

Kenya's Constitutional History

REDD+ Law Project - Briefing Paper

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The logo for the REDD+ Law Project, featuring the text "REDD+" in a large, bold, white font above the text "Law Project" in a smaller, white font, all set against a solid red rectangular background.

The **REDD+ Law Project** is led by Baker & McKenzie and the Cambridge Centre for Climate Change Mitigation Research (University of Cambridge), working with international and local advisers/institutions to assist countries in the development and implementation of their national REDD+ legal frameworks.

More information regarding this initiative is available at <http://www.4cmr.group.cam.ac.uk/research/projects/reddpluslawproject>

ABOUT THIS BRIEF

A country's national Constitution is the supreme law of that nation, sitting at the top of the hierarchy of law. In 2010, Kenya adopted a new Constitution (by Referendum). The Constitution of 2010 was the result of a reform process seeking to address several contentious issues, including land and environmental governance.

Formerly a British Colony, Kenya became a Republic in 1963. Since independence and the enactment of the Constitution of 2010, the national Constitution was amended numerous times. These constitutional amendments provide insight into the current system of government in Kenya and indicate the causes of past conflicts. As Kenya implements post-Constitutional reforms in many areas (including land and environmental governance), an appreciation of previous reforms could inform contemporary debates regarding the operation of devolution and land administration.

Given that REDD+ implementation will occur during the transitional process, Kenya's constitutional history provides insight into both past turbulence and current institutional and legal structures.

TIMELINE OF KENYA'S CONSTITUTIONAL HISTORY

The following table outlines Kenya's constitutional changes, preceding the current 2010 Constitution:

No.	ENABLING ACT	AMENDMENT
1	Constitution of Kenya (Amendment) Act No.28 of 1964	Established the office of the Vice President who would be appointed from the elected Members by the House of Representatives.
2	Constitution of Kenya (Amendment) Act No. 38 of 1964.	Repealed the provision allowing Regions to levy independent regional revenue, hence making the regions fully dependent on grants from the Central Government. ¹ This weakened the <i>majimbo</i> system by centralizing power.
3	Constitution of Kenya (Amendment) Act No. 14 of 1965	Amended the Parliamentary approval for a state of emergency from a majority (65 % in both houses) to a simple majority. ² In addition, the majority requirement for amending the

¹ Media Development Association and Konrad Adenauer Foundation, *History of Constitution Making in Kenya* (2012). Available at http://www.kas.de/wf/doc/kas_32994-1522-2-30.pdf?121206115057, accessed May 15, 2013.

² *Ibid.*

No.	ENABLING ACT	AMENDMENT
		Constitution was reduced from 90% in the Senate and 75% in the House of Representatives to 65% in both Houses. ³
4	Constitution of Kenya (Amendment) Act No. 17 of 1966	Provided that if a Member of Parliament was absent for more than eight consecutive sittings without the permission of the Speaker or were imprisoned for a term exceeding six months, then they would lose their seat in Parliament. The President could, however, pardon a Member of Parliament guilty of the above. ⁴ The aim of this amendment was to ensure the attendance of Members of Parliament to their Parliamentary sessions. It also granted the President extensive powers to appoint persons to the various positions in public service, as well as terminate them at their discretion. ⁵
5	Constitution of Kenya (Amendment) Act No. 17 of 1966.	This amendment required a Member of Parliament who resigned from the political party that sponsored him during the election at a time when that Party was still a parliamentary party, to vacate his seat. This amendment was effected after the ruling party (Kenya African National Union) experienced an outflow of sitting Members of Parliament to the Kenya People's Union.
6	Constitution of Kenya (Amendment) Act No. 18 of 1966.	Removed the exercise of emergency powers from Parliament and vested the same in the President. ⁶ The President could therefore order detention without trial at his own discretion.
7	Constitutional Amendment Act No. 40 of 1966	Established a unicameral legislature by abolishing the Senate and merging the two Houses.
8	Constitution of Kenya (Amendment) Act No. 16 of 1968	Removed the last traces of <i>majimboism</i> . This was achieved by abolishing the Provincial Councils, repealing all past laws of the regional assemblies, and deleting from the Constitution all references to provincial and district boundaries.
9	Constitutional Amendment Act No. 45 of 1968	Provided that the President can be elected through a General Election, as opposed to election by the National Assembly.
10	Constitutional of Kenya Act No.5 of 1969	This Act was passed in 1969. It was a consolidating Act, bringing together all the constitutional amendments since 1963. Other amendments made include: removing the powers to appoint the members of the Electoral Commission from the Speaker of the National Assembly, and vesting the same on the President.
11	Constitution of Kenya (Amendment) Act of 1974	Lowered the voting age from 21 years to 18 years. The Constitution of Kenya (Amendment) Act No. 2 of 1974

³ Lumumba, P.L.O., Mbondenyei, M. and Odero, S. (eds.), *The Constitution of Kenya: Contemporary Readings* (2011) LawAfrica Publishing (K) Limited, at page 24.

⁴ *Ibid.*

⁵ Media Development Association and Konrad Adenauer Foundation, *History of Constitution Making in Kenya* (2012). Available at http://www.kas.de/wf/doc/kas_32994-1522-2-30.pdf?121206115057, accessed May 15, 2013.

⁶ Lumumba, P.L.O., Mbondenyei, M. and Odero, S. (eds.), *The Constitution of Kenya: Contemporary Readings* (2011) LawAfrica Publishing (K) Limited, at page 29.

No.	ENABLING ACT	AMENDMENT
		introduced Kiswahili as an official language of the National Assembly.
12	Constitution of Kenya (Amendment) Act of 1975	Provided that bills should be presented in English, and debated in either English or Kiswahili.
13	Constitution of Kenya (Amendment) Act No. 14 of 1975	Extended the prerogative of mercy (sole power of the President) to include the power to pardon a person found guilty of an elections offence.
14	Constitution of Kenya (Amendment) Act No. 13 of 1977	Upon the collapse of the East African Community, it established the Court of Appeal of Kenya and the Court of Appeal for East Africa. Allowed the Chief Justice to sit as both a High Court judge and a Court of Appeal judge. If he/she sat as a Court of Appeal judge at any particular time, he/she would act as chair of the Appellate judges. ⁷ Abolished the right to remit compensation after compulsory acquisition.
15	Constitution of Kenya (Amendment) Act No. 1 of 1979 ⁸	Affirmed that English could now be used as an alternative to Kiswahili in parliamentary proceedings, including the presentation and debate of bills.
16	Constitution of Kenya (Amendment) Act No. 5 of 1979	Provided that a public officer who wished to contest parliamentary elections had to resign at least six months before the elections.
17	Constitution of Kenya (Amendment) Act of 1982	This significant amendment introduced Section 2A to the Constitution, which converted Kenya into a one party state. The effect of this amendment was that all political power in Kenya was vested in the ruling party, the Kenya African National Union ('KANU'). One had to be a member of KANU to vie for any political office. Furthermore, at the time of this Amendment, Kenya was experiencing strong political tension after the attempted <i>coup d'etat</i> in August 1982.
18	Constitution of Kenya (Amendment) Act No. 7 of 1984	The High Court now had finality in relation to determination of election petitions. Membership of the Public Service Commission increased from 7 to 17. It also gave the Public Service Commission powers to appoint officers to the local authorities. ⁹
19	Constitution of Kenya (Amendment) Act No. 6 of 1985	Repealed Section 89 of the Constitution. The effect of this was that a person could only be recognized as a Kenyan citizen if the mother and father are Kenyan citizens.
20	Constitution of Kenya (Amendment) Act No. 14 of	Removed security of tenure of the offices of the Attorney General, Controller, and Auditor General, thus eroding the

⁷ *Ibid*, page 32.

⁸ The first President of the Republic of Kenya died in office in August 1978. His then Vice President Hon Daniel Moi assumed office of the President immediately, initially for a period of 90 days. During this period, elections for the office of the President were conducted and Hon. Moi was elected. Constitutional amendments continued, and although fewer in number they were very significant. *See further* Media Development Association and Konrad Adenauer Foundation, *History of Constitution Making in Kenya* (2012). Available at http://www.kas.de/wf/doc/kas_32994-1522-2-30.pdf?121206115057, accessed May 15, 2013.

⁹ Gicheru, H.B. and Miano, K., *A textbook of the Constitution and Government of Kenya for Secondary Schools* (1987) Sterling Publishers (1987), at page 151.

No.	ENABLING ACT	AMENDMENT
	1986	independence of the two offices. The limit of parliamentary seats was set to a maximum of 188 and a minimum of 168.
21	Constitution of Kenya (Amendment) Act No. 20 of 1987	All capital offences punishable by death as provided in the Penal code (Cap 62) were made non-bailable.
22	Constitution of Kenya (Amendment) Act No. 4 of 1988	Changed the requirement for holding suspects of capital offences. Previously, such suspects were not to be held for a period exceeding 24 hours. The Amendment now provides that suspects of capital offences are not to be held for a period exceeding 14 days. Removed security of tenure for the office of the Public Service Commission, High Court judges and Court of Appeal judges. Created the Offices of the Chief Magistrate and Principal Magistrate.
23	Constitution of Kenya (Amendment) Act No. 2 of 1990	Restored security of tenure of the office of the Public Service Commission, High Court judges and Court of Appeal judges.
24	Constitution of Kenya (Amendment) Act No. 10 of 1991	Increased the maximum number of constituencies to 210 from 188 and the minimum number of constituencies to 188 from 68.
25	Constitution of Kenya (Amendment) Act No. 12 of 1991	Repealed Section 2A of the Constitution, which converted Kenya to a one party state in 1982.
24	Constitution of Kenya (Amendment) Act No. 10 of 1997	Reinforced the above repealing of Section 2A of the Constitution by introducing Section 1A. The effect of this was to change Kenya from a one party state to a multi-party state. It also amended Sections 7, 33, 41, 42A, 82 and 84 of the Constitution. In effect, the President was allowed to form his government from members of other political parties, the role of nominating members to parliament was transferred from the president to the parliamentary parties, the number of electoral commissioners was increased, voter education and ensuring free and fair elections was included as additional roles of the electoral commission, and lastly persons were allowed to appeal to the Court of Appeal on constitutional matters. ¹⁰
25	Constitution of Kenya (Amendment) Act 2008	Created a coalition government by establishing the office of the Prime Minister and the Deputy Prime Minister. This was necessary following the disputed elections of December 2007 and the ensuing violence that continued in to 2008.

¹⁰ Lumumba, P.L.O., Mbondenyi, M. and Odero, S. (eds.), *The Constitution of Kenya: Contemporary Readings* (2011) LawAfrica Publishing (K) Limited, at page 36.