Legal Gaps in the Implementation of Environmental Law at the National and County Level in Kenya

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Purpose: The main purpose of this study was to establish legal gaps in the implementation of environmental law at the national and county level in Kenya.

Methodology: The study employed desktop research by studying available secondary sources including republication journals. The study involved a critical review of these studies to establish knowledge gaps.

Results: Results findings from literature shows that environmental laws in Kenya have always faced many lapses during implementation. Results further indicates that lack of political will is a problem in the implementation of these environmental laws.

Unique Contribution to Theory, Practice and Policy: The government should formulate a comprehensive integrated environmental rights delivery strategy with sufficient institutional support and funding. Such strategy should focus on providing environmental justice through the implementation of existing legislation and fostering public participation in the implementation of environmental rights. The strategy should also envisage continuing environmental education among stakeholders.

Keywords: Implementation, environmental law, national level, county level
1.0 INTRODUCTION

Environmental agreements articulate international approaches to address environmental challenges. There are estimated to be over 700 different international environmental agreements, at bilateral, regional and multilateral levels. As environmental treaties proliferate, so do the challenges of implementing them. Most importantly, many national administrations, especially in developing economies, lack the capacity necessary to effectively implement. ‘Implementation’ in this legal context refers to all relevant laws, regulations, policies, and other measures and initiatives, adopted or taken to meet obligations under an environmental agreement (Rose, 2011).

The 1992 Rio Declaration on Environment and Development and Agenda 21 emphasized the need to develop endogenous capacity in the legal and institutional areas, which is critical for sustainable development. In the past two decades, developing countries have taken remarkable steps towards developing sustainable legal institutional frameworks for improved environmental management. A multitude of legislative and institutional building activities resulted in the creation of ministries of environment and their executing arms and the enactment of a new generation of legislation (Rose, 2011). Consequently, almost every country now has a ministry or agency empowered to implement a wide range of activities for the protection of the environment, conservation and sustainable use of natural resources.

Environmental ministries are usually established at cabinet level and are responsible for implementing the frameworks for environmental laws and for formulating environmental policies. Environmental agencies have also been set up at some provincial levels to assist in the implementation of national strategies and to improve the assessment and monitoring of resource use. Municipalities and local councils provide assistance in the execution of national environmental policies, as well as by initiating their own resource protection measures.

Environmental laws are put in place to mitigate or prevent the threatening environmental problems which emanate from human activities in the quest for economic growth and development. These laws which are formulated to address perceived crisis and environmental problems involve many stakeholders with varying interest and power. Because of this difference in interests, many stakeholders bear the wrought of the laws while other benefits (Okafor, 2011). These human activities which cause environmental problems can be controlled or prevented, or even modified and improved so that they will not cause severe problems to the environment which in turn affect the inhabitant of the environment. Some of these activities, which can be economic, social or cultural, are: oil exploration and exploitations; fishing; quarry; constructions; urban developments; drilling; forests exploitation (Okafor, 2011).

These human activities release some obnoxious and dangerous substances to the environment which alter the original state of the environment. Example of such substances is Greenhouse Gas (GHG) which alters the climatic condition of the earth system. This alteration causes climate change which affects both the developing and developed countries of the world. African countries experience the impact of the climate change more than any other countries because of their low coping/adaptation strategies and less effective laws (Jagtap, 2007; Msheila, 2005; Nwafor, 2007), though they introduce lesser amount of substances to the environment (Afrique en Ligne, 2010).
Since independence, the process of implementing environmental rights in Kenya has encountered a myriad of challenges. For example, until about a decade ago, the country never had any law or policy specifically designed to address violations of environmental rights. Litigants had to resort generally to the law of contract and tort to redress environmental breaches. Environmental matters were strictly private law affairs that were of less concern to the main branches of public law (Ojwang, 1992). These were compounded by the fact that the country’s environmental law regime was characterised by the existence of a variety of sectoral laws dealing with specific issues of environmental conservation, improvement and protection. Such a fragmented legal framework made the implementation of environmental rights elusive (Okidi, 1994).

This called for the consolidation of the existing environmental laws with a view to producing a comprehensive legal framework for environmental management and governance that would in turn enhance the enforcement of environmental rights in the country. Worse still, Kenya’s environmental law regime was characterized by the existence of a variety of sectoral laws dealing with specific issues related to environmental conservation, improvement and protection (Bosek, 2014).

The promulgation of a new constitution in August 2010 signified a paradigm shift in so far as the implementation of environmental rights is concerned. In contrast to its predecessor, the 2010 Constitution of Kenya strengthens the implementation of environmental rights. In particular, it significantly expands the scope of fundamental rights as well as their enforcement mechanisms. The article evaluates how the new Constitution deals with the question of the implementation of environmental rights in Kenya. It reviews the efficacy of both the normative and institutional mechanisms put in place to implement environmental rights. It also highlights the potential challenges to the enforcement of these rights in the country. As a way forward, the article suggests approaches to enhance the effective implementation of these rights (Bosek, 2014).

The desperate search for a sustainable framework for the effective management of the environment culminated in the enactment of the Environmental Management and Co-ordination Act (EMCA) in 1999. Although it was largely expected that the enactment of the EMCA would facilitate the realization of environmental rights in Kenya, this did not happen. Rather unfortunately, the Act turned out to be too weak for such an expectation. The repealed Constitution did not make matters any better as it failed to expressly give credence to environmental rights and their implementation.

The Government of Kenya has set environmental conservation monitoring guidelines with the aim of promoting sound environmental management standards and ensures that environmental management is followed at all stages of development, through best practices, governed by the National Environment Management Authority (NEMA). In the year 2003, the Government of Kenya published legal obligations relating to compliance with environmental standards and legislative requirements covering all existing enterprises including firms, industries, warehouses, factories, fuel stations, power stations, quarries, mines and any ongoing projects specified under the second schedule of the Environmental Management and Coordination Act (EMCA). The first environmental tool to be considered is environmental impact assessment (EIA). This is a systematic process that examines the environmental consequences of development actions in advance (Glasson, 2005) and is conducted prior to the construction of the fuel service
station (ideally at the project design stage) in order to identify and mitigate significant environmental impacts at construction, operation and decommissioning.

1.2 Statement of the problem
Conservation of environment is a very important project that must be taken with seriousness it deserves. This is because environment is all what supports and sustains life. In the recent, the world has found itself at the bad sight effects resulting from environmental degradation that range from global warming, heavy down flows that causes landslides, tsunamis, encroachment of drought and human-animals conflicts. In regard of this phenomenon, many countries have, local governments and United Nations on environmental conservation have developed environmental laws to curb this alarming situation. Despite these bold steps, implementation of these policies, treaties and laws on environmental conservation have not materialized fully. Bosek (2014) conducted a study about implementing environmental rights in Kenya’s new constitutional order: Prospects and potential challenges. Mputhia, Mukulu and Keriko (2012) conducted a study on Awareness as a Determinant of Compliance with Environmental Regulations by Micro and Small Enterprises in the Manufacturing Sector in Nairobi, Kenya. The study presented two research gaps; methodology gap and conceptual gap. Mukwindidza (2008) conducted a study on the Implementation of Environmental Legislation in the Mutasa District of Zimbabwe. This study presents a contextual gap because the study was carried in Mutasa District of Zimbabwe. The current study is carried in Kenya in the context of national and county government. This study therefore attempts to establish legal gaps in the implementation of environmental law at the national and county level in Kenya.

1.3 Research objective
i. To establish gaps in the implementation of environmental law at the national and county level in Kenya

2.0 LITERATURE REVIEW
2.1 Theoretical framework
2.1.1 Rational choice theory
Rational choice theory gives decision-makers the opportunity and models of ranking alternatives with the aim of choosing the alternative with the highest expected utility. In order to arrive at the most appropriate alternative each of the various alternatives is weighed against its possible consequences and risks. An alternative is given first preference if its consequences and risks are minimal.

The rational choice theory is useful in the policy-making process when deciding on the agenda status of an identified problem. Not all problems identified will be solved simultaneously. It is the problem which needs urgent attention and which has the least expected risks and maximum benefits that will be attended to first. When decisions are made to identify a problem in the application of rational choice theory and whether is used consciously or unconsciously. Even when formulating policy, the rational choice theory is used to decide on the best policy objective which will address the real problem. When various methods of policy implementation are put in place,
policy-makers use the rational choice theory to decide which method will be most effective in the light of the problem in question.

2.1.2 Ecological Modernization Theory

This paper is also anchored on the ecological modernization theory. Ecological modernization is employed as a notion for depicting prevailing discourses of environmental policy. Early formulations of ecological modernization were constructed around a projective theory intended to inspire rigorous technological innovation capable of achieving extremely ambitious improvements in energy and materials efficiencies. The major figure associated with the political-discursive and social-constructionist perspective on ecological modernization (Hajer, 1995). For Hajer (1995), ecological modernization is not so much a prediction of strong tendencies to industrial ecological progress as it is a category for describing the dominant discourses of the environmental policy arenas. In addition to Hajer’s constructionism being in stark contrast with the objectivism of the core literature in ecological modernization, Hajer’s view is that ecological modernization is environmental protection. Ecological modernization is often used as a synonym for strategic environmental management, industrial ecology eco-restructuring, among others (Ayes, 1998). Ecological modernization has tended to give primary emphasis to environmental improvements in the private sector, particularly in relation to manufacturing industry and associated sectors. Murphy (1997), for example, refers to state policies that make possible the internalization of environmental externalities as being instances of ecological modernization.

2.2 Empirical Review

Bosek (2014) conducted a study about implementing environmental rights in Kenya’s new constitutional order: Prospects and potential challenges. The 2010 Constitution has initiated a paradigm shift in the implementation of environmental rights in Kenya. In contrast to its predecessor, the Constitution strengthens the enforcement of environmental rights, as it significantly expands the scope of fundamental rights as well as their enforcement mechanisms. This notwithstanding, the process of implementing environmental rights in the country faces numerous challenges. The country had no law or policy specifically designed to address violations of environmental rights. Litigants had to resort generally to the law of contract and tort to redress environmental breaches. Environmental matters were strictly private law affairs that were of less concern to the main branches of public law. Worse still, Kenya’s environmental law regime was characterized by the existence of a variety of sectoral laws dealing with specific issues related to environmental conservation, improvement and protection. However the promulgation of the new constitution brought hope in the implementation of environmental laws though faced with implementation challenges. This study presents a contextual gap in that, the study focused Kenya as a whole in studying challenges facing implementation of environmental laws. The current study focuses on gaps in the implementation of environmental laws both at the national level and at the county level.

Mputhia, Mukulu and Keriko (2012) conducted a study on awareness as a determinant of compliance with environmental regulations by Micro and Small Enterprises (MSE) in the manufacturing sector in Nairobi, Kenya that ranges from productivity, creation of more jobs,
cleaner environment, and healthier workplaces amongst other benefits. The study adopted a mixed design approach. The target population was 358 MSEs from which a sample of 10% (36 MSEs) was selected by stratified random sampling. Data was collected by administration of questionnaires supplemented by interviews and observation schedule. The study established that awareness of environmental regulations influenced compliance with environmental regulations. The study presented two research gaps; methodology gap and conceptual gap. It has methodology gap in the sense that this study employed mixed design approach. This current study has employed desktop research design. It has conceptual gap because the study focused on awareness as a determinant of compliance with environmental regulations by Micro and Small Enterprises in the Manufacturing Sector in Nairobi, Kenya. The current study is seeks to establish gaps in the implementation of environmental law at the national and county level in Kenya.

Yatich, Awiti, Nyukuri, Mutua, Kyalo, Tanui and Catacutan (2007) conducted a study on policy and institutional context for NRM in Kenya: Challenges and opportunities for Land care. The existence of many land-related laws, some of which are incompatible, has resulted in complex land management regimes, giving rise to fragmented interventions, poor land administration, and inadequate provision of agricultural services. The consequences are serious environmental problems aggravated by social, economic and political factors. Today, significant progress is evident in rule-making, paving the way for adoption of more integrative approaches to natural resources management (NRM), including the more sustainable Land care. This review paper concludes that the existing policy context is neither inhibitive for Land care nor does it require new policies, due to the existing complex institutional architecture, the introduction Land care approaches in Kenya should be pragmatic and nuanced, Land care adoption will not only lead to achievement of national goals, but international obligations as well, the relevance and longevity of Land care is dependent on appropriate modes of integration and a coalition approach appears to have the potential mode for integrating Land care in Kenya. The study by Yatich, Awiti, Nyukuri, Mutua, Kyalo, Tanui and Catacutan presented a conceptual gap because it focused on Policy and institutional context for NRM in Kenya: Challenges and opportunities for Land care. The current study is seeks to establish gaps in the implementation of environmental law at the national and county level in Kenya.

Kanyi (2014) conducted a study to determine the factors affecting environmental best practice compliance among retail fuel service stations within Thika East Sub-County. To achieve this objective, the study was guided by the following specific research objectives; the effect of factors especially the influence of capital adequacy, influence of skills competence and ecological development on environmental best practice compliance status. Primary data used questionnaires, field observations of the facilities and interviews were done at times by telephone when the respondents needed clarifications. Secondary data was acquired through reviews of several Acts to help assess the level of compliance in relation to legislation, data from journals, project reports, maps, library books and the internet were used to generate data for the study. The study conducted a census of the 19 retail fuel service stations within the Thika East Sub-County.

The key findings of this research indicate that capital is very essential of which 49% of firms have affirmed to this and stated that the financial resources were available to the management of the fuel stations to initiate the required EBP compliance. The findings further indicated that the firms
had employed skilled competent employee to manage the oil product. On technology the
study found out that 79% of respondents stated that the firms enhance EBP positively by use of
recommended piping systems, automated dispensers and ATG system. This prevents and
minimizes fuel leakages and hence ground, air and water pollution. The key findings of this
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automated dispensers and ATG system. This prevents and minimizes fuel leakages and hence
ground, air and water pollution. It is recommended for best practice that fuel service stations
need to allocate and avail more finances to invest in Environmental Best Practice (EBP). The study by
Kanyi presented a contextual and methodological gap. It has contextual gap because it was carried
in Thika East Sub County. The current study is targeting both the national and county governments.
Methodological gap is presented in the sense that the study by Kanyi used both a questionnaire
and study of available literature sources to come up with a conclusion. The current study is
employing desktop study to come up with study conclusions.

Nyandika (2007) examined environmental problems associated with tea factories in Kenya. The
study found out that the underlying causes of environmental problems in the tea industry in Kenya
are mainly the over utilization of primary resource base such as forest products and water,
inadequate use of appropriate technologies, weak enforcement of environmental laws and
insufficient support towards technology change.

Mukwindidza (2008) conducted a study on the Implementation of Environmental Legislation in
the Mutasa District of Zimbabwe. Successful implementation of environmental legislation and any
other legislation is determined by various factors. Some of the factors include environmental
education, environmental awareness programmes, consistency in implementing environmental
legislation, coordination of all stakeholders, willingness of communities to co-operate and the
political will by political office bearers. This research revealed that the methods used to implement
environmental legislation in the Mutasa district of Zimbabwe are ineffective. Poverty is the main
reason for activities leading to environmental degradation. Communities in the Mutasa district of
Zimbabwe are ignorant of environmental legislation which govern their activities. Environmental
education and environmental awareness programmes are rarely carried out. The political office
bearers in the Mutasa district lack the political will to ensure that environmental legislation are
enforced. This study presents a contextual gap because the study was carried in Mutasa District of
Zimbabwe. The current study is carried in Kenya in the context of national and county government.

Matovu (2006) conducted a study on the Challenges in Monitoring and Enforcement of
Environmental Laws in Uganda. Results of the study showed that among the problems affecting
monitoring and enforcement of environmental laws are problems arising from failures at different
institutional linkages for environmental management and How to transfer management and
enforcement responsibility to local authorities and to resource users level. This study presents a
contextual gap because the study was carried in Uganda. The current study is carried in Kenya in
the context of national and county government.
2.3 Research gaps

Bosek (2014) conducted a study about implementing environmental rights in Kenya’s new constitutional order: Prospects and potential challenges. This study presents a contextual gap in that, the study focused Kenya as a whole in studying challenges facing implementation of environmental laws. The current study focuses on gaps in the implementation of environmental laws both at the national level and at the county level.

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3.0 METHODOLOGY

The study employed desktop research by studying available secondary sources including republication journals. The study involved a critical review of these studies to establish knowledge gaps.
4.0 CONCLUSION AND RECOMMENDATIONS

This paper presented the following conclusions and recommendation:

The government should formulate a comprehensive integrated environmental rights delivery strategy with sufficient institutional support and funding. Such strategy should focus on, among other things, providing environmental justice through the implementation of existing legislation and fostering public participation in the implementation of environmental rights. The strategy should also envisage continuing environmental education among stakeholders. The education programme should be coordinated by qualified environmental education officers at both the national and county levels of government. The programme should also focus on capacity building through the dissemination of information and the training of volunteers. Universities, colleges, high schools and primary schools can also be targeted for such education and training. Increasing awareness and education are important because it is necessary for people to know of their rights before their implementation.

Measures should be put in place to guarantee access to information and community participation in environmental decision making. This will encourage communities to support government policies and initiatives related to the environment as it will give communities the feeling of being ‘partners with government’.

An integrated environmental rights delivery strategy may not be possible without the establishment of a co-ordination agency. With the existence of a devolved system of government, there is a need to have a co-ordination agency to streamline the implementation of environmental rights at both levels of government. The agency may also mediate disputes that may arise between the national and county governments in the course of the implementation of environmental rights. The agency should be empowered to create accessible claim mechanisms for environmental rights breaches at both levels of government to enable people to find redress more speedily.

Apart from the measures discussed above, there must be the political will to enforce environmental rights. Political leaders, both at the national and county levels of government, must work together to inculcate environmental stewardship in the country. They must show their commitment to the implementation of environmental rights by taking environmental issues more seriously. A show of commitment by the political class will automatically encourage the people they lead to follow suit.
REFERENCES


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