

# **ENHANCING ENVIRONMENTAL DEMOCRACY IN KENYA**

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## **1.0 INTRODUCTION**

This paper casts a critical look at the emerging concept of environmental democracy and its relevance and level of entrenchment in Kenya. Kenya has been democratising in many areas and democratic space has arguably increased in the last few years. The review of the extent of the permeation of the process of democratisation in the sphere of environmental management and policy formulation is the subject of discussion in the paper. In any case, that environmental management and policy would benefit through public participation in environmental governance and access to information and justice on environment and environmental matters, which is what environmental democracy entails, is not in contest. The paper is premised on the view that democratisation and public participation in environmental governance are desirable elements that would enhance chances of realizing the Kenyan dream of achieving a clean healthy environment and realizing meaningful sustainable development.<sup>1</sup>

Thus the paper critically examines the status of entrenchment of environmental democracy in the environmental legal and institutional framework in Kenya in comparison with the international environmental law framework standards. In particular, a critical analysis of the Kenyan framework on environmental democracy in the background of the more developed environmental democracy framework of the European Union especially as typified by the Aarhus

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<sup>1</sup> Section 3 (1) Environmental Management & Co-ordination Act Number 8 of 1999 section 3 and section 5 (hereinafter referred to as EMCA).

Convention<sup>2</sup> and related regional documents is undertaken. The aim is to identify the strengths and weaknesses and/or challenges facing our environmental democracy framework in Kenya and make proposals for reform.

## **2.0 WHAT IS ENVIRONMENTAL DEMOCRACY?**

Environmental democracy may be a recent coinage but what it belies are concepts that have been in use all along. The term reflects increasing recognition that environmental issues must be addressed by all, or at-least a majority of those affected by their outcome, not just by the minority comprising the governments and leading private-sector actors.<sup>3</sup> It captures the principle of equal rights for all including the public, community groups, advocates, industrial leaders, workers, governments, academics and other professionals to be involved in environmental governance.<sup>4</sup> It connotes the right of all whose daily lives are affected by the quality of the environment to participate in environmental decision-making as freely as they do in other public interest matters such as education, health care, finance and government.<sup>5</sup> Access to environmental information and justice for all those who choose to participate in such decision-making is integral to the concept of environmental democracy.<sup>6</sup>

The generally recognized minimum requirements for existence of environmental democracy is the tripartite of the so-called “access rights” in environmental matters, namely, access to information, participation in decision-making, and access to justice.<sup>7</sup> These three access rights

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<sup>2</sup> The Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. Available at <http://www.unece.org/env/pp/documents/cep43e.pdf> <last accessed on 28/07/2008>

<sup>3</sup> Albert Mumma, Environmental Law in Kenya, A paper presented at the ICJ (K) members conference on “New Frontiers in the Law”, held at Nyali Beach Hotel, March 11<sup>th</sup> to 14<sup>th</sup>, 1999 p. 6

<sup>4</sup> Dr. Susan Hazen (1998, Environmental Democracy <<http://www.ourplanet.com>> accessed on 25/1/2007 (Susan Hazen is a Director of the Environmental Assistance Divisions, Environmental Protection Agency, Washington DC.).

<sup>5</sup> Susan Hazen Environmental Democracy, available at: <http://www.unep.org/ourplanet/imgversn/86/hazen/html>

<sup>6</sup> *Ibid.*

<sup>7</sup> Csaba Kiss and Michael Ewing (eds), Environmental Democracy: An Assessment of Access to Information, Participation in Decision-making and Access to Justice in Environmental Matters in Selected European Countries

have the common denominator that they empower individuals to have a meaningful voice in decisions that affect sustainable development.<sup>8</sup>

The three rights are also intertwined in that achievement and application of each impact on realization of the others. For instance, access to information ensures that all persons who choose to participate in environmental decision-making are equipped with the necessary, or at least, basic facts about quality of their environment and their legitimate expectation on the same.<sup>9</sup> Being informed of those basic facts about the quality of their environment; citizens can become active participants in identifying and resolving environmental issues at local, national, regional and even global levels. That way the citizens become active participants in environmental governance. The resulting public participation increases vigilance and identification of anomalies that call for engagement of the mainstream justice system in resolution.

Hence the right of access to justice by all becomes the inevitable way to go if this increased vigilance is to realize real fruits. It is access to justice that avails the means by which the public ventilate for resolution their reservations on the application of and implementation of environmental laws and policies.<sup>10</sup> Access to justice is also the most potent remedy when access to information or public participation have been wrongly denied or are incomplete in that it guarantees citizens the right to seek judicial review to remedy such denial and/or deprivation.<sup>11</sup>

In essence, environmental democracy in the context of this paper includes:

- Public participation in decision making;

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European Regional Report published by The Access Initiative Europe. Available at <<http://www.accessinitiative.org>> accessed on 25/-7/2008

<sup>8</sup> *Ibid*

<sup>9</sup> *Ibid*

<sup>10</sup> *Ibid.*

<sup>11</sup> See Migai Akech, "Land, the environment and the courts in Kenya," A background paper for The environment and land law reports, February 2006, available at <http://www.kenyalaw.org> <last accessed on 01/11/07>

- Public consultation and engagement in environmental matters;
- The right to take part in and be informed about the formulation of laws, regulations and decisions involving the use and management of environmental resources;
- The right to environmental information and access to an effective conflict resolution system in relation to environmental issues.

### **3.0 ENVIRONMENTAL CONCEPTS RELATED TO ENVIRONMENTAL DEMOCRACY**

The concept of environmental democracy is irretrievably connected some environmental concept and the understanding of which impacts on the conception of environmental democracy. These concepts mainly include: environment, sustainable development and environmental governance/management. We consider each in turn:

**Environment.** The Environmental Management and Coordination Act (hereafter referred to as EMCA) provide a legal definition of “environment”:

Environment includes the physical factors of the surroundings of human beings including land, water, atmosphere, climate, sound, odour, taste and biological factors of animals and plants an the social factor of aesthetics and includes both the natural and built environment.<sup>12</sup>

In this paper this is the meaning that is envisaged.

**Sustainable development** means that development that meets the needs of the present generation without compromising the ability of future generations to meet their needs by maintaining the carrying capacity of the supporting ecosystems. This concept is closely related to the concept of sustainable use which means the present use of the environment or natural resources which does not compromise the ability to use the same by future generations or degrade the carrying capacity of supporting ecosystems.<sup>13</sup>

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<sup>12</sup> EMCA section 2.

<sup>13</sup> *Ibid* section 2.

Kenya has embraced the principles of sustainable development. These are captured in section 3(5) of the Environmental Management and Coordination Act. They include:

- (a) The principle of public participation in the development of policies, plans and processes for the management of the environment;
- (b) The cultural and social principles traditionally applied by any community in Kenya for the management of the environment and natural resources;
- (c) The principle of international co-operation in the management of the environmental resources shared by two or more states;
- (d) The principles of intergenerational and intra-generational equity;
- (e) The polluter pays principle;
- (f) The precautionary principle.<sup>14</sup>

EMCA asserts the right of every Kenyan to a clean and healthy environment and creates a legal duty to safeguard and enhance the environment.<sup>15</sup>

**Environmental management** as used in this paper includes the protection, conservation and sustainable components of the environment.<sup>16</sup>

**Environmental governance** includes the structures, organisational forms, processes, actors and rules that determine how environmental resources are governed.<sup>17</sup>

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<sup>14</sup> EMCA section (3)5 (a)-(f)

<sup>15</sup> Section 3

<sup>16</sup> *Ibid.*

**Democratic Environmental Governance:** Democratic environmental governance would thus, in the writer's view, involve *inter alia* public participation in decision-making, public awareness and public consultation over issues affecting the public. The government would have to take on board the views and values on environmental management held by communities likely to be affected by decisions affecting environmental resources that are close to them or in which they live (such as decisions, on land, water and forest issues).

#### **4.0 THE IMPORTANCE OF ENVIRONMENTAL DEMOCRACY**

The rights of citizens and other members of civil society in relation to environmental matters to information, public participation, and access to justice are indispensable if any nation, Kenya not exception, is to foster sustainable development.<sup>18</sup> The goal of promotion of sustainable development is one that calls for co-operation of the government, private individuals, non-governmental organizations, businesses and others sectors of the society.<sup>19</sup> The public involvement achieved through this cooperation helps enhance sustainable development efforts in diverse ways.

Firstly, public participation allows a wide spectrum of members of the public to express their views regarding environmental issues and conditions confronting them and affecting their immediate domain. The utilization of these views in governmental decision-making on environmental issues results in better implementation of the goals of environmental protection and sustainable development. This is because the resultant decisions are beneficiaries of expanded knowledge base on the nature of environmental problems that are to be met by the decisions<sup>20</sup>

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<sup>17</sup> <[http://www.idrc.ca/en/ev-81668-201-1-DO\\_TOPIC.html](http://www.idrc.ca/en/ev-81668-201-1-DO_TOPIC.html)> accessed on 22/1/2007.

<sup>18</sup> Principle 10 of Rio Declaration of Environment and Development

<sup>19</sup> *Ibid.*

<sup>20</sup> Carl Bruch, Regional Opportunities for improving Environmental Governance Through access Information, Public Participation, and Access to Justice, A paper presented at the 8<sup>th</sup> Session of the African Ministerial Conference on Environment (AMCEN), Held at Abuja, Nigeria, April 3<sup>rd</sup> - 6<sup>th</sup> April, 2000.

Secondly, developing environmental laws and policies is a very resource-intensive area. Hence, the public input comes in handy, especially in developing countries, in supplementing scarce government resources for developing laws and policies. In addition, at the implementation stage, the public vigilance is critical for monitoring, inspection and enforcement of environmental laws and policies by identifying and raising with appropriate authorities, environmental threats and violations.<sup>21</sup>

Thirdly, public participation can help identify and address environmental problems at an early stage. This helps save reaction-time, energy and the scarce financial resources, at least in the long run. In addition, it improves the reactive and, often, adversarial nature of government action which promises solutions to environmental problems mostly *post-facto* and only if there is a physical complainant on board.<sup>22</sup>

Lastly, public involvement in natural resource management also helps improve the credibility, effectiveness and accountability of governmental decision-making processes. This is a result of broad-based consensus for environmental programs that flows from involvement of the public at the infancy stages of the decision making processes.<sup>23</sup>

## **5.0 THE INTERNATIONAL LEGAL FRAMEWORK FOR ENVIRONMENTAL DEMOCRACY**

Environmental democracy is among the issues that have been brought to the fore in the global environment discourse. The Stockholm Declaration<sup>24</sup> and the Rio Declaration<sup>25</sup> recognise the need to involve the populace in environmental decision-making. Public participation in

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<sup>21</sup> *Ibid*

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> Stockholm Declaration on the Human Environment - Stockholm, June 1972.

<sup>25</sup> Rio Declaration on Environment and Development Rio De Janeiro June 1992, see principle 10.

environmental governance is recognised as a vital element that ensures decisions made in the environmental sphere are arrived at after broad-based consultation and are acceptable to the people they are likely to affect.<sup>26</sup>

In fact, environmental democracy, that is, rights of access to information, public participation and justice in management of natural resources is not a sudden development but has, it seems, been evolving over years, from general declarations to more concrete entitlements and commitments of citizens and governments respectively. As early as 1948, the **Universal declaration on Human Rights (UDHR)** provided the framework for generalized of access to information<sup>27</sup> and justice.<sup>28</sup> The **International Covenant on Civil and Political Rights** promulgated in 1966 sought to guarantee the right of access and dissemination of information. In particular, the ICPR secured the freedom of citizens of the member countries “to seek, receive and impart information and ideas of all kinds [information on environmental issues included].”<sup>29</sup>

Closer home, the **African Charter on Human and Peoples’ Rights** in 1981 guaranteed that citizens have the rights of access to information,<sup>30</sup> participation<sup>31</sup> and justice.<sup>32</sup> These rights, under the charter, were granted in addition to the right of the citizens “to a general satisfactory environment favorable to their development.”<sup>33</sup>

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<sup>26</sup> *Ibid.*

<sup>27</sup> Article 19 of UDHR

<sup>28</sup> *Ibid* Article 8 and 10

<sup>29</sup> Article 19(2)

<sup>30</sup> Article 9(1), African Charter on Human and Peoples’ Rights

<sup>31</sup> Article 13 *ibid*

<sup>32</sup> Article 3 and 7 *ibid*

<sup>33</sup> Article 24 *ibid*



## 5.1 STOCKHOLM DECLARATION

Principle 1 of the Stockholm Declaration asserts 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. The duty or responsibility to improve the environment for the present and future generations is also recognised. Undemocratic policies such as apartheid, racial segregation, colonization and other forms of oppression and foreign domination stand condemned and must be eliminated.<sup>34</sup> This was the foundation for democratising the environmental sphere that was to follow. The aim was to allow people to realise their environmental rights even as they carry out their responsibility of improving the environment for the present and future generations.

Principle 19 of the Stockholm Declaration advocates for education in environmental matters for the younger generation as well as adults giving due consideration to the underprivileged in order to broaden the basis for an *enlightened opinion* and responsible conduct by individuals enterprises and communities in protecting and improving the environment in its full human dimension. (Emphasis ours) The call for an ‘enlightened opinion’ presupposes participation in decision-making. The enlightened opinion is to be taken on board in decisions affecting the environment.

## 5.2 RIO DECLARATION

But it is the **1992 Rio Declaration** that epitomized the high-noon of environmental democracy in that it crystallized the emergent norms of public involvement in environmental issues.<sup>35</sup> The **Rio Declaration** marked the international recognition of the access rights as at least by the 178 governments that signed it.<sup>36</sup> In addition, the Rio Declaration on Environment and Development develops the theme of environmental democracy further by creating new levels of cooperation among states key sectors of societies and people.<sup>37</sup>

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<sup>34</sup> Stockholm Declaration Principle 1.

<sup>35</sup> Rio Declaration on Environment and Development. Available at <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163&l=en> <accessed on 26/07/2008>

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.* Rio Declaration, preamble.

Koffi Annan, the former UN secretary-general stated of the Rio Declaration<sup>38</sup> “Principle 10 of the Rio Declaration ... stresses the need for citizens’ participation in environmental issues and access to information on the environment held by public authorities.”<sup>39</sup> The principle 10 provides:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by the public authorities, including information on hazardous material and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

It obligates governments to establish a process for citizens and civil society to obtain environmental information, participate in environmental decision-making and access justice on environmental matters. Agenda 21 which was adopted in 1992 to implement the principles in the Rio Declaration reflected the rights of access to information, public participation and justice throughout it.<sup>40</sup> Under Principle 10 of Rio Declaration the member states are obligated to facilitate the rights of access to information, public participation in decision making and access to justice in environmental matters.

In particular, each individual’s right to access information concerning environment held by public authorities is guaranteed. This access right includes entitlement to information on hazardous material and activities by persons likely to be affected by the same. States are also implored to create opportunities for participation in decision-making. In this regard, the state is obligated to encourage public awareness and participation by making information widely available and capacity building. There is also an obligation upon states to implement measures

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<sup>38</sup> <http://www.unece.org/env/pp/> <last accessed on 28/07/2008>

<sup>39</sup> *Ibid.*

<sup>40</sup> Specifically see, chapters 12, 19, 27, 36, 37, and 40.

that guarantee effective access to the justice system available for redressing and remedying violation of environmental rights and laws.

Hence, it suffices to say Principle 10 above has assumed a key place in the sustainable development framework. It is now the embodiment of one of the 12 core principles of the Rio Declaration, namely, Right of environmental democracy/public participation. The work towards sustainable development depends on the population having easy access to information, being able to participate in decision-making processes and having access to justice in environmental matters. Together with the Brundtland Report of 1987, the Rio Declaration of 1992 conveyed the clear message that active public participation is a prerequisite for achieving sustainable development and solving the environmental problems of the world.

### **5.3 THE AARHUS CONVENTION**

Since the Rio declaration, other diverse international conventions addressing environmental problems have been distinguished for incorporation of public involvement principles. In this regard, the **1992 Convention on Biological Diversity**<sup>41</sup> and **1994 convention to Combat Desertification**<sup>42</sup> are outstanding examples. But it is the 1988 United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental matters (or the “Aarhus Convention”) that has taken environmental democracy to new heights.

The convention has been hailed by none other than Kofi Annan<sup>43</sup> as “*the most ambitious venture in the area of ‘environmental democracy’, so far undertaken under the auspices of the United*

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<sup>41</sup> Articles 14(1)(a) encourages public participation in environmental impact assessment of proposed projects that are likely to have significant adverse effects on biological diversity. Article implores the promotion of exchange of publicly available information

<sup>42</sup> The convention adopted a model that emphasized “the participation of populations and local communities” in programs for identifying, combating, and mitigating the causes of desertification.

<sup>43</sup><http://www.unece.org/env/php>

*Nations*". And this description is not without merit. Aarhus Convention as an international agreement lays down an elaborate set of basic rules to promote public/citizens' involvement in environmental matters and improve enforcement of environmental law. To be specific, it grants the public access to environmental information, provides for participation in environmental decision-making, and allows the public to seek judicial redress when environmental laws are infringed, including breaches of the two previous rights. As such, it represents a milestone in strengthening democracy in environmental policy-making and environmental protection, and improves the effectiveness of environmental policies.

The Convention was negotiated among the countries of the United Nations Economic Commission for Europe (UNECE). It was adopted on 25 June 1998 at a pan-European conference of environment ministers in the Danish city of Aarhus hence the name. The Convention entered into force on 30 October 2001. As of May 2007, it had been signed by 40 (primarily European and Central Asian) countries and the European Union and ratified by 40 countries.<sup>44</sup> Importantly, the convention stands out as a clear example of fruitful efforts, involving the governments and the civil society in developing and fostering the framework for environmental democracy.

The Aarhus convention articulates the three rights that embody environmental democracy very well. We look at each of the rights in turn:

### **5.3.1 Access to Information**

Access to information is the first pillar of the Aarhus Convention. It safeguards the right for every person to obtain information on environment in custody of a public authority without need for justification or prove of citizenship.<sup>45</sup> Importantly, what counts as "environmental information" is widely defined to afford the right of access to information the widest construction.<sup>46</sup>

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<sup>44</sup> Bruch *supra* p. 9

<sup>45</sup> Aarhus Convention, Article 4

<sup>46</sup> *Ibid.* Article 2(3)

The Aarhus Convention provides for both active<sup>47</sup> and passive<sup>48</sup> publicity in relation to the environment. The distinguishing factor is the conditions for issue of such information by the public authority. Thus, with regards to passive publicity, the information is issued at the instance of the public failing which the same will not likely be availed to the In other words, there is need for public requests specific information from a public authority for passive publicity to issue.<sup>49</sup>

This form of information must be provided promptly given that it usually motivated by some anxiety on the part of the applicant. The public authority is required to provide the information at the latest within one month. However, it may extend the time of provision of such information by a further month provided it gives informs and gives reasons to the applicant.<sup>50</sup>

The public may request information from any public authority. Authorities can refuse requests to make information available in certain cases specifically listed in the Convention.<sup>51</sup> However, the Convention affords these express exceptions a strict interpretation. The interpretation must also be so as to ensure the refusal is for the benefit of public interest. Furthermore, the authority must justify its refusal, with the person requesting the information being able to appeal against this decision.<sup>52</sup>

### **5.3.2 Public participation in decision-making**

The second pillar of the Aarhus Convention is based on the concept of participation and draws from Principle 10 of the Rio Declaration: that is, environmental issues are best handled with the participation of all concerned citizens, at the relevant level.

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<sup>47</sup> *Ibid.* Article 5

<sup>48</sup> *Ibid.* Article 4

<sup>49</sup> *Ibid.*

<sup>50</sup> Article 4(5)

<sup>51</sup> *Ibid.* Article 4(3) and (4)

<sup>52</sup> *Ibid.* Article 4(7)

The Convention provides for a list of types of activity where public participation is required.<sup>53</sup> There is a requirement for timely and effective notification within reasonable timeframes and if possible to ensure early participation for maximum effect.<sup>54</sup> In addition, members of the public concerned are to be afforded free inspection of relevant information and availed opportunity to raise comments in writing or orally in public hearing.<sup>55</sup> There is also a requirement that due account to be taken of outcome of public participation.<sup>56</sup>

With regard to participation in formulation of environmental policies, the Convention places a general obligation on members to endeavour to provide opportunities in the preparation of policies relating to the environment “to the extent appropriate”.<sup>57</sup> In addition, there is an obligation on Member States to strive to promote effective public participation in formulation of rules and regulations and other legally binding instruments that may have a significant effect on the environment.<sup>58</sup>

### **5.3.3 Access to Justice**

The Convention obliges States to set up adequate and effective appeal procedures that are accessible to members of the public in the quest for remedy and redress for violation of environmental rights and law.<sup>59</sup> The procedures for access to justice must be fair, equitable and timely and not inordinately expensive.<sup>60</sup> Legal decisions must be recorded in writing and made accessible to the public.<sup>61</sup> Further, the public must be adequately informed of the availability of

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<sup>53</sup> *Ibid.* Annex I

<sup>54</sup> *Ibid.* Article 6(2) and (3)

<sup>55</sup> *Ibid.* Article 6(7)

<sup>56</sup> *Ibid.* Article 6(8)

<sup>57</sup> *Ibid.* Article 7

<sup>58</sup> *Ibid.* Article 8

<sup>59</sup> *Ibid.* Article 9

<sup>60</sup> *Ibid.* Article 9(4)

<sup>61</sup> *Ibid.*

administrative or legal procedures for accessing justice in environmental matters.<sup>62</sup> The authorities must also set up assistance mechanisms to remove or reduce financial barriers to access to justice.

The Aarhus Convention envisages a broad application of the right to access to justice. The right affords review procedures to challenge the handling of information requests (any person). It also avails review procedures to challenge legality of project-level decisions requiring public participation where public participation is alleged to be restricted. Lastly, the right is available to offer procedures to challenge general violations of environmental law provided matters to do with standing are determined by parties locally. In essence, everyone may refer a case to the court or another appeal authority to ensure respect for his/her rights as defined in the Convention. However, compliance with the rules provided for in national law is a condition precedent.<sup>63</sup>

## **6.0 THE LEGAL AND INSTUTIONAL FRAMEWORK ON ENVIRONMENTAL DEMOCRACY IN KENYA**

The provisions of Environmental Management and Coordination Act (Hereinafter EMCA) make significant steps towards securing the basic minimums of environmental democracy. The Act has instituted important reforms strides especially in the area of public participation in environmental matters. The Act also eased rules on requirement for standing in environmental matters and therefore advanced access to justice. We consider each of the articulation of each of the three planks of environmental democracy in EMCA in detail below.

### **6.1 Access to Environmental Information**

The Act mainly secures the passive component of the right to access environmental information. Section 123 of EMCA provides that any person may have access to any record transmitted to National Environment Management Authority (hereinafter NEMA/Authority). However, such access is at discretion of the Authority and only available upon application. The Authority may

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<sup>62</sup> *bid.* Article 9(5)

<sup>63</sup> *bid.* Article 9(1)

also impose a fee for grant of any such access. The records available and kept are such as gazetted by the Director-General.<sup>64</sup> The Authority is within its right to insist on maintaining the confidentiality and, therefore, restricting access to any document.<sup>65</sup>

NEMA is also tasked with preparing manuals, codes and guidelines relating to environmental management and prevention or abatement of environmental degradation for public consumption.<sup>66</sup> In addition, it is to prepare an annual report on the state of the environment.<sup>67</sup> These are potential avenues through which environmental information may be disseminated to the public. However, there is no requirement for publication or dissemination of the annual environmental report. The only condition is on the Minister of Environment to place the report before the National Assembly of Kenya as soon as possible upon its publication.<sup>68</sup> The failure to provide for mandatory publication in the local dailies limits accessibility of the annual report to the public.

There is no express public duty for public authorities to provide any environmental information of their own motion. The only provision for publication of environmental information is with regard to Environmental Impact Assessment (EIA) Study Reports.<sup>69</sup> The law requires that the Director-General cause the EIA Study Reports to be published in the Gazette and a newspaper circulating in the area concerned for two successive weeks the environmental impact Assessment study report.<sup>70</sup> However, there is no similar requirement for such other important documents like environmental policies, rules and regulations and standards which are only required to be gazetted.

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<sup>64</sup> Section 121(1)

<sup>65</sup> Section 122

<sup>66</sup> Section 9(2)(n)

<sup>67</sup> Section 9(2)(p)

<sup>68</sup> Section 9(3)

<sup>69</sup> Section 59(1)

<sup>70</sup> *Ibid.*



## **6.2 Public Participation in Environmental Matters**

Generally, NEMA is under a duty to undertake programmes intended to enhance environmental education and public awareness about environment.<sup>71</sup> In that respect, it may enlist the public support and encourage the efforts of other entities and actors aimed at promoting environmental education and awareness. These two are, no doubt, basic minimums for public participation in environmental decision making.<sup>72</sup>

EMCA has created a unique institutional framework for environmental management and coordination that has the public play an important role. On its part, the membership of the Provincial and District Environmental Committees, which in-charge of environmental management at the Province and District levels respective, is satisfactorily representative.<sup>73</sup> However, the apex of environmental management structure in Kenya led by the National Environment Council (NEC is dominated by Government officials including the Minister, about seventeen (17) Permanent Secretaries and the Director-General of NEMA.<sup>74</sup> The other members are mainly appointees of the Minister and no criteria are defined for such appointment.<sup>75</sup> Given the mandate of the NEC in formulation of policies and directions and setting-up goals and objectives in environmental management, the body is not satisfactorily representative of the public in Kenya.

The practice of Environmental Impact Assessment (EIA) as provided for in the Act has also enhanced environmental democracy to the extent that it guarantees public involvement in vetting projects that impact on the environment. In essence, environmental impact assessment (EIA) involves a systematic examination conducted to determine whether or not a programme activity

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<sup>71</sup> Section 9(2)(m)

<sup>72</sup> *Ibid.*

<sup>73</sup> Section 29

<sup>74</sup> Section 4

<sup>75</sup> *Ibid.*

or project will have adverse impacts on the environment.<sup>76</sup> Closely connected to Environmental Impact Assessment is ‘environmental audit’ which means the systematic, documented, periodic and objective evaluation of how well environmental organisation, management and equipment are performing in conserving or preserving the environment.<sup>77</sup>

The requirement for publication of EIA study reports equips the public for participation in reviewing an envisaged public project. In fact, the Authority is required to publish make an announcement in both official and local languages at least once a week for two consecutive weeks in a radio with a nation-wide coverage.<sup>78</sup> The EIA regulations<sup>79</sup> require the authority to invite the public to make oral or written comments on the report. Upon receipt of the comments, the Authority is to decide whether or not to hold public hearing. A public hearing, where it is to be held, must be publicised at least once a week and shall be presided over by a qualified person. The venue of such hearing shall be at a place accessible and convenient to people likely to be affected by the project. The project proponent is required to be given audience but the procedure in the hearing is a matter of discretion of the presiding office. The presiding officer is required to make a report at the end of the hearing and submit the same to the Director-general within fourteen (14) days thereof.<sup>80</sup>

However, it is clear that Environmental Impact Assessment as it stands under EMCA is limited as a tool for enhancing public participation as it is only mandatory at the project stage. The public is thus not allowed to vet projects at policy and/or formulation level where the comments and views generated can be most useful. In essence, there is no requirement for public participation in formulation of public policy and guidelines on environmental matters. Similarly,

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<sup>76</sup> EMCA section 2 and 58.

<sup>77</sup> EMCA section 2 and 68.

<sup>78</sup> Section 59 (1). See also Regulation 17 of The Environmental (Impact Assessment and Audit) Regulations, 2003

<sup>79</sup> Full citation is The Environmental (Impact Assessment and Audit) Regulations, 2003

<sup>80</sup> EIA Regulations, Regulation 21.

there is no involvement of the public in formulation of environmental rules and regulation in Kenya.

### **6.3 Access to Justice in Environmental Matters**

EMCA laid to rest the stringent requirement as to standing which had been a prime constraint to environmental litigation in Kenya. Now, everyone whose environmental rights have been violated can apply to the High Court of Kenya for redress and remedy without having to establish that the action or omission complained against caused or is likely to cause a personal injury or loss to him or her.<sup>81</sup> However, this protection is only afforded matters that are not frivolous or abuse the process of the court.<sup>82</sup>

The High Court in deciding environmental matters is obliged to be guided by principles of sustainable development including public participation in development of policies, plans and process in management of environment.<sup>83</sup> In addition, the Court must apply cultural and social principles applied in Kenya, principle of international cooperation, principles of intergenerational and intra-generational equity, polluter-pays principle, and pre-cautionary principle.<sup>84</sup>

Kenyan courts have handled quite a number of environmental cases, restated certain environmental principles and delivered sound rulings and judgments. Kenyan judges are becoming aware of the importance of sustainable use of the environment and the need to expeditiously resolve environmental conflicts. It is arguable that this awareness has been brought about by continuous legal education and their attendance at various seminars wherein they have widened their knowledge on environmental issues.

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<sup>81</sup> Section 3(3) of EMCA

<sup>82</sup> Section 3(4) of EMCA

<sup>83</sup> On the role of the court in environmental matters see generally Justice J.B. Ojwang, "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 Kenya Law Review Journal 19 (2007)

<sup>84</sup> Section 3(5) of EMCA

The court system is essentially adversarial. There are no “win-win” situations in an adversarial system and the cases also still take long to resolve. The judges must make a decision and decide the case one way or the other.<sup>85</sup> Invariably, one side to the litigation process always feels that justice has not been done. The procedure for bringing the cases to court and sustaining them there is also complex and cumbersome. In addition, the court system is susceptible to procedural and technical objections raised by parties which make the process rather slow at times. In such instances, the environmental issues that were to be addressed are as a result of the striking out of such cases on technicalities not addressed<sup>86</sup> and resolved. Litigation is also expensive and the average Kenyan desirous of enforcing an environmental right may not afford to pay the filing fees and other disbursements required before a matter is brought to court and heard. Nevertheless, the establishment of the Environment and Lands Division of the High Court of Kenya and Environmental Law Reports are laudable steps that are likely to increase efficiency in environmental litigation and, by extension, access to justice in environmental matters in Kenya.

EMCA also avails a number of adjudicatory mechanisms for environmental matters that members of public can utilize to secure environmental rights and enforce environmental laws without necessarily having recourse to the High Court. The key ones are the Public Complaints Committee and the National Environment Tribunal. The Public Complaints Committee (PCC) is composed of a chair who should be an advocate of the High Court of not less than 7 years standing, a representative of the Attorney general, a representative of the Law Society of Kenya, a representative of the Non-Governmental Organizations Council, a representative of the business community and two members appointed by the Minister for their active role in environmental management.<sup>87</sup> The function of the PCC is to investigate any complaints or allegations against any person or against NEMA in relation to the condition of the environment

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<sup>85</sup> See J.B. Ojwang, *Supra* p. 24

<sup>86</sup> See the case of *Lereya & Four Others (& 796 others-vs-A.G. & 2 Others [2006] eKLR*, regarding the poisonous plant *prosopis juliflora* that is allegedly poisoning animals in the Rift Valley. The same was initially struck out on the ground that the Plaintiff had not given a notice to the A.G. (this case is popularly referred to as the “toothless goat case”)

<sup>87</sup> Section 31 of EMCA

in Kenya. The tribunal may also of its own motion investigate any suspected case of environmental degradation.<sup>88</sup>

However, the PCC lacks autonomy and the enforcement powers as its decisions are only useful as finding and recommendations to the National Environment Council. The PCC is also under obligation to perform such other function and exercise such power as may be assigned by the Council.<sup>89</sup> There is no doubt that the idea of a Public Complaints Committee to act as an ombudsman on environmental matters is a noble one. But the PCC as conceived under EMCA is a poor equivalent of an environmental Ombudsman lacking as it does autonomy for NEC and any tangible enforcement powers. While the PCC offers an informal channel for access to justice against activities and operations impacting on environment in Kenya, there is no guarantee its recommendations to NEC will be enforced.

The National Environment Tribunal is empowered to inquire into the matters arising from refusal to grant or transfer a licence, imposition of any condition, limitation or restriction on a licence, the amount of money required to be paid as a fee and the imposition of an environmental improvement order by the Authority.<sup>90</sup> The Tribunal is made of a Chairperson appointed by the Judicial Service Commission, an advocate, a lawyer with professional qualifications in environmental law and to other persons of exemplary academic competence in environmental matters.

The Tribunal, it is apparent, does not deal and is, indeed, not mandated to deal with matters relating to the access to and use of environmental resources. Its mandate is limited to the matters provided for in the Act. It is not suitable for the purpose of settling environmental conflicts at community level. The Tribunal also does not envisage the participation of all interested parties, such as developers, government, the community, non governmental organisations, and environmental groups in a joint effort aimed at restoring the environment, and agreeing on the

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<sup>88</sup> *Ibid.* Section 32

<sup>89</sup> *Ibid.*

<sup>90</sup> See also EMCA section 129

sustainable use of the same. The Act also anticipates other tribunals established in provincial and district levels but these are yet to be set-up to date.<sup>91</sup>

## **7.0 CHALLENGES AND OPPORTUNITIES; WHICH WAY FOR KENYA?**

The environmental field in Kenya faces many challenges. Environmental democracy offers the requisite solutions especially to environmental management and policy as it brings to bear the advantages associated with public participation in governance. It should thus be given a chance to develop and thrive.

The foregoing discussion in this paper underscores the need for an African, or at least Kenyan, initiative on the promotion or cultivation of environmental democracy. An African contribution to the development of international norms on access to environmental democracy is necessary to ensure that the norms promulgated are relevant to the African context. The evolving international duties, rights, and procedures resulting from the perpetuation of environmental democracy principles have potential impacts for African countries at the national and international level. Environmental democracy principles are no longer a matter just “out there”, but directly impact and are applicable in Africa generally and Kenya in particular.

In Kenya, the Environmental Management and Co-ordination Act represents a bold attempt to provide an appropriate legal and institutional framework for environmental democracy. The Act also recognises the role of public participation Environmental Impact Assessment, Environmental Audit, and principles of international environmental law.<sup>92</sup> However, on the ground meaningful public participation, and by extension environmental democracy, in environmental matters is still minimal.

The Minister responsible pursuant to the powers conferred on him by section 147 of the Environmental Management & Coordination Act (EMCA) unitarily has enacted several regulations supplement the Act in management and coordination of environment in Kenya *to wit*:

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<sup>91</sup> Section 136(1) of EMCA

<sup>92</sup> *Ibid*; See also section 58, 68 & The Environmental (Impact Assessment & Audit) Regulations 2003.

- Environmental (Impact Assessment & Audit) Regulations 2003;<sup>93</sup>
- The Environmental Management & Co-ordination (Water Quality) Regulations 2006;<sup>94</sup>
- Environmental Management and Coordination (Waste Management) Regulations 2006;<sup>95</sup>
- Environmental Management & Coordination (Fossil Fuel Emission Control) Regulations;<sup>96</sup>
- Environmental Management and Coordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing Regulations 2006;<sup>97</sup>

But these regulations are enforced mainly through application of penalties for defaulters and a licensing system. Standards have been created in respect of emissions and water quality. In spite of all these laws and sanctions, environmental degradation and pollution of the environment continues unabated. Conflicts over natural resources such as land, water pasture and forest produce have sometimes degenerated into open clashes where lives are lost. Legislating penalties is just the first step. Will the penalties force Kenyans to operate any differently from the way they have in the past, with respect to environmental matters? Would it help if there was massive public awareness and education on the negative effects of pollution and environmental degradation? Would there be fewer conflicts and clashes if there was more public participation in decision making at the local level? These are pertinent questions.

## **8.0 REFORM PROPOSALS TOWARDS ENHANCING ENVIRONMENTAL DEMOCRACY IN KENYA**

There is no doubt that EMCA has significantly provided for entrenchment of environmental democracy in Kenya. However, if best practices in environmental democracy and public participation in other jurisdictions are anything to go by, it clear that the provisions of EMCA on

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<sup>93</sup> L.N.101 2003.

<sup>94</sup> L.N. 120 of 2006.

<sup>95</sup> L.N. 121 of 2006.

<sup>96</sup> L.N. 131 2006.

<sup>97</sup> L.N. 16 2006.

environmental democracy are in need of review. In particular, the following legal reforms need to be implemented to enhance environmental democracy in Kenya.

Firstly, the reporting requirements of public authorities on environmental matters need to be expanded so as to enhance the scope of access to environmental information. The “culture of secrecy” still permeates public authorities in Kenya. Matters are not made any easier by the Official Secrets Act<sup>98</sup> which makes almost everything handled by government agencies a matter of official secret. This culture has also found its way into the mindset of the public members who expect little or no information from the government authorities and are unwilling to try to extract the same.

EMCA also needs to increase transparency and accountability on environmental issues. There is no question that an informed public is in a better position to exercise environmental democracy than on that is not. Increase in transparency and accountability will enhance environmental democracy by exponentially increasing public participation and the quest for justice against the revealed environmental violations.

The scope of Environmental Impact Assessment must also be expanded to cover policy formulations. The EIA framework should also provide for incorporation of the views and comments of the public in NEMA’s decision whether or not to grant an environmental licence.<sup>99</sup> The public needs also to be engaged in formulating rules, regulations, standards and guidelines on environmental matters as these influence environmental decision making.

The structure and membership of environmental management institutions in Kenya needs to be reviewed to ensure that they sufficiently incorporate the principle of public participation. This is especially so with regard membership to NEC. A criteria for appointment of members of NEC needs to be put in place to ensure appointments are not politicised but are driven by quest for merit and ensuring balanced public participation and representation. The mandate and autonomy

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<sup>98</sup> Cap. 186, Laws of Kenya

<sup>99</sup> This matter is left unaddressed in the current legal framework under EMCA.



of the Provincial and District Environmental committees should also be expanded vis-à-vis the NEC. These grassroots institutions are the only guarantee that the people affected by environmental decision and beneficiaries of environmental resources have a say in the formulation of policies that manage the environment. Further, environmental education and public awareness should be made mandatory roles of NEMA as the public cannot be adequately participate in environmental affairs unless it is well informed and educated on the environmental governance issues.

Lastly, the framework for access to justice and especially with regard to the justice system on environmental matters ought to be reformed in order to incorporate alternative dispute Resolution methods. This is especially important if the cultural and social principles of the communities in Kenya are to be adhered to as implored by the EMCA. There are already proposals for court annexed mediation.<sup>100</sup> The same are timely and should be adopted to pave way for use of mediation in resolution of environmental disputes in Kenya. Given the informal and non-competitive nature of mediation, timely decisions that ensure that environment wins are likely to be the result of its official incorporation in the civil justice system in Kenya.

The institutional framework for access of justice under EMCA and especially Public Complaints Committee should be reviewed. PCC should be given autonomy and clout to ensure it takes the position of environmental ombudsman in Kenya. As matters stand, there is a lacuna in that the system does not provide for an informal method of ventilation of environmental issues and complaints with, at least, with assurance for enforcement of the decisions arrived. The mandate of the National Environment Tribunal also needs expansion to make the decision-making body an alternative to the court justice system in Kenya in environmental litigation. The membership of both PCC and NET should also be reviewed to include laymen members. That way, the accessibility and approachability of the institutions will be enhanced.

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<sup>100</sup> See Kariuki Muigua, The Role of Lawyers in Mediation, A paper Presented to Chartered Institute of Arbitrators-Kenya Branch Mediation Course for Advocates Disciplinary Committee, Held at Nairobi, August 2007 (available at the Institute's offices)

## **CONCLUSION**

The enactment of EMCA has laid the groundwork for environmental democracy in Kenya. The rights of access to environmental information, public-participation in environmental decision-making and access to justice in environmental matters are now guaranteed, at least to a minimal extent. However, there is room for reforms to enhance environmental democracy in Kenya is to be at par with developments in best practices in other jurisdictions in order to realize the goal of sustainable development in Kenya. The best starting point is to ensure that maximum application of the general principles of sustainable development reflected in the Act (EMCA) is expedited.

In addition, there is need to perpetrate a culture of transparency and accountability in environmental matters among public authorities and private sector in Kenya. Efforts in environmental education and public awareness need to be supported as to exercise environmental democratic rights, citizens need to be informed of opportunities and procedures to be followed. Environmental reporting obligations also need to be extended to cover all areas that call for public scrutiny and in-put.

“Democracy” without public participation, consultation and inclusive deliberation in environmental matters will remain a mere platitude. There is thus need to embrace a change in the way government and policy makers think. Environmental litigation and dispute resolution needs to be reinforced to ensure that the public exercise the due police power the right of access of justice in environmental matters affords.

In a word, the challenges facing entrenchment of environmental democracy in Kenya today can and should be turned into opportunities for a better tomorrow in which all Kenyans enjoy a clean and healthy environment within an atmosphere that allows the realisation of the cherished dream of sustainable development. Environmental democracy is attainable. Indeed, it is an imperative for Kenya if the goal of sustainable development is to see the light of day.