

Informal Institutions, Informal Mechanisms, and their Utility in the Promotion of Environmental Protection in Africa

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Abstract

In the twenty-first century, there have been numerous attempts by the state in different African countries to preserve the environment, including the enactment of environmental laws, policies and regulations that are in force to date. These laws, policies and regulations have been instrumental in preserving the natural environment for current and future generations, in the prevention of further environmental degradation and in maintaining a sustainable relationship between mankind and the natural environment. However, beyond the reach of the state and its interventions, lies the existence of informal institutions such as indigenous communities and religion which play a powerful role in maintaining the natural environment.

This article will explore these informal institutions and extract important aspects of their operation that are useful in conservation of the environment. The methodology applied is desktop research relying on journal articles, books, working papers and reports. The article is structured to assess informal institutions and their importance in environmental conservation, aspects of informal institutions such as self-coordination, collective action, collective identity and graduated sanctions, the role of religion as well as the accommodation of religion and informal institutions in international law. The paper uses the Plastics Treaty 2024 to demonstrate how appreciation and integration of religious and customary norms would eventually contribute to better outcomes in the governance of plastic waste.

Key words: collective, common-pool resources, indigenous, institution, natural.

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I. Introduction

Formal laws which span across the national, regional, and international spheres are helpful in guiding human conduct and in establishing a stable and predictable system. In the fight against plastic pollution, the formal laws relevant in environmental conservation in Kenya are sourced from domestic sources such as the Constitution of Kenya 2010, the Environmental Management and Coordination Act 1999 and the Sustainable Waste Management Act of 2022. As is the case in Kenya, existing formal frameworks are instrumental as they provide individuals with ordered liberty. Ordered liberty, in this case, can be understood as the ability of individuals to autonomously pursue their own goals while adhering to the established rules and regulations.¹

Although the presence of a formal framework is essential in shaping an atmosphere of harmony, Bruce Frohnen points out that too much law may eliminate autonomy that groups and individuals enjoy in the shaping of their realities. He points out that communities that are truly free enjoy the regulation of their conduct by formal law, only where there is a broad consensus to do so and that such formal law is established with pre-existing customs and norms in mind.² Otherwise, there are already pre-existing ethics, beliefs and values within these communities that are effective in preserving the environment.

Considering the above, this paper will assess the interplay between formal and informal institutions in environmental conservation and preservation. It will examine some of the approaches taken by indigenous communities in the preservation of natural resources. Additionally, it will examine the potential role that dominant religions can play in environmental conservation. These arguments are used to make the case for the integration of indigenous communities and religion in treaty negotiations ahead of the enactment and signing of the Plastics Treaty 2024.

The role of informal normative frameworks, informal institutions and the knowledge management systems of indigenous people has been recognized at the international level as demonstrated by the United Nations Declaration on the Rights of Indigenous Peoples. The treaty underlines the importance of this reality, highlighting the integration of indigenous perspectives on environmental governance as an essential ingredient for addressing national and global environmental challenges. The success of international environmental

¹ Frohnen B, 'The Limits of Law: How Formal Rules Undermine Human Relations', Ohio Northern University College of Law, 2014, 1.

² Frohnen B, 'The Limits of Law: How Formal Rules Undermine Human Relations', 2014, 4.

law treaties thus depends on the extent to which indigenous communities with their normative and institutional frameworks are included in the negotiation and decision-making process. This ought to be a central consideration in the lead up to the plastics treaty if the treaty is to be universally effective in curbing plastic pollution. Interaction of formal and informal frameworks and the complementarity of community-based knowledge and scientific knowledge would go a long way in ensuring positive outcomes.

II. Informal institutions and their importance in environmental conservation

The concept of informal institutions has been discussed by various authors across academic disciplines and contextualised within specific communities. Enabulele and Ekhatior in their work on the role of informal institutions in environmental protection, define informal institutions as unwritten rules that are shared within a group which are created, communicated and enforced outside the bounds of state-established forums.³ Within the African context, the imposition of colonial laws led to a legal pluralism, characterised by clashes between formal (colonial) and informal (customary law) systems. In most cases, formal legal systems took precedence over prior existing autochthonous customary laws. This system was interventionist in nature and distorted the pre-existing way of life of the communities. This interventionism by the colonial settlers interfered not only with the way native Africans interacted with their natural environment but also the values that they applied to environmental conservation.

As a result, the values and behaviours that were associated with conservation of the environment were detached from the people which not only distorted communal ownership and responsibility but also severed the relationship between native Africans and their environment.⁴ An example of interventionism that severed the relationship between native Africans and their environment is within the colonial administrative system in which large tracts of land were set

³ Enabulele O and Ekhatior E, 'Improving Environmental Protection in Nigeria: A Reassessment of the Role of Informal Institutions' *The Journal of Sustainable Development, Law and Policy*, 2022, <<https://dx.doi.org/10.4314/jsdlp.v13i1.7>> on 30 October 2023.

⁴ Kameri-Mbote P, *Contending Norms in a Plural Legal System, the limits of formal law*, 1st ed, University of Nairobi School of Law, Nairobi, 2021, 29. An illustration of interventionism that the author gives is the detachment of natives from their environment through the arresting of women who were found collecting firewood, fruits and mushrooms by the enforcers of the colonial laws that sought to separate the natives from natural resources. All of this was done under the guise of environmental conservation.

aside under the guise of environmental conservation.⁵ This is a process that snatched local communities of their ability to access the natural resources they relied on for their activities, and the ability to use their homegrown practices to sustainably manage the resources.

Literature in this area has proposed various approaches to the analysis of the operation of informal institutions. For instance, Williamson underlines the importance of conducting a comprehensive analysis of informal institutions as a prerequisite for grasping their proper functioning.⁶ In his view, the first level is embedded institutions consisting of norms, religion, mores, traditions and customs. Embedded institutions seldom change over a long period of time and are less susceptible to human manipulation. The second level is the institutional environment, which is more flexible than the embedded institution and sets the basis for societal activities. The third level relates to institutional arrangements which encompass the systems needed for guiding economic relationships. The final level is the institution of resource allocation and employment, which consists of details addressing the operations of individuals on a day-to-day basis.

Williamson points to the differences between the four levels, noting the controlling power wielded by higher level institutions over those at the lower levels. Consequently, embedded institutions influence institutional environments, which in turn influence institutional arrangements; with the latter influencing institutions tasked with resource allocation and resource employment.⁷ An assessment of the strength of existing institutions in the promotion of environmental protection would thus require an examination of embedded institutions and the existing norms, beliefs and customs within these institutions.

Within existing informal institutions such as indigenous communities, environmental management is achieved through different customs, norms and community-based approaches which include indigenous knowledge management.⁸ Through indigenous knowledge management, these communities gain their identity, practices and knowledge from the environment around them,

⁵ Kameri-Mbote P, 'Land Tenure Land Use and Sustainability in Kenya: Towards Innovative Use of Property Rights in Wildlife Management' International Environmental Law Research Centre, 2005 - 4, 2007,10, -< <https://www.ielrc.org/content/w0504.pdf>>- on 10 February 2024.

⁶ Williamson O, 'The New Institutional Economics: Taking stock, looking ahead' 38 (3) *Journal of Economic Literature*, [2000] 595.

⁷ Enabulele O and Ekhatior E, 'Improving Environmental Protection in Nigeria: A Reassessment of the Role of Informal Institutions', 2022, 167.

⁸ Burgos-Ayala A, Jiménez-Aceituno A, Torres-Torres A, Rozas-Vásquez D and Lam D, 'Indigenous and Local knowledge in environmental management for human-nature connectedness: A leverage points perspective', 16(1), *Ecosystems and People*, 2020, 290.

and become instinctively aware of the importance of maintaining it.⁹ This knowledge, together with information on how to respond to imminent disasters that will impact the environment, is transferred from one generation to another, thereby keeping environmental management traditions and practices alive.¹⁰

III. The inter-institutional gap between formal and informal institutions

The concept of the inter-institutional gap is one that addresses governance of actions both within formal and informal institutions, and between the two types of institutions. This framework is different from Williamson's analysis of informal institutions in the previous section as it analyses both formal and informal institutions while addressing the gap between them. It highlights three key layers of rules that are in effect in the formal and informal systems with regard to natural resource management governance. These three layers are operational choice rules, collective choice rules and constitutional choice rules.¹¹

Operational choice rules guide the day-to-day actions of an individual, while collective choice rules design the institutions tasked with the enforcement of operational choice rules. Within a hierarchical order, operational choice rules fall under collective choice rules, and collective choice rules in turn fall under constitutional choice rules. The latter category is the highest in the hierarchy and guides on collective-choice decision making processes.¹² These three layers of rules exist within both formal and informal institutions.

⁹ United Nations Environment Programme 'Application and Use of Indigenous Knowledge in Natural Disaster Management' in United Nations Environment Programme (eds) *Indigenous Knowledge in Disaster Management in Africa* 1, United Nations Environment Programme, Nairobi, 2008, 56.

¹⁰ Steiner A and Oviedo G, 'Indigenous Knowledge and Natural Resource Management' in Woykec R, Shroff-Mehta P, and Mohan P C (eds) *Local Pathways to Global Development: Marking Five Years of the World Bank Indigenous Knowledge for Development Program* 1, The World Bank, 2004, 30.

¹¹ Rahman H, Ville A, Song A, Po J, Berthet E, Brammer J, Brunet N, Jayaprakash L, Lowitt K, Rastogi A, Reed G and Hickey G, 'A framework for analysing institutional gaps in natural resource governance' 11(2), *International Journal of the Commons*, 2017, 827.

¹² Clement F, 'Analysing decentralised natural resource governance: proposition for a "politicised" institutional analysis and development framework', Policy Sciences, 2010, 1 —<<http://dx.doi.org/10.1007/s11077-009-9100-8>> on 29 October 2024.

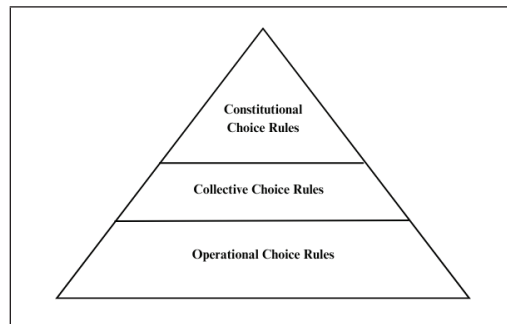


Figure 1.1

For effective and sustainable resource sharing, actions of individuals and communities must be guided by rules on all three levels, and these rules ought to be shaped autonomously. Operational and collective choice rules can be independently drawn from constant interaction between formal and informal institutions. Such cooperation is necessary for the rules to guide individual actions effectively. This interaction involves crucial aspects such as mutual recognition, reciprocity and linkages between the two forms of institutions.¹³ The result of this interplay would be a dynamic system that promotes dialogue between all relevant stakeholders.

It should be noted that both formal and informal institutions contain operational choice, collective choice and constitutional choice rules requiring inter-concessional relations to allow for effective resource sharing and management. However, as observed by H.M. Tuihedur Rahman et al, formal and informal institutions may have different resource management objectives. An example of difference in management objectives may occur where actors within formal institutions dismiss actions based on informal non-constitutional rules, ruling them out as illegitimate. This was common in the colonial period as observed in the East African Royal Commission report 1953-1955. Although relating to land, parallel lessons can be drawn. The Report pushed for individual land tenure on the assumption that it would result in a higher standard of living for Kenyans. Native Kenyans were encouraged to forgo their sense of community, their preservation of land for future generations, the protection of transfer of land ownership to non-community members, as well as the continuation of

¹³ Rahman H, Ville A, Song A, Po J, Berthet E, Brammer J, Brunet N, Jayaprakash L, Lowitt K, Rastogi A, Reed G and Hickey G, 'A framework for analysing institutional gaps in natural resource governance', 2017, 828.

traditions designed to preserve the tight-knit clans.¹⁴ Such destabilisation of the pre-existing informal systems may be an indicator of an inter-institutional gap that lacks mutual recognition and reciprocity.

In order to fill gaps such as the above, and to avoid the perpetuation of the inter-institutional gap even in the treaty negotiations of the plastics treaty, there is a need to acknowledge community-level demands through addressing the aims and demands of all the present actors, both in informal and formal institutions, to further recognise and appreciate customary laws and systems and to mandate actors in formal institutions to comply with informal non-constitutional rules. This includes the incorporation of indigenous communities and the input of their representatives in the course of treaty negotiations, as well as in implementation measures on a national level. This would go a long way in ensuring that effective resource management, which requires the sharing of responsibilities in planning, implementation and enforcement of management rules between formal and informal institutions, is achieved.¹⁵

IV. Indigenous communities as informal institutions

From the literature and even in the context of international law, multiple definitions of the indigenous community have been adopted. This is due to the variances in political systems and legal frameworks across different states around the world.¹⁶ In general, they are understood as the direct descendants of communities that existed in the pre-colonial era who lived within specific territories. In this paper, indigenous communities are regarded as informal institutions in so far as they precede and operate independently or semi-independently of state-established frameworks.

Indigenous communities had, many years prior to the colonial era, crafted their identities and lifestyles which crystallised into traditions that were then passed down through generations.¹⁷ Although the cultures of the communities varied with the community in question, the overarching understanding of indigenous communities is that they had a distinct identity, distinct language

¹⁴ *East African Royal Commission report 1953-1955*, June 1955, 323.

¹⁵ Sen A and PattaNaik S, 'Community-based Natural Resource Management in the Sundarbans: Implications of Customary Rights, Law and Practices' 52(29), *Economic and Political Weekly*, 2017, 93.

¹⁶ Sarivaara E, Maata K & Uusiautti S, 'Who is Indigenous?' special edition vol.1 *European Scientific Journal*, 2013, 369.

¹⁷ Popova-Gosart U, 'Indigenous peoples: Attempts to Define' in Berthier-foglar S, Collingwood-whit-tick S, Tolazzi S, *Biomapping Indigenous People: Towards an Understanding of the Issues*, 2012, 87.

from other communities, and carried out their activities within their established territories. The operation of these communities within established territories created a dependence on the lands in which they resided, and the resources with which the land was vested.¹⁸

Following the dawn of colonialism, many of these communities became marginalised at the hands of colonial powers and were displaced from the lands that they traditionally held.¹⁹ Within the African context, many of the indigenous communities, which consisted of nomadic and semi-nomadic pastoralists, became marginalised with limited access to economic and development resources and opportunities to substitute the lands that they had traditionally relied on for sustenance.²⁰ This led to an erosion of many of their practices, including those which were helpful in the conservation of the environment and in the sustainable use of natural resources.

V. Preservation of natural resources under indigenous systems

It had long been argued that the unhindered access to the natural resources and lack of formal norms results in a depletion and misuse of common resources.²¹ However, subsequent authors such as Elinor Ostrom, have demonstrated that higher economic outcomes are achieved when natural resource users enjoy autonomy in the design of the rules that govern their common-pool resource (CPR) use and management, than when a set of external experts come in to design the rules for the community.²² These features include the presence of a knowledge management system, a feedback mechanism, an inherent rule modification procedure, the stratification of norms and the use of autonomy by CPR users.²³

¹⁸ African Commission on Human and People's Rights (ACHPR) *Report of the African Commission's Working Group of Experts on Indigenous Populations / Communities*, 2005, 89.

¹⁹ Murei M, Nyanchonga S and Lilechi M, 'Impact of Colonialism on the Indigenous Farming Practices of the Nandi People in Kenya, 1895-1963, 7(3), *African Research Journal of Education and Social Sciences*, 2020, 9. The authors, in this work, acknowledge that the response to colonial invasion varied from one region to another, however, the attempt to separate communities from their natural resources was widespread.

²⁰ African Development Bank Group's *Development and Indigenous Peoples in Africa*, August 2016, 7.

²¹ Hardin G, 'The Tragedy of the Commons' 162(3859), *Science*, 1968, 1243.

²² Ostrom E, *Governing the Commons; The Evolution of Institutions for Collective Action*, 15, Press Syndicate of the University of Cambridge, Cambridge, 1990.

²³ Gachenga E, 'Governing the Commons Through Customary Law Systems of Water Governance The Case of the Marakwet' in IUCN Commission on Environmental, Economic and Social Policy, *Policy Matters*, 1, Finsbury Green, Australia, 2014, 63-65.

Diego Pacheco merged Ostrom's work on governance of common-pool resources with discussions on indigenous peoples and the role that they play in the sustainable use of natural resources. He observed that indigenous peoples, who have previously been left out of discussions on development and conservation of biodiversity, rely on and use natural resources without driving them to depletion.²⁴ In addition to the above-mentioned features, there are aspects of CPR management that when assessed, may aid in understanding the operation of these systems beyond formal law.

The studies of Ostrom and others have been proven by time. As of the year 2021, it has been estimated that indigenous people and local communities have custody of over a third of the established Key Biodiversity Areas, which are regions that contribute to the persistence of biodiversity to a great extent around the world.²⁵ This figure speaks to the communities that managed to retain their traditionally held lands and continue to live in harmony with their respective ecosystems. Owing to the fact that they continue to live and operate on these lands, they continue to enjoy unlimited access to natural resources and yet they are able to maintain sustainably.²⁶ However, the success of such communities is dependent on the maintenance of the features highlighted by Ostrom and others.

Lessons drawn from these considerations ought to be taken into account in the context of negotiation of international environmental treaties including the plastics treaty. Collective action, collective identity, graduated sanctions and self-coordination can all play a critical role in engaging communities in the fight against plastic pollution.

²⁴ Pacheco D, 'Recognition of the Role of Collective Action among Indigenous Peoples and Local Communities in the Convention on Biological Diversity' in IUCN Commission on Environmental, Economic and Social Policy, *Policy Matters*, 1, Finsbury Green, Australia, 2014, 107.

²⁵ World Wide Fund for Nature, UN Environment Programme World Conservation Monitoring Centre, GEF Small Grants Programme, ICCA-Global Support Initiative, LandMark Global Platform of Indigenous and Community Lands, The Nature Conservancy, Conservation International, Wildlife Conservation Society, UNDP Equator Prize, International Land Coalition Secretariat, Conservation Matters LLC and International Union for Conservation of Nature, *The State of Indigenous Peoples' and Local Communities' Lands and Territories: A technical review of the state of Indigenous Peoples' and Local Communities' lands, their contributions to global biodiversity conservation and ecosystem services, the pressures they face, and recommendations for actions*, 2021, 31.

²⁶ World Wide Fund for Nature, UN Environment Programme World Conservation Monitoring Centre, GEF Small Grants Programme, ICCA-Global Support Initiative, LandMark Global Platform of Indigenous and Community Lands, The Nature Conservancy, Conservation International, Wildlife Conservation Society, UNDP Equator Prize, International Land Coalition Secretariat, Conservation Matters LLC and International Union for Conservation of Nature, *The State of Indigenous Peoples' and Local Communities' Lands and Territories: A technical review of the state of Indigenous Peoples' and Local Communities' lands, their contributions to global biodiversity conservation and ecosystem services, the pressures they face, and recommendations for actions*, 33.

VI. Collective action and collective identity

Collective action is defined by Steve Bruce and Steven Yearley as the behaviour of a group towards a specific and finite goal.²⁷ It is helpful in building the resilience of a social-ecological system, in which resilience is understood as a system's ability to maintain its composition and operations amid disturbances.²⁸ As a phenomenon, it is useful in natural resource management following the concession that activities which touch on resource management cannot be effectively achieved by select individuals alone. Collective action is often driven by conditions where resources are scarce in comparison to their demand, and thus there is a need to manage competition that arises with regard to the resource use.²⁹ It is an effective tool in natural resource management as it introduces mutual monitoring of individuals who are in direct contact with the resources in question. In establishing and maintaining this phenomenon in natural resource management, Blake D. Ratner et al recommend capacity building for collective action.³⁰

Alfons W. Mosimane et al, on the other hand, discuss how collective action can be affected by collective identity and its change, and how the management of common pool resources through collective action relies heavily on collective identity. On a community level, a collective identity is formed on the basis of shared understanding between individuals. This identity aids individuals within the community to shape their expectations of the collective and to appreciate it. In addition to this, continuous self-organisation is achieved on a community level as the collective identity adjusts to the different levels of availability of the common resource. Individuals are able to identify themselves as part of a bigger group in which they can develop their own goals while sticking to the goals of the collective.³¹ Collective identity is two pronged and consists of identification and affective commitment. When both factors are present, individuals are able

²⁷ Bruce S and Yearley S, *The Sage Dictionary of Sociology*, Sage Publications, 2006.

²⁸ Ratner B, Meinzen-Dick R, Hellin J, Mapedza E, Unruh J, Veening W, Haglund E, May C and Bruch C, 'Addressing conflict through collective action in natural resource management' 11(2), *International Journal of the Commons*, 2017, 877.

²⁹ Tiffen M, Mortimore M and Gichuki F, *More People, Less Erosion; Environmental Recovery in Kenya*, 216. During the period of land encroachment by the colonial British government, the Akamba people did not align with the established goals of forest reservation and gazettement of land for forests. As a result of this, and the diminishing land resources in the region, they collectively settled and cultivated within the reserves.

³⁰ Ratner B, Meinzen-Dick R, Hellin J, Mapedza E, Unruh J, Veening W, Haglund E, May C and Bruch C, 'Addressing conflict through collective action in natural resource management' 877.

³¹ Mosimane A, Breen C and Nkhata B, 'Collective identity and resilience in the management of common pool resources', 2012, 344.

to discharge the duties that are placed on them by the collective without much questioning.³²

VII. The role of graduated sanctions

Sanctions exist to deter wrongdoers in a group from repeatedly violating community rules and are based on the gravity of the problem or the repetition of the offence.³³ Within a group setting that engages in common pool resource management, graduated sanctions are helpful in maintaining interpersonal relationships while correcting behaviour that does not contribute to the goals of the collective. In addition to this, graduated sanctions aid in maintaining proportionality between the level of violation and the harshness of the consequences of said violations.

VIII. Self-coordination within informal institutions

Small groups, that can be considered institutions in their own right, allow each member to achieve personal goals that would be unachievable on their own. Through constant interaction, the group's attitude, cohesion, and collective behaviour are sufficient to reinforce the agreed-upon behaviour on individuals, and this becomes more effective with smaller groups.³⁴ This is due to the institutions' promotion of social identity and the social categorisation that occurs among group members. The sense of belonging that comes from being a part of a community will naturally lead to an individual acting in accordance with others.

Garret Hardin proposes either state or privatised administration to counter the tragedy of the commons and thus forestall environmental degradation. His claim is met with varied counterarguments, including one made by Rogerio Scabim et al. The authors, in assessing whether small groups can avoid the tragedy of the commons, counter-propose that environmental degradation can be avoided where self-coordination is done within small groups in the

³² Ellemers N, Kortekaas P and Ouwerkerk J, 'Self-categorisation, commitment to the group and group self-esteem as related but distinct aspects of social identity', *European Journal of Social Psychology*, 1999, 371.

³³ Cox M, Arnold G and Tomás S, 'A Review of Design Principles for Community-based Natural Resource Management', 15(4). 2010 *Ecology and Society*, <<http://www.ecologyandsociety.org/vol15/iss4/art38/>> accessed on 15 October 2023.

³⁴ Morano R, Alves de Moraes E and Jacomossi R, 'Can small groups avoid the tragedy of the commons?' *AI & Society*, 2018, 71, —<<https://doi.org/10.1007/s00146-017-0720-9>> on 29 October 2023.

management of a scarce resource, and this coordination is achieved through a social identity and social institutions.³⁵ As a result of being part of small groups, the social identity of an individual is tied to the shaping of a person's internal and external circumstances in order to fit in with the reality created by the group. The behaviours, attitudes, expectations and mentalities that are adopted by the individual are those formed on the group level and contribute to social cohesion among the group.³⁶ Within the scope of common-pool resource management, communities have been proven to utilise their collective identity and behaviours to handle challenges that arise from the exploitation of resources.³⁷

Following the effective handling of the challenge, coupled with the constant interaction with the natural resource, groups are able to develop collective intelligence that they are able to pass down to future generations. Collective intelligence then enables groups to carry out their duties at the same time in a harmonised way.³⁸ Informal institutions such as these communities, therefore, make economic relationships predictable and allow decision-makers in formal institutions to make informed decisions while the groups continue to make collective achievements.³⁹

The above demonstrates that the plastics treaty ought to draw on the lessons from the governance of commons by indigenous peoples to engage informal actors in the setting up of informal institutions that share a collective identity and thus can adopt collective action in the curbing of plastic waste.

IX. The accommodation of informal normative frameworks in international law

Within African legal systems, African customary law is a reflection of the lived African experience and is a result of merging law and social order.⁴⁰

³⁵ Morano R, Alves de Moraes E and Jacomossi R, 'Can small groups avoid the tragedy of the commons?' *AI & Society*, 2018, 71.

³⁶ Chen R and Chen Y, 'The Potential of Social Identity for Equilibrium Selection' 101(6), *The American Economic Review*, 2011, 2562.

³⁷ Tiffen M, Mortimore M and Gichuki F, *More People, Less Erosion; Environmental Recovery in Kenya*, 1, African Centre for Technology Studies, Nairobi, 1994, 216.

³⁸ Morano R, Alves de Moraes E and Jacomossi R, 'Can small groups avoid the tragedy of the commons?' *AI & Society*, 2018, 71.

³⁹ Ostrom E, *Governing the Commons; The Evolution of Institutions for Collective Action*, 15, Press Syndicate of the University of Cambridge, Cambridge, 1990, 30.

⁴⁰ Buluma B, 'Integration of African Customary Legal Concepts into Modern Law: Restorative Justice: A Kenyan Example' *MDPI*, 2019, 1.

In assessing the interplay between African customary law and formal legal frameworks, social order gives way for the development of law and not the other way round. This occurs in three phases, with the first one being that social order creates values which guide the collective identities and behaviour of a group. These values are tried, tested and approved by the groups before graduating to become norms.

Within the second phase, the various norms that have been accepted form the society's customs. Interaction with formal lawmakers then leads to the third phase, in which these customs are written down and given 'legitimacy' through a formal legal status within a system. Therefore, in order to properly appreciate customary law from a point of African legal philosophy, there is a need to interact with the social order, norms and customs that give rise to the customary law. Such an understanding is crucial for the integration of indigenous communities and their customary law into formal legal systems without losing their authenticity.

On an international level, African customary law and the operation of indigenous communities is acknowledged and provided for in frameworks that states have adopted. For instance, the Rio Declaration on Environment and Development provides for indigenous people and affirms their entitlement to protection from states as they preserve their cultural practices.⁴¹ This is based on the indigenous communities and the critical role that they play in environmental conservation. In addition to this, Agenda 21 of the Rio Declarations acknowledges the indigenous communities and the scientific traditional knowledge that they apply in their interactions with nature, which contributes significantly to the sustainable use of natural resources.⁴²

Owing to the knowledge that the communities have gathered and developed, and its utility in the preservation of biodiversity, the agenda calls for the empowerment of indigenous people in their continued interactions with the natural environment. Agenda 21 of the Rio Declaration contains a chapter on the inclusion of demographic trends within various regions and the consideration of these trends in sustainable development. On a grassroots level, the implementation of environment programmes as per the agenda includes collaboration with various institutions, which include religious institutions.⁴³

⁴¹ Principle 22, Rio Declaration on Environment and Development, in the Report of the United Nations Conference on Environment and Development A/CONF.151/26.

⁴² Paragraph 26.1, Agenda 21, United Nations Conference on Environment & Development, 1992.

⁴³ Paragraph 5.53, Agenda 21, United Nations Conference on Environment & Development, 1992.

The Indigenous and Tribal Peoples Convention of 1989, which exists to encourage governments to protect and enhance the rights of indigenous communities, affirms the rights of ownership of land over which indigenous communities have long occupied.⁴⁴ This provision is mindful of the economic activities carried out by indigenous communities beyond agriculture, paying attention to nomadic indigenous communities inclusively. In addition to the right of these groups to own and occupy their traditional lands, their right to manage and conserve the environment is secured under the Convention.⁴⁵

In addition to the application of the Indigenous and Tribal Peoples Convention to this context, the Convention on Biological Diversity, which exists to guide states on the conservation of biodiversity globally, has one of its objectives to be the sustainable use of natural resources and the prevention of the long-term decline of biological diversity. Contracting parties to the Convention are encouraged to respect, preserve and to maintain the practices of indigenous communities and their lifestyles, as well as to promote the application of such knowledge.⁴⁶ In the development of frameworks for sustainability under the Convention, the contracting parties are mandated to exchange information amongst each other for the promotion of conservation of biodiversity.⁴⁷ Indigenous and traditional knowledge are included as part of the information that can positively contribute to environmental protection and preservation, thereby acknowledging the strong utility of the knowledge of indigenous communities to environmental preservation.

X. Indigenous communities and their engagement in treaty negotiations

Across the treaty negotiations surrounding the upcoming plastics treaty which have been held thus far, in Uruguay, France, Kenya, Canada and South Korea, reference has been made to the importance of indigenous communities and the role that they play in conservation of the environment. This reference can be seen through the intergovernmental negotiating committee (INC) meetings as they include stakeholder engagement as a critical part of drafting of the legally binding instrument. Within the INC-1 for example, there was the widespread acknowledgement of the need to include all important stakeholders

⁴⁴ Article 14, *The Indigenous and Tribal Peoples Convention*, 1989, C169.

⁴⁵ Article 15, *The Indigenous and Tribal Peoples Convention*.

⁴⁶ Article 8, *Convention on Biological Diversity*, 1992, United Nations, Treaty Series, vol. 1760, 79.

⁴⁷ Article 17, *Convention on Biological Diversity*, 1992, United Nations, Treaty Series, vol. 1760, 79.

in the process, with emphasis on hearing from marginalised groups such as indigenous people. The incorporation of their knowledge in the construction and improvement of existing knowledge bases would go a long way in informing the development and implementation of the treaty.⁴⁸

In the course of INC-2, on the other hand, discussions on the inclusion of indigenous people morph from the general acknowledgement that they need to be included as stakeholders to their inclusion in information exchange practices. One of the proposed obligations for state parties, which was under discussion by the delegations present, was the promotion of safe and sustainable alternatives, a process in which indigenous peoples and their knowledge systems can play a role in.⁴⁹ The outcome of INC-3 and INC-4 meetings shows the continued recognition of traditional knowledge, as well as local knowledge systems, and the use of these systems to complement the scientific approaches proposed to curb the persistent problem of plastic pollution. These discussions then boil down to the zero draft of the plastics treaty, which then includes indigenous peoples and their role in information exchange.⁵⁰

XI. The role of religion in natural resource management

Whereas the focus of this paper has been an analysis of informal normative frameworks for environmental governance, the lessons drawn can be used to tap into the potential role of religious norms in achieving sustainable environmental governance. Despite most countries being secular states where religion is not mandated, a significant percentage of their citizens ascribe to some religion or other. Religious norms and institutional frameworks to some extent play a normative role in society. Dominant religions, such as Christianity, Islam and Hinduism, share certain commonalities in the moral principles governing the relations between the human person and nature. The care and respect for the

⁴⁸ Intergovernmental negotiating committee to develop an international legally binding instrument on plastic pollution, including in the marine environment, *Report of the intergovernmental negotiating committee to develop an international legally binding instrument on plastic pollution, including in the marine environment, on the work of its first session*, 28 November–2 December 2022, 12.

⁴⁹ Intergovernmental negotiating committee to develop an international legally binding instrument on plastic pollution, including in the marine environment, *Report of the intergovernmental negotiating committee to develop an international legally binding instrument on plastic pollution, including in the marine environment, on the work of its second session*, 29 May– 2 June 2023, 25.

⁵⁰ Intergovernmental negotiating committee to develop an international legally binding instrument on plastic pollution, including in the marine environment, *Zero draft text of the international legally binding instrument on plastic pollution, including in the marine environment*, 26.

environment forms a fundamental part of the moral code of conduct.⁵¹ The effect of this is that there has been an increased affinity towards nature which has been linked with spirituality and the engagement in green practices.⁵²

There are themes across all the dominant religions which coincide with the notion of environmentalism and the preservation of nature. Within Islam, for example, man is entrusted with nature, and should therefore take care of it. This is a call to Muslims to engage in caring for and protecting the environment, failure to which they shall be held answerable on the day of judgement.⁵³ Within Hinduism, on the other hand, part of the teachings that relate to environmental protection is that God is present in all living things, great and small, and this is based on the notion of reincarnation. In line with this teaching, adherents to the religion are expected to preserve all life, including non-human life such as the natural environment, in order to obtain God's blessings.⁵⁴

One of the religious documents that has demonstrated the potential of informal religious norms and institutions in environmental governance is the *Laudato Si* Encyclical Letter of Pope Francis 'On Care For Our Common Home'. The letter speaks to the interplay between religions and science, noting that religious classics provide an adequate context for ethical principles to be practised, and that ethics cannot be assessed without a context.⁵⁵ It is further affirmed that the majority of people on Earth are believers and as such, religions ought to dialogue among themselves for the sake of environmental conservation and protection.⁵⁶ The messages that span across these dominant religions indicate that there is room for discussions on environmental conservation from a faith-based perspective. Given that religions operate outside the realm of formal law, there is potential for the inclusion of religious institutions in discussions surrounding sustainable development and the preservation of the environment on a much larger scale, such as within international law.

The letter points to the 'rapidification' that is occurring on planet Earth, in which the speed of human developments is outpacing the rate of biological

⁵¹ Bhagwat S, 'The Role of Religion in Linking Conservation and Development: Challenges and Opportunities' 5(1), *Journal for the Study of Religion, Nature and Culture*, 2011, 41.

⁵² Bhagwat S, 'The Role of Religion in Linking Conservation and Development: Challenges and Opportunities', 2011, 46.

⁵³ Kula E, 'Islam and Environmental Conservation', School of Public Policy, Economics and Law, University of Ulster, 4.

⁵⁴ Onyebuchi O J & Osim S, 'Hinduism and Ecology: Its relevance and importance' 1(1), *Journal of the Arts/Humanities*, 2018, 6.

⁵⁵ Encyclical Letter *Laudato Si'* of the Holy Father Francis on Care for our Common Home, 199.

⁵⁶ Encyclical Letter *Laudato Si'* of the Holy Father Francis on Care for our Common Home, 201.

evolution.⁵⁷ The document notes that the problems currently being experienced, including climate change and pollution, are the result of several rapidification processes, including the throwaway culture, which have emanated within the past few decades.⁵⁸ To illustrate this culture, he compares the process of plant and tree development to the short life cycle of products and the inability of industrial systems to absorb and reuse waste and by-products. The Pope calls upon Christians and humanity in general to develop stronger responses to the negative impacts of fast-paced industrialisation in order to restore the environment to its former glory.

XII. Conclusion

Indigenous communities and religion as informal institutions operate beyond the scope of state control and regulation but have an influential role in environmental conservation and protection. This is due to the phenomena of self-coordination, collective action, collective identity, the utilisation of traditional scientific knowledge by indigenous communities, the call of believers of religion towards environmental preservation and the teachings of religions to protect and preserve nature for spiritual purposes.

These frameworks have stood the test of time. The frameworks include a knowledge base that can complement the scientific measures that will be proposed, adopted and enacted. They have the potential to positively contribute to the development of a robust, flexible and responsive environmental framework of governance for plastics. The operation of these informal institutions has been acknowledged internationally and within various frameworks, party states have been encouraged to engage these formal institutions. Within the drafting and enactment of a plastics treaty, the engagement of these institutions will go a long way in the fight against plastic pollution.

⁵⁷ Encyclical Letter *Laudato Si'* of the Holy Father Francis on Care for our Common Home, 18.

⁵⁸ Encyclical Letter *Laudato Si'* of the Holy Father Francis on Care for our Common Home, 22.

