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DECENTRALIZATION OF NATURAL RESOURCES MANAGEMENT: REFLECTIONS ON THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA

By

Prof. Hamudi Ismail Majamba*

Abstract

This article aims to provide input into the ongoing deliberations on the enactment of a new Constitution for the United Republic of Tanzania, to replace the existing one that was enacted in 1977.[1] Its main objectives are two-fold: First is to inform stakeholders and raise their awareness on aspects of the relationship between decentralization of natural resources management and the Constitution to enable them to contribute more effectively in on-going Constitutional law making process and related discussions.[2] Second is to establish a foundation upon which the legal basis for the entrenchment of provisions on decentralization of natural resources management could be adequately addressed in the Constitution of the United Republic of Tanzania. The paper is confined to Mainland Tanzania. It does not address Zanzibar, which would require a separate study given the nature of the Union and the complexity surrounding natural resources management in each part of the Union.[3]

1.0 Introduction

Tanzania's landscape of about 945,000 square kilometers,[4] comprises of ocean, lakes, arable and non-arable land mass, hills and mountains, with variety of minerals and precious metals.[5] The country is also rich in wildlife, water, fisheries and forest resources found within national parks and the numerous Game Reserves and Game-Controlled Areas. All these resources have within them a variety of biodiversity.[6] One of the main characteristics of the natural resources generally, and

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[1] Cap. 2 [.R.E. 2002].

[2] The phrase "natural resources' has been used in a limited sense in this paper. It does not include the overall 'environment,' The use of the phrase has been confined to land and resources beneath land such as gold, oil and gas and those above land such as wildlife and forests.

[3] For example, although environment (forest, fisheries etc) is not a Union matter, oil, petroleum and gas are a Union matter, despite the controversy surrounding the placing of some of these resources in the list of Union matters.

[4] See *http://www.state.gov/r/pa/ei/bgn/2843.htm.*

[5] See (http://www.tanzania.go.tz/mining.html#Mineral%20Resources%20Endowments); The Africa Report, 23rd September 2011 - 'New Discoveries boost Tanzania's Gas Reserves' (at: http://www.theafricareport.com/index.php/201109235170875/reuters-feed/new-discoveries-boost-tanzania-s-gas-reserves-5170875.html). For more information kindly visit: http://www.tpdc-tz.com/tpdc/.

[6] See generally http://www.tanzania.go.tz/naturalresourcesf.html

that found in Tanzania, in particular is that they are all found on land. The difference is only that some of these are found underneath the land and others on the land's surface.

The natural resources in Tanzania are utilized, managed and regulated by different laws whose mandate is derived from the Constitution, principal legislation and subsidiary legislation. Both principal and subsidiary legislation address a multitude of processes relating to the management of natural resources that cut across many sectors. Regulations are one of the types of subsidiary legislation which govern the natural resources sector legislation made under the principal legislation. Regulations are ordinarily made by Ministers. The other type is the by-laws made by local government authorities, including Village Councils. The Regulations and by-laws have a great and direct impact on management of natural resources as they emanate from local government authorities, to whom power has been decentralized to and where majority of citizens live.[7] However, due to the limitations to which this paper has been confined, the Regulations and by-laws would not be analyzed. Suffice to point out that some of the challenges of the use of Regulations and by-laws in the conservation and management of natural resources that have a bearing on decentralization have been addressed in other studies.[8]

It is apparent therefore from the foregoing that there exists a system of rules, norms (laws) to govern utilization and control of natural resources. Indeed, the concept of decentralization is in-built in the body of laws governing natural resources enumerated above. First and foremost, the Constitution which is the fundamental law of the land has in-built features reflecting the decentralization concept. Accordingly, it provides that Parliament is the only organ that is empowered to make laws, including those related to control and management of natural resources. The Constitution itself provides for an avenue for other organs to make law, on its behalf. Further down the line, at the level of local government, there are by-laws which are the most prominent in determining the utilization and control of natural resources among local communities. Indeed, the local government district and urban authorities legislation has a number of provisions empowering local governments to determine the use to which natural resources could be put to and how the resources could be utilized within their jurisdictions.[9]

Despite the existence of such provisions, natural resources have continued to be used without local governments being effectively involved or properly consulted. This has led to occasional cries of foul play from local community members. In some cases, local communities have been displaced to pave way for the extraction of

[7] AIKAELI, J (2010) *Determinants of Rural Income in Tanzania: An Empirical Approach*, Research on Poverty Alleviation, (REPOA), Research Report 10/4 at p. 1.

[8] See Ministry of Natural Resources and Tourism, (2007) *Analysis of Conflicts between Central and Local Government Authorities in Implementing The National Forest and Beekeeping Programme in Tanzania: Case Study of Local Government Authorities' By-laws*, Dar-es-Salaam and NSHALA, R., NGOITIKO, D. & GARDNER, B. (1999) *The Role of Village By-Laws in Community-Based Natural Resource Management in Tanzania, Legal Background and Guidelines for Facilitators.* EPIQ / USAID, Dar es Salaam.

[9] See for example items 5, 94 and 95 of the Schedule to the Local Government (Urban) Authorities Act, Cap. 288 and sections 75 (c) and 147 (2) (c) of the Local Government (District) Authorities Act, Cap. 287.

minerals and have claimed not to have benefited. There are numerous complaints on the non payment or meager payments as compensation that is paid (when it is paid) to local communities when they are displaced from their ancestral lands to pave way for exploitation of natural resources such as wildlife and minerals.[10] Huge tracts of lands have continued to be grabbed villagers under the guise of privatization and investment leaving villages at the brink of extinction. The urgency of focusing on decentralization in general and that of natural resources management in particular, cannot be over-emphasized in Tanzania. This is because there are over 33 million citizens in the country spread over 945,000 square kilometres of land area who depend on 114 Local Government Authorities to provide them with the services.[11] The existence of controversies on decentralization of management of natural resources in Tanzania in the light of provisions of law that ostensibly reflect the decentralization concept, or at least make an effort to do so, calls for a deeper insight on the provisions of these laws.

2.0 The Constitution and Decentralization of Natural Resources - An Overview

2.1 The Decentralization-Constitution Connection

There are number of views on what the concept of decentralization generally entails. It is not intended to reiterate or reflect on all these views in this paper. Suffice to point out, however, that despite the variance in views, the general consensus is that decentralization consists of transferring authority and supervisory control to the lower level in the governance structure. Further that such transfer seeks to make local governments responsible for the provision of a wide variety of goods and services while at the same time being efficient, flexible, equitable, accountable and participatory.[12]

Literature on the relationship between decentralization and the management of natural resources in different jurisdictions, including the East African regions is in abundance.[13] The general agreement on the relationship between decentralization and management of natural resources is premised on the principle of subsidiarity. This principle states that decisions ought to be made at the lowest possible level in the decision-making process where competencies exist. The underlying aim being to ensure effective implementation of policy and legislation (in our case that governing natural resources management) minimizes costs and maximizes social well-being.

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[10] See generally SHIVJI, I. (2002) *"Village Governance and Common Pool Resources in Tanzania."* in *Policy Implications of Common Pool Resource Knowledge in India, Tanzania and Zimbabwe*, (DFID), London, UK

[11] http://www.poralg.go.tz/lga/index_intro.php (visited 12th January 2012).

[12] MNIWASA and SHAURI, (2001) *Review of the Decentralization Process and its Impact on Environment and Natural Resources Management in Tanzania,* LEAT Research Report, LEAT Dar-es-Salaam.

[13] See RIBOT, J.C (2002), *Democratic Decentralization of Natural Resources: Institutionalizing Popular Participation,* WRI, Washington DC. Ribot provides very useful sources on this topical theme in the seven page list of references. For specific examples on the topic in Africa, see also RIBOT, J.C. (2003) *Democratic Decentralization of Natural Resources: Institutional Choice and Discretionary Power Transfers in Sub-Saharan Africa*, Public Administration and Development, Vol. 23, No. 1 January 2003.

The nexus between Constitutional provisions and decentralization of natural resources generally has also been addressed by a number of authorities. Some of these authorities have specifically zeroed in on the link between entrenching provisions on decentralization of natural resources in the Constitution and effective management of such resources by local authorities.[14] The views on this issue are admittedly wide and diverse. Some authorities have pointed out that the existence of Constitutional provisions on decentralization of natural resources has not led to improved utilization of the resources. Such authorities have cited a number of examples to support their contentions.[15]

On the other hand, there are those who state that Constitutional provisions providing for the decentralization of natural resources has provided some basis for ensuring that a country's natural resources are not utilized to the detriment of and against the wishes of the citizenry. A notable feature of the arguments advanced by both sides in this debate is that the Constitutional provisions by themselves would not ensure effective decentralization of natural resources. It has been pointed out that factors, such as the capacity (in terms of among other things, financial and human resources) of local authorities may not be conducive to meet the expectations of the citizens. Bad governance at the local governance level has also been noted to deter efforts to enforce Constitutional provisions on decentralization of natural resources. In some cases, there have been some tensions between Central and Local Governments, where the former have been reluctant to devolve rights outright, preferring a more cautious approach.[16] What is also evident from the available literature on the subject is that social, cultural, economic and political factors have a great role in determining the extent to which decentralization of natural resources would be effective where Constitutional provisions exist. In view of this reality, the concept of decentralization of natural resources management in every country's laws should be analyzed in view of its peculiar social, cultural, economic and political factors.

3.2 The Constitution and Decentralization of Natural Resources

3.2.1 Introduction

Being the fundamental law of the land, the Constitution overrides all laws made under its authority. This is a rule that cannot be abrogated. It is due to this truism that many authorities have rightly argued that where Constitutional provisions provides for a right, then it would be difficult for authorities (including courts of law) to temper with such right. It is within this context, that arguments have been made for the entrenchment of a Constitutional provision providing for the decentralization of natural resources management in the on-going discussions for the enactment of a new Constitution in Tanzania. Ostensibly, such arguments have assumed that the current Constitution has some shortfall in this respect. The assumption of the lacuna

[14] See for example, HAYSOM and KANE, (2009), *Briefing Paper. Negotiating Natural Resources for Peace: Ownership, Control and Wealth*, Henry Dunant Center for Humanitarian Dialogue, Geneva, Switzerland; See also RIBOT, J.C and LARSON, A. *Democratic Decentralization Through a Natural Resource Lens* available at https://netfiles.uuiuc.edu/ribot/shared/161edr01.pdf.

[15] See for example RIBOT, J.C (2002) *op.cit.* note 4 at pp. 7-8.

[16] See FERROUKHI, *L et al*, *Local Practices and the Decentralization and Devolution of Natural Resource Management in French-Speaking West Africa* (available at www.fao.org/docrep/x3030E/x3030e08.htm).

or perceived inadequacy in the Constitution has partly been due to the tensions that have been reported in the media on the discontentment among a cross section of citizens and stakeholders on the misuse, mismanagement and abuse of natural resources across the spectrum.[17] The belief among many stakeholders seem to be that if the Constitutional provisions protect natural resources, then there would be no plunder of the resources currently being experienced. A meticulous review of the provisions of the Constitution and the principal and subsidiary legislation made under the authority of the Constitution, however, reveal a dearth of provisions addressing decentralization of natural resources management in a relatively holistically manner. An outline of some of these provisions supports this contention:

Constitutions in most jurisdictions generally and those in Africa, in particular, have elaborate and holistic provisions on ownership, control and management of natural resources. These include Papua New Guinea, South Africa, Nigeria, Iraq, Russia, Indonesia, Kenya and Uganda. Some of the underlying reasons for entrenching provisions calling for the decentralization of natural resources in Constitutions have been identified as being for purposes of ensuring political stability. The argument being that where natural resources are not seen to benefit local community members, anarchy may rein. The other argument is based on economic stability. Here, it has been stated that there is a need to ensure that resources bring about improved livelihoods for citizens and where resources are converted for the use of all, then provision for compensation ought to be clear. Along the same line, it is emphasized that efforts must be made to ensure that foreign investors are not locked out, leading to economic disturbances.

It is also apparent that the Constitutional provisions that address natural resources management in these jurisdictions differ. Some of the provisions have focused on aspects of maintaining sovereignty over the resources, placing ownership of the resources either in the government (State) to be held in trust for the people, or to the peoples themselves through a blanket provision.

3.2.2 The Constitution of the United Republic of Tanzania, 1977[18]

Although not explicit, the Constitution of the United Republic of Tanzania in its Article 27, places onto all citizens a duty to protect and manage the natural resources within the entire United Republic of Tanzania. The Constitution has also addressed the concept of decentralization generally. Its coverage of decentralization in the context of natural resources management is however, skewed. The coverage of the concept of decentralization is implied within the framework of delegation of law making functions, where government authorities, (at the central and local levels) can enact laws, including those that seek to regulate the management of natural resources.

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[17] See for example: *"Case for Environment, Natural Resources in New Constitution,"* Daily Newspaper, 20th January 2012: *"Secrecy in Oil Deals Would Trigger Chaos, Government Warned."* Citizen Newspaper 26th January 2012 and *"Listen to Experts on Uranium: MPs,"* Citizen Newspaper, 22nd August 2011.

[18] Cap. 2 [R.E. 2002]

Decentralization at the local government level is provided for in Articles 145 and 146 of the Constitution. The former provides that local government authorities shall be established by enactments of Parliament. Accordingly, such local governments shall be established in every region, district, urban area and in villages. The latter Article provides for the purposes and functions of the local government authorities. It is within this article that elements of natural resources management could be inferred. The Article provides that the purpose of local governments is to transfer authority to the people in among other things, planning and implementing development programmes within their areas. In this regard, programmes that have a bearing to natural resources management are impliedly addressed. The local authorities have also been entrusted with the power to enforce laws, including those that have a bearing to natural resources management.

4.0 Principal Legislation on Decentralization of Natural Resources

4.1 Local Government

In the course of giving effect to the directives of Article 145 and 146, Parliament passed the Local Government (District) Authorities Act and the Local Government (Urban) Authorities Act in 1982. These have elaborate provisions on natural resources management. They address the management of land, minerals, water, forest, wildlife etc. Subsidiary legislation made under the Local Government Acts also make some attempt to address issues relating to the management of natural resources at the level of local government. Experience has shown that the process of enacting legislation for natural resources management under the Local Government Act has done little to improve the livelihoods of local community members and to ensure sustainable utilization of natural resources. In some cases communities have seen little and sometimes no benefits accruing to them as a result of such laws. Problems that have been associated with this state of affairs include bad governance structures at the level of the District and village governments' level, limited capacity of local government authorities in understanding the intricacies of legislation and lack of serious commitment by government to devolve full responsibilities to the authorities at the lower level in the governance structure. The limitations placed by principal legislation on the nature and types of laws that local authorities could legislate has been noted to be another hindering factor.[19] A review of the sector laws also reveals that these have made attempts to address conservation and management of natural resources at the local level.

4. 2 Land

The Village Land Act[20] was purposely designed to ensure that land and the natural resources found in village lands would be used solely for the benefit of local communities. The Act empowers the Village Councils to manage land, as trustees, on behalf of the villagers and those persons who are resident in village lands.[21] To some extent the enactment of the Village Land Act has brought an end to the uncertainty that surrounded the legal ability of village to protect and natural resources found in their lands. The enactment of the provisions of the Tanzania Investment Act,

[19] See Ministry of Natural Resources and Tourism (2007), *op.cit.*
[20] Cap. 114 [R.E. 2002]
[21] Section 8

1997 that sought to ensure that no foreigner owns land in the country were deemed to have been further efforts to ensure that local governments' security of tenure in the management of natural resources on their lands was guaranteed. These legislative provisions have, however, failed to meet the intended objective. Efforts to attain this relatively progressive move in the land tenure regime in Tanzania has, however, been hampered by unscrupulous persons who have managed to obtain large tracts of village land in some parts of the country, overriding the decentralization initiative by the Village Land Act and leaving villagers in desperate situations.[22] The provisions of the Land Use Planning Act, 2007 also have implications for the management of natural resources under the decentralization concept as it seeks to protect the environment of human settlements in order to attain sustainable development.[23] Under this law, villages have been vested with powers to plan the use of lands in their jurisdictions.[24]

4.3 Other Select Natural Resources Sector Laws

The emergence of the community-based conservation paradigm in the late 1990's witnessed a mushrooming of policies propagating for devolving unto local community members' rights to access, utilize and manage natural resources within their lands in East Africa.[25] A number of legislation were promulgated to give effect to the policy aspirations in Tanzania. Models for decentralization were crafted into the legislation in the forestry, fisheries, wildlife and water sectors, to mention but a few.[26] A review of the select laws will serve to highlight the general trend and the challenges in the effort to use sector legislation in decentralizing the management of natural resources.

4.3.1 Natural Resources on the Land's Surface

4.3.1.1The Forest Sector

The Forest Act contains provisions that seek to improve forest governance at the level of local communities in an attempt to do away with the "control and command approach" which is common with most natural resources legislation and adopt an approach that seeks to include community members living in proximity in the management of natural resources. The Forest Act seeks to devolve powers to local government authorities and local communities. Section 22 (1) of this law empowers the Minister to declare, by Order published in the *gazette*, any area rich in biodiversity to be a local authority reserve. The Act's two main objectives are seek: *"to delegate responsibility for management of forest resources to the lowest possible*

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[22] See International Land Commission 2011, International Land Commission Annual Report, (available at: http://www.landcoalition.org/publications/2010-ilc-annual-report

[23] See section 3 (f) and (i) of the Act.

[24] See generally Part V and specifically section 22.

[25] See generally BARROW, E., GICHOHI, H. & INFIELD, M. (1998) *A Review of Community Conservation Policy and Practice in East Africa. Institute for Development Policy and Management.* University of Manchester and IIED. London.

[26] LEADER-WILLIAMS, N., KAYERA, J.A. & OVERTON, G.L. (eds.) (1996) *Community-based Conservation in Tanzania,* IUCN Gland and Cambridge and JAMBIYA, G., JONES, C., BAKOBI, B. & KIWANGO, E. (2000) *Community Based Conservation (CBC) Experience in Tanzania: An Assessment of Lessons Learnt. Summary Report* Wildlife Division, EPIQ / USAID and GTZ, Dar es Salaam.

level of local management consistent with the furtherance of national policies"[27] and *"to promote coordination and cooperation between the forest sector and other agencies and bodies in the public and private sector in respect of the management of natural resources."* [28] The first objective reflects the spirit of devolution of power to local government authorities and the second seeks to address situations where potential conflicts may arise in the course of implementing cross-sector natural resources management processes or activities. The Act lays emphasis on consultation amongst institutions in order to reconcile and resolve conflicts over the management plans and policies relating to forest reserves at the local level.[29]

The by-law making powers of local government authorities, provided for under the Local Government (District) Authorities Act and the Local Government (District) Authorities Act, have been subjected to conditions in the event the proposed by-laws relate to the management of forest reserves. Draft copies of proposed by-laws on forest management must be submitted to the Director of Forestry for scrutiny, guidance and recommendations.[30] Unlike the requirement for uniform by-laws made under the provisions of the Local Government (District) Authorities Act and the Local Government (District) Authorities Act, the village by-laws for forest management need not be routed through District Councils where they follow the format prescribed by the Director of Forestry.[31] The Director of Forestry may also prepare and publish model by-laws for forest reserves to be managed by local authorities. The incentive to adopt such model by-laws by local government authorities is great as this will make them avoid the stringent requirements of submitting proposals of by-laws to the Director of Forestry and thereafter having to comply with directions, recommendations and comments issued by him.[32] This procedure, although well intended, could be detrimental to the devolution process, since the decisions of the Village Council could be reversed by the Director.

Despite the efforts to decentralize the utilization and management of forest resources, the forest sector has been experiencing serious challenges. Local authorities to whom the management and control of forests have been vested in have been blamed for the crises. In some cases, the government's slow pace in effectively devolving powers to the local authorities has been cited as being a setback to the decentralization process.[33]

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[27] Section 3 (d) of the Forest Act.
[28] Section 3 (g).
[29] Section 8 (2) – (5) of the Forest Act
[30] See section 31 of the Forest Act
[31] Compare with section 37 (1) (a) of the Forest Act where by-laws in respect of village land forest reserves must be routed through the District Council.
[32] Section 31(5) exempts local authorities from the conditions where they adopt the model by-laws.
[33] See generally, Milledge, S. et al, (2007) Forestry, Governance and National Development: Lessons Learned From a Logging Boom in Southern Tanzania, TAFFIC/East.Southern Africa /Tanzania Development Partners Group/MNRT, Dar-es-Salaam, Tanzania

4.3.1.2 The Wildlife Sector

The decentralization paradigm in the Wildlife Conservation Act[34] is reflected in the administration of Wildlife Management Areas (WMAs) which entails, among other activities, devolving onto local communities the planning and managing of wildlife resources found on their lands. The WMA Regulations, made by the Minister, have placed an important role of management of WMAs on local government structures. The Village Council is responsible for coordinating natural resources activities at the village level, formulating natural resources management by-laws and overseeing the implementation of sector policies while entering agreements in the management of or investment in a WMA.[35]

District Councils also have responsibilities under the WMA Regulations. They are required to facilitate the District Natural Resources Advisory Bodies (DNRAB) in carrying out their functions, which include arbitration, conflict resolution and administering cross-sectoral issues. The DNRABs are to be established in every District and the District Forest Officers are members of the Bodies to provide oversight and advice.[36] Despite its good intentions, the WMA concept has been riled with governance problems that have been attributed to a number of factors, challenging the innovative decentralization initiative under the Wildlife Conservation Act. Some of the challenges faced in the process of decentralizing powers under the WMA concept, at the initial stage, came from investors (both local and foreign) who made a number of attempts to distort the concept, in some cases lobbying local district and village authorities, to refuse the concept. Some of the powerful "stakeholders" in the wildlife industry, using NGOs, even instituted court cases, in an attempt to stall the process.[37] The fruits of the WMA process are evident today.[38] This success could not have been realized if it were not for the personal initiatives and efforts of some dedicated officials from the Wildlife Division who stood their ground and refused to be detracted. Despite the limited success, the experiences of the WMAs initiative strongly suggest that in the absence of Constitutional provisions, the decentralization initiative in the management process could be hijacked to the detriment of local community members and wildlife resources.

The new approach in granting of hunting blocks under the provision of wildlife laws, as one form of decentralization, has also revealed serious problems to a sector that contributes greatly to the country's GDP. Hunting concessions have been issued under very questionable and dubious arrangements, creating friction between local communities and investors on the one hand and local communities and the

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[34] Act No. 5 of 2009. The processes of promulgating most Regulations under this Act to make it fully operational were still underway at the time of conducting this study.

[35] See Regulation 21 (d) and (h) of the WMA Regulations.

[36] See Regulations 26, 27 and 30.

[37] See MAJAMBA, H.I. (2006) *"Integrating Local Communities in the Policy and Legislative Framework for Wildlife Conservation and Management in Tanzania,"* Uongozi, Journal of Management and Development Dynamics, Vol.18 Issue No. 2, Mzumbe University.

[38] See for example Wami-Mbiki WMAs success at http://inece.org/newsletter/16/africa/tanzania.html (6th February 2012). Also see: WILFRED, P. (2010), *"Towards Sustainable Wildlife Management Areas in Tanzania,"* Mongabay.com Open Access Journal –Tropical Conservation Science, Vol. 3 (1): 103-116.

government on the other.[39] Initially, the law had given a lot of discretion to the Director, but this was later addressed when the law was revised. However, the initiative to change the allocation of hunting block system, as one aspect of decentralizing the hunting industry in Tanzania has continued to face stiff challenges from a cross-section of stakeholders, mainly some foreigners using some politicians.[40] Again, fortunately, the wisdom of the top-most official in the Ministry has helped to ensure that the provisions of the law are complied with.[41] In the absence of officials with such determination, things could easily take a drastic turn! Having in place Constitutional provisions to address such scenarios, in the management of natural resources, would certainly be useful under such circumstances.

4.3.1.3 The Framework Natural Resources Law

The Environmental Management Act[42] (EMA) is the framework law that governs the management of all natural resources in Tanzania. Its provisions cover a wide range of natural resources, making a lot of cross-referencing to almost the whole corpus of natural resources legislation. The provisions of EMA have some aspects of decentralization. For example, it provides that the Minister responsible for environment shall be responsible for the coordination of environmental issues between the Central Government and local government authorities.[43] Further, the Minister is empowered to issue guidelines of a general nature to sector Ministries, government departments, District Environmental Committees and other local authorities.[44] The Act further provides that the development of environmental management policies and processes should take into account the principle of public participation. It further directs local government authorities to have regard to environmental management principles and promote the National Environmental Policy. Another clear reflection of the decentralization approach adopted by EMA is where it directs local government authorities (City, District and Town Councils) to appoint or designate Environmental Management Officers. The duties of these officers include the provision of advice to environmental management committees, preparation of periodic reports on the state of local environment, review of by-laws on environmental management and on sector specific activities related to the environment.[45]

The cross-reference to the Local Government (District) Authorities and the Local Government (Urban) Authorities Acts by EMA is yet another reflection of the decentralization initiative of in some aspects.[46] Section 39 of the Act also requires every District Council to designate for each Ward, Village, *Mtaa* and *Kitongoji* a public officer to be known as an Environmental Management Officer who would coordinate functions and activities for protecting the environment. EMA also reflects the concept of decentralization of management of natural resources with regard to

[39] See NSHALA, R. (1999) Granting Hunting Blocs in Tanzania: The Need for Reform, LEAT, Dar-es-Salaam.
[40] See *'No Change of Heart on Hunting Permits,'* Citizen Newspaper, 11th January 2012.
[41] See *'Dar Expels 85% foreign hunting firms,'* Guardian Newspaper 2nd October 2011.
[42] Cap. 191 [R.E. 2002].
[43] Section 7(3) and (4) of the Act.
[44] See section 13.
[45] See section 36 (1) and (3).
[46] Section 37.

environmental planning. Section 42 the Act provides that each local government authority must prepare an environmental action plan. Despite the well intended decentralization provisions, EMA has not been fully implemented since most regulations to operationalize it are still in the pipe-line. Furthermore, conflicts and tensions between sector Ministries and the central and local government authorities have still persisted, 8 years since EMA came into force.[47]

4.3.2 Natural Resources Beneath the Land's Surface

Minerals resources, which are beneath the surface have generated tensions, conflicts and displacement of local communities or at best turning them into squatters on lands they had previously held time-immemorial under customary tenure to facilitate mining operations.[48] Stakeholders have denounced lack of transparency in oil, petroleum and gas exploration deals and payments of taxes by firms engaged in the explorations.

4.3.2.1 Petroleum

The Petroleum (Exploration and Development) Act, No. 27 of 1980, makes provision for exploration and extraction of petroleum but it does not have any provision for consultation of local authorities where such activities are conducted. Although it seeks to provide for surface rights for purposes of grazing and cultivation, section 73 of the Act clearly states that where petroleum is discovered, such rights are affected where they interfere with exploration or development. Section 74 which makes provision for compensation is also not helpful since discretion to determine and pay the compensation is granted to the Commissioner under section 76 of the Act. The Act does not provide for any criteria on the method or system that the Commissioner would employ in the assessment process. The discretion given to the Commissioner under the Act is enormous and in the light of the fact that there is no provision for consultation of local authorities, the aspect of decentralization under the provisions of this Act is seriously wanting. Local communities therefore have no representation on how the resources under this Act that are found in their vicinity are managed or utilized.

4.3.2.2 Oil and Gas

The Mining Act, No. 14 of 2010, regulates the law relating to prospecting for minerals, mining, processing and dealing in minerals, to granting, renewal and termination of mineral rights, payment of royalties, fees and other charges. The Act only applies to minerals defined under the provisions of section 4. Accordingly, the phrase 'minerals' is defined to mean: *"any substance, whether in solid, liquid or gaseous form, occurring naturally in or on the earth, or in or under the seabed formed by or subject to a geological process, but does not include petroleum or surface*

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[47] See "Marine Conservation Agreements: A Practitioner's Toolkit," at http://www.mcatoolkit.org/Country_Analyses/Tanzania.html.

[48] See for example, *'Tanzania's Mining Controversies'* Kikwete's New Headache, Citizen Newspaper, 1st May 2010; Globe and Mail (Business Mail), "Barrick's Tanzania's Project Tests Ethical Mining Policies, 29th September 2011 (available at: http://www.theglobeandmail.com/report-on-business/rob-magazine/barricks-tanzanian-project-tests-ethical-mining-policies/article2183592/singlepage/).

water." It is important to point out here that the Act does not include petroleum, which as noted above is regulated under a separate law.

Section 23 of the Act establishes a Mining Advisory Board whose composition does not include any representative of the local government authorities. The inclusion of a representative of the small scale miners (section 23 (3) (vii) may be applauded as a step in the right direction in terms of representation. However, this does not guarantee that the local government authorities in areas where mining activities would be carried out would be represented. In any event, one representative of the small scale miners who are spread all over the country engaging in different mining activities, with ostensibly different challenges is a mere bluff in the decentralization parlance.

Unlike the Petroleum (Exploration and Development) Act, the Mining Act at least makes some direct reference to local government authorities with a view to devolving onto them powers to direct the manner in which mining activities are conducted in their jurisdictions. Section 95 (1) (b) of the Act makes some attempt to reflect the decentralization aspect but seriously waters down this effort with the wording at the end, making a mockery of the whole concept where it provides: *where any consent so required is, in the opinion of the Minister and on the advice of the Board being unreasonably withheld, the Minister may, on such conditions if any as he may impose, direct that the need for the consent shall be dispensed with, and in that event this paragraph shall not have effect in so far as it required the consent of the lawful occupier to be given."*

The review above reflects just the tip of the ice-berg on what pertains in relation to decentralization of natural resources management in most sector laws. It shows that the existing body of laws that have attempted to decentralize the management, control and utilization of natural resources is plagued by a number of problems. Most of the provisions in the body of these laws that seek to decentralize management of natural resources have been subjected to some element of oversight by authorities at the central level. In other sector laws, a lot of discretionary power on the management of natural resources has been granted to authorities under the control of the Central government. In some cases, the provisions leave room for conflicting mandates which does not augur well with the concept of decentralization of natural resources, despite the initiative by EMA to address potential challenges. In general, the decentralization initiative attempted by the provisions of the sector natural resources management laws is inadequate and leaves room for potential abuse. This places the resources and the lives of the citizens who depend on them in jeopardy. It is partly in this context that the fears of not having specific Constitutional provision providing guidance on the decentralization of natural resources find support.

5.0 Lessons from Constitutions in Other Jurisdictions

The decentralization of management of natural resources has been implied in Constitutional provisions relating to ownership of the resources, by vesting the resources in the State as trustee of the citizenry. The Indonesian Constitution provides that the land, the waters and the natural resources within shall be under the

powers of the State and shall be used to the greatest benefit of the people.[49] Another example is the Constitution of Nigeria where Article 44, states that the entire property in and control of all minerals, mineral oils and natural gas in under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation. The Constitution of Venezuela, in its Article 12, provides that the mining deposits and of hydrocarbons; *"[...] existing in the national territory, under the bed of the territorial sea, in the exclusive economic zone and the continental platform, belong to the Republic, are goods of the public dominion and, therefore, inalienable and imprescriptible."* In some cases, the Constitutions have integrated the natural resources within the confines of territorial sovereignty. A case in point is the Constitution of Russia where Article 9.1 provides that *"the land and other natural resources shall be used and protected in the Russian Federation as the basis of the life and activity of the peoples living on their respective territories."*

In other jurisdictions, the natural resources have been placed directly under the control of the people with provision for ensuring the resources are protected for use by future generations and in accordance with international law. The Constitution of Papua New Guinea provides a classic example, where in Part I, Article 2.2, it provides: *"The sovereignty of Papua New Guinea over its territory, and over the natural resources of its territory, is and shall remain absolute, subject only to such obligations at international law as are freely accepted by Papua New Guinea in accordance with this Constitution."* The approach adopted by the Iraqi Constitution also places emphasis on vesting management of natural resources to the people by way of the decentralization approach. Article 111 of the Constitution of Iraq provides that oil and gas are owned by all the people of Iraq in the regions and governorates.

In other countries, the Constitutional provisions clearly refer to devolution of management of natural resources. In others, however, this is inferred. Examples of Constitutions that have adopted this approach are those of Iraq, Canada, Russia, Kenya and Uganda. Article 112 of the Iraqi Constitution sets a very good example. It provides: *"First: The federal government, with the producing governorates and regional governments, shall undertake the management of oil and gas extracted from present fields, provided that it distributes its revenues in a fair manner in proportion to the population distribution in all parts of the country, specifying an allotment for a specified period for the damaged regions which were unjustly deprived of them by the former regime, and the regions that were damaged afterwards in a way that ensures balanced development in different areas of the country, and this shall be regulated by a law. Second: The federal government, with the producing regional and governorate governments, shall together formulate the necessary strategic policies to develop the oil and gas wealth in a way that achieves the highest benefit to the Iraqi people using the most advanced techniques of the market principles and encouraging investment."*

The Constitution of Kenya, 2010, in its Chapter 11 (Article 174) provides for the objectives of devolution generally and makes some slight reference to natural resources management in 174(g) where it states that one of the objectives is to *"ensure equitable sharing of national and local resources throughout Kenya"* Chapter

[49] See Articles 33 (2) and (3)

5 of the Constitution which deals with Land and Environment (Article 62) defines public land to include all natural resources effectively placing natural resources under the watch of all citizens. In re-iterating the intent of Article 62, Article 71 (1) (a) of the Constitution of Kenya provides that: *"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;"*

Article 176 (2) (f) and (g) of the Constitution of Uganda brings to the fore a relatively new paradigm in the system of decentralization where it places the Central government under the watch of local government. The Article provides that:- *"(f) persons in the service of local governments shall be employed by local governments; and (g) local governments shall oversee the performance of persons employed by the Government to provide services in their areas and to monitor the provision of Government services or the implementation of projects in their areas".*

Due to the critical nature of management of natural resources it would have been very helpful if the above provision had categorically empowered local governments to deal with the resources, to avoid the intricacies of statutory interpretation which could be applied to restrict local governments in the powers vested onto them.

Like the Constitution of Uganda, that of South Africa contains provisions that have been crafted in a manner that requires one to read between the lines, making cross-referencing to various Articles of the Constitutions to infer the link between provisions on decentralization and those on natural resources management. Articles 151, 152 and 154 of this Constitution provides detailed provisions on the concept of decentralization, stating the powers of local authorities in general issues of governance. However, the Article that has some bearing on decentralization and management of natural resources is Article 25 (4) (a) which is under the Part dealing with property in general. This Article provides that: *"the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources;..."*

6.0 Conclusion and Recommendations

6.1 Conclusion

This paper notes that the connection between the provisions for decentralization and management of natural resources is not addressed directly by the Constitution of Tanzania. This connection can be traced in the provisions of the laws enacted to regulate local governments, the Local Government Urban and District Authorities Acts of 1982, whose shortcomings have been pointed out. A review of the body of laws governing natural resources management in Tanzania suggests that the concept of decentralization of natural resources has been addressed and efforts are being made to ensure that local communities have control and are involved in the governance and management of natural resources in their vicinity. An in-depth review of selected sector natural resources conservation laws, regulating wildlife, forests, oil, gas and petroleum, however, reveals that there is potentiality for conflicting mandates among authorities and institutions charged with management of the resources. Some of the provisions of these laws place local

government's power at the periphery and may also be detrimental to the management or natural resources. Local government authorities remain very fragile unless they are given legal and administrative recognition in the Constitution. As the provisions of most sector laws reveal, local governments in some cases, have generally depended on the goodwill of administrative authorities at both the central and local government levels.

The provisions of select Constitutions in other jurisdictions have been analyzed with a view to evaluating the extent to which they may be resorted to in providing guidance on how the corpus of laws governing natural resources in Tanzania could be used effectively to ensure that local communities that are targeted in the decentralization process derive benefits from them in order to improve their livelihoods. It has been pointed out that the approaches adopted by Constitutional provisions in other jurisdictions are diverse and generally reflect the existing political systems. However, important lessons that could be learnt are that some of the provisions have been crafted in a manner that provides some guarantee in the decentralization of management of natural resources at the local government level. In some cases, the Constitutional provisions on local government are detached from those relating to management of natural resources at the local government level. The link in these is difficult to grasp in some cases and would require persons knowledgeable in law to establish the link. A common trend amongst some of the Constitutional provisions of other jurisdictions (including that of Tanzania) reveals that there is little attention on placing an express right or duty of ownership, control and management of natural resources on different levels of government to develop and share benefits from such resources.

It should be clearly stated here that the entrenchment of provisions in the Constitutions would provide a better foundation for effective implementation in attempts to devolve unto local communities' the right and control in the use and management of natural resources under the concept of decentralization. This assumption, however, must be qualified by empowering local governments with the necessary tools to enable them undertake this task. It is acknowledged that a lot more needs to done to address the politics of decentralization holistically if the benefits of decentralization of natural resources are to be meaningfully achieved.

The limitations, to which the paper has been confined, could not enable an in-depth analysis of the politics of decentralization in their entirety. All the same, studies have shown that the management of natural resources at the local level has often been crippled with conflicting interests at the detriment of local community members. The provisions of the laws have been sometimes interpreted by authorities to deny local community members the right to access, use, manage and control natural resources in their areas. This state of affairs has not only increased animosity between government and local communities, but has also put in jeopardy the potential of investments in some areas, which is detrimental to development.

6.2 Recommendations

The basic finding of this paper is that the provisions in the current Constitution of Tanzania, like in some other jurisdictions provides for decentralization. It has also been observed that there also exist provisions that place a duty on citizens to protect

natural resources. It is apparent that the link between these provisions is skewed. Lessons from other jurisdictions provide some leeway for improving the Constitutional provisions with a view to providing a solid foundation for the management of natural resources by local government authorities through the decentralization concept.

One, there is a need to link the provisions on decentralization and management of natural resources in the Constitution rather than leaving the matter to be addressed by sector natural laws. A combination of the approach adopted by the Constitutions of Uganda, Kenya and South Africa, with modifications, could provide a useful guide. The modification needed is for the Constitutional provisions to categorically provide the decentralization- natural resources management link in one part, rather than in separate, and sometimes fragmented provisions in separate parts (provisions) of the Constitution. The requirement of subjecting agreements on the exploitation of land and natural resources (both on the surface and beneath the surface) to Parliament for approval is important. It is recommended that such agreements be also made public and in Kiswahili, a language that is comprehensible to the majority.

Where local community members are to be displaced to pave way for utilization of natural resources, provision for compensation, in line with the approach taken by the Article 25 (1) of the Constitution of South Africa could be adopted. The Article provides, *inter alia*, that property (including land) shall only be taken for public purposes or in the public interest. In such a case, the amount of compensation must be agreed by those affected or approved by a court of law. It provides further that such compensation and the time and manner of payment must be equitable, reflecting an equitable balance between the public interest and the interest of those affected. To avoid the misapplication of the phrase "public interest," Article 25 (4) (a) is explicit:"*... public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources*"