

Application of International Standards in Drafting Environmental Legislation and Law Reform Projects: The African Experience

Associate Professor Emmanuel Kasimbazi⁴

Abstract

Drafting environmental legislation in African countries began during the colonial period. The drafting of environmental legislation can be divided into five phases. The first phase which was before 1960 was characterized by total reliance on traditional common law and civil law regimes. It focused on production and pollution through command and control regimes. During this period, the legislation aimed at regulation of specific resources and collection of revenue and not the management of the environment as a whole. It emphasized physical planning and zoning in order to cope with urban development. It was also based on sectors such as public health, fisheries, forestry and wildlife. Notably absent were elements such as environmental impact assessment, public participation, revenue sharing and collaborative management. The second phase was the period 1960-1969; during this period, the situation was more or less the same as the first except that sectoral and functional statutes were strengthened. The third phase was between 1970 and 1980. During this period several sectoral and functional Statutes were developed, but without any coordinating institution. The last phase was from 1990 to date. During this period environmental legislation was drafted. This is a legislative technique for environmental management under the "umbrella" of framework law. Framework environmental laws are enacted to cover the entire spectrum of cross-sectoral environmental issues and to facilitate a more cohesive, coordinated and holistic approach to environmental management. They establish a single environmental agency to oversee environmental management and cover such cross-sectoral issues as environmental impact assessment, environmental quality criteria and public participation in decision-making and implementation. The purpose of this paper is to analyse the application of international standards in drafting environmental legislation in Africa. It will refer to environmental related legislation where international standards have been applied.

1. Introduction

There are several definitions of the term environment. The Black's Law Dictionary defines environment as the totality of physical, economic and social circumstances and factors that surround and affect the desirability and value of people and that

⁴ Associate Professor of Law, School of Law, Makerere University, Kampala, Uganda

also affect the quality of people's lives.⁵ It is the totality of nature and natural resources as well as the context within which they exist and interact and includes infrastructure constructed to support socio-economic activities. Environmental legislation of different countries has defined the term environment. The Ugandan National Environment Act defines it as the physical factors of the surroundings of human beings, including land, water, atmosphere, climate, sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics and includes both the natural and the built environment.⁶

Environmental legislation is an important tool for environmental regulation. It establishes environmental agencies, seeks to assess the possible impacts before the human activities can occur, sets standards and creates offenses. The evolution of environmental legislation can be traced from early resource exploitation legislation through later resource management legislation to more recent legislation conceived primarily from the perspective of environmental management. This has resulted in many of the provisions relating to natural resource conservation, pollution control and protection of historical and cultural sites being scattered among a wide range of statutes. Environmental legislation is thus intended to ensure that utilization or management of the environment ensures intergenerational equity or sustainability. The purpose of this paper is to analyse the application of drafting standards in the environmental legislation and law reform projects by drawing experience from Africa. It is divided into five sections. The first section traces the development of environmental legislation in Africa. This is covered under four phases: the pre-1960 phase, 1960-1969 phase, the 1970-80 phase and the post 1990 phase. The third section identifies and examines some modern principles that have been introduced in the environmental legislation; these include: environmental rights, Environmental Impact Assessment, audit and monitoring, strategic environmental assessment; public trust doctrine collaborative natural resources management; revenue sharing and polluter pays principle. The fourth section analyses constraints to developing environmental legislation in Africa and the final section provides the conclusion and some recommendations.

2. Development of Environmental Legislation in Africa

2.1 Pre-1960 Phase

Early governmental responses to the problems of environmental pollution took the form of legislative enactments to deal with the causes of environmental impacts, particularly industrial effluents and nuisance. Thus, in addition to new sectoral legislation to fill the more apparent gaps in national frameworks, countries in the region began to enact comprehensive anti-pollution laws, commencing from the early seventies. The main focus of the legislation was however on pollution control. Environmental quality and anti-pollution regulations are still the most widely used

⁵ Bryan Garner (ed), Black's Law Dictionary (9th Ed, West Group, 1990) 534.

⁶ S.1, the National Environment Act CAP 153 of the Laws of Uganda 2000.

legislative technique for pollution control, though several new approaches are evident in contemporary state practice. These laws usually deal with air and water quality, marine pollution, solid waste disposal, toxic materials management, and establish meet of quality criteria, definition of pollutants, setting permissible limits, and regulating control, compliance and enforcement methods. One of the most widely used techniques for environmental control is the system of authorisations (by permit, certification, license) administered by government institutions.

This stage was characterized by the following elements. Total reliance on the traditional common law⁷ which included causes of action in private law which include trespass, nuisance, negligence, riparian rights and strict liability. Civil law regimes⁸ also applied in some jurisdictions. There were lean sectoral and functional statutes on natural resources and environmental functions. These acts dealt with specific issues such as public health or factories. For example in Uganda there was the Public Health Act of 1935 and the Factories Act of 1953. The laws focused on timber production and pollution through command and control regimes. The Protection of Forestry Regulations Act No.3 of 1900 prohibited the exploitation of forest products on public land without a permit, set fixed fees for foreigners intending to take products out of the public forests, made the burning of forests or bushes an offence and imposed restrictions on tree cutting on private land. The Export of was regulated under the Timber Ordinance of 1934 and its successor of 1950 regulated inspection, grading and marking of timber before export. A legal notice in 1950⁹ prohibited the export from Uganda of more than 25% of the output of mule and mahogany.

During this phase, there was negligible public participation and cases were based on private and proprietary interests. Sectoral agencies generally applied conservation measures selectively, for instance, public health sector, fisheries sector, forestry sector, wild life sector among others. There was no single Agency that coordinated environmental issues. Pollution was not controlled and public interest groups were confined to consumer advocacy.

2.2 1960-1969 Phase

The situation was more or less the same as the first save for a few developments. Sectoral and functional statutes were strengthened and increase in public awareness and emergence of public interest groups (but these were often forcefully suppressed). There was growing local and global concern particularly in local urban

⁷ Common law arises from the English tradition which lays supremacy on case law wherein decided cases especially from superior courts provided precedence over succeeding cases, by virtue of the doctrine of *stare decisis*.

⁸ Civil law system is, at best grounded in codes and statutes and the judiciary is largely required to apply the provisions of written law.

⁹This was made under the Export of Timber Ordinance of 1950 which regulated inspection, grading and marking of timber before export.

centers regarding the problem of urbanization. The call by the UN General Assembly resolution in 1968 to hold a conference on human environment raised awareness and the need to develop environmental legislation to address environmental concerns.¹⁰

The laws of physical planning, zoning and control were strengthened.

In the United States between the 1930s and the 1960s, scientific advances laid a foundation for political action to protect the environment.¹¹ In 1956, a lengthy report of an international symposium on Man's Role in Changing the Face of the Earth was published¹² and in 1965, Harvard University Press reprinted a book written a century ago by George Perkins Marsh titled *Man and Nature*.¹³ Further, in 1965, the Conservation Foundation convened a conference on Future Environments of North America and published the proceedings in 1966.¹⁴ A number of high profile books further contributed to increased public awareness of an endangered environment.¹⁵

It is important to note that the Congress began to react to scientific and popular concern for the environment in the late 1950s and early 1960s.¹⁶ In 1959, Senator James Murray of Montana introduced a predecessor of National Environmental Policy Act (NEPA) titled the Resources and Conservation Act.¹⁷ This bill included a number of provisions that eventually found their way into NEPA, including a declaration of policy, the creation of an environmental organization in the Executive Office of the President, and an annual report.¹⁸ The Task Force on Environmental Health and Related Problems recommended to the Secretary of Health, Education,

¹⁰ The United Nations first considered environmental issues at the 45th session of the Economic and Social Council (ECOSOC), when in resolution 1346 (XLV) of 30 July 1968 it recommended that the General Assembly consider convening a United Nations conference on problems of the human environment. See <http://www.un.org/Depts/dhl/resguide/specenv.htm> accessed 12 April, 2012. At its 23rd session the General Assembly adopted resolution 2398 (XXIII) of 3 December 1968 convening a United Nations Conference on the Human Environment noted the "continuing and accelerating impairment of the quality of the human environment" and its "consequent effects on the condition of man, his physical, mental and social well-being, his dignity and his enjoyment of basic human rights, in developing as well as developed countries," thus relating the Charter to emerging environmental issues. The resolution also recognized that "the relationship between man and his environment is undergoing profound changes in the wake of modern scientific and technological developments".

¹¹ Paul S. Weiland, Amending the National Environmental Policy Act: Federal Environmental Protection in the Twenty-First Century available at <http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/jluenvl12&div=17&id=&page> Accessed on 15 April 2012.

¹²Ibid.

¹³Ibid.

¹⁴Ibid.

¹⁵Ibid.

¹⁶Ibid.

¹⁷Ibid.

¹⁸Ibid.

and Welfare that a council of ecological advisors be created.¹⁹ The Task Force, chaired by Ron Linton, urged the President to submit a proposal to Congress for an Environmental Protection Act which was the first framework environmental legislation that was enacted in 1969.²⁰

The National Environmental Policy Act (NEPA)²¹ was one of the first laws ever written that establishes the broad national framework for protecting our environment.²² NEPA's basic policy is to ensure that all branches of government give proper consideration to the environment prior to undertaking any major federal action that significantly affects the environment. However, effectiveness was not achieved because at the time, the act was not clearly understood.

Most of the African countries that gained independence re-enacted and adopted the environmental legislation that was enacted during the colonial period. For example, in Uganda, Forests Act of 1947 became the Forests Act of 1964; the National Parks Act of 1952 became the National Parks of 1962 and the Game (Preservation and Control) Act of 1959 became the Game (Preservation and Control Act) of 1964. Therefore, there was no substantive change in the laws. All that was done was to substitute words and names such as 'public' for 'crown' and 'Uganda' for 'Britain'. The failure to develop 'home-grown' concepts and laws to govern use of natural resources became an expensive premium on the environment. Apart from the forestry and fisheries sector, the management of other natural resources (soil, water, wildlife and vegetation etc.) was governed by numerous laws and regulations often without a gazetted policy. Moreover, principles were scattered in the laws and thus there was uncoordinated implementation which affected their implementation.

2.3 1970-80 Phase

The United Nations Conference on the Human Environment which took place in Stockholm from 5 to 16 June 1972 and adopted the Stockholm Declaration²³ influenced further developments of the environmental legislation. It also led to the establishment of the United Nations Environment Programme (UNEP), the lead programme within the UN working on environmental issues²⁴ and has had an impact on the environmental legislation and law reform in Africa.

¹⁹ Ibid.

²⁰ Ibid.

²¹ The National Environmental Policy Act 42 U.S.C. §4321 *et seq* (1969).

²² Ibid.

²³ The Declaration of the United Nations Conference on the Human Environment, or Stockholm Declaration, was adopted June 16, 1972 by the United Nations at the 21st plenary meeting as the first document in international environmental law to recognize the right to a healthy environment.

²⁴ Principle 11 of the Stockholm Declaration requires the all the States to enhance environmental policies.

The Stockholm Declaration and coming into force of NEPA as a framework environmental law in the United States in January 1970 influenced the trend of environmental legislation in different countries. In 1973, the Cabinet in Canada created the Environmental Assessment and Review Process (EARP) which required federal departments and agencies to take into account and to undertake an assessment of potential environmental impacts as part of decision making on matters affecting the environment.²⁵ In Europe it led to the development of the European Environmental Policy in 1972 aimed at prevention, reduction and containment of environmental damage; the conservation of an ecological equilibrium and the rational use of natural resources and it also emphasised the need for a comprehensive assessment of the impacts of other policies, in an effort to avoid damaging activities.²⁶ In 1972 the government of Japan passed the Nature Conservation Law, which aimed at protection of the natural environment and provision of recreational space for the public. The Cabinet also approved the environmental conservation guidelines in relation to public works.²⁷ In 1979, China enacted framework environmental protection law whose primary function was to ensure the rational use of natural environment, prevention and elimination of environmental pollution and damage to ecosystems in order to create a clean and favourable living and working environment, protect the health of the people and promote economic development during the construction of a modernized socialist state.²⁸

Overall, it is important to note that during this period, the regime of framework environmental legislation environmental impact assessment (EIA) process and public participation through the EIA process was introduced. It is important to note that several sectoral and functional statutes were developed, but without any coordinating institution.

In Africa, there was no single African country that developed framework environmental legislation. However, framework related environmental legislation at different levels were developed in Africa. In 1983, Algeria developed an environmental protection law aimed at the protection of the natural resources and prevention of pollution.²⁹ In 1982 Libya enacted Legislative Act No. 7 concerning

²⁵ Elder, P. S, 'Environmental Impact Assessment in Canada the Slave River Project' 24 Alta. L. Rev. 205 (1985-1986)

<http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/alblr24&div=14&id=&page=>> (accessed 14 April, 2012)

²⁶ The 1972 EU environmental policy was formally founded through the European Council declaration made in Paris in October 1972. See EU Stefan Scheuer, A Critical Analysis of EU Environmental Legislation Making it accessible to environmentalists and decision makers (Environmental Policy Handbook) available at www.eeb.org/ >accessed 14 April 2012.

²⁷ Chris Rowthorn 'Environmental Issues' available at lonelyplanet.com (accessed 14 April 2012)

²⁸ This adopted at the 11th meeting of the Standing Committee of the fifth National People's Congress on 13 September 1979.

²⁹ Available at <http://www.unep.org/padelia/publications/Comp1.htm> (accessed 14 April 2012)

protection of the environment³⁰ which provided for the protection of the air, seas, and marine resources, water resources, food and foodstuff, soil and plant, control of vehicular emissions, pollution caused by ships and waste disposal was developed. Tanzania enacted the National Environment Management Council Act, 1983³¹ which established the National Environment Management Council to act as an advisory body to the government on all matters relating to the environment. In its advisory capacity, NEMC was to formulate and recommend policy; coordinate activities; evaluate and improve existing policies; stimulate public and private participation in programmes and activities for national beneficial use of natural resources; specify standards and norms; establish and operate a system of documentation; formulate proposals for legislation; establish and maintain liaison in other national and international organisations; and undertake general environmental education programmes.

2.4 Post 1990 Phase

The development of environmental legislation during this phase was influenced by UNEP's Partnership for the Development of Environmental Law Institution (PADELIA)³² which launched immediately after UNCED in 1992.³³ PADELIA is a flagship UNEP pilot project³⁴ which seeks to support the development of environmental law as well as the corresponding national and regional institutions to ensure effective enforcement. This programme sought to assist African governments in building capacities for the development, strengthening, implementation and harmonization of environmental legislation as well as related institutions for sustainable development and poverty reduction.³⁵

The first Phase I of the PADELIA which lasted from 1995 to 2002 operated in only seven countries namely: Burkina Faso, Kenya, Malawi, Mozambique, Sao Tome and Principe, Tanzania and Uganda.³⁶ Mozambique, Sao Tome & Principe, Malawi, and Burkina Faso focused on country-specific issues of environmental law while the East African States of Kenya, Uganda, and Tanzania focused on issues of transboundary environmental law.³⁷ The second phase started in 2002 include: the Sahel states of Mali, Niger, and Senegal and the Southern African Development Community (SADC) (Botswana, Lesotho, and Swaziland). These countries were directed at

³⁰ Available at <www.ecolex.org> Accessed 10 April 2012

³¹ <http://www.unep.org/padeli/publications/Comp1.htm> (accessed 14 April 2012)

³² This project is other known as the UNEP/UNDP/Dutch Joint Project on Environmental Law and Institutions in Africa.

³³ Charles Okidi, "Capacity Building in Environmental Law in African Universities", in Jamie Benidickson, Ben Boer and Antonia Benjamin and Karen Morrow (Eds.) *Environmental Law and Sustainability after Rio* (Edward Elgar 2011) 35.

³⁴ It is sponsored by Belgium, Germany, Norway, Switzerland, Luxembourg, and The Netherlands, and it is currently in its second Phase since 2001. Phase I ran from 1994 to 2000.

³⁵ See <http://www.unep.org/padeli/> (accessed 10 April 2012)

³⁶ Ibid.

³⁷ Ibid.

issues of sub-regional character with the objective of developing and harmonising laws.³⁸

The first important feature of the project is that it is country-driven and highly participatory in nature. Topics for legislation are selected by stakeholders constituted as a National Task Force or Coordinating Committee. Second, the project operationalises the concept of capacity building and has coached nationals on how to identify problems requiring legal intervention and then assisting them in writing the draft laws. Third, the draft laws are subjected to national consensus building workshops and thus enhancing broad public acceptance and ownership. Each of the States during Phase I was able to move at its own pace to reach concrete and quantifiable results. Overall, 58 draft laws have been developed by the pilot countries since 1996.

The project formally encompassed the national policy framework focusing on development of environmental laws, both framework and sectoral statutes and Regulations. It also strengthened institutional environmental institutions.³⁹

One important element legislative technique for environmental developing the environmental legislation was the "umbrella" or framework law. This framework environmental legislation is enacted to cover the entire spectrum of cross-sectoral environmental issues and to facilitate a more cohesive, coordinated and holistic approach to environmental management. Such legislation lays down the basic legal principles without any attempt at codification. It normally entails the declaration of environmental objectives and policies, the establishment of the related environmental institutions,⁴⁰ and the definition of the common procedural principles for environmental decision-making applicable to all sectors. In this latter respect, the legislation often covers such cross-sectoral issues as environmental impact assessment, environmental quality criteria, and public participation in decision-making and implementation.

35 African countries have so far developed framework environmental legislation. These include: Algeria, Botswana, Burkina Faso, Chad, Congo, Djibouti, Ethiopia, Gambia, Ghana, Kenya, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sao Tome and Principe, Seychelles, Senegal, South Africa, Swaziland, Tanzania, Tunisia, Uganda, Zambia and Zimbabwe.

3. Modern Standards of Environmental Legislation in Africa

The existing environmental legislation has introduced new concepts that reflect modern principles of environmental legislation. The major ones include:

3.1 Environmental Rights

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Environmental agencies have been established with different nomenclature but with same functions. Some of them are as follows: Ghana & Ethiopia (Environmental Protection Agency); Kenya & Uganda (National Environment Management Authority); Lesotho (Lesotho Environment Authority);

36 countries have entrenched environmental rights in their Constitutions. Examples from select African countries include the following: the Burkina Faso constitution adopted in June 2000 under Article 14 provides, “the wealth and natural resources belong to the people. They are used for the improvement of its conditions of life” It has a specific provision on the environment under Article 29 which states “[T]he right to a healthy environment is recognized; the protection, the defense and promotion of the environment are a duty for all”.

The Constitution of the Republic of Ghana (1992) makes a number of provisions relating to the environment. Paragraph (i) of Article 24 deals specifically with the working environment under economic rights and duties. It says: “Every person has the right to work under satisfactory, safe and healthy conditions, and shall receive equal pay for equal work without distinction of any kind”. Chapter six which deals with the Directive Principles of State Policy provides in Article 36 (9) as follows: “The State shall take appropriate measures needed to protect and safeguard the national environment for posterity; and shall seek cooperation with other states and bodies for purposes of protecting the wider international environment for mankind”.

Article 41 deals with duties of a citizen and says “(k) to protect and safeguard the environment”.

The Constitution of Lesotho, which commenced in 1993, Article 27(1) under the general theme of Protection of Health provides that Lesotho shall adopt policies aimed at ensuring the highest standards that *inter alia*” ...(b) improve environmental and industrial hygiene”.

Article 36 deals specifically with the protection of the environment and states as follows: “Lesotho shall adopt policies designed to protect and enhance the natural and cultural environment of Lesotho for the benefit of both present and future generations and shall endeavour to assure all citizens a sound and safe environment adequate for their health and well-being”.

The Constitution of the Republic of South Africa, enacted in 1996 has its first provision on “Environment” under the Bill of Rights-. Article 24 provides “[E]veryone has the right to an environment that is not harmful to their health or well-being; and to have the environment protected, for the benefit of the present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development”.

The Constitution of the Republic of Uganda, adopted in 1995 in the Policy directives under Article XIII entitled “Protection of Natural Resources” provide as follows: “[T]he State shall protect important natural resources, including land,

water, wetlands, minerals, oil, fauna and flora on behalf of the people of Uganda”. Article XXVII on the environment provides as follows:

(i) *The State shall promote sustainable development and public awareness of the need to manage land, air, water, resources in a balanced and sustainable manner for the present and future generations.* (ii) *The utilization of the natural resources of Uganda shall be managed in such a way as to meet the development and environmental needs of the present and future generations of Uganda; and in particular, the State shall take all possible measures to prevent or minimize damage and destruction to land, air and water resources resulting from pollution and other causes. The State shall promote and implement energy policies that will ensure that the people’s basic needs and those of environmental preservation are met.*

The Ugandan Constitution has a chapter dealing with protection and promotion of fundamental and other Rights and Freedoms. In that chapter, Article 39 provides for the right of every Ugandan to enjoy a clean and healthy environment. This provision has been subject of litigation in a number of cases in Uganda for instance in *the Environmental Action Network (TEAN) v. AG & NEMA*, the petitioners sought for, and the Court granted, a declaration that smoking in public places violated the right of non-smoking members of the public to a clean and healthy environment guaranteed under article 39 of the Constitution.

The Togo Constitution under Article 41 states that everyone shall have the right to a clean environment and imposes a duty on the state to oversee the protection of the environment. Other countries that have provisions are related to environmental rights in their Constitutions include Angola, Cape Verde, Comoros, Congo, Ethiopia, Mozambique and Chad, Cameroon, Eritrea, Mali, Namibia, Seychelles, and Tanzania.

In several countries, the framework environmental legislation also recognised the environmental rights. For example the National Environment Act of Uganda, Section 3 provides that “Every person has a right to a healthy environment”. In Malawi the Environment Management Act provides that “Every person shall have a right to a clean and healthy environment”.

3.2 Environmental Impact Assessment, Audit and Monitoring

Environmental legislation establishes a number of environmental management tools such as the EIA, environmental audits, environmental monitoring and environmental restoration orders which are important in ensuring that development projects do not cause substantial harm to the environment.

EIA, auditing and monitoring are legal requirements for all development projects and activities that are likely to have significant impact on the environment. These tools including environmental restoration orders have been incorporated in the environmental framework legislation and regulations in several African countries.

These include: Angolan Environmental Law,⁴¹ the National Environment Act of Gambia,⁴² the Environmental Protection Agency Act of Ghana,⁴³ the Environmental Impact Assessment Act of Botswana,⁴⁴ the Environmental Management and Coordination Act of Kenya,⁴⁵ the Environment Management Act of Malawi,⁴⁶ the Environment Protection Act of Mauritius,⁴⁷ the Environment Act of Lesotho⁴⁸ and the Environment Management Act of Swaziland.⁴⁹

3.3 Strategic Environmental Assessment

The Strategic Environmental Assessment (SEA) is a formal, systematic process to analyse and address the environmental effects of policies, plans and programmes and other strategic initiatives. This process applies primarily to development-related initiatives that are known or likely to have significant environmental effects, notably those initiated individually in sectors, such as transport and energy, or collectively through spatial or land use change. This is a fairly new concept and therefore it is included in fewer environmental legislation in Africa. Countries such as Tanzania in the Tanzania Environmental Management Act under section 104 require policy regulations, public policies, programmes and development plans to be subjected to a strategic environmental assessment.⁵⁰

3.4 Public Trust Doctrine

This is another international law method by which Constitutions and environmental legislation impose duties on the state. The Public Trust Doctrine requires the government to preserve and protect certain resources it holds in trust for the public. The Public Trust Doctrine has been incorporated in the Constitutions of some African countries. For example in the Ugandan Constitution, Part XIII of the National Objectives and Directive Principles of State Policy Constitution of Uganda provides that the state shall protect important natural resources including land, water, wetlands, minerals, oil fauna and flora on behalf of Ugandans.⁵¹ In the substantive provisions, the Constitution provides that: “the Government or a Local Government as determined by Parliament by law, shall hold in trust for the people and protect, natural lakes, rivers, wetlands, forest reserves, game reserves, national parks and any land to be reserved for ecological and touristic purposes for the common good of all citizens”⁵² As required by the Constitution,⁵³ Parliament has

⁴¹ The Angolan Environmental Law No 8/98.

⁴² The National Environment Act No. 13 of 1994.

⁴³ The Environmental Protection Agency Act No. 490 of Ghana.

⁴⁴ The Environmental Impact Assessment Act No 6 of 2005 of Botswana.

⁴⁵ The Environmental Management and Coordination Act of Kenya, 1999

⁴⁶ The Environment Act of Lesotho 2001

⁴⁷ The Environment Protection Act of Mauritius, 2002

⁴⁸ Environment Act of Lesotho, 2001

⁴⁹ Environment Management Act of Swaziland, 2002

⁵⁰ Environment Management Act of Tanzania 2004.

⁵¹ Principle XIII

⁵² The 1995 Constitution of the Republic of Uganda, Article 237(2) (b)

⁵³ Article 245 of the Constitution, *supra*, note 71.

made several laws for the protection of the environment. These laws have in their endeavour to protect the environment incorporated the public trust doctrine as one of the management tools. The Land Act⁵⁴ and the National Forestry and Tree Planting Act re-echo obligations of the state in similar terms as the Constitution. The doctrine of Public Trust has been subjected to the interpretation of court in some jurisdictions. In Uganda, *Advocates Coalition for Development and Environment v. Attorney General*,⁵⁵ the applicants contended that the Government's issuance of 50 year sugar cane growing permit to Kakira Sugar Works Ltd with a in respect of Butamira Forest Reserve was in contravention of the law. That the respondent's actions were a violation of the doctrine of Public Trust as enshrined under the National Objectives and Directive Principles of state policy.⁵⁶ The Court considered the provisions of Article 237 (2) (b) of the constitution and section 44 of the Land Act and held that they should be read together and that the same should apply to Article 237 (2) (a) and Section 42 of the Land Act. It was thus held that:

Butamira Forest Reserve is land which Government of Uganda holds in trust for the people of Uganda to be protected for the Common good of the citizens. Government has no authority to lease out or otherwise 50 year sugar cane growing permit it. However, Government or a local government may grant concessions or licenses or permits in respect of land held under trust with authority from parliament and with consent from the local community in the area or district where the reserved land is situated. In the instant case there was evidence that the permit was granted to Kakira Sugar Works amidst protests from local communities which raised up a pressure group of over 1500 members who depended on the reserve for their livelihood through agro-forestry, and source of water, fuel and other forms of sustenance. There was therefore breach of public Trust doctrine.

3.5 Collaborative Natural Resource Management (CNRM)

CNRM seeks to forge agreements between local resource users and conservation authorities for negotiated access of natural resources which are usually under the control of a statutory authority. Through these kinds of agreements, the objectives of conservation with some rural livelihood benefits are thought. The aims of CNRM include: reduction of conflict; increase in community benefits from forests; involvement of local communities in forest management and reduction in forest destruction. It has the following elements: empowerment; participation; information sharing; social change; and balance of power and partnership. Some sectoral environmental legislation provide for that arrangement. For example, Section 14 of the Wildlife Act of Uganda provides for commercial arrangements to manage conservation areas. It thus provides that the Executive Director may with the approval of the board enter into any suitable commercial or collaborative

⁵⁴ The Land Act Cap 227, Laws of Uganda, 2000, Section 44 (1)

⁵⁵ Miscellaneous Cause No. 0100 of 2004

⁵⁶ Principle XIII

arrangements with any person for the management of a protected area or a portion of the protected area; provision of services and infrastructure in a protected area; or management of a species or a class of species of animals or plants.⁵⁷

3.6 Revenue Sharing

Revenue sharing is aimed at ensuring that local communities living adjacent to protected areas obtain benefits from existence of these areas, improve their welfare, and ultimately strengthen partnerships between the Uganda Wildlife Authority (UWA), local communities and local governments for sustainable management of resources in and around protected areas. This is increasingly being recognised in the sectoral environmental legislation. The Ugandan Wildlife Act makes express provision for revenue sharing under Section 70(4) where the Board of UWA is obliged to pay 20 percent of the park entry fee collected from a wildlife protected area to the adjacent local governments. However, it does not provide for how the derivation funds are allocated between local governments and the communities surrounding the protected areas (inter and intra-jurisdictional equity).⁵⁸

The revenue is used to set up income generating projects, to deter the communities from exploiting the wildlife resources. The local communities help in fighting poaching, fire outbreaks and other illegal activities in the park of which they used to be the culprits.

Revenue sharing is also recognised under Section 19 of the National Forestry and Tree Planting Act of Uganda which provides that any revenue derived from the management of community forest by the responsible body shall belong and form part of the accountable funds of the responsible body and shall be devoted to the sustainable management of the community forest and the welfare of the local community.

3.7 Polluter Pays Principle

The polluter pays principle is the principle according to which the polluter should bear the cost of measures to reduce pollution according to the extent of either the damage done to society or those exceeding of an acceptable level (standard) of pollution. This is a basic economic principle (currently being adopted in legislation by many countries) that requires the producers or generators of pollution to pay for the costs of avoiding pollution or of cleaning up or remedying its effects. Therefore, any pollution generated by a process must be paid for from within the cost structure of production. In broad terms, this means that companies must stop producing polluting emissions and effluents or ultimately stop production. Some African environmental legislation recognise this principle. The South African National Water Part IV deals with pollution prevention particularly the situation where pollution of a water resource occurs or might occur as a result of activities

⁵⁷ Section 14 of Uganda Wildlife Act, Cap 200 of the Laws of Uganda 2000

⁵⁸ Ibid, Section 70 (4).

on land. Therefore a person who owns, controls, occupies or uses the land in question is responsible for taking measures to prevent pollution of water resources. If these measures are not taken, the catchment management agency concerned may itself do whatever is necessary to prevent the pollution or to remedy its effects, and to recover all reasonable costs from the persons responsible for the pollution.⁵⁹ The South African National Environmental Management Act provides: “every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation”.⁶⁰ The Act empowers the Director-General or a provincial Head of Department to take urgent necessary action to protect the environment.⁶¹ This was considered in the case of *Hichange Investments Pty Ltd v. Cape Produce Pty Ltd*⁶² where the applicant alleged that noxious gases created by the tannery were discharged in the atmosphere, causing not only a foul and offensive odour but the rapid and uncontrolled corrosion of metal structures and equipment in its premises. It was also alleged that these gases harmed the health and well-being of the workers on the premises, as well as the residents of Port Elizabeth. The court held that although the fourth respondent argued that it did not have the personnel with necessary training and skills to comply with the provisions of section 28, the legislature has imposed certain obligations upon the fourth respondent under section 28, which he failed to do. The applicant is entitled to apply for an order directing the fourth respondent to take any steps listed in section 28 (4).

Although the principle’s precise legal definition, for the purposes of practical application, remains elusive, the core of the principle derives from the fundamental proposition that it is the parties who generate pollution, not others, nor indeed the government, who should bear the cost of abatement.

3.8 Environmental Restoration Orders

Some countries have introduced provisions of restoration orders which empower an environmental agency to issue an environmental restoration order requiring a person to restore the environment as near as it may be to the state in which it was before the taking of the action which is the subject of the order. The Ugandan Environment Act provides that a restoration order may also be issued to prevent a person from taking any action which would do harm to the environment; or to levy a charge on a person which represents a reasonable estimate of the cost of any action taken by an authorized person to restore the environment to the state in

⁵⁹ The National Water Act of South Africa, Act No 36 of 1998.

⁶⁰ The National Environmental Management Act No. 107 of 1998 section 28.

⁶¹ Ibid Section 28 (4).

⁶² 2004 (2) SA 393 ECD

which it was before the taking of the action which is the subject of the order.⁶³ The section further requires that where a person on whom an environmental restoration order has been served fails to take the action required by the order, NEMA may enter on any land under the control of the person on whom that order has been served and take all necessary action in respect of the activity to which that order relates and otherwise to enforce that order as may seem fit. The powers of NEMA to enforce restoration orders were examined in the case of *Amooti Godfrey Nyakana Vs NEMA and 6 others*. In this case the petitioner was the proprietor of a parcel of land in a suburban part of Kampala. He had obtained a title in 2004 to construct a residential house on the said plot and obtained the necessary approvals for building. In June 2004, NEMA, the first respondent carried out an inspection of Nakivubo wetlands, one of the famous wetlands in the country and determined that the petitioner was constructing his house within a wetland. Consequently, NEMA issued a restoration order in accordance with the National Environmental Act requiring the petitioner to carry out certain activities so as to restore the wetland within a period of twenty one days. After the expiry of the notice period and as a result of the failure of the petitioner to act in accordance with the restoration order, NEMA brought down the unfinished building. The petitioner argued that the demolition was a violation of his constitutional rights to property while NEMA being the respondents pointed out that ownership of property carries with it duties too. It further argued that section 43 of the Land Act requires an owner of land to manage and utilize it in accordance with the Forest Act, The Mining Act, and the National Environment Act, the Water Act and the Wildlife Act and any other law. They also argued that all that was taken away from the petitioner was the abuse of the land. Further the respondents argued that wetlands were constitutionally a public resource requiring protection. The Court stated that sections 36 of the National Environmental Act restricted activities on a wetland and required approval of NEMA. The Court therefore held that the action of the first respondent in issuing a restoration order and thereafter demolishing the building for non-compliance was in accordance with the law. Further, the action did not infringe the petitioner's proprietary rights. Instead it only prevented the petitioner from misusing his land and thus ensured protection of the environment. This case aptly demonstrates restoration orders can be used to protect public resources such wetlands in Uganda and that the state has a responsibility to ensure their wise use and to regulate property rights so as to deliver on the goals of sustainable use of public resources.

An environmental restoration Order can also be granted by a Court in any proceedings brought by any person, against another person who has harmed, is harming or is reasonably likely to harm the environment. The person bringing the proceedings need not show that he has an interest in the property, environment or land alleged to have been harmed.

⁶³ Section 67 of the National Environment Act

3.9 Easements

Some environmental legislation recognise the need for an environmental easement. An easement is the right to use the land of another for environmental conservation purposes. The Ugandan National Environment Act provides that an easement may be imposed to facilitate the conservation and enhancement of the environment and benefit environment, through the imposition of one or more obligations in respect of the use of land referred to as the burdened land, being land in the vicinity of the benefited environment.⁶⁴

3.10 *Locus Standi*

Locus standi means the right to bring an action, to be heard in court, or to address the Court on a matter before it. A party bringing an action in court has to demonstrate to the court sufficient connection to and harm from the law or action challenged to support that party's participation in the case. This position was prohibiting persons bringing environmental actions in public interest. The modern legislation of environmental law has removed these limitations and considerably extended the range of persons who can bring actions in the public environmental interest. The South African Constitution provides that:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -

- a. anyone acting in their own interest;
- b. anyone acting on behalf of another person who cannot act in their own name;
- c. anyone acting as a member of, or in the interest of, a group or class of persons;
- d. anyone acting in the public interest; and
- e. an association acting in the interest of its members.⁶⁵

The above Constitutional provisions have been reinforced by National Environment Management Act (NEMA) in various ways. First, NEMA grants the same range of *locus standi* as to seek "appropriate relief from the courts for breaches, or threatened breaches, of the provisions of NEMA or... any statutory provision concerned with the protection of the environment or the use of natural resources".⁶⁶ Second, NEMA has introduced innovative cost recovery provisions for persons to bring actions in the public or environmental interest.⁶⁷ Finally, provision is made for the public to privately prosecute any person who breaches,

⁶⁴ Uganda National Environment Act 72

⁶⁵ The Constitution of the Republic of South Africa 1994 Section 38

⁶⁶ NEMA section 32 (2)

⁶⁷ Ibid.

or threatens breach: NEMA; any other national, provincial or local environmental legislation; or authorization granted in terms of this legislation.⁶⁸

The Environment Act of Lesotho provides that any member of the public who feels that their right is being interfered with has *locus standi* to bring an action against any person whose actions or omissions are likely to cause harm to the environment.⁶⁹ The action may be brought before the authorities to seek remedies such as discontinuance of the activity, subjecting the activity to an environmental audit or environmental monitoring, or any other measure that may protect the environment from harm.⁷⁰ The Act also imposes a duty on every person living in Lesotho to safeguard and enhance the environment including the duty to inform the Authority of all activities and phenomena that may affect the environment significantly.

It is interesting to note that the right to take action against any person for activity or omission harmful to human health or environment does not seem to include litigating against the state.

Section 3 of the Ugandan Environment Act restricts the application of *locus standi*. Thus it imposes a duty on every person to maintain and enhance the environment, including a duty to inform the Authority or Local Environment Management Committees of all activities and phenomena that may affect the environment significantly.⁷¹ The Authority or Local Committee so informed is entitled to bring an action against any other person whose activities or omissions have or are likely to have a significant impact on the environment, to for instance prevent, stop, or discontinue any act or omission deleterious to the environment. According to the section, it is the Authority or the Local Environment Management Committee that is entitled to bring an action once a person has complained.

3. Constraints to the developing modern environmental legislation in Africa

There are some constraints that still affect the development of modern environmental legislation in Africa. The major ones include the following:

First, there is limited funding to develop a very comprehensive and inclusive legislation. As a result, most of the pieces of legislation are developed based on foreign funding. The major disadvantage with this approach is that the legislations tend to include the foreign based interest more than the local based interest.

Second, there is limited national capacity to develop the legislation. As result, the legislation is developed by foreign consultants who are very expensive and the process of developing it is rather lengthy. Third, there is limited public participation in the law-making process and legislative drafting process respectively. This results

⁶⁸ Ibid, Section 33.

⁶⁹ Section 4 (2) of the Environment Act 2001 of Lesotho

⁷⁰ Ibid, Section 4(3).

⁷¹ The National Environment Act Cap 153 Laws of Uganda, 2000.

in legislation that does not include concerns of the local people and yet they are the biggest users and beneficiaries of the legislation. Finally, there is limited political will to develop environmental legislation because it is seen by some politicians as anti-development.

4. Conclusion

Most countries in Africa have developed environmental legislation that sets up institutions and, along with them, the legislative basis and administrative procedures for environmental management. However, further progress of developing the legislation is limited by lack of adequate human, technical and financial resources, and ineffective institutional arrangements. In addition, the quest for foreign interest often leads to compromises in the strict enforcement of environmental laws, which tends to perpetuate unsustainable resource use patterns. There are some projects being undertaken without adequate application of environmental legislation. It is thus recommended that the development of environmental legislation based on international standards should be emphasized if Africa is to achieve sustainable development.