

Revisiting the Role of Law in Environmental Governance in Kenya

Kariuki Muigua

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Abstract

This paper discusses the general environmental governance practices and makes recommendations on how the environmental law frameworks in Kenya can be reviewed to make them more inclusive. The main argument is that the law should be a means to an end and it should be no different for the environmental laws in Kenya as far as meeting the socio-economic needs of the people is concerned. The paper advocates for laws that strike a balance between anthropocentric and ecocentric approaches in environmental governance.

1. Introduction

This paper makes a case for how the law on environmental governance in Kenya can be used in enhancing the participation of all stakeholders in environmental governance matters in the country. This is based on the belief that there are certain socio-cultural constructions of nature and the wider socio-economic, cultural and political contexts which help to shape environmental knowledges, rights and practices of a given group of people. This therefore calls for consideration of such issues when coming up with and implementing laws and policies on environmental governance if the same is to effectively deal with environmental issues.

The paper makes a case for greater consideration of social justice requirements of the society when legislating on environmental governance matters in Kenya.

2. Environmental Governance: Meaning and Scope

Environmental governance comprises the rules, practices, policies and institutions that shape how humans interact with the environment.¹ Environmental governance has also been defined as

*PhD in Law (Nrb), FCI Arb (Chartered Arbitrator), LL. B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); Dip. In Arbitration (UK); MKIM; Mediator; Consultant; Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; Advocate of the High Court of Kenya; Senior Lecturer at the University of Nairobi, School of Law [June, 2019].

¹ United Nations Environment Programme, "Environmental governance," available at https://wedocs.unep.org/bitstream/handle/20.500.11822/7935/Environmental_Governance.pdf?sequence=5&isAlloved=y [Accessed on 26/5/2019].

the set of regulatory processes, mechanisms and organizations through which political actors influence environmental actions and outcomes.²

Some scholars have used the term governance to refer to the fundamental question of how organisation, decisions, order and rule are achieved in heterogeneous and highly differentiated societies. At its core, governance addresses the problem of economic and political co-ordination in social life. Accounts of governance typically describe the form and geographical scale of socio-political institutions, identify key actors and organisations, and characterise how relations among these components may be changing.³

One scholar has convincingly suggested that environmental governance is best understood as the establishment, reaffirmation or change of institutions to resolve conflicts over environmental resources.⁴ In this broader context, conflict refers to a conflict of interest, not necessarily to an open conflict, between involved parties. In addition, the broader definition is considered applicable to the governance of all environmental resources from conventional renewable and non-renewable natural resources to biodiversity and atmospheric sinks, as well as to environmental safety and the quality of air and water.⁵ Furthermore, the definition does not limit the type or scale of environmental governance problems and solutions that can be examined, and it also recognizes social justice as an integral part of environmental decisions.⁶

It has been suggested that good governance includes: *Participation*- Good governance needs to be participatory. Participation can happen directly or through legitimate intermediate institutions or representatives. It includes the obligation of providing information. The rights of free association and freedom of expression are fundamental to participation; *Rule of law*- Good governance requires fair legal frameworks that are enforced impartially. The judiciary and executive powers need to be impartial and incorruptible; *Transparency*- Transparency means that the decision-making processes, as well as the enforcement of decisions, follow rules and regulations. In addition, information needs to be freely available and directly accessible to those

² Lemos, M. C., & Agrawal, A., "Environmental governance," *Annu. Rev. Environ. Resour.*, 31 (2006): 297-325.

³ Bridge, G., & Perreault, T., "Environmental governance," *A Companion to Environmental Geography* (2009): 475-497, at p. 476.

⁴ Paavola, J., "Institutions and Environmental Governance: A Reconceptualization," *Ecological economics*, 63, no. 1 (2007): 93-103, at p.94.

⁵ Ibid, p.94.

⁶ Ibid., p.94.

who will be affected by such decisions and their enforcement. Information needs to be provided in an easily understandable form and through appropriate media that reaches the people concerned; *Responsiveness*- Good governance requires that institutions and processes try to respond to all stakeholders within a reasonable timeframe; *Consensus oriented*- Good governance requires that different interests within the society be taken into account and that decisions follow the objective of reaching a broad consensus on what is in the best interest of the whole community; *Equity and inclusiveness*- Good governance does not only serve the interests of the mainstream of society, but includes also its most vulnerable and minority groups; *Effectiveness and efficiency*- Good governance means that processes and institutions produce results that meet the needs of society while making the best use of resources at their disposal. The concept of efficiency in the context of good governance also covers the sustainable use of natural resources and the protection of the environment; and *Accountability*- Accountability is a key requirement of good governance. Governmental institutions, but also the private sector and civil society organizations, must be accountable to those who will be affected by their decisions or actions.⁷

Good environmental governance takes into account the role of all actors that impact the environment, including governments, Non-Governmental Organisations (NGOs), the private sector and civil society, who must all cooperate to achieve effective governance that can help us move towards a more sustainable future.⁸

It has rightly been pointed out that ‘governance’ is an umbrella term for diverse forms of state and non-state political control exercised today at various policy levels against a backdrop of growing complexity in actor structures and the operating environment. In this respect, the term ‘governance’ therefore takes in a broader range of actors and policy instruments than ‘government’, which is restricted to state action.⁹

⁷ United Nations, *Introduction to Environmental Governance*, 2017. Available at <https://globalpact.informea.org/sites/default/files/documents/International%20Environmental%20Governance.pdf> [Accessed on 26/5/2019].

⁸ United Nations Environment Programme, “Environmental governance,” available at https://wedocs.unep.org/bitstream/handle/20.500.11822/7935/Environmental_Governance.pdf?sequence=5&isAllowed=y [Accessed on 26/5/2019].

⁹ Jänicke, M., & Jörgens, H., "New approaches to environmental governance," *Environmental Governance in Global Perspective. New Approaches to Ecological and Political Modernisation*. Berlin: Freie Universität Berlin (2006): 167-209 at p. 171.

It is against these definitions of the term ‘governance’ that this paper seeks to discuss what the law making process and its implementation should entail, especially in respect of environmental governance laws in Kenya.

3. Place of Law in General Governance Matters

Some scholars have conceptualised the link between law and governance in general terms. Some have ably argued that Law and governance are closely linked in the following ways:¹⁰ *Constitutions* provide the framework for the legal and political institutions through which government takes place. They provide- legal ‘power-maps’ for how power will be held and exercised; a legal framework for accountability, often enforceable by apex courts; a legalised text which embodies the underlying political settlement or elite-level pact from which any political community flows; rights and safeguards for individuals from abuses of power by political actors and institutions; *Public institutions of governance* are themselves also creatures of law, operating according to law and sometimes even having secondary law-making functions; Good governance depends on a legal platform of both criminal law and civil law, to create the environment – here law’s key role is to provide background norms that enable horizontal interactions; International law increasingly impacts on, and increasingly even regulates governance at the state level. This regulation is diverse and multifarious, including- International legal regulation of political change processes (including peace settlements, coup d’état, or other forms of regime change), which attempts to ensure only ‘democratic’ regime change; International legal requirements for human rights to be protected at the domestic level; Human rights directly impact on the internal governance arrangements of states; International legal requirements for ‘inclusion’ both in change processes and in the terms of the new political settlement itself; A range of diverse international bodies shape domestic governance in what have been termed ‘transnational global administrative spaces’ which impact on domestic governance.¹¹

¹⁰ Bell, C., “Governance and Law: The Distinctive Context of Transitions from Conflict and its Consequences for Development Interventions,” *Briefing Paper 4*, (The Political Settlements Programme Consortium, 2015), pp.1-2. Available at http://www.politicalsettlements.org/wp-content/uploads/2017/09/2015_BP_4_Bell_Governance-and-Law.pdf [Accessed on 26/5/2019].

¹¹ Bell, C., “Governance and Law: The Distinctive Context of Transitions from Conflict and its Consequences for Development Interventions,” *op cit*.

A good example of this link is to be found under the current Constitution of Kenya which provides for national values and principles of governance which must bind all State organs, State officers, public officers and all persons whenever any of them— (a) applies or interprets this Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions.¹²

The Constitution also declares the Republic of Kenya to be a multi-party democratic State founded on the national values and principles of governance referred to in Article 10.¹³ Article 10 of the Constitution of Kenya outlines the national values and principles of governance as including: (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; (c) good governance, integrity, transparency and accountability; and (d) sustainable development.¹⁴ These values and principles are meant to bind all State organs, State officers, public officers and all persons whenever any of them— (a) applies or interprets this Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions.¹⁵

It is thus evident that the law plays an important role in governance matters by not only setting up the relevant governance institutions but also setting out the *modus operandi* for such institutions.

Notably, the Constitution of Kenya recognises both formal and informal systems of law. However, the Constitution acknowledges the supremacy of the Constitution and provides that any law, including customary law, which is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid.¹⁶ Despite this qualification, it is clear that the definition of law in the context of Kenya includes customary law and applies in a pluralistic way.

The Constitution thus creates room for pluralistic operation of formal and informal laws in Kenya in governance matters, albeit with certain qualifications as stated.

¹² Constitution of Kenya 2010, Art. 10(1).

¹³ Constitution of Kenya 2010, Article 4(2).

¹⁴ Constitution of Kenya 2010, Art. 10(2).

¹⁵ Constitution of Kenya 2010, Art. 10(1).

¹⁶ Constitution of Kenya 2010, Art. 2(4).

4. Environmental Governance in Kenya: Prospects and Challenges in the Legal and Institutional Frameworks

4.1 Environmental Governance in Kenya: Legal and Institutional Frameworks

The Constitution of Kenya 2010 outlines the obligations of the State in respect of the environment as including the duty to: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources¹⁷, and ensure the equitable sharing of the accruing benefits; work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; protect and enhance intellectual property in, and indigenous knowledge of, biodiversity¹⁸ and the genetic resources of the communities; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity¹⁹; establish systems of environmental impact assessment, environmental audit and monitoring of the environment; eliminate processes and activities that are likely to endanger the environment; and utilise the environment and natural resources for the benefit of the people of Kenya.²⁰

Notably, the Constitution of Kenya also places a duty on 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.²¹

The existing policies, legal and regulatory frameworks, as highlighted in select statutes, appear to suggest that the sustainable management of resources agenda is one to be driven by the State, especially in terms of decision-making, and not in collaboration with the local community.

¹⁷ The Constitution interprets “natural resources” to mean the physical non-human factors and components, whether renewable or non-renewable, including—sunlight; surface and groundwater; forests, biodiversity and genetic resources; and rocks, minerals, fossil fuels and other sources of energy (Art. 260).

¹⁸ Generally, biodiversity is defined to include the variability among living organisms, from all sources including terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems (Art. 2, United Nations Environment Programme, 1760 UNTS 79; 31 ILM 818 (1992); The Convention on Biological Diversity, adopted during the Earth Summit in Rio de Janeiro, promotes biodiversity, sustainable use, and the sharing of benefits arising out of the utilization of genetic resources. The Convention provides for national reporting of efforts to implement the provisions of the Convention).

¹⁹ The Convention on Biological Diversity (CBD) adopted at the Earth Summit in Rio de Janeiro, Brazil, is a global convention which aims to achieve three objectives: the conservation of biological diversity; the sustainable use of its components; and the fair and equitable sharing of benefits from the use of genetic resources. Kenya is a signatory to this Convention and it is therefore bound by its provisions in promoting the realisation of the three objectives.

²⁰ Constitution of Kenya, Art. 69(1).

²¹ *Ibid.*, Art. 69(2).

The Constitution envisages a collaborative approach between communities and the State. Decision making processes still seem to be largely top-down in nature and communities are only afforded opportunities to apply for resource user rights, with little or no consultations regarding management and governance matters.

The Court in *Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others* [2017] eKLR²², stated that 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.²³

While this paper is not intended to downplay the place of command-and-control approach to environmental governance in some cases, this approach has a tendency to focus more on achieving conservation goals and tackling environmental degradation challenges at the expense of also seeking to ensure that these resources help in achieving social justice for the Kenyan people as far as the use environmental resources is concerned.

The public participation, consultations and institutional accountability requirements as provided for under different laws are at times treated as a formality. Social justice goals seem to be relegated to a secondary place.

²² *Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others* [2017] eKLR, Petition 32 of 2017.

²³ *Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others*, para. 23.

4.2 Need for revisiting the formal and state-centered governance solutions?

This section seeks to re-evaluate the effectiveness of the enforcement power of the state as against solutions or approaches based on voluntary cooperation within the environmental governance framework in Kenya.

Some scholars have observed that institutions resolve environmental conflicts by striking a particular balance between conflicting interests by either establishing, reaffirming or redefining entitlements in environmental resources.²⁴ In other words, they seek to strike a balance between anthropocentric and ecocentric approaches to environmental governance. An anthropocentric approach to environmental governance would focus on poverty eradication, food security, environmental democracy, environmental justice, environmental security, public participation, gender equity, access to information and conflicts management, amongst others.²⁵ Ecocentric approaches dwell on themes such as combating climate change, impact of resource extraction, environmental health, and environmental conservation for the sake of the Mother Nature.²⁶

Conflicts over natural resources and environmental crimes intensify the problems. The risks of violent conflict increase when exploitation of natural resources causes environmental damage, loss of livelihood, or unequal distribution of benefits.²⁷

The Court in *Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others [2017] eKLR*²⁸, pointed out that 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.²⁹ This is an affirmation of the fact that courts, in collaboration with other stakeholders in the environmental governance matters, also have a role to play.

²⁴ Paavola, J., "Institutions and Environmental Governance: A Reconceptualization," *op cit.*, at p.95.

²⁵ See generally, Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016.

²⁶ *Ibid.*

²⁷ United Nations, "Environmental Rule of Law," available at <https://www.unenvironment.org/explore-topics/environmental-rights-and-governance/what-we-do/promoting-environmental-rule-law-0>

²⁸ *Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others [2017] eKLR*, Petition 32 of 2017.

²⁹ *Ibid.*, para. 22.

It has rightly been argued that the aim of participatory approaches is to place policy programmes (and in particular the sustainability process) on a broad social base and to mobilise hitherto unused supporters and knowledge repositories. Involving citizens and NGOs thus offers untapped potential for environmental policy.³⁰ In addition, citizens serving as an added resource for environmental policy need a system of incentives and an infrastructure of rights and information. This includes transparency regarding the environmental credentials of products on the market, and rights of information, participation and access to justice for citizens and environmental groups. The will to participate also presupposes a minimum of accurate and problem focused environmental reporting in the media. There is again a wide-ranging need for capacity building.³¹

The State should also consult widely when coming up with the methods of benefit sharing especially with regard to the local community. It is only through mobilizing the efforts of all the relevant stakeholders that the constitutional provisions on the environment and natural resources can effectively be implemented and make it possible to achieve sustainable development. The various sectoral laws and policies must be designed in a way that protects the environment from degradation, and also involves communities through measures that encourage active participation in benefit sharing or decision-making processes, whether through incentives or otherwise.

Customary approaches to environmental governance can be incorporated into the formal environmental governance frameworks as a tool for facilitating participation of communities. As already pointed out, the law should include both formal and customary approaches to governance.

5. Achieving Sustainable Development in Kenya Through Effective Environmental Governance: Revisiting the Role of Law in Environmental Governance

At the global level, it has been suggested that it is through good governance that sustainable development can be achieved in a fair and effective manner.³² Notably, environmental rule of

³⁰ Jänicke, M., & Jörgens, H., "New approaches to environmental governance," *Environmental Governance in Global Perspective. New Approaches to Ecological and Political Modernisation*, Berlin: Freie Universität Berlin (2006): 167-209, at p.192.

³¹ Jänicke, M., & Jörgens, H., "New approaches to environmental governance," *op cit.*, at p.192.

³² United Nations, *Introduction to Environmental Governance*, 2017. Available at

law is central to sustainable development. It integrates environmental needs with the essential elements of the rule of law, and provides the basis for improving environmental governance. It highlights environmental sustainability by connecting it with fundamental rights and obligations. It reflects universal moral values and ethical norms of behaviour, and it provides a foundation for environmental rights and obligations.³³

In addition, it is contended that natural resources that are managed sustainably, transparently, and on the basis of the rule of law can be the engine for sustainable development as well as a platform for peace and justice. The rule of law in environmental matters is essential for equity in terms of the advancement of the Sustainable Development Goals (SDGs), the provision of fair access by assuring a rights-based approach, and the promotion and protection of environmental and other socio-economic rights.³⁴

Arguably, environmental governance structures should be used as means to an end, to wit, realisation of social justice for the people of Kenya. Legitimate environmental decisions have to reflect both distributive and procedural justice concerns. This is especially so when people have broader concerns than their narrowly construed economic welfare. In the context of pluralism, distributive justice matters in a broad sense of whose interests and values will be realized by the establishment, change or affirmation of environmental governance institutions.³⁵ Procedural justice plays a role in justifying decisions to those whose interests and values are sacrificed to realize some other interests and values. It can also facilitate learning and transformation of values and motivations of involved actors. Therefore, governance solutions do more than specify entitlements: they also provide for participation and avail conflict resolution to involved actors.³⁶

<https://globalpact.informea.org/sites/default/files/documents/International%20Environmental%20Governance.pdf>
[Accessed on 27/5/2019].

³³ United Nations, "Environmental Rule of Law", available at <https://www.unenvironment.org/explore-topics/environmental-rights-and-governance/what-we-do/promoting-environmental-rule-law-0> [Accessed on 27/5/2019].

³⁴ Ibid.

³⁵ Paavola, J., "Institutions and environmental governance: A reconceptualization," *Ecological economics*, vol.63, no. 1 (2007): 93-103 at p.98.

³⁶ Ibid., p. 97.

Increasing environmental pressures from climate change, biodiversity loss, water scarcity, air and water pollution, soil degradation, among others, contribute to poverty and to growing social inequalities.³⁷

Some scholars have observed that to cope with stressors like climate change, economic instability, and socio-political or ideological shifts, environmental governance needs to formally embrace a broader set of environmental actors, organizations, and institutions, and become more flexible, responsive, and innovative.³⁸ There is need for greater cooperation between state and private-sector actors in environment-related decision making and enforcement processes.

The Constitution of Kenya creates an opportunity where, through devolution, communities are supposed to be empowered by devolving power from the state to local institutions of decision-making as a way of empowering local communities to manage natural resources and environmental matters. There is also a need to put in place a framework that clearly defines the role of various stakeholders. The national values and principles of governance require formulation of laws and institutions that are based on, inter alia, (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; (c) good governance, integrity, transparency and accountability; and (d) sustainable development.³⁹ The common thread in most of these values and principles is the active participation of the people and the people-centred approach to governance matters. They are a reflection of what the law should seek to achieve in their formulation, interpretation and implementation. Any end result of such laws that does not reflect these values ought to be revisited or even such law reviewed to have it aligned with the Constitution.

In addition to the people-centred values and principles as listed above, one of the national values and principles of governance as provided under Article 10 of the Constitution is sustainable development. The principles of sustainable development as captured in Environment

³⁷ United Nations, "Environmental Rule of Law", op. cit.

³⁸ DeCaro, D. A., Chaffin, B. C., Schlager, E., Garmestani, A. S., & Ruhl, J. B., "Legal And Institutional Foundations Of Adaptive Environmental Governance," *Ecology And Society: A Journal Of Integrative Science For Resilience And Sustainability*, 22, no. 1 (2017): 1.

³⁹ Constitution of Kenya 2010, Art. 10(2).

(Management and Coordination) Act, 1999⁴⁰ EMCA⁴¹ include: the principle of public participation in the development of policies, plans and processes for the management of the environment; the cultural and social principle 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 principles of intergenerational and intragenerational equity; the polluter-pays principle; and the pre-cautionary principle.

The application of law in environmental governance matters in Kenya should include customary law and cultural practices that relate to the environment. In addition, law making process should ideally be bottom-up. There is need for wide consultation with various stakeholders including communities in not only implementation of the laws and polices but also during the formulation of the same. Meaningful participation of communities will play an important role in not only ensuring that these laws benefit such communities in their interaction of environmental resources but also ensure that their human rights are safeguarded from any potential violation as a result of such laws.

There is a need to actively engage the communities in environmental management and conservation in order to help in the implementation of these principles. With the communities empowered, then it is possible to hold to account those who flout environmental laws, be they entities or individuals. It is easier to engage a community that feels a sense of belonging than one that feels sidelined by the state actors.

Their customary law practices and knowledge concerning environmental matters can go a long way in enhancing environmental governance in Kenya and should be incorporated into the formal laws in Kenya.

⁴⁰ No. 8 of 1999, Laws of Kenya.

⁴¹ EMCA, S. 3(5).

6. Conclusion

It is imperative for the policy makers and legislators to bear in mind the end game of any intended law or policy as far as environmental governance is concerned. The law and any institutions put in place should not just be geared towards dictating how people should behave or conduct themselves when interacting with the environment. While this may be partly a reason as far as conflict management and conservation measures are concerned, laws should also capture and reflect the aspirations of the people and their implementation should be as a way of achieving such dreams and aspirations. Achieving social justice should be one of the direct results of implementing environmental laws and policies on governance.

The law should be a tool for achieving social justice for the people and environmental governance laws should not be any different.

There is indeed a need to revisit the role of law in environmental governance in Kenya. Formal laws and also customary law practices and norms should be utilised in participatory governance for sustainable development.

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