CONSTITUTIONAL REFORM PROCESSES AND INTEGRATION IN EAST AFRICA

Edited by
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ENVIRONMENTAL PROTECTION WITHIN THE FRAMEWORK OF THE EAST AFRICAN COMMUNITY: LESSONS FOR CONSTITUTIONAL REFORM IN TANZANIA[1]

1. INTRODUCTION

The phrase "environment" has been subjected to a number of interpretations. The approach adopted in this article takes cognisance of this reality but confines itself to a much narrower definition. For the purposes of this article, therefore, the phrase is used to mean the living and non-living organisms of an area and the ecological setting that surrounds them and supports their continued existence. The definition adopted here consequently does not cover natural resources, specifically natural gas, petroleum and minerals. The emphasis is on the totality of the environment to be found above the earth's surface and not on any constituents beneath the earth. The distinction has been purposefully made to avoid transcending on a discussion on natural resources *per se*, a topic which has been addressed elsewhere in relation to the constitutional process in Tanzania.[2] It must be admitted, however, that it is common to find the phrases "natural resource" and "environment" being applied interchangeably. The Constitution of the

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1 This article is based on a paper presented at the Annual Conference of the Konrad Adenauer Stiftung (KAS) and the Tanzanian-German Centre for Eastern African Legal Studies (TGCL) on Constitutional Reform Processes in Tanzania and Kenya, held at Nkrumah Hall, University of Dar es Salaam, on 24 May 2013. The article is an abridged version of the paper, modified to capture the developments brought about by the promulgation of the Draft Constitution of the United Republic of Tanzania of June 2013.

2 For an in-depth discussion on the need for the constitutional process in Tanzania to address natural resources beneath the earth's crust see MAJAMBA, Hamudi I., "Decentralization of Natural Resources Management: Reflections on the Constitution of the United Republic of Tanzania", in 6 *Orient Journal of Law and Social Sciences*, 2012, Issue II.

Constitutional Reform Processes and Integration in East Africa

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Republic of Uganda, 1995, and the Protocol on Environment and Natural Resources Management (the Protocol[3]) adopted under the auspices of the Treaty Establishing the East African Community are cases in point.[4] The separation of the phrases in Articles 112 and 114 of the Protocol is also notable in this regard. In Tanzania, the existence of the constitutional provisions requiring citizens to protect natural resources was not applied by the High Court when construing a constitutional provision guaranteeing the right to a clean and decent environment. Instead, the court construed the provisions of the right to life, to include this right.[5] It is submitted that this distinction further augments the view that environment and natural resources should be accorded different interpretations, when circumstances require.

The protection of the environment has for many decades evolved around rules set out in laws enacted by bodies established by the constitution, usually the parliament. Like others, laws enacted by parliament are enforceable by courts through decisions referred to as judgments or rulings. Decisions of courts of law within the Commonwealth system form an integral part of law in the course of applying the long established common law doctrine of *stare decisis*, also known as the doctrine of precedent. This doctrine requires courts in the judicial hierarchy to follow past decisions of courts above it. Moreover, courts must be consistent and apply the same principles of law in the course of adjudicating cases with similar or near similar facts.[6] This approach has been applied by courts of law in the three East African States in determining environmental rights. On some occasions

3 At http://www.eac.int/environment/index.php?option=com_content&view=article&id=122:eac-gender-a-community-development.

4 See Part XXVII (ii) of the Constitution of the Republic of Uganda, 1995. The definitions of the phrases "environment" and "natural resources" provided for under the Protocol on Environment and Natural Resources Management make some distinction between these two phrases. See the Preamble and Article 18. Paradoxically, the definition of the phrase in the Protocol does not make this distinction but uses the words interchangeably, by stating that "environment means natural resources" (Article 1).

5 This was in the case of *Joseph Kessy et al. v. The Dar es Salaam City Council*, High Court of Tanzania at Dar es Salaam, Civil Case No. 29 of 1998 (unreported).

6 SAWYERR, G.F.A. and J.A. Hiller, *The Doctrine of Precedent in the Court of Appeal for East Africa*, Dar es Salaam: Tanzania Publishing House, 1971.

courts have travelled that extra mile in applying innovation in the course of determining environmental disputes.[7]

It has, however, been correctly pointed out that environmental litigation in Tanzania has developed relatively slowly compared to Uganda and Kenya, although Tanzanian courts were the first in Africa to address the earliest decision on environmental litigation by construing the right to life to include the right to a clean and healthy environment in the decision.[8] There are a number of reasons for this state of affairs. One plausible explanation is a reluctance to place environmental concerns to the fore in countries that have attempted to tow the socialist path. Governments in such countries, it has been noted, seem to focus on addressing competing interests relating to a shortage of resources in the wake of economic problems.[9] For the case of Tanzania, this argument may be supported by the lack of enthusiasm on environmental protection by the then sole political party. Even after the introduction of the multi-party system, there has been little serious concern for protecting the environment despite some of the manifestos of the political parties seemingly reflecting this concern.[10]

The teaching curriculum at the then only law faculty in the region is another factor. The course curriculum of the faculty was at its very inception tailored mainly to suit the interest of an emerging socialist state.[11] It was not until the 1990s that environmental law was introduced in the faculty's curriculum.

7 See generally KAMERI-MBOTE, P. and C. Odote, "Courts as Champions of Sustainable Development: Lessons from East Africa", in 10 *Sustainable Development Law and Policy*, 2009, Issue I.

8 Ibid., p. 34.

9 BROWN, E.F., "In Defense of Environmental Rights in East European Constitutions", in 1 *University of Chicago Law School Roundtable*, 1993, p. 191.

10 See LAWYERS' ENVIRONMENTAL ACTION TEAM (LEAT) (ed.), *Legislative Environmental Representation in Tanzania: Taking Stock of Political Parties Perspective on Environmental Issues. Research Report 2004/2005*, Dar es Salaam, 2005; and LEGAL AND HUMAN RIGHTS CENTRE (ed.), *Political Parties Survey Report, 2003/2004*, Dar es Salaam, 2004.

11 See TENGA, R.W., "The Historical and Socio-economic Approaches in Learning the Law: Dar es Salaam and Third World Perspectives in Jurisprudence", in SHIVJI, Issa G. (ed.), *Limits of Legal Radicalism. Reflections on Teaching Law at the University of Dar es Salaam*, Dar es Salaam: Faculty of Law University of Dar es Salaam, 1986; and KANYWANYI, Josaphat L., "The Struggle to Decolonise and Demystify University Education: Dar's 25 Years Experience Focused on the Faculty of Law (October 1961-October 1986)", in 16 *Eastern Africa Law Review*, 1989, No. 1, pp. 1-70, at p. 46.

This implies that graduates, who later took up legal practice on the Bench and in the Bar, had basically no formal training on environmental law at undergraduate level. Today, the course is compulsory for law students at the University of Dar es Salaam School of Law, formerly the Faculty of Law, the oldest legal training institution in the Eastern African region.

It should also be pointed out that Tanzania's first environmental activists appeared in the 1990s with the establishment of the first NGO focused on environmental law in the country, the Lawyers' Environmental Action Team (LEAT). In Uganda and Kenya activism on environmental rights commenced around the same time but was less in evidence than in Tanzania. It was these activists who commenced the earliest environmental litigation in these three states and, in the course of doing so, they assisted courts in the development of environmental jurisprudence in the region. In Uganda, Kenneth Kakuru, a renowned environmental rights activist who has represented numerous clients in public interest environmental disputes, was recently appointed Judge of the Court of Appeal of Uganda, which also doubles as the Constitutional Court.[12] Meanwhile, the late Wangari Mathai, a 2004 Nobel Peace Prize Laureate, has become a household name in the pursuit of environmental justice in Kenya.

Developments in environmental rights jurisprudence in Kenya and Uganda came at a relatively fast rate compared to Tanzania, although as noted, the earliest court decision that linked human rights and the environment was pronounced by the High Court of Tanzania.[13] The difference in the approach to environmental activism could also in part be explained in terms of the economic path adopted by the respective governments at independence. The NGO environmental activists' movement was predominantly financed by a capitalist regime: the development of model environmental framework laws in the three East African states was financed by the World Bank after being sponsored by the United Nations Environment Programme (UNEP), the United Nations Development Programme (UNDP) and the Dutch Government.[14] It is therefore not

[12] Daily Monitor, 20 May 2013, p. 1.

[13] See note 2.

[14] KIMANI, N., "Participatory Aspirations of Environmental Governance in East Africa", in 6 *Law, Environmental and Development Journal*, 2010, pp. 200-215 at p. 206.

surprising that the framework environmental laws in Uganda and Kenya were promulgated before those of Tanzania, which, in comparison to the other two East African states, usually mulls over policies and laws advocated for in such manner.[15]

The early positive developments in environmental litigation in the region were faced with a major setback. This was the absence of specific provisions in the Constitution to justify the right to a safe, clean and decent environment. Courts were therefore mainly guided by developments in case law developed in other jurisdictions in the course of delivering judgments. The social, economic, political and historical circumstances upon which foreign judgments were based, however, did not always sit well with conditions prevalent in developing countries in general and those in the East African region in particular.[16] The dangers of relying entirely on such judgments were therefore clear. In some cases, sector laws for the conservation of, inter alia, wildlife, water and forests, which by their nature have a bearing on environmental protection, were applied. These laws were, and still are, largely segmented and found in separate pieces of legislation, supported by a multitude of enabling regulations, making it difficult in most cases to be fully comprehended even by the sharpest legal minds.[17]

The enactment of framework environmental laws in the three states in question came as a relief, in some way, for public interest environmental lawyers. These laws unequivocally provide for the right of citizens to a clean and decent environment. In Kenya and Uganda, the provisions of these laws are fully operational and litigants have tested some of them in the courts.[18] In Tanzania, regulations to operationalise the Environmental Management

[15] Ibid., p. 207.

[16] See the case of *M.C. Metha v. Union of India* [1987] 2 SCC 395 where the Supreme Court of India observed that there is a need to apply more stringent rules of strict liability in cases of environmental rights in developing countries in comparison with the lesser stringent position adopted by courts in developed countries.

[17] HITCHCOCK, L., *Report on Existing Environmental Legislation in Tanzania*, Dar es Salaam: Ministry of Tourism, Natural Resources and Environment, 1994.

[18] See generally KAMERI-MBOTE et al. (note 7) for the position in Kenya and the case of *Greenwatch v. Attorney General and the National Environmental Management Authority*, Misc. Cause No. 5 of 2011, High Court of Uganda at Kampala, where the court declared the use of all forms of plastic as violating the environmental rights of citizens of Uganda.

Act[19] are still in the pipeline, almost a decade since the Act was promulgated. As noted above, the probable causes for this inordinate delay could be explained, in part, by historical factors in the developmental path Tanzania took immediately after independence. As noted above, this may also be supported by the fact that the process to initiate framework environmental legislation was supported mainly by development partners, to wit, by the West.

2. THE DOCTRINE OF PRECEDENT AND ENVIRONMENTAL LITIGATION IN TANZANIA

Prima facie, one may be tempted to conclude that the enactment of framework environmental laws has resolved the problem of environmental rights in the three states concerned. However, this view is misguided when viewed through the lens of the doctrine of precedent, alluded to above. The application of the doctrine by the courts further supports this contention in Tanzania.[20] According to the application of the vertical obligation of the doctrine, the decisions of the highest court, the Court of Appeal of Tanzania, must be followed by the High Court. Along the same line, decisions of the High Court bind subordinate courts – Resident Magistrates' Courts and District Courts.

The Court of Appeal is ordinarily bound by its own decisions but may depart from them, when circumstances so demand. The High Court Judge, meanwhile, is not bound by the decision given by another High Court Judge, even on a similar point of law. In this regard, a High Court Judge based in Mwanza is not required to follow the judgment of a High Court Judge based in Dar es Salaam or any other part of Tanzania Mainland for that matter, according to the horizontal application of the doctrine of precedent. However, the decisions of the High Court, regardless of where they have been delivered, are binding on Magistrates at the Resident Magistrates' and

19 No. 20 of 2004.

20 The position is the same in Kenya and Uganda. See *Kisumuwalla Oil Industries Ltd v. Pan Asiatic Commodities Ltd and Others* [1995-1998] 1 EA 150; and *Paul K. Ssemogerere and Another v. The Attorney General*, Constitutional Appeal No. 1 of 2002, Supreme Court of Uganda at Mengo (unreported), at http://www.ulii.org/ ug/judgment/supreme-court/2004/10.

District Courts in the whole of Tanzania unless overturned by the Court of Appeal.

Decisions of the High Court of Tanzania which illustrate the confusion that may be caused by the horizontal and vertical application of the doctrine of precedent are in abundance.[21] A selection of such cases should suffice to illuminate our point, especially where no appeals have been successful:

In the case of *Charles Lala v. Abdallah Mangi*, the late Judge Mwalusanya (as he then was) departed from the High Court's findings in *Waisirikare v. Bakari*, *Festo v. Makabana* and *Morris Sawata v. Mattias Maleki* regarding the engrafting of the common law ingredients of malicious prosecution onto customary law.[22] Another illuminative example is the case of *Freita Walter and Three Others v. Republic*,[23] where Judge Kyando (as he then was), aware of the High Court ruling in the case of *Daudi Pete v. Republic*[24], chose not to apply it in construing the validity of Section 148 of the Criminal Procedure Act.

More confusion in the application of the doctrine of precedent by the High Court of Tanzania is evidenced in the case of *John Kirakwe v. Iddi Siko*[25] where Judge Mwalusanya opted to abandon the approach he had taken in his own decision in the case of *Zachariah Lugendo v. Shadrack Lumila*[26] and that of Judge Mfalila in the case of *Francis Leo v. Paschal Simon Maganga*.[27] In the earlier case, Mwalusanya J. had held that a ceremony was a necessary ingredient in maintaining the presumption of marriage. In the later case he blatantly stated that lack of a ceremony was in fact the true requisite for the presumption of marriage.

21 See NKOBOGO, J., "The Doctrine of Precedent in the High Court and the Case of Conflicting Decisions: Efforts to Ameliorate the Problem", in 1 *The Tanzania Lawyer*, 2012, No. 2; and KAHENDAGUZA, A., "The Power of the High Court of Tanzania to Depart from Its Previous Decisions", in 4 *National Organization for Legal Assistance Newsletter*, 2007, pp. 26-28.

22 See [1992] TLR 336, [1971] HCD 112, [1971] HCD 417 and [1981] TLR 158, respectively.

23 [1991] TLR 62.

24 HC (Mwanza Registry) Misc. Criminal Cause No. 80 of 1989.

25 [1989] TLR 215.

26 [1987] TLR 31.

27 [1978] LRT 22.

Although we could not find any conflicting decisions on environmental rights at the level of the High Court, the above cases serve to illustrate the dilemma that Magistrates at the Resident Magistrates' and District Courts would find themselves in if Counsel referred them to different conflicting decisions of the High Court. Of course a prudent Magistrate may resort to choosing to apply a case which he or she thinks best meets the interests of justice. However, this may be interpreted differently by others who may infer some element of "bias" based on unethical practices and so open up room for unnecessary tension in the process of seeking justice.

The dangers of leaving the application of the doctrine of precedent to apply, in the midst of the confusion alluded to at the level of the High Court with its trickling down effect, does not augur well for the enforcement of environmental rights. The confusion at the level of the High Court, it is submitted, would be less apparent where there are express constitutional provisions on an issue to guide the courts.

The existence of a legislative enactment by Parliament to address environmental rights is a move in the right direction. However, the foundation of such rights still remains on shaky grounds. This is because an overhaul or even revocation of legislation enacted by Parliament is possible. Moreover, revocation of regulations to implement such legislation, which are usually more detailed, is even easier. However, to change a constitutional provision often represents a Herculean task.[28] It is in this regard that Kenya and Uganda have entrenched constitutional provisions guaranteeing their citizens the right to a safe, decent and healthy environment.[29] Tanzanians are waiting to see whether this will materialise when a new constitution is promulgated.

[28] See *Paul K. Ssemogerere and Another v. The Attorney General* (note 20).

[29] See Article 39 of the Constitution of the Republic of Uganda, 1995, and Article 42 of the Constitution of the Republic of Kenya, 2010.

3. CONSTITUTIONAL PROVISIONS AND ENVIRONMENTAL RIGHTS: AN OVERVIEW

The need for entrenching specific provisions for the protection and conservation of environmental resources in constitutions has been a subject of diverging views. There are those who argue that even in the absence of specific provisions, courts, with the assistance of Counsel, should be able to expound the jurisprudence by, inter alia, construing legislative provisions purposefully and using case law developed in other jurisdictions in applying the doctrine of precedent. It has also been observed that to some extent bold-spirited judges in other jurisdictions have been quite innovative in construing the provisions of statutes in developing environmental law jurisprudence.[30] However, this approach has not provided a clear-cut avenue for litigants pursuing environmental rights, as evidenced by certain cases, as some judges (timorous souls) have resorted to hiding behind the veil and refused to grant such rights.[31] The approach taken by such judges heightens the intrinsic problems associated with the application of the doctrine of precedent, at least on a horizontal plane, and its dire consequences for the realisation of environmental rights.

In the light of the above observations, it is submitted that the constitution-making process in Tanzania needs to consider a viable way of guaranteeing citizens the right to a clean, decent and healthy environment. The need to entrench environmental protection provisions in the Constitution of Tanzania also finds support within the framework of the East African Community (EAC) on the one hand and, as noted above, because of the uncertainty of the application of the doctrine of precedent, on the other. It has also been noted that it is the duty of the state as trustee to protect and promote environmental rights.[32] This argument takes into account the

[30] MAY, J. and E. Daly, "Vindicating Fundamental Environmental Rights: Judicial Acceptance of Constitutional Entrenched Environmental Rights", in 11 *Oregon Review of International Law*, 2009, pp. 365-440, at http://ssrn.com/abstract=1479849.

[31] Ibid.

[32] See HOWARD, D.A., "State Constitutions and the Environment," in 58 *Virginia Law Review*, 1972, pp. 193-229 at p. 199.

danger of leaving the judicial arm of the state to determine citizens' environmental rights given the copious tribulations faced by this arm.[33]

4. ENVIRONMENTAL PROTECTION WITHIN THE FRAMEWORK OF THE EAST AFRICAN COMMUNITY

The East African states are parties to an arrangement under the auspices of the Protocol to cooperate in protecting environmental resources in the region generally. In particular, the Protocol also calls upon these states to enact laws in their jurisdictions to reflect its aspirations, especially when it comes to protection of transboundary environmental resources.[34] Furthermore, Articles 111, 112 and 113 of the Protocol lay emphasis on the need for cooperation and developing common policy approaches and legislative regimes in the management of environmental resources. The Protocol's approach in this regard deserves to be applauded since environmental, resource-based conflicts have threatened stability among states in the African region, in some cases causing tensions.[35] There have been efforts to address the Protocol's concern at the national levels, through respective framework environmental laws and other regional arrangements, such as the Lake Victoria Environmental Management Project.[36] The environmental framework legislation of the three Partner States has to some extent taken into account the Protocol's clarion call. The Bar and the Bench have also been proactive, responding positively in developing environmental protection jurisprudence since the promulgation of the framework environmental laws in Kenya and Uganda, in contrast to Tanzania.[37] It is also prudent to point out here that the East African Court of Justice has categorically stated that is has jurisdiction to entertain environmental law disputes between Partner States to the EAC Treaty.[38]

33 Ibid.

34 See Chapter Three of the Protocol.

35 See LOROY, M. (ed.), *Environment and Conflict in Africa: Reflections on Darfur*, Addis Ababa: University of Peace, 2006.

36 See http://www.lvbcom.org/index.php/2013-03-07-10-26-51/lvempii.

37 See KAMERI-MBOTE et al. (note 7), p. 37.

38 See *The Honourable Attorney General of the United Republic of Tanzania v. The African Network for Animal Welfare (ANAW)*, East African Court of Justice Appellate Division at Arusha, Appeal No. 3 of 2011 (unreported) at http://www.eacj.org/docs/judgements/Serengeti-final-judgement-15-03-12.pdf.

It is expected that the constitutions of Partner States, being the fundamental law, ought to reflect the Protocol's initiative. Closer inspection of the constitutional provisions of Kenya and Uganda, however, reveals that they do not reflect the collective East African spirit with regard to the protection of the environment as envisaged by the Protocol. Uganda's Constitution, which came into force in 1995, places a limit on those who can invoke constitutional rights. It is only citizens of Uganda.[39] Also, the constitutional provisions do not make specific reference to the Protocol or the EAC initiatives related to the environmental rights of the peoples' of the region. It does not address the need for regional initiatives in addressing environmental rights. It is submitted that environmental issues at the regional level were not considered important by the drafters of the Ugandan Constitution in 1995 or later in 2005 when the opportunity arose. The focus in 2005 seems to have been placed on more "pressing matters" – removing limits to the presidential term of office and introducing a multi-party system in the country.

Kenya's Constitution came into force in 2010, long after the Protocol which was signed in 2006. However, like the Ugandan Constitution there is no reference to regional initiatives for the protection of the environment, save for the reference to the commitment to respect international obligations relating to human rights. Kenya's Constitution also makes reference to the utilisation of the environment for the benefit of Kenyans. In both Kenya and Uganda, these have been left for framework laws, as required by the Protocol, which make reference to regional initiatives. Regional integration efforts, including the free movement of people of the region from one country to another were not considered important in terms of environmental rights by the drafters of the constitutions of Kenya or Uganda. It is submitted that this omission reflects a lack of seriousness in taking into account environmental rights within the framework of the East African Community. The interaction between people of the region requires commensurate environmental concerns in the constitutions which, as noted above, would provide a more solid foundation, as they are not easy to

39 See Chapter 4, Article 39 of the Constitution of the Republic of Uganda, 1995.

amend, as opposed to acts of parliament which can be amended overnight.[40] As far as it can be gauged, even using the broadest interpretation, rights to a healthy environment are limited only to the citizens of the individual member countries. The wording should have at least been "every person" rather than restricting the enjoyment of environmental rights to citizens of a particular country, in the spirit of the East African Community and in the absence of specific reference to the people of the Community, who, it is envisaged, will cross borders for purposes of settlement, in some cases, permanently.

Unfortunately, the constitutional provisions of Kenya and Uganda therefore do not reflect the Protocol's call. The drafters of the two constitutions seem to have left this domain to the East African Court of Justice.[41]

In Tanzania, the danger of relying on the innovation of judges in using the sector and framework environmental protection legislative enactments as a way of guaranteeing citizens the right to a clean and healthy environment is real. As opposed to Uganda and Kenya where litigants have managed to use the framework laws to seek redress from courts of law, in Tanzania, there is no case that has been decided on the basis of the environmental framework law. Of course, cases from these two countries could be used as persuasive authority, but the local circumstances of the countries are not always the same.[42]

Tanzania, it is to be noted, has taken the initiative of entrenching constitutional provisions to provide for the right to a clean and decent environment in the first draft of a new constitution. The next step should be to consider taking the lead in enacting whole encompassing provisions that take into account regional integration in the drafts that follow in order to achieve all-encompassing provisions. In this regard therefore, Tanzania should be a trend setter. However, since charity begins at home, the genesis

40 This point was re-echoed in the case of *Paul K. Ssemogerere and Another v. The Attorney General* (note 20).

41 See *The Honourable Attorney General of the United Republic of Tanzania v. The African Network for Animal Welfare (ANAW)* (note 38).

42 The case of *Festo Balegele and Others v. Dar es Salaam City Council*, Misc. Civil Case No. 90 of 1991, High Court of Tanzania at Dar es Salaam (unreported), was cited in the Ugandan case of *Greenwatch v. Attorney General and National Environment Management Authority* (note 18). However, it did not form the basis of the decision of the case.

of the EAC ideal, the merger with Zanzibar ought to be considered in the light of environmental rights in the constitution-making process, as it has been admitted by the Tanzanian Government that at inception, the merger between Tanganyika and Zanzibar "was meant to set a foundation for the establishment of the East African Community and ultimately the proposed United States of Africa."[43] The current arrangement between Tanzania Mainland and Zanzibar with regard to environmental rights in the two entities does not reflect this spirit. The draft that has been unveiled does not address this concern.

5. ENVIRONMENTAL PROTECTION IN THE CONTEXT OF THE UNION BETWEEN ZANZIBAR AND TANZANIA MAINLAND

In the course of discussing constitution-making processes in the East African region, one cannot ignore the link between Zanzibar and Tanzania Mainland and the history surrounding their merger to form the United Republic of Tanzania. As noted, in a way, the merger opened up the avenue for the formation of the Community on the one hand. On the other hand, issues of environmental concern cannot be the preserve of only one entity in an arrangement like the East African Community which has a number of shared (transboundary) resources.

Generally speaking, issues of environmental protection are not part of Union matters within the framework of the Union between Mainland Tanzania and Zanzibar. These comprise only matters that have been listed in the First Schedule of the Constitution of the United Republic of Tanzania. Environment is not one of these.[44] As noted above, environmental issues have not been included in the draft Constitution. It is because of this arrangement that each part of the Union has its sector and framework environmental legislation. The Environmental Management for Sustainable Development Act of 1996[45] is the framework law for environment in Zanzibar and its counterpart on the Mainland is the Environmental

43 See http://www.vpo.go.tz/document_storage/historical_overview.pdf.

44 Cap 2 RE 2002 Laws of Tanzania.

45 No. 2 of 1996.

Management Act[46] enacted in 2004. This rather awkward arrangement presents serious challenges that have not been given the attention they deserve. It is submitted that the opportunity to address this gap is still available in the ongoing constitutional reform process. Some of the main challenges of this set-up, as noted earlier, go to the very roots of the East African Community. An overview of these will now be undertaken:

Firstly, where it comes to addressing environmental concerns at the international level, there is convergence, as international affairs fall under the domain of Union matters under the arrangement between Tanzania Mainland and Zanzibar.[47] The draft Constitution has maintained this position.[48] Directives issued by Multilateral Environmental Agreements (MEAs) executed by the government of the United Republic of Tanzania must therefore be enforced in both parts of the Union.

Secondly, a person may challenge the lack of implementation of an MEA under the framework of the Environmental Law of Zanzibar and the matter will be adjudicated by the Court of Appeal of Tanzania, which is a Union organ.[49] This is because MEAs fall, for all intents and purposes, under the list of Union matters, as international relations. The possibility of conflicting mandates among the institutions charged with enforcing or implementing directives of MEAs, which may be detrimental to the environment and international obligations, is therefore not far-fetched.

Thirdly, it is submitted that the demarcation of environment as being a non-Union matter does not sit well with the holistic definition accorded to the phrase and the geographical realities of Zanzibar and Tanzania Mainland. A few examples serve to support this contention: The fact that ocean vessels plying between the two jurisdictions know no boundaries and oil spills on the ocean would spread into the territory of the other requiring joint coordination in operations to address the threat. Equally, traces of residues contained in fine dust particles from factories situated on Tanzania Mainland

46 No. 20 of 2004.

47 See Item 2 of the First Schedule.

48 See Item 5 of the Schedule to the Draft Constitution of June 2013.

49 Ibid., see Item 21 of the First Schedule.

may find their way into Zanzibar, which would require coordinated action by the environmental bodies.[50]

It is also on record that illegal activity centered on international trade in wild animal species has on some occasions involved Zanzibar as a transit route, ostensibly due to a lack (or laxity) of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) enforcement organs at exit points in Zanzibar. The United Republic of Tanzania ratified CITES (an MEA) in 1979.[51] Although a cooperative enforcement mechanism to implement this international agreement has since been established, implementation challenges of the MEA have persisted on the part of Zanzibar.[52]

The incidents discussed above merely reveal the tip of the ice-berg in the complicated arrangement in dealing with the environment outside the framework of the Union. However, they help to make a case for re-thinking the issue of environmental protection within the Union arrangement in the course of deliberations on developing a more vibrant constitution. The drafters of the new constitution could consider addressing the environmental problems identified in relation to the Union between Zanzibar and Tanzania Mainland by including the environment in the list of Union matters, while delving into the thorny issue of natural resources, such as oil and gas, which are included in the list of Union matters under the current framework of the Constitution separately.[53] It is now apparent that the precarious nature of the treatment of environmental issues in the Union between Tanzania Mainland and Zanzibar requires a clear distinction

50 See MARO, F., *Tanzania Mainland and Zanzibar Island Socio-Economic and Environment Study*, Dar es Salaam: Economic and Social Research Foundation, 2008; and UNITED NATIONS ENVIRONMENT PROGRAMME (ed.), *Preliminary Transboundary Diagnostic Analysis of Land-based Activities: Marine Pollution. Regional Synthesis Report*, Nairobi, 2007.

51 See http://cites.org/eng/disc/parties/chronolo.php for a list of the contracting parties. Tanzania is a member of this convention having ratified it in 1979.

52 See UNEP, CITES, IUCN and TRAFFIC (eds), *Elephants in the Dust: The African Elephant Crisis. A Rapid Response Assessment*, Arendal: GRID-Arendal, 2013, at http://www.cites.org/common/resources/pub/Elephants_in_the_dust.pdf; and http://www.wildlifeextra.com/go/news/tanzania-ivory.html#cr.

53 See Item 15 of the First Schedule of the Constitution of the United Republic of Tanzania.

between the phrases "environment" and "natural resources." This supports the distinction that was made at the outset.

6. CONCLUSIONS AND RECOMMENDATIONS

The distinction between environment and natural resources was made at the outset of this article to highlight the need to treat environmental rights as a distinct category in constitution-making in Kenya, Uganda and Tanzania. It has been noted that courts of law have been innovative in expounding the rights to a safe and decent environment, first in the absence of legislative provisions and later with the enactment of framework environmental legislation.

The article has revealed, by using case law, that the application of the doctrine of precedent (horizontally) does not guarantee citizens their environmental rights. The introduction of framework environmental legislation has been backed up by constitutional provisions providing environmental rights in Kenya and Uganda. It has been pointed out that the constitutions of these two states do not reflect the letter or spirit of the East African Community's approach to environmental protection, leaving this to a relatively shaky foundation in the form of framework environmental laws. We have noted that Tanzania is still in the process of enacting a new constitution and has a framework law which could be used to enforce environmental rights. A case has been made for Tanzania not towing the path taken by Kenya and Uganda, which have chosen not to reflect environmental rights initiatives at the regional level in their constitutions.

It has been submitted that not recognising the environment as a Union matter in the draft Constitution of the United Republic of Tanzania is at odds with the country's international obligations regarding environmental protection. The "Zanzibar factor" in the evolution of the EAC also makes a strong case for Tanzania instituting a regional approach of inclusion by guaranteeing environmental rights to the people of the region, regardless of their countries of origin. It has also been submitted that a clear distinction between environment and natural resources is necessary in the face of competing claims from both sides of the Union on the inclusion of some aspects of natural resources in the list of Union matters in the Constitution of the United Republic of Tanzania.

The drafters of the new constitution have made an effort to recognise environmental rights in the draft Constitution. The effort could be improved with unequivocal provisions stating that the state has an obligation to provide for the right to a clean, decent and healthy environmental on the basis of the public trust doctrine. This right should be considered as a human right which can be claimed by any person (not just Tanzanian citizens), and that the state has an obligation to protect this right. In this regard, Tanzania would be a trend-setter for Kenya and Uganda, with other countries in the East African Community to follow suit, by amending their constitutions to take on board reforms identified in this article.

In order to be meaningful and effective, the recognition of environmental rights in the Constitution in Tanzania should be backed up by educating and sensitising citizens on their roles, duties and responsibilities in enforcing the right on a continual basis.

This article has confined itself to an analysis of only three of the states forming the EAC. Future studies may expand on this study considering all the states in the EAC region, as the pursuit of environmental rights and related challenges faced by the region have significant implications for other regional initiatives affecting all Partner States.