2011

The Evolution of Constitutional Environmental Law in Kenya

J. Bradley Larkin
University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/kjeanrl
Part of the Environmental Law Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation
Available at: https://uknowledge.uky.edu/kjeanrl/vol3/iss2/6
THE EVOLUTION OF CONSTITUTIONAL ENVIRONMENTAL LAW IN KENYA

J. BRADLEY LARKIN*

The state of any country's environment is a reflection of the kind of governance in place, and without good governance there can be no peace.
- Wangari Maathai.

I. INTRODUCTION

On August 4, 2010, Kenyans overwhelming approved, through a general referendum, a new Constitution for the Republic, consequently opening up a new era in Kenyan political and legal history. The Kenyan Constitution adopted at independence from Great Britain quickly underwent profound alterations that reduced political freedoms and increasingly centralized power within the executive branch. In its place, Kenya adopted a federalist system, complete with checks on the president and a bicameral legislature. This new document borrows heavily from the emerging trends of recent constitutional construction, both in Africa and throughout the developing world, namely adopting an expansive view on human rights. In addition to containing traditional Western "negative rights," such as the right to not have free speech infringed by the government, the 2010 Kenyan Constitution also acknowledges second and third generation rights, such as socio-economic rights. This Note seeks to examine several provisions of the 2010 Constitution that deal with environmental rights, analyze the...
efficacy of these new provisions, and to place these provisions in context with other African Constitutions.

First, this Note will examine the theoretical arguments that underpin elevating environmental rights to constitutional status. Second, this Note shall analyze regional approaches to environmental law, as well as the manner in which Kenyan courts dealt with environmental concerns under the 2008 Constitution. Third, the relevant new provisions will be scrutinized in light of this context with some commentary on the overall effect these new provisions will have on environmental litigation. Finally, in terms of its effect on environmental rights, this Note will discuss the devolution of powers.

II. THE CASE FOR A CONSTITUTIONAL RIGHT TO A CLEAN ENVIRONMENT

The colonial heritage of Kenya was based on a system of exploitation and removal of natural resources. Law and policy was developed to support this exploitation in a manner that benefited a select few, namely the colonizers, to the detriment of the rest of the Kenyan people. In the furtherance of this goal, the legislature and judiciary perpetuated a system of exploitation of the land and removal of indigenous people from valuable areas.

Following independence, the command and control approach largely continued—although the levels of power were in the hands of the centralized government—but this time to the detriment of local communities. Whatever power was decentralized was largely counter-productive, as power was divided into sectoral agencies with narrowly defined authority applicable only to singular environmental issues, and these local authorities failed to coordinate their activities.

Prior to the 2010 Constitution, Kenyan courts began to utilize existing rights, primarily the right to life, under the Constitution to develop environmental law and litigation. The right to life was generally conceived as a “substantive standard[] regarding human relationships in the

---

7 Id.
8 Id. at 187.
9 Id. at 200.
10 Id.
natural world." While it was used in Kenya for the furtherance of environmental rights, this method has met mixed results internationally. Civil and political rights are necessary to allow affected groups to voice their problems and pressure governmental institutions to change. Essentially, these rights provide the means to participate in environmental protection, though they do not necessarily provide guidelines for court decision-making. This is representative of one widely adopted approach to utilize existing rights to address environmental issues, and it is an implicit recognition of the interconnected nature of human rights.

While existing human rights, promulgated in international treaty and customary law as well as within constitutional provisions, may be manipulated to meet environmental issues, several commentators have argued for the establishment of a new body of human rights law to meet the myriad challenges of environmental issues. A debate has developed as to whether these rights should take the form of procedural or substantive rights.

A. Procedural Rights

Procedural rights focus on the manner in which environmental rights are protected: theoretically, by ensuring citizen access and participation in decision-making, an equitable solution to environmental problems will naturally develop through the existing governmental structure. Not only will marginalized groups, normatively at least, be included in policy-making, but this structure will avoid the need for the judiciary to develop a "formulation of a substantive right to a decent environment." Environmental problems are diverse in both their nature and their effect, and it would be difficult for a judiciary to develop a practical interpretation of an environmental based human right of widespread applicability.

B. Substantive Rights

---

13 Id.
14 See id.
15 See id. at 4.
16 Id. at 9.
17 Id.
19 Id.
20 Id.
Some advocate a substantive right to a clean environment in addition to procedural rights. These advocates believe that procedural rights, on their own, place environmental decisions in the hands of the citizens, and critics argue that even in a perfect and equitable democratic system, which is a lofty assumption in a developing country, citizens may opt for present gains to the detriment of the environment for present and future citizens. This criticism is admittedly difficult to reject out of hand, as states with strong democratic systems and traditions today are responsible for a significant portion of present environmental degradation. Of course, a substantive right to a clean environment raises more difficult issues for the judiciary, as it is more difficult to apply than a simple negative right, such as the prohibition of government actors from infringing on free speech.

The utilization of different human rights can create conflict within any human rights paradigm, and consequently, it is up to the judiciary to determine an appropriate balance. Second and third generation rights provide an arguably greater chance of conflicting claims, and many argue that for this reason environmental rights should be left to the political system, where legislatures are arguably more capable of making the technical decisions required. In the environmental law context, it is easy to foresee conflicts between a right to a clean environment and the right to or goal of economic development, particularly in the context of a developing nation like Kenya.

Proponents have responded to this critique of substantive environmental rights by challenging the theory that courts are incapable of striking an appropriate balance between these two competing but very important goals. For one, courts may rely on expert advice and testimony, a practice already widely accepted in other areas of the law. Furthermore, as courts are supposed to be “neutral arbitrators,” citizens will consequently have more confidence in the decisions promulgated by the courts. Moreover, it may be efficient to provide this decision-making power to the courts, as they are more capable or more willing to make difficult decisions which legislatures would rather avoid making at the risk of upsetting their constituencies. Of course, these arguments presume a competent and

---

21 Id. at 10.
22 Id.
24 Id. at 221.
25 See id. at 220.
26 Id. at 221.
27 Id.
28 Id.
29 Anderson, supra note 123, at 221.
independent court system, which can be a difficult prerequisite to meet in some developed states and in almost all developing states.

C. International Law

In addition to national legal documents, international law and international legal bodies have begun to develop the concept of the human right to a clean environment. The first document to contain extensive third generation rights, such as environmental rights, is the African Charter on Human and People's Rights, 1981. Furthermore, the Treaty Establishing the East African Community, 1999, contains provisions that were designed to promote regional cooperation on environmental issues, among other areas. The East African Community also established the Council of Ministers, which has the “power to make regulations, issue directives, take [sic] decisions, make recommendations and give opinions” which are “binding on . . . [the] States.” Once a directive relating to the environment is issued, it becomes “part of the environmental law of East Africa.”

III. NEW CONSTITUTIONS, AN EMERGING AFRICAN TREND

Recently, African states have begun either to amend heavily their pre-existing constitutions or to adopt entirely new documents. As this process has continued, there has been a noticeable break from the Western constitutional tradition, namely with the inclusion of socio-economic rights.

This Note focuses on the environmental rights provisions in two other African states, South Africa and Uganda. Uganda has been selected because it is another state in East Africa with a constitution that directly addresses the environment, and South Africa has been selected due to its relative wealth and experience with socio-economic rights. It is important to note that the environmental issues in South Africa are unique in Sub-Saharan Africa. Not only does the country suffer from environmental problems typical of developing countries, namely resource management issues, but South Africa also experiences certain environmental issues

---


32 Id. at 501.

33 Id.
common to the developed world. However, because of Kenya's relative wealth in its region, a comparison to South Africa provides certain insights into environmental concerns that are less prevalent in Uganda. The following is a discussion of a few relevant provisions of these documents as a way to provide context for the new Kenyan document.

A. South Africa

Following the new dispensation in South Africa following the end of the Apartheid government, South Africa sought to develop a new constitution that would provide a sharp contrast to the previous regime's disregard for human rights. As a result, the document includes not only political rights but also a substantial number of socio-economic rights.

The main focus of the drafters of the South African Constitution was the direct injustices created by the previous dispensation. Consequently, poverty and the lack of political rights were at the forefront of debate, while the environmental issues were relegated to the backseat of the discussion. Nonetheless, the approved constitution's Bill of Rights contained the following environmental provision in Article 24:

24. Environment
Everyone has the right

a. to an environment that is not harmful to their health or well-being; and

b. to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that

i. prevent pollution and ecological degradation;

ii. promote conservation; and

iii. secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

Article 29 of the former interim constitution of South African was notable in that it was phrased in a partially negative manner: the right was qualified with the phrase "not detrimental to his or her health or well-

---

35 Id. at 179.
36 Id.
37 Id. at 179.
being.” 39 Similarly, Article 24 of the current South African constitution uses the “not harmful to their health or well-being” language to set a “minimum standard” that is implicit in the text, and consequently will be more beneficial to the lower income citizens than citizens that enjoy a higher standard of living. 40 Moreover, it is more realistic than an unlimited right to a clean environment. 41 The “or well-being” provision may yield a more expansive view, 42 but more case law is necessary to determine the exact parameters of this phrase.

B. Uganda

Uganda also provides a right to a “clean and healthy environment,” 43 but it is not formulated in a partially negative manner. Much more environmental emphasis is placed on the general policy requirements for the state. As shall be discussed below, this is similar to the eventual formulation of constitutional rights in Kenya, but noticeably absent from the Kenyan Constitution is a provision that explicitly provides legal standing for aggrieved citizens in Kenya. 44 Uganda, on the other hand, has a provision that “requires its citizens to ‘uphold and defend the Constitution,’” which can be read as implied access to the courts. 45

However, more focus is placed on the procedural rights in the Ugandan Constitution. “Wide access” to state-held information for citizens is provided, as long as the disclosure of that information does not affect national security. 46 Furthermore, the Ugandan Constitution stipulates certain state policies, such as the promotion of sustainable development. 47 This parallels Art. 69 in the 2010 Kenya Constitution discussed below.

IV. EVOLUTION OF KENYA’S CONSTITUTIONAL ENVIRONMENTAL LAW

A. Construing the Existing Rights to Incorporate Environmental Rights—Right to Life

Before the 2010 Constitution is discussed, it is important to place it in context within the development of its predecessor. In the First

---

39 Glazewski, supra note 34, at 187.
40 Id.
41 Id.
42 Id.
44 See infra Parts IV.A-C, V.A-D.
46 Id. at 180.
47 Okidi, supra note 11, at 16-17.
Constitution of Kenya, there was not a provision directly addressing environmental issues. As time progressed and environmental groups emerged to combat the degenerating condition of the environment, the courts began to develop a human right to a clean environment under Article 71, which stated that “[n]o person shall be deprived of his life intentionally,” referred to as the “right to life” clause.

In the landmark case Waweru v. Republic, the High Court of Kenya, bringing the issue up sua sponte, interpreted the “right to life” in Art. 71 to include a right to a clean and healthy environment. In Waweru, the issue centered around toxic waste that was being released into the environment by septic tanks that were installed by a group of plot owners in Kiserian Township. The court stated that “[t]he right to a clean environment is . . . inherent from the act of creation, the recent restatement in the Statutes and the Constitutions of the world notwithstanding.” The court’s 2006 decision brought Kenya in line with the jurisprudence of their southern neighbor Tanzania, which was the first African nation to construe a right to life clause to include environmental protection nearly ten years before in Joseph D. Kessy v. Dar es Salaam City Council.

However, as discussed above, the use of existing rights may be an imperfect vehicle to further environmental rights. A notable example of this concern can be found in Charles Lukeyen Nabori & 9 Others v. Attorney General & Another. The petitioners, a group of residents from an area known as the Ng’ambo Location, brought suit against the government for introducing two species of plants that infested the area and caused extensive environmental damage. Even worse, the plants at issue had thorns that caused “grievous harm,” and in several cases these injuries necessitated amputations. However, the court reasoned that because no deaths actually occurred, it was unable to find that the petitioners’ right to life had been violated by the government’s introduction of the invasive

---

48 Hereinafter referred to as the 2008 Constitution to incorporate all of the amendments incorporated up until the promulgation of the 2010 Constitution.
49 Okidi, supra note 10, at 18.
52 Id. at 34.
53 Id. at 34-5.
55 Id. at 687.
56 Kameri-Mbote, supra note 50, at 35.
58 Id.
59 Id. at 65-6.
While the court held that the right to a "clean and healthy environment is an important human rights issue," in dismissing the petition, it noted that the length of time between the introduction of the plant to the area and the suit was too long and the links too attenuated. By elevating this human right to the constitutional level on par with other rights, such as the right to property, it is possible that the court would be more willing to entertain the petition.

B. Property Rights

The Kenyan government also began to develop public rights in private property to limit environmental harm caused by private citizens on private property. To accomplish this, the state utilized both its police power and the doctrine of eminent domain. Courts in Kenya largely acquiesced to this expansive role of property rights. In *Park View Shopping Arcade Limited v. Charles M. Kangethe and 2 Others*, the petitioner owned title to a piece of wetland and sought to evict the respondents, who were operating a flower business along the adjacent Nairobi River. The flower grower's novel response was that the land was environmentally sensitive, and that their operation was "enhancing the environmental quality of the land with a permit from the authorities." While the court ruled against the respondents, it recognized the public property interest in the land and held only that the respondents were required to use legal channels instead; the court did not hold that it was impossible to support respondents' justification for utilizing the property without owning the title.

C. Locus Standi

An important measure of the efficacy of a human rights standard is the ability for citizens to invoke that right in judicial proceedings. Key to this is the *locus standi* requirement. Following the precedent in the English common law, as well as initial decisions in the East African region, Kenyan courts originally took a limited view of *locus standi*. Under the

---

60 Id.
61 Id. at 69.
62 Kameri-Mbote, supra note 50, at 36.
63 Id.
64 Id.
65 Id.
66 Id.
67 Id.
69 Kameri-Mbote, supra note 50, at 35.
70 See El-Busaidy, 479 K.L.R. 490.
traditional formulation of *locus standi* principles, litigants had to show a direct relationship to the litigation before the court. A strict interpretation of *locus standi* tends to limit litigation of environmental rights due to their public, rather than private, nature.

Following the path set by neighboring Uganda and Tanzania in recent years, however, Kenyan courts began to adopt a more expansive definition of *locus standi* to allow public interest litigation in the environmental area. In *El Busaidy v. Commissioner of Lands & 2 Others*, the court noted that Kenya had made a substantial break from English case law and “discarded the restrictive approach to the principles of *locus standi*.” Consequently Kenyan courts granted standing more frequently, improving access to the courts for public interest groups. Moreover, the Environmental Management and Co-ordination Act, passed in 1999, provided broad *locus standi* to citizens who assert that environmental standards are breached.

V. THE 2010 CONSTITUTION

The 2010 Constitution embodies a monumental change from the past. In place of a “winner-take-all” system modeled with an “imperial” presidency, Kenyan voters approved a new, devolved governmental structure resembling the American constitutional system. For example, the new document contains an expansive definition of fundamental rights and freedoms as enumerated in the Bill of Rights.

A. Guidelines for Implementations

Before the substantive and procedural rights are discussed further, it is important to note the general procedural guidelines, outlined in Part 1 of the Bill of Rights, that provide guidance for the courts and the State in both the application and protection of the “rights and fundamental freedoms” provided in the 2010 Constitution.

---

71 Kameri-Mbote, *supra* note 50, at 35.
72 Id.
73 See id. at 35-6.
75 Kameri-Mbote, *supra* note 50, at 36
78 See generally CONSTITUTION, Chapter 4 (2010) (Kenya).
79 See generally id. at Part 1.
1. Judicial Guidelines

The key language, in terms of the environmental rights, for judicial proceedings is found in Article 20. In relevant part, it provides the following:

(3) In applying a provision of the Bill of Rights, a court shall:

(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and

(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.\(^{80}\)

As apparent from the language, the Constitution clearly contemplates an active role for the judiciary when analyzing rights, including environmental rights. However, Art. 24 provides an important caveat on the court’s ability to construe and apply the fundamental rights and freedoms. Article 24 requires the courts to “ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others.”\(^{81}\) This provision can provide an important safety net for groups not party to the suit, particularly marginalized groups. In order to ensure that the rights of all are considered, Article 22 allows non-party groups to submit *amicus curiae* briefs, with leave of the court.\(^{82}\)

2. State Guidelines

Part 1 also contains important guidelines for the State as well. Notably, Art. 21(3) places upon “all state organs and all public officers . . . [a] . . . duty to address the needs of vulnerable groups within society, including . . . members of minority or marginalized communities.”\(^{83}\) As to be discussed later, one of the primary concerns with environmental law is unequal access to the court system: wealthier individuals have a greater capacity to resort to the court system to address environmental concerns while marginalized communities are the most effected by environmental degradation. At least on a procedural level, the State is required to actively determine and address the needs of the underprivileged sectors of society. This requirement is enhanced in Article 22, as standing is provided for “a person acting as a member of, or in the interest of, a group or class of persons”\(^{84}\) as well as “a person acting in the public interest.”\(^{85}\) Thus, to the

---

\(^{80}\) *Id.* at art. 20(3) (2010).

\(^{81}\) *Id.* at art. 24(1)(d).

\(^{82}\) *Id.* at art. 22(3)(e).

\(^{83}\) *Id.* at art. 21(3).

\(^{84}\) *CONSTITUTION*, art. 22(2)(b) (2010) (Kenya).
extent that disadvantaged groups can gain access to public interest groups and non-governmental organizations, they will also have access to the courts to enforce their fundamental rights and freedoms, including their environmental rights.

Kenya’s constitutional environmental law can be divided into two general parts: sections that provide a general description of the individual and group-oriented environmental rights and sections that provide for the enforcement of those rights.

B. Substantive Right to a Clean Environment

Below is the language of Article 42 which outlines generally the environmental right, followed by a brief discussion of the noteworthy terms and phrases.

42. Every person has the right to a clean and healthy environment, which includes the right—

(a) (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 70.86

1. "Every Person"

The use of "[e]very person" places the focus and ownership of the right on the individual, rather than on society in the aggregate. This signifies the individual orientation of the right’s conception. However, group rights are still protected by the expansive definition of *locus standi*, articulated in Art. 70 as well as the concept of intergenerational equality.87

2. "Clean and Healthy Environment"

The term "healthy" reflects a human-centric approach to the environment. Arguably, this section will be most beneficial to poor or marginalized communities, as these communities are most affected by environmental damage and deterioration.88

---

85 Id. at art. 22(2)(c).
86 Id. at art. 42.
87 Id. at art. 70(1).
health have been criticized by some for being anthropocentric, as it places humans above other environmental stakeholders, such as animals.\textsuperscript{89} Indeed, international environmental law has been criticized for failing to take account of the "intrinsic value" of the environment as a whole.\textsuperscript{90} However, as environmental law has progressed, there has been a growing recognition in international treaty law that wildlife in particular has an intrinsic value that is worth preserving.\textsuperscript{91}

While the anthropocentric criticism may have validity, the term "clean" is a far more subjective word, which may help to alleviate some of these concerns. Clean environments tend to have a positive "spill-over effect" for non-human stakeholders.\textsuperscript{92} While it has been used in numerous constitutions, there has not been a generally accepted definition of the term "clean."\textsuperscript{93} Thus, it is open to litigators to argue that "clean" incorporates non-anthropocentric rights and consequently has far greater applicability. It is conceivable that "clean" incorporates concepts such as conservation of wildlife and other important environmental concerns that may only be tangentially related to human health. Absent this more expansive definition, there is a danger that the term would be simply duplicative of "healthy," and thus meaningless. "Health" is a relatively narrow term,\textsuperscript{94} and if a more expansive definition of "clean" is assumed, it may be easier for litigants to prove an infringement on their Article 42 right. Consequently, this term will likely be the focus of intense litigation.

3. \textit{For the Benefit of Present and Future Generations}'

The phrase, "for the benefit of present and future generations," mirrors a similar clause in the South African Constitution,\textsuperscript{95} and is reflective of the emerging norm and realization that, in order for the right to the environment to have efficacy, courts will have to recognize intergenerational equality. Based on the notion "that there are no generations which are more favored or cherished—all of them are in a position of equality,"\textsuperscript{96} environmental rights are conceptualized not only as an individual right, but as a group right.\textsuperscript{97} Absent this understanding, courts

\textsuperscript{89} Glazewski, supra note 34, at 108.
\textsuperscript{91} Id.
\textsuperscript{92} See id. at 71.
\textsuperscript{94} See Feris, supra note 87.
\textsuperscript{95} S. AFR. CONST., sec. 24(b) 1996.
\textsuperscript{97} See id.
may find it more acceptable, or even necessary, to trade prosperity today for depleted environmental quality tomorrow.\textsuperscript{98} Furthermore, as has been argued intergenerational equality implicitly incorporates the concept of sustainable development.\textsuperscript{99} It is important to note that the concept of intergenerational equality raises difficult issues for judges. Considering the often highly technical nature of environmental problems and the difficulty for judges to determine the proper definition of health for present generations, the problem is only exacerbated when judges must also consider future generations not yet born and thus without legal representation.\textsuperscript{100}

4. Conclusions on Article 42

The potential impact of Article 42 is significant. Unlike the South African Constitution, there are no implicit limits on the degree of health to the environment that must be met. This is significant for two reasons. First, a limitless right may prove to be more difficult to determine, as there is no baseline or context. Second, a large degree of income inequality persists in Kenya, and those with wealth will be more capable of enforcing this right to the potential detriment of the poor.

C. Enforcement of Rights

Article 70 expressly provides standing for environmental rights. Moreover, it is explicitly stated that litigants are not required to demonstrate that any person has incurred a loss or suffered an injury. This effectively incorporates and expands the law of the previous constitution and protects the right of standing for individuals as well as NGOs.

70. (1) If a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being 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.

(3) For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.\textsuperscript{101}

\textsuperscript{98} See id. (noting the importance of fundamental principles of intergenerational equality).
\textsuperscript{99} Feris, \textit{supra} note 87.
\textsuperscript{100} See generally Fitzmaurice, \textit{supra} note 96 (noting that the concept of intergenerational equality includes the rights of past, present and future generations).
\textsuperscript{101} CONSTITUTION, art. 70 (2010) (Kenya).
Explicit provisions in constitutions giving force to environmental provisions are an emerging trend around the world.\textsuperscript{102} Litigants have used them in both a defensive manner, to prevent or halt unconstitutional governmental action, and in an affirmative manner, to force the government to act.\textsuperscript{103} Affirmative action can create the potential for abuse and flood the courts with environmental litigation; furthermore, it may create uncertainty in the law, which can result in reduced incentive for foreign investment.\textsuperscript{104}

However, there is a danger that explicit standing provisions will only have a real effect for the wealthy sections of society. Litigation is expensive, and large sections of the population may not be able to avail themselves of the Article 70 absent outside assistance.

It can be argued, therefore, that these provisions have no real effect on environmental law in Kenya. However, by elevating environmental rights to a constitutional level, Kenya has signaled that this right has now “achieve[d] the highest rank among legal norms, a level at which a given value trumps every statute, administrative rule or court decision.”\textsuperscript{105} Accordingly, these articles provide a floor for environmental protection, and courts and legislatures may not legally reduce this level of protection absent the drastic act of amending the Constitution itself.\textsuperscript{106}

While Kenya has a large amount of environmental legislation, the manner of organization is issue specific; different statutes address different environmental issues.\textsuperscript{107} As environmental problems have different causes and varying effects, inconsistencies in the application of the “environmental framework” statutes arose.\textsuperscript{108} By providing explicit constitutional rights, enforceable in the courts by individuals and NGOs, some of these inconsistencies may be removed, as the Constitution provides a minimum standard that governmental action must meet.\textsuperscript{109}

Lastly, unlike many constitutions,\textsuperscript{110} Kenya’s environmental rights are listed within the Bill of Rights, and are thus considered to be fundamental rights.\textsuperscript{111} This placement clearly buttresses the elevated stature

\textsuperscript{102} Bruch et al, \textit{supra} note 45, at 133.
\textsuperscript{103} Id. at 134.
\textsuperscript{106} Bruch et al, \textit{supra} note 45, at 134.
\textsuperscript{107} Ochieng, \textit{supra} note 6, at 200.
\textsuperscript{108} See id.
\textsuperscript{109} Bruch et al, \textit{supra} note 45, at 134.
\textsuperscript{110} Id. at 146.
of these rights. This further ensures that environmental rights will not be considered inferior to other rights or goals.

D. Article 69- Legislative Mandates

In addition to the individually-oriented right outlined in Article 42, the Constitution also places affirmative duties on the State to ensure environmental protection as well as a duty on every citizen to cooperate with the State in the furtherance of those goals. Within Article 69, outlined in relevant portion below and cross-referenced in Section 42, the obligations of the State are outlined.

69.(1) The State shall—

(a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;
(b) work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya;
(c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;
(d) encourage public participation in the management, protection and conservation of the environment; environmental audit and monitoring of the environment;
(g) eliminate processes and activities that are likely to endanger the environment; and
(h) utilise the environment and natural resources for the benefit of the people of Kenya.

(2) 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.

This article provides policy guidelines for state action. These guidelines, while important, are generally not to be "invoked or enforced" by the judiciary. Instead, these policy statements are intended to provoke the legislature to enact statutes that incorporate these concepts. Overall,
few constitutions around the world are limited to either public policy statements or fundamental rights concepts; most have some formulation of both.117

Much of the environmental law statutes prior to the 2010 Constitution were sector-specific, each addressing a different environmental issue.118 Consequently, the implementation of each of these laws has often given rise to conflicts, and consequently implementation has been "weak, inconsistent, and ad hoc."119 With the addition of the fundamental right to a clean environment, the courts will indirectly be able to address this issue and cause the State to examine these policy statements more carefully.

VI. DEVOLUTION

Kenya’s political history has been mired by a long history of centralization, culminating in President Moi amending the constitution to require a one-party state.120 This act, along with several other centralizing moves, gave birth to the drive for a new constitution.121 The centralization of government lead to a winner-take-all political system, and governmental accountability plummeted.122 One of the key innovations of the 2010 Constitution is Part 2, Section 14, which outlines in explicit detail how powers are to be apportioned among the national and county governments.123 While this is largely beyond the scope of this Note, it is an extremely important part of the 2010 Constitution and deserves mention and further academic analysis and commentary.

The devolution of environmental power and responsibilities is quite limited. County governments are responsible for the controlling of air pollution124 and the implementation of the national environmental conservation plan.125 What is unclear from the Constitution itself is how much power each county will have in the implementation of the national environmental laws and whether the national laws will provide merely a benchmark or both a ceiling and floor for environmental regulation.

Moreover, the national government is responsible for any issue that raises foreign relations questions. This jurisdictional mandate may pose a serious limitation on local governance of environmental issues due to the

117 Id. at 15.
119 Id.
121 Id.
122 See id.
123 See generally CONSTITUTION, Chap. 11 (2010) (Kenya),
125 Id. at § 3.
large-scale foreign investment and highly international nature of many of Kenya's environmental problems.

VII. CONCLUSION

One of the driving concerns in any developing state is the further development of the economy. Strong environmental protection improves health and ensures sustainable utilization of natural resources, which alone should improve the overall wealth of a state. However, it is important to note that foreign direct investment (FDI) is another key to economic growth, and FDI is often a key avenue for the importation of "environmentally sound technology" which can positively contribute to environmental sustainability or improvement. Multinational corporations (MNCs) are unlikely to select a country based solely on relaxed or non-existent environmental regulation, but uncertainty in the legal system and the rules applied is a powerful deterrent to risking capital in developing markets. Thus, it is imperative that the courts form a strong body of law that is predictable and equitable, lest the gains of environmental protection will be offset by economic stagnation or decline.

States often embark on new constitutions to signal a significant change from or a rejection of the past. While the 2010 Constitution creates an impressive constitutional framework for the advancement of environmental protection, the linchpin is the judicial system as a whole. Without a strong judiciary, these new provisions are threatened by the prospect of becoming paper tigers. The judiciary, along with many other Kenyan institutions, is replete with corruption and graft. Worse, the reputation of the judiciary among Kenyan citizens is strikingly poor. In 2010, Transparency International conducted a survey amongst ordinary Kenyan's regarding their perceptions of corruption. In a tie with parliament and political parties, the judiciary was rated the second most corrupt institution in Kenya, with a rating of 3.8, with 5 being completely corrupt. However, this new Constitution provides an opportunity for the judiciary to improve their image in the public eye. Environmental litigation tends to have a direct effect on a large number of citizens, especially in public interest litigation. A record of strong, impartial case law in this area could have a positive effect on the courts' reputation. This, in turn, would improve other democratic institutions, as individuals who trust the judiciary to protect them are more willing to engage in civil society.

126 Verhoosel, supra note 104, at 452.
127 Id. at 453.
128 Gathii, supra note 120, at 1110.
130 Id.
a strong reputation will also likely result in greater economic growth, as individuals will be more willing to invest and engage in economic activity if they are assured that the judiciary will prevent foul play.

Kenya has emerged as a guiding light among African nations focusing on environmental rights. This trend has brought the country in line with much of its pre-colonial heritage. Numerous indigenous groups placed a high value on the preservation of their environment, in sharp contrast to the exploitive view that characterized Kenya’s British colonial heritage. While it has been shown that, to a large degree, these new environmental provisions in practice provide little to the environmental rights of citizens in Kenya, by choosing to elevate environmental rights to a fundamental right, the Kenyan people have signaled the value they place on environmental quality which should in turn embolden both the courts and the legislature to pursue measures to enhance environmental quality. As the regional heavyweight of East Africa, this will likely result in a “domino effect,” as other states will emulate the Kenyan example.

---

131 Ochieng, supra note 6, at 195.
132 Id.