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## PARTICIPATORY ASPIRATIONS OF ENVIRONMENTAL GOVERNANCE IN EAST AFRICA

Nicholas N. Kimani

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# 1

## INTRODUCTION

Would it make sense to ask when and how the participatory aspirations of a multi-stakeholder approach to governing a region's shared environmental problems and concerns are realised? Why so? Such questions presuppose that environmental law can be analysed as a mechanism for steering and controlling the ordering of particular social outcomes and which is pursued through the promulgation of standards backed up by enforcement standards. In approaching these broad themes within one coherent framework, the scope of inquiry about the participative nature of environmental regulation in East Africa must be widened from a purely formalist legal perspective, to one that also approaches environmental regulation as a social practice. Adopting this unfamiliar line of inquiry (at least to 'conventional' environmental lawyers) appears promising for a number of reasons. Firstly, a regulatory perspective on any aspect of governance asks whether the steering mechanisms function effectively and efficiently. Secondly, the regulatory perspective asks whether the effectiveness of the governance mechanisms deployed could be improved. Thirdly, a regulatory perspective would ask whether the rule-setting and decision-making regime is democratically accountable to the extent that the emergent rules and decisions affect the public interest.<sup>1</sup>

For environmental lawyers, there is no better time than the present to explore the conditions under which participation may be enhanced in environmental law. In recent decades, dissatisfaction with the regulatory status quo has seen a paradigm shift in the structure of environmental law, which is aimed at answering the vexed question of how can, and how should, we cope with the pressing

environmental problems of our time.<sup>2</sup> In Africa, diverse United Nations organisations have been influential in facilitating reforms in environmental law and policy-making<sup>3</sup>, owing in part to the failure of colonial-era 'command and control regulation' to involve active citizen engagement in environmental law and policymaking, or even to control environmental problems emanating from pollution, land degradation, deforestation and loss of biological diversity.<sup>4</sup> Another equally important motivation has come from the recognition of the nature of regional environmental problems—i.e. problems whose causes are rooted in the activities of one country, but whose costs are borne by its neighbour(s) on the other side of an international border.<sup>5</sup> Given these considerations, it is necessary to question what conditions best facilitate multi-stakeholder participation in regions comprising geographically contiguous countries.

East Africa provides an appropriate empirical site for exploring this issue, owing to experiences which have occurred under the auspices of a UNEP-administered project—the Partnership for the Development of Environmental Law in Africa, or PADELIA. This project has sought to develop environmental laws and institutions in the participating African countries in ways that better facilitate collaboration between relevant national and regional institutions, while also supporting greater participation of civil actors in environmental governance. An earlier work has already traversed much of this terrain, which detailed the specific activities for law-making and institution-building, capacity-building, as well as the mechanisms through

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1 J. Black, 'Decentering Regulation: Understanding the Role of Regulation and Self Regulation in a 'Post-Regulatory' World', 54 *Current Legal Problems* 103 (2002).

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2 Z. Plater, 'From the Beginning, A Fundamental Shift of Paradigms: A Theory and Short History of Environmental Law', 27 *Loyola of Los Angeles Law Review* 981, 982 (2003-2004).

3 B. Boer, 'The Rise of Environmental Law in the Asian Region', 32 *University of Richmond Law Review* 1503, 1509 (1999).

4 P. Kamari-Mbote and P. Cullet, 'Law, Colonialism and Environmental Management in Africa', 6(1) *Review of European Community and International Environmental Law* 23, 23-25 (1997).

5 J. Ntambirweki, 'The Developing Countries in the Evolution of an International Environmental Law', 14 *Hastings International and Comparative Law Review* 905, 910-920 (1990-1991).

which UNEP facilitated the building of the regional institutional infrastructure. Among the key observations it made were that the relationship between the 'new' collaborative approach to environmental law and policy-making and the earlier 'conventional' approaches remains unclear. Although clearly conceptualised at normative level, and despite evidence of 'buy-in' from diverse stakeholders at national and regional levels, there was a notable problem in implementation. This was occasioned by the failure of respective governments to actively involve their citizens within the overarching regional environmental governance framework.<sup>6</sup> Additionally, it raised important empirical and theoretical questions regarding the ability of civil actors within East Africa to use the regional governance framework highlighted under the 1999 Treaty Establishing the East African Community to effectively represent their environmental interests in the face of wider dominant political powers.<sup>7</sup>

The point of departure for this paper is that if the overarching regional environmental governance framework is incomplete, then it falls upon civil actors to take the lead in mobilising their own talent, and ingenuity in finding solutions to their regional environmental issues and challenges using the existing national environmental legislation in place. The paper thus illuminates some conditions which have facilitated (or inhibited) participation of civil actors in environmental governance using the national environmental legislation, whose rationalisation and articulation is closely associated with PADELIA. The emergent normative and empirical insights will prove invaluable not merely to environmental governance theorists, but also to policy-makers. After all, if regional approaches to environmental governance are to result in critical renewal, re-invention and re-orientation of the respective countries' environmental regulatory regimes, and if they are to be replicated and

successfully applied elsewhere in the developing world, then it is necessary to understand what underlying principles and practical conditions contribute to the success and failure of regional multi-stakeholder approaches to environmental governance.

## 2 CONCEPTS AND CONTEXTS

It is necessary to start off by exploring a number of important concepts in order to better understand how 'governance', 'collaboration' and participation are understood.

### 2.1 Understanding 'Governance'

In so many ways, the term 'governance' has so risen in currency to practically become a buzzword or overused cliché.<sup>8</sup> It thus becomes necessary to clarify its meaning. At a broad level, the term involves reference to some notion of order, or a set of explicit or implicit normative prescriptions or rules about the way things ought to be. It can thus be understood by reference to the 'management of the course of events in a social system'.<sup>9</sup> This may involve various structures, processes and relationships for managing or influencing events, such as top-down enforcement of rules by governmental authorities,<sup>10</sup> as well as more horizontal relationships where civil and state actors employ less rigid, less prescriptive and less hierarchical approaches to address their social problems.<sup>11</sup> It thus represents the relationship between the governors and the governed, encompassing issues of accountability and empowerment, particularly of those normally

6 N. Kimani, 'A Collaborative Approach to Environmental Governance in East Africa', 22(1) *Journal of Environmental Law* 27, 27-57 (2010).

7 N. Kimani, *Environmental Governance in East Africa: Explanatory and Normative Dimensions* (PhD Thesis, Australian National University, 2008).

8 R. Rhodes, 'The New Governance: Governing without Government', 44(4) *Political Studies* (2005).

9 S. Burris and C Shearing, 'Nodal Governance', 30 *Australian Journal of Legal Philosophy* 30-58 (2005).

10 J. Black, 'Critical Reflections on Regulation', 27 *Australian Journal of Legal Philosophy* 1-35 (2002).

11 N. Gunningham and P. Grabosky, *Smart Regulation* (Oxford: Clarendon Press, 1988).

marginalised.<sup>12</sup> On its part, 'environmental governance' may be understood in relation to the various structures, processes and relationships aimed at securing institutional, legal, planning, training and capacity-building requirements necessary to facilitate stakeholders' efforts in relation to the environment.<sup>13</sup> There are, in essence, 'relational foundations', which refers to how well states can mobilise and work productively with societal groups, and draw on societal resources, including knowledge resources, as well as the 'institutional foundations', which involves questions about the available financial and bureaucratic resources, as well as the knowledge and expertise available to the various actors.<sup>14</sup>

## 2.2 Understanding 'Participation'

In essence, 'participation' is premised on a concern that citizens and non-governmental actors should obtain greater control and power over issues of concern to them.<sup>15</sup> Arguments for enhanced citizen participation, for instance, often rest on the merits of the process and the belief that an engaged citizenry is better than a passive citizenry.<sup>16</sup> Accordingly, participation within a collaborative model can enhance the quality of decisions by improving the information base of rules, thereby increasing the likelihood of successful implementation and providing important feedback on the rules' effects in practice. Meaningful stakeholder engagement also enables contributions of the most affected parties to be institutionalised in ways that are fair and adhere to conditions laid out by deliberative criteria.<sup>17</sup> Fulfilling the ideal of a more participatory and

deliberative approach to governance, thus promises several benefits. Citizen participation for instance, can readily secure the use of local and contextualised knowledge needed to understand a problem and its required solutions.<sup>18</sup> Such knowledge is often missing from command-and-control approaches, yet is vital to handling environmental issues.<sup>19</sup> Secondly, their participation better fosters the political development of individuals through their engagement in governance, particularly by allowing marginalised groups to participate more directly in decisions that affect their lives.<sup>20</sup> This has an added benefit of contributing to ideals of fairness in decision-making, which increases the acceptability of outcomes and thus reduces the costs of enforcing compliance.<sup>21</sup>

Despite these normative insights, deficits in empirical research highlight a fundamental knowledge gap regarding whether, when and how effective collective decision-making processes may be sustained in the long term amongst geographically contiguous countries. This lacunae points to the need for insights on exactly what works (or does not work) in respect of environmental governance in East Africa.

# 3 PADELIA

In order to evaluate and learn from empirical experiences in East Africa from the perspective of PADELIA, it is firstly necessary to illuminate what processes and mechanisms were used in enlisting the capabilities, experiences and understandings of the

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12 K. Sharma, *Governing Our Cities: Will People-Power Work* (London: The Panos Institute, 2000).

<http://unpan1.un.org/intradoc/groups/public/documents/un/unpan010173.pdf>.

13 C. Holley, *New Environmental Governance* (PhD Thesis, Australian National University, 2008).

14 See Kimani, note 6 above.

15 S. Anstein, 'A Ladder of Citizen Participation', 35 *Journal of American Institute of Planners* 217 (1967).

16 R. Irvin and J. Stansbury, 'Citizen Participation in Decision-making: Is It Worth the Effort?', 64(1) *Public Administration Review* 55, 61-62 (2004).

17 P. Smith and M. McDonough, 'Beyond Public Participation: Fairness in Natural Resource Decision Making', *Society and Natural Resource* 239, 239-241(2001).

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18 Eric Orts, 'Reflexive Environmental Law', 89 *North-Western University Law Review* 1227, 1238 (1995).

19 J. Ribot, *Democratic Decentralization of Natural Resources: Institutionalizing Popular Participation* (Washington DC: World Resources Institute, 2002).

20 A. Fung, 'Recipes for Public Spheres: Eight Institutional Design Choices and their Consequences', 11(3) *Journal of Political Philosophy* 338 (2003).

21 J. Parkinson, 'Legitimacy Problems in Deliberative Democracy', 51 *Political Studies* 180, 182-183 (2003).



various actors involved during Phases 1 and 2 of the Project.<sup>22</sup>

### 3.1 Overview of PADELIA

As a comprehensive overview of PADELIA may be found elsewhere<sup>23</sup> only a brief overview of PADELIA is given here. The Project started in 1994, and was at that time known as UNEP/UNDP<sup>24</sup>/Dutch Government Joint Project on Environmental Law and Institutions in Africa before it was re-named as 'Partnership for the Development of Environmental Law and Institutions in Africa' (PADELIA). The overall vision of PADELIA is to enhance the capacity of African countries in sound environmental management practices through the development and implementation of environmental laws.<sup>25</sup> The first phase covered seven countries, namely Burkina Faso, Kenya, Malawi, Mozambique, Sao Tome and Principe, Tanzania and Uganda. As of the end of Phase 2, thirteen African countries were involved in PADELIA. They were grouped into three sub-regions, namely: the SAHEL sub-region comprising Mali, Niger, Senegal and Burkina Faso; the Southern African Development Community (SADC) sub-region comprising Botswana, Lesotho, Swaziland and Malawi; and the East African sub-region comprising Kenya, Uganda and Tanzania. Additionally, the Portuguese-speaking countries of Mozambique and Sao Tome and Principe carried out country-specific activities.

The main features of PADELIA are, first, that it links all activities to poverty reduction strategies and sustainable development. Second, it is country-driven and highly participatory in nature, where beneficiary countries identify their own environmental problems, determine their priorities, build national consensus, build their own capacity, and implement activities using national expertise, thus ensuring national ownership. Third, it operates on the concept of capacity-building, where nationals are trained to identify environmental problems requiring legal intervention, and to review and prepare their own laws.<sup>26</sup>

Finally, several actors constitute PADELIA's Steering Committee: UNEP is designated as the institutional home of PADELIA, while the United Nations Development Programme (UNDP) assists in co-ordinating technical assistance and capacity building at national level. There is also the Environmental Law Centre of the International Union for the Conservation of Nature and Natural Resources, or IUCN. The World Bank is involved due to its prominent role in Africa in resource mobilisation and supporting development of national environmental action plans. Finally, the Development Law Service of the FAO is included, owing to its active role in Africa in developing laws on natural resource sectors such as water, land use, forestry, and fisheries.<sup>27</sup>

In summary PADELIA seeks to develop environmental laws and institutions in the participating African countries in ways that better facilitate collaboration between relevant national and regional institutions, while also supporting greater participation of civil actors in environmental governance.

### 3.2 Framework Environmental Legislation

Under PADELIA, framework environmental legislation plays an integral role in fulfilling the overall mission of assisting participating countries' building capacity for development, implementation

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22 PADELIA has been divided into several phases: Phase 1 (1994-2000); Phase II (2001-31 December 2006). Fundraising for Phase III is ongoing.

23 See Kimani, note 7 above.

24 United Nations Environment Program (UNEP)/ United Nations Development Program (UNDP) / Dutch Government Joint Project on Environmental Law and Institutions in Africa.

25 Evaluations of PADELIA, including experiences in East Africa, have been chronicled most recently by P Kameri-Mbote and H Ouedraogo, *Partnership for the Development of Environmental Law and Institutions in Africa (PADELIA): Evaluation Report* (Nairobi: United Nations Environment Program, 2006). This covered Phase 2 of PADELIA. Details of an earlier evaluation (Phase 1 of PADELIA) are found in S Doumbé-Billé and E Sinatambou, *External Evaluation: UNEP/UNDP Joint Project on Environmental Law and Institutions in Africa* (Nairobi: United Nations Environment Program, 1997).

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26 See Kameri-Mbote, *Id.*

27 UNEP, *Special Issue Bulletin of Environmental Law* 3 (Nairobi: United Nations Environment Programme, 1998).



and enforcement of environmental laws, and also strengthens environmental institutions for sustainable development and poverty reduction. The respective countries have all enacted framework environmental laws, which possess comparable features in order to facilitate the supervision, regulation and coordination of national environmental issues by the respective apex environmental agencies, as well as to facilitate the harmonisation of environmental legislation of cross-border significance across the region. Kenya's framework environmental law is the 1999 Environmental Management and Coordination Act, which was enacted in December 1999 and came into effect on 14 January 2000. Uganda's law is the National Environmental Statute, 1995, while Tanzania's law is the Environmental Management Act, 2004, which came into force on 8 February 2005.

While these laws were not developed under PADELIA, their close association with PADELIA is apparent in two respects. First, they were developed with support from the Steering Committee Members, notably the World Bank in Kenya, Uganda and mainland Tanzania, while the FAO supported the development of the framework law in Zanzibar Island.<sup>28</sup> Also, as the various Steering Committee members were already involved in various environmental governance activities in East Africa—such as the FAO in the Zanzibar Islands, and World Bank in Tanzania, Uganda and Kenya—it made sense for their activities to be coordinated in a synergistic manner. As a Kenyan respondent from UNEP pointed out:

I happened to know that as our African governments often circulate the same project proposals to several donors, resources can easily get wasted. So when I got on board PADELIA, I made sure that the main UN agencies all 'talked' to one another, so that they could all co-ordinate their work more efficiently, and avoid duplication....<sup>29</sup>

Finally, while these framework environmental laws are comparable in form and function, their structures

are also slightly dissimilar. While the Kenyan and Ugandan framework laws both establish a National Environmental Management Agency (NEMA), in sections 7 and 5 respectively, section 16 of Tanzania's framework law establishes the National Environmental Management Council (NEMC). Additionally, differences may be seen in terms of their functions. Section 7 of Uganda's framework law empowers NEMA-Uganda to, amongst other things, co-ordinate implementation of government policy and initiate legislative proposals, standards and guidelines on the environment. Similarly Kenya's framework law, in section 9(2), empowers NEMA-Kenya to carry out the same functions. However, in Tanzania's case, these functions are carried out by the office of Director of Environment (DoE) established under section 14 of the Act. The functions of this office include, by section 15, co-ordination of government policy and advising the government on environmental legislation.

### 3.3 Article 10 Procedural Mechanisms

As will shortly become apparent, respondents from the three countries were asked to share perspectives on the extent to which participation by civil actors in environmental governance is facilitated through the procedural mechanisms providing access to environmental information, public participation, and environmental justice. These provisions are found in Article 10 of the Rio Declaration, which is among the outcomes of the 1992 United Nations Conference on Environment and Development (UNCED). Article 10 states that environmental issues are best handled with participation of all concerned citizens, at the relevant level. It provides that at national level, each individual shall 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 are required to facilitate and encourage public awareness and participation by making information widely available. Finally, states are required to provide effective access to judicial and administrative proceedings, including redress and remedy.

The procedural provisions have been given effect through the respective countries' framework

28 H.I. Majamba, 'An Assessment of the Framework Environmental Law of Zanzibar', 1/1 *Law, Environment and Development Journal* 1, 1-5 (2005).

29 Personal Interview, 16 February 2007.

environmental laws. For example, freedom of access to environmental information is provided in section 8 of Uganda's framework environmental law, and in section 172 of Tanzania's framework environmental law. Further, the public's right to participate in environmental decision-making is explicitly granted in section 178 of Tanzania's framework environmental law, which empowers the public to receive timely information regarding actions by the executive or legislation of an environmental nature. It also mandates NEMC to establish mechanisms to collate and respond to public comments, concerns and questions relating to public debates and hearings, and environmental information held in public institutions. Lastly, as regards access to environmental justice Part XII of Kenya's environmental framework law establishes the National Environmental Tribunal (sections 125-136). Similarly, Part XVII of Tanzania's framework environmental law establishes an Environmental Appeals Tribunal (sections 204-212). Lastly, section 105 of Uganda's framework environmental law provides for appeals to be made against administrative decisions of NEMA-Uganda.

## 4 LEARNING FROM EXPERIENCES IN EAST AFRICA

### Overview

This section draws from the thoughts, views and attitudes of respondents in the three countries, which arose primarily from semi-structured interviews. Through the resulting data collection, interpretation and analysis, the following lessons learnt' are highlighted.

### 4.1 Lesson 1: Importance of National Environmental Governance Frameworks

An important finding is that developing and harmonising environmental laws on regional basis is difficult, when countries are not at the same level of

environmental law development and appear to have national agendas that differ from the aims and objectives of the regional initiative.<sup>30</sup> As a Kenyan environmental lawyer observed, 'we must always ask: where we are coming from? Who are the players? What resources are available, and what are the levels of political support?'<sup>31</sup> The uneven 'embedded-ness' of regional environmental governance frameworks was summed up by a Kenyan environmental lawyer working for the civil service, thus:

Kenyans are very good at creating draft laws and policies but they have a problem in implementing them. The Ugandans do not have that problem: they take those laws and policies and straight-away implement them. The Tanzanians, on the other hand, are very good at mulling over them.<sup>32</sup>

An overview of the respective countries' environmental governance frameworks follows:

#### *4.1.1 Environmental Governance Frameworks in Kenya*

Kenya is said to have had a long history of reforming its environmental governance frameworks, of which many attempts had failed due to interdepartmental rivalries and fears that an independent environmental authority would veto the economic and political agenda of rival ministries.<sup>33</sup> These sentiments were echoed by a Kenyan lawyer working at UNEP:

If you look back at what we underwent in order to get to NEMA-Kenya, you would be a great deal more accommodating of its perceived shortcomings. Even my colleagues at the World Bank didn't believe we would succeed. But I told them we would get there, and now we have.<sup>34</sup>

Despite enacting the statute in 1999, actual implementation was much slower: core staffs were

<sup>30</sup> See Kameri-Mbote, note 25 above.

<sup>31</sup> Personal interview, 16 January 2006.

<sup>32</sup> Personal interview, 24 August 2006.

<sup>33</sup> R. Hirji and L. Ortolano, 'Strategies Used by Kenya's National Environmental Secretariat to Promote Environmental Protection', 13 *Environmental Professional* (1991).

<sup>34</sup> Personal interview, 16 January 2006.

only seconded to NEMA-Kenya on 1 July 2002, while the board of NEMA-Kenya was only appointed in April 2003. Worse, due to logistical and financial limitations, bodies such as the National Environment Tribunal did not commence determining disputes until 2005 when the first appeal was lodged.<sup>35</sup> For most, the major issue lay elsewhere, as an officer working at NEMA-Kenya explained:

My concern is with our annual budget. We asked the Exchequer for about US100 million annually to execute our five-year strategic plan. In our first year we got US\$ 5 million, which was slashed in the following year by almost 40 per cent... Three quarters of this amount was used on our staffing and operational costs. This year the figure is even less...there is hardly enough left for us to do our work...<sup>36</sup>

Other respondents perceived the biggest problem resided in the Government's lack of political commitment to environmental conservation. Examples were given of the Mau Forest, an important water tower, which had been opened to human settlement ostensibly to resettle the landless. But as Kenyan lawyer explained, 'the largest beneficiaries were senior people in government and those with 'political' connections who didn't need that land.... They are still holding those parcels of land'.<sup>37</sup>

At other times, the Cabinet was accused of ignoring the law where major development projects were involved. An environmental law lecturer at Nairobi University gave the example of a major wetland, Yala Swamp, in Western Kenya, where an American investor sought to drain a swamp in order to grow rice and genetically modified tilapia fish. NEMA-

Kenya had raised objections to the developer's environmental impact assessment (EIA) report, citing, among other things, the importance of wetlands to the environment and the inadequate safeguards to prevent genetically modified tilapia from escaping into the nearby Lake Victoria where they could breed with wild tilapia fish. However, the Cabinet eventually overruled these objections on grounds that it was good for economic development. In my respondent's words:

I get the impression that environmental protection in Kenya is not a national priority...Once Cabinet makes a 'political' decision, NEMA-Kenya is either told to keep off, or its objections are ignored. Meanwhile, legalities such as EIA are given superficial treatment.<sup>38</sup>

In summary, while Kenya's environmental governance frameworks are in place, inadequate financial resources and a perceived lack of political commitment to environmental conservation present major challenges to environmental governance.

#### *4.1.2 Environmental Governance Frameworks in Tanzania*

An important consideration when highlighting the state of environmental governance in Tanzania concerns the failure of the relatively young Environmental Management Act No. 20 of 2004 to resolve the jurisdictional overlap created by the previous framework environmental law, the National Environment Management Act No. 19 of 1983. That the central government was undertaking environmental policy formulation and implementation, rather than devolving that role to the national apex environmental agency, the National Environmental Management Council, or NEMC, as both Kenya and Uganda had done, was put forward in a report by the Lawyers Environmental Action Team, or LEAT, a Tanzanian environmental NGO:

We have found that as a result of jurisdictional overlaps in Tanzania's environmental and natural resource legislation, abuses of power, interference

<sup>35</sup> A. Mumma, *The Place of Culture in the Enforcement of Environmental and Natural Resources Management Laws: The Case of Kenya* (Paper presented at the conference entitled *Implementing Environmental Legislation: The Critical Role of Enforcement and Compliance* organised by IUCN Academy of Environmental Law Colloquium, New York 16-20 October 2006).

<sup>36</sup> Personal interview, 24 August 2006.

<sup>37</sup> Personal interview, 9 September 2006.

<sup>38</sup> Personal interview, 19 December 2005.

in decision making and marginalisation of the public in decision-making processes.<sup>39</sup>

Similar sentiments were expressed by a Ugandan environmental lawyer, who averred that Tanzania's Department of Environment (DOE), which fell under the Vice President's Office, was effectively in charge of environmental policy formulation and implementation 'despite lacking in interest and capacity'. By contrast, Tanzania's apex environmental agency 'had an interest but lacked the resources to do anything meaningful'.<sup>40</sup> An alternative perspective, however, was offered as to why the organisational structure and powers of NEMC were dissimilar to those of NEMA-Kenya and NEMA-Uganda. A Tanzanian law professor from Dar-es-Salaam University contended that Tanzania's framework environmental law reflected both the ongoing local government reform programme and the private sector reform programme. Essentially, government was expected to deal with policy, legislation and regulation, and undertake service delivery through executive agencies or semi-autonomous agencies or private sector outsourcing. As a consequence, he argued, implementation of environmental laws could only be undertaken by local government. In turn, this implied that NEMC was only required to play a limited role, such as in licensing and preparation of State of Environment reports, while leaving policy formulation and implementation functions to central government.<sup>41</sup> However, as a Tanzanian civil servant observed, UN organisations and donor agencies customarily channeled their financial support directly to NEMA-Uganda or NEMA-Kenya, as these were considered to be semi-autonomous agencies. She opined that there was a notable wariness by donors and UN agencies to committing finances to NEMC because they perceived it as being part of central government.<sup>42</sup>

Moreover, as was pointed out, Tanzania's unique experiences with 'African socialism' are instructive.

Since the late 1960s the ruling Chama Cha Mapinduzi (CCM) political party had formulated policies for the Executive to subsequently implement. Thus when it came to environmental issues, it was necessary to consider implementation of both the Environmental Management Act of 2004 as well as party policy. In his words:

...this tendency of legislating on everything is new to Tanzania. If you want to evaluate environmental governance in Tanzania, don't just look at the implementation of the law; also look at the implementation of the ruling party's environmental policies.<sup>43</sup>

In summary, while Tanzania's framework environmental law is younger than either Kenya or Uganda, the fact that its apex environmental agency has fewer policymaking and implementation powers than its counterparts in Kenya and Uganda is also notable.

#### *4.1.3 Environmental Governance in Uganda*

Uganda's environmental governance frameworks were widely acknowledged as being the most highly operationalised of the three countries, a fact which was attributed to the country's experiences with post-war reconstruction. Ugandan respondents pointed out that the vibrant civil society culture emerged following years of armed struggle against authoritarianism. The resulting restructuring saw the expansion of opportunities for previously marginalised groups such as women in public policy making structures, for example in local government and the environment. They explained that the culture of public consultation had remained an entrenched feature of Ugandan public life ever since the 1995 Constitution was passed. As it contained strong environment-related provisions, PADELIA, which had only just been launched the previous year, was viewed as a golden opportunity to translate the aspirations expressed within legislation into action.<sup>44</sup> Others felt that while the country's laws looked good on paper, the reality was entirely different. While the Constitution had vested much public land in the people and in local government, central government still held the remaining land under public trust. In recent years, they noted that protected forests and wetlands had

<sup>39</sup> Lawyers Environmental Action Team (LEAT), Report On Institutional Mandates And Legal Framework For Environmental Management In Tanzania (Dar es Salaam: Lawyers Environmental Action Team, 1999).

<sup>40</sup> Personal interview, 25 August 2006.

<sup>41</sup> Personal interview, 1 September 2006.

<sup>42</sup> Personal interview, 16 December 2005.

<sup>43</sup> Personal interview, 1 September 2006.

<sup>44</sup> Personal interview, 7 September 2006.

been allocated to private developers and investors. An example was given of Mabira forest, located near a large sugarcane plantation, where squatters were forcefully evicted for allegedly degrading the environment. However, much of the same forest was later given to the factory owners in order to plant more sugarcane. To my respondent, an environmental lawyer, the inference was clear: the Executive was either insincere, or it never envisaged how far-reaching the environmental laws had turned out to be.<sup>45</sup>

In summary, while Uganda's environmental governance frameworks have been in place for longer than its neighbours, there are perceptions of increasingly contradictory actions being taken by the country's top leadership.

#### 4.2 Lesson 2: Different Patterns of State-civil Actor Interaction

A second finding was that civil and state actors from the respective countries all relate in different ways. As regards this issue, both general and specific considerations come to mind. From a general perspective, respondents demonstrated an awareness and appreciation of why the participation of civil actors in environmental governance is beneficial. As a Kenyan environmental lawyer contended NGOs were actively involved in shaping environmental governance in the region, and thus, 'if you want to get to the heart of things...information on envisioning concepts and their implementation, it is not governments but NGOs that will give it to you'.<sup>46</sup> Similarly, in line with assertions that industry self-regulation by local Kenyan subsidiaries of multinationals has tended to follow the standards set by their European parent companies,<sup>47</sup> a senior Kenyan executive at a local subsidiary of a French multinational cement producer noted that cement companies had come together and made a number of proposals regarding self-regulation. In his words:

We know that the cement industry is dirty: our operations emit dust and other pollutants. We try

our best to mitigate their impacts, but rather than wait for legal prescriptions, we thought it best as an industry to be proactive. At present, our standards are comparable to our parent company in the EU, and are much higher than what the East African governments would prescribe.<sup>48</sup>

A similar willingness and ability by industries to participate in environmental governance was also evident in Tanzania's mining industry. My respondent, an environmental legal counsel for the local subsidiary of a multinational British mining company, observed that there was a general willingness to meet, and exceed, the environmental standards prescribed by law.<sup>49</sup> This view reflected similar sentiments by a Tanzanian environmental law lecturer, who observed, 'what we need in Tanzania is not the confrontational style favoured by some of these NGOs....Rather we need them to evolve beyond that stage so that they enter into constructive engagement with government, where solutions are offered in the spirit of dialogue'.<sup>50</sup> Finally, in Uganda, a mutually supportive relationship was found to exist. As a Tanzanian environmental lawyer working at UNEP noted:

Some environmental NGOs in Uganda enjoy a high stature. They may take NEMA-Uganda to court in order to change environmental law or policy. But they still remain its 'biggest customers' when it comes being awarded consultancy contracts. This mutually supportive situation has not been replicated anywhere else in East Africa.<sup>51</sup>

These general perspectives notwithstanding, respondents from the three countries offered somewhat contrasting insights on how participation by civil actors occurs in respect of information access, public participation and public participation. A discussion follows.

##### 4.2.1 Insights Relating to Information Access

The rationale for information access is simple: without access to information held by state actors,

<sup>45</sup> Personal interview, 6 September 2006.

<sup>46</sup> Personal interview, 20 December 2005.

<sup>47</sup> E. Kamau, 'Environmental Law and Self-Management by Industries in Kenya', 17(2) *Journal of Environmental Law* 229, 242-244 (2005).

<sup>48</sup> Personal interview, 20 October 2007.

<sup>49</sup> Personal interview, 8 November 2007.

<sup>50</sup> Personal interview, 1 September 2006.

<sup>51</sup> Personal interview, 16 February 2007.



it is often difficult for civil actors to participate in environmental governance since they lack sufficient knowledge of what is happening.<sup>52</sup> Respondents observed that obtaining environmental information was unproblematic in either Kenya or Uganda. In Uganda's case, for example, a respondent acknowledged the readiness by NEMA-Uganda to provide environmental information upon request, even where such information was used for advocacy campaigns or litigation against NEMA-Uganda itself.<sup>53</sup> As a legal counsel for NEMA-Uganda noted, 'we don't mind. We are all on the same pro-environment team, and at the end of the day it is the environment that wins'.<sup>54</sup> In the case of NEMA-Kenya, a legal officer pointed out that information was generally available, particularly where it pertained to EIA processes. She pointed out that wherever requests for information were made, NEMA-Kenya responded in kind, but expressed surprise that in many cases the information is not subsequently used to institute legal action.<sup>55</sup>

In Tanzania, respondents felt there was a general unwillingness by government agencies to share information, especially concerning mining. Depending on the particular circumstances, requests for information could either go to the apex environmental agency, or to the all-powerful Department of Environment, which fell under the Vice-President's Office. In practice, however, such requests could be ignored even when legislators and Parliamentary Committees demanded information on mining activities in such places as Geita (gold mining), Mwadui (diamond prospecting) and Songo Songo (natural gas).<sup>56</sup> A Tanzanian environmental lawyer suggested that this situation arose from Tanzania's long-history of authoritarianism and single-party rule where the government had never felt compelled to open its files to its citizens. In his words, 'this is the institutional culture which has

been built over many decades of our political and legal system.<sup>57</sup> To others, the secrecy was attributable to corruption. As a Tanzanian environmental lawyer observed, the controversial mining contracts were closely guarded secrets to ensure the political survival of the bureaucrats and their political masters. There would be a huge public outcry if it came to be known exactly how some of them had come to amass such wealth. For this reason, he averred that freedom of information legislation would make no difference as far too much was at stake.<sup>58</sup>

#### *4.2.2 Insights on Public Participation in Environmental Decision-making*

It has been suggested that citizen participation in environmental policy formation is useful for informing regulators of exactly where volatile public backlash is likely to occur, and for winning the sympathies of a few influential citizens in places where opposition to environmental regulation is strongest. Additionally, a key assumption of successful public participation is the social influence of citizen participants. If they are influential community members, their enthusiasm for the policy will spread throughout the community and opposition will be diffused.<sup>59</sup> However, as the following illustrations show, public participation in environmental decision-making varies across the three countries.

Tanzania came out positively in matters of public participation. Respondents noted that the country's socialist legacy was such that while the state traditionally provided basic services like education and health, local people were also involved in planning their own lives and making decisions at the local level.<sup>60</sup> The impact was potentially huge, as a Tanzanian environmental lawyer opined:

We have a problem with deforestation, and to me the solution is simple. The local cell of the ruling Party should simply tell our people in the rural areas to come out and plant some trees. Our people will

52 W. Baber, 'Ecology and Democratic Governance: Toward a Deliberative Model of Environmental Politics', 41(3) *Social Science Journal* 331 (2004).

53 Personal interview, 22 December 2005.

54 Personal interview 25 August 2006.

55 Personal interview, 24 August 2006.

56 D.W. Ringia and S. Porter, *Access to Environmental Information in Tanzania* (Dar es Salaam: Lawyers Environmental Action Team, 1999).

57 Personal interview, 1 September 2006.

58 Personal interview, 2 August 2006.

59 See Irvin and Stansbury, note 16 above.

60 Personal interview, 22 December 2005.

not hesitate to come out in large numbers... Overnight our problem will vanish.<sup>61</sup>

Kenyan respondents, however, were somewhat more circumspect. On one hand, an environmental law lecturer from Nairobi University observed that despite the presence of a Nobel Peace Prize winner, the government had neither promoted her from assistant Minister to full Minister, nor had it mobilised members of the public into taking more decisive actions aimed at environmental conservation and natural resources management.<sup>62</sup> Further, an information officer at NEMA-Kenya perceived citizen participation in decision-making purely as an administrative formality where, for example members of the public would be invited to make formal objections to proposed property development.<sup>63</sup> A Kenyan environmental lawyer, for instance, pointed out that Resident Associations have contributed towards setting environmental standards at the local level, especially owing to the over-stretched capacity of the regulators. In his words:

Resident Associations are the way to go since they can quickly sound the alarm in case of any divergence by property developers away from the approved building plans, and also facilitate basic standards of security, tidiness and noise-control, which may absent in zoning regulations.<sup>64</sup>

This bureaucratic approach to public participation, however, was critiqued by a Ugandan environmental lawyer on the following grounds:

It is unlikely to make an impact at local levels where the issues are vastly different—such as agriculture, poverty or homestead management...This is why EIA is unlikely to be effective on the ground... Locals are more concerned with survival-issues or economic development. Moreover these EIA documents are very technical...and so may only be of interest to a few NGOs or other busy-bodies.<sup>65</sup>

In Uganda, different opinions were offered regarding the extent of public participation in the ongoing Bujagali Falls hydropower dam construction project. On one hand, a respondent working for NEMA-Uganda claimed that local support for the project was such that even the traditional spirits that dwelled on the waterfalls had even accepted to relocate to alternative waterfalls so as to make way for construction of the dam.<sup>66</sup> This claim is corroborated by reports that the original developers of the dam project had prepared a Cultural Property Management Plan, which detailed how spirits (residing in trees, rocks and boulders) would be moved prior to construction, and stated that in 2001, traditional ceremonies had been held to appease the spirits prior to transferring them elsewhere.<sup>67</sup> Ethereal matters aside, a Ugandan respondent took issue with the perceived unfairness of the EIA process held prior to the dam's construction. Although he expected to have a forum for objective discussion, no serious objections were entertained and the EIA was subsequently approved. It was only following recourse to the World Bank Inspection Panel, that the majority of his organisation's objections to the project were upheld. He viewed this disjuncture as evidence of how local stakeholders had been marginalised.<sup>68</sup>

#### *4.2.3 Insights Relating to Environmental Justice*

Environmental justice was understood in terms of dispute resolution either in court or in the environmental tribunals. The benefits of environmental justice were well appreciated owing, in no small part, to the training courses facilitated under PADELIA auspices for members of the judiciary and legal practitioners, as well as the compendia of laws and cases which were distributed. One respondent who had served as facilitator recalled one participant (a judge) declaring that if he

61 Personal interview, 1 September 2006.

62 Personal interview 18 December 2005.

63 Personal interview, 24 August 2006..

64 Personal interview, 8 February 2006.

65 Personal interview, 21 August 2007.

66 Personal interview, 2 September 2006.

67 S. Linaweaver, *Catching the Boomerang: EIA, the World Bank, and Excess Accountability: A Case Study of the Bujagali Falls Hydropower Project, Uganda* (Dissertation submitted to the Department of Geography and Environment and the Development Studies Institute, London School of Economics and Political Science, London, 2002).

68 Personal interview, 7 September 2006.



had participated in the workshop a week earlier, he would have decided a legal dispute earlier. He had been unaware that the dispute in question raised substantial environmental issues and not merely procedural ones.<sup>69</sup> These workshops had also resulted in Kenya's judiciary making environmental law a compulsory subject for both induction courses and in-service programmes for judges.<sup>70</sup>

For the most part, these newly-acquired skills were put to good use, although in varying degrees. In Tanzania, reference was often made to two celebrated public interest litigation (PIL) cases concerning environmental disputes conducted in the early 1990s, which affirmed the *locus standi* of litigants where the petitions are bona fide for the public good, and where the courts could provide effective remedies.<sup>71</sup> Respondents raised concerns, however, that despite many Tanzanian lawyers participating in the training courses, there was no corresponding increase in PIL, despite environmental challenges having increased.<sup>72</sup> In Kenya, respondents acknowledged the increase in environment-related cases being filed in court and in the National Environment Tribunal.<sup>73</sup> Uganda, however, was the most active in public interest litigation. One respondent, a successful commercial lawyer, recalled representing an environmental NGO in a case which sought to ban smoking in public on grounds that it violated peoples' right to a clean and healthy environment. The High Court agreed and directed NEMA-Uganda to make regulations prohibiting the smoking in public. My respondent observed that while smoking in public had not fully stopped, there was at least a raised level of sensitisation. Moreover, a precedent has been set, which opened up the way for others to engage in PIL for other issues.<sup>74</sup>

69 Personal interview, 26 January 2006.

70 Personal interview, 20 December 2005.

71 *Festo Balegele v Dar es Salaam City Misc. Cause No. 90*, High Court of Tanzania at Dar es Salaam, 1991; *Christopher Mtikila v Attorney General Civ. Case No. 5 of 1993*, High Court, Dodoma, 1993.

72 Personal interview, 1 September 2006.

73 Personal interview, 8 September 2006.

74 Personal interview, 7 September 2006.

### 4.3 Lesson 3: State-anchored Pluralism

A final lesson concerns the importance of the State facilitating conditions which best enable civil actors to attain their full potential. Here, two pertinent questions are whether the state given up its position of primacy, and whether the public has failed to take up the position of primacy? An explanation follows.

#### 4.3.1 *Has the State Given up its Position of Primacy?*

Respondents expressed varied views on the attitudes of their respective political leaders. One Tanzanian lawyer summed up the general mood thus, 'over the years, I've learnt that whenever our leaders don't want to do something, for example with respect to environmental governance, they say 'we don't have the money', even when the required action doesn't need money in order to get done...'.<sup>75</sup> Another Tanzanian lawyer expressed a similar point of view:

We seem to have this unlimited patience with our rulers and organisations. People have grown into that mentality where everybody is my *ndugu* (brother) and my *jirani* (neighbor) however bad he or she is. They cannot be criticised because in doing so you will be called *mnyapara* (oppressor).<sup>76</sup>

Finally, it was a Tanzanian environmental lawyer who averred that, 'while the law is important, even more important is the ability of the people to compel Government to respect it. People have to be mobilised to demand and to push and to fight for it. That is where the problem is: Tanzania has been described as a nation of sheep who just follow official policy...we don't complain'.<sup>77</sup> Uganda, on the other hand, provided a contrasting perspective. As respondents pointed out, experiences with post-war reconstruction since the mid-1980s had effectively seen an 'awakening' by members of civil society, and hence their active participation within the country's pluralist environmental frameworks. A respondent from NEMA-Uganda summed up the situation as follows:

75 Personal interview, 16 February 2007.

76 Personal Interview, 1 September 2006.

77 *Ibid.*

Given its experiences with wars and political instability, the question Ugandans have asked is this: do we want to return to a similar situation? 'Therefore, it is up to you and me to make a difference'...<sup>78</sup>

#### 4.3.2 *Is the Public Failing to Take up Their Position of Primacy?*

Kenya's experiences suggest that notwithstanding the existence of pluralist environmental governance structures, civil actors are unable or unwilling to proactively participate. In some instances, it was due to cronyism. One lawyer who served on the Governing Council of the Law Society of Kenya (LSK), which is the umbrella body for legal practitioners, observed that it was often statutorily mandated to nominating suitably qualified individuals to fulfill oversight or watchdog roles in public institutions.<sup>79</sup> In his words:

I lost confidence in the LSK's leadership, when I observed our chairman's mode of operation. He was filling statutory positions with his 'people', and has even nominated himself to four such positions. He was not consulting widely... How could he then criticise the government for flouting legal procedure?<sup>80</sup>

In other instances, the problem lay with the personal commitment and competence of individuals appointed to manage public institutions. In his view:

'The biggest problem is that rather than help the environmental cause, our leaders are only interested in doing things when they can receive the credit; they are far more interested in who is doing the work, rather than what is being done'. In environment issues we don't need credit-takers, just people who will do the work. However some of

our people only ask 'where is the gain, benefit or recognition to me?'<sup>81</sup>

It may thus be surmised from these sentiments that a vision 'gap', or 'deficit' in the translation process from vision through institutional mechanisms to practice, occurs either poor leadership is offered up by state actors or by civil actors involved in collaborative environmental governance.

## 5 CONCLUSION

In summary, this article has sought to illuminate the conditions under which the participatory aspirations of a regional approach to environmental governance are either facilitated or hindered. Three empirical insights have been illuminated. First, understanding 'participation' in a regional context necessitates an appreciation of the respective countries' contingent social and political circumstances. Secondly, it is necessary to privilege the State both normatively and empirically among the multiplicity of actors who may also contribute to regional environmental governance. Finally, despite the presence of a 'strong' and 'active' State serving as catalyst, activator or facilitator of the environmental governance framework, clarity is necessary as to whether the state has given up its position of primacy, or whether the public is failing to take up its position of primacy. The point, here, being that participation by an engaged and committed citizenry is a necessary underpinning of a pluralist environmental governance approach.

It is by now evident from these 'lessons-learnt' that their primary message reads thus: 'enhancing participation in regional environmental governance has as much to do with formalistic legal and institutional arrangements as with social, cultural and personal factors'. The implications are two-fold. First, as States are historically involved as ordering devices, namely as sources of the rules, resources and

<sup>78</sup> Personal interview, 16 February 2006.

<sup>79</sup> Statutory positions refer to those positions on state organizations that must be filled by particular civil society groups. Section 16 of Kenya's Anti-Corruption and Economic Crimes Act, 2003 establishes the Kenya Anti-corruption Advisory Board and requires professional organizations, such as the Law Society of Kenya, and the Institute of Certified Public Accountants of Kenya to nominate board members.

<sup>80</sup> Personal interview, 17 February 2007.

<sup>81</sup> Personal interview, 12 January 2006.

administrative capacity<sup>82</sup> the burden ultimately falls upon the states in a given region to facilitate the full participation of civil actors within their respective jurisdictions in ways that deliver improved environmental outcomes. Similarly civil actors situated in a given region have an inalienable responsibility to participate within their respective environmental governance frameworks in ways that are not only democratically accountable but which also best serve the public interest.

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82 I. Loader and N. Walker, 'Necessary Virtues: The Legitimate Place of the State in the Production of Security', in J. Wood and B. Dupont eds, *Democracy, Security and the Governance of Society* (Oxford: Oxford University Press, 2006).

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