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## IMPLICATIONS OF THE NEW CONSTITUTION ON ENVIRONMENTAL MANAGEMENT IN KENYA

Angela Mwenda and Thomas N. Kibutu

RECENT DEVELOPMENT



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# 1

## INTRODUCTION

Kenya has been touted as the 'Land of Splendor', with a rich historical background, great diversity of physical features, pleasant climate, diverse people, and magnificent wilderness areas.<sup>1</sup> More recently, it has been praised as a model for environmental progress in the region following enactment of a new constitution which contains specific measures for environmental management.<sup>2</sup> Any constitution functions to guarantee basic human rights and to provide guiding principles for the country, and by entrenching environmental rights and principles in the new constitution, Kenya signals unwavering environmental commitment. The focus of this paper is an analysis of provisions made in the new constitution for environmental management, and their implications.

# 2

## KENYA'S CONSTITUTIONAL REVIEW PROCESS

Kenya's initial constitution was negotiated between the British government and representatives of Kenya's political parties, and marked the end of colonial rule. Queen Elizabeth II of England was however still the head of state, until this was changed in 1964 following a constitutional amendment that transformed Kenya into a Republic, and the executive became Presidential. Additional constitutional amendments occurred in 1982 (when Kenya transformed into a one-party state) and 1991 (when a multi-party system was established). After

1 Ministry of Environment and Natural Resources, *Kenya: Land of Splendour* 1 (Nairobi: Ministry of Environment and Natural Resources, 2000).

2 J. Walljasper, Looking South for Environmental Progress, available at <http://onthecommons.org/looking-south-environmental-progress>.

Kenya became a multi-party state in 1991, comprehensive constitutional reforms started in earnest, with the Constitution of Kenya Review Act being passed following the 1997 general elections, as a precursor to comprehensive constitutional reforms. The Constitution of Kenya Review Commission was established under the Constitution of Kenya Review Act to provide civic education, seek public input, and prepare a draft constitution for consideration by the National Constitutional Conference. A draft constitution was prepared and presented to the National Constitutional Conference in 2005, but it was rejected in a referendum the same year. This meant that Kenya reverted to the 1964 Constitution.<sup>3</sup>

Following a political crisis associated with the 2007 general elections, a Committee of Experts was established to undertake another constitutional review. A harmonised draft of the constitution was ready for debate in November 2009.<sup>4</sup>

# 3

## RATIONALE FOR ENVIRONMENTAL PROVISIONS WITHIN THE CONSTITUTION

The provision for legal and institutional mechanisms is one of the basic conceptual tools for environmental management.<sup>5</sup> Further, considering that the environment supports life, it requires protection that is stable and can only be changed, if necessary, by a special and substantial majority. This

3 Institute for Law & Environmental Governance (ILEG), Constitutional Review Process, available at <http://www.ilegkenya.org/research/constitution.html> and International Institute for Democracy & Electoral Assistance (International IDEA) & Interpeace, Constitutional History of Kenya, available at <http://www.constitutionnet.org/en/country/constitutional-history-kenya>.

4 International IDEA & Interpeace, note 3 above.

5 C. O. Okidi, *Environmental Rights and Duties in the Context of Management of Natural Resources* (Nairobi: Constitution of Kenya Review Commission, 2003).

protection is provided by the constitution, which is the highest legal order in any country or society.<sup>6</sup>

Constitutional provisions for environmental management are not new, and already exist in other countries.<sup>7</sup> Environmental provisions were outlined, albeit superficially, in the previous constitution of Kenya. The current constitution's innovation is the presentation, in greater detail, of obligations in respect of specific natural resources, as well as the human aspects of environmental management.

## 4 KENYA'S NEW CONSTITUTION

A new constitution was promulgated on 27 August 2010, and became the supreme legislation of Kenya.<sup>8</sup> This document contains eighteen chapters and six Schedules, where the chapters elaborate on the following: sovereignty of the people and supremacy of the constitution; the republic; citizenship; the bill of rights; land and environment; leadership and integrity; representation of the people; the legislature; the executive; judiciary; devolved government; public finance; the public service; national security; commissions and independent offices; amendment of this constitution; general provisions; and transitional and consequential provisions. The six Schedules present information on the following: counties; national symbols; national oaths and affirmations; distribution of functions between national and county governments; legislation to be enacted by Parliament; and transitional and consequential provisions.<sup>9</sup>

Environmental provisions are included in Chapter Four, under 'Rights and Fundamental Freedoms', Chapter Five, under 'Environment and Natural Resources', and Chapter Ten, under 'Judicial

Authority and Legal System'. The Fourth Schedule also includes environmental provisions under 'Distribution of functions between National and County Governments' and the Fifth Schedule titled 'Legislation to be enacted by Parliament'.<sup>10</sup>

### 4.1 Rights and Fundamental Freedoms

Environmental rights and freedoms are presented in Article 42 of the new constitution, which states:

*Every person has the right to a clean and healthy environment, which includes the right –*

- (a) *To have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and*
- (b) *To have obligations relating to the environment fulfilled under Article 70.<sup>11</sup>*

The right to a clean and healthy environment was merely implied in the previous (1964) constitution under the 'right to life' (Section 71) since the constitution did not contain explicit environmental provisions.<sup>12</sup> The improvement made in the new (2010) constitution is first and foremost, the statement that a clean and healthy environment is everyone's right, as well as further elaboration on what exactly is meant when conferring this right. The right to a clean and healthy environment was previously acknowledged in the Environmental Management and Coordination Act of 1999

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> P. Kameri-Mbote, *Towards Greater Access to Justice in Environmental Disputes in Kenya: Opportunities for Intervention* (Geneva: International Environmental Law Research Centre, Working Paper 2005-1, 2005); A. Mumma, *Constitutional Issues relating to Natural Resources* (Nairobi: Constitution of Kenya Review Commission, 2003) and G.M. Wamukoya and F.D.P. Situma, *Environmental Management in Kenya: A Guide to the Environmental Management and Coordination Act 2* (Nairobi: Centre for Environmental Legal Research and Education (CREEL), 2003).

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Kenya, Constitution of Kenya Act of the Laws of Kenya (August 2010).

<sup>9</sup> *Id.*

(EMCA).<sup>13</sup> However, the elevation of this right to constitutional status has only been achieved in the new constitution.

## 4.2 Environment and Natural Resources

These are elaborated in Chapter Five, titled 'Land and Environment' which consists of two parts, the first dedicated to land, and the second to environment and natural resources. The second part, the main focus of this paper, is titled 'Environment and Natural Resources' and consists of four Articles detailing obligations, enforcement, agreements and legislation relating to the environment.<sup>14</sup>

## 4.3 Obligations in Respect of the Environment

### 4.3.1 Sustainable Environmental Management

These obligations are found in Article 69, which consists of two parts and provides guidance to the State on its role in sustainable management of the environment in Kenya. The commonly used definition of 'sustainable development' is derived from the 1983 United Nations World Commission on Environment and Development (WCED), which produced the Brundtland Report (named after the Chairman) and also referred to as 'Our Common Future'.<sup>15</sup> This report's significance lies in the fact that it was the first to focus on global sustainability. More specifically, sustainable development was defined as '... meeting the needs of the present without compromising the ability of future generations to meet their own needs...'<sup>16</sup> 'Vision 2030', Kenya's long term national planning strategy, also emphasises the need to achieve economic growth in a sustainable manner.<sup>17</sup> Article 69 (a) of the new constitution, by

stating '*The State shall ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits*',<sup>18</sup> acknowledges the role of the state in ensuring sustainable development as well as the importance of equitably sharing benefits derived from the environment.

### 4.3.2 Tree Cover

Forests in Kenya, like those elsewhere in the world, are unique in their contribution to environmental balance, as well as economic and socio-cultural functions. Nonetheless, they are victim to increasing demand for products and services, competition with other land uses, and poor governance.<sup>19</sup> Kenya's present forest cover is equivalent to 5.9 per cent of land area,<sup>20</sup> which is inadequate to significantly contribute to the national economy while fulfilling environmental and socio-cultural functions. The Kenya Forest Services, in its Strategic Plan 2009-2013, proposes to sustainably manage the forests through the combined use of ecological, economic and social approaches, guided by the Forest Act No. 7 of 2005, and in cooperation with the relevant institutions, including the Ministry of Forestry and Wildlife.<sup>21</sup>

Article 48 of EMCA outlines the procedure regarding registration of forests.<sup>22</sup> Specifically, the Director General of the National Environment Management Authority (NEMA) and the Chief Conservator of Forests, following consultations, may enter into contractual arrangements with private owners for registration of land as forest land. The same provision also requires these two authorities to ensure that the traditional interests of local communities with regard to these forests are not jeopardised.

Article 69 (b) of the new constitution states that '*The State shall work to achieve and maintain a tree cover*

13 Kenya, Environmental Management and Coordination Act, EMCA (Act No 8 of 1999, Kenya Gazette Supplement No. 3, Acts No. 1, January 2000).

14 See Constitution of Kenya, note 8 above.

15 *Our Common Future*, Report of the United Nations World Commission on Environment and Development, UN Doc A/RES/42/187.S (1987).

16 *Id.*

17 Republic of Kenya, *Kenya Vision 2030* 1 (Nairobi: Government Printer, 2007).

18 See Constitution of Kenya, note 8 above.

19 M. Kihu, Kenya using Constitution to Reverse Forest Loss, available at <http://newsciencejournalism.com/blog/09/2010/kenya-using-constitution-to-reverse-forest-loss/> and Kenya Forest Service, *Strategic Plan 2009-2013* (Nairobi: Kenya Forest Service, 2009), at 8.

20 See Kenya Forest Service, note 19 above, at 14.

21 *Ibid.*, at 16-18.

22 See EMCA, note 13 above.



of at least ten per cent of the land area of Kenya',<sup>23</sup> which is a recognition of the obligation of the State and its organs, including the Ministry of Forestry and Wildlife and the Kenya Forest Service, to ensure that the present forest cover is increased, so as to adequately meet the needs placed upon forests in Kenya. The protection of the traditional interests of local communities is provided for in the subsequent article of the new constitution, and not presented in a combined manner as was done in EMCA. This revision acknowledges that traditional interests are not only tied to protected areas like forests, but are important in their own right.

#### 4.3.3 Intellectual Property and Indigenous Knowledge

Modern scientific knowledge has been credited with the destruction of complex ecological systems, in part due to its separation of humans from the natural world.<sup>24</sup> This emphasis on scientific knowledge has also led to a disdain for the experiential knowledge of people who live and work in an area, referred to as 'traditional, indigenous or local' knowledge.<sup>25</sup> In Kenya, a significant segment of the national population has continued to depend on natural resources for their sustenance and livelihood,<sup>26</sup> resulting in a significant amount of indigenous knowledge. This indigenous knowledge is further embedded in people's religious, cultural and social lives.<sup>27</sup>

Previously, EMCA provided for the traditional interests of local communities in Article 43,<sup>28</sup> which required the Minister to notify in the Gazette the

traditional interests of local communities as relates to specific natural resources. The present constitution, in Article 69 (c), is more explicit. It states that

*The State shall protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities.*<sup>29</sup>

This safeguards indigenous knowledge systems and acknowledges their role in the conservation of biological diversity.

#### 4.3.4 Public Participation

The United Nations Conference on Environment and Development (Rio Conference) of 1992 through Local Agenda 21, and the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) of 1998 recognise the benefits of public participation in environmental decision-making.<sup>30</sup> Unfortunately, public participation has in some instances been viewed as a mere administrative formality,<sup>31</sup> to the extent that environmental degradation in Sub-Saharan Africa has many times been attributed to lack of access to information and public participation.<sup>32</sup> However,

<sup>23</sup> See Constitution of Kenya, note 8 above.

<sup>24</sup> B. Mitchell, *Resource and Environmental Management* 210 (Essex: Pearson Education Ltd, 2002).

<sup>25</sup> *Id.*

<sup>26</sup> C. Gatundu, *Policy and Legislative Framework for Community Based Natural Resource Management in Kenya: A Review of Existing and Proposed Laws and Policies* 1 (Nairobi: Forest Action Network, 2003), P.M. Maundu, G.W. Ngugi and C.H.S. Kabuye, *Traditional Food Plants of Kenya*, 1 (Nairobi: National Museums of Kenya, 1999) and Kenya Vision 2030, note 17 at 13.

<sup>27</sup> E.P. Amechi, 'Linking Environmental Protection and Poverty Reduction in Africa: An Analysis of the Regional Legal Responses to Environmental Protection' *6/2 Law, Environment and Development Journal* 112 (2010), available at <http://www.lead-journal.org/content/10112.pdf>.

<sup>28</sup> See EMCA, note 13 above.

<sup>29</sup> See Constitution of Kenya, note 8 above.

<sup>30</sup> G. Haughton, 'Information and Participation within Environmental Management' 11 *Environment and Urbanization* 51, 58 (1999), Aarhus Convention, in United Nations 4<sup>th</sup> Ministerial Conference in the 'Environment for Europe Process, Aarhus, Denmark (1998) and Agenda 21 in Report of the United Nations Conference on Environment and Development, Rio de Janeiro, UN Doc. A/CONF.151/26/Rev.1 (Vol 1), Annex II (1992).

<sup>31</sup> Nicholas N. Kimani, 'Participatory Aspirations of Environmental Governance in East Africa' *6/2 Law, Environment and Development Journal* 200 (2010), available at <http://www.lead-journal.org/content/10200.pdf>.

<sup>32</sup> E.P. Amechi, 'Poverty, Socio-Political Factors and Degradation of the Environment in Sub-Saharan Africa: The Need for a Holistic Approach to the Protection of the Environment and Realization of the Right to Environment' *5/2 Law, Environment and Development Journal* 107 (2009), available at <http://www.lead-journal.org/content/09107.pdf>.



different levels of public participation have been acknowledged,<sup>33</sup> each with its merits and demerits. Notably, the Government of Kenya (Government) acknowledges the role of public participation in democratic governance<sup>34</sup> and sustainable development. Article 69 (d) of the new constitution, which states that '[T]he State shall encourage public participation in the management, protection and conservation of the environment',<sup>35</sup> demonstrates Kenya's commitment to public participation, as well as reiterates the responsibility to ensure that public participation serves the purposes for which it is intended.

#### 4.3.5 Genetic Resources and Biological Diversity

Kenya ratified the Convention on Biological Diversity (CBD) of 1992 in 1994, and thereafter established the National Biodiversity Strategy and Action Plan (NBSAP) to address the requirements of the CBD through the then Ministry of Environment and Natural Resources.<sup>36</sup> Kenya's biological resources are diverse, with 80 per cent of the population depending on them for livelihood;<sup>37</sup> yet management of these resources is weak. In spite of the provisions outlined in the EMCA for an inventory of biological diversity and specific conservation measures, including *in situ* conservation,<sup>38</sup> adequate information on the non-consumptive values of resources is lacking, and there is limited access to biodiversity data and information and low levels of adoption of new technologies, including biotechnology. Consequently, plant and animal species are overexploited, resulting in genetic erosion and endangering of rare species. The Ministry of Environment and Mineral Resources (Ministry) is currently charged with coordination of all environmental matters in the country. Through Article 69 (e) of the new constitution which states

*'[T]he State shall protect genetic resources and biological diversity',*<sup>39</sup> it is expected that the State will work with its agencies (and in this case the Ministry) to protect genetic resources and biological diversity.

#### 4.3.6 Environmental Impact Assessment, Audit and Monitoring

Environmental Impact Assessment (EIA) is one of the most well known tools for environmental assessment.<sup>40</sup> Prior to the establishment of legislation specific to EIA in Kenya, the impact of development projects on the environment was assessed using 77 sectoral policies and laws.<sup>41</sup> Guidelines and procedures established by international organisations also guided the EIA process.<sup>42</sup> EMCA was the first legislation to formally define EIA within the Kenyan context, as well as to establish procedures and supporting institutions for EIA.<sup>43</sup> This was followed by the Environmental Impact Assessment and Audit Regulations of 2003 (EIAAR).<sup>44</sup> Together, these two legislation form the basis of EIA in Kenya. In addition, NEMA, the

39 See Constitution of Kenya, note 8 above.

40 J. Benny, *Environmental Studies* (New Delhi: McGraw Hill Company, 2<sup>nd</sup> ed. 2009), S. Jay et al, 'Environmental Impact Assessment: Retrospect and Prospect' 27 *Environmental Impact Assessment Review* 287, 298 (2007), G. Houghton, 'Information and Participation within Environmental Management' 11 *Environment and Urbanization* 51, 55 (1999) and J.G. Kelcey, 'Environmental Impact Assessments - Their Development and Application' 19/1 *Long Range Planning* 67 (1986).

41 A. Angwenyi, Environmental Legislation and Domestication of International Environmental Law in Kenya (Paper presented at the Sesei Program Sub-regional Legal Workshop, Nairobi, 13-17 December 2004) and P. Kameri-Mbote, Strategic Planning and Implementation of Public Involvement in Environmental Decision-making as they Relate to Environmental Impact Assessment in Kenya (Geneva: International Environmental Law Research Centre, Working Paper 2000-3, 2000).

42 J. Horberry, 'International Organization and EIA in Developing Countries' 5 *Environmental Impact Assessment Review* 207, 207 (1985).

43 See EMCA, note 13 above.

44 Kenya, Environmental (Impact Assessment and Audit) Regulations (Legal Notice No. 101, Kenya Gazette Supplement No. 56, Legislative Supplement No. 31, 13 June 2003).

33 S.R. Arnstein, 'A Ladder of Citizen Participation' 35/4 *Journal of the American Planning Association* 216, 217 (1969).

34 Kenya Vision 2030, note 17 above, at 23.

35 See Constitution of Kenya, note 8 above.

36 Ministry of Environment & Natural Resources, *A Summary of the Kenya National Biodiversity Strategy and Action Plan 1* (Nairobi: The National Environment Secretariat, 2000).

37 *Ibid*, at 7.

38 See EMCA, note 13 above.

principal instrument of Government for the implementation of environmental management in Kenya,<sup>45</sup> prepared guidelines and administrative procedures for the following: EIA; Environmental Audit and Monitoring; Strategic Environmental Assessment (SEA); EIA in the transboundary context; EIA in the context of international and regional treaties, conventions and agreements; and guidance to development of sectoral EIA guidelines.<sup>46</sup> More recently (between 2006 and 2009), subsidiary legislation to EMCA has been enacted to support EIA and environmental audit and monitoring. Article 69 (f) of the new constitution, by stating '[T]he State shall establish systems of environmental impact assessment, environmental audit and monitoring of the environment',<sup>47</sup> encourages the continued establishment of systems to further support EIA and environmental audit and monitoring.

#### *4.3.7 Threats to Environmental Integrity*

Kenya faces a dilemma presented to all countries in their quest for development: ensuring that development is sustainable.<sup>48</sup> Unfortunately, Kenya's economic growth has been associated with environmental degradation and pollution, including declining forest area; decreased wetlands; falling wildlife numbers; water and land shortage; rapid depletion of renewable and non-renewable natural resources; increased use of toxic chemicals; and discharge of waste and effluent into water, soil and air.<sup>49</sup> Other significant threats to the environment arise from poverty, overpopulation, climate change, political insecurity, pollution and unregulated bio-prospecting.<sup>50</sup>

In spite of the threats to the environment mentioned above, Kenya's economy is largely dependent on the environment, through activities such as agriculture, fisheries, mining, and the timber industry. As a result of environmental degradation due to these activities, Kenya continues to incur high costs including foregone opportunities, preventive/avertive expenditure, replacement costs, externalities and foregone future opportunities.<sup>51</sup>

The country's Vision 2030 has proposed specific strategies to protect the environment. They include: promoting environmental conservation; improving pollution and waste management through the design and application of economic incentives; commissioning of public-private partnerships (PPPs) for improved efficiency in water and sanitation delivery; enhancing disaster preparedness in all disaster-prone areas; and improving the capacity for adaptation to global climate change.<sup>52</sup> By stating in Article 69 (g) of the new constitution that '[T]he State shall eliminate processes and activities that are likely to endanger the environment',<sup>53</sup> a commitment is made to ensure that Kenya's continuing development does not compromise the foundation on which it is based.

#### *4.3.8 Benefits of the Environment to Citizens*

Kenya is well endowed with resources, including natural resources that comprise both physical and biological resources. Physical resources include land, water, minerals, and energy, and biological resources include forests, fish and wildlife.<sup>54</sup> These resources are distributed throughout the country, and most of them are being utilised to support Kenya's economy, to the extent that Kenya is considered the largest economy in East Africa. For example, agriculture has been estimated to contribute 23.8 per cent of GDP and tourism brought in revenue of USD 807 million in 2009.<sup>55</sup>

<sup>45</sup> See Kameri-Mbote, note 41 above and EMCA, note 13 above.

<sup>46</sup> National Environment Management Authority (NEMA), *Environmental Impact Assessment Guidelines and Administrative Procedures* 6-31 (Nairobi: NEMA, 2002).

<sup>47</sup> See Constitution of Kenya, note 8 above.

<sup>48</sup> B. Mitchell, *Resource and Environmental Management* 81 (Essex: Pearson Education Ltd, 2002).

<sup>49</sup> L. Emerton, J. Karanja and S. Gichere, *Environment, Poverty and Economic Growth in Kenya: What are the Links, and do they Matter?* (IUCN Policy Brief No. 2 Project No. UNTS/RAF/008/GEFP.O. No. 93330, 2000).

<sup>50</sup> MENR, note 36 above, at 7-9.

<sup>51</sup> See Emerton, Karanja and Gichere, note 49 above.

<sup>52</sup> Kenya Vision 2030, note 17 above, at 19.

<sup>53</sup> See Constitution of Kenya, note 8 above.

<sup>54</sup> Bureau of African Affairs, US Department of State, Background Note: Kenya, available at <http://www.state.gov/r/pa/ei/bgn/2962.htm> and Institute for Law & Environmental Governance (ILEG), *Community Guide to Environmental Management in Kenya* 11-14 (Nairobi: ILEG, 2004).

<sup>55</sup> *Id.*

Coincidentally, a significant amount of resources occur in Northern Kenya and other Arid and Semi Arid Lands (ASALs), yet these regions remain largely undeveloped. ASALs in Kenya occupy more than 80 per cent of the country and support approximately 70 per cent of the national livestock herd. Yet they are associated with the lowest development indicators and highest incidence of poverty. This has been largely due to the Government's continued investment in already developed areas, so as to achieve faster economic growth. Fortunately, through the Economic Recovery Program launched in 2005 and the subsequent creation of a Ministry of State for Development of Northern Kenya and other Arid Lands, the Government renewed its commitment to develop Kenya's ASALs.<sup>56</sup>

The potential of Northern Kenya lies in its strategic position and proximity to Ethiopia, Sudan and Somalia which need routes for imports and exports and materials for reconstruction. Northern Kenya and other ASALs also serve as markets and sources of materials for the rest of Kenya; contribute to the national economy through meat and livestock products; support tourism through the location of game reserves and national parks; have potential for solar and wind energy; contain mineral resources including sand, gravel, soda ash, gum, resins, and gemstones; provide habitat for medicinal plants; are associated with communities rich in indigenous knowledge of managing climate variability; and are characterised by expansive land that is available for further economic development of the entire country.<sup>57</sup> The recent focus on Northern Kenya and ASALs by the Government provides opportunities for the utilisation of resources available in these regions for the benefit of the people of Kenya and recognises that development cannot occur amidst social inequity.<sup>58</sup> Vision 2030 further confirms that benefits to society will include investments in education and training, health, water and sanitation,

housing, and urbanisation.<sup>59</sup> Article 69(h) of the new constitution, which states that '[T]he State shall utilise the environment and natural resources for the benefit of the people of Kenya',<sup>60</sup> confirms the Government's commitment to ensure that the environment and natural resources are utilised for the benefit of the people of Kenya and urges further action in the same direction.

#### 4.3.9 Individual Commitment to Environmental Management

The second part of Article 69 of the new constitution states: 'Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.'<sup>61</sup> This can be viewed as confirmation by the State of its commitment to sustainable management, and the expectation of support, in the execution of these activities, from its citizens.

#### 4.4 Enforcement of Environmental Rights

Article 70 of the new constitution deals with the enforcement of environmental rights and it consists of three parts. The first part states:

*If a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.<sup>62</sup>*

The second part of Article 70 states:

*On application under clause (1), the court may make any order, or give any directions, it considers appropriate –*

- (a) *To prevent, stop or discontinue any act or omission that is harmful to the environment;*

<sup>56</sup> Republic of Kenya, *National Policy for the Sustainable Development of Northern Kenya and other Arid Lands, Draft Sessional Paper, Version 4 11-14* (Nairobi: Office of the Prime Minister, Ministry of State for Development of Northern Kenya and other Arid Lands, 2009).

<sup>57</sup> *Ibid.*, at 12-13.

<sup>58</sup> *Ibid.*, at 3-4 and Kenya Vision 2030, note 17 above, at 6.

<sup>59</sup> Kenya Vision 2030, note 17 above, at 16-19.

<sup>60</sup> See Constitution of Kenya, note 8 above.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

- (b) To compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or
- (c) To provide compensation for any victim of a violation of the right to a clean and healthy environment.<sup>63</sup>

The third part of Article 70 states: *'For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury'*.<sup>64</sup>

The ability of citizens to apply to a court for redress on environmental issues, whether affected directly or indirectly, has been acknowledged as one of the great innovations of EMCA.<sup>65</sup> Specifically, the establishment of the Public Complaints Committee in Article 31 and the National Environment Tribunal in Article 125 to address environmental grievances was instrumental in realising this. These two institutions were established to provide the link between environmental management and the judiciary. For example, the Public Complaints Committee is chaired by a person qualified for appointment as a judge of the High Court of Kenya, and other members include a representative of the Attorney General, a representative of the Law Society of Kenya, a representative of NGOs, a representative of the business community, and two members appointed for their active role in environmental management. The National Environment Tribunal is chaired by a person qualified for appointment as a judge of the High Court of Kenya, and other members include an advocate of the High Court of Kenya nominated by the Law Society of Kenya, a lawyer with professional qualifications in environmental law and two persons with demonstrated competence in environmental management.<sup>66</sup> The existence of these institutions will facilitate enforcement of the new constitution as well as provide the necessary foundation for the enforcement of additional environmental legislation.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> E.C. Kamau, 'Environmental Law and Self-Management by Industries in Kenya' 17 *Journal of Environmental Law* 229, 240 (2005), Kameri-Mbote, note 12 above and EMCA, note 13 above.

<sup>66</sup> See EMCA, note 13 above.

## 4.5 Agreements Relating to Natural Resources

Article 2 (6) of the new constitution states that *'[A]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution'*.<sup>67</sup> Article 71 thereafter expounds on agreements relating to natural resources, and consists of two parts. The first part states:

*A transaction is subject to ratification by Parliament if it –*

- (a) *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 resource of Kenya; and*
- (b) *Is entered into on or after the effective date.*<sup>68</sup>

Kenya is party to 16 international environmental treaties,<sup>69</sup> which are designed to protect various aspects of the environment, including biological diversity, natural resources, marine and coastal environment, the ozone layer, wetlands, culture and natural heritage, pollution, international trade in wild flora and fauna, and combating desertification, among others. Article 71 of the new constitution subjects the exploitation of natural resources to further scrutiny by Parliament, thereby increasing control on the use of natural resources in the country. The second part states: *'Parliament shall enact legislation to give full effect to the provisions of this Part.'*<sup>70</sup> The timeframe provided for this is five years and it is presented in the Fifth Schedule.<sup>71</sup>

## 4.6 Legislation Relating to the Environment

Article 72 of the new constitution states that: *'Parliament shall enact legislation to give full effect to*

<sup>67</sup> See Constitution of Kenya, note 8 above.

<sup>68</sup> *Id.*

<sup>69</sup> E. Alitsi, Important Environmental Treaties and Conventions Kenya is Signatory to (Report presented at the Kenya NGO Earth Summit 2002 Forum on Civil Society Review of the Implementation of Agenda 21 in Kenya, February 2002).

<sup>70</sup> See Constitution of Kenya, note 8 above.

<sup>71</sup> *Id.*

*the provisions of this Part.*<sup>72</sup> The timeframe provided for this is four years and it is presented in the Fifth Schedule.<sup>73</sup>

So far in Kenya, primary environmental legislation include EMCA and EIAAR. Subsidiary legislation has been enacted to support EMCA, and it includes the following:

- Environmental Management and Coordination (Noise and Excessive Vibration Pollution) Control Regulations of 2009;
- Environmental Management and Coordination (Wetlands, Riverbanks, Lake Shores, and Sea Shore Management) Regulations of 2009;
- Environmental Management and Coordination (Air Quality Standards) Regulations of 2007;
- Environmental Management and Coordination (Controlled Substances) Regulations of 2007;
- Environmental Management and Coordination (Waste Management) Regulations of 2006;
- Environmental Management and Coordination (Water Quality) Regulations of 2006;
- Environmental Management and Coordination, Conservation of Biological Diversity (BD) Regulations of 2006; and
- Environmental Management and Coordination (Fossil Fuel Emission Control) Regulations of 2006.

Despite the above legislation and Regulations, the new constitution acknowledges that existing legislation is deficient, and that additional legislation will be required to adequately effect its provisions.<sup>74</sup>

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> See Constitution of Kenya, note 8 above and Kenya Vision 2030, note 17 above, at 19.

## 5

### SYSTEM OF COURTS

The system of courts is presented under Chapter Ten, titled 'Judiciary', and consists of two parts: the first dealing with judicial authority and legal system, and the second dealing with superior courts. Under the first part, 'System of Courts' is presented in Article 162, and states:

*Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to ... the environment and the use and occupation of, and title to, land.*<sup>75</sup>

The above provision enables the enforcement of environmental rights, as elaborated in Article 70. In establishing environmental courts with the status of the High Court, which is designated as a superior court, the new constitution demonstrates prioritisation of environmental issues. The designation of environmental courts with the status of the High Court also ensures that there is no conflict with existing institutions, that is, the Public Complaints Committee and the National Environment Tribunal, which exist at a similar level, in the enforcement of environmental rights.

## 6

### DISTRIBUTION OF FUNCTIONS BETWEEN THE NATIONAL GOVERNMENT AND THE COUNTY GOVERNMENTS

The distribution of functions between the national government and the county governments is presented in the Fourth Schedule. The National Government is responsible for

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<sup>75</sup> *Id.*



*Protection of the environment and natural resources with a view to establishing a durable and sustainable system of development, including, in particular –*

- (a) *Fishing, hunting and gathering;*
- (b) *Protection of animals and wildlife;*
- (c) *Water protection, securing sufficient residual water, hydraulic engineering and the safety of dams; and*
- (d) *Energy policy.*<sup>76</sup>

This indicates a macro-level of influence by the national government on environmental conservation and management.

The County Governments are responsible for

*Implementation of specific national government policies on natural resources and environmental conservation, including –*

- (a) *Soil and water conservation; and*
- (b) *Forestry.*<sup>77</sup>

Forty seven county governments are expected to be created under the new constitution as a form of devolved government that will enable increased self-governance by the citizens.<sup>78</sup> Due to the decentralised and local nature of these counties, the new constitution assigns to them the specific task of implementing nation-wide policies as appropriate within their jurisdiction.

## 7 LEGISLATION TO BE ENACTED BY PARLIAMENT

This is presented in the Fifth Schedule, with agreements relating to natural resources (Article 71)

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<sup>76</sup> *Id.*  
<sup>77</sup> *Id.*  
<sup>78</sup> *Id.*

being afforded a time frame of five years. The enactment of legislation regarding the environment (Article 72) is afforded a time frame of four years.<sup>79</sup>

## 8 CONCLUSIONS AND RECOMMENDATIONS

The specific provisions on environmental management in Kenya's new constitution as well as their implications have been reviewed in this paper. These provisions are detailed in Chapter Four under 'Rights and Fundamental Freedoms', Chapter Five under 'Environment and Natural Resources', and Chapter Ten under 'Judicial Authority and Legal System'. Environmental provisions are also elaborated in the Fourth and Fifth Schedules under 'Distribution of Functions between National and County Governments' and 'Legislation to be enacted by Parliament' respectively.

The inclusion of explicit environmental provisions in Kenya's new constitution is first and foremost recognition of the citizens' right to an environment that nurtures life and provides for human activities. The specific obligations in respect of the environment spelt out in the new constitution demonstrate further commitment to Kenya's citizens for improved environmental management. The presence of environmental considerations in the new constitution also recognises the role of the environment in Kenya's development. Needless to say, these environmental considerations will only be operationalised following increased commitment from the state and support to the citizens.

As a result of the inclusion of explicit environmental provisions in the new constitution, Kenya can now also be said to be better positioned to manage its environment in a more effective manner. The constitution of any country provides a roadmap of the direction in which that country is headed. By

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<sup>79</sup> *Id.*

including environmental considerations in the new constitution, Kenya acknowledges the importance of the environment to its development, and lists the requirements to enable improved environmental management. The inclusion of environmental considerations in the constitution also encourages the country to evaluate its current development activities, and how these can be aligned to the requirements of the new constitution.

The finalization of the new constitution took many years and a lot of effort by many Kenyans, as well as consultations with the international community. Indeed, months after the promulgation of the new constitution, Kenya witnessed antagonism within the political class on the issue of the nomination of four constitutional office holders for the offices of the Chief Justice, Attorney General, Director of Public Prosecution and Controller of Budget.<sup>80</sup> Such antagonisms cannot be avoided, due to differing interpretations of the requirements as well as expectations from the new constitution, which by its nature follows a wide approach. Further negotiations and agreement will therefore be required between all stakeholders for focused and effective implementation of the new constitution.

The new constitution has led to a significant increase in the opportunities for improved environmental management in Kenya. The new constitution is superior to the previous constitution in this regard. However, undivided and untiring commitment and energy will be required of Kenyans through the state, institutions and individuals for these provisions to become a reality.

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<sup>80</sup> B. Namunane and A. Shiundu, 'Kibaki List: MPs Slam Door on Budget Boss', *Daily Nation*, 16 February 2011, at 1.



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