



New Constitutional Environmental Law in Kenya: Changes in 2010

Robert Kibugi*

Introduction

This section introduces the main legal development in Kenya within the last six months, highlighted by new constitutional environmental law. On 4 August 2010, the people of Kenya voted at a referendum, and duly approved a new constitution with a 67 per cent majority. The new *Constitution*¹ came into force on 27 August 2010. Unlike the now repealed *Constitution*,² this new basic law introduces the right to a healthy environment, and classifies it as a fundamental or basic right. It also integrates a chapter on land, environment and natural resources management.

A Critical Consideration of the 2010 Constitutional Environmental Law

Right to a Clean and Healthy Environment

Article 42 in the Bill of Rights, creates an environmental right for all persons. This right includes having the environment protected for the benefit of present and future generations. Further, environmental protection for people of Kenya is enshrined as a

* PhD Candidate, University of Ottawa, Canada. Email: rkibu083@uottawa.ca.

¹ Revised Edition (2010).

² Revised Edition (2008).

constitutional concept that is actionable and enforceable as a basic right through a petition for enforcement of fundamental rights to the High Court (article 70). The *Environment Management and Coordination Act* (1999) (*EMCA*) was hitherto the only legal source for this right and still provides alternative access to the High Court by ordinary suit (section 3). It is therefore noteworthy that both *EMCA* (section 3) and the *Constitution* (article 70) now embody a liberalized *locus standi* to enforce the environmental right in court without need to show personal loss or injury.

The constitutional environmental right includes having 'the environment protected for the benefit of present and future generations through legislative and other means, particularly those contemplated in article 69'. The aspect of having a right fulfilled through 'legislative and other means,' coupled with the liberalized *locus standi* for access to justice, provides an opportunity for Kenya to realize some positive enhancement in environmental management. It will be necessary to have ordinary legislation enacted in order to set out, definitively, the meaning, criteria and parameters of these 'legislative and other means'. This will make it possible to guard procedural superficial enactment of law and policy by the Kenyan Government in order to claim compliance.

The decision of the South African Constitutional Court in *Government of the Republic of South Africa and Others v Grootboom and Others*³ at length analysed the actual interpretation where a constitution requires the government to fulfil fundamental rights through 'legislative and other means.' The actual phrase used in various sections of the *Constitution of the Republic of South Africa* (1996) is 'reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of...' the rights (article 26(2)). In this judgment, the court determined that enacting legislation and establishing a programme to fulfil the rights in question, are just a first step. In its interpretation of the provisions in the *Constitution of the Republic of South Africa*, the court ruled that 'what remains is the implementation of the programme by taking all reasonable steps that are necessary to initiate and sustain it. And it must be implemented with due regard to the urgency of the situations it is intended to address'.

The *Grootboom* judgment, while merely persuasive as judicial precedent in Kenya, offers useful conceptual insights. It is important to note there is a divergence because

³ 2001 (1) SA 46 (CC).

article 42 of the Kenyan *Constitution* does not refer to 'reasonable legislative' means, 'within its available resources' or achieving 'progressive realization' of the pertinent rights. However, the reasonableness of any measures taken by the Kenyan Government to implement this environmental right may have to be determined by a court of law. It is also arguable that the drafters of the *Constitution* considered environmental degradation to be a major challenge, and a threat to human survival, and therefore did not intend to restrict implementation of sustainable environmental management within the 'progressive realization' philosophy. This 'progressive realization' treatment, similar to the South African experience, is actually expressly restricted to provisions relative to socio-economic rights in the Kenyan *Constitution* (article 20(5)). On the other hand, article 72 states that 'parliament shall enact legislation to give effect to the provisions of this part,' supporting an argument that the *Constitution* intends the obligations and measures in article 69, for environmental management, to be implemented without delay.

Obligations and Measures for Environmental Management

Chapter five of the *Constitution* contains provisions regarding environment and natural resources. The second part on the environment addresses the obligations of the Kenyan Government in respect of the environment and agreements relating to mineral resources.

Article 69(1) of the *Constitution* sets out certain obligations contingent on the Kenyan Government relating to environmental management. It is useful to highlight that these obligations represent some of the 'legislative and other measures' set out as part of realization of the right to a clean and healthy environment in article 42.

These obligations compel the Kenyan Government to firstly ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of accruing benefits. This obligation combines the human need to utilize resources, with the contingent duty to sustainably manage and conserve these resources. Therefore for the first time, within the Kenyan legal system, the *Constitution* creates a sound basis for subsequent review of sectoral statutes with competence over natural resources to ascribe by these obligations. It is also noteworthy that the *Constitution* calls for equitable sharing

of benefits. The achievement of such an outcome will, however, require significant statute and governance reform, civic education, and possibly judicial enforcement.

The second obligation imposes a duty on the Government to work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya. Loss of forest cover from deforestation and degradation is a major setback for environmental management law and policy in Kenya, with tree cover currently estimated at two percent.⁴ The *Forest Act* (2005) is silent on any definitive reforestation targets and therefore a constitutional objective of attaining ten per cent tree cover affords unrivalled legal basis and merit. However, the provision should have directed the Government to set up clear legislative and policy mechanisms on how to achieve this goal, including how such mechanisms will respect other provisions of this article like public participation, or protecting biological diversity.

The third obligation compels the Government to encourage public participation in environmental protection and management. This forms a basis for the introduction of public participation components in statutes and policies relative to environmental management. However, it is notable that the *Constitution* applies the term 'encourage' raising the concern over how this obligation can be legally enforced. Since the population of Kenya is dominantly rural, and engaged in mostly land-use based economic activities like agriculture, it is important to develop an innovative approach to give legal effect, without overly inhibiting decision-making.

The fourth obligation is to establish systems of environmental impact assessment, audit and monitoring of the environment. Already, *EMCA* (section 58-60) provides for environmental impact assessment and audit for the category of projects set out in the second schedule of the Act. Enshrining these requirements in the *Constitution* is meritorious, as it underscores the importance integrating environmental and development concerns and interests in decision-making.

⁴ *Forest Policy* (2007).

Duty to Protect and Conserve the Environment

While article 42 captures the basic right to a healthy environment, article 69(2) states 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' (author's emphasis added). This provision can be analysed in two parts.

The first part relates to the duty on every person to cooperate with state organs, and other people to protect and conserve the environment. With regard to cooperation between every person and state organs, this duty could form another basis to reinforce public participation as a primary element of environment conservation and management. This duty could also form the basis to establish a statutory stewardship role defining responsibilities for people to the environment, land or natural resources. Further, the *Constitution* defines person to 'include a company, association or other body of persons whether incorporated or unincorporated' (article 260). This duty could be broadly construed to extend the duty to companies thereby providing a constitutional basis to require stricter compliance with environmental standards by artificial persons such as companies and industry.

The duty to protect and conserve the environment, discussed above, is intended to ensure 'ecologically sustainable development.' The right to a healthy environment in article 42 is linked to the entire article 69 by the requirement of the Government to take the 'legislative and other means' specified in article 69, to enhance realization of the fundamental right. Using this rationale and linkage allows the conclusion that overall, the aim of all the measures set out in the *Constitution* is to ensure the realization of ecologically sustainable development. This conclusion further implies that the *Constitution* has made a credible legal effort at integrating sustainable utilization and sustainable management of natural resources as key legal concepts in environmental decision-making.

Some normative support for this conclusion can be derived from the principles of ecologically sustainable development set out in Australia's *Environment Protection and Biodiversity Conservation Act* (1999), specifically section 3A. Indicatively, the first principle states that decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable

considerations. Another principle indicates that the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making. These principles offer useful conceptual insights from a comparative aspect. However, the constitutional law basis for ecologically sustainable development and sustainable environmental management in Kenya may only remain aspiration unless laws such as *EMCA* are either amended or totally reviewed to comply with the new *Constitution*.

Parliamentary Ratification for Natural Resources Agreements

The new *Constitution* introduces an innovative provision on agreements relating to natural resources. Article 71 specifies that a transaction is subject to ratification by parliament if ‘involves the grant of a right or concession by or on behalf of any person, including the national government, to another person for the exploitation of any natural resources of Kenya.’

This provision could be construed as intending to achieve several goals. The first goal is to ensure transparency and accountability regarding any revenues, or royalties, payable to any public agencies. The second goal concerns questions of involuntary displacement and resettlement of people whenever major mining operations are implemented. Presumably, parliamentary scrutiny would audit compliance with any law or regulations on involuntary resettlement. The third goal regards specific environmental requirements for natural resource exploitation undertakings such as mining. These include requirements like mandatory environmental management plans, environmental restoration plans, or questions over apportionment of disaster liability. This list is merely indicative, and implies that giving effect to this constitutional provision will require a complete review of the outdated *Mining Act* (1940).

Identification of Possible New Research Agenda for the IUCNAEL

The implementation of the provisions in Kenya’s new *Constitution* will be challenging. Article 71, referring to the environment provisions, states that Parliament ‘shall enact legislation required to give full effect to the provisions of this part’. The fifth schedule

to the *Constitution* requires legislation regarding the environment to be enacted within four years from the effective date, which was 27 August 2010. Legislation regarding natural resources agreements, and land use and property should be enacted within a period of five years. This is a complex task requiring significant technical and intellectual capacity.

The Minister for Environment has recently appointed a technical task force 'for drafting Legislation Implementing Land Use, Environment, and Natural Resources Provisions of the Kenya Constitution'.⁵ The duties of the task force include reviewing existing legislation and proposing provisions to be repealed or replaced through new legislation. The task force is also responsible for developing new legislation, in collaboration with other statutory bodies, for debate and adoption by parliament.

There is an opportunity for the IUCN Academy of Environmental Law to collaborate with the Kenyan legal, policy or other experts already engaged in the task force. This collaboration could include research on comparative experiences on implementing constitutional environmental law, especially in developing countries. Further, even though the term environmental law is used here, laws relative to the environment include land use, water, forests and physical planning among other specialized areas. The process underway in Kenya could be designed as a case study on constitutional implementation, highlighting challenges, opportunities or ideas on how to exploit the constitutional moment to address key challenges that confront developing countries, such as poverty or hunger.

⁵ *Gazette Notice* No. 13880, 1 November 2010.