

Realising Environmental Democracy in Kenya

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Abstract

This paper critically examines the concept of environmental democracy in light of the current Constitution of Kenya 2010 and the existing framework on facilitating enjoyment of environmental democracy by the Kenyan people. It traces the legal foundations of this right in the international environmental discourse as well as its place in the Kenyan law. The paper proffers recommendations on the practical ways through which this right can be actualized based on the existing legal, institutional and policy frameworks.

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1. Introduction

Over the years, environmental democracy has been incorporated as one of the important aspects of environmental governance both in the international and national environmental law discourse. While most national legal instruments on environmental governance do not expressly refer to the concept of environmental democracy as such, the same is incorporated within the provisions, both constitutional and statutory. Indeed, it has been pointed out that the global trend toward adopting environmental rights within national constitutions has been largely regarded as a positive development for both human rights and the natural environment.¹

This paper traces environmental democracy within the constitutional and main statutory framework on environment law in Kenya. It also offers a post 2010 Constitution perspective on the extent to which the concept of environmental democracy has been embraced and incorporated into the environmental policies and laws in the country.² The author ultimately makes a case for environmental democracy as a means to an end in promoting and realisation of environmental rights for Kenyan communities, for peace and development, in the context of sustainable development.

2. Need for Environmental Democracy as an Environmental Right

2.1 The Concept of Environmental Democracy

The concept of environmental governance has been defined as encompassing the relationships and interactions among government and non-government structures, procedures and conventions, where power and responsibility are exercised in making environmental decisions.³ Furthermore, it concerns how the decisions are made, with a particular emphasis on the need for

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¹ See Gellers, Joshua C. & Chris Jeffords, "Toward Environmental Democracy? Procedural Environmental Rights and Environmental Justice," *Global Environmental Politics* Early Access (2018): 99-121 at 99.

² See a pre-Constitution 2010 discussion on the same topic, Muigua, K & Musyimi, P.N., "Enhancing Environmental Democracy in Kenya" (2008). Available at http://www.kmco.co.ke/attachments/article/81/072_Envtal_Dem_Kenya.pdf

³ Jeffery, Michael I, "Environmental Governance: A Comparative Analysis of Public Participation and Access to Justice," *Journal of South Pacific Law* 9, no. 2 (2005).

citizens, interest groups, and communities generally, to participate and have their voices heard.⁴ Principles such as inclusivity, representativity, accountability, efficiency, and effectiveness, as well as social equity and justice, are believed to be the foundations of good governance.⁵

It has rightly been pointed out that ‘environmental democracy is rooted in the idea that meaningful public participation is critical to ensure that land and natural resource decisions adequately and equitably address citizens’ interests.’⁶ In addition, at its core, environmental democracy involves three mutually reinforcing rights: the right to freely access information on environmental quality and problems; the right to participate meaningfully in decision-making; and the right to seek enforcement of environmental laws or compensation for harm.⁷

‘Environmental democracy’, is also used to capture the recognition that environmental issues must be addressed by all those affected by their outcome, not just by governments and industrial sectors.⁸ Environmental democracy is believed to capture the principle of equal rights for all those in the environment debate-including the public, community groups, advocates, industrial leaders, workers, governments, academics and health care professionals.⁹ For those whose daily lives reflect the quality of their environment, participation in environmental decision-making is believed to be important. Furthermore, access to environmental information for all who choose to participate in such decision-making is also believed to be integral to the concept of environmental democracy.¹⁰

Democratic participation of citizenry in political processes is considered as one of the tenets of an open and just society around the world.¹¹ It has also been opined that ‘participatory democracy seems at first glance to be wholly congenial with the spirit of science, which places

⁴ Ibid.

⁵ “Part II: State of the environment,” 54. Available at https://www.environment.gov.za/sites/default/files/docs/part2_environmental_governance.pdf [Accessed on 15/04/2018].

⁶ Environmental Democracy Index, ‘Background and Methodology: Environmental Democracy Background,’ available at http://environmentaldemocracyindex.org/about/background_and_methodology [Accessed on 15/04/2018].

⁷ Ibid.

⁸ Hazen, S., “Environmental democracy,” *Our Planet* 8.6-March 1997. Available at <https://www.ourplanet.com/imgversn/86/hazen.html>

⁹ Ibid.

¹⁰ Ibid.

¹¹ See Jasanoff, Sheila, “The dilemma of environmental democracy,” *Issues in Science and Technology* 13, no. 1 (1996): 63-70 at 64; See also Gellers, Joshua C. & Chris Jeffords, “Toward Environmental Democracy? Procedural Environmental Rights and Environmental Justice,” *Global Environmental Politics* Early Access (2018): 99-121 at 102.

its emphasis on free inquiry, open access to information, and informed critical debate'.¹² The main argument is that 'increasing knowledge and increasing participation - in the sense of larger numbers of voices at the table - do not by themselves automatically tell us how to act or how to make good decisions....because participation and science together often produce irreducible discord and confusion.'. ¹³

Environmental democracy is pegged on the right and ability of the public to freely access relevant and timely information, provide input and scrutiny into decision making, and to challenge decisions made by public or private actors which may harm the environment or violate their rights before an accessible, independent, and fair legal authority.¹⁴ Environmental democracy is therefore an important element in effective environmental governance.

States make attempts to address environmental changes experienced at the national level by adopting environmental policy innovations whose origins lie at the global level, including environmental institutions, instruments, laws, and policies.¹⁵

Principle 10 of the *1992 Rio Declaration on Environment and Development*¹⁶ envisages the various elements of environmental governance where it provides that 'environmental issues are best handled with the participation of all concerned citizens, at the relevant level. It requires that at the national level, each individual should have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. Further, states should facilitate and encourage public awareness and participation by making information widely available. It also requires that effective access to judicial and administrative proceedings, including redress and remedy, should be provided'.¹⁷

¹² Jasanoff, Sheila, "The dilemma of environmental democracy," *op cit.*, at 64.

¹³ *Ibid.*, at 65.

¹⁴ Worker, Jesse & De Silva, Lalanath, *The Environmental Democracy Index*, (World Resources Institute, Technical Note Working Paper, June 2015), p.2. Available at http://environmentaldemocracyindex.org/sites/default/files/files/EDI_Technical%20Note%20Final%207_9_15.pdf [Accessed on 15/04/2018].

¹⁵ Gellers, Joshua C. & Chris Jeffords, "Toward Environmental Democracy? Procedural Environmental Rights and Environmental Justice," *op cit.* at 99.

¹⁶ Report of the United Nations Conference on Environment and Development (Rio De Janeiro, 3-14 June 1992) Annex I, *Rio Declaration on Environment and Development the United Nations Conference on Environment and Development*, A/CONF.151/26 (Vol. I). Adopted in Rio de Janeiro, Brazil on 14 June 1992.

¹⁷ *Rio Declaration on Environment and Development the United Nations Conference on Environment and Development*.

Although not directly applicable to Kenya, the *Aarhus Convention*¹⁸ offers significant pointers on effective environmental governance. The Convention provides for: the right of everyone to receive environmental information that is held by public authorities ("access to environmental information"); the right to participate in environmental decision-making ("public participation in environmental decision-making"); and the right to review procedures to challenge public decisions that have been made without respecting the two aforementioned rights or environmental law in general ("access to justice").¹⁹

The *Aarhus Convention* also emphasises rights of access to information as the means to ensure that the public can participate in environmental decision-making in "an informed manner", the aim being to "enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public opportunity to express its concerns and enable public authorities to take due account of such concerns."²⁰

It has been argued that 'participation is central to the notion of environmental democracy, and that participation in environmental governance enhances the likelihood that government agencies will be held accountable to the public; infuses local knowledge into decision-making processes; increases popular support for policies; and produces higher-quality planning outcomes, environmental decisions, and conservation efforts'.²¹

2.2 Environmental Democracy as an Empowerment Tool for Achieving Sustainable Development

The concept of sustainability provides the nexus of economic, social, and environmental spheres of life.²² Sustainable Development Goal (SDGs) 16 aims to 'promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build

¹⁸ United Nations Economic Commission for Europe (UNECE), *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, 1998.

¹⁹ European Commission, *The Aarhus Convention: What is the Aarhus Convention?* Available at <http://ec.europa.eu/environment/aarhus/>

²⁰ *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, 1998 page 2.

²¹ Gellers, Joshua C. & Chris Jeffords, "Toward Environmental Democracy? Procedural Environmental Rights and Environmental Justice," op cit. at 102.

²² Gellers, Joshua C. & Chris Jeffords, "Toward Environmental Democracy? Procedural Environmental Rights and Environmental Justice," op cit. at 104; See also Fisher, Joshua & Kristen Rucki, "Re-conceptualizing the Science of Sustainability: A Dynamical Systems Approach to Understanding the Nexus of Conflict, Development and the Environment," *Sustainable Development* 25, no. 4 (2017): 267-275.

effective, accountable and inclusive institutions at all levels'.²³ The SDGs also seek to promote participation of local communities in natural resource management.²⁴

The environmental democracy rights of access to information, public participation, and access to justice in environmental matters are promoted as key drivers of informed, accountable decision making and citizen empowerment.²⁵

Empowerment is aimed at achieving the following: developing the ability to access and control material and non-material resources and to effectively mobilize them in order to influence decision outcomes; developing the ability to access and influence decision-making processes on various levels (household, community, national, global) in order to ensure the proper representation of one's interests (also described as getting a —voice); gaining an awareness of dominant ideologies and of the nature of domination that one is subjected to in order to discover one's identity, and ultimately to develop the ability to independently determine one's preferences and act upon them; and developing the ability to trust in one's personal abilities in order to act with confidence.²⁶

It has been rightly noted that a right is not just the ability to do something that is among your important interests (whatever they are), but a guarantee or empowerment to actually do it, because it is the correct thing that you have this empowerment.²⁷

Political empowerment requires inclusion in democratic decision-making processes which is equated to mainly gaining a voice within the local and/or central state.²⁸

The *1994 Draft Declaration on Human Rights and Environment* envisages the procedural rights, such as the right to participation, necessary for realization of the substantive rights.²⁹ Procedural rights, such as rights to information, participation and access to justice, have the potential to empower civil society groups to make social and environmental claims and to hold

²³ United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, Resolution adopted by the General Assembly on 25 September 2015.

²⁴ Ibid, Goal 6b.

²⁵ Worker, Jesse & De Silva, Lalanath, *The Environmental Democracy Index*, (World Resources Institute, Technical Note Working Paper, June 2015), p.1.

²⁶ Oladipo, S.E., 'Psychological Empowerment and Development', *African Journals Online*, Vol. 2, No 1, 2009, p.121.

²⁷ The Hendrick Hudson Lincoln-Douglas *Philosophical Handbook*, Version 4.0 (including a few Frenchmen), p. 4.

Available at <http://www.jimmenick.com/henhud/hhldph.pdf> [Accessed on 15/10/2017].

²⁸ Miller, B., 'Political empowerment, local—central state relations, and geographically shifting political opportunity structures: Strategies of the Cambridge, Massachusetts, Peace Movement', *Political Geography*, (Special Issue: Empowering Political Struggle), Volume 13, Issue 5, September 1994, pp. 393–406.

²⁹ Part 3 (Principles 15–24).

State bodies and private sector actors accountable for their actions or omissions, while exercising basic civil and political rights to be free from harassment and abuse.³⁰ This is reiterated under Article 1 of the Aarhus Convention “in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and wellbeing, each Party should guarantee the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of this Convention.”³¹ It believed that environmental procedural rights such as the access to information, public participation and access to justice may be one of the ways and means to a realistic way for attaining the sustainable development.³²

It has been argued that ‘while trust and community are equally necessary in addressing complex environmental problems, building institutions that foster knowledge and trust, participation and community, is one of the greatest challenges confronting today's human societies’.³³ It is commendable that the Constitution provides for public participation and specifically tasks the state with the role of ‘encouraging public participation in the management, protection and conservation of the environment’.³⁴ It also obligates ‘every person to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources’.³⁵

It is important to point out that while policy and legal framework is necessary, it cannot alone guarantee achievement of environmental justice for communities. This was well captured in the Brutland Report, *Report of the World Commission on Environment and Development: Our Common Future* where the Commission observed that ‘the law alone cannot enforce the common interest. It principally needs community knowledge and support, which entails greater public participation in the decisions that affect the environment. This is best secured by decentralizing the management of resources upon which local communities depend, and giving these

³⁰ United Nations Non-Governmental Liaison Service, *Human Rights Approaches to Sustainable Development*, NGLS Roundup 90, May 2002, p. 1. Available at <http://www.un-ngls.org/orf/pdf/ru90hrsd.pdf> [Accessed on 28/08/2015]

³¹ Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, UN Doc. Sales No. E/F/R.98.II.E.27.

³² N. Mohammad, ‘Environmental Rights for Administering Clean and Healthy Environment towards Sustainable Development in Malaysia: A Case Study,’ *International Journal of Business and Management*; Vol. 9, No. 8; 2014, pp. 191-198 at p.192.

³³ Jasanoff, Sheila, “The dilemma of environmental democracy,” op cit., at 65.

³⁴ Article 69(1)(d), Constitution of Kenya 2010.

³⁵ Article 69(2), Constitution of Kenya 2010.

communities an effective say over the use of these resources. It will also require promoting citizens' initiatives, empowering people's organizations, and strengthening local democracy'.³⁶

Indeed, the place of public participation has been justified as important in getting the public's views on scientific and technological issues. Scholars have argued that 'political and institutional support for public participation does not infer a demotion or devaluing of scientific and technical expertise'.³⁷ According to these proponents, a paradox is evident as the appeal to scientific expertise continues to grow against a background of increasingly complex scientific underpinning of many current-day environmental controversies. There is evidence that the lay public both value and demand expert knowledge in decision making, but that they also increasingly wish to provide their own knowledge and to check expert claims'.³⁸ Public responses are conceived as judgments about the quality of existing knowledge and the claims made for it by scientists and policymakers. The assertion is that public concerns go to the heart of science as a knowledge system, questioning structural uncertainties, assumptions about social behaviour, and closed systems. Decision making problems lie not so much in failures of scientific dissemination but in 'a more fundamental social gap between different forms of understanding and expertise'. Bringing the lay public into environmental decision making processes is a means of ensuring that 'plural voices' are heard and acknowledged.³⁹

The foregoing assertion rightly points out the importance of collecting the views of the public even where experts deem their approach to governance matters, including environmental, as the best option. This is best exemplified by the constitutional and statutory recognition of the place of traditional knowledge and its interaction and integration with scientific knowledge.⁴⁰

³⁶ Brundtland, GH, *Our Common Future: report of the World Commission on Environment and Development*, Oxford University, 1987, A/RES/42/187, para. 77.

³⁷ Petts, J. and Brooks, C., "Expert Conceptualisations of the Role of Lay Knowledge in Environmental Decision making: Challenges for Deliberative Democracy," *Environment and Planning A*, 38, 2006, pp.1045-1059 at pp.1045-46.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ The Constitution provides that it recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation (Art. 11(1)) It also outlines the State's obligation to— promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage; recognise the role of science and indigenous technologies in the development of the nation; and promote the intellectual property rights of the people of Kenya(Art. 11(2)); See also the ⁴⁰*National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions*, 2009(Government Printer, July 2009, Nairobi) which was developed in response to a growing need to address three main challenges facing the country today: accelerating technological development, integration of the world economic, ecological, cultural, trading and information systems and the

Sustainable development needs to draw upon the best knowledge available from the relevant scientific and stakeholder communities.⁴¹ Public participation, as observed above, is important as it provides a forum whereby the scientific information and values of the publics and the agency can be integrated so that the final decision is viewed as both desirable and feasible by the broadest portion of society.⁴²

Environmental democracy presents an opportunity to entrench a culture of environmental justice for communities through formal and informal approaches. As already pointed out, environmental democracy includes rights of access to information, public participation, and access to justice in environmental matters.⁴³ However, some of these elements of environmental democracy carry varying meanings in different setups. For instance, it has been argued that ‘the idea of participation comes in many flavours and accents, so that, what passes as legitimate and inclusive in one country may look destabilizing and anarchical in another, especially when the subject matter is extremely technical. Different models of participation entail different costs and benefits.’⁴⁴

3. Status of Environmental Democracy in Kenya

As already pointed out, environmental democracy includes the following: the rights of access to information, public participation, and access to justice in environmental matters. These are mainly promoted through various concepts such as transparency, accountability and inclusiveness in environmental governance.

The Constitution of Kenya 2010 envisages the national values and principles of governance, including environmental governance matters. The relevant values and principles in this context

growing relevance of intellectual property rights to these areas of activity (Preamble). The Policy was formulated in order to provide a national framework for recognition, preservation, protection and promotion of sustainable use of traditional knowledge, genetic resources and traditional cultural expressions. Ultimately, this is meant to enhance mainstreaming of such knowledge systems into national development planning and decision making processes at all levels (para. 1.1.10); See also *Protection of Traditional Knowledge and Traditional Cultural Expressions Act*, No. 33 of 2016, Laws of Kenya, which was enacted to provide a framework for the protection and promotion of traditional knowledge and cultural expressions; to give effect to Articles 11, 40 and 69(1) (c) of the Constitution; and for connected purposes (preamble).

⁴¹ Daniels, SE & Walker, GB, ‘Rethinking public participation in natural resource management: Concepts from pluralism and five emerging approaches,’ p. 4.

Available at <http://dev.mtnforum.org/sites/default/files/publication/files/260.pdf> [Accessed on 4/05/2018].

⁴² Ibid, p.4.

⁴³ Worker, Jesse & De Silva, Lalanath, *The Environmental Democracy Index*, (World Resources Institute, Technical Note Working Paper, June 2015), p.1.

⁴⁴ Jasanoff, Sheila, "The dilemma of environmental democracy," op cit., at 66.

include: democracy and participation of the people; equity; social justice; inclusiveness; equality; non-discrimination and protection of the marginalised; good governance; integrity; transparency and accountability; and sustainable development.⁴⁵ Article 10 thereof requires ‘the national values and principles of governance bind all state organs, state officers, public officers and all persons whenever any of them-applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.’⁴⁶

The Constitution of Kenya 2010 guarantees the right of every citizen to: access information held by the state; and information held by another person and required for the exercise or protection of any right or fundamental freedom.⁴⁷ The State is however obligated to publish and publicise any important information affecting the nation.⁴⁸ These constitutional provisions are buttressed by the *Access to Information Act, 2016*⁴⁹ which was enacted to give effect to Article 35 of the Constitution; to confer on the Commission on Administrative Justice the oversight and enforcement functions and powers and for connected purposes. The object and purpose of the Act is to: give effect to the right of access to information by citizens as provided under Article 35 of the Constitution; provide a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on request in line with the constitutional principles; provide a framework to facilitate access to information held by private bodies in compliance with any right protected by the Constitution and any other law; promote routine and systematic information disclosure by public entities and private bodies on constitutional principles relating to accountability, transparency and public participation and access to information; provide for the protection of persons who disclose information of public interest in good faith; and provide a framework to facilitate public education on the right to access information under the Act.⁵⁰

The *Environment and Land Court Act, 2011* provides that ‘in exercise of its jurisdiction under this Act, the Court shall be guided by the following principles-the principles of sustainable development, including—the principle of public participation in the development of policies,

⁴⁵ Article 10(2), Constitution of Kenya 2010.

⁴⁶ Article 10(1), Constitution of Kenya 2010.

⁴⁷ Article 35(1), Constitution of Kenya 2010.

Article 35(3), Constitution of Kenya 2010.

⁴⁹ *Access to Information Act*, No. 31 of 2016, Laws of Kenya.

⁵⁰ Section 3, *Access to Information Act*, 2016.

plans and processes for the management of the environment and land’ and the national values and principles of governance under Article 10(2) of the Constitution.⁵¹

In the case of *Friends of Lake Turkana Trust v Attorney General & 2 others* [2014] eKLR,⁵² the Court stated that public participation as envisaged under the constitutional and statutory provisions can only be possible where the public has access to relevant information, and is facilitated in terms of reception of views. It was also the view of this Court that access to environmental information is therefore a prerequisite to effective public participation in decision-making and to monitoring governmental and private sector activities on the environment.⁵³ The Court also reiterated the fact that it is also now an accepted principle in international law that such access to environmental information is necessary to meet the goals of sustainable development, as it was stressed in Chapter 8 of Agenda 21 that all stakeholders in the environment should have access to the relevant environmental information relating to products or activities that have an environmental impact.⁵⁴

The Court, in the *Lake Turkana case*, cited the European Court of Human Rights in the cases of *Guerra v Italy* (1998) 26 EHRR 357 and *Oneryildiz v Turkey* (2005) 41 EHRR 20 that there is a positive obligation on the part of public authorities to supply information about the risks involved in living in close proximity to an environmentally sensitive use, particularly one which poses a risk to their right to life.⁵⁵

Under Article 69(1) (d) of the Constitution, which deals with the environment and natural resources, the State is obligated to “encourage public participation in the management, protection and conservation of the environment.”

There is an attempt by Parliament to statutorily entrench public participation through the proposed *Public Participation Bill, 2018*⁵⁶ which seeks to provide a general framework for effective public participation; to give effect to the constitutional principles of democracy and participation of the people under Articles 1(2), 10(2), 35, 69(1)(d), 118, 174(c) and (d), 184(1)(c), 196, 201(a) and 232(1)(d) of the Constitution; and for connected purposes.⁵⁷ Its proposed object is to enhance, promote and facilitate public participation in governance

⁵¹ Section 18, Environment and Land Court Act, No. 19 of 2011, Laws of Kenya.

⁵² Elc Suit 825 of 2012.

⁵³ *Friends of Lake Turkana Trust v Attorney General & 2 others* [2014] eKLR, p.14.

⁵⁴ *Friends of Lake Turkana Trust v Attorney General & 2 others* [2014] eKLR, p.14.

⁵⁵ *Friends of Lake Turkana Trust v Attorney General & 2 others* [2014] eKLR, p.14-15.

⁵⁶ *Public Participation Bill, 2018* (Senate Bills, Nairobi, 5th march, 2018).

⁵⁷ Preamble, *Public Participation Bill, 2018*.

processes and in particular to give effect to the principles of public participation as provided for in Articles 1(2), 10(2), 33(1)(a), 35, 69(1)(d), 118, 174(c) and (d), 184(1)(c), 196, 201(a) and 232(1)(d) of the Constitution; promote democracy and participation of the people in accordance with Article 10 of the Constitution; promote transparency and accountability in decision making; enhance public awareness and understanding of governance processes; promote community ownership of public decisions; and promote public participation and collaboration in governance processes.⁵⁸ The conduct of public participation is to be guided by the following principles - that the public, communities and organisations to be affected by a decision shall have a right to be consulted and involved in the decision making process; provision of effective mechanisms for the involvement of the public, communities and organizations that would be affected by or be interested in a decision; participants' equitable access to the information they need to participate in a meaningful manner; that public views shall be taken into consideration in decision making; development of appropriate feedback mechanisms; adherence to the national values under Article 10 of the Constitution; adherence to the principles of leadership and integrity set out in Chapter Six of the Constitution; adherence to the principles of public participation as may be prescribed by any written law; and promotion of sustainable decisions recognising the needs and interests of all participants, including decision makers.⁵⁹ In addition, each responsible authority is to develop guidelines for undertaking public participation in the respective institution.⁶⁰

The development of a law on public participation is a step in the right direction in enhancing environmental democracy in Kenya.

One of the pillars underpinning devolved system of governance in Kenya is public participation as envisaged under Article 174(c) of the Constitution of Kenya which outlines one of the objects of devolution as “to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them”. Indeed, the Fourth Schedule to the Constitution, in Part 2(14), states that the functions and powers of the County government include: *“Ensuring and coordinating the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level.”*

⁵⁸ Clause 3, *Public Participation Bill, 2018*.

⁵⁹ Clause 4, *Public Participation Bill, 2018*.

⁶⁰ Clause 6(1), *Public Participation Bill, 2018*.

The *County Public Participation Guidelines 2016* were also developed by the Ministry of Devolution and Planning & Council of Governors are meant to strengthen democracy and governance, increase accountability, inclusivity, ownership and legitimize the various processes of implementing devolution. The Guidelines provide that citizen participation in the county planning processes is mandatory and is facilitated through provision to the public of clear and unambiguous information on any matter under consideration in the planning process. This includes: Clear strategic environment assessment; Clear environment impact assessment reports; Expected development outcomes; and Development options and their cost implication.⁶¹

In The Matter of the National Land Commission [2015] eKLR, the Supreme Court was of the opinion that the dominant perception at the time of constitution-making was that the decentralization of powers would not only give greater access to the social goods previously regulated centrally, but would also open up the scope for political self-fulfilment, through an enlarged scheme of actual participation in governance mechanisms by the people thus giving more fulfilment to the concept of democracy.⁶²

Environmental democracy is a means to an end; the aim is to achieve environmental justice.⁶³

Despite the foregoing constitutional and statutory provisions guaranteeing public participation, access to information and access to justice in environmental matters, Kenya still lags behind as far as environmental democracy is concerned. There arises a challenge regarding the implementation of the environmental rights as guaranteed under the Constitution and the other statutes. The Constitution provides that ‘every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened’.⁶⁴

⁶¹ Republic of Kenya, *County Public Participation Guidelines 2016*, para. 30 (Ministry of Devolution and Planning & Council of Governors, January 2016). Available at <http://www.devolutionplanning.go.ke/wp-content/uploads/2016/04/County-Public-Participation.pdf>

⁶² *In The Matter of the National Land Commission [2015] eKLR*, para. 21; See also Muigua, K., *et al*, (2015) *Natural Resources and Environmental Justice in Kenya*, (Glenwood Publishers Limited, 2015, Nairobi).

⁶³ The *2030 Agenda for Sustainable Development* Goal 16 of the Sustainable Development Goals is dedicated to the promotion of peaceful and inclusive societies for sustainable development, the provision of access to justice for all, and building effective, accountable institutions at all levels. It seeks to ensure that there is public access to information and protection of fundamental freedoms, in accordance with national legislation and international agreements. The new agenda recognizes the need to build peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights (including the right to development), on effective rule of law and good governance at all levels and on transparent, effective and accountable institutions (Para. 16) (https://cic.nyu.edu/sites/default/files/publication_sdg16_roadmap_discussion_paper_07mar17.pdf).

⁶⁴ Article 22(1), Constitution of Kenya 2010.

Communities are still suffering in the hands of foreign and local investors and complacent state agencies who fail to uphold the rule of law in environmental governance matters. An example of the same is the recent case of lead poisoning at the Coastal region of Kenya, due to unregulated mining activities.⁶⁵ This is just one of the many instances where community rights have been disregarded in environmental and development matters that adversely affect their lives, despite having the legal and institutional framework in place to protect and promote environmental rights. The next section looks at how communities and other stakeholders can employ more meaningful and practical approaches for realisation of environmental democracy for the Kenyan people.

4. Realising Environmental Democracy in Kenya

Enhanced environmental democracy for the Kenyan people is one of the ways through which the internationally and constitutionally guaranteed environmental rights can be achieved. The associated rights of access to information, access to public participation, and access to justice (the three “access rights”) are considered practical means of ensuring that decisions by governments consider sustainable development concerns and the interests of the poor.⁶⁶ There are diverse ways through which these rights can be promoted and realised, ranging from formal to informal mechanisms. It has been documented that ‘that where environmental policy incorporates procedural rights, environmental protection efforts are more robust’.⁶⁷ In addition, ‘achieving environmental justice requires that vulnerable communities have opportunities to participate meaningfully in decision-making processes’.⁶⁸ Equipping underrepresented groups with environmental information and avenues for influencing policy decisions is also believed to strengthen the values and practices associated with democracy’.⁶⁹ Different forms of

⁶⁵ B. Jenje, ‘MP to compensate families injured by lead poison ‘if guilty’,’ *Daily Nation*, Wednesday, April 29, 2015, available at <http://www.nation.co.ke/news/politics/MP-to-compensate-families-injured-by-lead-poison-if-guilty/-/1064/2701594/-/15u9ivl/-/index.html> [Accessed on 03/05/2018]; See also M. W. Chege, *et al*, ‘Lead contamination of traditional hand-dug wells in parts of Kwale County, Kenya,’ *International Journal of Physical Sciences*, Vol. 8, No.17, 9 May, 2013, pp. 835-839.

⁶⁶ World Resources Institute, “The Access Initiative (TAI),” available at <http://www.wri.org/our-work/project/access-initiative-tai/commissions> [Accessed on 15/04/2018].

⁶⁷ Gellers, Joshua C. & Chris Jeffords, “Toward Environmental Democracy? Procedural Environmental Rights and Environmental Justice,” *op cit.* at 100.

⁶⁸ Gellers, Joshua C. & Chris Jeffords, “Toward Environmental Democracy? Procedural Environmental Rights and Environmental Justice,” *op cit.* at 100.

⁶⁹ *Ibid.*, at 100.

participatory processes have also been suggested as a way of improving environmental governance.⁷⁰

This section proffers suggestions on how environmental democracy can meaningfully be realised for the benefit of all. While this section is not exhaustive on the possible ways of doing this, it offers some of the most viable means through which environmental democracy as a facilitative right can be achieved.

4.1 Mobilising Communities/Citizenry through Demonstrations, Picketing and Petitions

The Constitution of Kenya 2010 guarantees that ‘every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities’.⁷¹ Courts have also commented on this right and affirmed its importance in expressing personal views as part of a democratic society. For instance, in *Ferdinand Ndung’u Waititu & 4 others v Attorney General & 12 others* [2016] eKLR⁷², the Court, while acknowledging that the right under Article 37 is not absolute, lent credence to this right by succinctly stating that Article 37, besides guaranteeing the right to assemble, demonstrate, picket and petition is itself an imperative rights’ article. Its import is in the fact that it brings together other rights critical in any free democratic society. Article 37 inherently invites the freedom of expression and opinion as well as the freedom of association. In the course of their demonstrations, persons are bound to assemble and associate and likewise, in the course of picketing the picketers are simply bound to express themselves, their common views and opinions.⁷³ The Court further stated that ‘it may very well be that the opinion or view is an unpopular one with others but yet again, freedom of assembly merely provides an alternative form of participating in democracy to those who may be disenchanted and uninspired in one way or another. A minority may, for example, feel disappointed by their own failure to convince the majority. The alternative avenue for expressing their view would simply then be through demonstrations and picketing, even though the minority may still not have their way.’⁷⁴ According to the Judge adjudicating this matter, demonstrations and picketing, in short, provide an avenue for those who have strong feelings about particular issues to express those feelings.

⁷⁰ Ibid., at 102.

⁷¹ Article 37, Constitution of Kenya 2010.

⁷² Petition 169 of 2016.

⁷³ Para 27, *Ferdinand Ndung’u Waititu & 4 others v Attorney General & 12 others* [2016] eKLR.

⁷⁴ Ibid., Para 28.

Such expressions may take the form of motionless protests, public meetings, protest marches, press-conferences, sit-ins and even counter-demonstrations....⁷⁵

As captured in the foregoing case, when done within the confines of law, assemblies, demonstrations, picketing and petitions can be effective channels of realizing environmental democracy for the general public and affected communities in cases of environmental justice. These channels are especially useful in instances where there are challenges in accessing courts for public litigation either due to limited resources or lack of courthouses. This channel has successfully been used in other jurisdictions with satisfactory results. For instance, ‘citizen protests and strong leadership from the Green Party led Germany in 1990 to enact the Genetic Engineering Law, which provided a framework for controlling previously unregulated industrial activity in biotechnology’.⁷⁶

As rightly pointed out by the Court in *Ferdinand Ndung’u Waititu* case, ‘the right to assemble, demonstrate, picket and petition is itself an imperative rights’ article. Its import is in the fact that it brings together other rights critical in any free democratic society’.

Petitions to the Parliament, with proper guidance, can also provide a good channel for communities especially those suffering injustices to communicate their concerns and problems to the Parliament for discussion and possibly policy and legal responses. This is guaranteed under Article 118(1) which places a mandatory duty upon Parliament to “(a) *conduct its business in an open manner, and its sittings and those of its committees shall be open to the public; and (b) facilitate public participation and involvement in the legislative and other business of Parliament and its committees.*”

It is, therefore, important to sensitise communities on the important role that demonstrations and picketing can play in enhancing environmental justice by giving a voice to the unheard communities.

4.2 Role of Media, Civil Society in Environmental Governance

Scholars have suggested that the civil society can play a major role in global environmental governance including: collecting, disseminating, and analysing information; providing input to agenda-setting and policy development processes; performing operational

⁷⁵ Ibid., Para 29.

⁷⁶ Jasanoff, Sheila, "The dilemma of environmental democracy," op cit., at 65.

functions; assessing environmental conditions and monitoring compliance with environmental agreements; and advocating environmental justice.⁷⁷

Regarding the place of media in environmental governance, it has been documented that countries with a larger newspaper circulation have better environmental responsiveness, on average, despite controlling for the extent of environmental regulation, the availability of information on environmental outcomes, and the level of economic development measured as GDP per capita.⁷⁸ Furthermore, public opinion pressure generated by an active press is also essential to efforts by private sector organizations to use self-regulation to improve corporate governance.⁷⁹

It has been argued that for the media to collect their own information about managers' actions (in case of corporations) is costly, thus they often rely on information provided to them.⁸⁰ It is therefore argued that an important source is the government, either directly, or indirectly through mandated disclosure, for instance, required financial or environmental disclosures. This is because, government-mandated information is the most reliable, because it is not affected by selectivity and is not provided in exchange for something.⁸¹ The belief is that with greater government mandated disclosure, such as the toxic release inventory, it is easier for interest groups to aggregate the information and for journalists to use this aggregated information when they communicate to the public.⁸² However, journalists also obtain information directly from the source, that is, managers, employees, and so on, although this information would be selective, often provided to the journalist on a quid pro quo basis, such as favorable treatment in the news story and would eventually affect the credibility of the media.⁸³

An improved working relationship between the government and non-state actors aimed at enhancing the contributions from civil society participation need to be enhanced through a strengthened, more formalized structure for engagement.⁸⁴

⁷⁷ See Gemmill, Barbara & Abimbola Bamidele-Izu, "The role of NGOs and civil society in global environmental governance," *Global environmental governance: Options and opportunities* (2002): 77-100 at 77; 83.

⁷⁸ Dyck, Alexander & Zingales, Luigi, "The Corporate Governance Role of the Media," August, 2002, p.5. Available at <http://faculty.chicagobooth.edu/finance/papers/corporate%20governance.pdf>

⁷⁹ Ibid., at 11.

⁸⁰ Ibid., at 17.

Dyck, Alexander & Zingales, Luigi, "The Corporate Governance Role of the Media," op cit, at 17.

⁸² Ibid., at 17.

⁸³ Ibid., at 17-18.

⁸⁴ Gemmill, Barbara & Abimbola Bamidele-Izu, "The role of NGOs and civil society in global environmental governance," *Global environmental governance: Options and opportunities* (2002): 77-100 at 96.

4.3 Streamlining Access to Environmental Information

Ensuring access to information on environmental matters has been touted as one of the ways that enhance the capacity of citizens to check abuses that public or private actors commit.⁸⁵ Empowered communities also find it easier to hold to account those who flout environmental laws, be they government entities, private institutions or individuals. It is easier to engage a community that feels a sense of belonging than one that feels sidelined by the state actors.

It has rightly been asserted that informed with basic facts about the quality of their environment, citizens can become active participants in identifying and resolving issues at both local and national levels.⁸⁶

Dissemination of information and knowledge in meaningful forms can enhance participation in decision-making and enhance appreciation of the best ways of protecting and conserving the environment. Affected persons are also able to give their Free, Prior and Informed Consent (FPIC) in case of development projects when they are armed with the right information. When people appreciate that the state of environmental health directly affects their livelihoods, it is possible to engage them in creation of a better environment that is clean and healthy as the first step towards improving their lives.

4.4 Enhanced Public Participation

Effective participation in decision-making processes by local communities is believed to be one of the ways through which they can articulate and effectively enforce their common interest.⁸⁷

The *Brundtland Commission* recommends that some large-scale projects may require participation on a different basis, where, public inquiries and hearings on the development and environment impacts can help greatly in drawing attention to different points of view.⁸⁸ Furthermore, free access to relevant information and the availability of alternative sources of technical expertise can provide an informed basis for public discussion.⁸⁹ When the environmental impact of a proposed project is particularly high, the Commission was of the

⁸⁵ Gellers, Joshua C. & Chris Jeffords, "Toward Environmental Democracy? Procedural Environmental Rights and Environmental Justice," op cit. at 103.

⁸⁶ Hazen, S., "Environmental democracy," *Our Planet* 8.6-March 1997, op cit.

⁸⁷ GH, Brundtland, *Our Common Future: Report of the World Commission on Environment and Development* para. 20.

⁸⁸ GH, Brundtland, *Our Common Future: Report of the World Commission on Environment and Development* Oxford University, 1987, A/RES/42/187, para. 78. A.

⁸⁹ Ibid.

opinion that public scrutiny of the case should be mandatory and, wherever feasible, the decision should be subject to prior public approval, perhaps by referendum.⁹⁰

The need for a broader conceptualisation of public participation was canvassed in the case of *Thuku Kirori & 4 Others v. County Government of Murang'a*⁹¹ where the Court held:⁹²

*“My understanding of the concept of public participation as contemplated under Articles 10 and 174 of the Constitution is that **the participation of the public in affairs that concern them should not be narrowly interpreted to mean engagement of a section of people purporting to be professionals who are out to rip maximum profits out of services for which they are neither registered nor qualified to offer; the ultimate goal for public engagement as envisaged in the constitution is for the larger public benefit.** In my view such benefit would include a county government’s provision of the basic infrastructure at a minimum cost for the economic empowerment of its people; this is certainly consistent with the national values and principles of governance enshrined in Article 10 2 (d) of the Constitution and the actualisation of the promotion of social and economic development which the same Constitution subscribes to in Article 174 (f) thereof”* (emphasis added).

Notably, natural resource related conflicts in Kenya are still prevalent and a cause of much concern. Natural resources are a source of livelihood for many, and any development activities that affect the same in any way ought to seek the social licence through engaging the affected communities.

Some of the ways through which public participation in major projects can be achieved are through such tools as Environmental Impact Assessment (EIA)⁹³ in environmental management and conservation efforts. There is also a need for Strategic Environmental Assessment (SEA) which is the process by which environmental considerations are required to be fully integrated into the preparation of policies, plans and programmes and prior to their final adoption.⁹⁴ The objectives of the SEA process are to provide for a high level of protection of the environment and to promote sustainable development by contributing to the integration of environmental considerations into the preparation and adoption of specified policies, plans and

⁹⁰ Ibid.

⁹¹ Petition No. 1 of 2014; [2014] eKLR.

⁹² See also *In the Matter of the National Land Commission [2015] eKLR*, Advisory Opinion Reference No. 2 of 2014, Para. 340.

⁹³ EIA is defined as an environmental management tool aiming at identifying environmental problems and providing solutions to prevent or mitigate these problems to the acceptable levels and contribute to achieving sustainable development (see N.M. Al Ouran, ‘Analysis of Environmental Health linkages in the EIA process in Jordan,’ *International, Journal of Current Microbiology and Applied Sciences*, (2015) Vol. 4, No. 7, 2015, pp. 862-871, p. 862.).

⁹⁴ Environmental protection Agency, ‘Strategic Environmental Assessment,’ available at <http://www.epa.ie/monitoringassessment/assessment/sea/#.Vi5tmGuJ2CA> [Accessed on 26/10/2015].

programmes.⁹⁵ Strategic Environmental and Social Assessment (SESA) integrates the social issues that are likely to emerge and not just the environmental considerations.⁹⁶ These exercises, should thus actively include the communities and not done as a mere formality.⁹⁷ The affected communities should be afforded an opportunity to meaningfully participate and appreciate the likely effects on their social, economic and environmental aspects. For instance, in *Mohamed Ali Baadi & 9 Others v Attorney General* [2018] eKLR⁹⁸, the Court ruled that failure to carry out these legal requirements can render the whole process procedurally weak since constitutional provisions require a proactive approach to integrate environmental considerations into the higher levels of decision making for projects with the potential to have significant interlinkages between economic and social considerations.⁹⁹

Apart from the foregoing tool of EIA and other tools through which communities can use in keeping the corporate in check, the affected sections of the public should be empowered through more meaningful and participatory ways such as negotiation and mediation.¹⁰⁰ Top down resource management approaches may leave out the necessary elements of meaningful

⁹⁵ Ibid; see also the *Environmental (Impact Assessment and Audit) Regulations, 2003*, Legal Notice 101 of 2003, Regulations 42, 43 & 47.

⁹⁶ Notably, the proposed law, *Energy Bill, 2015*, requires under clause 135 (1) (2)(d) that a person who intends to construct a facility that produces energy using coal shall, before commencing such construction, apply in writing to the Authority for a permit to do so. Such an application must be accompanied by, inter alia, a Strategic Environment Assessment and Social Impact Assessment licenses. Also notable are the provisions of s. 57A(1) of the *Environmental Management Co-ordination (Amendment) Act 2015* which are to the effect that all policies, plans and programmes for implementation shall be subject to Strategic Environmental Assessment. If fully implemented, this is a positive step towards achieving environmental security for all.

⁹⁷ See generally, United Nations, *Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach*, (UNEP, 2004). Available at <http://www.unep.ch/etu/publications/textONUbr.pdf> [Accessed on 10/04/2018]; See also The World Bank, 'Strategic Environmental Assessment,' September 10, 2013. Available at <http://www.worldbank.org/en/topic/environment/brief/strategic-environmental-assessment> [Accessed on 10/04/2018]. The World Bank argues that policy makers in are subject to a number of political pressures that originate in vested interests. The weaker the institutional and governance framework in which sector reform is formulated and implemented, the greater the risk of regulatory capture. The World Bank observes that in situations such as these, the recommendations of environmental assessment are often of little relevance unless there are constituencies that support them, and with sufficient political power to make their voices heard in the policy process. While strong constituencies are important during the design of sector reform, they are even more important during implementation. It follows that effective environmental assessment in sector reform requires strong constituencies backing up recommendations, a system to hold policy makers accountable for their decisions, and institutions that can balance competing and, sometimes, conflicting interests. The World Bank thus affirms its recognition of the Strategic Environmental Assessment (SEA) as a key means of integrating environmental and social considerations into policies, plans and programs, particularly in sector decision-making and reform.

⁹⁸ Petition No. 22 of 2018.

⁹⁹ See Articles 10, 69, 70 of the Constitution of Kenya 2010.

¹⁰⁰ See generally, Muigua, K., 'Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms,' Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Vol. 3, No. 2, (2015), pp. 64-108.

public participation. This is because, they provide for formal public participation process in which it is assumed that a government agency makes decisions and the general public can give their comments without necessarily affording them a meaningful opportunity to do so.¹⁰¹

Negotiation and mediation processes can cure this as they can help them in playing a more meaningful and active role in conflict management and decision-making processes. Having forums for negotiation and mediation between the stakeholders and communities can go a long way in averting conflicts and allowing proposed and ongoing developmental activities enjoy social acceptance in the community since concerns and expectations are more likely to be managed through such forums. Conflict resolution mechanisms such as negotiation and mediation are recommended because they afford the affected communities or sections of the public an opportunity to negotiate and reach a compromise agreement, where all sides get satisfactory outcome.¹⁰² ADR and Traditional dispute resolution mechanisms, especially negotiation and mediation, still have relevance in natural resource conflicts management, a role recognized in the constitution.¹⁰³ This is the true essence of environmental democracy; affording communities guaranteed and meaningful participation in the decision making process by presenting proof and reasoned arguments in their favour, as tools for obtaining a socio-economic justice.¹⁰⁴

4.5 Entrenching Environmental Ethics

Article 69(2) of the Constitution provides that every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. There is need to empower communities so as to actualise these constitutional provisions. It calls for active participation of all. Kenyans have a role to play in achieving sustainable development agenda. There is therefore a need to cultivate a culture of respect for environment by all, without necessarily relying on courts for

¹⁰¹ Daniels, SE & Walker, GB, 'Rethinking public participation in natural resource management: Concepts from pluralism and five emerging approaches,' op. cit., p. 4.

¹⁰² Warner, M., 'Conflict Management in Community-Based Natural Resource Projects: Experiences from Fiji and Papua New Guinea,' *Working Paper No. 135*, (Overseas Development Institute, April, 2000), p. 16.

¹⁰³ See Art. 60(1) (g); Art. 159.

¹⁰⁴ Ristanić, A., 'Alternative Dispute Resolution And Indigenous Peoples: Intellectual Property Disputes in the Context of Traditional Knowledge, Traditional Cultural Expressions and Genetic resources,' (Lund University, April 2015), available at [https://www.law.lu.se/webuk.nsf/%28MenuItemById%29/JAMR32exam/\\$FILE/Alternative%20Dispute%20Resolution%20and%20Indigenous%20Peoples.%20Intellectual%20Property%20Disputes%20in%20the%20Context%20of%20Traditional%20Knowledg.pdf](https://www.law.lu.se/webuk.nsf/%28MenuItemById%29/JAMR32exam/$FILE/Alternative%20Dispute%20Resolution%20and%20Indigenous%20Peoples.%20Intellectual%20Property%20Disputes%20in%20the%20Context%20of%20Traditional%20Knowledg.pdf) [Accessed on 03/05/2018].

enforcing the same. The citizenry should practise preventive measures. Developing environmental ethics and consciousness can be enhanced through adopting participatory approaches to conservation and management of environment and its resources.

It has been argued that when the environment is destroyed, plundered, or mismanaged, we undermine our quality of life and that of our future generations. A degraded environment leads to a scramble for scarce resources and may culminate in poverty and even conflict.¹⁰⁵ There is therefore a need to encourage voluntary compliance with environmental regulations, by the general public. This can be achieved through creating public awareness on the impacts of unsustainable and environment-degrading production and social activities, while providing sustainable alternatives. Such awareness can include organizing public forums, use of media to disseminate information and environmental campaigns and introducing comprehensive and up-to-date environmental studies in learning institutions, at all levels. Incentives and disincentives can also be offered to encourage people to discard unsustainable methods of production and other activities that contribute to the degradation of the environment. Environmental rules that reward environmental leadership, build on best practices, and ensure a level playing field are more likely to succeed in securing compliance.¹⁰⁶

This will ensure that the citizenry not only becomes aware of the right to environmental democracy but also actively utilises the same for environmental management and conservation for sustainable development.

4.6 Proactive Role of Courts in Environmental Justice

The judiciary is considered a crucial partner in promoting environmental governance, upholding the rule of law and in ensuring a fair balance amongst environmental, social and developmental considerations through its judgments and declarations.¹⁰⁷ The Rio Declaration in principle 10 emphasises the importance of courts by stating that: “Environmental issues are best

¹⁰⁵ ‘Wangari Maathai-an excerpt from the Nobel Peace Prize winner’s Acceptance Speech,’ *Earth Island Journal*. Available at http://www.earthisland.org/journal/index.php/eij/article/wangari_maathai_an_excerpt_from_the_nobel_peace_prize_winners_acceptance_sp/ [Accessed on 03/05/2018].

¹⁰⁶ International Network for Environmental Compliance and Enforcement (INECE), ‘The Importance of Environmental Compliance and Enforcement for Sustainable Development for the Rio+20 Conference,’ p.2, available at <http://www.uncsd2012.org/content/documents/332INECE%20Submission%20Rio%20Compilation%20Document.pdf> [Accessed on 03/05/2018].

¹⁰⁷ Gupta, K.S., The role of judiciary in promoting sustainable development: Need of specialized environment court in India. *Journal of Sustainable Development*, Vol. 4, No.2, 2011, p.249-253 at p. 249.

handled with the participation of all concerned citizens, at the relevant level.... *Effective access to judicial and administrative proceedings*, including redress and remedy, shall be provided (emphasis added).¹⁰⁸

Section 3 (5) of *Environment (Management and Coordination) Act 1999*¹⁰⁹ (EMCA) provides that “in exercising the jurisdiction conferred upon the Court under subsection 3, the High Court shall be guided by the following principles of sustainable development: the principle of public participation in the development of policies plans and processes for the management of the environment; the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and are not repugnant to justice and morality or inconsistent with any written law; the principle of international co-operation in the management of environmental resources shared by two or more states; the principle of intergenerational equity; the polluter pays principle; and the precautionary principle.

The foregoing provision under EMCA demonstrates that courts have a role to play in promoting sustainable development agenda. This has also been affirmed through various cases. For instance, in *Mohamed Ali Baadi & 9 Others v Attorney General* [2018] eKLR, the Court observed that there is a narrow class of cases where the exhaustion doctrine in environmental-related controversies does not mandatorily oust the jurisdiction of the court as the first port of call, especially where the alternative fora do not provide an accessible, affordable, timely and effective remedy. The court was also of the opinion that the precautionary principle allows the court to intervene where it is necessary to do so in order to avert a violation of environmental governance principles. This approach envisages intervention by the Courts to step in and protect the environment without necessarily looking for immediate proof of likely violation of principles of environmental governance. The environment should be regarded as a resource for improving living conditions and increasing wellbeing; and Governments, public authorities and private bodies should aim at both preventing and reducing adverse effects caused by potentially hazardous agents and degraded urban and rural environments.¹¹⁰

¹⁰⁸ United Nations Conference on Environment and development, *Rio Declaration on Environment and Development*, Rio de Janeiro, Brazil, 1992.

¹⁰⁹ No. 8 of 1999, Laws of Kenya.

¹¹⁰ Article 2, *European Charter on Environment and Health*, (First European Conference on Environment and Health, Frankfurt, 7-8 December 1989).

Article 162 (2) of the Constitution provides for the establishment of the Environment and Land Court as a superior court with status equal to that of the High Court. This Court has and can continue playing an important role in safeguarding environmental rights of communities and the public in general.

In the case of *Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others* [2017] eKLR, the Court rightly stated that “Besides the above general guiding principles, a court seized of an environmental dispute, whether at the interlocutory stage or at the substantive hearing, is to bear in mind that, through their judgments and rulings, courts play a crucial role in promoting environmental governance, upholding the rule of law, and in ensuring a fair balance between competing environmental, social, developmental and commercial interests”¹¹¹. The Court, in this case, went on to state that “Thirdly, in determining environmental disputes at any stage, Kenyan courts are obliged to be guided by and promote the constitutional framework on the environment as spelt out in Articles 42, 69 and 70 of the Constitution and the legislative framework set out in the EMCA. In this regard, Articles 42, 69 and 70 of the Constitution and the broad environmental principles set out in Section 3 of the EMCA are important tools in the interpretation of the law and adjudication of environmental disputes. Invariably, the environmental governance legal framework and any other relevant legislative instrument [substantive or subsidiary], ought to be construed in a manner that promotes the letter and spirit of the above constitutional underpinnings and general principles in Section 3 of the EMCA”¹¹².

The Constitution of Kenya gives courts the power to make any order, or give any directions, it considers appropriate – to prevent, stop or discontinue any act or omission that is harmful to the environment, or to any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment, or to provide compensation for any victim of a violation of the right to a clean and healthy environment.¹¹³ The Constitution provides that an applicant does not have to demonstrate that any person has incurred loss or

¹¹¹ Para 22, *Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others* [2017] eKLR.

¹¹² Para 23, *Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others* [2017] eKLR.

¹¹³ Art. 70(2).

suffered injury.¹¹⁴ However, to succeed in their plea one must demonstrate that their Right under Article 42 has been or is likely to be denied, violated, infringed or threatened.¹¹⁵

While there are several other institutions that are directly charged with addressing environmental related issues, courts still have an active role to play in protecting the environment. The Courts ought to proactively participate in promoting the realisation of sustainable development agenda in the country. In the case of *Peter K. Waweru v Republic*¹¹⁶, the Court observed that “...environmental crimes under the Water Act, Public Health Act and EMCA cover the entire range of liability including strict liability and absolute liability and ought to be severely punished because the challenge of the restoration of the environment has to be tackled from all sides and by every man and woman....” It went further to state, “...In the name of environmental justice water was given to us by the Creator and in whatever form it should never ever be the privilege of a few – the same applies to the right to a clean environment.”¹¹⁷ This position taken by the court demonstrates the active role that courts should take in promoting and protecting the right to environmental democracy and by extension the right to environmental justice.

The judiciary has a fundamental contribution to make in upholding the rule of law and ensuring that national and international laws and principles of environmental law, including promotion of sustainable development, are interpreted and applied fairly, efficiently, and effectively.¹¹⁸

Courts should also work closely with the general public as a way of enhancing identification of activities that violate environmental laws as well as increasing the rate of enforcement and compliance with court decisions, by bodies and individuals.

5. Conclusion

Environmental democracy, while not expressly acknowledged or recognised as one of the environmental rights, is a crucial component of the procedural rights associated with realization

¹¹⁴ Art. 70(3); See also section 3(1) of Environment (Management and Conservation) Act, 1999 (EMCA).

¹¹⁵ *Joseph Owino Muchesia & another v Joseph Owino Muchesia & another* [2014] eKLR, para. 34.

¹¹⁶ [2006] eKLR.

¹¹⁷ [2006] eKLR, Misc. Civ. Applic. No. 118 of 2004, p.14.

¹¹⁸ International Network for Environmental Compliance and Enforcement (INECE), ‘The Importance of Environmental Compliance and Enforcement for Sustainable Development for the Rio+20 Conference,’ p.2, available at <http://www.uncsd2012.org/content/documents/332INECE%20Submission%20Rio%20Compilation%20Document.pdf> [Accessed on 03/05/2018].

of environmental rights, especially environmental justice. It is an important link in actualizing and providing a channel through which the general environmental rights may be realised by all, regardless of their social standing. With the advent of the current Constitution of Kenya, 2010, communities have continually been sensitized on the Bill of rights. While it is clear that one can use courts to enforce the Bill of Rights, it is not as clear on how the other rights may be realised, especially where access to courts may still be a challenge. The Constitution is clear that the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies, and the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.¹¹⁹

Getting a platform to voice their environmental related concerns is important for affected persons or communities. Enhanced environmental democracy can potentially afford them this platform. Thus, environmental democracy is an important component of procedural justice in environmental justice that must be cultivated for the sake of securing a brighter future for realization of environmental rights for all.

Democratic engagement in environmental governance is essential to achieving a healthy flourishing environment which can support both nature and the health and wellbeing of society. Environmental democracy can be a driver of change towards achieving human rights in the environmental sphere.

Realising environmental democracy is possible. Environmental democracy is an ideal which should be pursued for the sake of achievement of environmental justice and sustainable development. It is no longer an abstract term but an idea that can change the lives of the populace and ensure that they achieve the sustainable development goals. It should be an integral component of the future of environmental governance in the world and Kenya in particular.

¹¹⁹ Article 19, Constitution of Kenya 2010.

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