

**THE ROLE OF THE CHIEF'S ACT CAP 128 IN MANAGEMENT AND
USE OF NATURAL RESOURCES.**

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1.1 Introduction

Historically Kenya has experienced two types of governance, centuries old family, clan and community based African traditional systems and colonial/post colonial centralized governance based on European models. The two differed in their decision making process and both are still in use in the country in management and utilization of natural resources to include water, forests, agricultural land, pastures, minerals, fish and wildlife. Kenya is composed of various communities who occupy different ecological zones and their traditional resource management and utilization reflect their ecological conditions, land use pattern and their cultural history. Communities with strong cultural heritage are found mostly in arid and semi-arid lands where their unique life styles have not been interfered with by external forces and modernism. These communities still have strong cultural institutions which can be empowered to enforce conservation and utilization of natural resources. In high potential zones centuries old customary laws on resource tenure has been systematically eroded by central government institutions through series of laws and pronouncements during and after colonial period thus rendering its regulatory functions inactive or irrelevant. Except for a few, most of the communities now depend on strong central government institution to enforce sound management and utilization natural resources. The decision making powers was centralized because most early foresters and conservationists viewed the communities as destroyers of forests in their search for more land for agricultural activities to improve the welfare of their expanding members which had to be stopped in order to protect the remnants of forests for the sake of environment and protection of water catchments.

Despite central government agencies taking over management and utilization of natural resources most indigenous forests and woodlands are currently shrinking at an alarming rate and facing serious degradation which differ only by degree depending on the prevailing factors within the geographical region under consideration. These problems include encroachment by cultivators

- * Detail analysis and Appraisal of the Chiefs Authority Act (Cap 128)
- * Its role in management and usage of natural resources,
- * Its effectiveness on the management and usage of natural resources.
- * Changes on the Chief's Authority Act after IPPG and possible implications
- * The roles of the chiefs in relation to the management and usage of natural resources as spelt in civil service reform document.

2.0 CHIEFS AUTHORITY ACT CHAPTER 128 OF THE LAWS OF KENYA.

The Chiefs Authority Act is the backbone of administrative law of Kenya. It was enacted in 1937 and has since undergone various amendments and additions to cope with changing administrative requirements of the time. By interpretation a chief and assistant chief respectively mean the persons appointed for any area to the offices of chief and assistant chief. It is the duty of the a chief or assistant chief to maintain order and for that he shall have to exercise jurisdiction and powers conferred upon him over persons residing or being within such area. The Act empowers the chief with authority to maintain law and order in the area under his jurisdiction, it also empowers him to issue orders for certain purposes for the good of individuals and society. The Act is based on command structures where the chief gives orders which must be obeyed and does not have room for consultation and redress if negatively affected. It depends on strong support by other arms of the government mostly the executive to ensure the residents within the jurisdiction comply with the orders. These procedures are strong on law and order but weak in the area of management and utilization of natural resources. As stated elsewhere the Act was meant to serve the interests of central government and its principal agents not the other way round thus making impossible to address issues in which the government and agents are involved which is the case in forest management and utilization.

The Act has some provisions in which the chief can intervene on grounds of conservation of the environment on behalf of the government at the grassroots level. Given the recent changes in economic, political and legal spheres in the country the Act will need strong and sustained support

from members of the public for any orders issued to attain the desired results. Except for one subsection all other sections are not explicitly meant to play a major role in the management and utilization of natural resources at the grassroots level. However, for the purpose of our analysis some sections with some potential implication on the environment are discussed below.

2.1 Section 10: power of Chief to issue orders for a certain Purpose.

Under the section the chief is empowered to issue orders from time to time for purposes listed below. Out the 16 subsections the following 7 are relevant in the management and utilization of natural resources:

2.1.1 Poisonous or Noxious Plants

Subsection (c) prohibits or restricts cultivation of poisonous or noxious plants. This provides avenue to intervene in cases where a plant planted or retained by farmers have some proven negative impacts to other crops or humans and has to be eliminated from farmlands. The subsection has not been used in the past possibly due non prevalence of the problem. However, many plants have been introduced into the country by individuals and institutions with good intentions but have turned out to be dangerous weeds.

2.1.2 Pollution and obstruction of Watercourses

Subsection (f) prevents the pollution of the water in any stream, watercourse or water-hole and obstruction of any stream or watercourse. Water pollution has increasingly become a contentious issue in many areas of the country where there is concentration of people and industries or intensive agricultural activities using fertilizers and insecticides and other chemicals. Diversion of water by upstream residents is on the increase thus making down stream residents have less water for their daily needs. Rivers courses are public property protected by both Water and Agricultural Acts, citizens are stakeholders and thus need guaranteed access to good quality water for their basic needs. Despite the powers given to the chief by the Act there is widespread water diversion for irrigation and serious pollution along most rivers courses in the country but little has been done by chiefs to minimise these abuses. Although chiefs under pressure from senior government officials or members of the public have sometimes intervened to stop diversion of water a long

river courses such actions have been few and irregular. When it comes to use of water for other purposes except for the basic needs and cultivation along rivercourses the public is usually divided into two camps those negatively affected oppose and the beneficiaries support their actions. Intervention in such issues have never been popular to the few beneficiaries who will always blame the chief for denying them rights to improve their welfare and do create enmity which can become tragic at times.

2.1.3 Cutting and destruction of trees

Subsection (g) is the subsection is the only one which deals directly with management and utilization of trees. It provides avenue for regulating the cutting of timber and prohibiting the wasteful destruction of trees. The sub-section empowers the chief to regulate cutting of trees within his/her jurisdiction. However, it does not specify on whose land freehold, trustland or government land. Titles Act entitles the owner free use of the property and its resources thus chiefs orders may be taken to interfere with such rights which may lay ground for compensation claims. Laws governing forests in government land empowers respective institution the rights to manage and utilize the resources on behalf of the government, county councils for trustlands, Forest Department for gazetted forests and KWS for forests in game reserves. The chief has no powers to intervene unless with authority from the relevant institution or authorized in the specified Act. Lack of details what constitute wanton destruction has made some chiefs interpret the section differently at various times under varying or same circumstances. Various fora has cited the sub-section to have hindered tree planting in farms because its does not give the farmer the freedom harvest tree crop at will without the permission of a chief or forest official which is not the case with other crops on the farm. Reports of farmers being brought before courts and sometimes fined a large amount of money for cutting trees they had planted on their farms without permission highlights the problem which is real in the rural areas. Though the section was meant for good purpose but due to lack of details on the process of identifying negative actions and deliberate actions by land owners to better their welfare through management and utilization of trees has made the decision subjective and sometimes arbitrary. Cases of chiefs charging some fee

for permits or denying their foes such permits are reported to be prevalent thus lending credence that the sub-section has been misused.

2.1.4 Preventing construction of Game pits

Sub-section (j) empowers the chief to prevent the construction of game pits and rendering game pits already constructed harmless. It is useful in protection of stray wildlife from hunters and trappers, wildlife is being decimated in the country side except in parks and reserves through not only destruction of their habitats but hunting for food and trophies. However, the conflict between humans and wildlife is real in areas where farmers border parks or reserves. Destruction of crops, domestic animals and even loss of human life through marauding animals has caused so much suffering to farmers that wildlife officials have a heavy task to convince farmers that the animals are an important heritage to the country which need protection. The section also lacks details if the game pits were meant to prevent or trap destructive animals encroaching on farms or a tool of hunting. The section could be useful to areas where game poaching is rampant, however, most chiefs have not utilized the section for the purpose of wildlife conservation.

2.1.5 Controlling Grass Fires

Subsection (n) empowers the chief to control grass fires. It is a fact that grass fires started by farmers for farm clearing sometimes has led to destruction of forests and property. The chief is authorized to issue orders on use of fires by farmers in land clearing and pasture management because fires may cause damage to property in the neighbourhood. Though it lacks in detail the Grass Fires Act Cap 327 of the laws of Kenya compels anybody intending to use fires for purposes of inducing grass in semi-arid areas to give the neighbours a notice of at least 2 days to enable them prepare in case it gets out of control. It has been dormant, use of fire to prepare land for cropping and other purposes is widespread in the country.

2.1.6 Any other purpose appointed by the Minister in writing.

The sub-section allows the Minister to appoint chiefs to intervene at the grassroots on matters of local or national interest which the citizens must act for positive development. From experience such directives are never popular with the people due to the mode of approach which is through

orders with little education on its value filtering to the those to be affected by the orders. It also opens room for misuse of chiefs through such directives. However, in cases where there is urgent need for intervention for betterment of the environment and the society but not covered by the Act the provisions are essential.

2.2 Section 11: Further empowers to chiefs to issue orders:

Out of the 13 subsection outlined only one is relevant for the purpose of natural resource management and utilization while most deal with law and order:

2.2.1 Suppressing or controlling plant pests, noxious weeds or diseases.

This sub-section empowers the chief or agents to assist other wings of the government to mobilize the people within his jurisdiction to destroy or control weeds, pests and diseases identified and proclaimed so by a technical arm of the government. Weeds such as striga and water hyacinth, pests such pine and cypress aphids and diseases such as greening leaves of oranges have caused serious economic damage in Kenya by causing mass deaths of crops or loss of productivity. The subsection has not been invoked in the recent times but it has the potential to used to protect country from dangerous weeds, pests and diseases.

2.2.2 Any other purpose appointed by the Minister,

Subsection (m) gives provisions same as sub-section (p) above.

2.3 Section 13: Work and Services the purpose of conservation of natural resources

The Minister can authorize a chief to issue orders for the above purpose only if:

- * There are no volunteers to be paid wages for the work by the government
- * The work is urgent and necessary
- * The work is very beneficial to the community
- * Fair wages are paid to the workers by the government
- * Workers who die or get injured shall be compensated by the Government as stipulated in the Workmen's compensation Act.

* Exempted from such order are civil servants, paid employees, teachers, students, and any other persons exempted by the D.O., persons below eighteen years (18) and over forty five years old.

The section is useful in case of an emergency preventive action or rehabilitation for the purpose of natural resource conservation. The section on its present form has rarely been invoked but its colonial version was invoked to combat soil erosion through hill side planting, terracing and construction of dams mostly in Ukambani. It had no component of fair wage payment and was donned forced labour despite its good policy intentions for the conservation of fragile natural resources was so much resented that the positive aspects were lost because it was introduced in a dubious way with insufficient education on its benefits in the short term to the people involved. Given the condition fair wage payment unless otherwise in very remote area where there is no sufficient volunteers, in its present form it may not be invoked in the current situation of run away unemployment.

2.4 Section 17: Powers of a D.O. to require a chief to issue orders.

For the purpose of proper governance a D.O. is empowered to order a chief to issue or cancel orders for any purposes enumerated under section 10, 11 and 13. The D.O. may also himself issue order or orders. The D.O. may act in two ways, order cancellation of a useful order or order issuing of an good order which a chief failed to do so. Depending on the situation and direction of the order D.O. intervention adds another dimension to the authority of the chief which can be a positive development or negates purpose of the Act.

2.5 Section 18: Penalties for Disobeying Chiefs orders.

Persons who without lawful excuse disobeys or fails to comply with any lawful order issued by a chief or assistant chief as stipulated in sections 10, 11, 12 and 13 or D.O. under section 17 is liable to an imprisonment for not more than 2 (two) months or a fine not exceeding Kshs. 150 or both. The fine by today's standards is too low to deter offenders through inability to pay but the sentence is a deterrent.

2.6 Section 20: Offences by chiefs

The section lists penalizable offences which a chief or assistant chief can commit in the course of duty. Which include failure to exercise powers conferred by the Act and failure to issue or cancel orders as directed by D.O.

3.0 Effectiveness of Chief's Authority Act

Chiefs and assistant chiefs are important grassroots government officers who translate government policies into action in conjunction with technical arms of the government be it law enforcement or agricultural development departments. Their presence though a colonial legacy has been accepted as an important position to facilitate development and maintain law and order necessary to provide conducive environment for socio-economic development at the grassroots. Although there are many good things the chiefs and assistant chiefs are doing in the country many have read articles on the enormous powers of chiefs which have being used to trample the various rights such as civil, human, and constitutional rights of citizens guaranteed in the Kenya Constitution and Laws. Most of the grievances on the chief's Authority Act stem from the law and orders sub-sections which give the chiefs sweeping powers to ensure that law and order is maintained at all times. Politicians especially those in opposition have something to say or remember about the rights of assembly or association and how the chiefs have powers to deny them or break meeting under the law and order sub-sections.

The law and order and to a lesser extend brewing or consumption illegal alcohol are the most invoked sections of the Act on daily basis and chiefs are mostly pinned down dealing with the two issues leaving less time for other activities such as management and conservation of natural resources. The Act has been successfully invoked in law and order activities in the past.

Except in few cases as stated in the text, the few provisions in the Act has not been fully utilized in natural resource activities due to various reasons. Management and utilization of natural resources is full of conflicts in interest and control with few strong claimants out to plunder who can usurp the powers of government officials to include chiefs against many weak citizers who may want such resources protected but are intimidated by even the presence of junior government

officials. The relationship between the chiefs and ordinary citizens whom they harass in the course of implementing law and order and as well stumping out drinking of illegal alcohol is not as good as expected. Many people only approach a chief for assistance when in need of given services and try keep away as much until such need arise which does not auger well when there is need for regular consultation on such matter as environmental conservation. Due to historically reasons police stations and chiefs offices are the few places where many people would not wish to go unless it is a must. This could be due to past misuse of the office to harass citizenry, some Kenyans are known to break the laws in the book and expect to get away with it. Those given the role to supervise observation of laws automatically turns to be the enemies of the people, it is also difficult to satisfy their divergent views on the same issue. There is still a lot to done if the image of the chiefs office will have to improved for it to viewed by most residents as that which bring hope in form of services and development closer to them.

Though government have through its various policy papers and pronouncements highlighted the importance of sustainable management and utilization of natural resources in the country such good gesture is rarely reflected in the ground. It is with this predicament that even the directives and evaluation of performance of chiefs have more to do with law and order and eradication of illicit brews in their areas of jurisdiction than dealing with issues on environmental conservation. The newly released civil service reform manual have stipulated the roles of the chiefs at the grassroots level in conservation of the environment to include such natural resources as water, vegetation, and air. But as stated above management and utilization of natural resources outside private land is associated with vicious conflict which many people would do without unless some sanity is forthcoming. In its present form the Act provides legal intervention avenue for centrally planned policies updown approach where traditionally the grassroots stakeholders were recipients of orders but not originators instead of the current form of down up. At current situation the Act may be effective only through punitive measures equivalent to those applied by Forest Department or KWS which are not yielding desired results. The people have to be educated and persuaded to develop some sense of responsibility to care and participate in maintenance of public forests and

improvement of environmental values through use of grassroots organization, community institutions and propaganda organs. The people should know why they should now participate in an area where a government institution run by professionals entitled to funds for the purpose from taxes they pay could not do. More, how they would directly benefit from their participation through some legislations indicating their role versus other stakeholders and the expected objectives, benefits, time, and necessary information to make them competent and confident to back the orders in its implementation. Charcoal burners in trustlands in semi-arid districts have caused so much destruction of natural vegetation in the quest to survive devastating droughts thus bringing an angle of moral issues which calls for passionate interpretation.

For the purpose of sustainable management and utilization of natural resources within his jurisdiction the Act has some provisions in which the chief can intervene to ensure the resources are managed and utilized in a sustainable manner for the benefit of current and future generations. However, this time round the local people have to be the initiators of the orders which will be applied to them and have to develop the will to comply with such orders. Otherwise Chiefs Authority Act will remain a tool for keeping law and order with no consequential benefit in regulating sustainable use of natural resources.

4.0 Implications of the IPPG changes of Chiefs Authority Act.

The IPPG brokered changes of the Act were minimal in sub-sections outside the contentious law and order powers of the chief. All the relevant subsections to management and utilization of natural resources except of sub-section (j) on preventing construction and removal of game pits in the area of their jurisdiction. The loss may hinder conservation of wildlife outside national parks and reserves. Unless otherwise the sub-section provided a potential tool for grassroots intervention in the protection of wildlife both in the private land and animal sanctuaries. May be it was found to duplicate the responsibilities of the Wildlife Act, however, its removal in my opinion was not justified. There has been concern on misuse of sub-section (g) in section 10 on regulating the cutting of timber and wanton destruction of trees by people within chief's jurisdiction. The much needed clarification on regulatory procedures and provision for redress

wanton destruction of trees constitute were not changed so as the same thing is
d to mean the same by all stakeholders. The sub-section was left intact and will
o attract more criticism from forest development agencies and farmers.

her change was the curtailing of the Minister's powers to authorize the chief to issue
any other purposes not authorized by the Act. This is in line with past misuse of the
chiefs office for other purpose not defined in the Act and thus this loophole had to be

on 11 only subsections touching on law and order were repealed with most of those
being irrelevant to the current multi-party conditions or already made irrelevant due to
sewhere. All of the sub-sections discussed above in the original Act were retained.

-sections of section 13 on work/services for the purpose of conservation of natural
was retained. The powers of a D.O. to require a chief to issues and cancel orders under
was repealed thus making chiefs to issues orders that are only authorized by the Act.
or disobeying chief's orders were also altered to a fine not exceeding Kshs five hundred
natural penal employment for a period not exceeding fourteen days. The changes in
consistent with liberal thinking and therefore acceptable as a deterrent.

PG brokered changes had little impact on the areas touching on management and
of natural resources except that it didn't reverse the flow of orders to reflect the current
it policy of promoting peoples participation in the management and utilization of natural
through bottom up approach. It provided no new opportunities for the people to
in management and utilization of natural resources but maintained a status quo. The
s have to take their own initiative to work closely with the chiefs and device how the
of use to their activities. This may involve developing an operational mechanisms from
olders forum to chief's office indicating their role and that of the chief in seeking
and penalties for non compliance. This may form a home grown regulatory system at
ots level in which the local people can use to put their ideas in the development and
it of local natural resources.

The IPPG brokered changes brought more confusion many people are not aware which areas were repealed, altered or intact in extreme cases some people believe that it has been scrapped altogether and thus chiefs have no more authority to intervene in management and use of natural resources or law and order except to report to the D.O.'s and D.C.'s. In semi-arid areas charcoal burning in trustlands and ranches has tremendously increased after the IPPG changes because most people including the chiefs have not received the new version of the Act. In the ensuing confusion most chiefs currently play safe and only intervene when it is very necessary to do so. In fact in some cases they have joined hands with those sponsoring charcoal production who pay small fee for not interfering with their activities. The current changes have drastically reduced the prestige and respect of the chief to the point where few chiefs depending on their will and pragmatism are effective in combating social ills and developments which negatively affect the environment.

The only positive aspect is that Kenyans are currently going through an interesting phase in all aspects of their daily lives such as political, economic and environmental awareness. More voluntary grassroots organization in the area of environment conservation and capacity building have sprung up in various parts of the country. The people are becoming more aware of their responsibilities in keeping health environment. The government has also ratified several conventions on environment since UNCED and is currently having several committees working on issues relating to the environment such as Environmental Law Review, Environmental Action Plan and Kenya Forestry Master Plan. There are several national and international NGO's currently working with the local institutions and rural villages in the area of environmental education and management. These developments have created more opportunities to positively influence the local people into participating in management and utilization of natural resources for the good of the society at large today than before. The local people can make requests to chiefs to issue orders on management and utilization of natural resources within their location which are authorized by the Act for betterment of their welfare so long such orders are consistent with other written laws and constitution of the land.

5.0 Environmental Protection: Civil Service Reform Manual 1996.

Kenya government is aware of the impacts of rapid population growth and industrialization activities on the natural resources. In pursuance of sound natural resource management the government has articulated its arguments in various policy statements, government directives and pronouncements, sessional papers, and development plans. For successful protection and conservation of the Kenyan natural resources every citizen must have a good understanding and appreciation of the role good natural resources in the country's socio-economic development. The government's good intentions in the management and use of natural resources is well spelt in environmental policy which aims at integrating environmental concerns into the national planning and management process and provision for environmental sustainable development.

The Civil Service Reform Manual released in 1996 defines the roles of chiefs and assistant chiefs in environmental protection at the locational level. among other things they will be expected

- (a) To establish and chair Locational Environmental Management Committees.
- (b) To implement government environmental policies and guidelines.
- (c) To co-ordinate all matters and activities within the location related to environmental management .
- d) To asses and advice on environmental impact of all Sectoral Development Programmes and Projects in the location at the initiation stage .
- e) To continually evaluate and appraise the environmental aspects of the Location Programmes and Projects and to co-ordinate intervention measures to avoid environmental degradation .

Identify areas that need urgent and critical attention in environmental conservation and rehabilitation such as the following resources :

- Water

- Land

- Vegetation
- Wildlife and Livestock
- Air

- (g) To appraise the Location Development Committees on environmental aspects of current and proposed development plans, programmes and projects .
- (h) To co-ordinate the generation of dissemination of environmental information through barazas , environmental conservation competition, etc.
- (i) To co-ordinate emergency operations arising from environmental hazards in order to contain and / or reduce negative effects on life of plants , animals and human beings .
- (j) To co-ordinate the enforcement of environmental laws .
- (k) To facilitate collection , storage and dissemination of information on environment .
- (l) To co-ordinate all matters pertaining to modified environments and thus as a clearing house for activities with environmental impact .

The guidelines provide further intervention avenues in which grassroots stakeholders can work closely with chiefs in environmental protection programmes to include management and utilization of natural resources within their locations. Since the authority of the chief emanate from the Act invoking some of its provisions to promote good environmental management will be a step in the right direction.

There are consistent conflicts across the country on management and use of natural resources mostly centred on continuous conversion of forests into private farms and commercial developments with the participation of government agencies which are mandated to protect them. There is a feeling that the government agencies to include provincial administration may not be relied on to protect and conserve forests in the country because it has failed in stemming the above activities and even accusations that it is an active participant in the destruction of natural resources is gaining ground. Its officers are known to condone or encourage the activities for their personal benefit to the amazement of the local communities. Sacred forests which some communities feel to be their invaluable heritage have not been spared as evidenced by various

confrontations between the Miji Genda and land developers at the coast and the Masaai of Narok District are also up in arms over their sacred forests being tempered with by the County Council and developers. Even at community level the need for more land for agricultural and settlement purposes is overwhelming when given any opportunity to make land use decision on forestlands their priority needs will feature. In fact more conflicts within the community commonly associated with plundering of natural resources for individual benefits between powerful groups, clans and other interested groups at grassroot level will be more intense than the organs at higher level of decision making. Successful community economic projects have come down on similar grounds such the co-operative movements, water and milling projects. It may conceptually be appealing that communities are given the responsibilities to manage and utilize natural resources within their area for the benefit of their members, however, experience doesn't attest to that except in very few unique cases possibly of a homogenous community with common vision on the environment.

More strength will lay in awareness creation and education of the respected leaders on communities to include chiefs on the importance of natural resources to their survival and best approaches to sustainably manage and utilize such resources for their interest and well being of the future generations.

The Civil Service Reform Training Manual gives several provision to the chief for protection of the environment which citizens and pressure groups can use to further their cases on management and utilization of natural resources within the location. The manual outlines the roles of the chief in all aspects of environmental protection and development without mention of the roles of other stakeholders in the location. The manual gives the chief the authority to establish and chair locational environmental committees but no guidelines are provided for the selection of its members to encompass the interests of diverse interests of members in the location. Locational committees if well constituted may formulated some guidelines on proper management and utilization of natural resources within the location acceptable to all stakeholders and consistent with constitution and other laws of the land. The guidelines can be selectively fitted into the activities authorized by Act and hence can be legally enforced by the chief with the assistance of

he community thus evolving a strong partnership between the community, implementing agency and the powerful office of the chief for the benefit of the community in the long term.