, eco-efficiency, stakeholder engagement, labour standards and working conditions, employee and community relations, social equity, human rights and good governance.⁹² This paper majors on environmental management with regard to CSR.

At the core of CSR debate is the idea that corporations should transition from a state of mere compliance to a mode of engagement, from harm minimization to value creation. Also implied in

⁸⁸ Ibid.

⁸⁹ Ibid30.

⁹⁰ Ibid7.

⁹¹ The Rio Declaration on Environment and Development (1992), Principle 13.

⁹² United Nations Industrial Development Organization, 'What is CSR?' <www.unido.org/en/what-we-do/trade/csr/what-is-csr.html> last accessed 18/02/2015.

the debate is the idea that the private sector is the dominant engine of growth-the principal creator of value and managerial resources-and that it has an obligation to contribute to economic growth and opportunity-equitable and sustainable.CSR is therefore founded on a strong recognition on the role of business as an active partner in a world of scarcity and dwindling resources.⁹³

Intense corporate attention to CSR has not been entirely voluntary as many companies awoke to it only after being surprised by public responses to issues they had not previously thought were part of their business responsibilities. Activists' organizations of all kind have grown much more aggressive and effective in bringing public pressure to bear on corporations.⁹⁴

Responsible mining requires stakeholder engagement throughout all operational stages and after mine closure as such by assessing the current and anticipated future socio-economic and environmental impacts, a company can maximize the positive impacts they can have on a community, whilst minimizing any negative impacts. Responsible business practice is taking an anticipatory and proactive approach to ensuring responsible operations during all phases involved in mining in order to prevent environmental pollution, respect human rights and mitigate and plan for any negative social impacts.⁹⁵

Society concern usually creates backlashes within the industry of concern leading to undoubted pressure for companies to respond to the voice of the society. Therefore, in order to learn sufficiently from the past, responsible mining need to adhere to precautionary principle; where common sense decisions are taken on the understanding of hazards and their associated risks potential when high standards of practice are followed.⁹⁶

2.3.2 REGULATION OF CORPORATE SOCIAL RESPONSIBILITY ACTIVITIES

⁹³ Dima Jamali,Ramez Mirshak(n 5)243.

⁹⁴ Michael E.Porter,Mark R.Kramer, 'Strategy and Society:The Link Between Competitive Advantage and Corporate Social Responsibility' Havard Bussiness Review(2006)< <https://hbr.org/2006/12/strategy-and-society-the-link-between-competitive-advantage-and-corporate-social-responsibility?>last> accessed 18/02/2015.

⁹⁵ Adey,Shail et al, 'Corporate social responsibility within the mining industry: case studies from across Europe and Russia'Universty of Exter UK 153< https://pure.ltu.se/portal/files/35955868/14_uni_exeter_adey.pdf>accessed 20/09/2016.

⁹⁶ Ibid.

The key challenge for companies today is that best practice management systems for applying CSR are not readily available, and there are no internationally recognized CSR standards against which a company can benchmark its efforts in this regard. That said, there are resources that have been developed by various organizations and associations and that discuss, analyze and offer guidance on various aspects of CSR.⁹⁷

There are different mechanisms for enforcing responsible and sustainable mining practices at the international and national level. At the international level there is the international Council on Mining and Metals and other United Nations guidelines while at the national level, legislation and guidelines will be available and each country will have its own mechanism for enforcement.⁹⁸

A country that is able to enforce tighter controls can use this as a policing mechanism to mitigate against any negative aspects of mining and maximize the benefits. It is further noted that developing countries often have policies in place but do not have the money or manpower for enforcement and therefore face greater challenges in mitigating for the potential impacts of mining. There is also the aspect of the voice of public opinion being greater in developed countries as compared to developing countries with corporations having paid more attention to the concerns of communities in developed countries than developing ones.⁹⁹

Apart from legislation within a country, there are also controls from other governing bodies as well as the mining industry itself which has voluntary codes and guidelines that companies may choose to sign up to as a way of acknowledging their good practice. International organizations like the World Bank, the UN and NGOs, also provide guidelines and challenge industry practice and performance.¹⁰⁰

Globally, one of the key initiators of responsible business practices has been the introduction of Equator Principles (EPs). These standards were introduced in 2003 and aim to ensure transparency in all aspects of how a business operates. These are standards within the finance industry that require projects being financed by institutions signed up to the EPs on a voluntary

⁹⁷ Prospectors and Developers Association of Canada(n 1)

⁹⁸ Adey,Shail et al (n 95).

⁹⁹ Ibid 154.

¹⁰⁰ Ibid 153.

basis to assess and review the environmental and social impacts of a project prior to financing decisions being made. The introduction of codes of practice like EPs are consumer driven initiatives, this has led to a lot of pressure to the banks to stop funding projects which have negative social or environmental impacts. The environmental and social issues associated with mining projects have led Barclays to automatically classify all mining projects as category A, the EPs highest category in environmental and social impacts, which therefore require the highest scrutiny of the details of the project when they are considering finance strategies for mining companies work internationally.¹⁰¹

Globalization is a driving force pushing companies to pay more attention to their CSR in developing countries as NGOs are also working in a wider, more globalized manner. The voice of the society is gradually changing and the expectations of people to ensure their environment and society is treated responsibly, by themselves and others is increasing. Therefore combination of increasing awareness and the increase in expectations of different stakeholders has placed demands on industries to reassess how they carry out their business interactions relating to all aspects of sustainability.¹⁰²

The International Organization for Standardization (ISO) brought out a new standard (ISO 26000) relating to social responsibility and sustainable development, encouraging organizations to go beyond legal compliance. ISO 26000 provides guidelines for a company on:

- Concepts, terms and definitions related to social responsibility.
- The background, trends and characteristics of social responsibility.
- Principles and practices relating to social responsibility.
- The core subjects and issues of social responsibility.
- Integrating, implementing and promoting socially responsible behavior throughout the organization and, through its policies and practices, within its sphere of influence.
- Identifying and engaging with stakeholders; and

¹⁰¹ Ibid.

¹⁰² Ibid.

- Communicating commitments, performance and other information related to social responsibility.¹⁰³

It is worth noting that there is an open debate about the necessity to regulate CSR. For some sectors especially NGOs and certain governments, it is necessary to adopt regulatory frameworks about socially responsible practices of the corporations which would in turn result to a certain obligatory nature to CSR. Other sectors like the entrepreneurial ones claim that CSR should be the fruit of exclusive implementation of voluntary measures. This debate became more relevant during the World Summit for Sustainable Development held in Johannesburg South Africa in the year 2002(Johannesburg Summit),where positions in favor of dictating norms confronted those who consider that CSR is essentially voluntary, as well as those who distrust the Corporations ethical performance debated versus the entrepreneurial sector who do not trust public intervention.¹⁰⁴

This paper is inclined to the view that mining corporations contribution to sustainable development should depend on the law and not on the company's goodwill.

2.3.3 THE PYRAMID OF CORPORATE SOCIAL RESPONSIBILITY

A comprehensive definition of CSR was set forth by Carroll in 1979. In this view, a four-part conceptualization of CSR envisaged the idea that the corporation has not only economic and legal obligations, but ethical and discretionary (philanthropic) responsibilities as well. The point here was that CSR, to be accepted as legitimate, had to address the entire spectrum of obligations business has to society, including the most fundamental—economic. It is upon this four-part perspective that the Archie Carroll's pyramid is based.¹⁰⁵

According to Carroll's, for CSR to be accepted by a conscientious business person, it should be framed in such a way that the entire range of business responsibilities are embraced. It is suggested here that four kinds of social responsibilities constitute total CSR: economic, legal, ethical and philanthropic. These four categories or components of CSR might be depicted as a pyramid. Certainly, all of these kinds of responsibilities have always existed to some extent but it

¹⁰³ Ibid 155.

¹⁰⁴ Francesco Boeren(n 3)11.

¹⁰⁵ Archie B Carroll, ' The pyramid of corporate social responsibility: Toward the moral management of organizational stakeholders' Business Horizons(1991) 39-48, 40.

has only been in recent years that ethical and philanthropic functions have taken a significant place.¹⁰⁶ Each of these four categories deserves closer consideration as discussed below.

2.3.3.1 ECONOMIC RESPONSIBILITIES

Carroll's states that business organizations were historically created as economic entities designed to provide goods and services to the society. The profit motive was established as the primary incentive for entrepreneurship. Before it was anything else, business organization was the basic economic unit in our society. As such, its principal role was to produce goods and services that consumers needed and wanted and to make an acceptable profit in the process. At some point the idea of the profit motive got transformed into a notion of maximum profits, and this has been an enduring value ever since. It is important to note that all other business responsibilities are predicated upon the economic responsibility of the firm, because without it the others become moot considerations.¹⁰⁷

Some of the key economic responsibility considerations of a corporation include: The corporation performing in a manner consistent to maximizing earnings per share, maintaining a strong competitive position, maintaining a high level of operating efficiency and ensuring that the firm is consistently profitable.¹⁰⁸

2.3.3.2 LEGAL RESPONSIBILITIES

According to Carroll's Society has not only sanctioned business to operate according to the profit motive; at the same time business is expected to comply with the laws and regulations promulgated by federal, state, and local governments as the ground rules under which business must operate. As a partial fulfillment of the "social contract" between business and society, firms are expected to pursue their economic missions within the framework of the law. He further states that, Legal responsibilities reflect a view of "codified ethics" in the sense that they embody basic notions of fair operations as established by our lawmakers. They are depicted as the next layer on the pyramid to portray their historical development, but they are appropriately seen as

¹⁰⁶ Ibid.

¹⁰⁷ Ibid 41.

¹⁰⁸ Ibid 40.

coexisting with economic responsibilities as fundamental precepts of the free enterprise system.¹⁰⁹

A few of the economic responsibilities include: The corporation performing in a manner that is consistent with the expectations of the government and law. The corporation being a law abiding corporate citizen. The corporation to be defined as one that fulfills its legal obligations and the corporation providing goods and services that at least meet minimal legal requirements.¹¹⁰

2.3.3.3 ETHICAL RESPONSIBILITIES

Carroll's is of the view that, although economic and legal responsibilities embody ethical norms about fairness and justice, ethical responsibilities embrace those activities and practices that are expected or prohibited by societal members even though they are not codified into law. Ethical responsibilities embody those standards, norms, or expectations that reflect a concern for what consumers, employees, shareholders, and the community regard as fair, just, or in keeping with the respect or protection of stakeholders' moral rights. In one sense, changing ethics or values precede the establishment of law because they become the driving force behind the very creation of laws or regulations. For example, the environmental, civil rights, and consumer movements reflected basic alterations in societal values and thus may be seen as ethical bellwethers foreshadowing and resulting in the later legislation.¹¹¹

In another sense, ethical responsibilities may be seen as embracing newly emerging values and norms society expects business to meet, even though such values and norms may reflect a higher standard of performance than that currently required by law. Ethical responsibilities in this sense are often ill-defined or continually under public debate as to their legitimacy, and thus are frequently difficult for business to deal with.¹¹²

The business ethics movement of the past decade has firmly established an ethical responsibility as a legitimate CSR component. Though it is depicted as the next layer of the CSR pyramid, it must be constantly recognized that it is in dynamic interplay with the legal responsibility category. That is, it is constantly pushing the legal responsibility category to broaden or expand

¹⁰⁹ Ibid 41.

¹¹⁰ Ibid 40.

¹¹¹ Ibid 41.

¹¹² Ibid 40.

while at the same time placing ever higher expectations on businesspersons to operate at levels above that required by law.¹¹³

Some of the ethical components of corporate social responsibility include: That corporations perform in a manner consistent with expectations of societal morals. That the corporations recognize and respect new and evolving ethical/moral norms adopted by society. That the corporations prevent ethical norms from being compromised in order to achieve corporate goals. That good corporate citizenship may be defined as doing what is expected morally and ethically. That corporations should recognize that corporate integrity and ethical behavior go beyond mere compliance with laws and regulations.¹¹⁴

2.3.3.4 PHILANTHROPIC RESPONSIBILITIES

Philanthropy encompasses those corporate actions that are in response to society's expectation that businesses be good corporate citizens. This includes actively engaging in acts or programs to promote human welfare or goodwill. Examples of philanthropy include business contributions to financial resources or executive time, such as contributions to the arts, education, or the community.¹¹⁵

The distinguishing feature between philanthropy and ethical responsibilities is that the former are not expected in an ethical or moral sense. Communities desire firms to contribute their money, facilities, and employee time to humanitarian programs or purposes, but they do not regard the firms as unethical if they do not provide the desired level. Therefore, philanthropy is more discretionary or voluntary on the part of businesses even though there is always the societal expectation that businesses provide it.¹¹⁶

One notable reason for making the distinction between philanthropic and ethical responsibilities is that some firms feel they are being socially responsible if they are just good citizens in the community. This distinction brings home the vital point that CSR includes philanthropic contributions but is not limited to them. In fact, it would be argued here that philanthropy is highly desired and prized but actually less important than the other three categories of social

¹¹³ Ibid.

¹¹⁴ Ibid 41.

¹¹⁵ Ibid 42.

¹¹⁶ Ibid.

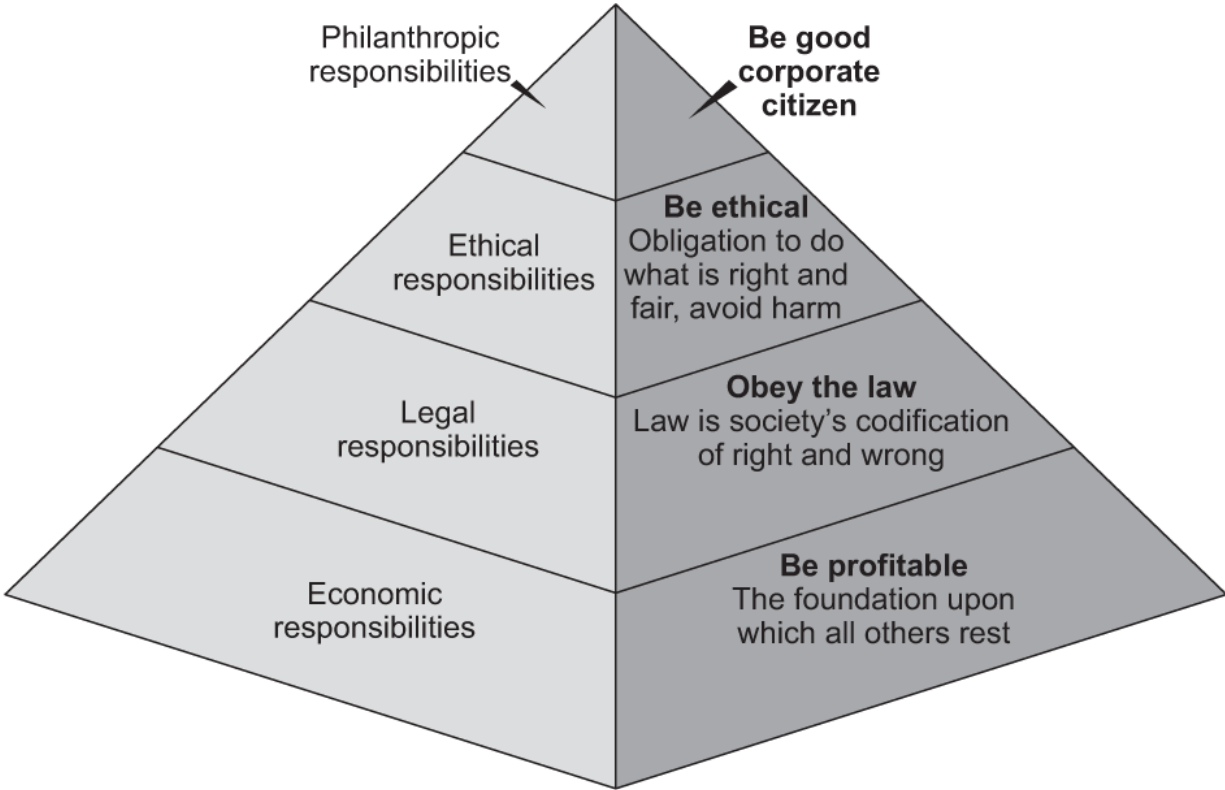
responsibility, In a sense, philanthropy is icing on the cake—or on the pyramid, using Carroll’s metaphor.¹¹⁷

According to Carroll’s, some of the philanthropic components in a corporation should include: Performing in a manner consistent with the philanthropic and charitable expectations of the society. Assisting the fine and performing arts. Participation of managers and employees in voluntary and charitable activities within their communities. To provide assistance to private and public educational institutions and to assist voluntarily those projects that enhances a community’s quality of life.¹¹⁸

The pyramid of corporate social responsibility is depicted below.

¹¹⁷ Ibid 41.

¹¹⁸ Ibid.



The pyramid portrays the four components of CSR, beginning with the basic building block notion that economic performance undergirds all else. At the same time, business is expected to obey the law because the law is society's codification of acceptable and unacceptable behavior. Next is business's responsibility to be ethical. At its most fundamental level, this is the obligation to do what is right, just, and fair, and to avoid or minimize harm to stakeholders (employees, consumers, the environment, and others). Finally, business is expected to be a good corporate citizen. This is captured in the philanthropic responsibility, wherein business is expected to contribute financial and human resources to the community and to improve the quality of life.¹¹⁹

Carroll's criticizes his metaphor as not being perfect. In Carroll's opinion the CSR pyramid is intended to portray that the total CSR of business comprises distinct components that, taken together, constitute the whole. Though the components have been treated as separate concepts for discussion purposes, they are not mutually exclusive and are not intended to juxtapose a firm's economic responsibilities with its other responsibilities. At the same time, a consideration of the separate components helps the manager see that the different types of obligations are in a

¹¹⁹ Ibid 42.

constant but dynamic tension with one another. The most critical tensions, of course, would be between economic and legal, economic and ethical, and economic and philanthropic.¹²⁰

In summary, the total corporate social responsibility of business entails the simultaneous fulfillment of the firm's economic, legal, ethical, and philanthropic responsibilities. Stated in more pragmatic and managerial terms, the CSR firm should strive to make a profit, obey the law, be ethical, and be a good corporate citizen.¹²¹

2.3.4 RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT

According to Muigua, the right to a clean environment became openly an international concern first in 1968 when the UN General Assembly passed a resolution identifying the relationship between the quality of the environment and the enjoyment of basic rights. It was not until the Stockholm conference in 1972 that the right to a healthy environment was explicitly recognized in an international environmental law document (Stockholm Declaration, 1972). It declared that man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. It is noteworthy that the Declaration did not just recognize the right to a good quality environment but also placed a responsibility on human beings to protect and improve the environment for present and future generations. This position of rights and responsibility towards the environment is now widely accepted and it goes to the core of the sustainable development discourse.¹²²

Udombana is of the view that it is now customary to discuss rights in terms of “generations” whereby the first generation consists of civil and political rights. These rights are libertarian in character, relating to the sanctity of the individual and his rights within the socio-political scene in which he is located. The second generation consists of economic, social and cultural rights; these are positive rights in the sense that they require the affirmative action of governments for

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Kariuki Muigua(n 38)6-7.

their implementation.¹²³The third generation consists of solidarity rights. This research paper intends to maintain this classification; the right to a clean and healthy environment is classified as belonging to the third generation of solidarity rights. This generation includes the right to development, the right to peace, the right to environment, the right to ownership of the common heritage of mankind and the right to communication. Udombana further states that proponents of a third generation of rights emphasize that these rights will reinforce existing human rights, enhance their effectiveness and make them more relevant to both governments and individuals.¹²⁴

Muigua is of a different opinion and states that ,the right to a clean and healthy environment, as is with all environmental rights, has for a long time been grouped under the third generation rights‘ or solidarity rights‘. However, the right to clean and healthy environment is not a third generation right but a fundamental right, a prerequisite for full enjoyment of all the other rights. Muigua adds that it is a right, crucial for the realization of the so-called first and second generation rights.¹²⁵

Muigua further argues that the right to a clean and healthy environment is so interwoven with the realization and enjoyment of other fundamental rights that any attempt to classify it as an inferior right sabotages the realization of all the other basic rights, including life, health, livelihood and wellbeing, amongst others. This right advocates for a healthy human habitat, including clean water, air and soil that are free from toxins or hazards that threaten human health.¹²⁶

Indeed, it has been rightly argued that when people must struggle to obtain the basic necessities of life, political freedoms and human rights may appear meaningless to them. This is because the destruction of life-sustaining ecosystems, the pollution of the world's water, land, and air, the inability to control the world's wastes, and other related environmental problems prevent people from securing the minimum requisites for health and survival, thereby impeding and even

¹²³ N.J.Udombana, 'The Third World and the Right to Development: Agenda for the Next Millenium' Human Rights Quarterly 22(2000)753-787, The John Hopkins University Press 753-754.

¹²⁴ Ibid.

¹²⁵ Kariuki Muigua(n 38).

¹²⁶ Ibid 9.

prohibiting the effective exercise and enjoyment of human rights for much of the world's population.¹²⁷

It is against this background that there emerged recognition of the right to a clean and healthy environment, as a distinct right, owing to the importance of the environment to realization of the other human rights especially the socio-economic rights.¹²⁸

The Rio Declaration on Environment and Development recognized the right to development in Principle 3, and was clear in Principle 4 that “in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.”¹²⁹

The African Charter on Human and Peoples’ Rights, adopted in Nairobi, Kenya, on June 27 1981, proclaimed in its Article 24 that, “All peoples shall have the right to a general satisfactory environment favorable to their development.” Article 24 of the African Charter on Human Rights has led to important jurisprudence on the content of environmental rights. The African Commission on Human and Peoples’ Rights has decided cases concerning pollution and the exclusion of indigenous peoples from their lands set aside for nature preserves. It has concluded that the right to environment is a justiciable right that must be integrated into and balanced with the right to development. For example, in the Ogoni land case, the African Commission on Human and Peoples’ Rights concluded that “an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and development as the breakdown of the fundamental ecologic equilibria and is harmful to physical and moral health.”¹³⁰

In Kenya, Every person has the right to a clean and healthy environment which includes having the environment protected for the benefit of present and future generations through legislative and other measures.¹³¹ In terms of securing the environment for present and future generations; the state is supposed among others to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources and ensure equitable sharing of the

¹²⁷ Ibid 7.

¹²⁸ Ibid.

¹²⁹ Rio+20: Joint Report OHCHR and UNEP, Human Rights and the Environment, 11.

¹³⁰ Ibid 16.

¹³¹ The Constitution of Kenya 2010, Article 42.

accruing benefits.¹³²This can be achieved through: encouragement of public participation in the management, protection and conservation of environment.¹³³Establishment of systems of environmental impact assessment, environmental audit and monitoring of the environment.¹³⁴Also Elimination of the processes and activities that are likely to endanger the environment and utilization of the environment and natural resources for the benefit of the people of Kenya.¹³⁵It is the duty of every person to cooperate with state organs to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.¹³⁶

The constitution further provides for enforcement of environmental rights by which means obligations relating to the environment are supposed to be fulfilled.¹³⁷This is applicable whereby if a person alleges that a right to a clean and healthy environment has been, is being or is likely to be, denied, violated, infringed or threatened, such a person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter. In response to such an application the court may make any order or give any directions it considers appropriate to prevent, stop, or discontinue any act or omission that is harmful to the environment .The court may also compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment. Further the court may provide compensation for any victim of a violation of the right to a clean and healthy environment.¹³⁸The hearing and determination of these environmental disputes is done by land and environmental courts which have the status of the High Court,¹³⁹with regard to applications concerning the environment the applicant does not have to demonstrate that any person has incurred loss or suffered injury.¹⁴⁰

Despite all these progressive provisions by the Constitution, parliament has been slow in passing laws to ensure implementation of the environmental provisions especially with regard to the right

¹³² Ibid Article 69(1(a).

¹³³ Ibid Article 69(1(d).

¹³⁴ Ibid Article 69(1(f).

¹³⁵ Ibid Article 69(g)(h).

¹³⁶ Ibid Article 69(2).

¹³⁷ Ibid Article 70.

¹³⁸ Ibid Article 70(2).

¹³⁹ Ibid Article 162(2,b).

¹⁴⁰ Ibid Article 70(3).

to a clean and healthy environment by corporations. It is the duty of parliament to enact legislations to give full effect to these environmental rights and ¹⁴¹without the appropriate legislation and its implementation, these rights will only remain on paper and mining corporations' activities will continue polluting the environment unabated.

According to the World Health Organization (WHO), environmental health is concerned with all the physical, chemical, and biological factors external to a person, and all the related factors impacting behaviors. It encompasses the assessment and control of those environmental factors that can potentially affect health. Health is defined as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.¹⁴²

WHO has asserted that more than three million children under five die each year from environment-related causes and conditions. This thus, makes the environment one of the most critical contributors to the global toll of more than ten million child deaths annually as well as a very important factor in the health and well-being of their mothers.¹⁴³

WHO observes that polluted indoor and outdoor air, contaminated water, lack of adequate sanitation, toxic hazards, disease vectors, ultraviolet radiation, and degraded ecosystems are all important environmental risk factors for children, and in most cases for their mothers as well. On a general scale, it is believed that environmental hazards are responsible for an estimated 25% of the total burden of disease worldwide, and nearly 35% in regions such as sub-Saharan Africa. In this regard, it has been argued that addressing the effects of the environment on human health is essential if we are to achieve the goal of health for all. Human health is believed to be connected to environmental health and that the two are mutually dependent¹⁴⁴.

The joint statement of health effects of coal in Australia recommends that federal and state governments must urgently research and account for the risks to human health starting with consistent air, water and soil quality monitoring at around every coal mine in Australia¹⁴⁵. This research paper will concentrate on the right to a clean and healthy environment and the possible adverse effects likely to result from coal mining which would undermine this right. This paper

¹⁴¹ Ibid Article 72.

¹⁴² Kariuki Muigua(n 38)9.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Climate Council, Climate and Health Alliance(n 12)2.

will also seek to put forward suggestions on how to achieve the right to a clean and healthy environment and sustainable development through coal mining in Kitui County.

According to the Climate Council, authoritative studies in Europe and the United States show severe health impacts from coal emissions by miners, workers and local communities. These studies link coal pollution to the development of potentially fatal diseases resulting into thousands of premature deaths and costing national economies billions of dollars annually. For instance, in the United States the Physicians for Social Responsibility found that coal contributes to four of the five leading causes of mortality; heart disease, cancer, stroke and chronic respiratory diseases. Furthermore health risks are not limited to mining and combustion as emissions from coal mine fires are linked to; lung cancer, bronchitis, heart disease and other health conditions.¹⁴⁶

If not properly managed dust from coal mines can be a nuisance to local communities and high levels of nuisance dust may reduce visibility and amenity. The presence of nuisance dust can also cause a perceived increase in health risk. It is noted that the impact of dust from mines on local amenities depends on the distance from the mine sites and climatic conditions including wind speed and direction. Concerns about amenity from mine site dust often relate to the visibility of dust plumes and dust sources. Visible dust is usually due to short term episodes of high emissions such as blasting. Other amenity impacts include dust depositing on fabrics or house roofs or dust transported from roofs to water tanks.¹⁴⁷

According to Australian Network of Environmental Defender's Offices, the impacts of mining on agricultural land falls into two broad categories, the first is land acquisition for instance where an approval condition will require the mining companies to purchase properties for sale within the area that will be affected by the mining activities, this comprises of all privately owned residential and rural properties closest to the mine. In this case, land owners cannot be forced to sell their properties however many of them feel pressured to dispose their property to avoid the

¹⁴⁶ Ibid.

¹⁴⁷ Department of Environment Climate Change and Water, 'Environmental Compliance and Performance Report:Management of Dust from Coal Mines'(2010)3.

noise, dust and other environmental impacts associated with these developments despite the fact that this may culminate to poor compensation arrangements.¹⁴⁸

The second category comprises of impact on land holders who remain in possession of their land while exploration or mining activities take place on or in the vicinity of their property. Clearly coal and unconventional gas mining can impact on current land uses such as agriculture and food production.¹⁴⁹ This paper does not give the way forward on how long term negative environmental impacts of mining can be curbed and how the mining corporations can participate, thus this is the main issue that this research paper will be focusing on.

According to Clean Air Task Force, the trace elements contained in coal and others formed during combustion are a large group of diverse pollutants with a number of health and environmental effects. Such elements are a public health concern because at sufficient exposure levels they adversely affect human health. Some are known to cause cancer and others impair reproduction and the normal development of children and still others affect the nervous and immune system. Many are also respiratory irritants that can worsen respiratory conditions such as asthma. These gases are an environmental concern because they damage ecosystems. The coal power plants also emit large quantities of carbon dioxide, the “greenhouse gas” largely responsible for climate change.¹⁵⁰ This paper seeks to critically analyze the legal system with an aim of exploring the appropriate remedies to adverse environmental and health impact of coal mining.

The South African Constitutional Court relied on the international environmental principles in giving substantive content to the Constitutional guarantee of environmental quality. *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* a case that required the integration of the need to protect the environment with the need for social and economic development. In the Court’s view, the international principle of sustainable development provided the applicable framework for reconciling these two needs. Sustainable development “recognizes that socio-economic development invariably brings risk of

¹⁴⁸ The Australian Network for Environmental Defenders, ‘Coal and gas mining in Australia and opportunities for National Law Reform’(2003)5-6.

¹⁴⁹ Ibid.

¹⁵⁰ Clean Air Task Force, ‘Cradle to Grave:The Environmental Impacts from Coal’(2011)1.

environmental damage as it puts pressure on environmental resources” but it envisages that decision-makers “will ensure that socio-economic developments remain firmly attached to their ecological roots and that these roots are protected and nurtured so that they may support future socio-economic developments.”In turn, this broad definition of sustainable development incorporates both the internationally recognized principle of integration of environmental protection and socio-economic development, and the principle of inter-generational and intra-generational equity.¹⁵¹

2.3.5 CORPORATE SOCIAL RESPONSIBILITY AND SUSTAINABLE DEVELOPMENT

The international community recognized sustainable development as the overarching paradigm for improving the quality of life in 1992 at the United Nations Conference on Environmental Development (UNCED).Although sustainable development is susceptible to different definitions, the most commonly accepted and cited definition is that of the Brundtland Commission on Environment and Development which stated in its 1987 report dubbed our common future, that sustainable development is “development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs.”¹⁵²

The Brundtland commission mandate was to take up the critical relationship between environmental protection and economic development and to formulate realistic proposals for reconciling or balancing the two subjects; to propose new forms of international cooperation on these issues to influence policies in the direction of needed changes; and to raise the levels of understanding and commitment to action of individuals, organizations, businesses, and governments.¹⁵³

The conclusions of the Brundtland Report stressed the need for an integrated approach to development policies and projects that, if environmentally sound, should lead to sustainable economic development in both developed and developing countries. The Report emphasized the need to give higher priority to anticipating and preventing problems. It defined sustainable development as development that meets present and future environment and development

¹⁵¹ Rio+20: Joint Report OHCHR and UNEP(n 129)19.

¹⁵² Report of the World Commission on Environment and Development: Our Common Future (1987).

¹⁵³ Rio+20: Joint Report OHCHR and UNEP(n129)11.

objectives and concluded that without an equitable sharing of the costs and benefits of environmental protection within and between countries, neither social justice nor sustainable development can be achieved.¹⁵⁴

Principle 4 of the Rio Declaration provides that in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it. Principle 25 further buttresses this point by stating that peace, development and environmental protection are interdependent and indivisible. As such policies and activities in various spheres, including environmental protection must be integrated in order to achieve sustainable development. These principles also make it clear that the efforts to improve society, including those to protect the environment, achieve peace and accomplish economic development are interdependent.¹⁵⁵

Therefore it is important to note that the concept of sustainable development is not restricted to economic growth only but it involves environmental, economic and social sectors. It is a process of progressive improvement in the quality of life of the human beings placing it as the center and principal subject of development.¹⁵⁶

Chapter 23 of Agenda 21, the action plan related to sustainable development on strengthening the role of major groups, proclaims that individuals, groups and organizations should have access to information relevant to the environment and development, held by national authorities, including information on products and activities that have or are likely to have a significant impact on the environment, as well as information on environmental protection matters. The Preamble to Chapter 23 also calls broad public participation in decision-making “one of the fundamental prerequisites for the achievement of sustainable development.” This includes the need of individuals, groups, and organizations to participate in environmental impact assessment procedures and to know about and participate in decisions, particularly those that potentially affect the communities in which they live and work. Section III of Agenda 21 identifies major groups whose participation is needed: women, young persons, indigenous and local populations,

¹⁵⁴ Ibid.

¹⁵⁵ Lal Kurukulasuriya, Nicholas A Robinson(n 11)25.

¹⁵⁶ Francesco Boeren(n 3)8.

nongovernmental organizations, local authorities, workers, business and industry, scientists, and farmers.¹⁵⁷

Social responsibility which includes corporate social responsibility is understood as the obligation all citizens including institutions both public and private and the civil society organizations have to contribute towards for the improvement of local and global society wellbeing. Corporate social responsibility therefore refers to this social responsibility but specifically included in the corporations performance and it is the channel to express the mining sectors commitment to sustainable development.¹⁵⁸

Initially the concept of corporate social responsibility majorly referred to charity actions but nowadays it includes a broader notion linked to a business approach that considers the social, environmental and economic impact of the corporation's performance and that incorporates ethical principles, health and occupational security, good labour practices, respect for the person's rights as well as environmental care.¹⁵⁹

A corporation enters a society not only as an active economic subject but also as a social agent and its through corporate social responsibility that entrepreneurs may commit to actively participate in sustainable development. This change of status of the corporation is fundamental to corporate social responsibility.¹⁶⁰

Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living in dignity. The Committee on Economic, Social and Cultural Rights noted that the right to health is closely related to and dependent upon the realization of other human rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition of torture, privacy, access to information and the freedoms of association, assembly and movement. Furthermore, the Committee recognized that the highest attainable standard of physical and mental health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life and extend to the underlying determinants of health, such as food and nutrition, housing, access to safe and

¹⁵⁷ Rio+20: Joint Report OHCHR and UNEP(n 129)11.

¹⁵⁸ Francesco Boeren(n 3)8.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

potable water and adequate sanitation, safe and healthy working conditions and a healthy environment.¹⁶¹

United Nations rights treaty bodies and Charter organs have taken up environmental degradation when it threatens the rights to life and health. The former Human Rights Commission and the current Human Rights Council have consistently recognized that environmental violations “constitute a serious threat to the human rights to life, good health and a sound environment for everyone.” Treaty bodies monitoring compliance through periodic state reporting have expressed concern over environmental degradation as it affects the enjoyment of human rights.¹⁶²

If the enjoyment of human rights depends on environmental protection, in turn, environmental protection depends on the exercise of certain human rights, such as the rights to information, public participation in decision-making and access to justice. Effective compliance with environmental laws and standards necessitates knowledge of them as well as of environmental conditions. In addition, local communities play a vital role in preserving the resources upon which they depend. Allowing those potentially affected to participate in decision-making processes concerning harmful activities may prevent or mitigate the threatened harm and contribute to public support for environmental action, as well as lead to better decisions consistent with sustainable development. In the event the activity goes forward and harm is suffered, access to justice can provide for restoration or remediation of the damaged environment. In general, procedural human rights – access to information, public participation in decision-making and access to justice – linked to environmental protection have received the greatest attention in legal instruments and jurisprudence, as well as in doctrine.¹⁶³

Therefore, strengthening the procedural rights, access to information, public participation and access to justice, will help develop sustainable development and the green economy. The exercise of these rights will provide information to prevent and address environmental degradation and stop the resulting human rights violations, thereby encouraging sustainable development and encouraging actions that promote a green economy. For example, the public informed with accurate environmental information can make choices that consider both short-

¹⁶¹ Rio+20: Joint Report OHCHR and UNEP (n 129)24.

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

term benefits of an economic action, as well as the long-term costs that the action may have on the ecosystem services that they rely on. Access to information, public participation and access to justice are discussed in more detail below to highlight options for considering sustainable development issues and opportunities to integrate human rights and environmental protection into sustainable development.¹⁶⁴

2.3.5.1 ACCESS TO INFORMATION

Access to environmental information is a prerequisite to public participation in decision-making and to monitoring governmental and private-sector activities. The nature of environmental deterioration, which often arises long after a project is completed and can be irreversible, compels early and complete data to make informed choices. Transboundary impacts also produce significant demands for information across borders. The rights to information and participation, and their particular importance for both human rights and environment matters, are well reflected in the international legal framework, in both human rights law and environmental law. Access to information can help impact economic choices by giving involved parties full information regarding the decisions they make. This will help parties choose decisions that support sustainable development and the green economy by providing information needed to make these decisions.¹⁶⁵

The right to information constitutes an essential feature of democratic processes and of the right to participation in public life. Article 19 of the Universal Declaration of Human Rights states that everyone has the right to freedom of opinion and expression; that right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers. The right is also enshrined in article 19 of the International Covenant on Civil and Political Rights. Article 19(2) stipulates that everyone should have the right to freedom of expression; that right should include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. Article 19(3) does allow certain restrictions, but they should only be such as are provided by law and are necessary: (a) for the respect of the rights and reputations of others; (b) for the protection of national security or of

¹⁶⁴ Ibid 25.

¹⁶⁵ Ibid.

public order, or of public health and morals. In 2011, the Human Rights Committee issued a new General Comment further detailing the rights under Article 19 of the ICCPR. This included, with regards to right of access to information, that “States parties should proactively put in the public domain Government information of public interest.”¹⁶⁶

In addition, the Rio Declaration on Environment and Development emphasizes the importance of participation of all concerned citizens and access to information in environmental issues in its Principle 10.

The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, signed in Aarhus, Denmark (Aarhus Convention), on 25 June 1998, takes a very comprehensive approach to the recognition of the importance of the right to information and public participation. In the preamble, it states that “every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations.”¹⁶⁷ It also states that, in order to be able to assert that right and observe that duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and, in that regard, citizens may need assistance in order to exercise their rights.

Article 4 and 5 of the Aarhus Convention obligate States parties to collect and publicly disseminate information and to make information. Each party to the Convention is to publish a national report on the state of the environment every three to four years. A party is obliged to disseminate legislative and policy documents, treaties and other international instruments relating to the environment. Each party must ensure that public authorities provide environmental information to a requesting person without the latter having to state an interest. In addition, each State party must be proactive, ensuring that public authorities collect and update environmental information relevant to their functions.¹⁶⁸ This requires States parties to establish

¹⁶⁶ Ibid.

¹⁶⁷ Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, UN Doc. Sales No. E/F/R.98.II.E.27.

¹⁶⁸ Ibid.

mandatory systems to obtain information on proposed and existing activities, which could significantly affect the environment.

The right to access to information has been well-established in international law. It simply needs to be further utilized to provide the information to make informed choices that promote sustainable development and the green economy, to make choices that promote a healthier ecosystem.¹⁶⁹

2.3.5.2 PUBLIC PARTICIPATION

The major role played by the public in environmental protection is participation in decision making, especially in environmental impact or other permitting procedures. Public participation is based on the right of those who may be affected, including foreign citizens and residents, to have a say in the determination of their environmental future. Public participation allows for those most impacted by environmental degradation to speak and influence the decisions that will impact their basic human rights, such as right to life and health. By making decisions with the opinions of those most greatly impacted, decisions will be reached that better address poverty issues and encourage sustainable development and a green economy.¹⁷⁰

Participation is also critical to the effectiveness of law. The process by which rules emerge, or how proposed rules become norms and norms become law, is a matter of legitimacy, and legitimacy in turn affects compliance. Legitimacy depends on participation: the governed must have and perceive that they have a voice in governance through representation, deliberation, or some other form of action. Participation may take place through elections, grassroots action, lobbying, public speaking, hearings, and other forms of governance, whereby various interests and communities participate in shaping the laws and decisions that affect them.¹⁷¹

Many times the right to public participation overlaps with the access to information. For example, public participation is guaranteed by articles 6 to 8 of the Aarhus Convention. In the Aarhus Convention, public participation is required in regard to all decisions on whether to permit or renew permission for industrial, agricultural and construction activities listed in annex I

¹⁶⁹ Rio+20: Joint Report OHCHR and UNEP(n 129)26.

¹⁷⁰ Ibid 27.

¹⁷¹ Ibid.

to the Convention, as well as other activities which may have a significant impact on the environment (art. 6(1) (a)–(b)). The public must be informed in detail about the proposed activity early in the decision-making process and be given time to prepare and participate in the decision-making (art. 6(2)–(3)). In addition, article 7 of the Convention calls for public participation in the preparation of environmental plans, programmes, policies, laws and regulations.¹⁷²

The Stockholm Convention in article 10 requires parties to promote and facilitate public participation. Article 6 of the U.N. Framework Convention on Climate Change provides that its parties “shall promote and facilitate at the national and, as appropriate, sub-regional and regional levels, and in accordance with national laws and regulations, and within their respective capacities, public access to information and public participation.” The U.N. Convention on Biological Diversity refers in its preamble to the general lack of information and knowledge regarding biological diversity and affirms the need for the full participation of women at all levels of policy-making and implementation.

Public participation, especially encouraging participation of the most vulnerable, in actions affecting environment is essential to address issues of social justice and needs of those most likely to be heavily dependent on local ecosystems. This allows for all stakeholders to be involved in decision making, therefore helping to ensure all impacts are considered, including those that affect the ecosystem. Therefore, the strengthening of this right is essential to sustainable development and will enable a green economy to reach its objectives of providing healthy ecosystems to help alleviate poverty.¹⁷³

2.3.5.3 ACCESS TO JUSTICE

The right of access to justice is expressed in article 2; paragraph 3(a), of the International Covenant on Civil and Political Rights (ICCPR), which guarantees victims of human rights violations an effective remedy. This has been interpreted to include environmental wrongs that impinged upon human rights. There are two aspects to the right to a remedy: access to justice and substantive redress. This allows for violations of other rights to have consequences and discourages possible violations. By strengthening the access to justice, all other rights are

¹⁷² Aarhus Convention(n 167).

¹⁷³ Rio+20: Joint Report OHCHR and UNEP (n 129)27.

strengthened. In turn, this reinforces human rights and the environmental protection, advancing the promotion of actions that help alleviate poverty and support sustainable development.¹⁷⁴

Access to justice requires the existence of independent and impartial bodies with the capacity to afford redress after a hearing, which respects due process guarantees. More and more national administrative and judicial bodies throughout the world are giving effect to the right to a remedy in cases of alleged violations of constitutional rights to a sound environment, related in some cases to the right to life or to health. While the International Covenant on Economic, Social and Cultural Rights has no provision comparable to article 2(3) of the International Covenant on Civil and Political Rights, it has been argued that the rights it recognizes also require that remedies be available for victims of violations. The Committee on Economic, Social and Cultural Rights has noted, for example, that any person or group victim of a violation of the right to health should have access to effective judicial or other appropriate remedies at both the national and international levels and should be entitled to adequate reparation.¹⁷⁵

By encouraging access to justice for people who have suffered human rights violations related to environmental degradation and ecosystem loss, these rights can be strengthened and actions can be taken to prevent the violations and maintain healthy ecosystems, like those required in a green economy, will be encouraged. The jurisprudence developed through access to justice helps establish the baseline of environmental violations, as well as provides accountability within the system and guarantees the rights are available to all involved.¹⁷⁶

2.4 NORMATIVE FRAMEWORK

The normative framework for this research paper will be based on three key principles and these are; public participation, access to information and access to justice. These principles have been discussed below.

Public participation is the main point of reference in this research paper. This is because public participation is fundamental in order for corporations' CSR activities to aid in realizing the right to a clean and healthy environment. Public participation ensures all key stakeholders participate

¹⁷⁴ Ibid.

¹⁷⁵ Ibid 28.

¹⁷⁶ Ibid.

in decision making. The key players in the context of this paper being; the government, the communities affected by the mining activities and the corporations involved in mining.

As noted earlier in this paper, allowing those potentially affected to participate in decision making process concerning harmful activities may prevent or mitigate the threatened harm and contribute to public support for environmental matters. In addition, public participation may lead to better decisions which are in line with sustainable development.¹⁷⁷

The other tenet is access to information. This is a requirement which is essential in the realization of the right to a clean and healthy environment through the corporations CSR activities. Where there is no access to the right and sufficient information, proper decision making is almost impossible. Corporations therefore have a duty to relay to the public information about the corporation; detailing the activities it intends to carry out in the community and both positive and negative effects of such activities. Timely and correct dissemination of the information will enable the stakeholders likely to be affected to weigh their options from the correct perspective and whichever the decision they settle on will be an informed decision. Further the Constitution of Kenya Article 71 provides that if the Government is to enter into an agreement for mining with any company, the same should be ratified by parliament. This information should be accessible to the public this is because the government only holds mineral resources in trust for the citizens and therefore all information pertaining to mineral resources should be publicly available to the citizens.

The other important guide in this research paper is access to justice. This is a tenet which is critical if corporations are to be involved in CSR with the aim of realizing the right to a clean and healthy environment. As discussed earlier, this is one of the essentials of Immanuel Kant's ethics. Every corporation is tasked with establishing procedures geared towards ensuring that relations among stakeholders are governed by rules of justice. This principle is designed to ensure that the rules that the corporation adopts are in tandem with the basic principles of justice.

Access to justice also serves to ensure that any grievances which arise between the stakeholders can be ventilated through a legal process and as such a legal redress can be achieved. The Constitution of Kenya Article 70 provides that; if a person alleges his or her right to a clean and

¹⁷⁷ Ibid 24.

healthy environment has been, is being or is likely to be denied, violated, infringed or threatened, such a person may apply to court for redress.

These three principles will constitute the normative framework in this research paper and will aid in answering the research question.

2.5 CONCLUSION

This chapter has laid down the theoretical framework and it has expounded on the social contract theory and Immanuel Kant's theory of morals and duties. The social contract theory has been advanced as a theoretical basis for explaining the emerging practice of Corporate Social Responsibility (CSR) by corporations. Since the 17th century the social contract concept has also been used to justify human rights. This chapter has depicted the modern corporation as one that has acquired the status similar to that of a person under the law and therefore should be treated as such in determining the corporation's social responsibility. The Kantian theory on the other hand is based on the supreme principle of morality as a standard of rationality, this includes unconditional principles which we must always follow despite any natural desires or inclinations we may have to the contrary.

The second part of this chapter has discussed the right to a clean and healthy environment and a conclusion is drawn that rights and responsibilities towards the environment are now widely accepted and they enhance the realization of sustainable development. This part also discusses CSR and sustainable development and this paper concludes that sustainable development can only be achieved if the concept of CSR is taken seriously and incorporated into the legal and regulatory framework. Finally the normative framework which guides the rest of the research paper is discussed and three key principles are covered, that is access to information, public participation and access to justice.

CHAPTER THREE

SOUTH AFRICAN LEGAL REGIME WITH REGARD TO CORPORATE SOCIAL RESPONSIBILITY AND ITS ROLE TOWARDS REALIZATION OF THE RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT

3.0 INTRODUCTION

This chapter will focus on an overview of coal mining in South Africa. Reference is often made to Mpumalanga which is South Africa's most important coal field having experienced coal mining for over 100 years. The coal mining process and the effects of each mining procedure on the environment is also discussed. CSR and politics of coal mining in South Africa is also discussed. The devastating effects of coal mining on rivers and people's livelihood is also discussed. An overview of the South African legislative and regulatory framework with regard to mining and the environment is also covered *inter-alia*; the Constitution of the Republic of South Africa, the Minerals and Petroleum Development Act of 2002 (MPRDA), the National Environment Management Act (NEMA) Act 107 of 1998. The key principles of public participation, access to environmental information and access to justice are also covered in this chapter. Finally the challenges in legislation and regulation of mining in South Africa are highlighted.

3.1. COAL MINING DYNAMICS IN SOUTH AFRICA

Coal is mined using two methods, that is surface or opencast mining and underground or deep mining. The choice of mining method is largely determined by the coal deposits. There are two main methods of underground mining that is room and pillar and long wall mining. In room and

pillar mining, coal deposits are mined by cutting a network of rooms into the coal seam and leaving behind pillars of coal to support the roof of the mine. The pillars can be up to 40% of the coal in the seam, although this coal is usually recovered at a later stage. This is achieved in what is known as retreat mining where coal is mined from the pillars as workers retreat. The roof is then allowed to collapse and the mine is abandoned.¹⁷⁸

The collapsing of the roof between the pillars can cause terminal damage to surface structures and render the surface almost unusable. The other detrimental effect is that the coal remaining in the pillars can heat up and eventually ignite. As the burning pillar collapses, the roof falls in, admitting air and allowing the combustion products to escape. It is estimated that as much carbon dioxide is emitted from this source annually as from the generation of electricity in South Africa which is also coal powered process.¹⁷⁹

Long wall mining on the other hand involves full extraction of coal from a section of the seam of face using mechanical shears. A long wall face requires careful planning to ensure favorable geology exists throughout the section before development works begin. The coal face can vary in length from 100-350 meters. Self advancing hydraulic powered supports temporarily hold up the roof while coal is extracted. When coal has been extracted from the area the roof is allowed to collapse.¹⁸⁰

Underground mining as discussed above, has considerable environmental effects. One of them is the production of methane, a green house gas which is said to be twenty one times more potent in its green house effect than carbon dioxide. As a result methane is growing in the atmosphere at a faster rate than carbon dioxide. All coal contains some methane, however, the deeper the mine the higher is the amount of methane in the coal. As mining proceeds, the methane is released into the air and finally discharged into the atmosphere.¹⁸¹

¹⁷⁸ Anglo American, Mining and Mineral Processing, 'Coal Mining and Processing in South Africa' <https://vula.uct.ac.za/access/content/group/9eafe770-4c41-4742-a414-0df36366abe6/Mining%20and%20Mineral%20Processing%20Resource%20Pack/Coal%20Learner%20Information%20sheets.pdf>. Accessed on 16/09/2016.

¹⁷⁹ Phillip J Lloyd, 'Coal Mining and the Environment' Energy Research Institute, University of Cape Town (2004) 3.

¹⁸⁰ Anglo American, Mining and Mineral Processing (n 178).

¹⁸¹ Phillip J Lloyd (n 179).

The second method of mining is surface mining, which is also known as open cast or open cut mining. It is only economic when the coal seam is near the surface. This method recovers a higher proportion of the coal deposit than underground mining as it ensures all coal seams are exploited. Large open cast mines can cover an area of many square meters. It uses very large pieces of equipments including; drag lines which remove the overburden (layers of soil and rocks/strata between the coal seams and the surface), power shovels, large trucks which transport overburden and coal, bucket wheel excavators and conveyors. The overburden of soil and rocks is first broken up by explosives; it is then removed by drag lines or by shovel and truck. Once the coal seam is exposed, it is drilled, fractured and systematically mined in strips. The coal is then loaded onto large trucks or conveyors for transport to either the coal preparation plant or direct to where it will be used.¹⁸²

Strip mining is the most environmental friendly and easy to rehabilitate and more sustainable than underground mining because it extracts virtually all of the extractable coal. There is a possibility that some thin, uneconomic or low-grade seams above the primary seams may not be mined, but become mixed with the spoil and thus contribute to the threat of acid generation either from the spoil heaps or from the fill in the mined-out area.¹⁸³ The impacts of opencast mining are considerable. Huge overburden dumps, often contaminated with waste coal, spread across the horizon. The coal in such dumps may combust spontaneously and emit sulphurous fumes and smoke. The mine will invariably create a huge pit.¹⁸⁴

From the foregoing, it is clear that Coal mining is by nature disturbing and destructive of the environment. For instance, open cast mining method removes large volume of soil and rock overburden to get to the workable coal seams and destroys regional aquifers. This kind of mining produces large mountain of solid waste.¹⁸⁵ Such coal heaps are prone to spontaneous combustion. Once ignited, the dumps are very difficult to put out and some dumps left by previous generations continue to smolder. One of the impacts from burning dumps is the release of sulphur dioxide. The sulphur compounds are concentrated in the wastes and so contribute far

¹⁸² Anglo American, Mining and Mineral Processing(n 178).

¹⁸³ Phillip J Lloyd(n 179)2.

¹⁸⁴ Ibid.

¹⁸⁵ Victor Munnik, Geraldine Hochmann et al, 'The Social and Environmental Consequence of Coal Mining in South Africa: A Case Study' Environmental Monitoring Group(2010) 3.

more than the equivalent amount of clean coal.¹⁸⁶ Mining also has serious social consequences on the movement of people, on people's health and the environment they live in.¹⁸⁷

Mining corporations continue to assume little responsibility for the health, education or housing of the families of their employees while operating in monopolistic conditions and creating super profits. The impact and consequence of mining on local farmers and traditional communities on whose land minerals are found is often overlooked.¹⁸⁸

Coal mines are located in five Provinces of South Africa, that is; Limpopo, Mpumalanga, Free State, Kwazulu-Natal, and Eastern Cape Province. The main coal mining projects are presently in the Witbank-Middleburg, Ermelo and Standerton-Secunda areas of Mpumalanga. Almost 90% of South Africa's saleable coal is mined in Mpumalanga.¹⁸⁹ The largest number of collieries (coal mine and its structures), that is twenty two are concentrated around Witbank, now renamed Emalaheni (place of coal). A hundred years of coal mining in the Mpumalanga Highveld; which is South Africa's most important coal field has imposed a complicated coal dynamic on the area, resulting in extensive environmental and social externalities. This dynamic includes the mining itself, the generation of electricity in coal fired power stations, heavy industry using coal to produce steel and alloyed products, coal hauling by trucks and culture of indoor coal burning for heating and cooking in seasonally cold areas, now recognized as a major health hazard.¹⁹⁰

South Africa generates ninety percent of its electricity through coal. Coal mining leads to carbon dioxide emissions, sulphur dioxide, heavy metals deposits in the soil and acid ground water; As a result the landscape shines in bright colours as layers of white and yellow cover former river beds and grasslands that were turned into mining areas. There are no leaves on the trees and the waters are clear and lifeless as thick fog looms into the air. Acid drainage from coal mining has killed all life in nearby rivers in the coal mining district of Mpumalanga. Sink holes and polluted

¹⁸⁶ Phillip J Lloyd(n 179)3.

¹⁸⁷ Victor Munnik, Geraldine Hochmann et al(n 185).

¹⁸⁸ David Van Wyk, Loselo Segwe et al, 'Corporate Social Responsibility and the Mining Sector in South Africa, A focus on mining in Malawi South Africa and Zambia' The Bench Marks Foundation(2008)13.

¹⁸⁹ L.S Jeffrey, 'Characterization of the Coal Resources of South Africa' The journal of South Africa Institute of Mining and Metallurgy(2005)95.

¹⁹⁰ Victor Munnik, Geraldine Hochmann et al(n 185)8.

ground water from abandoned mines are a hazard to the surrounding communities as children play on the old mines and adults collect the coal wastes for domestic fires.¹⁹¹

According to International Energy Agency (IEA) demand for coal is increasing worldwide, it has been the fastest growing global energy source in the twenty first century ensuring forty percent of the world's electricity supply in 2014. The IEA predicts that China will account for three fifths of global demand growth in the next five years followed by India and other Asian nations. At the launch of the IEA's annual coal market report in 2015 Executive Director Maria Van Der Hoeven acknowledged the unsustainability of the use of coal as energy production through coal releases sulphur dioxide, nitrogen dioxide and particulate matter at levels that exceed the maximum recommended by the World Health Organization.¹⁹²

It is important to note that even though Europe is greatly investing in renewable energy it still derives a third of its power from the most carbon intensive fossil fuel. These trends ignore the studies that have proved the negative impacts of coal mining on the environment, in this case South Africa serves as a prime example.¹⁹³

Tracy Davis, an attorney in South Africa is of the opinion that the government is responsible for the disaster. This is because the law makers are failing to monitor and enforce the good policies which South Africa has regarding the rehabilitation of the environment. A case in point is the fact that the Department of Mineral Resources continues to grant mine closure certificates without ensuring that the mines are properly rehabilitated. Further, coal mining companies ignore legal requirements to rehabilitate the areas where they are mining whereas the law explicitly urges companies to rehabilitate an area concurrently, while they are mining it.¹⁹⁴

Phuti Mabelebele from the Department of Petroleum and Minerals, which regulates the duties of the mining companies to prevent environmental damage, says that currently 263 mining licenses

¹⁹¹ Victoria Schneider, 'The Heavy Toll of Coal Mining in South Africa-South African Coal Powered Energy Sector Brings Environmental Devastation Despite Legal Regulations' www.aljazeera.com/indepth/features/2015/03/heavy-toll-coal-mining-South-Africa-150329/123518557.html accessed on 11/8/2016.

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ Ibid.

have been granted and more than 500 prospecting rights. Mining companies are expected to comply with the mine environmental policy and the mine rehabilitation programme.¹⁹⁵

According to Bench Mark Foundation of South Africa report action must be taken urgently to rescue the environment. This report states that there are 600 abandoned mines in Mpumalanga; 160 of these are around Emalahleni which are spilling acid water and heavy metals into the environment. The Bench Mark Foundation has called for obligatory transparency by mining corporations regarding mine closure plans. This is because thousands of communities are living in areas that should have been closed off many decades ago thus exposing these communities to extremely hazardous conditions. The CEO of the NGO refers to places like Coronation, an informal settlement in Emalahleni which he says “it looks like a post-apocalyptic film set-hills over hills of blackness, interrupted by sink holes that cut through the landscape like giant scars”.¹⁹⁶

5.2 CSR AND POLITICS OF COAL MINING

During South Africa’s transition to democracy, two major trends were seen in the mining industry, both affecting CSR in the industry. The first trend is that South Africa’s capital markets were reintegrated with international markets. As a result mining companies experienced increasing pressures to meet international expectations. Most of the Companies started to be listed in one of the main stock exchanges especially the London stock exchange. Such companies felt compelled to increase their CSR to meet corporate governance codes and appeal to investors. Therefore due to the increasing expectations internationally, policies changed locally.¹⁹⁷

The second trend was an increase in state sovereignty over mineral resources. By 2002, all companies were required to renew their mining licenses contingent on their compliance with the score card for the broad based socio-economic empowerment charter for the South African

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

¹⁹⁷ Magdaleine Busacca, ‘Corporate Social Responsibility in South Africa’s Mining Industry, Redressing the Legacy of Apartheid’ CMC Senior Thesis Paper 632(2013) <<http://scholarship.claremont.edu/cmc-thesis/632>> accessed on 18/8/2016.

mining industry. This charter put in place policies that introduced public participation by the previously disadvantaged communities in the South African economy and particularly in the coal mining sector.¹⁹⁸

South Africa is a politically sophisticated country and both miners and communities work in conjunction, they have developed an understanding of and an interest in mining and its externalities. South Africa mine owners have played a prominent part in the mining council and related initiatives. They have together developed sophisticated environment management, reporting and communication systems as well as programmes of CSR and community outreach.¹⁹⁹

This was elicited by the fact that the management of mining companies began to recognize that it is almost impossible for a business to effectively or sustainably operate in an unstable environment. This shift resulted in public-private partnerships and an understanding that CSR might contribute to the general uplifting of the historically disadvantaged people that have been discriminated for centuries. Companies have as a result developed the practice of consulting the community about the environmental impact of its projects and as a result, community and stakeholder interests began to be reflected in business strategies.²⁰⁰

3.3 POLLUTION OF RIVERS AND PEOPLE'S LIVELIHOOD

Acid mine drainage (AMD) is the flow or seepage of polluted water from old mining areas. AMD is highly acidic water usually containing high concentrations of metals, sulphides and salt as a consequence of mining activities. The major sources of AMD is drainage from underground mine shafts, run off and discharge from open pits and mine waste dumps. Drainage from abandoned underground mine shafts into surface water systems may occur as the mine shafts fill with water.²⁰¹ Lacheate from waste heaps are often acidic adding to the general and large scale acid mine drainage impact and interferes with underground and surface water.²⁰²

¹⁹⁸ Ibid.

¹⁹⁹ Victor Munnik, Geraldine Hochmann et al(n 185)7.

²⁰⁰ Magdaleine Busacca(n 197).

²⁰¹ Pat Manders, Linda Godfrey et al, 'Acid Mine Drainage in South Africa' CSIR Report Briefing Note 2009/02(2009)..

²⁰² Victor Munnik, Geraldine Hochmann et al(n 185)3.

Major rivers rise from the Mpumalanga Highveld. The Vaal River which is the source of Rand waters provide water for more than ten million people and the core economy in Guateng and neighbouring areas, it also runs through South Africa's industrial heart land. The Olifants River supplies water to the national electricity supplier Eskom and to the Kruger National Park and surrounding private game reserves, the heart of South Africa's conservation and eco tourism industry. The Olifants and Inkomati Rivers are shared with neighbouring Mozambique and Swaziland, where major downstream investments have been made in irrigation. These are sensitive to rising salinity in the water.²⁰³

Acid mine drainage from coal mining areas has had a devastating impact on water sources, with acidification of rivers and streams, elevated metal levels and consequent fish die offs. A study conducted by Green Peace Revolution concluded that decades of coal mining have poisoned the landscape and driven the Olifants River to a crisis point. The study suggested that the pollution levels are the cause of more than two thousand premature deaths per year in South Africa. According to Mathews Habane from the South African Green Revolutionary Council, if strict measures are not taken, South Africa is going to lose all its water sources as the Olifants River is already contaminated and the next would be the Limpopo River.²⁰⁴

Mine publicists generally point to the positive impacts of mining, like job creation and coming up of businesses. It is noteworthy that only 41% of the income from the economic activities in the area, chief of which is coal mining, remains in the area. What remains behind is land that is mostly not rehabilitated for agricultural use. Rivers like the Olifants are polluted with acid mine drainage, air pollution from dust and the associated effects of coal fired power stations with inadequate pollution control, and coal miners suffering the effects of silicosis, tuberculosis and other occupational diseases.²⁰⁵

In addition, coal mining and the uses of coal, both domestic, at ground level and via coal fired power stations cause air pollution. Coal mining was based on cheap and dangerous work until mechanization started in 1970s leading to the advent of open cast mining in the 1980s. Currently coal mining is almost equally divided between underground and open cast mining and it has

²⁰³ Ibid 7

²⁰⁴ Victoria Schneider (n 191).

²⁰⁵ Victor Munnik, Geraldine Hochmann et al(n 185)3.

attracted thousands of job seekers over time who have stayed on even as job numbers have drastically reduced. These jobless former employees of coal mines live in discarded coal dumps prone to spontaneous combustion. These deplorable living conditions have created a situation whereby the poor communities reclaim coal in dangerous conditions. Further, the use of duff (fine low quality coal) in power stations has imposed air pollution on the whole area and on more distant areas.²⁰⁶

3.4 LEGISLATION AND REGULATION OF MINING AND COAL MINES

3.4.1 PRE- INDEPENDENCE

As far back as 1903, South Africa had laws that placed the responsibility for mining impacts on the mine owner. When a closure certificate was obtained this responsibility closed. However, under a traditionally weak regulation system, many mines became defunct and ownerless. The then apartheid government attempted to deal with this situation through the *1975 Fanie Botha Accord*, between the minister of water affairs and chamber of mines. They agreed that the state would take one hundred percent responsibility for all mines closed before 1976. Mines closed from 1976-1986 would be fifty percent state responsibility and fifty percent owner responsibility. After 1986, all mines and its closure would be the responsibility of the owner. As a result, the South African Department of Water Affairs has spent more than 120 million Rand in the last 10 years to deal with historic pollution. This amount is said to be only a fraction of what is needed.²⁰⁷

Historical problems include the estimated six thousand abandoned mines (not all of them coal mines). The abandoned Transvaal and Delagoa Bay colliery outside Witbank has been identified as representing the greatest possible risk of any mine in the mines database. This is a large colliery which has partially collapsed, leaving large sink holes in the area adjacent to an informal settlement. The remaining coal in the underground workings is burning, compounding the physical hazard posed by the mine as well as polluting the air. The workings are flooded and have started to decant producing highly saline acid drainage with unacceptable levels of heavy metals. This water drains into Brugspruit, a tributary of the Olifants River. Poor water quality

²⁰⁶ Ibid 7.

²⁰⁷ Ibid.

resulting from this and other abandoned and operational coal mines has been linked to the death of fish and crocodiles in the Loskop dam nature reserve downstream.²⁰⁸

3.4.2 POST-INDEPENDENCE

The change of government in 1994 brought changes in legislation, a Constitution was adopted and government became the custodian of all natural resources for the people of South Africa. Under the *Constitution of the Republic of South Africa* all laws and matters relating to minerals and energy are administered under the control of the Minister of Minerals and Energy in the national government. The government does not seek to participate in the exploitation of minerals in South Africa and it views its involvement in the mineral industry as being of a complimentary nature only.²⁰⁹

The *South African Constitution* recognizes the State's obligation to protect citizens' socio-economic rights such as the right to housing, clean water and medical assistance. The Constitution further provides that everyone has the right - to an environment that is not harmful to their health or well-being; and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that;-prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.²¹⁰ Chapter seven of the Constitution outlines the objectives of the local government which are, to promote social and economic development, to ensure service provision in a sustainable manner and to provide a safe and healthy environment.²¹¹

A key focus of attention for application of Section 24 of the Constitution of South Africa and other legal provisions has been around the extractive sector. South Africa holds some of the largest coal and gold reserves in the world. This has resulted to confrontations between the communities and industries due to the pollution faced by the communities and the mine workers. A problem of interest has been trends of silicosis among gold miners, a life-threatening disease caused from inhaling silica from gold. This has led to thousands of gold miners joining forces to

²⁰⁸ Ibid8.

²⁰⁹ Phillip J Lloyd (n 179)3.

²¹⁰ Constitution of the Republic of South Africa,1996 –s. 24.

²¹¹ Ibid Chapter 7.

initiate a class action lawsuit against the companies in question on grounds of environmental health violations, this is said to be the largest class action on the African continent. The movements took root after South Africa's highest court ruled in 2012 that miners had the right to sue mining companies for compensation in addition to compensation covered by a state compensation fund. In addition to victims' compensation, the class action could set a legal precedent in the country for the use of the class action mechanisms as a tactic in achieving goals of environmental justice.²¹²

In South Africa, the mineral industry is regulated by several Acts inter alia, The *Minerals and Petroleum Resources Development Act of 2002(MPRDA)*, This Act regulates inter alia, the prospecting for and optimal exploitation of minerals and the rehabilitation of the surface of land during and after prospecting and mining operations. The other Act is the *Mining Health and Safety Act (Act 29 of 1996)*. This Act provides for protection of the health and safety of employees and other persons at mines. These Acts are administered by the Department of Minerals and Energy (DME).²¹³

The other regulation is *The National Water Act (Act 36 of 1998)* which regulates the use of water, including water for mining and protection of the resource. The National Water Act also supports the polluter pays principle; it stipulates that mines producing, allowing or causing pollution, including acid mine drainage (AMD) should be held liable for the cost of cleaning up and legal enforcement. In practice however, it has not been easy to enforce this legislation. Partly due to capacity constraints at the department of water affairs and in DME, which has only seventy nine inspectors for the whole country to deal with prospecting and mining applications as well as infringements.²¹⁴

All of mining activities require a water use licence from the Department of Water Affairs (DWA). A mining company is not allowed to start using water until it has a water use licence. This therefore means that a mining company cannot start mining until it has been granted water

²¹² UNDP, 'Environmental Justice:Comparative Experiences in Legal Empowerment'<
<http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Access%20to%20Justice%20and%20Rule%20of%20Law/Environmental-Justice-Comparative-Experiences.pdf>>Accessed on 22/09/2016.

²¹³ Phillip J Lloyd(n 179)3.

²¹⁴ Victor Munnik,Geraldine Hochmann et al(n 185)8.

use licence. If a company uses water without a licence, it is a criminal offence and it can be reported to the DMR and DWA.²¹⁵

3.4.3 MINERAL AND PETROLEUM RESOURCES DEVELOPMENT ACT (MPRDA)

The MPRDA was passed in June 2002. It represents a legislative commitment to achieving equitable access to and sustainable development in South Africa's mineral and petroleum resources.²¹⁶ The Act grants all mining rights with the State. The MPRDA preamble outlines the States role in the mining sector

“affirming the State's obligation to protect the environment for the benefit of present and future generations, to ensure ecologically sustainable development of mineral and petroleum resources and to promote economic and social development; recognizing the need to promote local and rural development and the social upliftment of communities affected by mining; reaffirming the State's commitment to reform to bring about equitable access to South Africa's mineral and petroleum resources; being committed to eradicating all form of discriminatory practices in the mineral and petroleum industries; considering the State's obligation under the Constitution to take legislative and other measures to redress the results of past racial discrimination.”

One of the objectives of this Act is to give effect to Article 24 of the Constitution by ensuring that the nation's mineral resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development. In addition the Act is supposed to ensure that holders of mining rights contribute towards the socio-economic development of the areas in which they are operating.²¹⁷

The Minister of Minerals and Energy can only grant a mining right if the mining will not result in unacceptable pollution, ecological degradation or damage to the environment and the

²¹⁵ Centre for Environmental Rights, 'Mining and your Community: Know Your Environmental Rights' <<http://cer.org.za/wp-content/uploads/2014/03/CER-Mining-and-your-Community-Final-web.pdf>> Accessed on 22/09/2016

²¹⁶ Magdaleine Busacca (n 197).

²¹⁷ Minerals and Petroleum Resources Development Act of 2002, Section 2(h)(i).

applicant has financially provided for the prescribed social and labour plan. The mining right comes into effect on the date that the environmental management programme is approved.²¹⁸

The holder of a mining right is also required to submit an annual report detailing the extent of the holders compliance with the relevant provisions of MPRDA and any other relevant law and terms and conditions of the mining right as well as compliance with the requirements of the prescribed social and labour plan. This ensures accountability on the part of the mining rights holder.²¹⁹

This Act also recognizes the principle of sustainable development and stipulates that all prospecting or mining operations must be conducted in accordance with generally accepted principles of sustainable development by integrating social, economic and environmental factors into the planning and implementation of prospecting and mining projects in order to ensure that exploitation of mineral resources serves present and future generations.²²⁰

The holder of the mining right is therefore tasked with managing all environmental impacts in accordance with his or her approved environmental plan or approved environmental management programme. Such a holder must as far as it is reasonably practicable, rehabilitate the environment affected by the mining operations to its natural or predetermined state or to a land use which conforms to the generally accepted principle of sustainable development. The corporation is also responsible for any environmental damage, pollution or ecological degradation as a result of its mining operations including effects which may occur outside the boundaries of the area to which the right relates.²²¹

Every person who has applied for a mining right must conduct an environmental impact assessment and submit an environmental management programme. Such an applicant must; establish baseline information concerning the affected environment to determine protection, remedial measures and environmental management objectives. The applicant must also investigate, assess and evaluate the impact of the proposed mining operation. The other important requirement is to develop an environmental awareness plan describing the manner in which the

²¹⁸ Ibid Section 23(1) (d)(e)(5).

²¹⁹ Ibid Section 25(h).

²²⁰ Ibid Section 37(2).

²²¹ Ibid Section 38(3)(d)(e).

applicant intends to inform employees of any environmental risks which may result from their work and the manner in which the risks must be dealt with in order to avoid pollution or the degradation of the environment. The other requirement is that the applicant must describe the manner in which they intend to modify, remedy, control or stop any action, activity or process which causes pollution or environmental degradation. They must also describe how they will contain or remedy the cause of pollution or degradation and migration of pollutants.²²²

Remediation of environmental damage caused by mining operations is also contemplated in the MPRDA. An applicant for prospecting or mining right must make the prescribed financial provision for the rehabilitation or management of negative environmental impacts. This is done prior to the Minister approving the environmental management plan or the environmental management programme. If such a holder of a right fails to rehabilitate or manage, or is unable to undertake such rehabilitation or to manage any negative impact on the environment, the Minister may, upon written notice the holder, use all or part of the financial provision to rehabilitate or manage the negative environmental impact which has occurred.²²³

It is the responsibility of holder of a prospecting or mining right to annually assess environmental liability and increase financial provision to the satisfaction of the Minister. If the Minister is not satisfied with the financial provisions made by the holder, the Minister is at liberty to appoint an independent assessor to conduct the assessment and determine the actual financial provision which the holder should reserve. The requirement to maintain and retain the financial provision remains in force until the Minister issues a certificate of closure to the holder. However the Minister may retain a portion of the financial provision as may be required to rehabilitate the closed mining or prospecting operation with regard to latent or residual environmental impacts which may become known in future.²²⁴

When it comes to closure of the mine, a mine can only be deemed to be closed when a closure certificate has been issued to the rights holder. Such a rights holder remains responsible for any environmental liability, pollution or ecological degradation, and the management of the mine until a closure certificate is issued by the Minister. An application for closure certificate must be

²²² Ibid Section 39.

²²³ Ibid Section 41 (1)(2).

²²⁴ Ibid Section 41 (4)(5).

made to the Regional Manager in whose region the land in question is situated upon the occurrence of the lapsing, abandonment, cancellation, cessation, relinquishment or completion of mining activities. Such an application must be accompanied by the prescribed environmental risk report. A closure certificate cannot be issued until the Chief Inspector and the Department of Water Affairs and Forestry have confirmed in writing that the provisions pertaining to health and safety and management of potential pollution to water resources have been addressed.²²⁵

The Minister has powers to suspend or cancel mining rights if the holder is contravening the approved environmental management programme or has submitted inaccurate, incorrect or misleading information in connection with any matter required to be submitted under the MPRDA.²²⁶

In terms of CSR, the most important objective of the Act is section 2(I) which ensures that mining companies contribute towards the socio-economic development of the areas in which they operate. The Act does not explicitly state how this objective should be achieved; it is thus left up to the industry to adopt the spirit of the Act in a meaningful way. The extent to which businesses chose to subscribe to the Act is voluntary and can be seen through the degree of their CSR programs.

In Compliance to the Act, when applying for a new mining right a company must submit a mine works plan, environmental management plan, and a social and labour plan. Mining operations are further required to submit annual compliance reports. This legislation indirectly reinforced CSR into the mining industry.²²⁷

3.5 ACCESS TO ENVIRONMENTAL INFORMATION

Mining has long been a closed book for researchers, and research information circulated in small circles aimed at immediate practical application and amelioration under close scrutiny of mines and with their cooperation. However, in recent years more information has flowed from researchers into the public realm beyond the narrow circles of scientists beholden to shareholders. Much of the information concerns mining externalities including the uranium

²²⁵ Ibid Section 43(1)(2)(4)(5).

²²⁶ Ibid Section 47(1)c,d).

²²⁷ Magdaleine Busacca (n 197).

contamination of water resources and acid mine drainage. Communities and activists have become more outspoken and as a result mines are more guarded in their relationship with critical researchers. The popular media as opposed to generally uncritical business media have taken the side of the communities and as the mines see it sensationalized the issue.²²⁸

The Constitution gives everyone the right to access any information held by government and any information held by companies that is required to protect human rights.²²⁹ Where a mining company wants to mine in a community, the community members are entitled to information on how the mining will be carried out and the effects of such mining to the community. When the community is well informed about the mining activities it is easier to participate in decision making regarding granting of licenses. In addition with information on how mining should take place, the community is able to notice once the right procedures are flaunted and report it.²³⁰

If a mining company does not provide satisfactory information on how it will ensure protection of the environment as well as protection of the community from pollution; the community is entitled to send an objection to the department of mineral resources objecting to that company being given the right to mine in that particular community.²³¹

Section 31 of the NEMA provides that every person has a right to access information held by the State and to the state of the environment and actual and future threats to the environment. This Act also allows the public access to all environmental management and implementation plans.²³² The principle of access to information is also emphasized by the **Promotion of Access to Information Act of 2001**. This Act provides for the right of access to information including the records of public and private bodies. It applies to all private and public bodies including companies, close corporations, partnerships, trusts and sole proprietors.

²²⁸ Victor Munnik, Geraldine Hochmann et al(n 185)7.

²²⁹ The Constitution of the Republic of South Africa, Article 32.

²³⁰ Centre for Environmental Rights(n 215).

²³¹ Ibid.

²³² National Environment Management Act, Section 16(5).

Access to environmental information is important because an informed public is more alert to environmental challenges, more ready to challenge government and corporate decision-makers and more capable of discussing these environmental challenges.²³³

Mines also accuse activists of not having a scientific basis for their accusations, while ironically the mines guard the scientific information very closely. Government departments of mineral and energy, water affairs and local government operate with progressive legislation, but constrained capacity for monitoring and acting against mining and other industrial polluters. However, pressure is mounting to act because South Africa's water resources are fully committed, and future well being of the nation depends crucially on guarding the water quality. While legislation is in place for a stakeholder driven catchment management system, this has been slow to take effect.²³⁴

3.6 PUBLIC PARTICIPATION

public participation is an important principle towards ensuring that mining corporations CSR activities contribute to the realization of the right to a clean and health environment. To foster public participation, it is a requirement that whenever a mining company applies for any permission, it must consult all interested and affected parties and report those parties' concerns to government. Proper consultation means that the company must give interested parties information about the proposed mining and the parties must have an opportunity to tell the mining company and government what their concerns and objections are about the proposed mining project. It is mandatory for the mining company to respond to the elicited objections and concerns.²³⁵

However, mining companies have notoriously bypassed the requirement for public participation and have often not consulted communities properly or at all. At times they mislead the communities by providing scanty or incorrect information. Others use trickery to avoid proper consultation with the community by holding meetings in venues and times that do not favour the

²³³ Saliem Fakier, Anthea Stephens et al, 'National State of the Environment Project: Environmental Governance South Africa Environment Outlook' (October 2005) <http://soer.deat.gov.za/dm_documents/Environmental_Governance_-_Background_Paper_WU45Q.pdf> Accessed 22/09/2016.

²³⁴ Victor Munnik, Geraldine Hochmann et al (n 185) 7.

²³⁵ Centre for Environmental Rights (n 215).

community, as such the communities interests end up not represented in such meetings. Some mining companies are also known to bribe a few community members and telling them what to say in the meeting in favour of the mining company proposed activities .It is therefore very important that communities know that they must be properly consulted by the mining companies as consultation is an important part of every licence application.²³⁶

The principle of public participation is also upheld by the MPRDA which demands consultation with interested and affected parties. The regional manager is required within fourteen days of accepting an application for prospecting right, mining right or mining permit to; make known that such an application has been received in respect of the land in question and call upon interested and affected persons to submit their comments regarding the application within 30 days. If a person rejects to the granting of any of the rights, the Regional Manager is required to forward the objection to the Regional Mining Development and Environmental Committee to consider the objections and advise the minister.²³⁷

The principle of public participation is also supported by *National Environment Management Act (NEMA-Act 107 of 1998)* in South Africa's legal system. NEMA is enforced by the Department of Environmental Affairs and Tourism (DEAT) and requires Environmental Impact Assessments (EIAs) and Environmental Management Programmes (EMPs) for activities that affect the environment. In line with the National Water Act, this Act also requires prevention or rectification of pollution and if the person responsible fails to do this, DEAT can recover the costs for clean up from the polluter. Enforcement and implementation suffers from the large degree of intergovernmental cooperation required by EIA and EMP approval and the lack of capacity earlier mentioned.²³⁸

Regarding environmental sustainability, NEMA requires mines to develop an Environmental Management Programme Report (EMPR), with the EMP also containing adequate provision for financial guarantees for rehabilitation, and arrangements for monitoring and auditing. The EMPR should also contain a closure plan, including a financial provision which should be available at the onset, during the life of the mine and at closure. Having to have these funds available at any

²³⁶ Ibid.

²³⁷ Mineral and Petroleum Resources Development Act of 2002, Section 10.

²³⁸ Victor Munnik, Geraldine Hochmann et al (n 185)9.

time poses a problem as mines generally work towards an end point, a closure date and thus do not have enough funds should the mine close abruptly.²³⁹

According to Hochmann et al, large mining companies do not necessarily support this approach to impact management. This is because environmental impacts at any point are not well known neither by the mines nor by the government. While larger mining companies generally support mine management from the beginning of mining to mine closure, there are express concerns about smaller mining companies that seem to dig and duck.²⁴⁰

The NEMA also envisaged public participation. It is a requirement in agreeing on an environmental management plan, a social and labour plan, and a closure plan. In practice, such participation is often frustrated.²⁴¹

The social and labour plan indicates the jobs that will be available at the proposed mine and the steps the mining company will take to develop the skills of the mine workers. This plan also includes infrastructure development and poverty eradication projects that the mine will support.²⁴²

The issue of EMP requires the usual process of public participation which includes consultation with the public and scoping as envisaged in the celebrated case of *Director: Mineral Development Gauteng region and another v Save the Vaal Environment and others, AD 2000*; in this case, the Director of Mineral Development in the Gauteng Province had granted the appellant a licence to carry out opencast mining, without first allowing the environmental NGO (SAVE) to make representations.

The Supreme Court of Appeal questioned whether parties wishing to oppose application for a mining licence on the grounds of environmental concerns were entitled to be heard by the Director. The Court decided that they were and held that:

²³⁹ Ibid.

²⁴⁰ Ibid.

²⁴¹ Ibid.

²⁴² Centre for Environmental Rights(n 215).

“Our Constitution, by including environmental rights as fundamental justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative process in our country.”²⁴³

The Court found it was appropriate for the respondent to be granted a hearing during the licence decision making process, as opposed to when an environmental management plan was being considered, as suggested by the appellant.²⁴⁴

The regulatory framework has been modified accordingly to ensure that the consultative process conforms to the citizens’ constitutional rights.²⁴⁵

3.7 CHALLENGES IN LEGISLATION AND REGULATION OF MINING IN SOUTH AFRICA

Government departments associated with mining have undertaken very few prosecutions despite clear infringement of legislation and have only imposed token penalties. Other factors that have been invoked are lack of capacity and political will to prosecute or speculation that retribution will be swayed by the political power of the mining companies under scrutiny.²⁴⁶

Amendments were made to both MPRDA and NEMA in 2010 to deal with these gaps but they have not yet been translated into practice. Although inter-departmental cooperation has supposedly been adopted by all government departments, the Department of Mineral Resources (DMR) is often criticized because it is perceived to have the final say on any prospecting right and mining right application. Even under the amendments the DMR still remains the lead authority for assessing environmental submissions and providing environmental authorizations.²⁴⁷

²⁴³ Director: Mineral Development, Gauteng region and another v Save the Vaal Environment and others 1999 (2) SA 709F-G (SCA).

²⁴⁴ South Africa Human Rights Commission, ‘Report of the SAHRC Investigative Hearing: Issues and Challenges in Relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa’ <<http://www.sahrc.org.za/home/21/files/Unregulated%20Artisanal%20Underground%20and%20Surface%20Mining%20Activities%20electronic%20version.pdf>> Accessed on 22/09/2016.

²⁴⁵ Phillip J Lloyd (n 179)7.

²⁴⁶ Christine Covin, Angus Burns, ‘Water Futures in South Africa, the Case for Protecting Head Waters in the Enkanhala Grasslands’ WWF Report ZA (2011)30.

²⁴⁷ Ibid.

The full control of DMR over environmental authorizations creates a conflict of interest as it is the responsibility of Department of Environmental Affairs (DEA) to take care of the sustainable development and conservation of the country's natural resources. This disempowers government departments that are entrusted with protecting natural resources and leaves room for DMR to exploit natural resources at the expense of sustainable practices.²⁴⁸

3.8 CONCLUSION

In this chapter we have seen the negative effects of coal mining and the processes involved therein. This chapter has also elicited the destructive impacts that poor a legal and regulatory regime in the mining sector can have on the environment and people's livelihood. This has clearly been illustrated by coal mining activities which took place in pre-independence South Africa whereby most of the mines were abandoned without any rehabilitation. However, in post independence South Africa a proper legal and regulatory framework was put in place and it is working towards realization of the right to a clean and healthy environment through CSR by ensuring proper consultation between the concerned ministries, the local communities and the mining corporations. In addition, with regard to a robust and legal and regulatory framework the Constitution, the MPRDA and NEMA deserve a special mention as they together ensure public participation, access to environmental information and access to justice. This ensures the realization of the right to a clean and healthy environment.

²⁴⁸ *ibid.*

CHAPTER 4

KENYAN LEGAL REGIME WITH REGARD TO CORPORATE SOCIAL RESPONSIBILITY AND ITS ROLE TOWARDS REALIZATION OF THE RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT.

4.0 INTRODUCTION

This chapter focuses on an overview of the anticipated coal mining in Mui Basin. The Fenxi Mining Company which has entered into an agreement to mine coal is also discussed and the anticipated economic value that coal mining will add to Kenya. CSR and public participation in the Kenyan mining sector is also discussed. The principle of access to information in the Kenyan mining sector is also discussed. Legislation and regulation of mining has been covered with a special interest to the Constitution of Kenya, the Mining Act, and the Environmental Management and Coordination Act of 1999 (EMCA). CSR and the right to a clean and healthy

environment has also been discussed. The principle of access to justice has been covered and finally challenges in legal and regulatory framework in the mining sector have been discussed.

4.1 AN OVERVIEW OF COAL MINING IN MUI BASIN

The Constitution of Kenya provides guidance on the use and protection of natural resources. The Constitution vests ownership of all minerals and mineral oils on the Kenyan people with the national government holding them in trust on their behalf. The Constitution also provides that agreements for exploitation of natural resources must be ratified by parliament. Therefore, in accordance to the Constitution the Mining Act vests ownership of mineral resources in the government as the trustee of the people of Kenya. The cabinet secretary administers the right to explore and exploit mineral resources and appoint the Commissioner of Mines and Geology to implement the Mining Act.²⁴⁹

Prospecting for coal in Kitui County began back in 1999. However, commercially viable coal was discovered in 2010. The coal deposits were discovered in the Mui Basin, in Mwingi East, Mwingi Central and Mutitu districts. The Government of Kenya divided the coal blocks within the basin into concessions for the purposes of private sector exploration, exploitation and development. Feasibility investigations showed that there are at least 275 million metric tonnes of coal in the Mui Basin.²⁵⁰ In 2010 four hundred million tonnes of coal reserves were confirmed in Block C.²⁵¹

It is anticipated that the Mui Basin coal will greatly benefit the country. One of the major benefits being the provision of the much needed power from a source which will be cheap as compared to the hydro and thermal electricity which does not meet demand in the country. This will also help in industrial growth to create wealth and employment. The locals are also bound to benefit from shared revenue accrued from coal mining, local employment, stimulation of local

²⁴⁹ Government of the Republic of Kenya, Ministry of Mining, 'Kenya Mining, Investment Handbook' (2015)38.

²⁵⁰ Robert Okemwa Onsare, 'Kenya: Commercially Viable Deposits of Coal Confirmed in Mui Basin' <<http://theglobalherald.com/kenya-commercially-viable-deposits-of-coal-confirmed-in-mui-basin/22429/>> accessed on 24/09/2016.

²⁵¹ Diakonia, 'Rapid Assessment of the Extractive Industry Sector in Kitui County: The Case of Coal Exploration in and Mining in the Mui Basin' (December 2014) <

<https://www.diakonia.se/globalassets/documents/diakonia/where-we-work/africa/kenya-2014-rapid-assessment-coal-mining-kitui.pdf>> Accessed on 24/09/2016.

business, improved infrastructure and CSR developments.²⁵²The coal will also be used in the cement and steel industries which are estimated to be spending at least Kshs 4 billion annually in coal imports. In general Kenya spends Kshs 14 billion annually on importation of 150 metric tonnes of coal.²⁵³

Despite all these positive expectations from coal, Coal mining could bring many challenges to the management of the environment as a result of the impact of the mining process on the environment and hydrogeology during mining. Therefore despite all the good tidings coal mining seems to be bearing, coal mining will also lead to pollution of both the environment and water resources. Therefore this negative aspect should also be anticipated and prepared for adequately through putting in place the necessary legal and regulatory framework. Coal mining companies should also be prevailed upon to use clean technology in mining, in order to reduce the amount of hazardous gases emitted in the air²⁵⁴

The Government tendered for the mining of the coal and a Chinese corporation known as Fenxi Mining Company, in conjunction with Great Lakes Company, a Kenyan corporation won the contract to extract coal from block C and block D.Fenxi Mining Mining Company Limited owns a 89% interest in the Mui coal mining project while the government owning 11%.The Mui coal mine is economically important as it is estimated to hold one billion tonnes of coal with a potential to produce over 3000 megawatts of power annually and is valued at Kshs 6.9 trillion.²⁵⁵

According to the benefit sharing agreement signed between the Government and Fenxi Mining Corporation, Kenya will get 23.6% of all revenues generated from block C and 22.1% from block D. This percentage is opposed to the investors cut which will be 76.4% of the proceeds to purportedly enable them recover their input in the project. The government will also acquire 11% stake in Fenxi Mining Company Limited. The coal deposits in Kitui are estimated to be in excess of 1 billion tones with an estimated market value of Kshs 6.9 trillion.This agreement has been

²⁵² Robert Okemwa Onsare(n 247).

²⁵³ Kennedy Senelwa, 'Kenya to Lease 31 Coal Blocks as it Eyes Cheaper Energy'The East African< <http://www.theeastafrican.co.ke/news/Energy-ministry-set-to-lease-31-new-coal-blocks/2558-1682726-4cg176/index.html>>Accessed on 24/09/2016.

²⁵⁴ University of Nairobi,Department of Geology, 'Potential Environmental Impact Due to Mining and Use of Coal in Areas Around Mui Basin in Kenya'< <http://geology.uonbi.ac.ke/node/980>>Accessed on 24/09/2016.

²⁵⁵ Lois.M.Musikali and Elizabeth.M.Musikali, 'Legislating Corporate Social Responsibility in Kenya's Extractive Industry:A Case Study of the Mui Coal Mining Project'Africa Nazarene UniversityLaw Journal,Vol.3(1)65-82 (2015)5.

said to be basically be skewed in favour of Fenxi Mining Company. To start with, the agreement is for a long period of time(21 years) and Fenxi may decide to sell the contract to a third party which is dangerous and expensive. The other undoing of the agreement is the fact that the percentage going to the government is very small bearing in mind that the resource belongs to the government.²⁵⁶

Further details emerging from the contract is the fact that Fenxi Mining Company Limited is under no obligation to hire local labour, use local materials from Kenyan suppliers nor subcontract local entrepreneurs .This begs the question of what the Kenyan citizen who is the owner of these minerals is left to gain from this contract.²⁵⁷

Fenxi Mining Company was Formed in 1956 Fenxi Mining Company is a subsidiary of Shanxi Coking Coal Group, a Chinese corporation which owns six other subsidiaries whose assets are estimated to be over six billion United States Dollars which is equivalent to 510 billion Kenyan Shillings. The Company was one of the 82 pilot enterprises founded by the Chinese Government. The group was privatized and listed on the Shanghai Stock Exchange in 1996.The Shanxi group runs over 32 mines exporting coal to six countries across the world including Brazil, Japan and Germany. It is the second largest coal coking company in the world, producing over 100 million tonnes of coal annually with total sales of over 9.85 billion USD equivalent of Kshs 833 billion annually²⁵⁸.

4.2 CSR AND PUBLIC PARTICIPATION IN THE KENYAN MINING SECTOR

In Kenya, public participation is entrenched in the Constitution. Participation of the people, inclusiveness, transparency, accountability and sustainable development are considered as national values and principles under the Constitution.²⁵⁹ Public participation is also viewed as an

²⁵⁶ Kitavi Mutua, 'Fresh Dispute Over Coal Mining Agreement' < <http://mobile.nation.co.ke/news/Fresh-dispute-over-coal-mining-agreement/1950946-2208640-format-xhtml-hh4j26z/index.html>>Accessed on 24/09/2016.

²⁵⁷ Ibid.

²⁵⁸ Lois.M.Musikali and Elizabeth.M.Musikali(n255).

²⁵⁹ The Constitution of Kenya,Article 10((a)(c)(d).

expression of sovereignty of the people, empowering people to determine their destiny.²⁶⁰The Constitution specifically provides for public participation in the management, protection and conservation of the environment.²⁶¹

It is a constitutional duty for every person to cooperate with State organs and other persons towards the protection and conservation of the environment and ensuring of ecologically sustainable development and use of natural resources.²⁶²Every person in the context of this research paper includes the mining corporations involved in the mining activities in Kenya.

Participation of the local communities in the licensing process is protected under the Constitution of Kenya 2010 and remains a critical issue in mining. Most of the exploration and mining activities are going to take place in the communities which fall under the administration of the county government. In addition, most of the lands that are likely to be subjects of mineral rights are owned by the communities. It is therefore important that communities and counties have a say in how mineral resource development impact their livelihood, and at a minimum information disclosure for minimal citizen participation during the different stages of the expected mining project.²⁶³

Therefore, the mining, legal and regulatory framework requires that communities and the relevant county government where mineral activities are likely to take place are notified and their consent sought before mineral operations are carried out on their land. The notification requirements provide a platform for the county, community, land owners and lawful occupiers of land to get to know the applicants of licenses. This also offers an opportunity for them to seek answers from the applicant and the Ministry of Mining of the potential impact of an intended mineral activity on their livelihoods. It is also intended that this process ensures free, prior and informed consent before the actual commencement of any mining operations. After receiving a complete application from the mining company, a notification is made to communities and the county government through publication and the facilitation by the ministry of mining. Through

²⁶⁰ IHRB, ILEG, 'Stakeholder Management in Kenya's Extractive Sector: Principles and pointers' <https://www.ihrb.org/uploads/reports/IHRB-ILEG_ESF_Stakeholder_Engagement_Principles_Sept_2016.pdf> Accessed on 21/09/2016.

²⁶¹ The Constitution of Kenya, Article 69(1)(d).

²⁶² The Constitution of Kenya, Article 69(2).

²⁶³ Government of the Republic of Kenya, Ministry of Mining (n 249)42.

this publication, the applicant is supposed to meet the community and discuss its intentions. This constitutes the first and most important leg of the entire licensing process.²⁶⁴

In practice, experts are concerned about lack of transparency regarding the deals that the government has struck with extractive companies. They contend that crucial aspects of mining and prospecting deals the State has signed in the recent years remain veiled in secrecy including the crucial detail on the formula for sharing the proceeds from mining activities. As a result of such dealings Kenyans are unable to determine whether the country is getting value for its natural resources. World Wide Fund for Nature (WWF) Country Director Mohammed Awer is of the opinion that all the agreements between the government and mining companies should be publicized in order for citizens to scrutinize them and ensure that the best interests of the country are taken care of. They include, *inter-alia* the rights of the local communities, environmental rights and economic sustainability. It is therefore improper for such important deals to be discussed and endorsed by a few government individuals locking out the rest of the Kenyans. Such negotiations should be open to the public. He adds that lack of transparency results to mismanagement of resources and distrust among stakeholders.²⁶⁵

A case in point is the agreement between the Government and Fenxi Mining Company to mine huge quantities of coal in the Mui Basin. It took the intervention of the Parliamentary Committee on Energy for Kenyans to learn about details of the agreement albeit scanty. The Cabinet Minister for energy stated that the Government had gotten a good deal with Fenxi, which got a 21 year license to harvest coal deposits. However, the Mwingi North Member of Parliament stated that the excessive secrecy surrounding the deal was unacceptable blaming it for the controversy surrounding the project. He stated that the local community was beginning to suspect that it would not benefit from the natural resource right next door.²⁶⁶

It is noteworthy that the mining process in the Mui Basin has stalled due to consistent community objections. The most contentious issue has been the land compensation process. This is worsened by the fact that majority of the people living in the mining zone do not hold title

²⁶⁴ Ibid 43.

²⁶⁵ Ally Jamah, 'Stakeholders Blame 'Secrecy Clause' to Graft in Kenya Mining Sector' <<http://www.standardmedia.co.ke/m/article/2000095810/stakeholders-blame-secrecy-clause-to-graft-in-kenya-mining-sector/?pageNo=1>>Accessed on 24/09/2016.

²⁶⁶ Ibid.

deeds. It is therefore difficult to establish land ownership. The Government has started the process of demarcating the land and issuing titles. The residents of Mui have however felt shortchanged as they have not been involved in the relocation and compensation plans. As a result, Mui residents have severally vowed not to cooperate until a liaison committee which consists of representatives from the four prospective blocks is involved in the talks.²⁶⁷

The *Community Land Act* which came into effect on 21st September 2016 is meant to cure some of the problems experienced by the communities such as the Mui Basin community. The Community Land Act states that the natural resources found on community land shall be used and managed sustainably and productively for the benefit of the whole community including future generations with transparency and accountability and on the basis of equitable sharing of accruing benefits.²⁶⁸

On the aspect of benefit sharing, the Act provides that an agreement relating to investment in community land shall be made after a free, open consultative process and shall contain: An environmental, social, cultural and economic impact assessment, stakeholder consultations and cater for involvement of the community. It shall also contain a provision on continuous monitoring and evaluation of the impact of the investment to the community, payment of compensation and royalties, requirement to rehabilitate the land upon completion or abandonment of the project measures to be put in place to mitigate any negative effects of the investment, capacity building of the community and transfer of technology to the community and any other matters necessary for determining how local communities will benefit from investments in their land.²⁶⁹

The Act also states that an agreement relating to investment in community land shall only be made between the investor and the community. For such an agreement to be valid, it has to be approved by two thirds of adult members at a community assembly meeting called to consider the offer and at which a quorum of two thirds of adult members of that community is represented. This Act has very progressive provisions with regard to participation of the

²⁶⁷ Lois.M.Musikali and Elizabeth.M.Musikali(n 255) 6.

²⁶⁸ The Community Land Act,Section 35.

²⁶⁹ The Community Land Act,Section 36(1(a-h)).

members of the community in decision making towards the mining of natural resources found within their community land.²⁷⁰

It is interesting to note that the agreement between Fenxi Mining Company and the Government did not involve stakeholders until the final stages of negotiations.²⁷¹ This is unconstitutional as the Constitution demands that any agreement relating to natural resources involving the grant of a right or concession by or on behalf of any person including the National Government to another person for the exploitation of any natural resource of Kenya is subject to ratification by parliament.²⁷²

The *local Equity Participation Regulations of 2012* aim at increasing Kenyan participation in mining companies and states that “*It shall be a condition of every mining licence that the mineral right in respect of which the licence is issued shall have a component of local equity participation amounting to at least thirty five per cent (35%) of the mineral right.*” Local equity in this context means the share of interest in a mining right which should be held by a citizen of Kenya.²⁷³ The Regulation has been interpreted to mean that at least 35% of shareholders in mining companies must be Kenyan nationals. It is said that for such a law to reach its intended aim there must be adequate finance and financial infrastructure available to the local Kenyan investors.²⁷⁴

The UNDP progress report on the extractive industries in Kenya calls out for facilitation of community engagement to ensure participatory decision making. This report cites one of the ways to achieve this to be through collaborative engagement between the communities, government and the private sector. This can be done through workshops and forums between stakeholders to deliberate on the emerging issues in the industry and agree on a way forward.²⁷⁵

²⁷⁰ The Community Land Act, Section 36(2,3,4).

²⁷¹ Ibid.

²⁷² The Constitution of Kenya, Article 71.

²⁷³ Mining (Local Equity Participation Regulations) 2012, Section 2,3.

²⁷⁴ Mayer Brown LLP, ‘Mining in Kenya-The Start of a New Era?’ <

<http://www.lexology.com/library/detail.aspx?g=1c84aee5-4a36-456b-a927-7bd061da39d9>> Accessed on 24/09/2016.

²⁷⁵ UNDP, ‘Extractive Industries for Sustainable Development in Kenya’ <

<http://www.undp.org/content/dam/undp/library/Poverty%20Reduction/Extractive%20Industries/Extractive-Industries-Brochure.pdf>> Accessed on 21/09/2016.

There is also the need to come up with benefit sharing models that will cater for sustainability and the security of future generations. To achieve this Kenya must ensure that the legal and institutional framework is working and the laws are enforced to prevent environmental damage. A participatory approach where all stakeholders are involved is also vital. Further, Kenya needs to have a formally recognized CSR framework to guide business operations in general in order to spell out basic minimum requirements for CSR compliance.²⁷⁶ Therefore Kenya has to take deliberate measures to ensure preparedness for and prevention of the negative impacts of mining activities to the local communities' way of life and in particular with regard to a clean and healthy environment.

Musikali et al, notes that it is important that the Government respects the Constitution in awarding of mining tenders. Proper stakeholder engagement through public participation should be observed and the natural resources should be used in a manner beneficial to Kenya as a nation and the residents of the community where the resources are found.²⁷⁷

4.3 ACCESS TO INFORMATION

The right to access information is a constitutional right in Kenya. Every person has the right of access to information held by the state and information held by another person and required for the exercise or protection of any right or fundamental freedom. The state is also under an obligation to publish any information affecting the nation.²⁷⁸ This right has been operationalized by the Access to Information Act which came into effect on the 21st of September 2016. We are yet to experience the implementation of this Act. However, a quick scan of the Act presents an apparent problem, this is with regard to fees required in order to access public and private information.²⁷⁹ It is noteworthy that citizens may genuinely be in need of information however the charges may impede their right to this information.

The EMCA provides for publication of the EIA report for two weeks in the Kenya Gazette and in a newspaper which is in circulation in the proposed area of the project. This is mainly to create

²⁷⁶ Norwegian Church Aid, 'Local Communities in Kenya's Extractive Sector: From Paternalism to Partnership' (2015) <https://www.kirkensnodhjelp.no/contentassets/2a28ebbac27d47e1bf647844633586d4/local-communities-in-kenya_s-extractive-sector-from-paternalism-to-partnership-0..pdf> Accessed on 21/09/2016.

²⁷⁷ Lois.M.Musikali and Elizabeth.M.Musikali(n 255)20.

²⁷⁸ The Constitution of Kenya, Article 35(1)(3).

²⁷⁹ Access to Information Act, Section 11.

awareness to the local community of the intended project. This notice is supposed to have a summary description of the project, state where the project will be carried out and it should also state where the EIA report will be for inspection by the public. The public is then given 60 days to comment on the EIA report.²⁸⁰ It is noteworthy that the public is being invited to deliberations concerning the project when the project owner has already identified an area where to carry out the report and conducted a study oblivious of the public especially the local community. This information is being provided to late in the day.

Participants of the Extractive Sector Forum (ESF) held in Nairobi emphasized the importance of timely sharing of accurate information by the government, civil society, communities and the corporations. It was stated that sharing of information was a necessity to foster sustainability, inclusiveness and smooth operation in the mining sector. Participants of this forum also noted the persisting challenge of information dissemination unevenness within the communities. In such an instance the communities are the most disadvantaged.²⁸¹ This has borne seeds of mistrust and suspicion towards corporations and government by the local community. Such suspicion have led to stalemates like the ones describe in this paper between the local citizens of the Mui Basin, the government and the mining companies allocated the four mining blocks.²⁸²

4.4 LEGISLATION AND REGULATION OF MINING IN KENYA

In Kenya, the environmental matters are regulated by a legal and institutional framework established by the *Environmental Management and Coordination Act (EMCA) of 1999*. There is also a subsidiary legislation; Environmental Impact Assessment and Audit Regulations (EIAAR) of 2003, which prescribes procedures for environmental regulation. In addition to addressing principles for sustainable development that promotes responsible use of natural resources, EMCA spells out the requirements for Environmental Impact Assessment (EIA) for industrial activity including mining activity.²⁸³

The Constitution of Kenya also states that the State shall ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources. Further, the

²⁸⁰ Environmental Management and Coordination Act, Section 59.

²⁸¹ IHRB, ILEG(n 260).

²⁸² Lois.M.Musikali and Elizabeth.M.Musikali(n 255) 6.

²⁸³ Environmental Management and Coordination Act, Part VI.

State is supposed to ensure equitable sharing of the accruing benefits. On the same note the State is also supposed to establish systems of environmental impact assessment, environmental audit and monitoring of the environment.²⁸⁴ In addition, the State is charged with the responsibility of eliminating processes and activities that are harmful and likely to endanger the environment. It is also the constitutional duty of the State to utilize the environment and natural resources for the benefit of all the people of Kenya.²⁸⁵

EMCA establishes the National Environment Management Authority (NEMA). The function of this authority is general supervision and coordination over all matters relating to the environment and to be the principal instrument of government in the implementation of all policies relating to the environment.²⁸⁶ There is a national environment restoration fund established by EMCA and administered by NEMA it is administered by the Director General of NEMA. The restoration fund acts as a supplementary insurance for the mitigation of environmental degradation where the perpetrator is not identifiable or where exceptional circumstances require the Authority to intervene towards the control or mitigation of environmental degradation.²⁸⁷

EMCA confers the responsibility to NEMA for EIA planning and implementation as well as environmental audit and monitoring. Under the environmental laws of Kenya, mining operations are required to conduct EIAs and receive a license to that effect.²⁸⁸ The process is supervised by NEMA and requires that a registered EIA expert conduct the study and develop appropriate action plans.²⁸⁹ The second schedule of EMCA recognizes coal mining as one of the projects that should undergo EIA before mining starts.²⁹⁰

Once an EIA study is completed and filed, and authorities are satisfied as to the adequacy of EIA, NEMA will issue an EIA license. The license is issued subject to such terms and conditions as may be appropriate and necessary to facilitate sustainable development and sound environmental management.²⁹¹ Implementation of the EIA, its requirements, plans and

²⁸⁴ The Constitution of Kenya, Article 69(a)(f).

²⁸⁵ Ibid Article 69(g)(h)

²⁸⁶ Environmental Management and Coordination Act, Section 7,9.

²⁸⁷ Ibid Section 25.

²⁸⁸ Ibid Section 63.

²⁸⁹ Ibid Section 58(5).

²⁹⁰ Ibid Second Schedule 6(d).

²⁹¹ Ibid Section 63.

recommendations remain as the responsibility of the project owner. An allocation of 0.1% of the total project cost is assessed by NEMA as the cost of administering the EIA.²⁹²

- It is noteworthy that despite these provisions on EIA, in practice this law is not followed. For instance it is curious why Fenxi Mining Company Limited was allowed to conduct its own EIA rather than have an independent party (registered EIA expert) do it as required by the law. The question which lingers on is as to the validity of such an EIA and how a company can obtain an EIA license after conducting the exercise in such an unscrupulous manner.²⁹³

All natural resources are vested in the people of Kenya with the government as trustee. Minerals are classified as public land and therefore belong to all Kenyan citizens. The law requires that holders of prospecting and mining titles secure access to the land required for prospecting and mining and offer fair compensation for the same. Specifically, the licensing procedures require consents from local communities, owners and occupiers of land as well as other governing bodies at the devolved level of government. Licensees are also obligated to offer fair compensation for damages, obstructions and other inconveniences to owners and occupiers of the land where applicable.²⁹⁴

The Constitution of Kenya 2010 guarantees the protection of life and private property and therefore prospecting and mining titles are secured in form of tenure, the *Mining Act* further secures prospecting and mining titles provided terms and conditions are adhered to, work programs are fulfilled, and timely payments of fees are made.²⁹⁵ There are provisions that clearly state the conditions under which licenses and leases may be revoked.²⁹⁶

Prospecting licenses are typically valid for one year subject to renewal for a maximum of five years.²⁹⁷ Mining leases on the other hand can be issued for durations between 5-21 years. Leases can be renewed for any duration not exceeding 21 years. Extensions on both licenses and leases

²⁹² Government of the Republic of Kenya, Ministry of Mining(n249)42.

²⁹³ Kitavi Mutua(n 256).

²⁹⁴ Government of the Republic of Kenya, Ministry of Mining(n 249)39.

²⁹⁵ Ibid.

²⁹⁶ The Mining Act , Section 173.

²⁹⁷ Ibid Section 13(4).

can be granted by the Commissioner of Mines, as deemed fit.²⁹⁸ Renewals have assessed fees and are predicated on completion of work programs subject to the approval of the Commissioner of Mines. Special prospecting and mining leases have no restriction on duration of prospecting or mining as the case may be.²⁹⁹

In order to qualify for any of the licenses and leases allowed under the Mining Act, individuals must first apply for a prospecting right. The prospecting right allows individuals and agents of companies, bodies of persons and partnerships to prospect on any land as authorized by the Commissioner of Mines and Geology and qualifies them to acquire licenses and peg locations.³⁰⁰ This is the first step in acquiring all other mining licenses.

4.5 CSR AND THE RIGHT TO CLEAN AND HEALTHY ENVIRONMENT

CSR has traditionally been seen as a voluntary commitment from the corporations and is often industry driven with minimal government interference. However, there are a number of countries, which have opted for a compulsory approach. In this approach CSR is founded on the philosophy that is more than just welfare and philanthropy. CSR is instead centered on promotion of fundamental human rights for instance right to life, right to property, dignity of labour and good livelihood. Therefore CSR is ethically necessary, morally obligatory and within the realms of compulsory regulation. Compulsory regulation bears the benefits of certainty, enforceability, fair play and stakeholder empowerment. Where compulsory CSR regulation is practiced even in the context of stakeholder and communities' engagement, the regulations will define duties, provide for the rights of parties, and create order and predictability in procedure of engagement.³⁰¹

The Constitution of Kenya acknowledges the need to treat the environment in a respectful manner in its preamble. It states that the environment is the heritage of all Kenyan citizens

²⁹⁸ Ibid Section 43.

²⁹⁹ Ibid Section 55.

³⁰⁰ Ibid Section 13.

³⁰¹ Norwegian Church Aid(n 276).

therefore there is need to sustain it for the benefits of future generations.³⁰²In addition the Constitution acknowledges that every person has the right to a clean and healthy environment.³⁰³

Every individual has a responsibility to contribute to the protection of the environment in the interests of his or her own health and the health of others. According to the European Charter on Environment and Health, good health and well being require a clean and harmonious environment in which physical, physiological, social, and aesthetic factors are all given their due importance. The environment should be regarded as a source for improving living conditions and increasing well being. Therefore governments, public authorities and private bodies should aim at preventing and reducing adverse effects caused by potentially hazardous agents and degraded rural and urban environments.³⁰⁴

According to Muigua, though the above sentiments offer a reminder on the special relationship between human health, the environment and the best approaches to dealing with them. As such there is need for strengthening multi sectoral cooperation by integrating environmental health concerns into all national and county environmental and health related policies.³⁰⁵In addition corporations which engage in mining in Kenya should also be compelled to ensure a proper relationship between human health and the environment by behaving in a responsible manner.

NEMA is charged with the responsibility of carrying out environmental audit of all activities likely to have significant effect on the environment. Whereby the environmental inspector may enter any land to check conformity with the statements made in the EIA.³⁰⁶NEMA is also supposed to monitor all environmental phenomenons with a view to making an assessment of any changes in the environment and their possible impacts. This includes monitoring the operations of any project with a view of determining its immediate and long term effects on the environment. Further, the environment inspector may enter upon any land for the purposes of monitoring the effects of any activities carried out on that land upon the environment.³⁰⁷

³⁰² The Constitution of Kenya 2010,Preamble.

³⁰³ The Constitution of Kenya 2010,Article 42.

³⁰⁴ Kariuki Muigua(n 38)18.

³⁰⁵ Ibid.

³⁰⁶ Environmental Management and Coordination Act,Section 68(1).

³⁰⁷ Ibid Section 69(1,a)(2).

The Kenya vision 2030 is the long term development blue print for the country with various pillars which include economic, social and political pillars. The social pillar seeks to build a just and cohesive society that enjoys equitable social development in a clean and secure environment. The blue print targets key social sectors, which include, *inter-alia*, water, sanitation, the environment, housing and urbanization. It aims to ensure that Kenya becomes a nation that has a clean, secure and sustainable environment by the year 2030. This is to be achieved through promoting environmental conservation to better support the economic pillars aspirations. This will also be achieved through improving pollution and waste management through the application of the right economic incentives and commissioning of public private partnerships. Joint efforts from all the relevant stakeholders, including private citizens coupled with collaborative approach by all the government authorities can enhance the country's effort for a clean and healthy environment.³⁰⁸

The sessional paper on Vision 2030 notes that growth will be dependent on agriculture, tourism, manufacturing and the energy sector. All these sectors heavily rely on exploitation of natural resources and the environment. Arguably, major developments anticipated by vision 2030 will affect pollution levels and generate larger quantities of solid waste than at present. All these changes will consequently exert pressure on the declining natural resources base and on the country's fragile environment. The sessional paper on Vision 2030 therefore advocates for a strong policy on environment in order to sustain economic growth while mitigating the impact of rapid industrialization.³⁰⁹

The EMCA has tried to curb the consequences of natural resources exploitation by providing for environmental restoration orders. NEMA has the authority to issue and serve orders upon any person with regard to any matter relating to the environment. This order is issued to require the person on whom it is served to restore the environment as near as it may be to the state in which it was before taking of the action which is the subject matter. The order may also be issued to prevent the person on whom it is served from taking any action which is reasonably likely to cause harm to the environment. The order may also award compensation to be paid on by the person on whom it is served to other persons whose environment or livelihood has been harmed

³⁰⁸ Kariuki Muigua(n 38)19.

³⁰⁹ Ibid.

by the action. The order may also levy a charge on the person on whom it is served to cater for any costs incurred by any other person or organisation to restore the environment in the state in which it was before the project took place.³¹⁰

According to Muigua, the environment should be accorded some right, independent of the human beings. The Constitution of Kenya elevates the environment as worthy of protection by stating in the preamble that the people of Kenya are respectful of the environment, which is their heritage and they are determined to sustain it for the benefit of future generations. Muigua states that the constitutional recognition of this position in Kenya should give the law makers, courts and other stakeholders an incentive and clear authority to take strong action to protect the environment.³¹¹

4.6 ACCESS TO JUSTICE

The Constitution of Kenya enshrines the right to access justice and obligates the state to ensure access to justice for all persons.³¹²

The Mining Act envisages a dispute resolution mechanism whereby the Cabinet Secretary will solve any dispute which arises with regard to mineral rights. The disputes may also be solved through arbitration and mediation process as may be agreed upon by the disputing parties or as per the existing contract between the parties. The dispute may also be addressed through a court of competent jurisdiction.³¹³

In line with ensuring access to justice, alternative dispute resolution mechanisms should also be encouraged. These mechanisms include arbitration, mediation, reconciliation and traditional dispute resolution. This principle is enshrined in the Constitution of Kenya as one of the guiding principles which guides the courts and tribunals in exercise of judicial authority.³¹⁴ These mechanisms can be established and implemented to solve disputes between the communities and the mining corporations.³¹⁵ This way not every dispute would have to end up in court and this

³¹⁰ Environmental Management and Coordination Act, Section 108.

³¹¹ Kariuki Muigua (n 38) 20.

³¹² The Constitution of Kenya, Article 48.

³¹³ The Mining Act, Section, 154.

³¹⁴ The Constitution of Kenya, Article 159(2)(c).

³¹⁵ UNDP (n 275).

would help avoid creating acrimony between the stakeholders who are bound to coexist with each other.

As discussed earlier in chapter two, the Constitution of Kenya provides for enforcement of environmental rights by which means obligations relating to the environment are supposed to be fulfilled.³¹⁶ This means that if a person alleges that a right to a clean and healthy environment has been, is being or is likely to be, denied, violated, infringed or threatened, such a person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.

In response to such an application the court may make any order or give any directions it considers appropriate to prevent, stop, or discontinue any act or omission that is harmful to the environment. The court may also compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment. Further the court may provide compensation for any victim of a violation of the right to a clean and healthy environment.³¹⁷ The hearing and determination of these environmental disputes is done by land and environmental courts which have the status of the High Court,³¹⁸ with regard to applications concerning the environment the applicant does not have to demonstrate that any person has incurred loss or suffered injury.³¹⁹

Muigua is of the opinion that it is important to adopt a broader approach to the protection of the right to clean and healthy environment, one which does not solely rely on proof by the complainant of actual or likely denial, violation, infringement or threat by the respondent, but one that also incorporates nature centered values. This is because the Courts are under a constitutional obligation under Article 10 of the Constitution to uphold the principles of sustainable development. This includes protecting the environment for the sake of future generations, who may not be able to prove the likelihood of denial, violation, infringement or threat to the right to a clean and healthy environment. The court has a duty to protect the right of such future generations.

³¹⁶ The Constitution of Kenya 2010, Article 70.

³¹⁷ Ibid Article 70(2).

³¹⁸ Ibid Article 162(2)(b).

³¹⁹ Ibid Article 70(3).

A case in point is the *Minors Oposa Case* where the Supreme Court of the Republic of the Phillipines decided that the petitioners could file a class suit for others of their generation and for the succeeding generations. The court in considering the concept of intergenerational responsibility further stated that every generation has a responsibility to the next to preserve that rhythm necessary for the full enjoyment of a balanced and healthful ecology.³²⁰

4.7 CHALLENGES IN LEGAL AND REGULATORY FRAMEWORK IN THE MINING SECTOR

The Vision 2030 blue print also points out that Kenya's current institutional framework on environmental management is characterized by fragmentation. This is because it has different aspects of environment policy cutting across different institutions. Therefore there is need for policy and institutional reforms for proper enforcement. However, policy and legal measures require determination and political good will from the citizens and leadership for successful enforcement and compliance. As such realizing the right to clean and healthy environment requires an integrated approach that incorporates social, cultural and political measures from all.³²¹

Musikali et al, argues that it is crucial for Kenya to ensure an adequate legal regime is enacted to guide the exploration of natural resources. In addition, despite the fact that the Government is supposed to ensure an conducive business environment for mining companies like Fenxi, the government should also with the same zeal ensure that stakeholders interests are catered for and the local communities are protected from exploitation by the mining companies. This can be achieved through the enactment and enforcement of laws that require such investors to adhere to corporate social responsibility.³²²

Therefore the State should require that foreign investors adhere to CSR. Lack of a CSR framework is likely to leave the communities adjacent to mines poor and devastated due to the externalities of coal mining in their locality. The environment will also be negatively impacted thus affecting the quality of life of the citizens. Musikali et al suggests that the State should be allocated an everlasting stake in the economic activities of foreign mining companies for the sake

³²⁰ Phillipines-Oposa et al vs.Fulgencio S.Factoran,jr.et al.GR No 101083.

³²¹ Kariuki Muigua(n 38)19.

³²² Lois.M.Musikali and Elizabeth.M.Musikali(n 255)21.

of future generations. In addition, the requirement that companies engage in CSR needs to be legislated both at the national and international level.³²³

The Extractive Sector Forum expressed concerns that the Kenyan laws as they are, are likely not to satisfactorily address challenges that result from mining industries. The major challenges being the adverse impacts on communities and the environment. Therefore there is need to come up with regulations which tackle this short coming directly. In addition the sectoral laws involving mining and the extractive industry should be aligned with auxiliary actors such as NEMA encompassed with principles of transparency, accountability and sustainability.³²⁴

4.8 CONCLUSION

In this chapter the anticipated coal mining in the Mui Basin activities have been discussed. The Fenxi Mining Company Limited has also been discussed being the main mining company which was awarded the tender to mine coal at block C and D. The agreement between Fenxi Mining Company and the Government has also been discussed albeit briefly due to the little content of that agreement which is in the public domain. The principle of public participation has been discussed and we have discovered that this principle has not been adhered to in the Mui Basin. The principle of access to information is also discussed. The chapter has also discussed the Kenya legal and regulatory framework regarding coal mining and the right to a clean and healthy environment. CSR and the right to a clean and healthy environment have also been discussed. The vision 2030 blue print has been discussed particularly the social pillar. Finally challenges in legal and regulatory framework in the Kenyan mining sector is discussed.

CHAPTER 5

COMPARATIVE STUDY

5.0 INTRODUCTION

³²³ Ibid.

³²⁴ IHRB, ILEG(n 260).

This chapter will draw a comparative analysis between Kenya and South Africa with regard to CSR in the coal mining sector and efforts of mining corporations towards fulfilling the right to a clean and healthy environment.

5.1 THE RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT

This right is provided for by both South Africa and the Kenyan Constitution. In South Africa, it has been operationalized by the NEMA,MPRDA and Promotion of Access to information Act among others. In Kenya, this right is yet to become fully operationalized legally, however there are several Acts which enhance the realization of this right. They include EMCA, the Access to Information Act and the Mining Act.Parliament is yet to legislate fully on this right in as required by Article 70 of the Constitution of Kenya.

In Kenya, there is a provision on closure of mines and mine rehabilitation. This is to ensure that the surface used for mining is rehabilitated back to how it was before the location was used for mining purposes.³²⁵This is also to avoid historical problems like the ones experienced in South Africa as a result of thousands of abandoned mines, for instance in Mpumalanga where there are 600 abandoned mines. This trend was mainly facilitated by poor legal regime in pre-independence South Africa.³²⁶The provision on closure of mines in the Kenyan mining Act is however ambiguous, this is because the Act does not state who vets the suitability of the mine closure plans. The Act should stipulate clearly which body is charged with the responsibility of ensuring that the closure plans capture all the required steps for effective rehabilitation of the surface used for mining and its subsequent closure. Kenya is looking forward to a vibrant mining industry, however if issues like regulation of closure of mines are not addressed then the economic gains anticipated from mining sector are likely to be watered down by the impacts of such mining activities on the environment and consequently on the citizenry. This is gradually going to impede the realization of the right to a clean and healthy environment.

The MPRDA of South Africa requires the holder of the prospecting permit or mining authorization to rehabilitate the surface of the land concerned. In addition, the Act requires such

³²⁵ The Mining Act,section180(1).

³²⁶ Victor Munnik,Geraldine Hochmann et al(n 185)8.

rehabilitation to be done simultaneously with the mining operations.³²⁷ As such, mine owners must have rehabilitation of the disturbed land in mind and also in action from the start of mining operations to the end. The Regional Manager is charged with ensuring such rehabilitation is done to satisfaction.³²⁸ Kenya should adopt such a system to ensure that in a few years there is no problem of abandoned unrehabilitated mines.

South Africa also has a provision for a trust fund as part of the EMP especially in cases of small and marginal mines. This fund is supposed to ensure decommissioning and after care of the mine. Kenya should borrow this idea in order to ensure that even artisanal miners respect the task of rehabilitating the surface after mining. This fund is finally closed when the mine has satisfied the Director of Mineral Development that it has complied with mine closure requirements.³²⁹ In addition, the idea of issuing of a certificate of closure should be incorporated in the Kenyan mining laws.

5.2 PUBLIC PARTICIPATION, ACCESS TO INFORMATION AND ACCESS TO JUSTICE

In South Africa, public participation is usually fostered through proper environmental management programmes (EMP) which are well regulated with proper checks and balances. In Kenya public participation in the mining sector is envisaged in the environmental impact assessment (EIA). The principle of public participation goes hand in hand with the right of access to information. This is because stakeholders can only make the right decision if the right information is availed to them regarding the mining projects benefits to the economy and impacts to the environment. The right of access to justice on the other hand ensures that any disputes between the stakeholders are solved with ease.

The right of access to information has been operationalized by the Access to Information Act. However, as noted earlier for citizens to access this information they are required to pay a certain fee which has not yet been stated by the Cabinet Secretary. This fee may impede the realization of this right because if a citizen needs the information and they cannot raise the fee then they will not requisition for the said information or even if they ask for it the information will not be

³²⁷ Mineral and Petroleum Resources Development Act, Section 41.

³²⁸ Phillip J Lloyd (n 179) 6.

³²⁹ Minerals and Petroleum Resources Development Act, Section 12.

provided to someone who does not pay for it. As such this fee may deter the public from seeking information that they are entitled and have the right to. Therefore, it would be better if the Acts had a provision stating that if a member of the public proves that they cannot raise the required fee, then the information that the person is requisition for will be provided to him/her free of charge.

The mining Act provides that the Cabinet Secretary is supposed to ensure access to information by ensuring that there are mineral agreements and the status of such agreements is available in the official website of the ministry of mining.³³⁰ The Cabinet Secretary is also supposed to publish annual records, reports and any other relevant information on the ministry's website.³³¹ These steps are plausible, however it is important to note that not many Kenyans have access to the internet nor know how to use the internet. This information should therefore be devolved to the county, ward and location levels respectively. People on the ground for instance chiefs can help disseminate this information to the locals who in some instances are the ones affected directly by mining activities.

The National Environment Management Act of South Africa is keen on environmental sustainability and it requires mines to develop an Environmental Management Programme Report (EMPR). It further requires the EMP to provide adequate provision for financial guarantees for rehabilitation and arrangements for monitoring and auditing. The EMPR is also required to have a mine closure plan, including a financial provision which should be available from the onset of mining activities to the closure of the mine.³³²

The mining sector in Kenya should adopt such EMPR to ensure environmental sustainability from when mining starts to the last stage of mining which is mine closure. This would greatly boost the Environmental Impact Assessment provided in the Kenyan law which loses its relevance the moment the project owner is issued with EIA license. The fact that the responsibility of implementation of the EIA requirements, plans and recommendations remains on the project owner poses a big challenge. This is because it is totally upon the project owner to implement or not and as a result EIA ends up to be just a formality with its implementation not

³³⁰ The Mining Act, Section 119(2).

³³¹ The Mining Act, Section 119(4).

³³² Victor Munnik, Geraldine Hochmann et al (n 185)9.

being adhered to. Therefore in Kenya, there should be a department similar to the Department of Environmental Affairs and Tourism in South Africa. ³³³This department will ensure implementation of EIAs by ensuring that for instance there are annual or quarterly reports on the implementation of the EIAs and if project owners fail to rectify pollution, they can recover the costs of clean up from the polluter just like in South Africa.

The South African NEMA not only provides for EMP, but also a social and labor plan and a closure plan.³³⁴These are all very essential plan to ensure sustainable mining and optimal involvement of mining corporations in ensuring sustainable development. Kenya should borrow from South Africa and envisage these important plans in her mining legal framework. The Mining Act of Kenya has included alongside the EIA, the social heritage assessment and the environmental plan which are to be approved before a mining licence is granted to anyone.³³⁵However,the Act does not define what these two concepts entail in order to enable their implementation.This is an area of the law which needs review in order to bring out what exactly the drafters intended. The other contention is once a prospective holder of a mining licence presents these documents and their mining licence is approved; who will monitor the implementation of these programmes? The Act should be very clear on this issue.

In Kenya, the holder of a mining permit or licence is supposed to use the land in accordance with the terms of the permit or licence and shall ensure sustainable use of land through restoration of abandoned mines and quarries. Further, upon completion of prospecting or mining,the land in question shall be returned to its original status or to an acceptable or reasonable condition as close as possible to its original state. ³³⁶This provision should instead provide for simultaneous rehabilitation. This is because in the instance that a corporation is in breach of the terms and pollution occurs and a legal battle ensues against the corporation. The environment will be the biggest loser as it will greatly suffer before the stalemate can be resolved. Simultaneous rehabilitation would help address such a scenario.

It is also noteworthy that before the Director of Mineral Development in South Africa can issue an EMP, he must consult with every department charged with administering any law affecting

³³³ Ibid.

³³⁴ Ibid.

³³⁵ The Mining Act,Section 176(2).

³³⁶ The Mining Act,Section 179.

the environment.³³⁷ This is mainly to ensure that there is harmony across the industry but more importantly it serves the purpose of ensuring the EMP is scrutinized thoroughly to ensure its suitability. It also serves the purpose of ensuring that there is agreement across the board and that it is not a single person who is to contribute towards the decision of issuing the approval of EMP but instead the final decision is as a result of proper consultations. Kenya should borrow this practice from South Africa and implement such regulations to ensure that it is not the ministry of mining which is involved in granting mining approvals only and when it comes to EIA NEMA should not be left alone to issue the EIA licenses but such licenses should be issued in consultation with all the affected departments and ministries. Ministries of interest here include the energy ministry and the environmental, water and natural resources ministry. The social heritage assessment and the environmental plan should also be approved upon thorough cross-ministerial consultation.

In South Africa, the Mining and Petroleum Resources Development Act (MPRDA) ensures that mining companies contribute towards the socio-economic development of the areas in which they operate.³³⁸ As such the mining industry in South Africa is obligated to adopt the spirit of the Act in a meaningful way and subscribe to CSR programs. This legislation has reinforced CSR into the South African mining industry. It is of importance that Kenya adopts a legal framework which addresses CSR directly as this is one of the major ways sustainable development can be fostered whereby even corporations are compelled to behave in a socially responsible manner.

5.3 CONCLUSION

This chapter has compared South Africa and Kenya on the basis of their ability to realize the right to a clean and healthy environment through CSR. The key points of comparison were public participation, access to information and access to justice. The chapter has also suggested a few modes of operation which Kenya can borrow from South Africa in preparation for coal mining in the Mui Basin.

³³⁷ Phillip J Lloyd(n 179)6.

³³⁸ Minerals and Petroleum Resources Development Act, Section (2(1).

CHAPTER 6

6.0 CONCLUSION

This research paper set out to analyze and find out the contribution of CSR towards the realization of the right to a clean and healthy environment. It is undisputed that historically business organizations were created as economic entities designed to provide goods and services to the society. Therefore the profit motive has always been the primary incentive for entrepreneurs. All other business responsibilities are based upon the economic responsibility of the firm because without it the other considerations cannot be achieved.³³⁹

However in as much as the basic responsibility of a firm is economic responsibility, the corporation does not operate in a vacuum and as such there are other stakeholders including the government, community, employees and the environment. This gives rise to other responsibilities including; legal, ethical and philanthropic responsibilities. Therefore a firm that is CSR compliant should strive to make a profit, obey the law, be ethical and be a good corporate citizen.³⁴⁰ This is because a corporation enters a society not only as an active economic subject but also as a social agent and it is through CSR that entrepreneurs may commit to actively participate in sustainable development.³⁴¹

The Kenyan legal regime has also come out as inadequate in that under Article 72 of the Constitution of Kenya, parliament is charged with the responsibility of coming up with legislation that will give full effects to the provisions relating to the environment. However six years since the implementation of the Constitution parliament has only enacted some of these laws recently, they include inter alia, The Mining Act No.12 of 2016, Community Land Act No.27 of 2016 and Access to Information Act No. 31 of 2016. The urgent legislation was the one

³³⁹ Archie B Carroll(n 105)41.

³⁴⁰ Ibid 42.

³⁴¹ Francesco Boeren(n 3)8.

related to agreements related to natural resources which is now contained in the mining Act. The delay to legislate on this issue has created a gap in dealing with natural resources contract, of particular importance is the expected coal mining in Mui Basin whose contract with the government the public has never seen. Communities in Mui Basin have suffered due to lack of a well coordinated law to transit them into understanding what is happening in their land. However, there is hope with the upcoming of the laws.

The other part where the Kenyan legal system is lacking is with regard to access to information and consequently public participation. The EMCA provides for two weeks circulation of the EIA in the Kenya Gazette and a news paper which circulates within the area where the project is to set base. This is mainly to ensure that there is public participation and the locals are aware of the project. However, it is ironic that the public is being informed of the project at this stage when public participation should have started from the prospecting stage or fair enough, when this EIA was being prepared. It is unprocedural to bypass the local communities and their concerns from the beginning then introduce them to the transactions midway. The mode of disseminating the EIA report is also inadequate, this is because hardly local citizens read the Kenya Gazette or in that case the daily newspaper, some of these people do not even know how to read. The issue at hand here is serious and the Kenyan legal and regulatory framework should treat it as such, there should be provisions in the law detailing on how information relating to any mining project should be disseminated to the people. In addition there should be legal provisions detailing how public participation should be carried out.

The right to a clean and healthy environment is equated to the right to life. This is because this right is a prerequisite for full enjoyment of all other rights.³⁴² It advocates for a healthy human habitat including clean water, air and soil that are free of toxins or hazards that threaten human health.³⁴³ Therefore for this right to be realized in the mining sector which contributes to the bulk of pollution of the environment, corporations need to embrace sound CSR programs and strategies to ensure that they contribute towards a sustainable environment for the benefit of present and future generations.

³⁴² Kariuki Muigua(n 38)7.

³⁴³ Ibid 9.

From this research paper, it is clear that the Kenyan laws do not adequately provide for the immediate and future environmental and health challenges of coal mining. For instance, the Chinese Fenxi Mining Company has already entered into an agreement with the Kenyan Government to mine coal at Mui Basin for 21 years.³⁴⁴ However, the Government has not anticipated the negative impact the mining activities of this company will have on the environment and its citizenry for those 21 years and beyond. This is so because there has been no elaborate legal framework in place to deal with the mining activities at Mui Basin nearly three years after the signing of the contract between Fenxi Mining Corporation and the Government of Kenya. Several Acts have been put in place recently and we are yet to see how this agreement which was entered into three years ago will implement the provisions of these legislations.

It is important to note that if corporations are not regulated and compelled to contribute in conserving the environment and mitigating their negative impact to the environment. The economic development that these multinationals come bearing will translate into unsustainable development in the long run.

³⁴⁴ Lois M Musikali and Elizabeth M Musikali(n 255)5.

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