



COUNTRY REPORT: KENYA Constitutional Provisions on the Environment

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Introduction

When Kenya adopted a new *Constitution*¹ on 4 August 2010, it gave constitutional recognition to environmental management. Hitherto, its *Constitution* was not only silent on environmental issues, its treatment of land and property focused on private property rights at the expense of sustainable management.² This happened despite the fact that the environmental crisis brings into question political arrangements and the constitutional order that exists to validate and regulate those arrangements.³

The Environmental Law Institute has surveyed constitutional law provisions in African constitutions. The reason for constitutional recognition of environmental issues are given as including: constitutional environmental provisions provide a 'safety net' for resolving environmental problems; constitutional recognition elevates the status of environmental rights and protection to the same level as human rights and thus reduces their subordination to other priorities like economic development; and the

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¹ Republic of Kenya, *Constitution of Kenya* (2010).

² D. Ogolla and J. Mugabe, 'Land Tenure Systems and Natural Resource Management' in C. Juma and J. Ojwang, *In Land We Trust: Environment, Private Property and Constitutional Change* (1996) Initiative Publishers and Zed Books, Nairobi and London Acts, 85-116.

³ J. Ojwang, 'The Constitutional Basis for Environmental Management' in C. Juma and J. Ojwang, *In Land We Trust: Environment, Private Property and Constitutional Change* (1996) Initiative Publishers and Zed Books, Nairobi and London, 49.

existence of procedural rights alongside the substantive environmental rights in constitutions enhance environmental governance.⁴

Kenya has a rich and diverse natural resource base. The majority of its population relies on natural resources for their livelihoods. However, the country has numerous environmental challenges requiring legislative intervention. The country's new *Constitution* provides a framework for the sustainable management of the environment and natural resources. This report discusses key developments in 2011 seeking to implement these provisions.

Summary of the Constitutional Provisions

The *Constitution of Kenya* addresses issues of environmental governance in several articles.⁵ The preamble notes that the country's environment should be sustained for the benefit of future generations.⁶ Article 10 of the *Constitution*, detailing national values and principles of governance for implementation of the *Constitution*, recognizes the achievement of sustainable development as an essential principle of governance.

Environmental management is recognized as a constitutional right within the Bill of Rights.⁷ Article 42 guarantees the right to a clean and healthy environment, which includes 'the right to have the environment protected for present and future generations through legislative and other measures'⁸ and 'to have obligations relating to the environment fulfilled'.⁹ The obligations placed on the State include:¹⁰

- ensuring sustainable exploitation, utilization, management and conservation of the environment and natural resources and equitable sharing of accruing benefits;

⁴ Environmental law Institute and United Nations Environment Programme, *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa* (2007) 2nd Edition, Washington, 2.

⁵ For a more in-depth discussion of the constitutional provisions relating to the environment in Kenya's new *Constitution*, see: R Kibugi, 'New Constitutional Environmental Law in Kenya: Changes in 2010' (2011) 2 *IUCNAEL eJournal* 136-142.

⁶ *Constitution of Kenya*, Preamble.

⁷ *Constitution of Kenya*, Article 42.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Constitution of Kenya*, Article 69.

- promoting the achievement and maintenance of a tree cover of at least ten percent of the land area in Kenya;
- protecting and enhancing intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of communities;
- encouraging public participation in the management, protection and conservation of the environment;
- protecting genetic resources and biological diversity;
- establishing systems of environmental impact assessment, environmental audit and monitoring of the environment;
- eliminating processes and activities that are likely to endanger and degrade the environment; and
- utilizing the environment and natural resources for the benefit of the people of Kenya.

Every person is under a duty to cooperate with State organs and other persons to protect and conserve the environment.¹¹ The *Constitution* contains provisions on access to justice, giving every person the right to apply to court for redress whenever they feel that the right to a clean and healthy environment ‘has been, is being or is likely to be denied, infringed or threatened’.¹² This is a marked improvement from the previous constitutional framework where accessing courts to vindicate environmental rights was met with serious procedural hurdles (particularly on standing).

The *Constitution*, by dint of Article 70, explicitly provides that when seeking to enforce the right to a clean and healthy environment, an ‘applicant does not have to demonstrate that any person has incurred any loss or suffered any injury’.¹³ Further, and in accordance with the requirements of Principle 10 of the *Rio Declaration*, the *Constitution* also recognizes and seeks to promote public participation and access to information.¹⁴

The other critical environmental concern relates to the manner in which natural resources are exploited. In addition to a general call for their sustainable use and conservation,¹⁵ the *Constitution* provides a framework for negotiation of contracts

¹¹ *Constitution of Kenya*, Article 69(2).

¹² *Constitution of Kenya*, Article 70(1).

¹³ *Constitution of Kenya*, Article 70(3).

¹⁴ *Constitution of Kenya*, Article 35 read together with Article 69.

¹⁵ *Constitution of Kenya*, Article 69.

relating to natural resources, which process must involve Parliament.¹⁶ Such investments must benefit local communities and their economies.¹⁷ The rationale is to address past practices where natural resource contracts for investments and exploitation were shrouded in secrecy, fostering corruption and disadvantaging local communities. Related to these provisions are those for land ownership and management. The right to land has been a contested issue in Kenya since the colonial period.¹⁸ It formed a major reason for the agitation for constitutional reform.¹⁹ The *Constitution* recognizes that land belongs to all Kenyans and can be held by them collectively as a nation, as communities or as individuals.²⁰ It also makes fundamental reforms in the terms under which land is held, the institutional architecture for its management and the policies that regulate such management, with the establishment of a National Land Commission responsible for managing public lands. Kenya adopted a *National Land Policy* in August 2009 to 'guide the country towards efficient, sustainable and equitable use of land for prosperity and posterity'.²¹ The *Policy* consists of 'measures and guidelines, which the government shall implement to achieve optimal utilization and management of land, and from which laws governing land administration and management shall be drawn'.²² It represents the first time since independence that Kenya has such a policy on land and largely accords with the requirements of the *Constitution*.

The last provisions with direct bearing on environmental management relate to those addressing the structure of government. Kenya has since independence generally had a centralized government system. With the *Constitution* this has been reformed to address its shortcomings especially relating to accountability, service delivery, public participation and efficient management of resources. The reform has seen the adoption of a devolved system of government with two levels.²³ The *Constitution* divides the country into forty-seven counties each of which has a legislative arm and executive arm headed by a county governor. The relationship between the national

¹⁶ *Constitution of Kenya*, Article 71.

¹⁷ *Constitution of Kenya*, Article 66(2).

¹⁸ For a discussion of the importance of land in the context of Kenya, see: Ogolla et al (supra note 2) 94-5; P. Kameri-Mbote, 'Land Tenure and Sustainable Environmental Management in Kenya' in C. Okidi et al *Environmental Governance in Kenya: Implementing the Framework Law* (2008) East African Educational Publishers, Nairobi; and P. Kameri-Mbote, 'The Land Question in Kenya: Legal and Ethical Dimensions' in E Gachenga et al *Governance, Institutions and the Human Condition* (2009) Law Africa Publishing Ltd, Nairobi, 219-246.

¹⁹ *Ibid.* See also Chapter V of the *Constitution*.

²⁰ *Constitution of Kenya*, Article 61(1).

²¹ Republic of Kenya, *Sessional Paper Number 3 of 2009 on National Land Policy* (2009).

²² *Ibid.*, 11.

²³ *Constitution of Kenya*, Article 6.

and devolved governments is detailed in the *Constitution* to ensure that there is complementarity and cooperation between the two levels.

Implementing the Constitution

While the adoption of the *Constitution*, through a referendum on 4 August 2010 and its promulgation on 27 August 2010 marked a turning point in the country's governance systems in all spheres including environment and natural resources, the impact of these reforms depends on the implementation of the constitutional principles. These actions are particularly critical when viewed against past assessments that point to a history of the existence of good constitutional frameworks without application and acceptance.²⁴

To help inculcate constitutionalism and promote the implementation of the *Constitution*, the Constitutional Implementation Commission was established.²⁵ Its mandate includes monitoring, facilitating and overseeing legislation and administrative procedures to implement the *Constitution* and working with Constitutional Commissions to ensure adherence to the *Constitution*.²⁶ The Commission is required to regularly report to Parliament²⁷ and through it to the people of Kenya on the implementation of the *Constitution*; and to enable corrective action to be taken to entrench a constitutional culture within Kenyan society. In its latest progress report the Commission reports that the country has made commendable progress but that the process is dogged by challenges including impunity, disagreements amongst stakeholders and the quality of Bills passed.²⁸

Three areas are important to highlight with regard to the implementation process. These relate to: the work of the Land Use, Environment and Natural Resources Task Force appointed to align the laws relating to land use, environment and natural Resources; reforms within the Judiciary; and progress in development and enactment of new laws.

²⁴ For a discussion of this concept referred to as the existence of constitutions without constitutionalism, see: H. Okoth-Ogendo, 'Constitutions Without Constitutionalism: Reflections on an African Paradox' in D. Greenberg et al *Constitutionalism and Democracy: Transitions in the Contemporary World* (1993) Oxford University Press, New York, 65-82.

²⁵ *Constitution of Kenya*, Article 5 of the Sixth Schedule.

²⁶ *Constitution of Kenya*, Article 6 of the Sixth Schedule.

²⁷ *Ibid.*

²⁸ Commission for the Implementation of the Constitution, *Third Quarterly Report, July-September 2011* (available at <http://cickenya.org/sites/default/files/reports/CIC%203rd%20Quarter%20Report%20.pdf>).

Work of the Land Use, Environment and Natural Resources Task Force

On 19 November 2010, the Minister for Environment and Mineral Resources appointed a Task Force to advise on implementing the environmental provisions.²⁹ By the time the Task Force mandate came to an end in November 2011, it had contributed to the enactment of the *Environment and Land Court Act*,³⁰ made proposals for the finalization of a *Mineral Bill* and developed proposals on amendment to the *Environmental Management and Coordination Act*.³¹

The Task Force faced numerous challenges. While the new *Constitution* makes a strong case for public participation in enacting law or implementing public policies,³² including in environmental matters,³³ the process of the Task Force involved limited public consultation. Secondly, bureaucratic challenges impacted on the outputs. Membership and enthusiasm of the Task Force members waned during the life of the committee such that the envisaged work was not fully complete. This highlights the need for ministries to play an active role in implementing the *Constitution* and reforming institutions of government where necessary.

Environment and Land Court Act

Concerns about how non-specialized court systems handle environmental and land issues have accelerated the creation of environmental courts and tribunals worldwide,³⁴ reflecting the need to provide expeditious and cost effective justice, and the challenges facing ordinary courts including accessibility, delay, cost, complexity, lack of legal and technical expertise and quality of decisions.³⁵

²⁹ *Gazette Notice* No. 13880, 1 November 2010.

³⁰ Act No. 19 of 2011. Required under Article 162 of the *Constitution* and discussed in detail below

³¹ Act No. 8 of 1999.

³² *Constitution of Kenya*, Article 10.

³³ *Constitution of Kenya*, Article 69.

³⁴ G. Pring and C. Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (2009) The Access Initiative, 1.

³⁵ *Ibid.* See further: A. Mumma, 'The Role of Administrative Dispute Resolution Institutions and Processes in Sustainable Land Use Management: The Case of the National Environment Tribunal and the Public Complaints Committee of Kenya' in N. Chalifour et al, *Land Use Law for Sustainable Development* (2007) Cambridge University Press, USA, 253.

In 2000 Kenya established, under the *Environmental Management and Coordination Act*, the National Environmental Tribunal with powers to hear disputes arising from the decisions of the country's National Environmental Management Authority (NEMA). The Tribunal has members with legal and scientific and technical knowledge. It is not bound by the strict rules of evidence.

The *Constitution* provides for a specialized body to hear disputes relating to 'the environment and use and occupation of, and title to, land'.³⁶ Parliament enacted the *Environmental and Land Court Act* to establish the Environment and Land Court in 2011. This Court has the same status as the High Court with its own registrar and presiding judge. While establishing the Court is laudable, it raises several legal challenges. The Act establishing the Court did not link it to the mainstream judiciary under the *Constitution*, which has delayed the efficient operation of the Court. The policy making body for the broader judiciary is the Judicial Service Commission.³⁷ The Act does not provide any link between the Environment and Land Court and the Commission, and the Registrar of the court is not linked in any way to the Chief Registrar of the Judiciary. At around the same time that the *Environmental and Land Court Act* was passed, the Chief Justice appointed three judges with one as the head to the Land and Environmental Division of the High Court, a division that had been established administratively in 2007. This raises questions about the relationship between the Land and Environment Division of the High Court and the Land and Environment Court. It is necessary to resolve this disconnect to ensure that the Land and Environment Court operates as part of the general judicial structure and not as a quasi-judicial body.

Urban Areas and Cities Act

As with federal governments, the devolved government of Kenya envisages sharing of functions and competencies between the national and devolved government. In the field of the environment, the national government has the powers of 'protecting the environment and natural resources with a view to establishing a durable and sustainable system of development', while the county governments have the

³⁶ *Constitution of Kenya*, Article 162(2)(b).

³⁷ *Constitution of Kenya*, Articles 171-172.

functions relating to agriculture, health, pollution control and county planning and development,³⁸ all of which have implications for environmental management.

The *Constitution* envisages the promulgation of several laws. One is to provide for the governance and management of urban areas and cities.³⁹ In 2011, Parliament passed the *Urban Areas and Cities Act*.⁴⁰ Urbanization, if not properly managed, has profound negative impact on the environment.⁴¹ The *Urban Areas and Cities Act* provides for the sustainable management of Kenya's urban areas and cities. It makes provision for the integrated development planning of all urban areas, identifying environmental plans as a key component of integrated development.⁴²

Reforming the Judiciary

The judicial branch of Government was the subject of focus during the review of Kenya's previous *Constitution*. Reports by task forces (including those appointed by the Judiciary) returned a damning verdict on the state of the Kenyan Judiciary, characterizing it as opaque and corrupt, and the judicial officers as incompetent.⁴³ This had negative implications in environmental governance and sustainable development. Courts worldwide have an important role to play in promoting sustainable development.⁴⁴ A review of cases decided in Kenya before 2002 revealed a judiciary that was not assertive and that preferred to dismiss environmental cases on technical as opposed to substantive grounds.⁴⁵ However, in

³⁸ *Constitution of Kenya*, Fourth Schedule.

³⁹ *Constitution of Kenya*, Article 184.

⁴⁰ Act No. 13 of 2011.

⁴¹ For a discussion of the environmental challenges that urbanization poses to developing countries, see: P. Hassan, 'Urbanization and Environmental Challenges' in Chalifour et al (supra note 35) 334-351.

⁴² *Urban Areas and Cities Act*, Section 36.

⁴³ For a discussion on the sorry state of the Judiciary before the adoption of the new *Constitution*, see: Republic of Kenya, *Report of the Committee on the Administration of Justice* (1998); Constitution of Kenya Review Commission, *Report of the Advisory Panel of Eminent Commonwealth Judicial Experts* (2002); Republic of Kenya, *Report of the Integrity and Anti-Corruption Committee* (2003); Republic of Kenya, *Report of the Sub-Committee on Ethics and Governance of the Judiciary* (2006); Republic of Kenya, *Report of the Committee on Ethics and Governance of the Judiciary* (2007); Republic of Kenya, *Final Report of the Task Force on Judicial Reforms* (2010).

⁴⁴ For a discussion of the role of the judiciary in promoting sustainable development, see: B. Preston, 'The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific' (2005) 9 (2&3) *Asia Pacific Journal of Environmental Law* 109-211; and P. Kamari-Mbote and C. Odote 'Courts as Champions of Sustainable Development: Lessons from East Africa' (2009) 10(1) *Sustainable Development Law & Policy* 30.

⁴⁵ See further: M. Makoolo et al, *Public Interest Environmental Litigation In Kenya: Prospects and Challenges* (2007) ILEG.

the recent past the Kenyan Judiciary has started being assertive and become innovative champions of sustainable development. This is evident from not only the number of cases on environmental matters that the courts in Kenya have heard in the recent past, but also from the content of the judgments. The case of *Peter K. Waweru vs. Republic*⁴⁶ is representative of this new approach. The applicants, property owners in a town in Kenya, filed an application in the High Court of Kenya challenging the constitutionality of their charge for the offence of discharging raw sewage into underground water contrary to the provisions of the *Public Health Act*.⁴⁷ Their main ground for challenging the charge was that the action was discriminatory since not all landowners undertaking similar activities in the town had been similarly charged. The court, while upholding the application went ahead to discuss the environmental implication of the action of discharging the water and held that this action was contrary to sound environmental management. Although brought to court under the former *Constitution*, the court had no hesitation in adopting the reasoning of the Pakistan case of *Shehla Zia vs. Wapda*,⁴⁸ stating that the right to life includes the right to a clean and healthy environment. In the words of the court, 'It is quite evident from perusing the most important international instruments on the environment that the word life and the environment are inseparable and the word life means much more than keeping body and soul together'.⁴⁹

This is in line with the tenor to the new *Constitution's* provisions on the environment and the focus on a vibrant and reformed judiciary.⁵⁰ The *Constitution* provides that judicial authority in Kenya derives from the people⁵¹ and is to be exercised in accordance with listed principles, which include: dispensing justice to all without regard to their status; expeditious dispensation of justice; and a focus on substantive justice without undue regard to procedural technicalities.⁵² Reforms introduced by the *Constitution* have focused on increasing the quality of delivery of justice, improving the management of the judiciary, appointment of more judges and reconstituting the Judicial Service Commission. The reforms have seen the vacation of office of Justice Gicheru as Chief Justice and the appointment of the current Chief Justice, Justice Willy Mutunga, following a public recruitment process, the first of its kind in Kenya. A

⁴⁶ 1 Kenya Law Reports (Environment and Land) 677-700(20006).

⁴⁷ Chapter 242, Laws of Kenya.

⁴⁸ Pld 1994 SC 693.

⁴⁹ Ibid, 691.

⁵⁰ *Constitution of Kenya*, Chapter 10.

⁵¹ *Constitution of Kenya*, Article 159(1).

⁵² *Constitution of Kenya*, Article 159(2).

substantive Deputy Chief Justice has been appointed together with twenty-eight new judges to the High Court. Furthermore, a Supreme Court has been created. These reforms have resulted in a more robust judiciary and increased public confidence in this institution.

A Strategy for Nationwide Civic Education

The Government, through the Ministry of Justice, National Cohesion and Constitutional Affairs and in collaboration with non-state actors, finalized a *Strategy for Nationwide Civic Education*⁵³ in June 2011. The *Strategy* identified several result areas for civic education programmes, one of which is sustainable management of the environment and natural resources. A draft *Manual on Land, Environment and Natural Resources* has already been produced and is to be validated in 2012 as the basis for nationwide civic education campaigns.

Prospects for the Future

Kenya's new constitutional dispensation is pointing to brighter prospects in the management of the environment. There is attitudinal change within the country, greater environmental consciousness being inculcated through a nation-wide and sustained civic education programmes and legislative reform to align existing legislation to the new *Constitution's* ethos. Ongoing reforms address environment, water, irrigation, land, minerals, wildlife and forestry. In each of these areas, collective expertise and comparative information will be required.

As highlighted in this country report, the implementation process is not without its challenges. Analytical and in-depth review of the implementation process could not only serve as useful lessons for other countries undergoing similar constitutional reforms, but could also highlight areas where the academy could through research and collaborative initiatives help the Kenyan process. In the final analysis, Kenya's constitutional and legal landscape for environmental governance continues to improve and creates numerous opportunities for scholarship. In many areas the country is pioneering innovative and modern solutions to environmental challenges facing the country, the continent and the globe.

⁵³ Ministry of Justice, National Cohesion and Constitutional Affairs, *Kenya National Civic Education Programme Strategy and Implementation Plan*, June 2011 (Unpublished, on file with author).