

# THE DRAWBACK OF THE RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT IN TANZANIA; ANALYSIS OF THE LEGAL FRAMEWORK

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## INTRODUCTION

Today in Tanzania, there is a bill of rights which provides for several rights. This is found under the constitution of the United Republic of Tanzania and this bill of rights was incorporated in 1984 following Tanzania's fifth constitutional amendment.<sup>i</sup>

However, there has been concern and criticism of Tanzania's Human Rights record in recent years. Some sources have further suggested that Tanzania's Human Rights record deteriorated significantly under President John Magufuli's reign.<sup>ii</sup>

On the downside however, despite the fact that there has been a down-sore of human rights in Tanzania, the right to a clean and healthy environment does not even form part of the bill of rights. However, on the upside, statute law in Tanzania such as the Environmental Management Act<sup>iii</sup> has provided for the right to a clean and healthy under Section 4. The right to a clean and healthy environment despite it not forming part of the bill of rights has further been supplemented by case law such as the case of *Joseph Kessy et al Vs. Dares Salaam City Council*<sup>iv</sup>.

This paper shall seek to highlight that the right to a clean and healthy environment plays an integral role in attainment of sustainable development. But the fact that it is does not form art of the bill of rights in Tanzania, this paper shall show how much this is an obstacle in the attainment of sustainable development.

## BACKGROUND TO RIGHTS IN TANZANIA

To understand the origins of rights in Tanzania, it is idealistic to take a journey back in history of Tanzania as a nation. Tanzania was colonised by Germany and later the Britain as a protectorate of the League of Nations. In the colonial era, native Tanzanians had no rights whatsoever. It was not until 1961 after Tanzania, then Tanganyika attained independence that the first glimpses of rights were observed mainly because the country was now in the political, social and economic control of Tanzanians in particular under the stewardship of Julius Kambarage Nyerere.<sup>v</sup>

With gaining independence, independence came along bearing fruits such as a new constitution. The 1961 constitution did not however have a bill of rights. Despite the 1961 constitution going through several amendments, it was not until 1984, that for the first time a bill of rights was included in the constitution as a result of the fifth amendment.<sup>vi</sup> However, a point to note is that not all rights are enforceable in Tanzania. Article 7(2) of the constitution<sup>vii</sup> provides that provisions of Part II of the constitution are not enforceable by any court.

### *Background to the Right to a Clean and Healthy Environment*

It is prudent to understand what the right to a clean and healthy environment means at this juncture. A clean and healthy environment entails elements including clean air, a safe climate, access to safe water, and adequate sanitation, healthy and sustainably produced food, non-toxic environments in which to live, work, study and play and a healthy biodiversity and eco systems.<sup>viii</sup>

From a Tanzanian perspective, a clean and healthy environment is defined under section 4 of the Environment Management Act to include; the right of access by any citizen to the various public elements or segments of the environment for recreational, educational, health, spiritual, cultural and economic purposes.

A healthy environment can also mean safe food and water, clean surroundings and clean air.<sup>ix</sup>

Environmental issues were first put to the forefront by the United Nations in 1972 through the United Nations Conference on the Environment in Stockholm. This marked the beginning of

the right to a clean and healthy environment as a right calling onto states to work together in ensuring people get to enjoy the right to a clean and healthy environment.<sup>x</sup>

The right to a clean and healthy environment is a human right. On July 28, member states of the U.N. General Assembly voted overwhelmingly to adopt a historic resolution<sup>xi</sup> that recognizes that a clean, healthy and sustainable environment is a human right. It is important to note however that the said resolution<sup>xii</sup> is not legally binding, experts say it can give rise to constitutional and legal changes that will positively impact the environment and human well-being.

In Africa, the Constitutions of Lesotho, Malawi, Mozambique, South Africa and Uganda have provisions that specifically provide for peoples' rights to a clean, safe and healthy environment.<sup>xiii</sup> This is not the case for Tanzania as the right to a clean and healthy environment does not form part of the bill of rights. However, statutory law and case law does provide for the right to a clean and healthy environment in Tanzania. Tanzania is also party to several regional and international legal instruments that provide for the right to a clean and healthy environment some of which include, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal of 1989, United Nations Convention on Biological Diversity of 1992, Bamako Convention on the Ban on the Import into Africa and the

Control of Transboundary Movement and Management of Hazardous Wastes Within Africa 1991, the Africa Charter on Human and Peoples Rights, 1981 also known as the Banjul Charter.

Tanzania's efforts to protect its environment became more pronounced with the enactment of National Environment Management Act 1983 which Act established a National Environment Management Council (NEMC) and entrusted it with the overall mandate of overseeing compliance with rules and regulation governing environmental management and protection.

## **ANALYSIS OF THE LEGAL FRAMEWORK GOVERNING THE RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT IN TANZANIA**

This section shall analyse both domestic and international legal instruments governing the right to a clean and healthy environment in Tanzania.

### ***National Environmental Policy in Tanzania***

Policy literally means set of principles that guide ordinary sequence of action. The Tanzania National Environmental Policy of 1997 provides for a structure for making major changes needed to bring environmental attention to the mainstream of the management in Tanzania and laying plans which help launch the determination of priority actions, and analysis of policies involved with environment.<sup>xiv</sup> There are several objectives of the National Environmental Policy. But those in regard to environment and sustainable development include;

- i. Ensure sustainable and equitable use of resources with little degradation of the environment including land, water and vegetation whilst considering health and safety of man.
- ii. To improve the condition of productivity of degraded areas in both rural and urban areas in an effort to make such environment safe for human settlement
- iii. To raise public awareness so that individuals and the community at large can collectively protect the environment thus sustainable development.<sup>xv</sup>

The National Environmental Policy also provides for environmental impact assessments; environmental laws, institutional frameworks and setting minimum environmental standards.<sup>xvi</sup>

The National Environmental Policy also calls on Non-Governmental and other community-based Organizations in the private sector to participate in the promotion of environmental protection.<sup>xvii</sup>

### ***The Environmental Management Act***

The Environmental Management Act<sup>xviii</sup> governs environmental aspects in Tanzania. The Act provides for the legal and institutional framework for preservation and control of pollution of waste management;<sup>xix</sup> environmental quality standards;<sup>xx</sup> public participation;<sup>xxi</sup> compliance

and enforcement,<sup>xxii</sup> and the basis for implementation of international instruments on the environment.

section 4 defines the right to clean, safe and healthy environment to include the right of access by any citizen to the various public elements or segments of the environment for recreational, educational, health, spiritual, cultural and economic purposes.

Section 5 (3) is to the effect that the court, tribunal or any person exercising jurisdiction under the Environmental Management Act in relation to any decision, order or exercise of power or performance of any function to be guided by principles of environment such as the precautionary principle, polluter pays principle and the principle of inter-generational equity and intra-generational equity. This clearly highlights the concept of the right to a clean and healthy environment.

### ***Environmental Management (Hazardous Waste Control and Management) Regulations, 2021***

These regulations are a product of the Environmental Management Act<sup>xxiii</sup>. More specifically, they were made under sections 133(4) and (5), 135(1) and 230(2)(f).<sup>xxiv</sup> Regulation 4(1) provides for three major principles to be abided by.

These principles include; polluter pays principle, the precautionary principle, and the producer extended responsibility which principles all subsidise to sustainable development. That is to say any person generating, collecting, storing, transporting, treating, recycling, reusing, recovering and disposing of hazardous waste should be guided by the mentioned principles. This includes artificial persons like mine companies.

Further regulation 5 provides for the Cleaner Production principle. It states that anybody that owns or runs a facility which produces hazardous and toxic waste (for purposes of this study a mine for instance) shall diminish the toxic waste produced through adoption of cleaner production principles such as enhanced production process which have less or reduced toxic emissions at nationally acceptable levels.

In particular, Regulation 6(1) provides that all in Tanzania have the right to a clean, healthy and safe environment. It further imposes a duty on every person in Tanzania to protect the environment from undesirable effects of hazardous wastes and to inform the relevant authority



on any activity resulting from hazardous waste that is likely to negatively impact the environment and health.

Regulation 6(2) is to the effect that any producer of dangerous waste, shall be accountable for the sound management and disposal of such waste and shall be liable for damage to the environment and injury to human health arising thereby.

Regulation 61 stipulates that the management of industrial, consumer and chemical waste, that is to say, the management of industrial and consumer and chemical waste shall be conducted at designated sites or plant. It should be noted that mining activities result into major production of chemical wastes hence this regulation applies. By designating sites and plants to dump wastes, protects the environment.

Regulation 72 provides for disposal of hazardous waste for those who generate said waste. It stipulates that any person who generates hazardous waste shall ensure that the hazardous waste generated is disposed of in an environmentally sound manner, or taken by persons with collection and transportation permits issued under these Regulations. This too clearly highlights protection of the environment

### ***The African Charter on Human and Peoples' Right***

On 21 October 1986, the African Charter came into force.<sup>xxv</sup> Article 2<sup>xxvi</sup> guarantees enjoyment of all rights and freedoms stipulated in the Charter, free from discrimination of any kind.<sup>xxvii</sup>

Article 24<sup>xxviii</sup> is of seminal importance as it calls on member states to ensure that all peoples have the right to a fitting environment propitious to their development. This provision makes it clear that member states are under the obligation to protect the environment. The charter calls upon African states in other words to essentially enact environmental laws which must provide protection to the people and environment in general.

### ***The Treaty for the Establishment of the East African Community***

The East African Community (EAC) is regional block that consists of seven countries namely, Burundi, Kenya, Rwanda, Tanzania, Uganda, South Sudan and the Democratic Republic of the Congo.

The EAC was established in 1967. After just ten years, the EAC sadly collapsed. It was only in 2000 that the EAC was established again with three countries that is Kenya, Tanzania and Uganda. Rwanda and Burundi joined later to make it five countries including the original three. The regional block has since grown and extended its membership to two more countries in South Sudan which joined in 2016 and the Democratic Republic of Congo in 2022.<sup>xxix</sup>

Article 111<sup>xxx</sup> provides for Environmental Issues and Natural Resources. It recognizes that the member states should have in mind that development though important, some activities associated with development may have undesirable impacts on the environment. Such dangers include environmental degradation and depletion of natural resources. It empathises that a clean and healthy environment is essential.

Article 111<sup>xxxi</sup> further calls upon partner states to:

- i. protecting the environment against all forms of degradation and pollution arising from developmental activities
- ii. To co-operate and adopt common policies for control of movement of toxic and hazardous waste so as to minimize environmental degradation.
- iii. To notify neighbouring counties timely on natural and human activities that may or are likely to have major trans-boundary environmental bearing

Article 111(2)<sup>xxxii</sup> goes further to stipulate that partner states have the following objectives when taking action in relation to the environment that is to preserve, protect and enhance the quality of the environment.

Article 112 makes reference to Article 111 of the East African Community Treaty and suggests that partner states should among other things not only integrate environmental management and conservation measures in all developmental activities such as agriculture, industrial development, mining among others but also develop capabilities and measures to undertake environmental impact assessment of all development project activities and programmes.

### ***Universal Declaration of Human Rights***

The UDHR<sup>xxxiii</sup> is regarded as the blueprint for freedom and equality in the world. Its major aim is to protect rights of every individual universally enabling such individuals to live life freely, equally and in dignity.

The UDHR<sup>xxxiv</sup> was adopted on the 10<sup>th</sup> day of December 1948 by the UN. It was adopted to curtail and prevent the occurrence of vicious acts which infuriated to the core of mankind's conscience during the Second World War.<sup>xxxv</sup> Through its 3<sup>rd</sup> session, the General assembly adopted Resolution 217. For the first time in history, the world witnessed, fundamental human rights which were to be universally protected were set forth.<sup>xxxvi</sup>

Tanzania (formerly Tanganyika) became a member of the UN on the 14<sup>th</sup> day of December 1961. With the Union of Tanganyika and Zanzibar on the 26<sup>th</sup> day of April 1964 Tanzania as a single state was born.<sup>xxxvii</sup> The UN continued to recognize her so one could argue that the United Republic of Tanzania joined the UN in 1964.<sup>xxxviii</sup>

States are not legally bound by the UDHR<sup>xxxix</sup> as it is not a treaty but rather a resolution of the UN General Assembly. Despite this, the UDHR<sup>xl</sup> possess binding ability indirectly as it has acquired a status of acceptable customary international law as in the course of over six decades it has been accepted globally.<sup>xli</sup>

In its preamble, states are called upon to confirm their devotion to not only promoting equality of men and women in their respective states but also uphold the fundamental human rights with focus in the promotion of freedom, bettering people's standards of life and social progress. This although not directly mentioning sustainable development, highlights that every person has the right to better standards of life which among other things includes a clean and healthy environment which ultimately leads to attainment of sustainable development.

Article 8<sup>xlii</sup> calls upon states to endeavour that everyone has the right to a remedy by the competent courts of law in case fundamental rights which a person is so entitled to by the constitution or any other laws have been infringed. In Tanzania for instance, the right to a clean and healthy environment is provided for under the National Environmental Act.<sup>xliii</sup>



### ***Stockholm Declaration on the Human Environment***

This is at times referred to as The declaration of the United Nations Conference on the Human Environment.<sup>xliv</sup> It was an international conference convened in Stockholm, Sweden in June 1972.<sup>xlv</sup> It was the first major conference of a kind relating to issues concerning the environment which paved way for the development of international environmental beliefs and views.

The Stockholm Declaration advocated environmental policy goals and objectives. However, following Stockholm, global awareness of environmental issues increased vividly, with also increased efforts by the international community towards laws relating to environment.

The Stockholm Conference paved way for the international community to structuring and reaffirming already existing normative prospects regarding the environment, in the Rio Declaration. In other words, it acted as blue print for the right to a clean and healthy environment.

Since the adoption of the Stockholm Declaration the United Nations has put much effort into ensuring that the environment is protected from destruction. Thus, the UN has adopted conventions and instruments which aim at protecting the environment. Some of these instruments include the United Nations Convention on the Law of the Sea, the Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and their Disposal and United Nations Convention on Biological Diversity.<sup>xlvi</sup>

### ***The International Convention on Economic, Social and Cultural Rights***

The (ICESR) is the human rights instrument which is one of the most important instruments in protecting cultural, economic and social rights in the world. Article 12 (2) (b) is to the effect that states that state parties take steps to ensure the improvement of all aspects of environmental and industrial hygiene

This Article urges all the state parties to this convention to ensure that they protect the environment in their states, further cementing the fact that it is paramount in protecting the environment even from mining activities. Thus, governments must ensure that the environment laws are enacted and put in place in order to protect the environment.

## CONCLUSION AND WAY FORWARD

### *Conclusion*

The right to clean and healthy environment is one of the rights vested to all people in the world. It has been recognized and declared under international law whereby different instruments have been declared and impose obligations to state to fulfil, recognize, enforce and ensure enjoyment of the right to clean and healthy environment under domestic jurisdiction. In Tanzania the right to clean and healthy environment is not directly mentioned under the Bill of Rights rather it is provided for under statutory legislation and case law as earlier observed.

This deficiency in lacking of a specific constitutional provision on the right to clean and healthy environment makes the enforcement of this right hard, thus makes it ineffective to implement.

### *Way Forward*

After critical examination and analysis of the law, instruments and the legal regime governing the right to clean and healthy environment then the researcher gives the following recommendations;

Incorporation of the specific constitutional provision with regards to the right to clean and healthy environment. There is a need to have a specific provision which touches directly on the right to clean and healthy environment, there must be a specific provision like which is incorporated in the Constitution of the Republic of Kenya which will provide for recognition and enforcement of the all matters with regards to environment. It is recommended that the Constitution of the United Republic of Tanzania to be amended to include exhausted provisions on environmental protection.

The only existing provision in the constitution is not expressly to ensure protection of environment. Tanzania can use an example of Republic of South Africa Constitution which includes detailed and exhaustive environmental rights and environmental administration in generality. The constitution should include environmental rights as among the basic right to human being.

### ***Amendment of Environmental Management Act of 2004***

It is recommended that, the Environment Management Act of 2004 should be clearly amended to include some important enabling provisions to make practically possible in enforcement and implementation of environmental laws to ensure protection of the environment.

Further as it is seen that environment is life and without health environment there could be no life, it is highly recommended to the lawmaker to rethink and make amendment to include provision which will facilitate the establishment of workable environmental division in the court of law, dealing at the highest speed in litigation, with maximum due diligence in environmental issues.

### ***Reshuffle of Tanzania Environmental Institutions***

It is recommended that the government of Tanzania should reform environmental institutions to enable these institutions to have power for enforcing and implementing environmental law including some authority to impose sanction on environmental unfriendly activities. NEMC should be given enough resources including human resources competent to perform their duties at the highest standard. Moreover, each district to have workable and committed environmental committee with no element of politics which will be responsible for the environmental protection.

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